PRETRIAL MOTIONS PRACTICE

Presenters:

- Carrie Allman, Homicide Chief, Montgomery County (PA) Office of the Public Defender
- Brie Halfond, Trial Attorney, Montgomery County (PA) Office of the Public Defender

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,

v. Nos. CP-46-CR-0005776-2016,

CLIENT,
Defendant

MOTION IN LIMINE SEEKING EXCLUSION OF CELL PHONE TEXT MESSAGES

1. CLIENT is charged at the above-captioned as follows: Count 1 - Drug Delivery Resulting in Death; Count 2 - Recklessly Endangering Another person; Count 3 - Criminal Use of a Communication Facility; Count 4 - Possession with Intent to Deliver (Heroin); and Count 5 - Possession (Heroin).

2. These charges are connected to the January 29, 2016 death of Ms. Renee Winslow.

3. Investigating Officers found three bags of suspected heroin and a cell phone near Decendent when they responded to the 911 call.

4. Per the investigative reports, and discovery provided in this matter, a forensic digital analysis of this phone was conducted and it was determined that Decendent's last communication was a "drug-related text message conversation with an individual stored in her cellular phone as "Rachel", on Thursday January 28, 2016.

5. Following this information, an application was made under the Wiretapping and Electronic Surveillance Act (18 Pa. C.S. §5701) seeking subscriber information and identification of cell phone number (484) 358-8938. This application was approved by court

order.[1]

6. The subscriber associated to telephone number (484) 358-8938 was a CLIENT, DOB 2/1/1980.

7. The defendant in this case is CLIENT, DOB 2/1/1980.

8. The text messages at issue begin with Decendent asking Rachel if she will be around in 45 minutes to come to her apartment. Decendent then asks if Rachel wants to meet her or if she should call Rachel. Rachel asks what Decendent needs, and Decendent states, “depends you giivin to me for 10 or 15”, Decendent then sends a text that says “is really appreciate 10 then I’d need 4”. Rachel responds “ok”. Decendent then sends three texts stating “thanks babe so I’ll see you in like 45 mins”, “are you not coming I mean its Thursday seems like you always tell me your coming on Thursdays but never show up”, and “so what’s up with that promise??” (errors are in original texts)

9. During the preliminary hearing, Detective Millan was called by the Commonwealth to testify regarding these text messages, and he testified that these texts were a “drug-related conversation”. (Preliminary Hearing Transcript p. 13) Detective Milan agreed that the word heroin was never mentioned in the texts, nor any code word; however, he made his determination that the texts were about a drug-related conversation based on the totality of the circumstances, including that three bags were recovered and a price was negotiated in the texts. (Preliminary Hearing Transcript p. 25-26)

10. Based on the discovery, and the preliminary hearing testimony, it is believed that the Commonwealth will seek to admit the text messages, as well as the Detectives interpretation of the messages at trial.

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[1] This application and order was the subject of a previously filed suppression motion.

11. Pursuant to *Commonwealth v. Koch*, and *Commonwealth v. Mosley*, it is improper to admit the substance of these texts or any interpretation thereof as the Commonwealth will not be able to authenticate these messages and, even if they could, the content of the messages is hearsay without exception, and therefore, admission of the texts, as well as the Detectives interpretation of the texts, would violate the rules of evidence.

12. In *Commonwealth v. Koch*, an evenly divided Pennsylvania Supreme Court determined that text messages were subject to authentication pursuant to Rule 901 of the Pennsylvania Rules of Evidence.

13. Pennsylvania Rule of Evidence 901 states that, to satisfy the requirement of authentication, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is. Pa.R.E. 901(a).

14. Authentication can be shown by the testimony of a witness with knowledge. However, in the context of a communication, other factors may need to be looked at such as distinctive characteristics. *Commonwealth v. Koch,* 106 A.3d 705, 712 (Pa. 2014).

15. Distinctive Characteristics may include information specifying an author-sender, references to other relevant events that precede or follow the communication, or any other aspects that the communication is what it claims to be. *Id.* at 712-713 (citing *Commonwealth v. Collins,* 957 A.2d 237, 265-66 (Pa.2008)).

16. The *Koch* Court agreed that authentication is a low standard, but also that communications technology presented novel questions with regard to both authentication and hearsay. *Id.* at 713.

17. The Court then concluded that:

Suppression was denied on May 11, 2017 following a hearing.

> **The authentication inquiry will, by necessity, be fact-bound and case-by case, but like courts in many other states, we believe that authorship is relevant to authentication, particularly in the context of text messages proffered by the government as proof of guilt in a criminal prosecution. This is not an elevated "prima facie plus" standard or imposition of an additional requirement. Rather, it is a reasonable contemporary means of satisfying the core requirement of Rule 901 when a text message is the evidence the Commonwealth seeks to admit against a defendant; the Commonwealth must still show that the message is what the Commonwealth claims it to be, and authorship can be a valid (and even crucial) aspect of that determination.**

Koch, 106 A.3d at 714.

18. The Court concluded in *Koch* that authentication had been established because the appellant had admitted ownership of the phone, other evidence demonstrated the content of the messages were drug sale activity, and because the appellant was charged as both an accomplice and conspirator in a drug trafficking enterprise, the need for authorship was not as crucial to authentication. *Id.*

19. In the instant matter, no ownership of the phone is admitted, no actual phone was ever found on CLIENT, and the only evidence connecting him to any text messages is that Decendent was texting a number that was later determined to be registered to a CLIENT.

20. The number Decendent was texting is labeled in her phone as "Rachel", as such, there are no circumstantial clues that connect the texts to CLIENT.

21. No one saw CLIENT making or sending these texts, and no one can testify that he authored these texts.

22. Furthermore, any claim that these are authenticated because they appear on the phone of the victim, cannot be sustained as Decendent is unable to testify to the content of these texts, who they were with, or even that she was the one sending and receiving these texts. There is no one who can testify as to authorship of any of the text messages.

23. Additionally, even if it could be shown that Decendent authored the texts, there is no way to establish that CLIENT was the other party, and that is exactly what the Commonwealth will seek to do as without that link, the text messages are wholly irrelevant to this trial.

24. There can be no doubt that the Commonwealth intends to introduce these texts to demonstrate that there was a drug-related conversation between Decendent and CLIENT prior to her drug-related death. Any other explanation would not meet a relevancy test.

25. However, the texts cannot be authenticated in any manner and therefore their admission is improper.

26. Because the Supreme Court was evenly divided in *Koch*, the award of a new trial, as provided by the Superior Court panel who reviewed the case was affirmed. As such, the holdings of the Superior Court on the issue must be evaluated. The Superior Court concluded that the text messages could not be authenticated, they were inadmissible hearsay as they were not offered for any reason other than to show the truth of the mater asserted as to the content of the messages, and that the admission of unauthenticated hearsay messages was not harmless error. *Commonwealth v. Koch,* 39 A.3d 996, 1003-1005 (Pa. Super. 2011).

27. The Court further stated that a mere assertion of ownership does not establish that a defendant was an active correspondent of particular text messages, and that confirmation

that the number or address belongs to a particular person does not satisfy the authentication requirements under Pa. R. E. 901. *Id.* at 1005.

28. In *Commonwealth v. Mosley*, the Superior Court was again confronted with the issue of authentication of text messages (again in a drug-related case) and determined that there was no corroborating witness testimony regarding the authenticity of the messages that the messages were not properly authenticated and should not have been admitted. *Commonwealth v. Mosley,* 114 A.3d 1072, 1084 (Pa. Super. 2015).

29. Some of the factors looked to in *Mosley* included that there was no witness testimony corroborating the authenticity of the text messages, others could have had access to the phone, while there were messages that could be interpreted as drug-activity, none of the communications identified Mosley, and no testimony was presented from anyone who sent or received the texts. *Id*. at 1083.

30. In the instant matter, the text messages cannot be authenticated as no one can testify as to who sent or received the messages, or that these messages are in anyway connected to the defendant, CLIENT. The mere fact that he has the same name as the subscriber associated to telephone number (484) 358-8938 is not sufficient to meet the authentication requirements. As such, the text messages should be excluded.

Hearsay

31. Even if the text messages could be properly authenticated, they are still not admissible as they are hearsay.

32. In the instant matter, the Commonwealth will seek to introduce these text messages through Detective Millan who will testify to the content as well as his interpretation that this

was a drug-related conversation about the sale and purchase of heroin as he did at the preliminary hearing.

33. Again, there is only one reason to introduce this evidence, and that is as part of the Commonwealth's efforts to connect the drug-death of Decendent to CLIENT. Otherwise, the evidence is irrelevant.

34. In both *Koch* and *Mosley,* the Appellate Courts determined that admission of testimony regarding the nature and content of the text messages was hearsay. In both cases, testimony was admitted through a Detective or Officer who interpreted the drug-related language and meaning of the texts, both cases involved allegations of drug-trafficking or delivery.

35. In *Koch,* the Supreme Court stated the following regarding the use of a Detective to testify to the content and meaning of the text messages:

> Lawyers with trial experience know that when a party has classic hearsay evidence that it knows is harmful to the opposing party, but cannot actually identify a theory to overcome exclusion on hearsay grounds, a common fallback position is to declare that the out-of-court statements are not being offered for their truth. Counsel in such circumstances recognize that if they can manage to get the evidence admitted this way, the party's cause will be advanced, irrespective of reliability or relevancy. But, the required analytical response to this facile fallback position is**: if the hearsay is not being offered for its truth, then what exactly is its relevance? And, assuming some such tangential relevance, does the probative value of the evidence outweigh the potential for prejudice? In this case, the inquiry is not difficult because the only relevance of this evidence -- drug sales text messages on appellee's cell phone -- is precisely for the truth of the matter asserted, and we have little doubt that that is precisely how the lay jury construed it.**

At trial, after appellee lodged her hearsay objection while Detective Lively was on the stand, the prosecutor responded that he was not trying to prove the truth of the matter asserted in the messages, but wanted the detective to testify that he understood the messages to be similar to "buy sheets" recording and arranging drug sales and to show that "these statements were on the phone that belonged to her and that -- that these other types of statements then would constitute drug receipts, drug statements, and orders." The prosecutor later added: "[T]he purpose of this evidence is to show that [appellee's] phone was used in drug transactions, and, therefore, it makes it more probable than not when the Defendant possessed this marijuana that she did so with the intent to deliver as opposed to personal use." N.T., Trial, 5/26/10, at 73-79 (emphasis supplied).

The trial prosecutor's candor should be determinative here. The prosecutor conceded that he sought to admit the message contents as substantive evidence probative of appellee's alleged intent to engage in drug sales activity. And that is certainly how the jury would construe the messages. It requires a suspension of disbelief to conclude that the messages had any relevance beyond their substantive and incriminating import, especially because they served as a platform for the crucial expert testimony of Detective Lively. Furthermore, as the panel below recognized, the Commonwealth's evidence of appellee's intent to deliver, without the truth revealed in the messages (via the expert testimony of the detective), was negligible. Simply put, the messages were out-of-court statements that were relevant, and indeed proffered, for a purpose that depended upon the truth of their contents, as probative of appellee's alleged intent to deliver. Accordingly, appellee's hearsay objection had merit and, in light of the paucity of other evidence that she possessed illegal drugs with the intent to deliver, the trial court's abuse of discretion in admitting the message contents was not harmless error.

> In closing, we note that all sorts of inadmissible evidence may exist that might be helpful to a party's cause, and we understand the special incentive for the Commonwealth, in criminal cases, in perfect good faith, to attempt to make use of all the helpful "evidence" it may have. This is so because, unlike the defendant, the Commonwealth generally only gets one opportunity in a case; there is a very limited prospect of appeal. But, courts must remain mindful of those legal precepts that regulate unreliable evidence, in service of higher principles, such as the right to a fair trial.

Commonwealth v. Koch, 106 A.3d 705, 716-17 (Pa. 2014).

36. The text messages are clearly out of court statements that are being admitted for the truth of the matter asserted, namely that CLIENT delivered drugs to Decendent before her death from a drug-related overdose.

For all of the foregoing reasons of fact and law, the text messages should be excluded.

Respectfully Submitted,

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CARRIE L. ALLMAN
PA ID No. 92080
Chief-Homicide
Montgomery County Public Defender
2nd Floor Courthouse
PO Box 311
Norristown, PA 19404

(610) 278-3571

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,

v. Nos. CP-46-CR-0000963-2018

CLIENT,
Defendant

DEFENSE RESPONSE TO COMMONWEALTH'S *MOTION IN LIMINE*

1. CLIENT is charged at the above-captioned as follows: Count 1 - Drug Delivery Resulting in Death (F1); Count 2 - Criminal Use of a Communication Facility (F3); Count 3 - Possession with Intent to Deliver (F); Count 4 – Recklessly Endangering Another Person (F2); Count 5 - Possession (M); and Count 6 – Paraphernalia (M).

2. These charges are connected to the October 6, 2017 death of DECEDENT.

3. DECEDENT and CLIENT were both residents at the Coordinated Homeless Outreach Center (CHOC) located at Norristown State Hospital.

4. CLIENT is scheduled for a jury trial on July 17, 2018; and motions are to be heard on July 13, 2018.

5. On July 6, 2018, the Commonwealth filed a *Motion in Limine* seeking to admit testimony from the Director of CHOC, Genny O'Donnell, that she reviewed surveillance videos and saw a "transaction between CLIENT and DECEDENT at the time prior to Hernandez's death". (Phrasing copied from Commonwealth's motion)

6. The alleged surveillance video that she viewed no longer exists.

7. The Commonwealth's motion notes that Ms. O'Donnell met with Detective Rippert on

October 16, 2017 and told him about this video.

8. She then informed Detective Rippert on November 6, 2017 that she was unable to download the video as it had been written over with more recent footage.

9. There is no indication in the motion as to why 21 days passed between Detective Rippert meeting with Ms. O'Donnell, at CHOC, learning of the existing of the footage, and when Ms. O'Donnell stated the video no longer existed.

10. There is no indication as to what efforts were made by either Detective Rippert to secure the video on October 16, 2017, or by any responding officers on October 6, 2017 to determine if such video existed and preserve the video.

11. The best evidence rule requires that the Commonwealth produce the actual video/surveillance footage. Pa.R.E. 1002 states: "to prove the content of writing, recording, or photograph, the original writing, recording, or photograph is required".

12. It is true that an exception can be made, and secondary evidence permitted, if the originals are not available through "no fault of the Commonwealth". *Commonwealth v. Dent,* 837 A.2d 571, 589 (Pa.Super.2003).

13. However, in the instant matter, the Commonwealth, through its investigating officers and Detective Rippert should have known of the surveillance and preserved it as soon as October 6, 2017, and did, in fact, know of it by October 16, 2017 which is three weeks before it was noted to be "unavailable". (see *Commonwealth v. Lewis,* 460 A.2d 1149 (Pa. Super. 1983 remanding where the unavailability of the tape was never satisfactorily explained).

14. Additionally, the factual matter in *Dent*, is not comparable to the instant matter. In

Dent, which was a retail theft case, store surveillance was unavailable as the system recycled itself; however, the manager, who testified to the video, had also encountered the the defendant in the store, face to face, and observed unpaid items in her bag. *Dent,* 837 A.2d at 590.

15. In the instant matter, the testimony is only regrading what Ms. O'Donnell says she saw on surveillance, not anything she herself also directly saw, encountered, or experienced.

16. The *Dent* court also noted that such secondary evidence is appropriate where the Commonwealth does not need to prove the contents of the recording in order to prove the elements of the offense. *Id.* citing to *Commonwealth v. Fisher,* 764 A.2d 82 (Pa.Super. 2000).

17. In the instant matter, the Commonwealth MUST prove a delivery of drugs for both the lead charge of Drug Delivery Resulting in Death, as well as lesser charges of drug delivery. As such, the missing video would prove a necessary element of the offense and extrinsic evidence of such video is not permitted.

18. Finally, the Commonwealth has two other fact witnesses who actually saw CLIENT and DECEDENT together prior to his death, and both provided statements indicating they observed a transaction, or "shady" behavior.

For all of the foregoing reasons of fact and law, the testimony of Ms. O'Donnell regarding what she saw on surveillance footage should be excluded.

Respectfully Submitted,

CARRIE L. ALLMAN
PA ID No. 92080
Chief-Homicide
Montgomery County Public Defender
2nd Floor Courthouse
PO Box 311
Norristown, PA 19404
(610) 278-3571

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,

v. Nos. CP-46-CR-0000963-2018

CLIENT,
Defendant

MOTION IN LIMINE SEEKING EXCLUSION OF CELL PHONE TEXT MESSAGES AND INTERPRETATIONS OF THOSE MESSAGES

1. CLIENT is charged at the above-captioned as follows: Count 1 - Drug Delivery Resulting in Death (F1); Count 2 - Criminal Use of a Communication Facility (F3); Count 3 - Possession with Intent to Deliver (F); Count 4 – Recklessly Endangering Another Person (F2); Count 5 - Possession (M); and Count 6 – Paraphernalia (M).

2. These charges are connected to the October 6, 2017 death of DECEDENT.

3. Without stipulating, the facts, *as alleged in the Affidavit*, are as follows:

a. On October 6, 2017, Norristown Borough Police responded to 9 Locust Street, Norristown State Hospital Grounds for a medical call around 8:30pm.

b. DECEDENT, a shelter resident, was deceased.

c. DECEDENT was a known heroin user and had been involved in a non-fatal drug overdose on 9/22/17.

d. Michael Boles was the last person to see DECEDENT alive and told officers that, at some unknown time on 10/6/17, he noticed Hernandez was high and tried to talk to him about it to avoid Hernandez getting into trouble.

e. Mr. Boles continued checking on DECEDENT every five minutes and the last

time he checked on him, DECEDENT's coloring appeared off and Mr. Boles could not find a pulse.

f. Mr. Boles asked his friend, George Dinkins, for help and located staff personnel to summon aid.

g. Mr. Boles told officers he did not know where DECEDENT obtained the drugs.

h. However, Boles later told officers that another person, David Lovett may have observed the transaction.

i. Mr. Lovett was questioned and told officers that he saw CLIENTd walk up to Hernandez and hand him something on the "QT".

j. Lovett said they were whispering and he could not hear what they were saying. Lovett stated it was obvious to him that it was a drug deal because he knew Hernandez would try to get drugs from people.

k. Mr. Lovett observed this encounter between 4:30 and 7pm.

l. A cellular phone was found next to Hernandez's body which had recent calls and texts to "Sandy".

m. The number associated with "Sandy" was 610-680-8918.

n. The texts include messages talking about "2 Jawns" which officers claim is street slang for two drug bags.

o. Officers were informed that a white female named CLIENTd was also a resident at the facility.

p. Officers asked to speak with CLIENT and she complied and went to the police station.

q. CLIENT allowed officers to search her purse which contained drug

paraphernalia. CLIENT was arrested and charged with drug paraphernalia.

r. CLIENT did not give a statement to police.

s. Her cell phone was seized.

t. An additional resident, George Dinkins spoke with police, after Mr. Boles advised that Mr. Dinkins had also seen a transaction between Hernandez and McDonald.

u. Mr. Dinkins stated that he did not know what was exchanged between McDonald and Hernandez but described it as “shady”.

v. A search warrant was sought and obtained for the cell phone CLIENT had in her possession at the time of her arrest.

w. There are numerous text messages between CLIENT and Hernandez on 10/5/17 and 10/6/17.

x. There are also numerous text messages between CLIENT and an individual identified as “Eli Mariono”.

y. The affidavit states, that these messages are drug-related texts in which CLIENT is securing drugs for herself and DECEDENT, at Hernandez’s request, by making drug purchases from Eli Mariono.

z. The texts, according to the affidavit and testimony from the preliminary hearing, are alleged to show that Hernandez requested drugs on 10/5/17, McDonald received the drugs from Mariono, gave some to Hernandez, and the drugs were of low quality. Thereafter, and in an effort to “make good”, CLIENT secured additional drugs for DECEDENT, again from Mr. Mariono on 10/6/17 and told him she would give him the drugs and a blow job to make up for the previous bad drugs.[1]

[1] The actual texts comprise several pages as such a this summary of what the

4. The affidavit indicates that the text messages between CLIENT and DECEDENT, as well as between CLIENT and "Eli" are "drug-related conversations".

5. Based on the discovery, and the preliminary hearing testimony, it is believed that the Commonwealth will seek to admit the text messages, as well as the Detective's interpretation of the messages at trial.

6. Pursuant to *Commonwealth v. Koch*, and *Commonwealth v. Mosley*, it is improper to admit the substance of these texts or any interpretation thereof as the Commonwealth will not be able to authenticate these messages and, even if they could, the content of the messages is hearsay without exception, and therefore, admission of the texts, as well as the Detectives interpretation of the texts, would violate the rules of evidence.

7. In *Commonwealth v. Koch*, an evenly divided Pennsylvania Supreme Court determined that text messages were subject to authentication pursuant to Rule 901 of the Pennsylvania Rules of Evidence.

8. Pennsylvania Rule of Evidence 901 states that, to satisfy the requirement of authentication, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is. Pa.R.E. 901(a).

9. Authentication can be shown by the testimony of a witness with knowledge. However, in the context of a communication, other factors may need to be looked at such as distinctive characteristics. *Commonwealth v. Koch,* 106 A.3d 705, 712 (Pa. 2014).

10. Distinctive Characteristics may include information specifying an author-sender, references to other relevant events that precede or follow the communication, or any other aspects that the communication is what it claims to be. *Id.* at 712-713 (citing

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Commonwealth alleges has been provided for brevity. The affidavit of probable cause and

Commonwealth v. Collins, 957 A.2d 237, 265-66 (Pa.2008)).

11. The *Koch* Court agreed that authentication is a low standard, but also that communications technology presented novel questions with regard to both authentication and hearsay. *Id.* at 713.

12. The Court then concluded that:

> **The authentication inquiry will, by necessity, be fact-bound and case-by case, but like courts in many other states, we believe that authorship is relevant to authentication, particularly in the context of text messages proffered by the government as proof of guilt in a criminal prosecution. This is not an elevated "prima facie plus" standard or imposition of an additional requirement. Rather, it is a reasonable contemporary means of satisfying the core requirement of Rule 901 when a text message is the evidence the Commonwealth seeks to admit against a defendant; the Commonwealth must still show that the message is what the Commonwealth claims it to be, and authorship can be a valid (and even crucial) aspect of that determination.**

Koch, 106 A.3d at 714.

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discovery materials list all texts at issue.

13. The Court concluded in *Koch* that authentication had been established because the appellant had admitted ownership of the phone, other evidence demonstrated the content of the messages were drug sale activity, and because the appellant was charged as both an accomplice and conspirator in a drug trafficking enterprise, the need for authorship was not as crucial to authentication. *Id.*

14. In the instant matter, no one has ever seen CLIENT sending or receiving texts and no one can authenticate that she was the person communicating with DECEDENT or "Eli" in these texts.

15. Furthermore, any claim that these are authenticated because they appear on the phone of the victim, cannot be sustained as DECEDENT is unable to testify to the content of these texts, who they were with, or even that he was the one sending and receiving these texts. There is no one who can testify as to authorship of any of the text messages.

16. Even if it could be shown that DECEDENT authored the texts, there is no way to establish that CLIENT was the other party, and that is exactly what the Commonwealth will seek to do as without that link, the text messages are wholly irrelevant to this trial.

17. There can be no doubt that the Commonwealth intends to introduce these texts to demonstrate that there was a drug-related conversation between DECEDENT and CLIENT prior to Hernandez's drug-related death. Any other explanation would not meet a relevancy test.

18. However, the texts cannot be authenticated in any manner and therefore their admission is improper.

19. Because the Supreme Court was evenly divided in *Koch*, the award of a new trial, as provided by the Superior Court panel who reviewed the case was affirmed. As such, the

holdings of the Superior Court on the issue must be evaluated. The Superior Court concluded that the text messages could not be authenticated, they were inadmissible hearsay as they were not offered for any reason other than to show the truth of the mater asserted as to the content of the messages, and that the admission of unauthenticated hearsay messages was not harmless error. *Commonwealth v. Koch,* 39 A.3d 996, 1003-1005 (Pa. Super. 2011).

20. The Court further stated that a mere assertion of ownership does not establish that a defendant was an active correspondent of particular text messages, and that confirmation that the number or address belongs to a particular person does not satisfy the authentication requirements under Pa. R. E. 901. *Id.* at 1005.

21. In *Commonwealth v. Mosley*, the Superior Court was again confronted with the issue of authentication of text messages (again in a drug-related case) and determined that there was no corroborating witness testimony regarding the authenticity of the messages that the messages were not properly authenticated and should not have been admitted. *Commonwealth v. Mosley,* 114 A.3d 1072, 1084 (Pa. Super. 2015).

22. With regard to "the admissibility of electronic communication, such messages are to be evaluated on a case-by-case basis as any other document to determine whether or not there has been an adequate foundational showing of their relevance and authenticity." "[A]uthentication of electronic communications, like documents, requires more than mere confirmation that the number or address belonged to a particular person. Circumstantial evidence, which tends to corroborate the identity of the sender, is required." *Commonwealth v. Mosley*, 114 A.3d 1072, 1081-82 (Pa. Super. 2015) internal citations omitted.

23. Some of the factors looked to in *Mosley* included that there was no witness testimony corroborating the authenticity of the text messages, others could have had access to the phone, while there were messages that could be interpreted as drug-activity, none of the communications identified Mosley, and no testimony was presented from anyone who sent or received the texts. *Id*. at 1083.

24. In the instant matter, the text messages cannot be authenticated as no one can testify as to who sent or received the messages, or that these messages are in anyway connected to the defendant, CLIENTd.

25. The mere fact that she has the phone with that same number , or even had that phone is her possession is not sufficient to meet the authentication requirement; as ownership alone is insufficient per established case law. As such, the text messages should be excluded.

Hearsay

26. Even if the text messages could be properly authenticated, they are still not admissible as they are hearsay. Hearsay is an out-of-court statement offered for the truth of the matter asserted and is inadmissible unless it falls within an exception to the hearsay rule. See Pa.R.E. 801(c); Pa.R.E. 802.

27. In the instant matter, the Commonwealth will seek to introduce these text messages through Detective Rippert who will testify to the content as well as his interpretation that this was a drug-related conversation about the sale and purchase of heroin as was done at the preliminary hearing and in the affidavit.

28. In both *Koch* and *Mosley,* the Appellate Courts determined that admission of

testimony regarding the nature and content of the text messages was hearsay. In both cases, testimony was admitted through a Detective or Officer who interpreted the drug-related language and meaning of the texts, both cases involved allegations of drug-trafficking or delivery:

> In *Koch*, a detective, who was a Commonwealth expert witness, testified that in his opinion the text messages found on the defendant's cell phone, in conjunction with other factors (bongs, pipes, large amounts of cash, drug scales) were consistent with drug sales that implicated the defendant, even though the detective conceded that the author of the drug-related text messages could not be definitively ascertained, that several texts were incomplete and that some messages referenced the defendant in the third person. *Koch*, 39 A.3d at 1002-1003. In addition, the prosecutor acknowledged that the purpose of the text evidence was to show that defendant's phone was used in drug transactions, and, therefore, that it makes it more probable than not that when the defendant possessed the drugs she did so with the intent to deliver it as opposed to for personal use. *Id*. at 1005-06.
>
> As a result, the Court concluded that the only relevance of the evidence was to prove the truth of the matter asserted — that there were drug-related text messages on defendant's cell phone and, therefore, that admission of the messages was an abuse of discretion and not harmless error.

Commonwealth v. Mosley, 2015 PA Super 88, 114 A.3d 1072, 1085.

29. This is very similar to what will be presented in the instant matter, and how it was presented at the preliminary hearing. Detective Rippert will testify that the texts are drug related conversations between Mss. McDonald and DECEDENT, despite having no personal knowledge of who sent the texts, and will say that these messages show that CLIENT had drugs to deliver to DECEDENT on the very day that he died of a drug overdose.

30. There can be no doubt that these texts are being introduced to show that CLIENT delivered drugs to DECEDENT before his death.

31. As the drug delivery death statute (18 Pa. C.S. §2506) only requires that the Commonwealth prove a delivery and a death (from that delivery); the introduction of these text messages are designed to assist the Commonwealth in proving the truth of the matter asserted.

32. In *Koch,* the Supreme Court stated the following regarding the use of a Detective to testify to the content and meaning of the text messages:

> Lawyers with trial experience know that when a party has classic hearsay evidence that it knows is harmful to the opposing party, but cannot actually identify a theory to overcome exclusion on hearsay grounds, a common fallback position is to declare that the out-of-court statements are not being offered for their truth. Counsel in such circumstances recognize that if they can manage to get the evidence admitted this way, the party's cause will be advanced, irrespective of reliability or relevancy. But, the required analytical response to this facile fallback position is**: if the hearsay is not being offered for its truth, then what exactly is its relevance? And, assuming some such tangential relevance, does the probative value of the evidence outweigh the potential for prejudice? In this case, the inquiry is not difficult because the only relevance of this evidence -- drug sales text messages on appellee's cell phone -- is precisely for the truth of the matter asserted, and we have little doubt that that is precisely how the lay jury construed it.**
>
> At trial, after appellee lodged her hearsay objection while Detective Lively was on the stand, the prosecutor responded that he was not trying to prove the truth of the matter asserted in the messages, but wanted the detective to testify that he understood the messages to be similar to "buy sheets" recording and arranging drug sales and to show that "these statements were on the phone that belonged to her and that -- that these other types of statements then would constitute drug receipts, drug statements, and

orders." The prosecutor later added: "[T]he purpose of this evidence is to show that [appellee's] phone was used in drug transactions, and, therefore, it makes it more probable than not when the Defendant possessed this marijuana that she did so with the intent to deliver as opposed to personal use." N.T., Trial, 5/26/10, at 73-79 (emphasis supplied).

The trial prosecutor's candor should be determinative here. The prosecutor conceded that he sought to admit the message contents as substantive evidence probative of appellee's alleged intent to engage in drug sales activity. And that is certainly how the jury would construe the messages. It requires a suspension of disbelief to conclude that the messages had any relevance beyond their substantive and incriminating import, especially because they served as a platform for the crucial expert testimony of Detective Lively. Furthermore, as the panel below recognized, the Commonwealth's evidence of appellee's intent to deliver, without the truth revealed in the messages (via the expert testimony of the detective), was negligible. Simply put, the messages were out-of-court statements that were relevant, and indeed proffered, for a purpose that depended upon the truth of their contents, as probative of appellee's alleged intent to deliver. Accordingly, appellee's hearsay objection had merit and, in light of the paucity of other evidence that she possessed illegal drugs with the intent to deliver, the trial court's abuse of discretion in admitting the message contents was not harmless error.

In closing, we note that all sorts of inadmissible evidence may exist that might be helpful to a party's cause, and we understand the special incentive for the Commonwealth, in criminal cases, in perfect good faith, to attempt to make use of all the helpful "evidence" it may have. This is so because, unlike the defendant, the Commonwealth generally only gets one opportunity in a case; there is a very limited prospect of appeal. But, courts must remain mindful of those legal precepts that regulate unreliable evidence, in service of

higher principles, such as the right to a fair trial.

Commonwealth v. Koch, 106 A.3d 705, 716-17 (Pa. 2014).

33. The text messages are clearly out of court statements that are being admitted for the truth of the matter asserted, namely that CLIENT delivered drugs to DECEDENT before his death from a drug-related overdose.

34. If they are not being introduced for that purpose, then they are irrelevant and should be excluded.

MOTION IN LIMINE TO EXCLUDE EXPERT TESTIMONY REGARDING THE INTERPRETATION OF, OR MEANING OF, TEXT MESSAGES

35. Assuming, that the Commonwealth plans to introduce expert testimony regarding the meaning or interpretation of text messages it found on cellular phones of CLIENT, DECEDENT, and "Eli", the Defense objects to any such testimony as it is not proper expert testimony.

36. It has been noted:

> Expert testimony generally is admissible to aid the jury when the subject matter is distinctly related to a science, skill or occupation which is beyond the knowledge or experience of an average lay person. *Commonwealth v. Counterman,* 553 Pa. 370, 719 A.2d 284, 302-03 (citing *Commonwealth v. O'Searo,* 466 Pa. 224, 352 A.2d 30, 33 (1976)), *cert. denied,* --- U.S. ----, 120 S.Ct. 97, 145 L.Ed.2d 82 (1999). Conversely, expert testimony is not admissible where the issue involves a matter of common knowledge. *Id.* at 303. In assessing the credibility of a witness, jurors must rely on their ordinary experiences of life, common knowledge of the tendencies of human behavior, and observations of the witness' character and demeanor. *Id.* Because the truthfulness of a witness is solely within the province of the jury, expert testimony cannot be used to bolster the credibility of witnesses. *See id.*

Commonwealth v. Minerd, 753 A.2d 225, 230 (Pa. 2000).

37. The Pennsylvania Rules of Evidence require that Expert Testimony is proper where the specialized knowledge is beyond that possessed by the average person.

38. In the instant matter, the meaning of text messages is not something that requires specialized knowledge or skill, and it is something that involves a matter of common knowledge for the jury. Assuming the content of the text messages is admitted, the jury should be determining the meaning of those messages.

39. There are no specialized words or hidden code language that needs deciphered or explained. The ultimate question before the jury is whether or not CLIENT delivered drugs

to DECEDENT causing his death; as such, the jury must determine the meaning of the text messages.

MOTION IN LIMINE TO EXCLUDE TEXT MESSAGES AS THEY CONTAIN PRIOR BAD ACTS AND SHOULD BE BARRED BY RULE 404B OF THE PENNSYLVANIA RULES OF EVIDENCE

40. Additionally, these text messages would introduce prior bad acts and should be excluded as they are not proper 404b, and their prejudicial impact outweighs their probative value.

41. Specifically, the texts would introduce evidence of a drug exchange on October 5, 2017. CLIENT is not charged with any acts connected to October 5, 2017.

42. The text messages from that day, if admitted, would include an allegation of a prior bad act, namely that CLIENT had secured drugs, at the request of DECEDENT, from a source and provided those drugs to DECEDENT.

43. Additionally, the October 5, 2017 texts between CLIENT's cell phone and Eli Mariono's phone should be excluded as they are prior bad acts of a drug purchase.

44. As a general matter, evidence of other crimes, wrongs, or acts may not be introduced against a criminal defendant. Pa.R.E. 404(b)(1); *Commonwealth v. LaCava,* 666 A.2d 221, 229 (Pa. 1995); *Commonwealth v. Griffin*, 684 A.2d 589, 594 (Pa. Super. 1996) ("It is well established that evidence of prior bad acts is not admissible to show that the defendant committed the crime at issue." (citing *Commonwealth v. Peterson*, 307 A.2d 264, 269 (Pa. 1973); *Commonwealth v. Walker*, 656 A.2d 90, 99 (Pa.), cert. denied, 516 U.S. 854 (1995)).

45. As an exception to this rule, this evidence can be introduced for other purposes "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." Pa.R.E. 404(b)(2). The evidence is admissible, however, "only upon a showing that the probative value of the evidence outweighs its potential for prejudice." Pa.R.E. 404(b)(3).

46. Evidence of prior bad acts can cause a jury to believe that the defendant's propensity to commit other crimes leads to the conclusion that he or she committed the instant crime and because it can portray the defendant generally as having bad character and, thus, worthy of conviction regardless of the proof about the charged crime. The Supreme Court has said that

> [t]he Commonwealth must prove beyond a reasonable doubt that a defendant has committed the particular crime of which he is accused, and it may not strip him of the presumption of innocence by proving that he has committed other criminal acts. There are, of course, important exceptions to the rule where the prior criminal acts are so closely related to the crime charged that they show, inter alia, motive, intent, malice, identity, or a common scheme, plan or design.

Commonwealth v. Stanley, 398 A.2d 631, 633-34 (Pa. 1979).

47. The Third Circuit has written that use of prior-bad-acts evidence often is intended more to show a propensity to commit a crime than for the expressed reason for admission.

> Despite our characterization of [Federal] Rule 404(b) as a rule of admissibility, we have expressed our concern that, although the proponents of Rule 404(b) evidence "will hardly admit it, the reasons proffered to admit prior act evidence may often be potemkin village, because the motive, we suspect, is often mixed between an urge to show some other consequential fact as well as to impugn the defendant's character." Thus, when evidence of prior bad acts is offered, the proponent must clearly articulate how that evidence fits into a chain of logical inferences, no link of which may be the inference that the defendant has the propensity to commit the crime charged.

United States v. Himelwright, 42 F.3d 777, 781-82 (3d Cir. 1994) (citations omitted) *quoted*

in Commonwealth v. Chapman, 763 A.2d 895, 901 n.6 (Pa. Super. 2000), *allocatur denied*, 771 A.2d 1278 (Pa. 2001).

48. As such, prior bad acts may not be used to infer that the defendant is likely to commit the crime charged.

49. However, if evidence of other drug purchases/sales/exchanges is introduced, that is exactly what the jury will infer, that CLIENT is a drug dealer, or has the propensity to buy/sell drugs and therefore must have been involved in the drug delivery on October 6, 2017 that resulted in DECEDENT's death.

50. Historically, our courts have held that evidence of prior bad acts should be strictly limited. This limitation is designed to prevent evidence of prior crimes resulting in a fact-finder forming a fixed bias or hostility in determining the charges in a current case. "[i]t is not proper to raise a presumption of guilt on the ground that, having committed one crime, the depravity it exhibits makes it likely [the same person] would commit another," thereby relieving the Commonwealth of its constitutional burden of proof beyond a reasonable doubt. *Shaffner v. Commonwealth*, 72 Pa. 60, 65 (1872). Rule 404b exists to prevent the use of propensity evidence and to limit prior bad acts to very limited and specific circumstances.

51. Additionally, it is important to recognize the inherent prejudice associated with the introduction of prior bad acts and the virtual impossibility that a jury has in separating those out from the crime charged in the instant matter:

> The difficulty of requiring jurors to dismiss a defendant's prior criminal record from their minds when deciding the issue of guilt while permitting them to consider such evidence for some other purpose is clear. Even with careful instructions from the trial court, allowance of such evidence may lead to a confusion of issues. Jurors may be over-persuaded by evidence of past criminal conduct, prejudge a defendant with a bad

> general record, and deny him a fair opportunity to acquit himself of a particular offense. Indeed, Judge Biggs has called the jurors' need to put knowledge of a defendant's extensive record out of mind while considering his guilt or innocence 'a feat of psychological wizardry (which) verges on the impossible even for berobed judges.' United States ex rel. Scoleri v. Banmiller, 310 F.2d 720, 725 (3rd Cir. 1962) reh. denied, *148 310 F.2d 736 (3rd Cir. 1962) cert. denied, 374 U.S. 828, 83 S.Ct. 1866, 10 L.Ed.2d 1051 (1963). And Judge Learned Hand in a similar case termed the task of jurors instructed to consider evidence for one purpose while disregarding it for another 'a mental gymnastic which is beyond, not only their powers, but anybody else's.' Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932) cert. denied, 285 U.S. 556, 52 S.Ct. 457, 76 L.Ed. 945 (1932).

Com. v. Chapasco, 258 A.2d 638, 640 (Pa. 1969).

52. In the instant matter, the evidence of other drug transactions or activities does not demonstrate any of the proper exceptions under the rule and the October 5, 2017 text messages should be excluded.

For all of the foregoing reasons of fact and law, the text messages should be excluded. If the messages are admitted, the jury should determine their meaning, not an "expert" in drug jargon, and no texts from October 5, 2017 should be admitted as they constitute prior bad acts and should not be admitted per the balancing test of Rule 404b.

Respectfully Submitted,

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CARRIE L. ALLMAN
PA ID No. 92080
Chief-Homicide
Montgomery County Public Defender
2nd Floor Courthouse
PO Box 311
Norristown, PA 19404
(610) 278-3571

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,

v. Nos. CP-46-CR-0007271-2017
Drug Delivery Resulting in Death

CLIENT,
Defendant

MOTION IN LIMINE TO EXCLUDE PRIOR BAD ACTS

AND NOW COMES the Defendant, CLIENT, by his attorney from the Law Office of the Public Defender of Montgomery County; Carrie L. Allman, Homicide Chief/Trial Counsel, and respectfully submits this Pre-Trial Motion of which the following is a statement:

1. CLIENT was charged on September 28, 2017 at OTN T 975386-6 with numerous charges, including one count of Drug Delivery Resulting in Death (18 Pa. C.S. §2506).

2. This charge is based on an incident that occurred on, or about, March 29, 2017 in Spring City, Chester County, Pennsylvania involving the overdose death of DECEDENT.

3. Chester County provided a McPhail letter permitting prosecution in Montgomery County.

4. The pertinent facts for this motion, as alleged in the affidavit, are as follows:

a. Police responded to an overdose on March 29, 2017 around 9:17pm in Spring City. Upon arrival, Amanda Jones was found at the scene, and a male, DECEDENT, was found unresponsive in a vehicle.

b. The vehicle was a Honda Accord that belonged to DECEDENT.

c. Medics provided care, but DECEDENT was pronounced dead and transported to the coroner's office.

d. DECEDENT cause of death was listed as acute fentanyl and alcohol intoxication.

e. Ms. Jones told police she had snorted one bag of Heroin and Treys snorted two bags. Jones stated she passed out and when she awoke, she found Treys unresponsive and called 911.

f. Jones told police she had purchased 12 bags of heroin, for $60, from a black male she knows as "Sheed".

g. Jones stated that Treys asked her to get the heroin because he did not have any contacts.

h. Jones stated she was introduced to "Sheed" about 12-18 months ago and was provided with "Sheed's phone number so she could make arrangements with him to purchase heroin.

i. The number she provided as being connected with "Sheed" was (484) 804-1644.

j. Jones stated she purchased heroin on March 29, 2017 by a young black male who was sent by "Sheed"; this purchase occurred in Norristown, Pa. She did not meet "Sheed" that evening.

k. Jones allowed police to search her phone and texts were recovered between Jones and individual she says is "Sheed". Notably, not all text messages are available because Jones erased them. The messages are alleged to be an effort by Ms. Jones to obtain heroin from "Sheed".

l. Jones says she purchased 12 bags from this unknown black male she met on March 29, 2017, the black male she received the drugs from was not “Sheed”.

m. 12 bages of suspected heroin were recovered from Trey’s vehicle. The suspected heroin was later identified as heroin and fentanyl.

n. On March 30, 2017, officers arranged a controlled buy between Jones and “Sheed”. Again, the individual who delivered the drugs was not “Sheed”.

o. Another controlled buy was conducted on April 4, 2017 between a CI and CLIENT, and CLIENT was arrested.

p. The affidavit also references two controlled buys in November 2016 with CIs.

q. Wilson was arrested following the controlled buy on April 4, 2017.

5. This motion seeking to exclude any reference to the November or April controlled buys follows as they are other bad acts and are prohibited by Rule 404b where their prejudicial impact would outweigh any probative value.

6. Based on the discovery provided, the Defense believes the Commonwealth will seek to admit drug transactions and controlled buys from November 2016, March 30, 2017, and April 4, 2017.

7. The discovery materials, and affidavit, as well as the preliminary hearing testimony contain evidence that there were two controlled buys with different CIs in November 2016, then one with Amanda Jones on March 30, 2017, and one with another CI on April 4, 2017, at which time, CLIENT was arrested.

8. CLIENT is NOT charged with any incidents from November 2016.[1]

9. In the instant matter, the charges reflect the death of DECEDENT on March 29,

[1] There are two other cases outstanding at CC NO.s 7220-16 and 0780-17 but

207 as well as the controlled buys on March 29, 2017 and April 4, 2017.

10. Any reference to the controlled buys in November should be excluded as they are not connected to this case and are unduly prejudicial.

11. As a general matter, evidence of other crimes, wrongs, or acts may not be introduced against a criminal defendant. Pa.R.E. 404(b)(1); *Commonwealth v. LaCava,* 666 A.2d 221, 229 (Pa. 1995); *Commonwealth v. Griffin*, 684 A.2d 589, 594 (Pa. Super. 1996) ("It is well established that evidence of prior bad acts is not admissible to show that the defendant committed the crime at issue." (citing *Commonwealth v. Peterson*, 307 A.2d 264, 269 (Pa. 1973); *Commonwealth v. Walker*, 656 A.2d 90, 99 (Pa.), cert. denied, 516 U.S. 854 (1995)).

12. As an exception to this rule, this evidence can be introduced for other purposes "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." Pa.R.E. 404(b)(2). The evidence is admissible, however, "only upon a showing that the probative value of the evidence outweighs its potential for prejudice." Pa.R.E. 404(b)(3).

13. However, there is no connection between these November sales and the death of DECEDENT in March 2017, and the only impact these additional controlled buys would have is to prejudice the jury against CLIENT.

14. Evidence of prior bad acts can cause a jury to believe that the defendant's propensity to commit other crimes leads to the conclusion that he or she committed the instant crime and because it can portray the defendant generally as having bad character

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both of thses occurred in September 2016.

and, thus, worthy of conviction regardless of the proof about the charged crime. The Supreme Court has said that

> [t]he Commonwealth must prove beyond a reasonable doubt that a defendant has committed the particular crime of which he is accused, and it may not strip him of the presumption of innocence by proving that he has committed other criminal acts. There are, of course, important exceptions to the rule where the prior criminal acts are so closely related to the crime charged that they show, inter alia, motive, intent, malice, identity, or a common scheme, plan or design.

Commonwealth v. Stanley, 398 A.2d 631, 633-34 (Pa. 1979).

15. The Third Circuit has written that use of prior-bad-acts evidence often is intended more to show a propensity to commit a crime than for the expressed reason for admission.

> Despite our characterization of [Federal] Rule 404(b) as a rule of admissibility, we have expressed our concern that, although the proponents of Rule 404(b) evidence "will hardly admit it, the reasons proffered to admit prior act evidence may often be potemkin village, because the motive, we suspect, is often mixed between an urge to show some other consequential fact as well as to impugn the defendant's character." Thus, when evidence of prior bad acts is offered, the proponent must clearly articulate how that evidence fits into a chain of logical inferences, no link of which may be the inference that the defendant has the propensity to commit the crime charged.

United States v. Himelwright, 42 F.3d 777, 781-82 (3d Cir. 1994) (citations omitted) *quoted in Commonwealth v. Chapman*, 763 A.2d 895, 901 n.6 (Pa. Super. 2000), *allocatur denied*, 771 A.2d 1278 (Pa. 2001).

16. As such, prior bad acts may not be used to infer that the defendant is likely to commit the crime charged.

17. However, if evidence of other drug sales is introduced, that is exactly what the jury will infer, that CLIENT is a drug dealer and must have been involved in the drug delivery on March 29, 2017 that resulted in DECEDENT' death.

18. Historically, our courts have held that evidence of prior bad acts should be strictly limited. This limitation is designed to prevent evidence of prior crimes resulting in a fact-finder forming a fixed bias or hostility in determining the charges in a current case. "[i]t is not proper to raise a presumption of guilt on the ground that, having committed one crime, the depravity it exhibits makes it likely [the same person] would commit another," thereby relieving the Commonwealth of its constitutional burden of proof beyond a reasonable doubt. *Shaffner v. Commonwealth*, 72 Pa. 60, 65 (1872). Rule 404b exists to prevent the use of propensity evidence and to limit prior bad acts to very limited and specific circumstances.

19. Additionally, it is important to recognize the inherent prejudice associated with the introduction of prior bad acts and the virtual impossibility that a jury has in separating those out from the crime charged in the instant matter:

> The difficulty of requiring jurors to dismiss a defendant's prior criminal record from their minds when deciding the issue of guilt while permitting them to consider such evidence for some other purpose is clear. Even with careful instructions from the trial court, allowance of such evidence may lead to a confusion of issues. Jurors may be over-persuaded by evidence of past criminal conduct, prejudge a defendant with a bad general record, and deny him a fair opportunity to acquit himself of a particular offense. Indeed, Judge Biggs has called the jurors' need to put knowledge of a defendant's extensive record out of mind while considering his guilt or innocence 'a feat of psychological wizardry (which) verges on the impossible even for berobed judges.' United States ex rel. Scoleri v. Banmiller, 310 F.2d 720, 725 (3rd Cir. 1962) reh. denied, *148 310 F.2d 736 (3rd Cir. 1962) cert. denied, 374 U.S. 828, 83 S.Ct. 1866, 10 L.Ed.2d 1051 (1963). And Judge Learned Hand in a similar case termed the task of jurors instructed to consider evidence for one purpose while disregarding it for another 'a mental gymnastic which is beyond, not only their powers, but anybody else's.' Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932) cert. denied, 285 U.S. 556, 52 S.Ct. 457, 76 L.Ed. 945 (1932).

Com. v. Chapasco, 258 A.2d 638, 640 (Pa. 1969).

In the instant matter, the evidence of other drug transactions or activities does not demonstrate any of the proper exceptions under the rule and the November drug transactions should be excluded.

Respectfully Submitted,

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CARRIE L. ALLMAN
PA ID No. 92080
Chief-Homicide
Montgomery County Public Defender
2nd Floor Courthouse
PO Box 311
Norristown, PA 19404
(610) 278-3571

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,

v. Nos. CP-46-CR-0007567-2017

CLIENT,
Defendant

POST SENTENCE MOTION

AND NOW COMES the Defendant, CLIENT, by his attorney from the Law Office of the Public Defender of Montgomery County; Carrie L. Allman, Homicide Chief/Trial Counsel, and respectfully submits this Post Sentence Motion of which the following is a statement:

1. CLIENT was charged on September 19, 2017 with one count of Drug Delivery Resulting in Death (18 Pa. C.S. §2506), and numerous other charges including possession with intent to deliver, involuntary manslaughter, recklessly endangering another person, obstruction, tampering with evidence, and abuse of a corpse.

2. These charges are based on an incident that occurred on, or about, March 29 – March 30, 2017 in Pottstown when DECEDENT was found deceased in an apartment complex on High Street.

3. CLIENT was arrested in connection with these charges on September 27, 2017.

4. A preliminary hearing was held on November 8, 2017 and all charges were held.

5. CLIENT's Formal Arraignment was scheduled for January 3, 2018; however, he waived his appearance at that proceeding via a signed waiver form at the time of his

preliminary hearing.

6. Due to the nature of the charges, this case was scheduled for a Status Conference on December 11, 2017 before this Honorable Court.

7. At that time, a date of February 8, 2018 was set for a suppression hearing and a jury trial date of April 16, 2018 was also scheduled.

8. The Court denied suppression and a jury trial commenced on April 16, 2018.

9. The Commonwealth proceeded on the following charges:

Count 1 – Drug Delivery Resulting in Death (F1)

Count 2 – Controlled Substance/Delivery – Fentanyl (F)

Count 3 – Controlled Substance Delivery – Methamphetamine (F)

Count 4 – Paraphernalia (M)

Count 5 – Paraphernalia (M)

Count 7 – Recklessly Endangering Another Person – (M2)

Count 8 – Hindering Apprehension (F3)

Count 10 – Tampering with Evidence (M2)

Count 11 – Abuse of a Corpse (M2)

Count 12 – Possession – Fentanyl (M)

Count 13 – Possession – Methamphetamine (M)

10. The Commonwealth had withdrawn Counts 6 (Involuntary Manslaughter) and 9 (Obstruction) prior to trial.

11. On April 18, 2018, the jury returned a verdict of guilty to all charges.

12. The Court ordered a Presentence Report and scheduled sentencing for July 6, 2018.

13. At sentencing, the Commonwealth noted that, due to merger, they would only be

seeking a sentence on the following counts:

Count 1 – Drug Delivery Resulting in Death – "DDRD" (F1)

Counts 4 and 5 – Paraphernalia (M)

Count 8 – Hindering (F3)

Count 11 – Abuse of a Corpse (M2)

14. CLIENT's prior record score was noted to be a 1, and the guidelines were listed as follows:

Count 1 – DDRD – 66 - 84 months (+/- 12 months)

Counts 4 and 5 – Paraphernalia – RS - 1 (+/- 3 months)

Count 8 – Hindering – RS - 9 (+/- 3 months)

Count 11 – Abuse of a Corpse – RS – 6 (+/- 3 months)

15. The Court imposed the following sentence:

Count 1 – DDRD – 15 – 40 years of incarceration

Count 8 – Hindering – 2-5 years of incarceration consecutive to Count 1

Count 11 – Abuse of a Corpse – 1-2 years of incarceration consecutive to Count 8

The effective date of the sentence was 9/27/17.

16. CLIENT' total aggregate sentence is 18-47 years of incarceration in a state correctional facility.

17. At every count, the Court sentenced well outside of the guidelines; in fact, the sentence at Count 1 is more than twice the top range of the standard guidelines for the offense. The guidelines called for 66-84 months in the standard range (5 and ½ to 7 years) and the Court instead imposed a sentence of 15-40 years.

18. The minimum sentence is *more than twice* the guidelines, and the maximum is the

statutory maximum permitted by law.

19. The Court sentenced outside of the guidelines on Counts 8 and 11 as well, imposing sentences well outside the guidelines at each charge, including imposing the statutory maximum at Count 11.

20. All counts were run consecutive for the total sentence of 18-47 years.

21. This timely post sentence motion follows:

The Verdict Rendered was Contrary to the Weight of the Evidence, as such a new trial should be awarded

The jury erred in returning its verdict because "the evidence presented was so contrary to the verdict rendered that it shock's one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail." *Commonwealth v. Smith*, 861 A.2d 892, 895 (Pa. Super. 2004). The Commonwealth's evidence was of such low quality, tenuous, vague and uncertain as to make the verdict of guilty pure conjecture; and, therefore, shocks of the conscience of the Court. A finding of guilt under the circumstances of this case should shock the conscience of the Court. The verdict was contrary to the weight of the evidence and a new trial should be awarded. Some factors demonstrating that the verdict was against the weight of evidence are as follows:

a. There were multiple people in and out of the apartment all day long while DECEDENT was present and any of them could have provided the drugs that resulted in DECEDENT's overdose death, including Shemar Reed who currently has pending criminal charges for drug delivery. Specifically, at the time of CLIENT' trial, Mr. Reed was facing

charges for delivering heroin. Mr. Reed also has a history of *crimen falsi* and none of his testimony is credible. Finally, Mr. Reed has every incentive to be dishonest and claim he has seen CLIENT with drugs before as he is looking to curry favor with the Commonwealth for his own criminal cases.

b. Despite also being in the apartment numerous times that day, the Commonwealth failed to present David Hiller or "Jessica" despite evidence showing they were present at various times throughout the day, interacted with DECEDENT and could have provided drugs to DECEDENT.

c. The only bag of drugs found in the apartment was initially reported to contain only heroin, until the date of trial when suddenly it was claimed that the lab does not report fentanyl, only heroin due to the classifications of each drug, but that fentanyl was also in the baggie. This was claimed despite other lab reports, by the same exact scientist, from the same lab, in the same month, where BOTH Heroin and Fentanyl were listed in the reports.

d. Despite the cause of death being Fentanyl and Meth, no such drugs were found in the apartment.

e. Commonwealth witnesses agreed that DECEDENT had fresh needle marks in his arm, yet there was NO testimony presented that he injected drugs inside the apartment of CLIENT and Mr. Weigand, as such, it is clear that DECEDENT used drugs prior to his arrival at the Apartment.

f. The testimony of Jennifer Weigand was wholly incredible where she had received immunity despite having the exact same access to the apartment, the drugs, and DECEDENT. Ms. Weigand also lived in the apartment, had access to drugs, admitted to

using the meth in the apartment, admitted to having access to the meth, and where Ms. Weigand is seen on camera making food and doing nothing to ever assist DECEDENT, and even leaving the apartment to go shopping, purchasing makeup and other items while DECEDENT remained in her apartment building. Ms. Weigand's testimony was the only evidence stating that CLIENT had given the drugs to DECEDENT and was said only to protect herself from prosecution and only after a grant of immunity.

For all of the foregoing reasons of fact and law, CLIENT requests a new trial as the verdict rendered by the jury is contrary to the weight of the evidence presented.

The Sentence imposed is manifestly excessive, unreasonable, and an abuse of discretion

The sentence imposed is manifestly excessive, unreasonable and an abuse of discretion where the Court failed to consider the rehabilitative needs of the defendant, the nature and characteristics of the defendant, failed to give careful consideration to all relevant factors and imposed a sentence that is inconsistent with the norms underlying the sentencing code. This is true where the sentence imposed at the lead charge is more than twice the sentence recommended by the guidelines. The guidelines at Count 1 – Drug Delivery Resulting in Death called for a sentence of 5 and ½ to 7 years in the standard range (with +/- 12 months, or one year for aggravating or mitigating factors. The Court imposed a sentence of 15-40 years at Count 1, well outside the guidelines, and without adequate support or factors placed on the record. The Court then stacked consecutive sentences for Counts 8 and 11, including sentences that were outside the guidelines at those counts, and despite using the elements of those offenses (erasing surveillance,

abusing the body) as factors to increase the sentence at Count 1. The Court double penalized CLIENT for the same conduct by using the elements of Counts 8, and 11 (at which lengthy sentences were imposed) to justify a sentence double the guidelines at Count 1.

The Sentencing Code requires that a sentence be consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant. 42 Pa. C.S. §9721(b). The sentence imposed by the Court fails to follow those standards. The sentence focuses solely on the seriousness of the offense and the Court's personal feelings about the matter and how offensive the Court found the actions of CLIENT.

Furthermore, the Court focused solely on the seriousness of the offense at the expense of considering other pertinent factors. The sentence imposed was manifestly excessive, unreasonable, and abuse of discretion where the Court did not consider the particular circumstances of the case or the nature and characteristics of the defendant. Specifically, the Court did not consider all of the mitigating factors such as: the defendant's lack of family support, addiction issues as the defendant had an addiction to alcohol, the defendant's mental health issues including ADHD and depression. The sentence imposed fails to consider not only the rehabilitative needs of CLIENT, but also his personal nature and characteristics and therefore is an abuse of discretion.

Additionally, the Court put an emphasis on the defendant's lack of remorse and failure to take responsibility which is an improper factor to consider when the defendant maintains his innocence. The Superior Court has noted that if a sentencing court considers improper factors in imposing a sentence upon a defendant, although the sentence thereby imposed is not rendered illegal, the court has committed an abuse of

discretion. *Commonwealth v. McAfee*, 849 A.2d 270, 274 (Pa. Super. 2004) (citing *Commonwealth v. Archer*, 722 A.2d 203, 210 (Pa. Super. 1998) (*en banc)*.

The Court considered additional improper factors when it stated that CLIENT had thrown water on DECEDENT and slapped him, where the evidence clearly demonstrated those were the specific acts of others, namely Jessica. CLIENT did use a blood pressure cuff and a shock collar to check on and attempt to waken DECEDENT. Additionally, the evidence showed that CLIENT did not pull DECEDENT down the stairwell, but rather Jennifer Weigand testified that Floyd Wilkins had committed that act.

[T]he proper standard of review when considering whether to affirm the sentencing court's determination is an abuse of discretion. *Commonwealth v. Walls*, 592 Pa. 557, 564, 926 A.2d 957, 961 (Pa. 2007). The abuse of discretion standard includes review of whether the judgment exercised was unreasonable. *Id.* At 962. The Supreme Court has noted that the Sentencing Code sets forth a requirement of appellate review for whether a sentence outside of the guidelines is "unreasonable." 42 Pa.C.S. § 9781c. Thus, the statutory unreasonableness inquiry is a component of the jurisprudential standard of review for an abuse of discretion. *Commonwealth v. Walls,* 592 Pa. 557, 565, 926 A.2d 957, 962 (Pa.2007).

Furthermore, the Superior Court has noted that it may vacate an appellant's sentence if the trial court abused its discretion by imposing a sentence that is manifestly unreasonable or where the sentencing court fails to give "careful consideration to all relevant factors in sentencing [appellant]." *Commonwealth v. Parlante*, 823 A.2d 927, 930 (Pa. Super. 2003) (citing *Commonwealth v. Sierra*, 752 A.2d 910, 913 (Pa. Super. 2000)). Additionally, it has been noted that an abuse of discretion occurs when a sentence is

clearly unreasonable or manifestly excessive under the circumstances of the case," *Commonwealth v. Duffy*, 491 A.2d 230, 233 n.3 (Pa.Super. 1985), or when the sentence "commits an error of law." *Commonwealth v. Townsend*, 443 A.2d 1139, 1140 (Pa. 1982). Notably, an error of law occurs whenever a sentence "overlook[s] pertinent facts" or "disregard[s] the force of evidence." *Townsend,* 443 A.2d at 1140. In the instant matter, the failure to consider CLIENT' history, lack of significant prior criminal history, addiction issues, rehabilitative needs, and the Court punished CLIENT for acts he did not commit, and for his decision to exercise his right to not speak about this case during presentence interviews.

For all of the foregoing reasons of fact and law, the sentence imposed is an abuse of discretion and should be modified to comport with the sentencing guidelines.

Respectfully Submitted,

_____

CARRIE L. ALLMAN
PA ID No. 92080
Chief-Homicide
Montgomery County Public Defender
2nd Floor Courthouse
PO Box 311
Norristown, PA 19404
(610) 278-3571

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,

v. Nos. CP-46-CR-0005776-2016,

CLIENT,
Defendant

POST SENTENCE MOTION

AND NOW COMES the Defendant, CLIENT, by his attorney from the Law Office of the Public Defender of Montgomery County; Carrie L. Allman, Homicide Chief/Trial Counsel, and respectfully submits this Post Sentence Motion of which the following is a statement:

1. CLIENT was charged at the above-captioned as follows: Count 1 - Drug Delivery Resulting in Death; Count 2 - Recklessly Endangering Another person; Count 3 - Criminal Use of a Communication Facility; Count 4 - Possession with Intent to Deliver (Heroin); and Count 5 - Possession (Heroin).

2. These charges are connected to the January 29, 2016 overdose death of Ms. DECEDENT.

3. CLIENT was not charged until June of 2016.[1]

4. Numerous pretrial motions were filed and litigated and a Jury Trial commenced on July 9, 2018.

[1] Attorney Douglas Breidenbach Jr. represented CLIENT from the time he was charged until January 19, 2017 when he withdrew, and the Office of the Public Defender

5. After numerous hours of deliberation, the Jury returned the following verdict:

Count 1 – Drug Delivery Resulting in Death - Guilty

Count 2 – Recklessly Endangering Another Person – Not Guilty

Count 3 – Criminal Use of a Communication facility – Guilty

Count 4 – Possession with Intent to Deliver – Guilty

6. On October 30, 2018, CLIENT appeared for sentencing.

7. The Court had ordered a PSI and it was reviewed by both parties.

8. Additionally, both parties agreed that Count 4 would merge with Count 1 for sentencing purposes. As such, a sentence could only be imposed at Counts 1 and 3.

9. CLIENT's prior record score listed him as an RFEL; as such, the following guidelines applied:

Count 1 – Drug Delivery Resulting in Death – OGS – 13; PRS-RFEL

Guidelines: 108-126 months (9-10 and ½ years) +/- 12 months

Count 3 – Criminal Use of a Communication facility – OGS -5; PRS –RFEL

Guidelines: 24-36 months (2-3 years) +/- 3 months

10. The Defense requested a sentence that considered CLIENT's mitigating factors, including his traumatic childhood, and his expressions of regret and requested a sentence of 8-16 years at Count 1 and a concurrent sentence at Count 3.

11. The Commonwealth requested a sentence at the top of the standard range at each Count, and requested they run consecutive.

12. The Court imposed the following sentence:

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was appointed.

Count 1 – 10 and ½ to 28 years

Count 3 – 2 and ½ to 7 years (consecutive to Count 1)

13. As such, CLIENT's aggregate sentence is 13-35 years of incarceration.

14. This timely post sentence motion follows:

The verdict rendered was contrary to the weight of the evidence, as such a new trial should be awarded

The jury erred in returning its verdict because "the evidence presented was so contrary to the verdict rendered that it shock's one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail." *Commonwealth v. Smith*, 861 A.2d 892, 895 (Pa. Super. 2004). The Commonwealth's evidence was of such low quality, tenuous, vague and uncertain as to make the verdict of guilty pure conjecture; and, therefore, shocks of the conscience of the Court. A finding of guilt under the circumstances of this case should shock the conscience of the Court. The verdict was contrary to the weight of the evidence and a new trial should be awarded. Some factors demonstrating that the verdict was against the weight of evidence are as follows:

a. Not a single witness saw a drug exchange between CLIENT and DECEDENT.

b. The texts and brief visit were consistent with what CLIENT explained, in his own words, to his girlfriend in a jail call; namely that DECEDENT was badgering him for drugs and he went to tell her to stop.

c. CLIENT was not arrested in possession of any drugs, nor is there any

evidence that he ever had drugs on him.

d. The texts show 12 messages, with 8 of them being sent from DECEDENT seeking drugs and asking where CLIENT is, and why he never keeps his promises.

e. The theory that DECEDENT as the “buyer” is setting the price on the drugs is inconsistent with common sense drug dealing as the dealer would seek to maximize his profit, not allow a buyer to set terms and conditions.

f. DECEDENT was experiencing a substance use disorder and could have received the drugs from others, particularly where her place of work employed those with previous convictions, where the apartment complex she lived in had numerous people engaging in drug activity mere doors down, and where she had a history of drug addiction and use and would reasonably know where to find drugs.

g. The evidence presented was weighted in favor of the cause of death not being a fentanyl overdoes, but rather the result of DECEDENT’s other prescription drugs.

For all of the foregoing reasons of fact and law, CLIENT requests a new trial as the verdict rendered by the jury is contrary to the weight of the evidence presented.

The Sentence imposed is manifestly excessive, unreasonable, and an abuse of discretion

The sentence imposed is manifestly excessive, unreasonable and an abuse of discretion where the Court failed to consider the rehabilitative needs of the defendant, the nature and characteristics of the defendant, failed to give careful consideration to all relevant factors and imposed a sentence that is inconsistent with the norms underlying the sentencing code.

Despite being a "standard" range sentence, the sentences imposed both start at the top of the standard range, the maximum is more than twice the minimum at each count, and each count was made to run consecutive. However, even a standard range sentence can be an abuse of discretion as the guidelines are only advisory, a court must consider a variety of factors in sentencing and is not bound by the guidelines. "Guidelines have no binding effect, create no presumption in sentencing, and do not predominate over other sentencing factors-they are advisory guideposts that are valuable, may provide an essential starting point, and that must be respected and considered; they recommend, however, rather than require a particular sentence." *Commonwealth v. Walls,* 592 Pa. 557, 570, 926 A.2d 957, 964 - 965 (Pa. 2007).

In the instant matter, a sentence of 13-35 years does not reflect a careful consideration of all factors. The Sentencing Code requires that a sentence be consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant. 42 Pa. C.S. §9721(b). The sentence imposed by the Court fails to follow those standards. The sentence focuses solely on the seriousness of the offense and the Court's personal feelings about the matter and how offensive the Court found the actions of

CLIENT.

Furthermore, the Court focused solely on the seriousness of the offense at the expense of considering other pertinent factors. The sentence imposed was manifestly excessive, unreasonable, and abuse of discretion where the Court did not consider the particular circumstances of the case or the nature and characteristics of the defendant. Specifically, the Court did not consider all of the mitigating factors such as: the defendant's traumatic history of having a drug-addicted mother, an absent father, and a step-father who was murdered; the defendant's own addiction issues as the defendant had an addiction to alcohol, marijuana, and percocets. As such, the sentence imposed fails to consider not only the rehabilitative needs of CLIENT, but also his personal nature and characteristics and therefore is an abuse of discretion.

The Superior Court has noted that it may vacate an appellant's sentence if the trial court abused its discretion by imposing a sentence that is manifestly unreasonable or where the sentencing court fails to give "careful consideration to all relevant factors in sentencing [appellant]." *Commonwealth v. Parlante*, 823 A.2d 927, 930 (Pa. Super. 2003) (citing *Commonwealth v. Sierra*, 752 A.2d 910, 913 (Pa. Super. 2000)). Additionally, it has been noted that an abuse of discretion occurs when a sentence is clearly unreasonable or manifestly excessive under the circumstances of the case," *Commonwealth v. Duffy*, 491 A.2d 230, 233 n.3 (Pa.Super. 1985), or when the sentence "commits an error of law." *Commonwealth v. Townsend*, 443 A.2d 1139, 1140 (Pa. 1982). Notably, an error of law occurs whenever a sentence "overlook[s] pertinent facts" or "disregard[s] the force of evidence." *Townsend,* 443 A.2d at 1140.

In the instant matter, the Court focused on the seriousness of the offense to the

exclusion of other factors, and imposed a sentence based on the idea that dealers should "know" what their product is, which is wholly inconsistent with the testimony of the Detectives offered at trial, and based on the Court's distaste for this particular crime. The Court punished CLIENT for factors already taken into account in the guidelines – namely the seriousness of the offense and CLIENT's prior record. The Court failed to consider the mitigating evidence in fashioning a sentence and therefore imposed a sentence that is excessive and not in keeping with the norms underlying the sentencing code.

For all of the foregoing reasons of fact and law, the sentence imposed is an abuse of discretion and should be modified.

Respectfully Submitted,

CARRIE L. ALLMAN
PA ID No. 92080
Chief-Homicide
Montgomery County Public Defender
2nd Floor Courthouse
PO Box 311
Norristown, PA 19404
(610) 278-3571

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,

v. Nos. CP-46-CR-0007271-2017
Drug Delivery Resulting in Death

CLIENT,
Defendant

SUPPLEMENTAL MOTION TO SUPPRESS CELL SERVICE LOCATION INFORMATION

AND NOW COMES the Defendant, CLIENT, by his attorney from the Law Office of the Public Defender of Montgomery County; Carrie L. Allman, Homicide Chief/Trial Counsel, and respectfully submits this Pre-Trial Motion of which the following is a statement:

1. CLIENT was charged on September 28, 2017 at OTN T 975386-6 with numerous charges, including one count of Drug Delivery Resulting in Death (18 Pa. C.S. §2506).

2. This charge is based on an incident that occurred on, or about, March 29, 2017 in Spring City, Chester County, Pennsylvania involving the overdose death of DECEDENT.

3. Chester County provided a McPhail letter permitting prosecution in Montgomery County.

4. The pertinent facts, as alleged in the affidavit, are as follows:

a. Police responded to an overdose on March 29, 2017 around 9:17pm in Spring City. Upon arrival, Amanda Jones was found at the scene, and a male, DECEDENT, was found unresponsive in a vehicle.

b. The vehicle was a Honda Accord that belonged to DECEDENT.

c. Medics provided care, but DECEDENT was pronounced dead and transported to the coroner's office.

d. DECEDENT cause of death was listed as acute fentanyl and alcohol intoxication.

e. Ms. Jones told police she had snorted one bag of Heroin and Treys snorted two bags. Jones stated she passed out and when she awoke, she found Treys unresponsive and called 911.

f. Jones told police she had purchased 12 bags of heroin, for $60, from a black male she knows as "Sheed".

g. Jones stated that Treys asked her to get the heroin because he did not have any contacts.

h. Jones stated she was introduced to "Sheed" about 12-18 months ago and was provided with "Sheed's phone number so she could make arrangements with him to purchase heroin.

i. The number she provided as being connected with "Sheed" was (484) 804-1644.

j. Jones stated she purchased heroin on March 29, 2017 by a young black male who was sent by "Sheed"; this purchase occurred in Norristown, Pa. She did not meet "Sheed" that evening.

k. Jones allowed police to search her phone and texts were recovered between Jones and individual she says is "Sheed". Notably, not all text messages are available because Jones erased them. The messages are alleged to be an effort by Ms. Jones to

obtain heroin from “Sheed”.

l. Jones says she purchased 12 bags from this unknown black male she met on March 29, 2017, the black male she received the drugs from was not “Sheed”.

m. 12 bages of suspected heroin were recovered from Trey’s vehicle. The suspected heroin was later identified as heroin and fentanyl.

n. On March 30, 2017, officers arranged a controlled buy between Jones and “Sheed”. Again, the individual who delivered the drugs was not “Sheed”.

o. Another controlled buy was conducted on April 4, 2017 between a CI and CLIENT, and CLIENT was arrested.

p. The affidavit also references two controlled buys in November 2016 with CIs.

q. Wilson was arrested following the controlled buy on April 4, 2018.

r. Wilson had $512.00 dollars on him and two cell phones – a Samsung Galaxy and an Iphone. The Samsung phone rang when Detectives called (484) 804-1644.

s. On March 31, 2017, a Court order was issued in Chester County allowing subscriber information, call detail records, and cell tower/location information for cell number (484) 804-1644.

t. ON September 19, 2017, a second application was made under the wiretap act for call detail records and cell service location information with the affiant being Detective Fedak.

u. Then, on March 6, 2018, Detective Fedak, sought a warrant for the same information.

5. This supplemental motion seeking suppression of certain evidence follows:

CELL SERVICE LOCATION DATA

6. On March 31, 2017, an order was issued allowing access to subscriber information, call logs details, and cell service location data from number (484) 804-1644.

7. This information was obtained by a court order pursuant to the Wiretap Act 18 Pa. C.S. §5743 (c) and (d).

8. The Wiretap Act allows for a court order to issue where there are "specific and articulable facts showing that there are reasonable grounds to believe that …records or other information sought, are relevant and material to an ongoing criminal investigation".

9. This is a reasonable suspicion standard and falls below the probable cause standard that would be required for a warrant to issue.

10. Again, on September 19, 2017, information was sought through the wiretap act with affiant Detective Fedak.

11. Again, this information was obtained by a court order pursuant to the Wiretap Act 18 Pa. C.S. §5743 (c) and (d).

12. ONLY in March of 2018, did Detective Fedak seek a warrant for the same information, and only because of the pending United States Court Supreme Court case *United States v. Carpenter*, 819 F.3d 880 dealing with this exact question – namely whether or not a warrant is required by the 4th amendment in order to obtain cell service location information. See *Carpenter v. United States,* 2017 U.S. LEXIS 3686 (U.S., June 5, 2017).

13. This warrant was sought on March 6, 2018. The warrant was also sought by Detective Fedak.

14. Pretrial Motions were due in this case on March 30, 2018.

15. The Defense filed several motions, but one of which sought suppression of CSLI based on the pending *carpenter* case and arguing that a warrant was required. (see previously filed suppression motion)

16. The Commonwealth did not provide the Defense a copy of the warrant until June 18, 2018.

17. On June 22, 2018, The US Supreme Court issued its decision in *Carpenter*, holding that acquisition of historical cell-site location information (CSLI) was a search under the 4th amendment, it invaded a reasonable expectation of privacy, obtaining the information from a third party did not overcome the 4th amendment protections, and that a warrant was needed to obtain CSLI in the absence of an exception, such as exigent circumstances. *Carpenter v. United States,* 2018 U.S. LEXIS 3844 (U.S., June 22, 2018).

18. As such, it is now clear that CSLI is private information and a warrant is required to obtain historic CSLI information.

19. Therefore, on March 6, 2018, the Commonwealth sought a warrant for the exact same information it had already obtained unlawfully through the provisions of the wiretap act.

20. This subsequent warrant was obtained by the same affiant, there is no independent source, and the information obtained from the warrant, namely the cell service location information must be suppressed.

21. The Commonwealth cannot rely on *Commonwealth v. Henderson*, 47 A.3d 797 (Pa. 2012) which applies the independent source doctrine. Under *Henderson,* evidence tainted by illegal police conduct may admitted if the evidence can be fairly regarded as having an

origin independent of the unlawful conduct. *Id.*

22. First, *Henderson*, is inconsistent with the standards the Pennsylvania Supreme Court set for itself in *Commonwealth v. Melendez* where the Court held that "application of the independent source doctrine is proper only in the very limited circumstances where the independent source is truly independent from both the tainted evidence and the police or investigative team which engaged in the misconduct by which the tainted evidence was discovered." *Commonwealth v. Melendez*, 676 A.2d 226 (Pa. 1996).

23. Second, there is NO independent source at all in this matter as Detective Fedak sought both the wiretap application and the subsequent warrant.

24. The taint cannot be cured by simply getting a warrant.

25. It is clear that there is support for exclusion when the tainted evidence is not truly independent and in this case, the evidence is not independent where the "new" affiant relied on the materials he learned from the former affiant, including an in-person conversation with the prior affiant, and where the warrant was sought in preparation for trial at which time, the new affiant, employed by the same investigative agency knew all of the details of the case and what the prior search had revealed.

26. There is no independent source in the instant matter and there are not the factual circumstances that existed in *Henderson,* which involved a rape case and the need for a subsequent blood draw due to some questions with the first warrant. The Court expressly stated "in the present circumstances, we are unwilling to enforce a "true independence" rule in the absence of police misconduct and on pain of the Commonwealth being forever barred from obtaining non-evanescent evidence connecting Appellant with his crimes". *Henderson,* 47 A.3d at 804.

27. Outside of the federal 4th amendment privacy protections at play, it is important to note that the Pennsylvania Constitution is being violated and this is more significant as Article I §8 of the Pennsylvania Constitution has long encompassed a broader range of protections than those provided by the 4th amendment.

28. The right to be free from unreasonable searches and seizures is guaranteed by the United States and Pennsylvania Constitutions. The Pennsylvania Constitution provides that: The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation, subscribed to by the affiant. Pa. Const. Article I §8. The United States Constitution provides that: The right of the people to be secure in their persons, houses, papers and effects, against unreasonable search 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. US Const. 4th Amend.

29. Despite the fact that the two sections are very similar, and both provisions guarantee protection from "unreasonable searches and seizures", Pennsylvania Courts have recognized that our state constitution can provide greater rights and protections to the citizens of this Commonwealth than those provided under similar provisions of the federal constitution. *Commonwealth v. Crouse*, 729 A.2d 588, 595 (Pa. Super. 1999) (citing *Commonwealth v. Edmunds*, *supra* 586 A.2d 887, 894 (Pa. Super. 1991)).

30. The purpose behind Pennsylvania's exclusionary rule differs from the purpose of the exclusionary rule founded in the Fourth Amendment. The Fourth Amendment's

exclusionary rule has been construed by the United States Supreme Court as serving solely a deterrent purpose [to police misconduct], whereas the exclusionary rule under Article I, Section 8 has been interpreted by this Court to serve the purposes of safeguarding privacy and ensuring that warrants are issued only upon probable cause. *Commonwealth v. Zhahir,* 561 Pa. 545, 751 A.2d 1153, 1159 n. 5 (2000) (citations omitted); *see Commonwealth v. Edmunds,* 526 Pa. 374, 586 A.2d 887 (1991).

31. Pennsylvania Courts have recognized that our state constitution can provide greater rights and protections to the citizens of this Commonwealth than those provided under similar provisions of the federal constitution. *Commonwealth v. Crouse*, 729 A.2d 588, 595 (Pa. Super. 1999) (citing *Commonwealth v. Edmunds*, *supra* 586 A.2d 887, 894 (Pa. Super. 1991)). The exclusionary rule is one area in which Pennsylvania has granted a greater right than that afforded by the 4th Amendment based upon this Commonwealth's belief that the heart of the exclusionary rule in Pennsylvania is privacy. *Commonwealth v. Williams*, 547 Pa.577, 692 A.2d 1031 (1997).

31. As such, the issue of police misconduct is not the focus; rather the privacy interest that has been invaded.

32. In the instant matter, the Commonwealth obtained phone logs detailing calling information such as numbers dialed and when, length of call, number of calls, as well as location data for those calls.

33. This is far more expansive information than that which can be obtained by pen registers, and the Pennsylvania Supreme Court has held that a warrant is required under Pennsylvania law for the use of a pen register, which is a device that merely records numbers called from a particular phone line. The court held that probable cause was

required to place a pen register on appellants' telephone lines and that there was no "good faith" exception to the probable cause requirement. *Commonwealth v. Melilli*, 521 Pa. 405, 408, 555 A.2d 1254, 1255 (1989).

34. The information was obtained in this case without a warrant, as such, it was an unconstitutional search and seizure and the evidence gained must be suppressed. No subsequent warrant can issue that ‘saves” the original unlawful search.

35. Additionally, there is no good-faith exception to the warrant requirement in Pennsylvania. In fact, the *Edmunds* Court noted that, to adopt a ‘good faith’ exception to the exclusionary rule, would virtually eliminate the safeguards which have developed under the Pennsylvania Constitution over the past 200 years. *Commonwealth v. Edmunds,* 586 A.2d 887, 889 (Pa. 1991).

For all of the foregoing reasons of fact and law, the evidence, obtained without a warrant, namely the subscriber information, call logs, and cell service location information connected to (484) 804-1644 should be suppressed.

Respectfully Submitted,

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CARRIE L. ALLMAN
PA ID No. 92080
Chief-Homicide
Montgomery County Public Defender
2nd Floor Courthouse
PO Box 311
Norristown, PA 19404
(610) 278-3571

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,

v. Nos. CP-46-CR-0007567-2017,

CLIENT,
Defendant

MOTION TO SUPPRESS STATEMENTS AND PHYSICAL EVIDENCE

AND NOW COMES the Defendant, CLIENT, by his attorney from the Law Office of the Public Defender of Montgomery County; Carrie L. Allman, Homicide Chief/Trial Counsel, and respectfully submits this Pre-Trial Motion of which the following is a statement:

1. CLIENT was charged on September 19, 2017 with one count of Drug Delivery Resulting in Death (18 Pa. C.S. §2506), and numerous other charges including possession with intent to deliver, involuntary manslaughter, recklessly endangering another person, obstruction, tampering with evidence, and abuse of a corpse.

2. These charges are based on an incident that occurred on, or about, March 29 – March 30, 2017 in Pottstown when DECEDENT was found deceased in an apartment complex on High Street.

3. CLIENT was arrested in connection with these charges on September 27, 2017.

4. On October 4, 2017, after meeting with CLIENT, and confirming that he qualified for the services of the Public Defender, undersigned counsel filed a Motion with then Administrative Judge, Steven T. O'Neill, seeking appointment. This was filed pursuant to

the policy established by Judge O'Neill for all homicide cases, including drug delivery resulting in death cases.

5. On October 17, 2017, an Order was entered appointing undersigned counsel, and the Office of the Public Defender to represent CLIENT.

6. A preliminary hearing was held on November 8, 2017 and all charges were held.

7. CLIENT's Formal Arraignment was scheduled for January 3, 2018; however, he waived his appearance at that proceeding via a signed waiver form at the time of his preliminary hearing.

8. Due to the nature of the charges, this case was scheduled for a Status Conference on December 11, 2017 before this Honorable Court.

9. At that time, a date of February 8, 2018 was set for a suppression hearing and a jury trial date of April 16, 2018 was also scheduled.

10. The Commonwealth provided discovery, including the applicable search warrants and police reports on January 9, 2018, with additional materials provided on January 10, 2018 and January 12, 2018, including numerous CDs containing video and phone downloads.

11. This motion, seeking suppression of statements attributed to CLIENT, as well as physical items gained from CLIENT's residence at 376 East High Street (Apartment 9) Pottstown, PA, follows

Statements obtained from CLIENT should be suppressed as they were obtained in violation of the 5th amendment of the United States Constitution and Article I §9 of the Pennsylvania Constitution as they were obtained without adequate safeguards as required by *Miranda*

12. The pertinent facts, as alleged in the affidavit of probable cause are as follows:

a. Pottstown Police were dispatched to 374 E. High Street in the early morning hours of March 30, 2017 for a report of an unconscious person. This is an apartment building and police were responding to a 911 call from Jennifer Wiegand, an occupant of Apartment 9.

b. Upon entry to the Apartment Complex, officers observed a white male lying at the bottom of a stairway; the male was deceased.

c. The deceased was identified as DECEDENT.

d. Ms. Wiegand advised that DECEDENT was a guest in her apartment earlier in the day. Ms. Wiegand resided in Apartment 9 with her boyfriend, CLIENT.

e. CLIENT was described as being "uncooperative" at the scene.

f. CLIENT was later questioned, at the Pottstown Police Station (Borough Hall) by Sergeant Markovich.

g. CLIENT is alleged to have stated that:

-DECEDENT came to the apartment and used heroin in the living room.

-A plan was made to put DECEDENT in the hallway hoping he would leave when he woke up.

-Later, DECEDENT did not look good, had a low body temperature, and police were called.

h. Sergeant Markovich told CLIENT that he “thought there was more going on here” and that “if Kevin used heroin in his apartment and overdosed it was not his [Ron’s] fault”.

i. CLIENT is then alleged to have said “yeah, but what about the person that gave it to him?”

13. CLIENT seeks to suppress the entire contents of this conversation as he was not provided Miranda Warnings, was in police custody, was subjected to interrogation, and was directly asked questions about an on-going investigation which were designed to elicit an incriminating response.

14. CLIENT was transported to the police station by officers and asked questions about what Officers deemed a suspicious death, this transport was not of his own volition or ability and amounts to custodial detention. This transport and questioning happened after CLIENT declined to cooperate at his own residence, and the police taking CLIENT, and his girlfriend to a police station to ask additional questions was designed to be coercive and intimidating. Additionally, the police seized CLIENT’s cell phone at the station and did not return it but sought a warrant for its contents.

15. If the police choose to engage in a procedure that significantly deprives one of their freedom than they bear the burden of providing appropriate warnings to the individual. The Pennsylvania Supreme Court has held:

> A person is in custody for Miranda purposes only when he ‘is physically denied his freedom of action in any significant way or is placed in a situation in which he reasonably believes that his freedom of action or movement is restricted by the interrogation.’ *Commonwealth v. Boczkowski*, 577 Pa. 421, 846 A.2d 75, 90 (2004) (quoting *Commonwealth v. Johnson*, 556 Pa. 216, 727 A.2d 1089, 1100 (1999)) (footnote omitted). “The standard for determining whether an encounter with the police is deemed ‘custodial’ ... is an objective one based on a totality of the circumstances with due consideration given to

> the reasonable impression conveyed to the person interrogated...." *Commonwealth v. Gwynn*, 555 Pa. 86, 723 A.2d 143, 148 (1998) (citing *Commonwealth v. Edmiston*, 535 Pa. 210, 634 A.2d 1078, 1085 (1993)).

Commonwealth v. Johnson, 42 A.3d 1017, 1028 (Pa. 2012).

16. While at the police station, CLIENT was asked questions regarding an on-going investigation about an individual who had died at his apartment, and these questions were being asked after CLIENT had indicated he did not wish to speak with police at his residence.

17. Removing CLIENT from his residence, using police transport, questioning at a police station, and telling CLIENT that officers believed there was "more" to the story was the functional equivalent of a custodial interrogation and CLIENT was not provided any *Miranda* warnings:

18. The test for determining whether or not a person is in custody for *Miranda* purposes is whether he "... is physically deprived of his freedom of action in any significant way or is placed in a situation in which he reasonably believes that his freedom of action or movement is restricted by such interrogation...." *Commonwealth v. O'Shea,* 318 A.2d 713, 715 (1974), cert. denied 419 U.S. 1092, 95 S.Ct. 686, 42 L.Ed.2d 685 (1974), (emphasis deleted; citation omitted). Furthermore, the test for custodial interrogation does not depend upon the subjective intent of the law enforcement officer interrogator. *Commonwealth v. Medley,* 612 A.2d 430, 433 (Pa.1992).

19. Furthermore, CLIENT was being asked questions designed to elicit an incriminating response, and an "interrogation "occurs when the police "should know that their words or actions are reasonably likely to elicit an incriminating response from the suspect." *Commonwealth v. Ingram*, 814 A.2d 264, 271 (Pa.Super. 2002).

20. CLIENT had provided answers to the police questioning; however, Sergeant Markovich expressly told him that he didn't believe him, that there was more to the story, and then Sergeant Markovich stated that it would not be CLIENT's "fault" if someone did drugs and died in his apartment. It was only after this suggested scenario that CLIENT stated "what about the person that gave it to him".

21. The totality of the circumstances and the nature of the questioning demonstrates that this was a custodial interrogation and that the failure to provide adequate *Miranda* warnings and safeguards should result in the suppression of all statements made by CLIENT on March 30, 2017.

22. The failure to provide adequate safeguards violates CLIENT's rights as provided by the 5th amendment of the US Constitution and Article I §9 of the Pennsylvania Constitution.

Items obtained and searched as a result of the search warrants dated March 30, 2017 and all additional warrants should be suppressed as the warrants lacked probable cause, and were overly broad

23. On March 30, 2017, a search warrant was sought for Apartment 9 of 374 East High Street in Pottstown, PA. This warrant sought narcotics, drug paraphernalia, digital storage devices, surveillance systems, SD Cards, computer hard-drives, external hard-drives, and indicia of occupancy.

24. As a result of this search and seizure, an additional warrant was sought and obtained to download/search the flash drives and computer seized on March 30, 2017, and a separate warrant was obtained on April 3, 2017 to conduct a second search of the

residence for additional electronic storage devices and hardware due to “detectives not realizing what that device actually was at that time”. (Warrant and Affidavit dated April 3, 2017)

25. All items obtained as a result of the initial March 30, 2017 warrant, and the subsequent warrants connected to that initial warrant should be suppressed as they were obtained without probable cause and the warrants were overly broad.

26. It is clear that both the 4th amendment of the United States Constitution and Article I §8 of the Pennsylvania Constitution protect against unreasonable searches and seizures. The expectation of privacy protected by the United States and Pennsylvania Constitutions has been held to be greatest in one's home. *See Commonwealth v. Gutierrez,* 750 A.2d 906 (Pa.Super.2000).

27. Furthermore, for a warrant to issue, probable cause must exist. In determining whether probable cause exists, Pennsylvania applies the “totality of the circumstances” test. *Commonwealth v. Sharp*, 683 A.2d 1219, 1223 (1996). The duty of the Superior Court is to ensure that the magistrate had a “substantial basis for concluding that probable cause existed.” *Id*.

28. It is well established that a search warrant is not to be issued without probable cause and the issuing authority cannot consider any evidence outside the four corners of the affidavit in determining whether or not probable cause has been established. Pa.R.Crim.P. 203(B); *Commonwealth v. Sharp*, 683 A.2d 1219 (Pa.Super. 1996); *Commonwealth v. Singleton*, 603 A.2d 1072 (Pa.Super. 1992). In determining whether probable cause exists, Pennsylvania looks to the “totality of the circumstances”. *Commonwealth v. Gray*, 503 A.2d 921 (Pa. 1985).

29. In the instant matter, the warrant obtained on March 30, 2017 is not supported by probable cause. The affidavit, after listing basic qualifications for the affiant, states that DECEDENT was found deceased outside of Apartment 9 with overdose being the suspected cause of death, that DECEDENT was at the residence, and removed when he passed put, and that surveillance cameras existed in the apartment.

30. This bare-bones affidavit provides no support for why the affiant wants to search the residence or what they anticipate gaining from the search or the items to be seized. There is no connection made between the items to be searched for/seized and the death of DECEDENT or any other criminal act.

31. The inclusion of surveillance items is overly broad where no time frame or limits are placed on such a search, and there was no information to support why the surveillance was being sought of the interior/exterior of a private residence. Surveillance items are perfectly legal and have no inherent criminality and the affidavit lacks any support for the purpose of such a seizure and then the subsequent downloads of this equipment.

32. A residential search warrant may only be issued if there exists present probable cause to believe that contraband, evidence of crime, or stolen property will be found inside the residence sought to be searched.

33. The determination of whether or not probable cause exists is to be made solely via review of the affidavits submitted by the officer seeking the warrant. See *Commonwealth v. Edmunds*, 586 A.2d 887, 891 (Pa. 1991) ("courts in Pennsylvania shall not consider oral testimony outside the four corners of the written affidavit to supplement the finding of probable cause for a search warrant").

34. The affidavit of probable cause failed to satisfy these requirements, and

consequently the search warrant issued in reliance upon the defective affidavit was itself defective. That is, the affidavit failed to specify sufficient facts permitting the issuing authority to conclude that present probable cause existed, at the time the warrant was sought, to conclude that contraband was to be found inside the residence or within the contents of the home's surveillance systems. It was therefore a defectively-issued warrant and all items seized should be suppressed.

35. Additionally, it was overly-broad to seek a warrant for any and all electronics and electronic storage items. Items to be searched for must be stated with specificity,a nd general searches are not permitted. "A warrant unconstitutional for its overbreadth authorizes in clear or specific terms the seizure of an entire set of items, or documents, many of which will prove unrelated to the crime under investigation. ... An overbroad warrant is unconstitutional because it authorizes a general search and seizure." *Commonwealth v. Melvin*, 2014 PA Super 181, 103 A.3d 1, 18.

36. Finally, a cell phone was also seized from CLIENT at the time he was taken to the police station on March 30, 2017 for questioning. A subsequent search warrant allowed for a download and search of the phone. At this time, the Commonwealth has indicated that no such download has been possible. However, should any items from Mr.. Purvis's phone be recovered as evidence, the Defense would seek suppression as the phone was unlawfully seized without reasonable suspicion or probable cause, and the warrant lacked probable cause.

For all of the foregoing reasons of fact and law, the Defense requests suppression of statements attributed to CLIENT, as well as any items obtained as a result of the search of Apartment 9 including surveillance feeds, videos, and all electronic items.

Respectfully Submitted,

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CARRIE L. ALLMAN
PA ID No. 92080
Chief-Homicide
Montgomery County Public Defender
2nd Floor Courthouse
PO Box 311
Norristown, PA 19404
(610) 278-3571

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,

v. Nos. CP-46-CR-0005776-2016,

CLIENT,
Defendant

MOTION TO SUPPRESS

1. CLIENT is charged at the above-captioned as follows: Count 1 - Drug Delivery Resulting in Death; Count 2 - Recklessly Endangering Another person; Count 3 - Criminal Use of a Communication Facility; Count 4 - Possession with Intent to Deliver (Heroin); and Count 5 - Possession (Heroin).

2. These charges are connected to the January 29, 2016 death of DECEDENT.

3. CLIENT was not charged until June of 2016.[1]

4. During the investigation, a warrant was sought, and obtained for subscriber information and identification of cell phone number (484) 358-8938. (Exhibit A attached)

5. The affidavit in support of the application states that "based on the affiant's knowledge, training, and experience, the victim and the individual possessing telephone facility (484) 358-8938 were engaging in a drug-related conversation". (see Exhibit A – affidavit at p. 3).

6. The affidavit then states "Specifically, the victim ordered four (4) bags of purported

[1] Attorney Douglas Breidenbach Jr. represented CLIENT from the time he was charged until January 19, 2017 when he withdrew, and the Office of the Public Defender was appointed. Prior Counsel provided Discovery to the Office of the Public Defender, and

heroin and agreed to pay $10.00 U.S. currency per bag." (Exhibit A – affidavit at p. 3)

7. However, this is a material misstatement as the text messages never use the word heroin or state any drug terms.

8. There are 429 text messages associated with the download of DECEDENT's phone. Within those messages, there are 12 text messages between DECEDENT and an individual listed as "Rachel" with the phone number of (484)358-8938.

9. The text messages at issue begin with DECEDENT asking Rachel if she will be around in 45 minutes to come to her apartment. DECEDENT then asks if Rachel wants to meet her or if she should call Rachel. Rachel asks what DECEDENT needs, and DECEDENT states, "depends you giivin to me for 10 or 15", DECEDENT then sends a text that says "is really appreciate 10 then I'd need 4". (see Exhibit B – attached, text messages p. 22; numbers 412-423; texts are included as they appear in the Discovery without spelling or grammar correction)

10. Despite the language used in the application that the victim ordered 4 bags of heroin for 10 dollars each, there are no text messages that the use the word heroin, or clearly indicate a plan to purchase heroin for a certain price.

11. It is clear that material misstatements in a warrant are improper and subject to investigation through a pre-trial proceeding:

> In deciding today that, in certain circumstances, a challenge to a warrant's veracity must be permitted, we derive our ground from language of the Warrant Clause itself, which surely takes the affiant's good faith as its premise: "[No] Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . . ." Judge Frankel, in *United States* v. *Halsey*, 257 F.Supp. 1002, 1005 (SDNY 1966), aff'd, Docket No. 31369 (CA2, June 12, 1967) (unreported), put the matter simply: "[When] the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the

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after review, this motion follows.

> obvious assumption is that there will be a *truthful* showing" (emphasis in original). This does not mean "truthful" in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. 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. It is established law, see *Nathanson* v. *United States*, 290 U.S. 41, 47 (1933); *Giordenello* v. *United States*, 357 U.S. 480, 485-486 (1958); *Aguilar* v. *Texas*, 378 U.S. 108, 114-115 (1964), that a warrant affidavit must set forth particular facts and circumstances underlying the existence of probable cause, so as to allow the magistrate to make an independent evaluation of the matter. If an informant's tip is the source of information, the affidavit must recite "some of the underlying circumstances from which the informant concluded" that relevant evidence might be discovered, and "some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, . . . was 'credible' or his information 'reliable.'" *Id*., at 114. Because it is the magistrate who must determine independently whether there is probable cause, *Johnson* v. *United States*, 333 U.S. 10, 13-14 (1948); *Jones* v. *United States*, 362 U.S. 257, 270-271 (1960), it would be an unthinkable imposition upon his authority if a warrant affidavit, revealed after the fact to contain a deliberately or recklessly false statement, were to stand beyond impeachment.

Franks v. Delaware, 438 U.S. 154, 164-165 (U.S. 1978).

12. CLIENT submits that, based on the misstatement in the application that a heroin sale was discussed; he is entitled to a hearing on the validity of the warrant and whether or not probable cause existed for the warrant to be issued, particularly if the misstatement is excised from the application.

13. This is the appropriate remedy per *Franks*, which noted:

> In sum, and to repeat with some embellishment what we stated at the beginning of this opinion: There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting

> reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and 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. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing. Whether he will prevail at that hearing is, of course, another issue.

Franks v. Delaware, 438 U.S. 154, 171-172 (U.S. 1978).

14. Furthermore, in Pennsylvania such material misstatements do result in suppression as Pennsylvania does not have a good faith exception to the warrant requirement.

15. Pennsylvania has long-recognized that there is a distinction between the 4th amendment to the United States Constitution and Article I §8 of the Pennsylvania Constitution; namely that at the heart of the protections afforded under Pennsylvania law is not government deterrence but rather a privacy interest. *Commonwealth v. Edmunds,* 586 A.2d 887 (Pa. 1991).

16. In fact, the *Edmunds* Court noted that, to adopt a 'good faith' exception to the exclusionary rule, would virtually eliminate the safeguards which have developed under the Pennsylvania Constitution over the past 200 years. *Commonwealth v. Edmunds,* 586 A.2d 887, 889 (Pa. 1991).

17. Based on these differing standards, the Pennsylvania Courts have suppressed evidence based on material misstatements in a warrant and made it clear that such a remedy is proper under Pennsylvania law:

> The Commonwealth contends an affidavit that includes material misstatements from a confidential informant should not render inadmissible evidence obtained from a warrant approved on the basis of the faulty affidavit. **Because the good-faith exception to the exclusionary rule does**

> **not apply in Pennsylvania, we hold that the trial court properly suppressed the evidence obtained solely through the deliberate misstatements the informant admittedly made to the affiant.**

Commonwealth v. Antoszyk, 985 A.2d 975, 976 (Pa. Super. Ct. 2009) emphasis added.

18. In *Antoszyk,* the faulty information was the result of an informant; who admitted at the suppression hearing that he had provided false information to the police because the defendant was harassing him about an old drug debt. *Id.* At 977. Despite the good faith belief of the affiant, the warrant was deemed to lack probable cause and suppression was granted.

19. In the instant matter, the warrant application contains a material misstatement, from the affiant, as to the nature and content of the text messages; as such, the warrant fails under both the United States and Pennsylvania Constitutions.

For all of the foregoing reasons of fact and law, the evidence obtained as a result of the warrant, namely the subscriber information and identification to CLIENT should be suppressed.

Respectfully Submitted,

_____

CARRIE L. ALLMAN
PA ID No. 92080
Chief-Homicide
Montgomery County Public Defender
2nd Floor Courthouse
PO Box 311
Norristown, PA 19404
(610) 278-3571

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,

v. Nos. CP-46-CR-0007271-2017,

CLIENT,
Defendant

DEFENSE PROPOSED VOIR DIRE AND POINTS FOR CHARGE

Proposed Voir Dire

a. Do you have strong feelings about the use of drugs, particularly heroin, or fentanyl, that would prohibit you from fairly judging a case in which there are allegations regarding the use and sale of such drugs?

b. Have you, or anyone you know, ever been the victim of a drug overdose?

c. Do you have strong feelings about individuals who struggle with addiction to drugs that may prejudice you against such individuals?

d. Do you have strong feelings about drug sales which may prejudice you against an individual who is alleged to have engaged in drug sales?

e. Do you follow the District Attorney's Facebook page, or any other social media by the District Attorney's Office?

Proposed Points for Charge

The Defense requests the following proposed jury instructions, all of which are included in the Pennsylvania Standard Jury Instructions, second edition:

3.10 A
3.13
3.18
4.09
4.15
4.17
7.01
7.02A
7.03
7.04
7.05
15.2506
15.2705
15.7512
16.01
16.02(b)A
16.13(a) (30)B

Respectfully Submitted,

_____

CARRIE L. ALLMAN
PA ID No. 92080
Chief-Homicide
Montgomery County Public Defender
2nd Floor Courthouse
PO Box 311
Norristown, PA 19404
(610) 278-3571

KeyCite Yellow Flag - Negative Treatment
Not Followed on State Law Grounds State v. Carpenter, Ohio App. 3 Dist., January 14, 2019

134 S.Ct. 881
Supreme Court of the United States

Marcus Andrew BURRAGE, Petitioner
v.
UNITED STATES.

No. 12–7515.
|
Argued Nov. 12, 2013.
|
Decided Jan. 27, 2014.

Synopsis
Background: Defendant was convicted in the United States District Court for the Southern District of Iowa, Robert W. Pratt, J., of distribution of heroin and distribution of heroin resulting in death, and he appealed. The United States Court of Appeals for the Eighth Circuit, Benton, Circuit Judge, 687 F.3d 1015,affirmed, and certiorari was granted.

Holdings: The Supreme Court, Justice Scalia, held that:

[1] at least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim's death or serious bodily injury, a defendant cannot be liable under the penalty enhancement provision of Controlled Substance Act applicable when death or serious bodily injury results from use of the distributed substance unless such use is a but-for cause of the death or injury, abrogating *United States v. Monnier*, 412 F.3d 859, and *United States v. McIntosh*, 236 F.3d 968, and

[2] defendant, who distributed heroin used by victim who died of a drug overdose after also using other drugs, could not be convicted under the penalty enhancement provision, absent evidence that the victim would have lived but for his heroin use.

Reversed and remanded.

Justice Alito joined in part.

Justice Ginsburg filed an opinion concurring in the judgment, in which Justice Sotomayor joined.

West Headnotes (12)

[1] **Homicide**
Extent of Punishment in General

Although language of the Controlled Substances Act requiring a minimum sentence of 20 years, a substantial fine, "or both" when death or serious bodily injury results from the use of the distributed substance, read literally, suggests that courts may impose a fine or a prison term, the "death results" provision mandates a prison sentence. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(b)(1)(A–C), 21 U.S.C.A. § 841(b)(1)(A–C).

34 Cases that cite this headnote

[2] **Homicide**
Relation between predicate offense or conduct and homicide
Jury
Particular cases in general

Because the "death results" enhancement of the Controlled Substances Act increased the minimum and maximum sentences to which defendant was exposed, it was an element that was required be submitted to the jury and found beyond a reasonable doubt. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(b)(1)(A–C), 21 U.S.C.A. § 841(b)(1)(A–C).

71 Cases that cite this headnote

[3] **Homicide**
Controlled substances

Crime charged under Controlled Substance Act

provision imposing 20 year minimum sentence when "death results" from use of the distributed substance has two principal elements: (1) knowing or intentional distribution of the substance, and (2) death caused by ("resulting from") the use of that drug. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), (b)(1)(C), 21 U.S.C.A. § 841(a)(1), (b)(1)(C).

66 Cases that cite this headnote

[4] **Criminal Law**
Criminal act or omission

When a crime requires not merely conduct but also a specified result of conduct, a defendant generally may not be convicted unless his conduct is both (1) the actual cause, and (2) the "legal" cause (often called the "proximate cause") of the result.

38 Cases that cite this headnote

[5] **Criminal Law**
Criminal act or omission

A thing "results" when it arises as an effect, issue, or outcome from some action, process or design.

8 Cases that cite this headnote

[6] **Statutes**
Particular Words and Phrases

Statutory phrase "results from" imposes a requirement of actual causality; in the usual course, this requires proof that the harm would not have occurred in the absence of—that is, but for—the defendant's conduct. Restatement of Torts § 431, Comment.

23 Cases that cite this headnote

[7] **Criminal Law**
Criminal act or omission

In common talk, the phrase "based on" indicates a but-for causal relationship, and the phrase "by reason of" requires at least a showing of "but for" causation.

7 Cases that cite this headnote

[8] **Statutes**
Particular Words and Phrases

It is one of the traditional background principles against which Congress legislates that a phrase such as "results from" imposes a requirement of but-for causation.

20 Cases that cite this headnote

[9] **Criminal Law**
Liberal or strict construction; rule of lenity

Especially in the interpretation of a criminal statute subject to the rule of lenity, courts cannot give the text a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant.

11 Cases that cite this headnote

[10] **Constitutional Law**
Making, Interpretation, and Application of Statutes
Constitutional Law
Policy

Role of Supreme Court is to apply the statute as

it is written, even if the Court thinks some other approach might accord with good policy.

26 Cases that cite this headnote

[11] **Sentencing and Punishment**
Physical injury and degree thereof

At least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim's death or serious bodily injury, a defendant cannot be liable under the penalty enhancement provision of Controlled Substance Act applicable when death or serious bodily injury results from use of the distributed substance unless such use is a but-for cause of the death or injury; abrogating *United States v. Monnier*, 412 F.3d 859, and *United States v. McIntosh*, 236 F.3d 968. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(b)(1)(C), 21 U.S.C.A. § 841(b)(1)(C).

209 Cases that cite this headnote

[12] **Homicide**
Controlled substances

Defendant who distributed heroin used by victim who died of a drug overdose after also using other drugs could not be convicted under the Controlled Substances Act's "death results" penalty enhancement provision, where there was no evidence that the victim would have lived but for his heroin use. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(b)(1)(C), 21 U.S.C.A. § 841(b)(1)(C).

108 Cases that cite this headnote

****883** *Syllabus*[*]

***204** Long-time drug user Banka died following an extended binge that included using heroin purchased from petitioner Burrage. Burrage pleaded not guilty to a superseding indictment alleging, *inter alia,* that he had unlawfully distributed heroin and that "death ... resulted from the use of th [at] substance"—thus subjecting Burrage to a 20–year mandatory minimum sentence under the penalty enhancement provision of the Controlled Substances Act, 21 U.S.C. § 841(b)(1)(C). After medical experts testified at trial that Banka might have died even if he had not taken the heroin, Burrage moved for a judgment of acquittal, arguing that Banka's death could only "result from" heroin use if there was evidence that heroin was a but-for cause of death. The court denied the motion and, as relevant here, instructed the jury that the Government only had to prove that heroin was a contributing cause of death. The jury convicted Burrage, and the court sentenced him to 20 years. In affirming, the Eighth Circuit upheld the District Court's jury instruction.

****884** *Held* : At least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim's death or serious bodily injury, a defendant cannot be liable for penalty enhancement under § 841(b)(1)(C) unless such use is a but-for cause of the death or injury. Pp. 886 – 892.

(a) Section 841(b)(1)(C)'s "death results" enhancement, which increased the minimum and maximum sentences to which Burrage was exposed, is an element that must be submitted to the jury and found beyond a reasonable doubt. See, *e.g., Alleyne v. United States,* 570 U.S. ——, ——, 133 S.Ct. 2151, ——, 186 L.Ed.2d 314. Pp. 886 – 887.

(b) Because the Controlled Substances Act does not define "results from," the phrase should be given its ordinary meaning. See *Asgrow Seed Co. v. Winterboer,* 513 U.S. 179, 187, 115 S.Ct. 788, 130 L.Ed.2d 682. Ordinarily, that phrase imposes a requirement of actual causality, *i.e.,* proof " 'that the harm would not have occurred' in the absence of—that is, but for—the defendant's conduct." *University of Tex. Southwestern Medical Center v. Nassar,* 570 U.S. ——, ——, 133 S.Ct. 2517, 2525, 186 L.Ed.2d 503. Similar statutory phrases—"because of," see *id.,* at ——, 133 S.Ct., at ——, " 'based on,' " *Safeco Ins. Co. of America v. Burr,* 551 U.S. 47, 63, 127 S.Ct. 2201, 167 L.Ed.2d 1045, and " 'by reason of,' " ***205** *Gross v. FBL Financial Services, Inc.,* 557 U.S. 167, 176, 129 S.Ct. 2343, 174 L.Ed.2d 119—have been read to impose a but-for causation requirement. This Court declines to adopt the Government's permissive interpretation of "results from" to mean that use of a drug distributed by the defendant need only contribute to an aggregate force, *e.g.,* mixed-drug intoxication, that is itself a but-for cause of death. There is no need to address a special rule

developed for cases in which multiple sufficient causes independently, but concurrently, produce death, since there was no evidence that Banka's heroin use was an independently sufficient cause of his death. And though Congress could have written § 841(b)(1)(C) to make an act or omission a cause-in-fact if it was a "substantial" or "contributing" factor in producing death, Congress chose instead to use language that imports but-for causality. Pp. 887 – 891.

(c) Whether adopting the but-for causation requirement or the Government's interpretation raises policy concerns is beside the point, for the Court's role is to apply the statute as written. Pp. 890 – 892.

687 F.3d 1015, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which the ROBERTS, C.J., and KENNEDY, THOMAS, BREYER, and KAGAN, JJ., joined, and in which ALITO, J., joined as to all but Part III–B. GINSBURG, J., filed an opinion concurring in the judgment, in which SOTOMAYOR, J., joined.

Attorneys and Law Firms

Angela L. Campbell, Des Moines, IA, for Petitioner.

Benjamin J. Horwich, Washington, D.C., for Respondent.

Jeffrey T. Green, Ryan C. Morris, Jeremy M. Bylund, Sidley Austin LLP, Washington, D.C., Angela L. Campbell, Counsel of Record, Gary Dickey Jr., Dickey & Campbell Law Firm PLC, Des Moines, IA, for Petitioner.

Donald B. Verrilli, Jr., Solicitor General, Counsel of Record, Mythili Raman, Acting Assistant Attorney General, Michael R. Dreeben, Deputy Solicitor General, Benjamin J. Horwich, Assistant to the Solicitor General, Stephan E. Oestreicher, Jr., Attorney, ****885** Department of Justice, Washington, D.C., for Respondent.

Opinion

Justice SCALIA delivered the opinion of the Court.*

***206** The Controlled Substances Act imposes a 20–year mandatory minimum sentence on a defendant who unlawfully distributes a Schedule I or II drug, when "death or serious bodily injury results from the use of such substance." 21 U.S.C. § 841(a)(1), (b)(1)(A)-(C) (2012 ed.). We consider whether the mandatory-minimum provision applies when use of a covered drug supplied by the defendant contributes to, but is not a but-for cause of, the victim's death or injury.

I

Joshua Banka, a long-time drug user, died on April 15, 2010, following an extended drug binge. The episode began on the morning of April 14, when Banka smoked marijuana at a former roommate's home. Banka stole oxycodone pills from the roommate before departing and later crushed, cooked, and injected the oxycodone. Banka and his wife, Tammy Noragon Banka (Noragon), then met with petitioner Marcus Burrage and purchased one gram of heroin from him. Banka immediately cooked and injected some of the heroin and, after returning home, injected more heroin between midnight and 1 a.m. on April 15. Noragon went to sleep at around 5 a.m., shortly after witnessing Banka prepare another batch of heroin. When Noragon woke up a few hours later, she found Banka dead in the bathroom and called 911. A search of the couple's home and car turned up syringes, 0.59 grams of heroin, alprazolam and clonazepam tablets, oxycodone pills, a bottle of hydrocodone, and other drugs.

Burrage pleaded not guilty to a superseding indictment alleging two counts of distributing heroin in violation of § 841(a)(1). Only one of those offenses, count 2, is at issue here. (Count 1 related to an alleged distribution of heroin ***207** five months earlier than the sale to Banka.) Count 2 alleged that Burrage unlawfully distributed heroin on April 14, 2010, and that "death ... resulted from the use of th[at] substance"—thus subjecting Burrage to the 20–year mandatory minimum of § 841(b)(1)(C).

Two medical experts testified at trial regarding the cause of Banka's death. Dr. Eugene Schwilke, a forensic toxicologist, determined that multiple drugs were present in Banka's system at the time of his death, including heroin metabolites, codeine, alprazolam, clonazepam metabolites, and oxycodone. (A metabolite is a "product of metabolism," Webster's New International Dictionary 1544 (2d ed. 1950), or, as the Court of Appeals put it, "what a drug breaks down into in the body," 687 F.3d 1015, 1018, n. 2 (C.A.8 2012).) Although morphine, a heroin metabolite, was the only drug present at a level above the therapeutic range—*i.e.,* the concentration normally present when a person takes a drug as prescribed—Dr. Schwilke could not say whether Banka would have lived had he not taken the heroin. Dr. Schwilke nonetheless concluded that heroin "was a

contributing factor" in Banka's death, since it interacted with the other drugs to cause "respiratory and/or central nervous system depression." App. 196. The heroin, in other words, contributed to an overall effect that caused Banka to stop **886 breathing. Dr. Jerri McLemore, an Iowa state medical examiner, came to similar conclusions. She described the cause of death as "mixed drug intoxication" with heroin, oxycodone, alprazolam, and clonazepam all playing a "contributing" role. *Id*., at 157. Dr. McLemore could not say whether Banka would have lived had he not taken the heroin, but observed that Banka's death would have been "[v]ery less likely." *Id.,* at 171.

The District Court denied Burrage's motion for a judgment of acquittal, which argued that Banka's death did not "result from" heroin use because there was no evidence that heroin was a but-for cause of death. *Id.,* at 30. The court *208 also declined to give Burrage's proposed jury instructions regarding causation. One of those instructions would have required the Government to prove that heroin use "was the proximate cause of [Banka's] death." *Id.,* at 236. Another would have defined proximate cause as "a cause of death that played a substantial part in bringing about the death," meaning that "[t]he death must have been either a direct result of or a reasonably probable consequence of the cause and except for the cause the death would not have occurred." *Id.,* at 238. The court instead gave an instruction requiring the Government to prove "that the heroin distributed by the Defendant was a contributing cause of Joshua Banka's death." *Id.,* at 241–242. The jury convicted Burrage on both counts, and the court sentenced him to 20 years' imprisonment, consistent with § 841(b)(1)(C)'s prescribed minimum.

The Court of Appeals for the Eighth Circuit affirmed Burrage's convictions. 687 F.3d 1015. As to the causation-in-fact element of count 2, the court held that the District Court's contributing-cause instruction was consistent with its earlier decision in *United States v. Monnier,* 412 F.3d 859, 862 (C.A.8 2005). See 687 F.3d, at 1021. As to proximate cause, the court held that Burrage's proposed instructions "d[id] not correctly state the law" because "a showing of 'proximate cause' is not required." *Id.,* at 1020 (quoting *United States v. McIntosh,* 236 F.3d 968, 972–973 (C.A.8 2001)).

We granted certiorari on two questions: Whether the defendant may be convicted under the "death results" provision (1) when the use of the controlled substance was a "contributing cause" of the death, and (2) without separately instructing the jury that it must decide whether the victim's death by drug overdose was a foreseeable result of the defendant's drug-trafficking offense. 569 U.S. ——, 133 S.Ct. 2049, 185 L.Ed.2d 884 (2013).

II

[1] As originally enacted, the Controlled Substances Act, 84 Stat. 1242, 21 U.S.C. § 801 *et seq.,* "tied the penalties for *209 drug offenses to both the type of drug and the quantity involved, with no provision for mandatory minimum sentences." *DePierre v. United States,* 564 U.S. ——, ——, 131 S.Ct. 2225, 2229, 180 L.Ed.2d 114 (2011). That changed in 1986 when Congress enacted the Anti–Drug Abuse Act, 100 Stat. 3207, which redefined the offense categories, increased the maximum penalties and set minimum penalties for many offenders, including the "death results" enhancement at issue here. See *id*., at 3207–4. With respect to violations involving distribution of a Schedule I or II substance (the types of drugs defined as the most dangerous and addictive[1]) the Act imposes sentences ranging from 10 years to life imprisonment for large-scale distributions, **887 § 841(b)(1)(A), from 5 to 40 years for medium-scale distributions, § 841(b)(1)(B), and not more than 20 years for smaller distributions, § 841(b)(1)(C), the type of offense at issue here. These default sentencing rules do not apply, however, when "death or serious bodily injury results from the use of [the distributed] substance." § 841(b)(1)(A)-(C). In those instances, the defendant "shall be sentenced to a term of imprisonment which ... shall be not less than twenty years or more than life," a substantial fine, "or both."[2] *Ibid.*

[2] [3] *210 Because the "death results" enhancement increased the minimum and maximum sentences to which Burrage was exposed, it is an element that must be submitted to the jury and found beyond a reasonable doubt. See *Alleyne v. United States,* 570 U.S. ——, ——, 133 S.Ct. 2151, 2162–2163, 186 L.Ed.2d 314 (2013); *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Thus, the crime charged in count 2 of Burrage's superseding indictment has two principal elements: (i) knowing or intentional distribution of heroin, § 841(a)(1),[3] and (ii) death caused by ("resulting from") the use of that drug, § 841(b)(1)(C).

III

A

[4] The law has long considered causation a hybrid concept, consisting of two constituent parts: actual cause and legal cause. H. Hart & A. Honore, Causation in the Law 104 (1959). When a crime requires "not merely conduct but also a specified result of conduct," a defendant generally may not be convicted unless his conduct is "both (1) the actual cause, and (2) the 'legal' cause (often called the 'proximate cause') of the result." 1 W. LaFave, Substantive Criminal Law § 6.4(a), pp. 464–466 (2d ed. 2003) (hereinafter LaFave); see also ALI, Model Penal Code § 2.03, p. 25 (1985). Those two categories roughly coincide with the two questions on which we granted certiorari. We find it necessary to decide only the first: whether the use of heroin was the actual cause of Banka's death in the sense that § 841(b)(1)(C) requires.

[5] [6] The Controlled Substances Act does not define the phrase "results from," so we give it its ordinary meaning. See *Asgrow Seed Co. v. Winterboer,* 513 U.S. 179, 187, 115 S.Ct. 788, 130 L.Ed.2d 682 (1995). A thing "results" when it "[a]rise[s] as an effect, issue, or outcome *from* some action, process or design." 2 The New ***211** Shorter Oxford English Dictionary 2570 (1993). "Results from" imposes, in other words, a requirement of actual causality. "In the usual course," this requires proof " 'that the harm would not have occurred' in the absence of—that is, ****888** but for—the defendant's conduct." *University of Tex. Southwestern Medical Center v. Nassar,* 570 U.S. ——, ——, 133 S.Ct. 2517, 2525, 186 L.Ed.2d 503 (2013) (quoting Restatement of Torts § 431, Comment *a* (1934)). The Model Penal Code reflects this traditional understanding; it states that "[c]onduct is the cause of a result" if "it is an antecedent but for which the result in question would not have occurred." § 2.03(1)(a). That formulation represents "*the minimum* requirement for a finding of causation when a crime is defined in terms of conduct causing a particular result." *Id.,* Explanatory Note (emphasis added); see also *United States v. Hatfield,* 591 F.3d 945, 948 (C.A.7 2010) (but for "is the minimum concept of cause"); *Callahan v. Cardinal Glennon Hospital,* 863 S.W.2d 852, 862 (Mo.1993) (same).

Thus, "where A shoots B, who is hit and dies, we can say that A [actually] caused B's death, since but for A's conduct B would not have died." LaFave 467–468 (italics omitted). The same conclusion follows if the predicate act combines with other factors to produce the result, so long as the other factors alone would not have done so—if, so to speak, it was the straw that broke the camel's back. Thus, if poison is administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived. See, *e.g., State v. Frazier,* 339 Mo. 966, 974–975, 98 S.W.2d 707, 712–713 (1936).

This but-for requirement is part of the common understanding of cause. Consider a baseball game in which the visiting team's leadoff batter hits a home run in the top of the first inning. If the visiting team goes on to win by a score of 1 to 0, every person competent in the English language and familiar with the American pastime would agree ***212** that the victory resulted from the home run. This is so because it is natural to say that one event is the outcome or consequence of another when the former would not have occurred but for the latter. It is beside the point that the victory also resulted from a host of *other* necessary causes, such as skillful pitching, the coach's decision to put the leadoff batter in the lineup, and the league's decision to schedule the game. By contrast, it makes little sense to say that an event resulted from or was the outcome of some earlier action if the action merely played a nonessential contributing role in producing the event. If the visiting team wound up winning 5 to 2 rather than 1 to 0, one would be surprised to read in the sports page that the victory resulted from the leadoff batter's early, non-dispositive home run.

Where there is no textual or contextual indication to the contrary, courts regularly read phrases like "results from" to require but-for causality. Our interpretation of statutes that prohibit adverse employment action "because of" an employee's age or complaints about unlawful workplace discrimination is instructive. Last Term, we addressed Title VII's antiretaliation provision, which states in part:

> "It shall be an unlawful employment practice for an employer ... to discriminate against any individual ... *because* he has opposed any practice made an unlawful employment practice by this subchapter, or *because* he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e–3(a) (2006 ed.) (emphasis added).

Given the ordinary meaning of the word "because," we held that § 2000e–3(a) "require[s] proof that the desire to retaliate ****889** was [a] but-for cause of the challenged employment action." *Nassar, supra,* at ——, 133 S.Ct., at 2528. The same result obtained in an earlier case interpreting a provision in the Age Discrimination in Employment Act that makes it "unlawful for an employer ... ***213** to discharge any individual or otherwise

discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age." 29 U.S.C. § 623(a)(1) (emphasis added). Relying on dictionary definitions of "[t]he words 'because of' "—which resemble the definition of " results from" recited above—we held that "[t]o establish a disparate-treatment claim under the plain language of [§ 623(a)(1)] ... a plaintiff must prove that age was [a] 'but for' cause of the employer's adverse decision." *Gross v. FBL Financial Services, Inc.,* 557 U.S. 167, 176, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009).[4]

[7] Our insistence on but-for causality has not been restricted to statutes using the term "because of." We have, for instance, observed that "[i]n common talk, the phrase 'based on' indicates a but-for causal relationship," *Safeco Ins. Co. of America v. Burr,* 551 U.S. 47, 63, 127 S.Ct. 2201, 167 L.Ed.2d 1045 (2007), and that "the phrase, 'by reason of,' requires at least a showing of 'but for' causation," *Gross, supra,* at 176, 129 S.Ct. 2343 (citing *Bridge v. Phoenix Bond & Indemnity Co.,* 553 U.S. 639, 653–654, 128 S.Ct. 2131, 170 L.Ed.2d 1012 (2008)). See also *Holmes v. Securities Investor Protection Corporation,* 503 U.S. 258, 265–268, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992) (explaining that a statute permitting recovery for injuries suffered " 'by reason of' " the defendant's unlawful conduct "require[s] a showing that the defendant's violation ... was," among other things, "a 'but for' cause of his injury"). State courts, which hear and decide the bulk of the Nation's criminal matters, usually interpret similarly worded criminal statutes in the same manner. ***214** See, *e.g., People v. Wood,* 276 Mich.App. 669, 671, 741 N.W.2d 574, 575–578 (2007) (construing the phrase "[i]f the violation results in the death of another individual" to require proof of but-for causation (emphasis deleted)); *State v. Hennings,* 791 N.W.2d 828, 833–835 (Iowa 2010) (statute prohibiting " 'offenses ... committed against a person or a person's property because of the person's race' " or other protected trait requires discriminatory animus to be a but-for cause of the offense); *State v. Richardson,* 295 N.C. 309, 322–323, 245 S.E.2d 754, 763 (1978) (statute requiring suppression of evidence " 'obtained as a result of' " police misconduct "requires, at a minimum," a but-for causal relationship between the misconduct and collection of the evidence).

[8] In sum, it is one of the traditional background principles "against which Congress legislate[s]," *Nassar,* 570 U.S., at ——, 133 S.Ct., at 2525, that a phrase such as "results from" imposes a requirement of but-for causation. The Government argues, however, that distinctive problems associated with drug overdoses counsel in ****890** favor of dispensing with the usual but-for causation requirement. Addicts often take drugs in combination, as Banka did in this case, and according to the National Center for Injury Prevention and Control, at least 46 percent of overdose deaths in 2010 involved more than one drug. See Brief for United States 28–29. This consideration leads the Government to urge an interpretation of "results from" under which use of a drug distributed by the defendant need not be a but-for cause of death, nor even independently sufficient to cause death, so long as it contributes to an aggregate force (such as mixed-drug intoxication) that is itself a but-for cause of death.

In support of its argument, the Government can point to the undoubted reality that courts have not *always* required strict but-for causality, even where criminal liability is at issue. The most common (though still rare) instance of this occurs when multiple sufficient causes independently, but concurrently, produce a result. See *Nassar, supra,* at ——, 133 S.Ct., at 2525; ***215** see also LaFave 467 (describing these cases as "unusual" and " numerically in the minority"). To illustrate, if "A stabs B, inflicting a fatal wound; while at the same moment X, acting independently, shoots B in the head ... also inflicting [a fatal] wound; and B dies from the combined effects of the two wounds," A will generally be liable for homicide even though his conduct was not a but-for cause of B's death (since B would have died from X's actions in any event). *Id.*, at 468 (italics omitted). We need not accept or reject the special rule developed for these cases, since there was no evidence here that Banka's heroin use was an independently sufficient cause of his death. No expert was prepared to say that Banka would have died from the heroin use alone.

Thus, the Government must appeal to a second, less demanding (but also less well established) line of authority, under which an act or omission is considered a cause-in-fact if it was a "substantial" or "contributing" factor in producing a given result. Several state courts have adopted such a rule, see *State v. Christman,* 160 Wash.App. 741, 745, 249 P.3d 680, 687 (2011); *People v. Jennings,* 50 Cal.4th 616, 643, 114 Cal.Rptr.3d 133, 237 P.3d 474, 496 (2010); *People v. Bailey,* 451 Mich. 657, 676–678, 549 N.W.2d 325, 334–336 (1996); *Commonwealth v. Osachuk,* 43 Mass.App. 71, 72–73, 681 N.E.2d 292, 294 (1997), but the American Law Institute declined to do so in its Model Penal Code, see ALI, 39th Annual Meeting Proceedings 135–141 (1962); see also Model Penal Code § 2.03(1)(a). One prominent authority on tort law asserts that "a broader rule ... has found general acceptance: The defendant's conduct is a cause of the event if it was a material element and a substantial

factor in bringing it about." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 41, p. 267 (5th ed. 1984) (footnote omitted). But the authors of that treatise acknowledge that, even in the tort context, "[e]xcept in the classes of cases indicated" (an apparent reference to the situation where each of two causes is independently effective) "no case has been ***216** found where the defendant's act could be called a substantial factor when the event would have occurred without it." *Id.,* at 268. The authors go on to offer an alternative rule—functionally identical to the one the Government argues here—that "[w]hen the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them, the conduct of each is a cause in fact of the event." *Ibid.* Yet, as of 1984, "no judicial opinion ha[d] approved th[at] formulation." ****891** *Ibid.,* n. 40. The "death results" enhancement became law just two years later.

[9] We decline to adopt the Government's permissive interpretation of § 841(b)(1). The language Congress enacted requires death to "result from" use of the unlawfully distributed drug, not from a combination of factors to which drug use merely contributed. Congress could have written § 841(b)(1)(C) to impose a mandatory minimum when the underlying crime "contributes to" death or serious bodily injury, or adopted a modified causation test tailored to cases involving concurrent causes, as five States have done, see Ala.Code § 13A–2–5(a) (2005); Ark.Code Ann. § 5–2–205 (2006); Me.Rev.Stat. Ann., Tit. 17–A, § 33 (2006); N.D. Cent. Code Ann. § 12.1–02–05 (Lexis 2012); Tex. Penal Code Ann. § 6.04 (West 2011). It chose instead to use language that imports but-for causality. Especially in the interpretation of a criminal statute subject to the rule of lenity, see *Moskal v. United States,* 498 U.S. 103, 107–108, 111 S.Ct. 461, 112 L.Ed.2d 449 (1990), we cannot give the text a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant.

B

The Government objects that the ordinary meaning of "results from" will "unduly limi[t] criminal responsibility" and "cannot be reconciled with sound policy." Brief for United States 24. We doubt that the requirement of but-for causation ***217** for this incremental punishment will prove a policy disaster. A cursory search of the Federal Reporter reveals that but-for causation is not nearly the insuperable barrier the Government makes it out to be. See, *e.g., United States v. Krieger,* 628 F.3d 857, 870–871 (C.A.7 2010) (affirming "death results" conviction based on expert testimony that, although the victim had several drugs in her system, the drug distributed by the defendant was a but-for cause of death); *United States v. Webb,* 655 F.3d 1238, 1254–1255 (C.A.11 2011) (*per curiam*) (same). Moreover, even when the prosecution is unable to prove but-for causation, the defendant will still be liable for violating § 841(a)(1) and subject to a substantial default sentence under § 841(b)(1).

Indeed, it is more likely the Government's proposal that "cannot be reconciled with sound policy," given the need for clarity and certainty in the criminal law. The judicial authorities invoking a "substantial" or "contributing" factor test in criminal cases differ widely in their application of it. Compare *Wilson v. State,* 24 S.W. 409, 410 (Tex.Crim.App.1893) (an act is an actual cause if it "contributed materially" to a result, even if other concurrent acts would have produced that result on their own), with *Cox v. State,* 305 Ark. 244, 248, 808 S.W.2d 306, 309 (1991) (causation cannot be found where other concurrent causes were clearly sufficient to produce the result and the defendant's act was clearly insufficient to produce it) (applying Ark.Code Ann. § 5–2–205 (1987)).[5] Here the Government is uncertain about the precise application of the test that it proposes. Taken literally, its "contributing-cause" test would treat as a cause-in-fact every act or omission that makes a positive incremental contribution ***218** , however small, to a particular result. See Brief for State of Alaska et al. as *Amici Curiae* 20; see also Black's Law Dictionary 250 (9th ed. 2009) ****892** (defining "contributing cause" as "[a] factor that—though not the primary cause—plays a part in producing a result"). But at oral argument the Government insisted that its test excludes causes that are " not important enough" or "too insubstantial." Tr. of Oral Arg. 28. Unsurprisingly, it could not specify how important or how substantial a cause must be to qualify. See *id.,* at 41–42. Presumably the lower courts would be left to guess. That task would be particularly vexing since the evidence in § 841(b)(1) cases is often expressed in terms of probabilities and percentages. One of the experts in this case, for example, testified that Banka's death would have been "[v]ery less likely" had he not used the heroin that Burrage provided. App. 171. Is it sufficient that use of a drug made the victim's death 50 percent more likely? Fifteen percent? Five? Who knows. Uncertainty of that kind cannot be squared with the beyond-a-reasonable-doubt standard applicable in

criminal trials or with the need to express criminal laws in terms ordinary persons can comprehend. See *United States v. L. Cohen Grocery Co.,* 255 U.S. 81, 89–90, 41 S.Ct. 298, 65 L.Ed. 516 (1921).

[10] But in the last analysis, these always-fascinating policy discussions are beside the point. The role of this Court is to apply the statute as it is written—even if we think some other approach might " 'accor[d] with good policy.' " *Commissioner v. Lundy,* 516 U.S. 235, 252, 116 S.Ct. 647, 133 L.Ed.2d 611 (1996) (quoting *Badaracco v. Commissioner,* 464 U.S. 386, 398, 104 S.Ct. 756, 78 L.Ed.2d 549 (1984)). As we have discussed, it is written to require but-for cause.

* * *

[11] [12] We hold that, at least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim's death or serious bodily injury, a defendant cannot be liable under the penalty enhancement provision of ***219** 21 U.S.C. § 841(b)(1)(C) unless such use is a but-for cause of the death or injury. The Eighth Circuit affirmed Burrage's conviction based on a markedly different understanding of the statute, see 687 F.3d, at 1020–1024, and the Government concedes that there is no "evidence that Banka would have lived but for his heroin use," Brief for United States 33. Burrage's conviction with respect to count 2 of the superseding indictment is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice GINSBURG, with whom Justice SOTOMAYOR joins, concurring in the judgment.

For reasons explained in my dissenting opinion in *University of Tex. Southwestern Medical Center v. Nassar,* 570 U.S. ——, ——, 133 S.Ct. 2517, 2534–2547, 186 L.Ed.2d 503 (2013), I do not read "because of" in the context of antidiscrimination laws to mean "solely because of." See *id.,* at —— – ——, —— – ——, 133 S.Ct., at 2544–2546, 2546–2547. And I do not agree that words "appear[ing] in two or more legal rules, and so in connection with more than one purpose, ha[ve] and should have precisely the same scope in all of them." Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 Yale L.J. 333, 337 (1933). But I do agree that "in the interpretation of a criminal statute subject to the rule of lenity," where there is room for debate, one should not choose the construction "that disfavors the defendant." *Ante,* at 891. Accordingly, I join the Court's judgment.

All Citations

571 U.S. 204, 134 S.Ct. 881, 187 L.Ed.2d 715, 122 Fair Empl.Prac.Cas. (BNA) 237, 82 USLW 4076, 14 Cal. Daily Op. Serv. 856, 2014 Daily Journal D.A.R. 1030, 24 Fla. L. Weekly Fed. S 531

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

* Justice ALITO joins all but Part III–B of this opinion.

1 Schedule I drugs, such as heroin, have "a high potential for abuse," "no currently accepted medical use in treatment in the United States," and "a lack of accepted safety" even "under medical supervision." § 812(b)(1). Schedule II drugs, such as methamphetamine, likewise have "a high potential for abuse" and a propensity to cause "severe psychological or physical dependence" if misused. 21 U.S.C. § 812(b)(2).

2 Although this language, read literally, suggests that courts may impose a fine *or* a prison term, it is undisputed here that the "death results" provision mandates a prison sentence. Courts of Appeals have concluded, in effect, that the "or" is a scrivener's error, see, *e.g., United States v. Musser,* 856 F.2d 1484, 1486 (C.A.11 1988) (*per curiam*). The best evidence of that is the concluding sentence of § 841(b)(1)(C), which states that a court "shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph *which provide for a mandatory term of imprisonment if death or serious bodily injury results*." (Emphasis added.)

3 Violation of § 841(a)(1) is thus a lesser included offense of the crime charged in count 2. It is undisputed that Burrage is guilty of that lesser included offense.

4 *Price Waterhouse v. Hopkins,* 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), is not to the contrary. The three opinions of six Justices in that case did not eliminate the but-for-cause requirement imposed by the "because of" provision of 42 U.S.C. § 2000e–2(a), but allowed a showing that discrimination was a "motivating" or "substantial" factor to shift the burden of persuasion to the employer to establish the absence of but-for cause. See *University of Tex. Southwestern Medical Center v. Nassar,* 570 U.S. ——, ——, 133 S.Ct. 2517, 2525–2527, 186 L.Ed.2d 503 (2013). Congress later amended the statute to dispense with but-for causality. Civil Rights Act of 1991, Tit. I, § 107(a), 105 Stat. 1075 (codified at 42 U.S.C. § 2000e–2(m)).

5 Some cases apply what they call a "substantial factor" test only when multiple independently sufficient causes "operat[e] together to cause the result." *Eversley v. Florida,* 748 So.2d 963, 967 (Fla.1999); see also *Callahan v. Cardinal Glennon Hospital,* 863 S.W.2d 852, 862–863 (Mo.1993). We will not exaggerate the confusion by counting these as genuine "substantial factor" cases.

138 S.Ct. 2206
Supreme Court of the United States

Timothy Ivory CARPENTER, Petitioner
v.
United States.

No. 16–402.
|
Argued Nov. 29, 2017.
|
Decided June 22, 2018.

Synopsis
Background: In prosecution for multiple counts of robbery and carrying a firearm during federal crime of violence, the United States District Court for the Eastern District of Michigan, Sean F. Cox, J., 2013 WL 6385838, denied defendant's motion to suppress cell-site location information (CSLI), and denied defendant's posttrial motion for acquittal, 2013 WL 6729900, and the District Court, Sean F. Cox, J., 2014 WL 943094, denied defendant's motion for new trial. Defendant appealed. The United States Court of Appeals for the Sixth Circuit, Kethledge, Circuit Judge, 819 F.3d 880, affirmed. Certiorari was granted.

Holdings: The Supreme Court, Chief Justice Roberts, held that:

[1] an individual maintains a legitimate expectation of privacy, for Fourth Amendment purposes, in the record of his physical movements as captured through CSLI;

[2] seven days of historical CSLI obtained from defendant's wireless carrier, pursuant to an order issued under the Stored Communications Act (SCA), was the product of a "search";

[3] Government's access to 127 days of historical CSLI invaded defendant's reasonable expectation of privacy; and

[4] Government must generally obtain a search warrant supported by probable cause before acquiring CSLI from a wireless carrier.

Reversed and remanded.

Justice Kennedy filed a dissenting opinion, in which Justices Thomas and Alito joined.

Justice Thomas filed a dissenting opinion.

Justice Alito filed a dissenting opinion, in which Justice Thomas joined.

Justice Gorsuch filed a dissenting opinion.

West Headnotes (20)

[1] **Searches and Seizures**
Fourth Amendment and reasonableness in general

The basic purpose of the Fourth Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. U.S.C.A. Const.Amend. 4.

26 Cases that cite this headnote

[2] **Searches and Seizures**
Persons, Places and Things Protected

Property rights are not the sole measure of Fourth Amendment violations; the Fourth Amendment protects people, not places. U.S.C.A. Const.Amend. 4.

36 Cases that cite this headnote

[3] **Searches and Seizures**
What Constitutes Search or Seizure
Searches and Seizures
Expectation of privacy

When an individual seeks to preserve something as private, and his expectation of privacy is one that society is prepared to recognize as reasonable, official intrusion into that private sphere generally qualifies as a search under the Fourth Amendment, and requires a warrant supported by probable cause. U.S.C.A. Const.Amend. 4.

30 Cases that cite this headnote

[4] **Searches and Seizures**
Expectation of privacy

Although no single rubric definitively resolves which expectations of privacy are entitled to protection under the Fourth Amendment, the analysis is informed by historical understandings of what was deemed an unreasonable search and seizure when the Fourth Amendment was adopted. U.S.C.A. Const.Amend. 4.

9 Cases that cite this headnote

[5] **Searches and Seizures**
Expectation of privacy

While property rights are often informative in resolving which expectations of privacy are entitled to protection under the Fourth Amendment, such an interest is not fundamental or dispositive in determining which expectations of privacy are legitimate. U.S.C.A. Const.Amend. 4.

21 Cases that cite this headnote

[6] **Searches and Seizures**
Fourth Amendment and reasonableness in general

The Fourth Amendment seeks to secure the privacies of life against arbitrary power. U.S.C.A. Const.Amend. 4.

11 Cases that cite this headnote

[7] **Searches and Seizures**
Fourth Amendment and reasonableness in general

A central aim of the Framers in adopting the Fourth Amendment was to place obstacles in the way of a too permeating police surveillance. U.S.C.A. Const.Amend. 4.

2 Cases that cite this headnote

[8] **Searches and Seizures**
Use of electronic devices; tracking devices or "beepers."

In light of the immense storage capacity of modern cell phones, police officers must generally obtain a warrant before searching the contents of a phone. U.S.C.A. Const.Amend. 4.

9 Cases that cite this headnote

[9] **Searches and Seizures**
Abandoned, surrendered, or disclaimed items

Under the third-party doctrine, a person has no legitimate expectation of privacy, for Fourth Amendment purposes, in information he voluntarily turns over to third parties, and that remains true even if the information is revealed on the assumption that it will be used only for a limited purpose; as a result, the Government is typically free to obtain such information from the recipient without triggering Fourth Amendment protections. U.S.C.A. Const.Amend. 4.

33 Cases that cite this headnote

[10] **Searches and Seizures**
Expectation of privacy
Telecommunications
Carrier's cooperation; pen registers and tracing

An individual maintains a legitimate expectation of privacy, for Fourth Amendment purposes, in the record of his physical movements as captured through cell-site location information (CSLI). U.S.C.A. Const.Amend. 4.

101 Cases that cite this headnote

[11] **Searches and Seizures**
Use of electronic devices; tracking devices or "beepers."

Seven days of historical cell-site location information (CSLI) obtained from suspect's wireless carrier, pursuant to an order issued by a federal magistrate judge under the Stored Communications Act (SCA), was the product of a "search" under the Fourth Amendment. U.S.C.A. Const.Amend. 4; 18 U.S.C.A. § 2703(d).

68 Cases that cite this headnote

[12] **Searches and Seizures**
Persons, Places and Things Protected

A person does not surrender all Fourth Amendment protection by venturing into the public sphere, and to the contrary, what one seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. U.S.C.A. Const.Amend. 4.

13 Cases that cite this headnote

[13] **Searches and Seizures**
Expectation of privacy
Telecommunications
Carrier's cooperation; pen registers and tracing

Government's access to 127 days of historical cell-site location information (CSLI) obtained from suspect's wireless carrier, pursuant to an order issued by a federal magistrate judge under the Stored Communications Act (SCA), invaded suspect's reasonable expectation of privacy, under the Fourth Amendment, in the whole world of his physical movements. U.S.C.A. Const.Amend. 4; 18 U.S.C.A. § 2703(d).

66 Cases that cite this headnote

[14] **Searches and Seizures**
Abandoned, surrendered, or disclaimed items

The third-party doctrine partly stems from the notion that an individual has a reduced expectation of privacy in information knowingly shared with another, but the fact of diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely. U.S.C.A. Const.Amend. 4.

12 Cases that cite this headnote

[15] **Telecommunications**
Carrier's cooperation; pen registers and tracing

The Government must generally obtain a search warrant supported by probable cause before acquiring cell-site location information (CSLI) from a wireless carrier. U.S.C.A. Const.Amend. 4.

135 Cases that cite this headnote

[16] **Searches and Seizures**
Necessity of and preference for warrant, and exceptions in general

Although the ultimate measure of the constitutionality of a governmental search, under the Fourth Amendment, is reasonableness, warrantless searches are typically unreasonable where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, and thus, in the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement. U.S.C.A. Const.Amend. 4.

9 Cases that cite this headnote

[17] **Telecommunications**
Carrier's cooperation; pen registers and tracing

An order issued by a federal magistrate judge under the Stored Communications Act (SCA) is not a permissible mechanism for the Government to access cell-site location information (CSLI), and before compelling a wireless carrier to turn over a subscriber's CSLI, the Fourth Amendment requires the Government to get a search warrant. U.S.C.A. Const.Amend. 4; 18 U.S.C.A. § 2703(d).

47 Cases that cite this headnote

[18] **Searches and Seizures**
Emergencies and Exigent Circumstances; Opportunity to Obtain Warrant

One well-recognized exception to the search warrant requirement applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment. U.S.C.A. Const.Amend. 4.

9 Cases that cite this headnote

[19] **Searches and Seizures**
Emergencies and Exigent Circumstances; Opportunity to Obtain Warrant

Exigencies that support an exception to the Fourth Amendment's search warrant requirement include the need to pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence. U.S.C.A. Const.Amend. 4.

10 Cases that cite this headnote

[20] **Searches and Seizures**
Expectation of privacy

The Supreme Court is obligated, as subtler and more far-reaching means of invading privacy have become available to the Government, to ensure that the progress of science does not erode Fourth Amendment protections. U.S.C.A. Const.Amend. 4.

4 Cases that cite this headnote

***2208** *Syllabus*[*]

Cell phones perform their wide and growing variety of functions by continuously connecting to a set of radio antennas called "cell sites." Each time a phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI). Wireless carriers collect and store this information for their own business purposes. Here, after the FBI identified the cell phone numbers of several robbery suspects, prosecutors were ***2209** granted court orders to obtain the suspects' cell phone records under the Stored Communications Act. Wireless carriers produced CSLI for petitioner Timothy Carpenter's phone, and the Government was able to obtain 12,898 location points cataloging Carpenter's movements over 127 days—an average of 101 data points per day. Carpenter moved to suppress the data, arguing that the Government's seizure of the records without obtaining a warrant supported by probable cause violated

the Fourth Amendment. The District Court denied the motion, and prosecutors used the records at trial to show that Carpenter's phone was near four of the robbery locations at the time those robberies occurred. Carpenter was convicted. The Sixth Circuit affirmed, holding that Carpenter lacked a reasonable expectation of privacy in the location information collected by the FBI because he had shared that information with his wireless carriers.

Held :

1. The Government's acquisition of Carpenter's cell-site records was a Fourth Amendment search. Pp. 2212 - 2221.

(a) The Fourth Amendment protects not only property interests but certain expectations of privacy as well. *Katz v. United States,* 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576. Thus, when an individual "seeks to preserve something as private," and his expectation of privacy is "one that society is prepared to recognize as reasonable," official intrusion into that sphere generally qualifies as a search and requires a warrant supported by probable cause. *Smith v. Maryland,* 442 U.S. 735, 740, 99 S.Ct. 2577, 61 L.Ed.2d 220 (internal quotation marks and alterations omitted). The analysis regarding which expectations of privacy are entitled to protection is informed by historical understandings "of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted." *Carroll v. United States,* 267 U.S. 132, 149, 45 S.Ct. 280, 69 L.Ed. 543. These Founding-era understandings continue to inform this Court when applying the Fourth Amendment to innovations in surveillance tools. See, *e.g., Kyllo v. United States,* 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94. Pp. 2212 - 2215.

(b) The digital data at issue—personal location information maintained by a third party—does not fit neatly under existing precedents but lies at the intersection of two lines of cases. One set addresses a person's expectation of privacy in his physical location and movements. See, *e.g., United States v. Jones,* 565 U.S. 400, 132 S.Ct. 945, 181 L.Ed.2d 911 (five Justices concluding that privacy concerns would be raised by GPS tracking). The other addresses a person's expectation of privacy in information voluntarily turned over to third parties. See *United States v. Miller,* 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (no expectation of privacy in financial records held by a bank), and *Smith,* 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (no expectation of privacy in records of dialed telephone numbers conveyed to telephone company). Pp. 2214 - 2216.

(c) Tracking a person's past movements through CSLI partakes of many of the qualities of GPS monitoring considered in *Jones*—it is detailed, encyclopedic, and effortlessly compiled. At the same time, however, the fact that the individual continuously reveals his location to his wireless carrier implicates the third-party principle of *Smith* and *Miller.* Given the unique nature of cell-site records, this Court declines to extend *Smith* and *Miller* to cover them. Pp. 2216 - 2221.

(1) A majority of the Court has already recognized that individuals have a ***2210** reasonable expectation of privacy in the whole of their physical movements. Allowing government access to cell-site records—which "hold for many Americans the 'privacies of life,' " *Riley v. California,* 573 U.S. ——, ——, 134 S.Ct. 2473, 2494–2495, 189 L.Ed.2d 430—contravenes that expectation. In fact, historical cell-site records present even greater privacy concerns than the GPS monitoring considered in *Jones* : They give the Government near perfect surveillance and allow it to travel back in time to retrace a person's whereabouts, subject only to the five-year retention policies of most wireless carriers. The Government contends that CSLI data is less precise than GPS information, but it thought the data accurate enough here to highlight it during closing argument in Carpenter's trial. At any rate, the rule the Court adopts "must take account of more sophisticated systems that are already in use or in development," *Kyllo,* 533 U.S., at 36, 121 S.Ct. 2038, and the accuracy of CSLI is rapidly approaching GPS-level precision. Pp. 2217 - 2219.

(2) The Government contends that the third-party doctrine governs this case, because cell-site records, like the records in *Smith* and *Miller,* are "business records," created and maintained by wireless carriers. But there is a world of difference between the limited types of personal information addressed in *Smith* and *Miller* and the exhaustive chronicle of location information casually collected by wireless carriers.

The third-party doctrine partly stems from the notion that an individual has a reduced expectation of privacy in information knowingly shared with another. *Smith* and *Miller,* however, did not rely solely on the act of sharing. They also considered "the nature of the particular documents sought" and limitations on any "legitimate 'expectation of privacy' concerning their contents." *Miller,* 425 U.S., at 442, 96 S.Ct. 1619. In mechanically applying the third-party doctrine to this case the Government fails to appreciate the lack of comparable limitations on the revealing nature of CSLI.

Nor does the second rationale for the third-party

doctrine—voluntary exposure—hold up when it comes to CSLI. Cell phone location information is not truly "shared" as the term is normally understood. First, cell phones and the services they provide are "such a pervasive and insistent part of daily life" that carrying one is indispensable to participation in modern society. *Riley,* 573 U.S., at ——, 134 S.Ct., at 2484. Second, a cell phone logs a cell-site record by dint of its operation, without any affirmative act on the user's part beyond powering up. Pp. 2219 - 2220.

(d) This decision is narrow. It does not express a view on matters not before the Court; does not disturb the application of *Smith* and *Miller* or call into question conventional surveillance techniques and tools, such as security cameras; does not address other business records that might incidentally reveal location information; and does not consider other collection techniques involving foreign affairs or national security. Pp. 2220 - 2221.

2. The Government did not obtain a warrant supported by probable cause before acquiring Carpenter's cell-site records. It acquired those records pursuant to a court order under the Stored Communications Act, which required the Government to show "reasonable grounds" for believing that the records were "relevant and material to an ongoing investigation." 18 U.S.C. § 2703(d). That showing falls well short of the probable cause required for a warrant. Consequently, an order issued under § 2703(d) is not a permissible mechanism for accessing historical cell-site ***2211** records. Not all orders compelling the production of documents will require a showing of probable cause. A warrant is required only in the rare case where the suspect has a legitimate privacy interest in records held by a third party. And even though the Government will generally need a warrant to access CSLI, case-specific exceptions—*e.g.,* exigent circumstances—may support a warrantless search. Pp. 2220 - 2223.

819 F.3d 880, reversed and remanded.

ROBERTS, C.J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which THOMAS and ALITO, JJ., joined. THOMAS, J., filed a dissenting opinion. ALITO, J., filed a dissenting opinion, in which THOMAS, J., joined. GORSUCH, J., filed a dissenting opinion.

Attorneys and Law Firms

Nathan Freed Wessler, Ben Wizner, Brett Max Kaufman, American Civil Liberties, Union Foundation, New York, NY, David D. Cole, American Civil Liberties, Union Foundation, Washington, DC, Cecillia D. Wang, Jennifer Stisa Granick, American Civil Liberties, Union Foundation, San Francisco, CA, Harold Gurewitz, Gurewitz & Raben, PLC, Detroit, MI, Daniel S. Korobkin, Michael J. Steinberg, Kary L. Moss, American Civil Liberties, Union Fund of Michigan, Detroit, MI, Jeffrey L. Fisher, Stanford Law School, Supreme Court Litigation Clinic, Stanford, CA, for Petitioner.

Noel J. Francisco, Solicitor General, Kenneth A. Blanco, Acting Assistant Attorney General, Michael R. Dreeben, Deputy Solicitor General, Elizabeth B. Prelogar, Assistant to the Solicitor General, Jenny C. Ellickson, Attorney, Department of Justice, Washington, DC, for Respondent.

Opinion

Chief Justice ROBERTS delivered the opinion of the Court.

This case presents the question whether the Government conducts a search under the Fourth Amendment when it accesses historical cell phone records that provide a comprehensive chronicle of the user's past movements.

I

A

There are 396 million cell phone service accounts in the United States—for a Nation of 326 million people. Cell phones perform their wide and growing variety of functions by connecting to a set of radio antennas called "cell sites." Although cell sites are usually mounted on a tower, they can also be found on light posts, flagpoles, church steeples, or the sides of buildings. Cell sites typically have several directional antennas that divide the covered area into sectors.

Cell phones continuously scan their environment looking for the best signal, which generally comes from the closest cell site. Most modern devices, such as smartphones, tap into the wireless network several times a minute whenever their signal is on, even if the owner is not using one of the phone's features. Each time the

phone connects to a cell site, it generates a time-stamped record known as cell-site location information (CSLI). The precision of this information depends on the size of the geographic area covered by the cell site. The greater the concentration of cell sites, the smaller the coverage area. As data usage from cell phones has increased, ***2212** wireless carriers have installed more cell sites to handle the traffic. That has led to increasingly compact coverage areas, especially in urban areas.

Wireless carriers collect and store CSLI for their own business purposes, including finding weak spots in their network and applying "roaming" charges when another carrier routes data through their cell sites. In addition, wireless carriers often sell aggregated location records to data brokers, without individual identifying information of the sort at issue here. While carriers have long retained CSLI for the start and end of incoming calls, in recent years phone companies have also collected location information from the transmission of text messages and routine data connections. Accordingly, modern cell phones generate increasingly vast amounts of increasingly precise CSLI.

B

In 2011, police officers arrested four men suspected of robbing a series of Radio Shack and (ironically enough) T–Mobile stores in Detroit. One of the men confessed that, over the previous four months, the group (along with a rotating cast of getaway drivers and lookouts) had robbed nine different stores in Michigan and Ohio. The suspect identified 15 accomplices who had participated in the heists and gave the FBI some of their cell phone numbers; the FBI then reviewed his call records to identify additional numbers that he had called around the time of the robberies.

Based on that information, the prosecutors applied for court orders under the Stored Communications Act to obtain cell phone records for petitioner Timothy Carpenter and several other suspects. That statute, as amended in 1994, permits the Government to compel the disclosure of certain telecommunications records when it "offers specific and articulable facts showing that there are reasonable grounds to believe" that the records sought "are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). Federal Magistrate Judges issued two orders directing Carpenter's wireless carriers—MetroPCS and Sprint—to disclose "cell/site sector [information] for [Carpenter's] telephone[ ] at call origination and at call termination for incoming and outgoing calls" during the four-month period when the string of robberies occurred. App. to Pet. for Cert. 60a, 72a. The first order sought 152 days of cell-site records from MetroPCS, which produced records spanning 127 days. The second order requested seven days of CSLI from Sprint, which produced two days of records covering the period when Carpenter's phone was "roaming" in northeastern Ohio. Altogether the Government obtained 12,898 location points cataloging Carpenter's movements—an average of 101 data points per day.

Carpenter was charged with six counts of robbery and an additional six counts of carrying a firearm during a federal crime of violence. See 18 U.S.C. §§ 924(c), 1951(a). Prior to trial, Carpenter moved to suppress the cell-site data provided by the wireless carriers. He argued that the Government's seizure of the records violated the Fourth Amendment because they had been obtained without a warrant supported by probable cause. The District Court denied the motion. App. to Pet. for Cert. 38a–39a.

At trial, seven of Carpenter's confederates pegged him as the leader of the operation. In addition, FBI agent Christopher Hess offered expert testimony about the cell-site data. Hess explained that each time a cell phone taps into the wireless network, the carrier logs a time-stamped record of the cell site and particular sector that were used. With this information, ***2213** Hess produced maps that placed Carpenter's phone near four of the charged robberies. In the Government's view, the location records clinched the case: They confirmed that Carpenter was "right where the ... robbery was at the exact time of the robbery." App. 131 (closing argument). Carpenter was convicted on all but one of the firearm counts and sentenced to more than 100 years in prison.

The Court of Appeals for the Sixth Circuit affirmed. 819 F.3d 880 (2016). The court held that Carpenter lacked a reasonable expectation of privacy in the location information collected by the FBI because he had shared that information with his wireless carriers. Given that cell phone users voluntarily convey cell-site data to their carriers as "a means of establishing communication," the court concluded that the resulting business records are not entitled to Fourth Amendment protection. *Id.,* at 888 (quoting *Smith v. Maryland,* 442 U.S. 735, 741, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979)).

We granted certiorari. 582 U.S. ——, 137 S.Ct. 2211, 198 L.Ed.2d 657 (2017).

II

A

[1] The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The "basic purpose of this Amendment," our cases have recognized, "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Municipal Court of City and County of San Francisco,* 387 U.S. 523, 528, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). The Founding generation crafted the Fourth Amendment as a "response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity." *Riley v. California,* 573 U.S. ——, ——, 134 S.Ct. 2473, 2494, 189 L.Ed.2d 430 (2014). In fact, as John Adams recalled, the patriot James Otis's 1761 speech condemning writs of assistance was "the first act of opposition to the arbitrary claims of Great Britain" and helped spark the Revolution itself. *Id.,* at —— – ——, 134 S.Ct., at 2494 (quoting 10 Works of John Adams 248 (C. Adams ed. 1856)).

[2] [3] For much of our history, Fourth Amendment search doctrine was "tied to common-law trespass" and focused on whether the Government "obtains information by physically intruding on a constitutionally protected area." *United States v. Jones,* 565 U.S. 400, 405, 406, n. 3, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012). More recently, the Court has recognized that "property rights are not the sole measure of Fourth Amendment violations." *Soldal v. Cook County,* 506 U.S. 56, 64, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992). In *Katz v. United States,* 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), we established that "the Fourth Amendment protects people, not places," and expanded our conception of the Amendment to protect certain expectations of privacy as well. When an individual "seeks to preserve something as private," and his expectation of privacy is "one that society is prepared to recognize as reasonable," we have held that official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause. *Smith,* 442 U.S., at 740, 99 S.Ct. 2577 (internal quotation marks and alterations omitted).

[4] [5] [6] [7] Although no single rubric definitively resolves which expectations of privacy ***2214** are entitled to protection,[1] the analysis is informed by historical understandings "of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted." *Carroll v. United States,* 267 U.S. 132, 149, 45 S.Ct. 280, 69 L.Ed. 543 (1925). On this score, our cases have recognized some basic guideposts. First, that the Amendment seeks to secure "the privacies of life" against "arbitrary power." *Boyd v. United States,* 116 U.S. 616, 630, 6 S.Ct. 524, 29 L.Ed. 746 (1886). Second, and relatedly, that a central aim of the Framers was "to place obstacles in the way of a too permeating police surveillance." *United States v. Di Re,* 332 U.S. 581, 595, 68 S.Ct. 222, 92 L.Ed. 210 (1948).

We have kept this attention to Founding-era understandings in mind when applying the Fourth Amendment to innovations in surveillance tools. As technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes, this Court has sought to "assure [ ] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo v. United States,* 533 U.S. 27, 34, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001). For that reason, we rejected in *Kyllo* a "mechanical interpretation" of the Fourth Amendment and held that use of a thermal imager to detect heat radiating from the side of the defendant's home was a search. *Id.,* at 35, 121 S.Ct. 2038. Because any other conclusion would leave homeowners "at the mercy of advancing technology," we determined that the Government—absent a warrant—could not capitalize on such new sense-enhancing technology to explore what was happening within the home. *Ibid.*

[8] Likewise in *Riley,* the Court recognized the "immense storage capacity" of modern cell phones in holding that police officers must generally obtain a warrant before searching the contents of a phone. 573 U.S., at ——, 134 S.Ct., at 2489. We explained that while the general rule allowing warrantless searches incident to arrest "strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to" the vast store of sensitive information on a cell phone. *Id.,* at ——, 134 S.Ct., at 2484.

B

The case before us involves the Government's acquisition of wireless carrier cell-site records revealing the location of Carpenter's cell phone whenever it made or received calls. This sort of digital data—personal location information maintained by a third party—does not fit neatly under existing precedents. Instead, requests for cell-site records lie at the intersection of two lines of cases, both of which inform ***2215** our understanding of the privacy interests at stake.

The first set of cases addresses a person's expectation of privacy in his physical location and movements. In *United States v. Knotts,* 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983), we considered the Government's use of a "beeper" to aid in tracking a vehicle through traffic. Police officers in that case planted a beeper in a container of chloroform before it was purchased by one of Knotts's co-conspirators. The officers (with intermittent aerial assistance) then followed the automobile carrying the container from Minneapolis to Knotts's cabin in Wisconsin, relying on the beeper's signal to help keep the vehicle in view. The Court concluded that the "augment[ed]" visual surveillance did not constitute a search because "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Id.,* at 281, 282, 103 S.Ct. 1081. Since the movements of the vehicle and its final destination had been "voluntarily conveyed to anyone who wanted to look," Knotts could not assert a privacy interest in the information obtained. *Id.,* at 281, 103 S.Ct. 1081.

This Court in *Knotts,* however, was careful to distinguish between the rudimentary tracking facilitated by the beeper and more sweeping modes of surveillance. The Court emphasized the "limited use which the government made of the signals from this particular beeper" during a discrete "automotive journey." *Id.,* at 284, 285, 103 S.Ct. 1081. Significantly, the Court reserved the question whether "different constitutional principles may be applicable" if "twenty-four hour surveillance of any citizen of this country [were] possible." *Id.,* at 283–284, 103 S.Ct. 1081.

Three decades later, the Court considered more sophisticated surveillance of the sort envisioned in *Knotts* and found that different principles did indeed apply. In *United States v. Jones,* FBI agents installed a GPS tracking device on Jones's vehicle and remotely monitored the vehicle's movements for 28 days. The Court decided the case based on the Government's physical trespass of the vehicle. 565 U.S., at 404–405, 132 S.Ct. 945. At the same time, five Justices agreed that related privacy concerns would be raised by, for example, "surreptitiously activating a stolen vehicle detection system" in Jones's car to track Jones himself, or conducting GPS tracking of his cell phone. *Id.,* at 426, 428, 132 S.Ct. 945 (ALITO, J., concurring in judgment); *id.,* at 415, 132 S.Ct. 945 (SOTOMAYOR, J., concurring). Since GPS monitoring of a vehicle tracks "every movement" a person makes in that vehicle, the concurring Justices concluded that "longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy"—regardless whether those movements were disclosed to the public at large. *Id.,* at 430, 132 S.Ct. 945 (opinion of Alito, J.); *id.,* at 415, 132 S.Ct. 945 (opinion of Sotomayor, J.).[2]

***2216** [9] In a second set of decisions, the Court has drawn a line between what a person keeps to himself and what he shares with others. We have previously held that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith,* 442 U.S., at 743–744, 99 S.Ct. 2577. That remains true "even if the information is revealed on the assumption that it will be used only for a limited purpose." *United States v. Miller,* 425 U.S. 435, 443, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976). As a result, the Government is typically free to obtain such information from the recipient without triggering Fourth Amendment protections.

This third-party doctrine largely traces its roots to *Miller*. While investigating Miller for tax evasion, the Government subpoenaed his banks, seeking several months of canceled checks, deposit slips, and monthly statements. The Court rejected a Fourth Amendment challenge to the records collection. For one, Miller could "assert neither ownership nor possession" of the documents; they were "business records of the banks." *Id.,* at 440, 96 S.Ct. 1619. For another, the nature of those records confirmed Miller's limited expectation of privacy, because the checks were "not confidential communications but negotiable instruments to be used in commercial transactions," and the bank statements contained information "exposed to [bank] employees in the ordinary course of business." *Id.,* at 442, 96 S.Ct. 1619. The Court thus concluded that Miller had "take[n] the risk, in revealing his affairs to another, that the information [would] be conveyed by that person to the Government." *Id.,* at 443, 96 S.Ct. 1619.

Three years later, *Smith* applied the same principles in the context of information conveyed to a telephone company. The Court ruled that the Government's use of a pen register—a device that recorded the outgoing phone numbers dialed on a landline telephone—was not a

search. Noting the pen register's "limited capabilities," the Court "doubt[ed] that people in general entertain any actual expectation of privacy in the numbers they dial." 442 U.S., at 742, 99 S.Ct. 2577. Telephone subscribers know, after all, that the numbers are used by the telephone company "for a variety of legitimate business purposes," including routing calls. *Id.,* at 743, 99 S.Ct. 2577. And at any rate, the Court explained, such an expectation "is not one that society is prepared to recognize as reasonable." *Ibid.* (internal quotation marks omitted). When Smith placed a call, he "voluntarily conveyed" the dialed numbers to the phone company by "expos[ing] that information to its equipment in the ordinary course of business." *Id.,* at 744, 99 S.Ct. 2577 (internal quotation marks omitted). Once again, we held that the defendant "assumed the risk" that the company's records "would be divulged to police." *Id.,* at 745, 99 S.Ct. 2577.

III

The question we confront today is how to apply the Fourth Amendment to a new phenomenon: the ability to chronicle a person's past movements through the record of his cell phone signals. Such tracking partakes of many of the qualities of the GPS monitoring we considered in *Jones*. Much like GPS tracking of a vehicle, cell phone location information is detailed, encyclopedic, and effortlessly compiled.

At the same time, the fact that the individual continuously reveals his location to his wireless carrier implicates the third-party principle of *Smith* and *Miller*. But while the third-party doctrine applies to telephone numbers and bank records, it is not clear whether its logic extends to the qualitatively different category of cell-site ***2217** records. After all, when *Smith* was decided in 1979, few could have imagined a society in which a phone goes wherever its owner goes, conveying to the wireless carrier not just dialed digits, but a detailed and comprehensive record of the person's movements.

[10] [11] We decline to extend *Smith* and *Miller* to cover these novel circumstances. Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection. Whether the Government employs its own surveillance technology as in *Jones* or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI. The location information obtained from Carpenter's wireless carriers was the product of a search.[3]

A

[12] A person does not surrender all Fourth Amendment protection by venturing into the public sphere. To the contrary, "what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz,* 389 U.S., at 351–352, 88 S.Ct. 507. A majority of this Court has already recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements. *Jones,* 565 U.S., at 430, 132 S.Ct. 945 (ALITO, J., concurring in judgment); *id.,* at 415, 132 S.Ct. 945 (SOTOMAYOR, J., concurring). Prior to the digital age, law enforcement might have pursued a suspect for a brief stretch, but doing so "for any extended period of time was difficult and costly and therefore rarely undertaken." *Id.,* at 429, 132 S.Ct. 945 (opinion of Alito, J.). For that reason, "society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period." *Id.,* at 430, 132 S.Ct. 945.

[13] Allowing government access to cell-site records contravenes that expectation. Although such records are generated for commercial purposes, that distinction does not negate Carpenter's anticipation of privacy in his physical location. Mapping a cell phone's location over the course of 127 days provides an all-encompassing record of the holder's whereabouts. As with GPS information, the time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his "familial, political, professional, religious, and sexual associations." *Id.,* at 415, 132 S.Ct. 945 (opinion of SOTOMAYOR, J.). These location records "hold for many Americans the 'privacies of life.' " *Riley,* 573 U.S., at ——, 134 S.Ct., at 2494–2495 (quoting *Boyd,* 116 U.S., at 630, 6 S.Ct. 524). And like GPS monitoring, cell phone ***2218** tracking is remarkably easy, cheap, and efficient compared to traditional investigative tools. With just the click of a button, the Government can access each carrier's deep repository of historical location information at practically no expense.

In fact, historical cell-site records present even greater

privacy concerns than the GPS monitoring of a vehicle we considered in *Jones*. Unlike the bugged container in *Knotts* or the car in *Jones,* a cell phone—almost a "feature of human anatomy," *Riley,* 573 U.S., at ——, 134 S.Ct., at 2484—tracks nearly exactly the movements of its owner. While individuals regularly leave their vehicles, they compulsively carry cell phones with them all the time. A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales. See *id.,* at ——, 134 S.Ct., at 2490 (noting that "nearly three-quarters of smart phone users report being within five feet of their phones most of the time, with 12% admitting that they even use their phones in the shower"); contrast *Cardwell v. Lewis,* 417 U.S. 583, 590, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974) (plurality opinion) ("A car has little capacity for escaping public scrutiny."). Accordingly, when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user.

Moreover, the retrospective quality of the data here gives police access to a category of information otherwise unknowable. In the past, attempts to reconstruct a person's movements were limited by a dearth of records and the frailties of recollection. With access to CSLI, the Government can now travel back in time to retrace a person's whereabouts, subject only to the retention polices of the wireless carriers, which currently maintain records for up to five years. Critically, because location information is continually logged for all of the 400 million devices in the United States—not just those belonging to persons who might happen to come under investigation—this newfound tracking capacity runs against everyone. Unlike with the GPS device in *Jones,* police need not even know in advance whether they want to follow a particular individual, or when.

Whoever the suspect turns out to be, he has effectively been tailed every moment of every day for five years, and the police may—in the Government's view—call upon the results of that surveillance without regard to the constraints of the Fourth Amendment. Only the few without cell phones could escape this tireless and absolute surveillance.

The Government and Justice KENNEDY contend, however, that the collection of CSLI should be permitted because the data is less precise than GPS information. Not to worry, they maintain, because the location records did "not on their own suffice to place [Carpenter] at the crime scene"; they placed him within a wedge-shaped sector ranging from one-eighth to four square miles. Brief for United States 24; see *post,* at 2232 - 2233. Yet the Court has already rejected the proposition that "inference insulates a search." *Kyllo,* 533 U.S., at 36, 121 S.Ct. 2038. From the 127 days of location data it received, the Government could, in combination with other information, deduce a detailed log of Carpenter's movements, including when he was at the site of the robberies. And the Government thought the CSLI accurate enough to highlight it during the closing argument of his trial. App. 131.

At any rate, the rule the Court adopts "must take account of more sophisticated systems that are already in use or in development." ***2219** *Kyllo,* 533 U.S., at 36, 121 S.Ct. 2038. While the records in this case reflect the state of technology at the start of the decade, the accuracy of CSLI is rapidly approaching GPS-level precision. As the number of cell sites has proliferated, the geographic area covered by each cell sector has shrunk, particularly in urban areas. In addition, with new technology measuring the time and angle of signals hitting their towers, wireless carriers already have the capability to pinpoint a phone's location within 50 meters. Brief for Electronic Frontier Foundation et al. as *Amici Curiae* 12 (describing triangulation methods that estimate a device's location inside a given cell sector).

Accordingly, when the Government accessed CSLI from the wireless carriers, it invaded Carpenter's reasonable expectation of privacy in the whole of his physical movements.

B

The Government's primary contention to the contrary is that the third-party doctrine governs this case. In its view, cell-site records are fair game because they are "business records" created and maintained by the wireless carriers. The Government (along with Justice KENNEDY) recognizes that this case features new technology, but asserts that the legal question nonetheless turns on a garden-variety request for information from a third-party witness. Brief for United States 32–34; *post,* at 2229 - 2231.

The Government's position fails to contend with the seismic shifts in digital technology that made possible the tracking of not only Carpenter's location but also everyone else's, not for a short period but for years and years. Sprint Corporation and its competitors are not your

typical witnesses. Unlike the nosy neighbor who keeps an eye on comings and goings, they are ever alert, and their memory is nearly infallible. There is a world of difference between the limited types of personal information addressed in *Smith* and *Miller* and the exhaustive chronicle of location information casually collected by wireless carriers today. The Government thus is not asking for a straightforward application of the third-party doctrine, but instead a significant extension of it to a distinct category of information.

[14] The third-party doctrine partly stems from the notion that an individual has a reduced expectation of privacy in information knowingly shared with another. But the fact of "diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely." *Riley,* 573 U.S., at ——, 134 S.Ct., at 2488. *Smith* and *Miller,* after all, did not rely solely on the act of sharing. Instead, they considered "the nature of the particular documents sought" to determine whether "there is a legitimate 'expectation of privacy' concerning their contents." *Miller,* 425 U.S., at 442, 96 S.Ct. 1619. *Smith* pointed out the limited capabilities of a pen register; as explained in *Riley,* telephone call logs reveal little in the way of "identifying information." *Smith,* 442 U.S., at 742, 99 S.Ct. 2577; *Riley,* 573 U.S., at ——, 134 S.Ct., at 2493. *Miller* likewise noted that checks were "not confidential communications but negotiable instruments to be used in commercial transactions." 425 U.S., at 442, 96 S.Ct. 1619. In mechanically applying the third-party doctrine to this case, the Government fails to appreciate that there are no comparable limitations on the revealing nature of CSLI.

The Court has in fact already shown special solicitude for location information in the third-party context. In *Knotts,* the Court relied on *Smith* to hold that an individual has no reasonable expectation of privacy in public movements that he "voluntarily ***2220** conveyed to anyone who wanted to look." *Knotts,* 460 U.S., at 281, 103 S.Ct. 1081; see *id.,* at 283, 103 S.Ct. 1081 (discussing *Smith*). But when confronted with more pervasive tracking, five Justices agreed that longer term GPS monitoring of even a vehicle traveling on public streets constitutes a search. *Jones,* 565 U.S., at 430, 132 S.Ct. 945 (ALITO, J., concurring in judgment); *id.,* at 415, 132 S.Ct. 945 (SOTOMAYOR, J., concurring). Justice GORSUCH wonders why "someone's location when using a phone" is sensitive, *post,* at 2262, and Justice KENNEDY assumes that a person's discrete movements "are not particularly private," *post,* at 2232. Yet this case is not about "using a phone" or a person's movement at a particular time. It is about a detailed chronicle of a person's physical presence compiled every day, every moment, over several years. Such a chronicle implicates privacy concerns far beyond those considered in *Smith* and *Miller*.

Neither does the second rationale underlying the third-party doctrine—voluntary exposure—hold up when it comes to CSLI. Cell phone location information is not truly "shared" as one normally understands the term. In the first place, cell phones and the services they provide are "such a pervasive and insistent part of daily life" that carrying one is indispensable to participation in modern society. *Riley,* 573 U.S., at ——, 134 S.Ct., at 2484. Second, a cell phone logs a cell-site record by dint of its operation, without any affirmative act on the part of the user beyond powering up. Virtually any activity on the phone generates CSLI, including incoming calls, texts, or e-mails and countless other data connections that a phone automatically makes when checking for news, weather, or social media updates. Apart from disconnecting the phone from the network, there is no way to avoid leaving behind a trail of location data. As a result, in no meaningful sense does the user voluntarily "assume[ ] the risk" of turning over a comprehensive dossier of his physical movements. *Smith,* 442 U.S., at 745, 99 S.Ct. 2577.

We therefore decline to extend *Smith* and *Miller* to the collection of CSLI. Given the unique nature of cell phone location information, the fact that the Government obtained the information from a third party does not overcome Carpenter's claim to Fourth Amendment protection. The Government's acquisition of the cell-site records was a search within the meaning of the Fourth Amendment.

* * *

Our decision today is a narrow one. We do not express a view on matters not before us: real-time CSLI or "tower dumps" (a download of information on all the devices that connected to a particular cell site during a particular interval). We do not disturb the application of *Smith* and *Miller* or call into question conventional surveillance techniques and tools, such as security cameras. Nor do we address other business records that might incidentally reveal location information. Further, our opinion does not consider other collection techniques involving foreign affairs or national security. As Justice Frankfurter noted when considering new innovations in airplanes and radios, the Court must tread carefully in such cases, to ensure that we do not "embarrass the future." *Northwest Airlines, Inc. v. Minnesota,* 322 U.S. 292, 300, 64 S.Ct. 950, 88 L.Ed. 1283 (1944).[4]

***2221** IV

[15] [16] Having found that the acquisition of Carpenter's CSLI was a search, we also conclude that the Government must generally obtain a warrant supported by probable cause before acquiring such records. Although the "ultimate measure of the constitutionality of a governmental search is 'reasonableness,' " our cases establish that warrantless searches are typically unreasonable where "a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing." *Vernonia School Dist. 47J v. Acton,* 515 U.S. 646, 652–653, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995). Thus, "[i]n the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement." *Riley,* 573 U.S., at ——, 134 S.Ct., at 2482.

[17] The Government acquired the cell-site records pursuant to a court order issued under the Stored Communications Act, which required the Government to show "reasonable grounds" for believing that the records were "relevant and material to an ongoing investigation." 18 U.S.C. § 2703(d). That showing falls well short of the probable cause required for a warrant. The Court usually requires "some quantum of individualized suspicion" before a search or seizure may take place. *United States v. Martinez–Fuerte,* 428 U.S. 543, 560–561, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976). Under the standard in the Stored Communications Act, however, law enforcement need only show that the cell-site evidence might be pertinent to an ongoing investigation—a "gigantic" departure from the probable cause rule, as the Government explained below. App. 34. Consequently, an order issued under Section 2703(d) of the Act is not a permissible mechanism for accessing historical cell-site records. Before compelling a wireless carrier to turn over a subscriber's CSLI, the Government's obligation is a familiar one—get a warrant.

Justice ALITO contends that the warrant requirement simply does not apply when the Government acquires records using compulsory process. Unlike an actual search, he says, subpoenas for documents do not involve the direct taking of evidence; they are at most a "constructive search" conducted by the target of the subpoena. *Post,* at 2252 - 2253. Given this lesser intrusion on personal privacy, Justice ALITO argues that the compulsory production of records is not held to the same probable cause standard. In his view, this Court's precedents set forth a categorical rule—separate and distinct from the third-party doctrine—subjecting subpoenas to lenient scrutiny without regard to the suspect's expectation of privacy in the records. *Post,* at 2250 - 2257.

But this Court has never held that the Government may subpoena third parties for records in which the suspect has a reasonable expectation of privacy. Almost all of the examples Justice ALITO cites, see *post,* at 2253 - 2255, contemplated requests for evidence implicating diminished privacy interests or for a corporation's own books.[5] The lone exception, of course, is ***2222** *Miller,* where the Court's analysis of the third-party subpoena merged with the application of the third-party doctrine. 425 U.S., at 444, 96 S.Ct. 1619 (concluding that Miller lacked the necessary privacy interest to contest the issuance of a subpoena to his bank).

Justice ALITO overlooks the critical issue. At some point, the dissent should recognize that CSLI is an entirely different species of business record—something that implicates basic Fourth Amendment concerns about arbitrary government power much more directly than corporate tax or payroll ledgers. When confronting new concerns wrought by digital technology, this Court has been careful not to uncritically extend existing precedents. See *Riley,* 573 U.S., at ——, 134 S.Ct., at 2485 ("A search of the information on a cell phone bears little resemblance to the type of brief physical search considered [in prior precedents].").

If the choice to proceed by subpoena provided a categorical limitation on Fourth Amendment protection, no type of record would ever be protected by the warrant requirement. Under Justice ALITO's view, private letters, digital contents of a cell phone—any personal information reduced to document form, in fact—may be collected by subpoena for no reason other than "official curiosity." *United States v. Morton Salt Co.,* 338 U.S. 632, 652, 70 S.Ct. 357, 94 L.Ed. 401 (1950). Justice KENNEDY declines to adopt the radical implications of this theory, leaving open the question whether the warrant requirement applies "when the Government obtains the modern-day equivalents of an individual's own 'papers' or 'effects,' even when those papers or effects are held by a third party." *Post,* at 2230 (citing *United States v. Warshak,* 631 F.3d 266, 283–288 (C.A.6 2010)). That would be a sensible exception, because it would prevent the subpoena doctrine from overcoming any reasonable expectation of privacy. If the third-party doctrine does not apply to the "modern-day equivalents of an individual's own 'papers' or 'effects,' " then the clear implication is that the documents should receive full Fourth Amendment protection. We simply think that such protection should extend as well to a detailed log of a person's movements over several years.

This is certainly not to say that all orders compelling the production of documents will require a showing of

probable cause. The Government will be able to use subpoenas to acquire records in the overwhelming majority of investigations. We hold only that a warrant is required in the rare case where the suspect has a legitimate privacy interest in records held by a third party.

[18] [19] Further, even though the Government will generally need a warrant to access CSLI, case-specific exceptions may support a warrantless search of an individual's cell-site records under certain circumstances. "One well-recognized exception applies when ' "the exigencies of the situation" make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.' " *Kentucky v. King,* 563 U.S. 452, 460, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011) (quoting ***2223** *Mincey v. Arizona,* 437 U.S. 385, 394, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978)). Such exigencies include the need to pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence. 563 U.S., at 460, and n. 3, 131 S.Ct. 1849.

As a result, if law enforcement is confronted with an urgent situation, such fact-specific threats will likely justify the warrantless collection of CSLI. Lower courts, for instance, have approved warrantless searches related to bomb threats, active shootings, and child abductions. Our decision today does not call into doubt warrantless access to CSLI in such circumstances. While police must get a warrant when collecting CSLI to assist in the mine-run criminal investigation, the rule we set forth does not limit their ability to respond to an ongoing emergency.

* * *

[20] As Justice Brandeis explained in his famous dissent, the Court is obligated—as "[s]ubtler and more far-reaching means of invading privacy have become available to the Government"—to ensure that the "progress of science" does not erode Fourth Amendment protections. *Olmstead v. United States,* 277 U.S. 438, 473–474, 48 S.Ct. 564, 72 L.Ed. 944 (1928). Here the progress of science has afforded law enforcement a powerful new tool to carry out its important responsibilities. At the same time, this tool risks Government encroachment of the sort the Framers, "after consulting the lessons of history," drafted the Fourth Amendment to prevent. *Di Re,* 332 U.S., at 595, 68 S.Ct. 222.

We decline to grant the state unrestricted access to a wireless carrier's database of physical location information. In light of the deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection. The Government's acquisition of the cell-site records here was a search under that Amendment.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice KENNEDY, with whom Justice THOMAS and Justice ALITO join, dissenting.

This case involves new technology, but the Court's stark departure from relevant Fourth Amendment precedents and principles is, in my submission, unnecessary and incorrect, requiring this respectful dissent.

The new rule the Court seems to formulate puts needed, reasonable, accepted, lawful, and congressionally authorized criminal investigations at serious risk in serious cases, often when law enforcement seeks to prevent the threat of violent crimes. And it places undue restrictions on the lawful and necessary enforcement powers exercised not only by the Federal Government, but also by law enforcement in every State and locality throughout the Nation. Adherence to this Court's longstanding precedents and analytic framework would have been the proper and prudent way to resolve this case.

The Court has twice held that individuals have no Fourth Amendment interests in business records which are possessed, owned, and controlled by a third party. *United States v. Miller,* 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976); *Smith v. Maryland,* 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979). This is true even when the records contain personal and sensitive information. So when the Government uses a subpoena to obtain, for ***2224** example, bank records, telephone records, and credit card statements from the businesses that create and keep these records, the Government does not engage in a search of the business's customers within the meaning of the Fourth Amendment.

In this case petitioner challenges the Government's right to use compulsory process to obtain a now-common kind of business record: cell-site records held by cell phone service providers. The Government acquired the records through an investigative process enacted by Congress.

Upon approval by a neutral magistrate, and based on the Government's duty to show reasonable necessity, it authorizes the disclosure of records and information that are under the control and ownership of the cell phone service provider, not its customer. Petitioner acknowledges that the Government may obtain a wide variety of business records using compulsory process, and he does not ask the Court to revisit its precedents. Yet he argues that, under those same precedents, the Government searched his records when it used court-approved compulsory process to obtain the cell-site information at issue here.

Cell-site records, however, are no different from the many other kinds of business records the Government has a lawful right to obtain by compulsory process. Customers like petitioner do not own, possess, control, or use the records, and for that reason have no reasonable expectation that they cannot be disclosed pursuant to lawful compulsory process.

The Court today disagrees. It holds for the first time that by using compulsory process to obtain records of a business entity, the Government has not just engaged in an impermissible action, but has conducted a search of the business's customer. The Court further concludes that the search in this case was unreasonable and the Government needed to get a warrant to obtain more than six days of cell-site records.

In concluding that the Government engaged in a search, the Court unhinges Fourth Amendment doctrine from the property-based concepts that have long grounded the analytic framework that pertains in these cases. In doing so it draws an unprincipled and unworkable line between cell-site records on the one hand and financial and telephonic records on the other. According to today's majority opinion, the Government can acquire a record of every credit card purchase and phone call a person makes over months or years without upsetting a legitimate expectation of privacy. But, in the Court's view, the Government crosses a constitutional line when it obtains a court's approval to issue a subpoena for more than six days of cell-site records in order to determine whether a person was within several hundred city blocks of a crime scene. That distinction is illogical and will frustrate principled application of the Fourth Amendment in many routine yet vital law enforcement operations.

It is true that the Cyber Age has vast potential both to expand and restrict individual freedoms in dimensions not contemplated in earlier times. See *Packingham v. North Carolina,* 582 U.S. ——, —— – ——, 137 S.Ct. 1730, 1735–1736, 198 L.Ed.2d 273 (2017). For the reasons that follow, however, there is simply no basis here for concluding that the Government interfered with information that the cell phone customer, either from a legal or commonsense standpoint, should have thought the law would deem owned or controlled by him.

I

Before evaluating the question presented it is helpful to understand the nature of cell-site records, how they are commonly ***2225** used by cell phone service providers, and their proper use by law enforcement.

When a cell phone user makes a call, sends a text message or e-mail, or gains access to the Internet, the cell phone establishes a radio connection to an antenna at a nearby cell site. The typical cell site covers a more-or-less circular geographic area around the site. It has three (or sometimes six) separate antennas pointing in different directions. Each provides cell service for a different 120–degree (or 60–degree) sector of the cell site's circular coverage area. So a cell phone activated on the north side of a cell site will connect to a different antenna than a cell phone on the south side.

Cell phone service providers create records each time a cell phone connects to an antenna at a cell site. For a phone call, for example, the provider records the date, time, and duration of the call; the phone numbers making and receiving the call; and, most relevant here, the cell site used to make the call, as well as the specific antenna that made the connection. The cell-site and antenna data points, together with the date and time of connection, are known as cell-site location information, or cell-site records. By linking an individual's cell phone to a particular 120– or 60–degree sector of a cell site's coverage area at a particular time, cell-site records reveal the general location of the cell phone user.

The location information revealed by cell-site records is imprecise, because an individual cell-site sector usually covers a large geographic area. The FBI agent who offered expert testimony about the cell-site records at issue here testified that a cell site in a city reaches between a half mile and two miles in all directions. That means a 60–degree sector covers between approximately one-eighth and two square miles (and a 120–degree sector twice that area). To put that in perspective, in urban areas cell-site records often would reveal the location of a cell

phone user within an area covering between around a dozen and several hundred city blocks. In rural areas cell-site records can be up to 40 times more imprecise. By contrast, a Global Positioning System (GPS) can reveal an individual's location within around 15 feet.

Major cell phone service providers keep cell-site records for long periods of time. There is no law requiring them to do so. Instead, providers contract with their customers to collect and keep these records because they are valuable to the providers. Among other things, providers aggregate the records and sell them to third parties along with other information gleaned from cell phone usage. This data can be used, for example, to help a department store determine which of various prospective store locations is likely to get more foot traffic from middle-aged women who live in affluent zip codes. The market for cell phone data is now estimated to be in the billions of dollars. See Brief for Technology Experts as *Amici Curiae* 23.

Cell-site records also can serve an important investigative function, as the facts of this case demonstrate. Petitioner, Timothy Carpenter, along with a rotating group of accomplices, robbed at least six RadioShack and T–Mobile stores at gunpoint over a 2–year period. Five of those robberies occurred in the Detroit area, each crime at least four miles from the last. The sixth took place in Warren, Ohio, over 200 miles from Detroit.

The Government, of course, did not know all of these details in 2011 when it began investigating Carpenter. In April of that year police arrested four of Carpenter's co-conspirators. One of them confessed to committing nine robberies in Michigan and Ohio between December 2010 and March 2011. He identified 15 accomplices who had participated in at ***2226** least one of those robberies; named Carpenter as one of the accomplices; and provided Carpenter's cell phone number to the authorities. The suspect also warned that the other members of the conspiracy planned to commit more armed robberies in the immediate future.

The Government at this point faced a daunting task. Even if it could identify and apprehend the suspects, still it had to link each suspect in this changing criminal gang to specific robberies in order to bring charges and convict. And, of course, it was urgent that the Government take all necessary steps to stop the ongoing and dangerous crime spree.

Cell-site records were uniquely suited to this task. The geographic dispersion of the robberies meant that, if Carpenter's cell phone were within even a dozen to several hundred city blocks of one or more of the stores when the different robberies occurred, there would be powerful circumstantial evidence of his participation; and this would be especially so if his cell phone usually was not located in the sectors near the stores except during the robbery times.

To obtain these records, the Government applied to federal magistrate judges for disclosure orders pursuant to § 2703(d) of the Stored Communications Act. That Act authorizes a magistrate judge to issue an order requiring disclosure of cell-site records if the Government demonstrates "specific and articulable facts showing that there are reasonable grounds to believe" the records "are relevant and material to an ongoing criminal investigation." 18 U.S.C. §§ 2703(d), 2711(3). The full statutory provision is set out in the Appendix, *infra*.

From Carpenter's primary service provider, MetroPCS, the Government obtained records from between December 2010 and April 2011, based on its understanding that nine robberies had occurred in that timeframe. The Government also requested seven days of cell-site records from Sprint, spanning the time around the robbery in Warren, Ohio. It obtained two days of records.

These records confirmed that Carpenter's cell phone was in the general vicinity of four of the nine robberies, including the one in Ohio, at the times those robberies occurred.

II

The first Clause of the Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The customary beginning point in any Fourth Amendment search case is whether the Government's actions constitute a "search" of the defendant's person, house, papers, or effects, within the meaning of the constitutional provision. If so, the next question is whether that search was reasonable.

Here the only question necessary to decide is whether the Government searched anything of Carpenter's when it used compulsory process to obtain cell-site records from Carpenter's cell phone service providers. This Court's decisions in *Miller* and *Smith* dictate that the answer is no, as every Court of Appeals to have considered the question has recognized. See *United States v. Thompson,* 866 F.3d

1149 (C.A.10 2017); *United States v. Graham,* 824 F.3d 421 (C.A.4 2016) (en banc); *United States v. Carpenter,* 819 F.3d 880 (C.A.6 2016); *United States v. Davis,* 785 F.3d 498 (C.A.11 2015) (en banc); *In re Application of U.S. for Historical Cell Site Data,* 724 F.3d 600 (C.A.5 2013).

A

Miller and *Smith* hold that individuals lack any protected Fourth Amendment interests ***2227** in records that are possessed, owned, and controlled only by a third party. In *Miller* federal law enforcement officers obtained four months of the defendant's banking records. 425 U.S., at 437–438, 96 S.Ct. 1619. And in *Smith* state police obtained records of the phone numbers dialed from the defendant's home phone. 442 U.S., at 737, 99 S.Ct. 2577. The Court held in both cases that the officers did not search anything belonging to the defendants within the meaning of the Fourth Amendment. The defendants could "assert neither ownership nor possession" of the records because the records were created, owned, and controlled by the companies. *Miller, supra,* at 440, 96 S.Ct. 1619; see *Smith, supra,* at 741, 99 S.Ct. 2577. And the defendants had no reasonable expectation of privacy in information they "voluntarily conveyed to the [companies] and exposed to their employees in the ordinary course of business." *Miller, supra,* at 442, 96 S.Ct. 1619; see *Smith,* 442 U.S., at 744, 99 S.Ct. 2577. Rather, the defendants "assumed the risk that the information would be divulged to police." *Id.,* at 745, 99 S.Ct. 2577.

Miller and *Smith* have been criticized as being based on too narrow a view of reasonable expectations of privacy. See, *e.g.,* Ashdown, The Fourth Amendment and the "Legitimate Expectation of Privacy," 34 Vand. L. Rev. 1289, 1313–1316 (1981). Those criticisms, however, are unwarranted. The principle established in *Miller* and *Smith* is correct for two reasons, the first relating to a defendant's attenuated interest in property owned by another, and the second relating to the safeguards inherent in the use of compulsory process.

First, *Miller* and *Smith* placed necessary limits on the ability of individuals to assert Fourth Amendment interests in property to which they lack a "requisite connection." *Minnesota v. Carter,* 525 U.S. 83, 99, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998) (KENNEDY, J., concurring). Fourth Amendment rights, after all, are personal. The Amendment protects "[t]he right of the people to be secure in *their* ... persons, houses, papers, and effects"—not the persons, houses, papers, and effects of others. (Emphasis added.)

The concept of reasonable expectations of privacy, first announced in *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), sought to look beyond the "arcane distinctions developed in property and tort law" in evaluating whether a person has a sufficient connection to the thing or place searched to assert Fourth Amendment interests in it. *Rakas v. Illinois,* 439 U.S. 128, 143, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). Yet "property concepts" are, nonetheless, fundamental "in determining the presence or absence of the privacy interests protected by that Amendment." *Id.,* at 143–144, n. 12, 99 S.Ct. 421. This is so for at least two reasons. First, as a matter of settled expectations from the law of property, individuals often have greater expectations of privacy in things and places that belong to them, not to others. And second, the Fourth Amendment's protections must remain tethered to the text of that Amendment, which, again, protects only a person's own "persons, houses, papers, and effects."

Katz did not abandon reliance on property-based concepts. The Court in *Katz* analogized the phone booth used in that case to a friend's apartment, a taxicab, and a hotel room. 389 U.S., at 352, 359, 88 S.Ct. 507. So when the defendant "shu[t] the door behind him" and "pa[id] the toll," *id.,* at 352, 88 S.Ct. 507, he had a temporary interest in the space and a legitimate expectation that others would not intrude, much like the interest a hotel guest has in a hotel room, ***2228** *Stoner v. California,* 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964), or an overnight guest has in a host's home, *Minnesota v. Olson,* 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990). The Government intruded on that space when it attached a listening device to the phone booth. *Katz,* 389 U.S., at 348, 88 S.Ct. 507. (And even so, the Court made it clear that the Government's search could have been reasonable had there been judicial approval on a case-specific basis, which, of course, did occur here. *Id.*, at 357–359, 88 S.Ct. 507.)

Miller and *Smith* set forth an important and necessary limitation on the *Katz* framework. They rest upon the commonsense principle that the absence of property law analogues can be dispositive of privacy expectations. The defendants in those cases could expect that the third-party businesses could use the records the companies collected, stored, and classified as their own for any number of business and commercial purposes. The businesses were not bailees or custodians of the records, with a duty to

hold the records for the defendants' use. The defendants could make no argument that the records were their own papers or effects. See *Miller, supra,* at 440, 96 S.Ct. 1619 ("the documents subpoenaed here are not respondent's 'private papers' "); *Smith, supra,* at 741, 99 S.Ct. 2577 ("petitioner obviously cannot claim that his 'property' was invaded"). The records were the business entities' records, plain and simple. The defendants had no reason to believe the records were owned or controlled by them and so could not assert a reasonable expectation of privacy in the records.

The second principle supporting *Miller* and *Smith* is the longstanding rule that the Government may use compulsory process to compel persons to disclose documents and other evidence within their possession and control. See *United States v. Nixon,* 418 U.S. 683, 709, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) (it is an "ancient proposition of law" that "the public has a right to every man's evidence" (internal quotation marks and alterations omitted)). A subpoena is different from a warrant in its force and intrusive power. While a warrant allows the Government to enter and seize and make the examination itself, a subpoena simply requires the person to whom it is directed to make the disclosure. A subpoena, moreover, provides the recipient the "opportunity to present objections" before complying, which further mitigates the intrusion. *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186, 195, 66 S.Ct. 494, 90 L.Ed. 614 (1946).

For those reasons this Court has held that a subpoena for records, although a "constructive" search subject to Fourth Amendment constraints, need not comply with the procedures applicable to warrants—even when challenged by the person to whom the records belong. *Id.,* at 202, 208, 66 S.Ct. 494. Rather, a subpoena complies with the Fourth Amendment's reasonableness requirement so long as it is " 'sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.' " *Donovan v. Lone Steer, Inc.,* 464 U.S. 408, 415, 104 S.Ct. 769, 78 L.Ed.2d 567 (1984). Persons with no meaningful interests in the records sought by a subpoena, like the defendants in *Miller* and *Smith,* have no rights to object to the records' disclosure—much less to assert that the Government must obtain a warrant to compel disclosure of the records. See *Miller,* 425 U.S., at 444–446, 96 S.Ct. 1619; *SEC v. Jerry T. O'Brien, Inc.,* 467 U.S. 735, 742–743, 104 S.Ct. 2720, 81 L.Ed.2d 615 (1984).

Based on *Miller* and *Smith* and the principles underlying those cases, it is well established that subpoenas may be used to ***2229** obtain a wide variety of records held by businesses, even when the records contain private information. See 2 W. LaFave, Search and Seizure § 4.13 (5th ed. 2012). Credit cards are a prime example. State and federal law enforcement, for instance, often subpoena credit card statements to develop probable cause to prosecute crimes ranging from drug trafficking and distribution to healthcare fraud to tax evasion. See *United States v. Phibbs,* 999 F.2d 1053 (C.A.6 1993) (drug distribution); *McCune v. DOJ,* 592 Fed.Appx. 287 (C.A.5 2014) (healthcare fraud); *United States v. Green,* 305 F.3d 422 (C.A.6 2002) (drug trafficking and tax evasion); see also 12 U.S.C. §§ 3402(4), 3407 (allowing the Government to subpoena financial records if "there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry"). Subpoenas also may be used to obtain vehicle registration records, hotel records, employment records, and records of utility usage, to name just a few other examples. See 1 LaFave, *supra,* § 2.7(c).

And law enforcement officers are not alone in their reliance on subpoenas to obtain business records for legitimate investigations. Subpoenas also are used for investigatory purposes by state and federal grand juries, see *United States v. Dionisio,* 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973), state and federal administrative agencies, see *Oklahoma Press, supra,* and state and federal legislative bodies, see *McPhaul v. United States,* 364 U.S. 372, 81 S.Ct. 138, 5 L.Ed.2d 136 (1960).

B

Carpenter does not question these traditional investigative practices. And he does not ask the Court to reconsider *Miller* and *Smith*. Carpenter argues only that, under *Miller* and *Smith,* the Government may not use compulsory process to acquire cell-site records from cell phone service providers.

There is no merit in this argument. Cell-site records, like all the examples just discussed, are created, kept, classified, owned, and controlled by cell phone service providers, which aggregate and sell this information to third parties. As in *Miller,* Carpenter can "assert neither ownership nor possession" of the records and has no control over them. 425 U.S., at 440, 96 S.Ct. 1619.

Carpenter argues that he has Fourth Amendment interests in the cell-site records because they are in essence his personal papers by operation of

statute imposes certain restrictions on how providers may use "customer proprietary network information"—a term that encompasses cell-site records. §§ 222(c), (h)(1)(A). The statute in general prohibits providers from disclosing personally identifiable cell-site records to private third parties. § 222(c)(1). And it allows customers to request cell-site records from the provider. § 222(c)(2).

Carpenter's argument is unpersuasive, however, for § 222 does not grant cell phone customers any meaningful interest in cell-site records. The statute's confidentiality protections may be overridden by the interests of the providers or the Government. The providers may disclose the records "to protect the[ir] rights or property" or to "initiate, render, bill, and collect for telecommunications services." §§ 222(d)(1), (2). They also may disclose the records "as required by law"—which, of course, is how they were disclosed in this case. § 222(c)(1). Nor does the statute provide customers any practical control over the records. Customers do not create the records; they have no say in whether or for how long the records are stored; and they cannot require the records to be modified or destroyed. Even ***2230** their right to request access to the records is limited, for the statute "does not preclude a carrier from being reimbursed by the customers ... for the costs associated with making such disclosures." H.R.Rep. No. 104–204, pt. 1, p. 90 (1995). So in every legal and practical sense the "network information" regulated by § 222 is, under that statute, "proprietary" to the service providers, not Carpenter. The Court does not argue otherwise.

Because Carpenter lacks a requisite connection to the cell-site records, he also may not claim a reasonable expectation of privacy in them. He could expect that a third party—the cell phone service provider—could use the information it collected, stored, and classified as its own for a variety of business and commercial purposes.

All this is not to say that *Miller* and *Smith* are without limits. *Miller* and *Smith* may not apply when the Government obtains the modern-day equivalents of an individual's own "papers" or "effects," even when those papers or effects are held by a third party. See *Ex parte Jackson,* 96 U.S. 727, 733, 24 L.Ed. 877 (1878) (letters held by mail carrier); *United States v. Warshak,* 631 F.3d 266, 283–288 (C.A.6 2010) (e-mails held by Internet service provider). As already discussed, however, this case does not involve property or a bailment of that sort. Here the Government's acquisition of cell-site records falls within the heartland of *Miller* and *Smith*.

In fact, Carpenter's Fourth Amendment objection is even weaker than those of the defendants in *Miller* and *Smith*. Here the Government did not use a mere subpoena to obtain the cell-site records. It acquired the records only after it proved to a Magistrate Judge reasonable grounds to believe that the records were relevant and material to an ongoing criminal investigation. See 18 U.S.C. § 2703(d). So even if § 222 gave Carpenter some attenuated interest in the records, the Government's conduct here would be reasonable under the standards governing subpoenas. See *Donovan,* 464 U.S., at 415, 104 S.Ct. 769.

Under *Miller* and *Smith,* then, a search of the sort that requires a warrant simply did not occur when the Government used court-approved compulsory process, based on a finding of reasonable necessity, to compel a cell phone service provider, as owner, to disclose cell-site records.

III

The Court rejects a straightforward application of *Miller* and *Smith*. It concludes instead that applying those cases to cell-site records would work a "significant extension" of the principles underlying them, *ante,* at 2219, and holds that the acquisition of more than six days of cell-site records constitutes a search, *ante,* at 2217, n. 3.

In my respectful view the majority opinion misreads this Court's precedents, old and recent, and transforms *Miller* and *Smith* into an unprincipled and unworkable doctrine. The Court's newly conceived constitutional standard will cause confusion; will undermine traditional and important law enforcement practices; and will allow the cell phone to become a protected medium that dangerous persons will use to commit serious crimes.

A

The Court errs at the outset by attempting to sidestep *Miller* and *Smith*. The Court frames this case as following instead from *United States v. Knotts,* 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983), and *United States v. Jones,* 565 U.S. 400, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012). Those cases, the Court suggests, establish that ***2231** "individuals have a reasonable expectation of

privacy in the whole of their physical movements." *Ante,* at 2214 - 2216, 2217.

Knotts held just the opposite: "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., at 281, 103 S.Ct. 1081. True, the Court in *Knotts* also suggested that "different constitutional principles may be applicable" to "dragnet-type law enforcement practices." *Id.,* at 284, 103 S.Ct. 1081. But by dragnet practices the Court was referring to " 'twenty-four hour surveillance of any citizen of this country ... without judicial knowledge or supervision.' " *Id.,* at 283, 103 S.Ct. 1081.

Those "different constitutional principles" mentioned in *Knotts,* whatever they may be, do not apply in this case. Here the Stored Communications Act requires a neutral judicial officer to confirm in each case that the Government has "reasonable grounds to believe" the cell-site records "are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). This judicial check mitigates the Court's concerns about " 'a too permeating police surveillance.' " *Ante,* at 2214 (quoting *United States v. Di Re,* 332 U.S. 581, 595, 68 S.Ct. 222, 92 L.Ed. 210 (1948)). Here, even more so than in *Knotts,* "reality hardly suggests abuse." 460 U.S., at 284, 103 S.Ct. 1081.

The Court's reliance on *Jones* fares no better. In *Jones* the Government installed a GPS tracking device on the defendant's automobile. The Court held the Government searched the automobile because it "physically occupied private property [of the defendant] for the purpose of obtaining information." 565 U.S., at 404, 132 S.Ct. 945. So in *Jones* it was "not necessary to inquire about the target's expectation of privacy in his vehicle's movements." *Grady v. North Carolina,* 575 U.S. ——, ——, 135 S.Ct. 1368, 1370, 191 L.Ed.2d 459 (2015) (*per curiam*).

Despite that clear delineation of the Court's holding in *Jones,* the Court today declares that *Jones* applied the " 'different constitutional principles' " alluded to in *Knotts* to establish that an individual has an expectation of privacy in the sum of his whereabouts. *Ante,* at 2215, 2217 - 2218. For that proposition the majority relies on the two concurring opinions in *Jones,* one of which stated that "longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy." 565 U.S., at 430, 132 S.Ct. 945 (ALITO, J., concurring). But *Jones* involved direct governmental surveillance of a defendant's automobile without judicial authorization—specifically, GPS surveillance accurate within 50 to 100 feet. *Id.,* at 402–403, 132 S.Ct. 945. Even assuming that the different constitutional principles mentioned in *Knotts* would apply in a case like *Jones*—a proposition the Court was careful not to announce in *Jones, supra,* at 412–413, 132 S.Ct. 945—those principles are inapplicable here. Cases like this one, where the Government uses court-approved compulsory process to obtain records owned and controlled by a third party, are governed by the two majority opinions in *Miller* and *Smith*.

B

The Court continues its analysis by misinterpreting *Miller* and *Smith,* and then it reaches the wrong outcome on these facts even under its flawed standard.

The Court appears, in my respectful view, to read *Miller* and *Smith* to establish a balancing test. For each "qualitatively different category" of information, the Court suggests, the privacy interests at stake must be weighed against the fact that the information has been disclosed to a third party. See ***2232** *ante,* at 2216, 2219 - 2220. When the privacy interests are weighty enough to "overcome" the third-party disclosure, the Fourth Amendment's protections apply. See *ante,* at 2220.

That is an untenable reading of *Miller* and *Smith*. As already discussed, the fact that information was relinquished to a third party was the entire basis for concluding that the defendants in those cases lacked a reasonable expectation of privacy. *Miller* and *Smith* do not establish the kind of category-by-category balancing the Court today prescribes.

But suppose the Court were correct to say that *Miller* and *Smith* rest on so imprecise a foundation. Still the Court errs, in my submission, when it concludes that cell-site records implicate greater privacy interests—and thus deserve greater Fourth Amendment protection—than financial records and telephone records.

Indeed, the opposite is true. A person's movements are not particularly private. As the Court recognized in *Knotts,* when the defendant there "traveled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination."

281–282, 103 S.Ct. 1081. Today expectations of privacy in one's location are, if anything, even less reasonable than when the Court decided *Knotts* over 30 years ago. Millions of Americans choose to share their location on a daily basis, whether by using a variety of location-based services on their phones, or by sharing their location with friends and the public at large via social media.

And cell-site records, as already discussed, disclose a person's location only in a general area. The records at issue here, for example, revealed Carpenter's location within an area covering between around a dozen and several hundred city blocks. "Areas of this scale might encompass bridal stores and Bass Pro Shops, gay bars and straight ones, a Methodist church and the local mosque." 819 F.3d 880, 889 (C.A.6 2016). These records could not reveal where Carpenter lives and works, much less his " 'familial, political, professional, religious, and sexual associations.' " *Ante,* at 2217 (quoting *Jones, supra,* at 415, 132 S.Ct. 945 (SOTOMAYOR, J., concurring)).

By contrast, financial records and telephone records do " 'revea[l] ... personal affairs, opinions, habits and associations.' " *Miller,* 425 U.S., at 451, 96 S.Ct. 1619 (Brennan, J., dissenting); see *Smith,* 442 U.S., at 751, 99 S.Ct. 2577 (Marshall, J., dissenting). What persons purchase and to whom they talk might disclose how much money they make; the political and religious organizations to which they donate; whether they have visited a psychiatrist, plastic surgeon, abortion clinic, or AIDS treatment center; whether they go to gay bars or straight ones; and who are their closest friends and family members. The troves of intimate information the Government can and does obtain using financial records and telephone records dwarfs what can be gathered from cell-site records.

Still, the Court maintains, cell-site records are "unique" because they are "comprehensive" in their reach; allow for retrospective collection; are "easy, cheap, and efficient compared to traditional investigative tools"; and are not exposed to cell phone service providers in a meaningfully voluntary manner. *Ante,* at 2216 - 2218, 2220, 2223. But many other kinds of business records can be so described. Financial records are of vast scope. Banks and credit card companies keep a comprehensive account of almost every transaction an individual makes on a daily basis. "With ***2233** just the click of a button, the Government can access each [company's] deep repository of historical [financial] information at practically no expense." *Ante,* at 2218. And the decision whether to transact with banks and credit card companies is no more or less voluntary than the decision whether to use a cell phone. Today, just as when *Miller* was decided, " 'it is impossible to participate in the economic life of contemporary society without maintaining a bank account.' " 425 U.S., at 451, 96 S.Ct. 1619 (BRENNAN, J., dissenting). But this Court, nevertheless, has held that individuals do not have a reasonable expectation of privacy in financial records.

Perhaps recognizing the difficulty of drawing the constitutional line between cell-site records and financial and telephonic records, the Court posits that the accuracy of cell-site records "is rapidly approaching GPS-level precision." *Ante,* at 2219. That is certainly plausible in the era of cyber technology, yet the privacy interests associated with location information, which is often disclosed to the public at large, still would not outweigh the privacy interests implicated by financial and telephonic records.

Perhaps more important, those future developments are no basis upon which to resolve this case. In general, the Court "risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." *Ontario v. Quon,* 560 U.S. 746, 759, 130 S.Ct. 2619, 177 L.Ed.2d 216 (2010). That judicial caution, prudent in most cases, is imperative in this one.

Technological changes involving cell phones have complex effects on crime and law enforcement. Cell phones make crimes easier to coordinate and conceal, while also providing the Government with new investigative tools that may have the potential to upset traditional privacy expectations. See Kerr, An Equilibrium–Adjustment Theory of the Fourth Amendment, 125 Harv. L. Rev 476, 512–517 (2011). How those competing effects balance against each other, and how property norms and expectations of privacy form around new technology, often will be difficult to determine during periods of rapid technological change. In those instances, and where the governing legal standard is one of reasonableness, it is wise to defer to legislative judgments like the one embodied in § 2703(d) of the Stored Communications Act. See *Jones,* 565 U.S., at 430, 132 S.Ct. 945 (ALITO, J., concurring). In § 2703(d) Congress weighed the privacy interests at stake and imposed a judicial check to prevent executive overreach. The Court should be wary of upsetting that legislative balance and erecting constitutional barriers that foreclose further legislative instructions. See *Quon, supra,* at 759, 130 S.Ct. 2619. The last thing the Court should do is incorporate an arbitrary and outside limit—in this case six days' worth of cell-site records—and use it as the foundation for a new constitutional framework. The Court's decision runs roughshod over the mechanism Congress put in place to govern the acquisition of cell-site

records and closes off further legislative debate on these issues.

C

The Court says its decision is a "narrow one." *Ante,* at 2220. But its reinterpretation of *Miller* and *Smith* will have dramatic consequences for law enforcement, courts, and society as a whole.

Most immediately, the Court's holding that the Government must get a warrant to obtain more than six days of cell-site records limits the effectiveness of an important investigative tool for solving serious crimes. As this case demonstrates, cell-site records are uniquely suited to help ***2234** the Government develop probable cause to apprehend some of the Nation's most dangerous criminals: serial killers, rapists, arsonists, robbers, and so forth. See also, *e.g., Davis,* 785 F.3d, at 500–501 (armed robbers); Brief for Alabama et al. as *Amici Curiae* 21–22 (serial killer). These records often are indispensable at the initial stages of investigations when the Government lacks the evidence necessary to obtain a warrant. See *United States v. Pembrook,* 876 F.3d 812, 816–819 (C.A.6 2017). And the long-term nature of many serious crimes, including serial crimes and terrorism offenses, can necessitate the use of significantly more than six days of cell-site records. The Court's arbitrary 6–day cutoff has the perverse effect of nullifying Congress' reasonable framework for obtaining cell-site records in some of the most serious criminal investigations.

The Court's decision also will have ramifications that extend beyond cell-site records to other kinds of information held by third parties, yet the Court fails "to provide clear guidance to law enforcement" and courts on key issues raised by its reinterpretation of *Miller* and *Smith*. *Riley v. California,* 573 U.S. ——, ——, 134 S.Ct. 2473, 2491, 189 L.Ed.2d 430 (2014).

First, the Court's holding is premised on cell-site records being a "distinct category of information" from other business records. *Ante,* at 2219. But the Court does not explain what makes something a distinct category of information. Whether credit card records are distinct from bank records; whether payment records from digital wallet applications are distinct from either; whether the electronic bank records available today are distinct from the paper and microfilm records at issue in *Miller*; or whether cell-phone call records are distinct from the home-phone call records at issue in *Smith,* are just a few of the difficult questions that require answers under the Court's novel conception of *Miller* and *Smith*.

Second, the majority opinion gives courts and law enforcement officers no indication how to determine whether any particular category of information falls on the financial-records side or the cell-site-records side of its newly conceived constitutional line. The Court's multifactor analysis—considering intimacy, comprehensiveness, expense, retrospectivity, and voluntariness—puts the law on a new and unstable foundation.

Third, even if a distinct category of information is deemed to be more like cell-site records than financial records, courts and law enforcement officers will have to guess how much of that information can be requested before a warrant is required. The Court suggests that less than seven days of location information may not require a warrant. See *ante,* at 2217, n. 3; see also *ante,* at 2220 - 2221 (expressing no opinion on "real-time CSLI," tower dumps, and security-camera footage). But the Court does not explain why that is so, and nothing in its opinion even alludes to the considerations that should determine whether greater or lesser thresholds should apply to information like IP addresses or website browsing history.

Fourth, by invalidating the Government's use of court-approved compulsory process in this case, the Court calls into question the subpoena practices of federal and state grand juries, legislatures, and other investigative bodies, as Justice ALITO's opinion explains. See *post,* at 2247 - 2257 (dissenting opinion). Yet the Court fails even to mention the serious consequences this will have for the proper administration of justice.

In short, the Court's new and uncharted course will inhibit law enforcement and "keep defendants and judges guessing for years to come." ***2235** *Riley,* 573 U.S., at ——, 134 S.Ct., at 2493 (internal quotation marks omitted).

* * *

This case should be resolved by interpreting accepted property principles as the baseline for reasonable expectations of privacy. Here the Government did not search anything over which Carpenter could assert ownership or control. Instead, it issued a court-authorized subpoena to a third party to disclose information it alone owned and controlled. That should suffice to resolve this case.

Having concluded, however, that the Government searched Carpenter when it obtained cell-site records from his cell phone service providers, the proper resolution of this case should have been to remand for the Court of Appeals to determine in the first instance whether the search was reasonable. Most courts of appeals, believing themselves bound by *Miller* and *Smith,* have not grappled with this question. And the Court's reflexive imposition of the warrant requirement obscures important and difficult issues, such as the scope of Congress' power to authorize the Government to collect new forms of information using processes that deviate from traditional warrant procedures, and how the Fourth Amendment's reasonableness requirement should apply when the Government uses compulsory process instead of engaging in an actual, physical search.

These reasons all lead to this respectful dissent.

APPENDIX

"**§ 2703. Required disclosure of customer communications or records**
"(d) REQUIREMENTS FOR COURT ORDER.—A court order for disclosure under subsection (b) or (c) may be issued by any court that is a court of competent jurisdiction and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation. In the case of a State governmental authority, such a court order shall not issue if prohibited by the law of such State. A court issuing an order pursuant to this section, on a motion made promptly by the service provider, may quash or modify such order, if the information or records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider."

Justice THOMAS, dissenting.

This case should not turn on "whether" a search occurred. *Ante,* at 2223 - 2224. It should turn, instead, on *whose* property was searched. The Fourth Amendment guarantees individuals the right to be secure from unreasonable searches of "*their* persons, houses, papers, and effects." (Emphasis added.) In other words, "*each* person has the right to be secure against unreasonable searches ... in *his own* person, house, papers, and effects." *Minnesota v. Carter,* 525 U.S. 83, 92, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998) (Scalia, J., concurring). By obtaining the cell-site records of MetroPCS and Sprint, the Government did not search Carpenter's property. He did not create the records, he does not maintain them, he cannot control them, and he cannot destroy them. Neither the terms of his contracts nor any provision of law makes the records his. The records belong to MetroPCS and Sprint.

The Court concludes that, although the records are not Carpenter's, the Government must get a warrant because Carpenter had a reasonable "expectation of privacy" ***2236** in the location information that they reveal. *Ante,* at 2216 - 2217. I agree with Justice KENNEDY, Justice ALITO, Justice GORSUCH, and every Court of Appeals to consider the question that this is not the best reading of our precedents.

The more fundamental problem with the Court's opinion, however, is its use of the "reasonable expectation of privacy" test, which was first articulated by Justice Harlan in *Katz v. United States,* 389 U.S. 347, 360–361, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (concurring opinion). The *Katz* test has no basis in the text or history of the Fourth Amendment. And, it invites courts to make judgments about policy, not law. Until we confront the problems with this test, *Katz* will continue to distort Fourth Amendment jurisprudence. I respectfully dissent.

I

Katz was the culmination of a series of decisions applying the Fourth Amendment to electronic eavesdropping. The first such decision was *Olmstead v. United States,* 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928), where federal officers had intercepted the defendants' conversations by tapping telephone lines near their homes. *Id.,* at 456–457, 48 S.Ct. 564. In an opinion by Chief Justice Taft, the Court concluded that this wiretap did not violate the Fourth Amendment. No "search" occurred, according to the Court, because the officers did not physically enter the defendants' homes. *Id.,* at 464–466, 48 S.Ct. 564. And neither the telephone lines

nor the defendants' intangible conversations qualified as "persons, houses, papers, [or] effects" within the meaning of the Fourth Amendment. *Ibid.*[1] In the ensuing decades, this Court adhered to *Olmstead* and rejected Fourth Amendment challenges to various methods of electronic surveillance. See *On Lee v. United States,* 343 U.S. 747, 749–753, 72 S.Ct. 967, 96 L.Ed. 1270 (1952) (use of microphone to overhear conversations with confidential informant); *Goldman v. United States,* 316 U.S. 129, 131–132, 135–136, 62 S.Ct. 993, 86 L.Ed. 1322 (1942) (use of detectaphone to hear conversations in office next door).

In the 1960's, however, the Court began to retreat from *Olmstead*. In *Silverman v. United States,* 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961), for example, federal officers had eavesdropped on the defendants by driving a "spike mike" several inches into the house they were occupying. *Id.,* at 506–507, 81 S.Ct. 679. This was a "search," the Court held, because the "unauthorized physical penetration into the premises" was an "actual intrusion into a constitutionally protected area." *Id.,* at 509, 512, 81 S.Ct. 679. The Court did not mention *Olmstead* 's other holding that intangible conversations are not "persons, houses, papers, [or] effects." That omission was significant. The Court confirmed two years later that "[i]t follows from [*Silverman*] that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects.' " *Wong Sun v. United States,* 371 U.S. 471, 485, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); accord, ***2237** *Berger v. New York,* 388 U.S. 41, 51, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967).

In *Katz,* the Court rejected *Olmstead* 's remaining holding—that eavesdropping is not a search absent a physical intrusion into a constitutionally protected area. The federal officers in *Katz* had intercepted the defendant's conversations by attaching an electronic device to the outside of a public telephone booth. 389 U.S., at 348, 88 S.Ct. 507. The Court concluded that this was a "search" because the officers "violated the privacy upon which [the defendant] justifiably relied while using the telephone booth." *Id.,* at 353, 88 S.Ct. 507. Although the device did not physically penetrate the booth, the Court overruled *Olmstead* and held that "the reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion." 389 U.S., at 353, 88 S.Ct. 507. The Court did not explain what should replace *Olmstead* 's physical-intrusion requirement. It simply asserted that "the Fourth Amendment protects people, not places" and "what [a person] seeks to preserve as private ... may be constitutionally protected." 389 U.S., at 351, 88 S.Ct. 507.

Justice Harlan's concurrence in *Katz* attempted to articulate the standard that was missing from the majority opinion. While Justice Harlan agreed that " 'the Fourth Amendment protects people, not places,' " he stressed that "[t]he question ... is what protection it affords to those people," and "the answer ... requires reference to a 'place.' " *Id.,* at 361, 88 S.Ct. 507. Justice Harlan identified a "twofold requirement" to determine when the protections of the Fourth Amendment apply: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' " *Ibid.*

Justice Harlan did not cite anything for this "expectation of privacy" test, and the parties did not discuss it in their briefs. The test appears to have been presented for the first time at oral argument by one of the defendant's lawyers. See Winn, *Katz* and the Origins of the "Reasonable Expectation of Privacy" Test, 40 McGeorge L. Rev. 1, 9–10 (2009). The lawyer, a recent law-school graduate, apparently had an "[e]piphany" while preparing for oral argument. Schneider, *Katz v. United States*: The Untold Story, 40 McGeorge L. Rev. 13, 18 (2009). He conjectured that, like the "reasonable person" test from his Torts class, the Fourth Amendment should turn on "whether a reasonable person ... could have expected his communication to be private." *Id.,* at 19. The lawyer presented his new theory to the Court at oral argument. See, *e.g.,* Tr. of Oral Arg. in *Katz v. United States,* O.T. 1967, No. 35, p. 5 (proposing a test of "whether or not, objectively speaking, the communication was intended to be private"); *id.,* at 11 ("We propose a test using a way that's not too dissimilar from the tort 'reasonable man' test"). After some questioning from the Justices, the lawyer conceded that his test should also require individuals to subjectively expect privacy. See *id.,* at 12. With that modification, Justice Harlan seemed to accept the lawyer's test almost verbatim in his concurrence.

Although the majority opinion in *Katz* had little practical significance after Congress enacted the Omnibus Crime Control and Safe Streets Act of 1968, Justice Harlan's concurrence profoundly changed our Fourth Amendment jurisprudence. It took only one year for the full Court to adopt his two-pronged test. See *Terry v. Ohio,* 392 U.S. 1, 10, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). And by 1979, the Court was describing Justice Harlan's test as the "lodestar" for determining whether ***2238** a "search" had occurred. *Smith v. Maryland,* 442 U.S. 735, 739, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979). Over time, the Court minimized the subjective prong of Justice Harlan's test. See Kerr, *Katz* Has Only One Step: The Irrelevance of Subjective Expectations, 82 U. Chi. L. Rev. 113 (2015).

That left the objective prong—the "reasonable expectation of privacy" test that the Court still applies today. See *ante,* at 2213 - 2214; *United States v. Jones,* 565 U.S. 400, 406, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012).

II

Under the *Katz* test, a "search" occurs whenever "government officers violate a person's 'reasonable expectation of privacy.' " *Jones, supra,* at 406, 132 S.Ct. 945. The most glaring problem with this test is that it has "no plausible foundation in the text of the Fourth Amendment." *Carter,* 525 U.S., at 97, 119 S.Ct. 469 (opinion of Scalia, J.). The Fourth Amendment, as relevant here, protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches." By defining "search" to mean "any violation of a reasonable expectation of privacy," the *Katz* test misconstrues virtually every one of these words.

A

The *Katz* test distorts the original meaning of "searc[h]"—the word in the Fourth Amendment that it purports to define, see *ante,* at 2213 - 2214; *Smith, supra*. Under the *Katz* test, the government conducts a search anytime it violates someone's "reasonable expectation of privacy." That is not a normal definition of the word "search."

At the founding, "search" did not mean a violation of someone's reasonable expectation of privacy. The word was probably not a term of art, as it does not appear in legal dictionaries from the era. And its ordinary meaning was the same as it is today: " '[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to *search* the house for a book; to *search* the wood for a thief.' " *Kyllo v. United States,* 533 U.S. 27, 32, n. 1, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001) (quoting N. Webster, An American Dictionary of the English Language 66 (1828) (reprint 6th ed. 1989)); accord, 2 S. Johnson, A Dictionary of the English Language (5th ed. 1773) ("Inquiry by looking into every suspected place"); N. Bailey, An Universal Etymological English Dictionary (22d ed. 1770) ("a seeking after, a looking for, & c."); 2 J. Ash, The New and Complete Dictionary of the English Language (2d ed. 1795) ("An enquiry, an examination, the act of seeking, an enquiry by looking into every suspected place; a quest; a pursuit"); T. Sheridan, A Complete Dictionary of the English Language (6th ed. 1796) (similar). The word "search" was not associated with "reasonable expectation of privacy" until Justice Harlan coined that phrase in 1967. The phrase "expectation(s) of privacy" does not appear in the pre-*Katz* federal or state case reporters, the papers of prominent Founders,[2] early congressional documents and debates,[3] collections of early American English texts,[4] or early American newspapers. ***2239** [5]

B

The *Katz* test strays even further from the text by focusing on the concept of "privacy." The word "privacy" does not appear in the Fourth Amendment (or anywhere else in the Constitution for that matter). Instead, the Fourth Amendment references "[t]he right of the people to be secure." It then qualifies that right by limiting it to "persons" and three specific types of property: "houses, papers, and effects." By connecting the right to be secure to these four specific objects, "[t]he text of the Fourth Amendment reflects its close connection to property." *Jones, supra,* at 405, 132 S.Ct. 945. "[P]rivacy," by contrast, "was not part of the political vocabulary of the [founding]. Instead, liberty and privacy rights were understood largely in terms of property rights." Cloud, Property Is Privacy: Locke and Brandeis in the Twenty–First Century, 55 Am. Crim. L. Rev. 37, 42 (2018).

Those who ratified the Fourth Amendment were quite familiar with the notion of security in property. Security in property was a prominent concept in English law. See, *e.g.,* 3 W. Blackstone, Commentaries on the Laws of England 288 (1768) ("[E]very man's house is looked upon by the law to be his castle"); 3 E. Coke, Institutes of Laws of England 162 (6th ed. 1680) ("[F]or a man[']s house is his Castle, & domus sua cuique est tutissimum refugium [each man's home is his safest refuge]"). The political philosophy of John Locke, moreover, "permeated the 18th-century political scene in America." *Obergefell v. Hodges,* 576 U.S. ——, ——, 135 S.Ct. 2584, 2634,

192 L.Ed.2d 609 (2015) (THOMAS, J., dissenting). For Locke, every individual had a property right "in his own person" and in anything he "removed from the common state [of] Nature" and "mixed his labour with." Second Treatise of Civil Government § 27 (1690). Because property is "very unsecure" in the state of nature, § 123, individuals form governments to obtain "a secure enjoyment of their properties." § 95. Once a government is formed, however, it cannot be given "a power to destroy that which every one designs to secure"; it cannot legitimately "endeavour to take away, and destroy the property of the people," or exercise "an absolute power over [their] lives, liberties, and estates." § 222.

The concept of security in property recognized by Locke and the English legal tradition appeared throughout the materials that inspired the Fourth Amendment. In *Entick v. Carrington,* 19 How. St. Tr. 1029 (C.P. 1765)—a heralded decision that the founding generation considered "the true and ultimate expression of constitutional law," *Boyd v. United States,* 116 U.S. 616, 626, 6 S.Ct. 524, 29 L.Ed. 746 (1886)—Lord Camden explained that "[t]he great end, for which men entered into society, was to secure their property." 19 How. St. Tr., at 1066. The American colonists echoed this reasoning in their "widespread hostility" to the Crown's writs of assistance[6]—a practice that inspired the Revolution and became "[t]he driving force behind the adoption of the [Fourth] Amendment." ***2240** *United States v. Verdugo–Urquidez,* 494 U.S. 259, 266, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990). Prominent colonists decried the writs as destroying " 'domestic security' " by permitting broad searches of homes. M. Smith, The Writs of Assistance Case 475 (1978) (quoting a 1772 Boston town meeting); see also *id.,* at 562 (complaining that " 'every householder in this province, will necessarily become *less secure* than he was before this writ' " (quoting a 1762 article in the Boston Gazette)); *id.,* at 493 (complaining that the writs were " 'expressly contrary to the common law, which ever regarded a man's *house* as his castle, or a place of perfect security' " (quoting a 1768 letter from John Dickinson)). John Otis, who argued the famous Writs of Assistance case, contended that the writs violated " 'the fundamental Principl[e] of Law' " that " '[a] Man who is quiet, is as secure in his House, as a Prince in his Castle.' " *Id.,* at 339 (quoting John Adam's notes). John Adams attended Otis' argument and later drafted Article XIV of the Massachusetts Constitution,[7] which served as a model for the Fourth Amendment. See Clancy, The Framers' Intent: John Adams, His Era, and the Fourth Amendment, 86 Ind. L.J. 979, 982 (2011); Donahue, The Original Fourth Amendment, 83 U. Chi. L. Rev. 1181, 1269 (2016) (Donahue). Adams agreed that "[p]roperty must be secured, or liberty cannot exist." Discourse on Davila, in 6 The Works of John Adams 280 (C. Adams ed. 1851).

Of course, the founding generation understood that, by securing their property, the Fourth Amendment would often protect their privacy as well. See, *e.g., Boyd, supra,* at 630, 6 S.Ct. 524 (explaining that searches of houses invade "the privacies of life"); *Wilkes v. Wood,* 19 How. St. Tr. 1153, 1154 (C.P. 1763) (argument of counsel contending that seizures of papers implicate "our most private concerns"). But the Fourth Amendment's attendant protection of privacy does not justify *Katz* 's elevation of privacy as the *sine qua non* of the Amendment. See T. Clancy, The Fourth Amendment: Its History and Interpretation § 3.4.4, p. 78 (2008) ("[The *Katz* test] confuse[s] the reasons for exercising the protected right with the right itself. A purpose of exercising one's Fourth Amendment rights might be the desire for privacy, but the individual's motivation is not the right protected"); cf. *United States v. Gonzalez–Lopez,* 548 U.S. 140, 145, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) (rejecting "a line of reasoning that 'abstracts from the right to its purposes, and then eliminates the right' "). As the majority opinion in *Katz* recognized, the Fourth Amendment "cannot be translated into a general constitutional 'right to privacy,' " as its protections "often have nothing to do with privacy at all." 389 U.S., at 350, 88 S.Ct. 507. Justice Harlan's focus on privacy in his concurrence—an opinion that was issued between *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), and *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973)—reflects privacy's status as the organizing constitutional idea of the 1960's and 1970's. The organizing constitutional idea of the founding era, by contrast, was property.

***2241** C

In shifting the focus of the Fourth Amendment from property to privacy, the *Katz* test also reads the words "persons, houses, papers, and effects" out of the text. At its broadest formulation, the *Katz* test would find a search "*wherever* an individual may harbor a reasonable 'expectation of privacy.' " *Terry,* 392 U.S., at 9, 88 S.Ct. 1868 (emphasis added). The Court today, for example, does not ask whether cell-site location records are "persons, houses, papers, [or] effects" within the meaning of the Fourth Amendment.[8] Yet "persons, houses, papers, and effects" cannot mean "anywhere" or "anything." *Katz*

's catchphrase that "the Fourth Amendment protects people, not places," is not a serious attempt to reconcile the constitutional text. See *Carter,* 525 U.S., at 98, n. 3, 119 S.Ct. 469 (opinion of Scalia, J.). The Fourth Amendment obviously protects people; "[t]he question ... is what protection it affords to those people." *Katz,* 389 U.S., at 361, 88 S.Ct. 507 (Harlan, J., concurring). The Founders decided to protect the people from unreasonable searches and seizures of four specific things—persons, houses, papers, and effects. They identified those four categories as "the objects of privacy protection to which the *Constitution* would extend, leaving further expansion to the good judgment ... of the people through their representatives in the legislature." *Carter, supra,* at 97–98, 119 S.Ct. 469 (opinion of Scalia, J.).

This limiting language was important to the founders. Madison's first draft of the Fourth Amendment used a different phrase: "their persons, their houses, their papers, and their *other property*." 1 Annals of Cong. 452 (1789) (emphasis added). In one of the few changes made to Madison's draft, the House Committee of Eleven changed "other property" to "effects." See House Committee of Eleven Report (July 28, 1789), in N. Cogan, The Complete Bill of Rights 334 (2d ed. 2015). This change might have narrowed the Fourth Amendment by clarifying that it does not protect real property (other than houses). See *Oliver v. United States,* 466 U.S. 170, 177, and n. 7, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984); Davies, Recovering the Original Fourth Amendment, 98 Mich. L. Rev. 547, 709–714 (1999) (Davies). Or the change might have broadened the Fourth Amendment by clarifying that it protects commercial goods, not just personal possessions. See Donahue 1301. Or it might have done both. Whatever its ultimate effect, the change reveals that the Founders understood the phrase "persons, houses, papers, and effects" to be an important measure of the Fourth Amendment's overall scope. See Davies 710. The *Katz* test, however, displaces and renders that phrase entirely "superfluous." *Jones,* 565 U.S., at 405, 132 S.Ct. 945.

D

"[P]ersons, houses, papers, and effects" are not the only words that the *Katz* test reads out of the Fourth Amendment. The Fourth Amendment specifies that the people have a right to be secure from unreasonable searches of "their" persons, houses, papers, and effects. Although phrased in the plural, "[t]he obvious meaning of ['their'] is that *each* person has the right to be secure against unreasonable searches ***2242** and seizures in *his own* person, house, papers, and effects." *Carter, supra,* at 92, 119 S.Ct. 469 (opinion of Scalia, J.); see also *District of Columbia v. Heller,* 554 U.S. 570, 579, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) (explaining that the Constitution uses the plural phrase "the people" to "refer to individual rights, not 'collective' rights"). Stated differently, the word "their" means, at the very least, that individuals do not have Fourth Amendment rights in *someone else's* property. See *Carter, supra,* at 92–94, 119 S.Ct. 469 (opinion of Scalia, J.). Yet, under the *Katz* test, individuals can have a reasonable expectation of privacy in another person's property. See, *e.g., Carter,* 525 U.S., at 89, 119 S.Ct. 469 (majority opinion) ("[A] person may have a legitimate expectation of privacy in the house of someone else"). Until today, our precedents have not acknowledged that individuals can claim a reasonable expectation of privacy in someone else's business records. See *ante,* at 2224 (KENNEDY, J., dissenting). But the Court erases that line in this case, at least for cell-site location records. In doing so, it confirms that the *Katz* test does not necessarily require an individual to prove that the government searched *his* person, house, paper, or effect.

Carpenter attempts to argue that the cell-site records are, in fact, his "papers," see Brief for Petitioner 32–35; Reply Brief 14–15, but his arguments are unpersuasive, see *ante,* at 2229 - 2230 (opinion of KENNEDY, J.); *post,* at 2257 - 2259 (ALITO, J., dissenting). Carpenter stipulated below that the cell-site records are the business records of Sprint and MetroPCS. See App. 51. He cites no property law in his briefs to this Court, and he does not explain how he has a property right in the companies' records under the law of any jurisdiction at any point in American history. If someone stole these records from Sprint or MetroPCS, Carpenter does not argue that he could recover in a traditional tort action. Nor do his contracts with Sprint and MetroPCS make the records his, even though such provisions could exist in the marketplace. Cf., *e.g.,* Google Terms of Service, https://policies.google.com/terms ("Some of our Services allow you to upload, submit, store, send or receive content. You retain ownership of any intellectual property rights that you hold in that content. In short, what belongs to you stays yours").

Instead of property, tort, or contract law, Carpenter relies on the federal Telecommunications Act of 1996 to demonstrate that the cell site records are his papers. The Telecommunications Act generally bars cell-phone companies from disclosing customers' cell site location

information to the public. See 47 U.S.C. § 222(c). This is sufficient to make the records his, Carpenter argues, because the Fourth Amendment merely requires him to identify a source of "positive law" that "protects against access by the public without consent." Brief for Petitioner 32–33 (citing Baude & Stern, The Positive Law Model of the Fourth Amendment, 129 Harv. L. Rev. 1821, 1825–1826 (2016); emphasis deleted).

Carpenter is mistaken. To come within the text of the Fourth Amendment, Carpenter must prove that the cell-site records are *his* ; positive law is potentially relevant only insofar as it answers that question. The text of the Fourth Amendment cannot plausibly be read to mean "any violation of positive law" any more than it can plausibly be read to mean "any violation of a reasonable expectation of privacy."

Thus, the Telecommunications Act is insufficient because it does not give Carpenter a property right in the cell-site records. Section 222, titled "Privacy of customer ***2243** information," protects customers' privacy by preventing cell-phone companies from disclosing sensitive information about them. The statute creates a "duty to protect the confidentiality" of information relating to customers, § 222(a), and creates "[p]rivacy requirements" that limit the disclosure of that information, § 222(c)(1). Nothing in the text pre-empts state property law or gives customers a property interest in the companies' business records (assuming Congress even has that authority).[9] Although § 222 "protects the interests of individuals against wrongful uses or disclosures of personal data, the rationale for these legal protections has not historically been grounded on a perception that people have property rights in personal data as such." Samuelson, Privacy as Intellectual Property? 52 Stan. L. Rev. 1125, 1130–1131 (2000) (footnote omitted). Any property rights remain with the companies.

E

The *Katz* test comes closer to the text of the Fourth Amendment when it asks whether an expectation of privacy is "reasonable," but it ultimately distorts that term as well. The Fourth Amendment forbids "unreasonable searches." In other words, reasonableness determines the legality of a search, not "whether a search ... within the meaning of the Constitution has *occurred*." *Carter,* 525 U.S., at 97, 119 S.Ct. 469 (opinion of Scalia, J.) (internal quotation marks omitted).

Moreover, the *Katz* test invokes the concept of reasonableness in a way that would be foreign to the ratifiers of the Fourth Amendment. Originally, the word "unreasonable" in the Fourth Amendment likely meant "against reason"—as in "against the reason of the common law." See Donahue 1270–1275; Davies 686–693; *California v. Acevedo,* 500 U.S. 565, 583, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991) (Scalia, J., concurring in judgment). At the founding, searches and seizures were regulated by a robust body of common-law rules. See generally W. Cuddihy, The Fourth Amendment: Origins and Original Meaning 602–1791 (2009); *e.g., Wilson v. Arkansas,* 514 U.S. 927, 931–936, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995) (discussing the common-law knock-and-announce rule). The search-and-seizure practices that the Founders feared most—such as general warrants—were already illegal under the common law, and jurists such as Lord Coke described violations of the common law as "against reason." See Donahue 1270–1271, and n. 513. Locke, Blackstone, Adams, and other influential figures shortened the phrase "against reason" to "unreasonable." See *id.,* at 1270–1275. Thus, by prohibiting "unreasonable" searches and seizures in the Fourth Amendment, the Founders ensured that the newly created Congress could not use legislation to abolish the established common-law rules of search and seizure. See T. Cooley, Constitutional Limitations *303 (2d ed. 1871); 3 J. Story, Commentaries on the ***2244** Constitution of the United States § 1895, p. 748 (1833).

Although the Court today maintains that its decision is based on "Founding-era understandings," *ante,* at 2214, the Founders would be puzzled by the Court's conclusion as well as its reasoning. The Court holds that the Government unreasonably searched Carpenter by subpoenaing the cell-site records of Sprint and MetroPCS without a warrant. But the Founders would not recognize the Court's "warrant requirement." *Ante,* at 2222. The common law required warrants for some types of searches and seizures, but not for many others. The relevant rule depended on context. See *Acevedo, supra,* at 583–584, 111 S.Ct. 1982 (opinion of Scalia, J.); Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 763–770 (1994); Davies 738–739. In cases like this one, a subpoena for third-party documents was not a "search" to begin with, and the common law did not limit the government's authority to subpoena third parties. See *post,* at 2247 - 2253 (ALITO, J., dissenting). Suffice it to say, the Founders would be confused by this Court's transformation of their common-law protection of property into a "warrant requirement" and a vague inquiry into "reasonable expectations of privacy."

III

That the *Katz* test departs so far from the text of the Fourth Amendment is reason enough to reject it. But the *Katz* test also has proved unworkable in practice. Jurists and commentators tasked with deciphering our jurisprudence have described the *Katz* regime as "an unpredictable jumble," "a mass of contradictions and obscurities," "all over the map," "riddled with inconsistency and incoherence," "a series of inconsistent and bizarre results that [the Court] has left entirely undefended," "unstable," "chameleon-like," " 'notoriously unhelpful,' " "a conclusion rather than a starting point for analysis," "distressingly unmanageable," "a dismal failure," "flawed to the core," "unadorned fiat," and "inspired by the kind of logic that produced Rube Goldberg's bizarre contraptions."[10] Even Justice Harlan, four years after penning his concurrence in *Katz,* confessed that the test encouraged "the substitution of words for analysis." *United States v. White,* 401 U.S. 745, 786, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971) (dissenting opinion).

***2245** After 50 years, it is still unclear what question the *Katz* test is even asking. This Court has steadfastly declined to elaborate the relevant considerations or identify any meaningful constraints. See, *e.g., ante,* at 2213 - 2214 ("[N]o single rubric definitively resolves which expectations of privacy are entitled to protection"); *O'Connor v. Ortega,* 480 U.S. 709, 715, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987) (plurality opinion) ("We have no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable"); *Oliver,* 466 U.S., at 177, 104 S.Ct. 1735 ("No single factor determines whether an individual legitimately may claim under the Fourth Amendment that a place should be free of government intrusion").

Justice Harlan's original formulation of the *Katz* test appears to ask a descriptive question: Whether a given expectation of privacy is "one that society is prepared to recognize as 'reasonable.' " 389 U.S., at 361, 88 S.Ct. 507. As written, the *Katz* test turns on society's actual, current views about the reasonableness of various expectations of privacy.

But this descriptive understanding presents several problems. For starters, it is easily circumvented. If, for example, "the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry," individuals could not realistically expect privacy in their homes. *Smith,* 442 U.S., at 740, n. 5, 99 S.Ct. 2577; see also Chemerinsky, Rediscovering Brandeis's Right to Privacy, 45 Brandeis L.J. 643, 650 (2007) ("[Under *Katz,* t]he government seemingly can deny privacy just by letting people know in advance not to expect any"). A purely descriptive understanding of the *Katz* test also risks "circular[ity]." *Kyllo,* 533 U.S., at 34, 121 S.Ct. 2038. While this Court is supposed to base its decisions on society's expectations of privacy, society's expectations of privacy are, in turn, shaped by this Court's decisions. See Posner, The Uncertain Protection of Privacy by the Supreme Court, 1979 S.Ct. Rev. 173, 188 ("[W]hether [a person] will or will not have [a reasonable] expectation [of privacy] will depend on what the legal rule is").

To address this circularity problem, the Court has insisted that expectations of privacy must come from outside its Fourth Amendment precedents, "either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Rakas v. Illinois,* 439 U.S. 128, 144, n. 12, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). But the Court's supposed reliance on "real or personal property law" rings hollow. The whole point of *Katz* was to " 'discredi[t]' " the relationship between the Fourth Amendment and property law, 389 U.S., at 353, 88 S.Ct. 507, and this Court has repeatedly downplayed the importance of property law under the *Katz* test, see, *e.g., United States v. Salvucci,* 448 U.S. 83, 91, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980) ("[P]roperty rights are neither the beginning nor the end of this Court's inquiry [under *Katz*]"); *Rawlings v. Kentucky,* 448 U.S. 98, 105, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980) ("[This Court has] emphatically rejected the notion that 'arcane' concepts of property law ought to control the ability to claim the protections of the Fourth Amendment"). Today, for example, the Court makes no mention of property law, except to reject its relevance. See *ante,* at 2214, and n. 1.

As for "understandings that are recognized or permitted in society," this Court has never answered even the most basic questions about what this means. See Kerr, ***2246** Four Models of Fourth Amendment Protection, 60 Stan. L. Rev. 503, 504–505 (2007). For example, our precedents do not explain who is included in "society," how we know what they "recogniz[e] or permi[t]," and how much of society must agree before something constitutes an "understanding."

Here, for example, society might prefer a balanced regime

that prohibits the Government from obtaining cell-site location information unless it can persuade a neutral magistrate that the information bears on an ongoing criminal investigation. That is precisely the regime Congress created under the Stored Communications Act and Telecommunications Act. See 47 U.S.C. § 222(c)(1); 18 U.S.C. §§ 2703(c)(1)(B), (d). With no sense of irony, the Court invalidates this regime today—the one that society actually created "in the form of its elected representatives in Congress." 819 F.3d 880, 890 (2016).

Truth be told, this Court does not treat the *Katz* test as a descriptive inquiry. Although the *Katz* test is phrased in descriptive terms about society's views, this Court treats it like a normative question—whether a particular practice *should* be considered a search under the Fourth Amendment. Justice Harlan thought this was the best way to understand his test. See *White,* 401 U.S., at 786, 91 S.Ct. 1122 (dissenting opinion) (explaining that courts must assess the "desirability" of privacy expectations and ask whether courts "should" recognize them by "balanc[ing]" the "impact on the individual's sense of security ... against the utility of the conduct as a technique of law enforcement"). And a normative understanding is the only way to make sense of this Court's precedents, which bear the hallmarks of subjective policymaking instead of neutral legal decisionmaking. "[T]he only thing the past three decades have established about the *Katz* test" is that society's expectations of privacy "bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable." *Carter,* 525 U.S., at 97, 119 S.Ct. 469 (opinion of Scalia, J.). Yet, "[t]hough we know ourselves to be eminently reasonable, self-awareness of eminent reasonableness is not really a substitute for democratic election." *Sosa v. Alvarez–Machain,* 542 U.S. 692, 750, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004) (Scalia, J., concurring in part and concurring in judgment).

* * *

In several recent decisions, this Court has declined to apply the *Katz* test because it threatened to narrow the original scope of the Fourth Amendment. See *Grady v. North Carolina,* 575 U.S. ——, ——, 135 S.Ct. 1368, 1370, 191 L.Ed.2d 459 (2015) (*per curiam*); *Florida v. Jardines,* 569 U.S. 1, 5, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013); *Jones,* 565 U.S., at 406–407, 132 S.Ct. 945. But as today's decision demonstrates, *Katz* can also be invoked to expand the Fourth Amendment beyond its original scope. This Court should not tolerate errors in either direction. "The People, through ratification, have already weighed the policy tradeoffs that constitutional rights entail." *Luis v. United States,* 578 U.S. ——, ——, 136 S.Ct. 1083, 1101, 194 L.Ed.2d 256 (2016) (THOMAS, J., concurring in judgment). Whether the rights they ratified are too broad or too narrow by modern lights, this Court has no authority to unilaterally alter the document they approved.

Because the *Katz* test is a failed experiment, this Court is dutybound to reconsider it. Until it does, I agree with my dissenting colleagues' reading of our precedents. Accordingly, I respectfully dissent.

Justice ALITO, with whom Justice THOMAS joins, dissenting.

I share the Court's concern about the effect of new technology on personal privacy, ***2247** but I fear that today's decision will do far more harm than good. The Court's reasoning fractures two fundamental pillars of Fourth Amendment law, and in doing so, it guarantees a blizzard of litigation while threatening many legitimate and valuable investigative practices upon which law enforcement has rightfully come to rely.

First, the Court ignores the basic distinction between an actual search (dispatching law enforcement officers to enter private premises and root through private papers and effects) and an order merely requiring a party to look through its own records and produce specified documents. The former, which intrudes on personal privacy far more deeply, requires probable cause; the latter does not. Treating an order to produce like an actual search, as today's decision does, is revolutionary. It violates both the original understanding of the Fourth Amendment and more than a century of Supreme Court precedent. Unless it is somehow restricted to the particular situation in the present case, the Court's move will cause upheaval. Must every grand jury subpoena *duces tecum* be supported by probable cause? If so, investigations of terrorism, political corruption, white-collar crime, and many other offenses will be stymied. And what about subpoenas and other document-production orders issued by administrative agencies? See, *e.g.,* 15 U.S.C. § 57b–1(c) (Federal Trade Commission); §§ 77s(c), 78u(a)-(b) (Securities and Exchange Commission); 29 U.S.C. § 657(b) (Occupational Safety and Health Administration); 29 C.F.R. § 1601.16(a)(2) (2017) (Equal Employment Opportunity Commission).

Second, the Court allows a defendant to object to the search of a third party's property. This also is revolutionary. The Fourth Amendment protects "[t]he right of the people to be secure in *their* persons, houses, papers, and effects" (emphasis added), not the persons,

houses, papers, and effects of others. Until today, we have been careful to heed this fundamental feature of the Amendment's text. This was true when the Fourth Amendment was tied to property law, and it remained true after *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), broadened the Amendment's reach.

By departing dramatically from these fundamental principles, the Court destabilizes long-established Fourth Amendment doctrine. We will be making repairs—or picking up the pieces—for a long time to come.

I

Today the majority holds that a court order requiring the production of cell-site records may be issued only after the Government demonstrates probable cause. See *ante,* at 2220 - 2221. That is a serious and consequential mistake. The Court's holding is based on the premise that the order issued in this case was an actual "search" within the meaning of the Fourth Amendment, but that premise is inconsistent with the original meaning of the Fourth Amendment and with more than a century of precedent.

A

The order in this case was the functional equivalent of a subpoena for documents, and there is no evidence that these writs were regarded as "searches" at the time of the founding. Subpoenas *duces tecum* and other forms of compulsory document production were well known to the founding generation. Blackstone dated the first writ of subpoena to the reign of King Richard II in the late 14th century, and by the end of the 15th century, the use of such writs had "become the daily practice of the [Chancery] court." 3 W. Blackstone, ***2248** Commentaries on the Laws of England 53 (G. Tucker ed. 1803) (Blackstone). Over the next 200 years, subpoenas would grow in prominence and power in tandem with the Court of Chancery, and by the end of Charles II's reign in 1685, two important innovations had occurred.

First, the Court of Chancery developed a new species of subpoena. Until this point, subpoenas had been used largely to compel attendance and oral testimony from witnesses; these subpoenas correspond to today's subpoenas *ad testificandum*. But the Court of Chancery also improvised a new version of the writ that tacked onto a regular subpoena an order compelling the witness to bring certain items with him. By issuing these so-called subpoenas *duces tecum,* the Court of Chancery could compel the production of papers, books, and other forms of physical evidence, whether from the parties to the case or from third parties. Such subpoenas were sufficiently commonplace by 1623 that a leading treatise on the practice of law could refer in passing to the fee for a "*Sub poena of Ducas tecum* " (seven shillings and two pence) without needing to elaborate further. T. Powell, The Attourneys Academy 79 (1623). Subpoenas *duces tecum* would swell in use over the next century as the rules for their application became ever more developed and definite. See, *e.g.,* 1 G. Jacob, The Compleat Chancery–Practiser 290 (1730) ("The *Subpoena duces tecum* is awarded when the Defendant has confessed by his Answer that he hath such Writings in his Hands as are prayed by the Bill to be discovered or brought into Court").

Second, although this new species of subpoena had its origins in the Court of Chancery, it soon made an appearance in the work of the common-law courts as well. One court later reported that "[t]he Courts of Common law ... employed the same or similar means ... from the time of Charles the Second at least." *Amey v. Long,* 9 East. 473, 484, 103 Eng. Rep. 653, 658 (K.B. 1808).

By the time Blackstone published his Commentaries on the Laws of England in the 1760's, the use of subpoenas *duces tecum* had bled over substantially from the courts of equity to the common-law courts. Admittedly, the transition was still incomplete: In the context of jury trials, for example, Blackstone complained about "the want of a compulsive power for the production of books and papers belonging to the parties." Blackstone 381; see also, *e.g., Entick v. Carrington,* 19 State Trials 1029, 1073 (K.B. 1765) ("I wish some cases had been shewn, where the law forceth evidence out of the owner's custody by process. [But] where the adversary has by force or fraud got possession of your own proper evidence, there is no way to get it back but by action"). But Blackstone found some comfort in the fact that at least those documents "[i]n the hands of third persons ... can generally be obtained by rule of court, or by adding a clause of requisition to the writ of *subpoena,* which is then called a *subpoena duces tecum*." Blackstone 381; see also, *e.g., Leeds v. Cook,* 4 Esp. 256, 257, 170 Eng. Rep. 711 (N.P. 1803) (third-party subpoena *duces tecum*); *Rex v. Babb,* 3 T.R. 579, 580, 100 Eng. Rep. 743, 744 (K.B. 1790)

(third-party document production). One of the primary questions outstanding, then, was whether common-law courts would remedy the "defect[s]" identified by the Commentaries, and allow parties to use subpoenas *duces tecum* not only with respect to third parties but also with respect to each other. Blackstone 381.

That question soon found an affirmative answer on both sides of the Atlantic. In the United States, the First Congress established the federal court system in the ***2249** Judiciary Act of 1789. As part of that Act, Congress authorized "all the said courts of the United States ... in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery." § 15, 1 Stat. 82. From that point forward, federal courts in the United States could compel the production of documents regardless of whether those documents were held by parties to the case or by third parties.

In Great Britain, too, it was soon definitively established that common-law courts, like their counterparts in equity, could subpoena documents held either by parties to the case or by third parties. After proceeding in fits and starts, the King's Bench eventually held in *Amey v. Long* that the "writ of subpoena duces tecum [is] a writ of compulsory obligation and effect in the law." 9 East., at 486, 103 Eng. Rep., at 658. Writing for a unanimous court, Lord Chief Justice Ellenborough explained that "[t]he right to resort to means competent to compel the production of written, as well as oral, testimony seems essential to the very existence and constitution of a Court of Common Law." *Id.,* at 484, 103 Eng. Rep., at 658. Without the power to issue subpoenas *duces tecum,* the Lord Chief Justice observed, common-law courts "could not possibly proceed with due effect." *Ibid.*

The prevalence of subpoenas *duces tecum* at the time of the founding was not limited to the civil context. In criminal cases, courts and prosecutors were also using the writ to compel the production of necessary documents. In *Rex v. Dixon,* 3 Burr. 1687, 97 Eng. Rep. 1047 (K.B. 1765), for example, the King's Bench considered the propriety of a subpoena *duces tecum* served on an attorney named Samuel Dixon. Dixon had been called "to give evidence before the grand jury of the county of Northampton" and specifically "to produce three vouchers ... in order to found a prosecution by way of indictment against [his client] Peach ... for forgery." *Id.,* at 1687, 97 Eng. Rep., at 1047–1048. Although the court ultimately held that Dixon had not needed to produce the vouchers on account of attorney-client privilege, none of the justices expressed the slightest doubt about the general propriety of subpoenas *duces tecum* in the criminal context. See *id.,* at 1688, 97 Eng. Rep., at 1048. As Lord Chief Justice Ellenborough later explained, "[i]n that case no objection was taken to the writ, but to the special circumstances under which the party possessed the papers; so that the Court may be considered as recognizing the general obligation to obey writs of that description in other cases." *Amey, supra,* at 485, 103 Eng. Rep., at 658; see also 4 J. Chitty, Practical Treatise on the Criminal Law 185 (1816) (template for criminal subpoena *duces tecum*).

As *Dixon* shows, subpoenas *duces tecum* were routine in part because of their close association with grand juries. Early American colonists imported the grand jury, like so many other common-law traditions, and they quickly flourished. See *United States v. Calandra,* 414 U.S. 338, 342–343, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). Grand juries were empaneled by the federal courts almost as soon as the latter were established, and both they and their state counterparts actively exercised their wide-ranging common-law authority. See R. Younger, The People's Panel 47–55 (1963). Indeed, "the Founders thought the grand jury so essential ... that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by 'a presentment or ***2250** indictment of a Grand Jury.' " *Calandra, supra,* at 343, 94 S.Ct. 613.

Given the popularity and prevalence of grand juries at the time, the Founders must have been intimately familiar with the tools they used—including compulsory process—to accomplish their work. As a matter of tradition, grand juries were "accorded wide latitude to inquire into violations of criminal law," including the power to "compel the production of evidence or the testimony of witnesses as [they] conside[r] appropriate." *Ibid.* Long before national independence was achieved, grand juries were already using their broad inquisitorial powers not only to present and indict criminal suspects but also to inspect public buildings, to levy taxes, to supervise the administration of the laws, to advance municipal reforms such as street repair and bridge maintenance, and in some cases even to propose legislation. Younger, *supra,* at 5–26. Of course, such work depended entirely on grand juries' ability to access any relevant documents.

Grand juries continued to exercise these broad inquisitorial powers up through the time of the founding. See *Blair v. United States,* 250 U.S. 273, 280, 39 S.Ct.

468, 63 L.Ed. 979 (1919) ("At the foundation of our Federal Government the inquisitorial function of the grand jury and the compulsion of witnesses were recognized as incidents of the judicial power"). In a series of lectures delivered in the early 1790's, Justice James Wilson crowed that grand juries were "the peculiar boast of the common law" thanks in part to their wide-ranging authority: "All the operations of government, and of its ministers and officers, are within the compass of their view and research." 2 J. Wilson, The Works of James Wilson 534, 537 (R. McCloskey ed. 1967). That reflected the broader insight that "[t]he grand jury's investigative power must be broad if its public responsibility is adequately to be discharged." *Calandra, supra,* at 344, 94 S.Ct. 613.

Compulsory process was also familiar to the founding generation in part because it reflected "the ancient proposition of law" that " ' "the public ... has a right to every man's evidence." ' " *United States v. Nixon,* 418 U.S. 683, 709, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974); see also *ante,* at 2228 (KENNEDY, J., dissenting). As early as 1612, "Lord Bacon is reported to have declared that 'all subjects, without distinction of degrees, owe to the King tribute and service, not only of their deed and hand, but of their knowledge and discovery.' " *Blair, supra,* at 279–280, 39 S.Ct. 468. That duty could be "onerous at times," yet the Founders considered it "necessary to the administration of justice according to the forms and modes established in our system of government." *Id.,* at 281, 39 S.Ct. 468; see also *Calandra, supra,* at 345, 94 S.Ct. 613.

B

Talk of kings and common-law writs may seem out of place in a case about cell-site records and the protections afforded by the Fourth Amendment in the modern age. But this history matters, not least because it tells us what was on the minds of those who ratified the Fourth Amendment and how they understood its scope. That history makes it abundantly clear that the Fourth Amendment, as originally understood, did not apply to the compulsory production of documents at all.

The Fourth Amendment does not regulate all methods by which the Government obtains documents. Rather, it prohibits only those "searches and seizures" of "persons, houses, papers, and effects" that are "unreasonable." Consistent with that language, "at least until the latter half of the 20th century" "our Fourth Amendment jurisprudence was tied to common-law trespass." ***2251** *United States v. Jones,* 565 U.S. 400, 405, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012). So by its terms, the Fourth Amendment does not apply to the compulsory production of documents, a practice that involves neither any physical intrusion into private space nor any taking of property by agents of the state. Even Justice Brandeis—a stalwart proponent of construing the Fourth Amendment liberally—acknowledged that "under any ordinary construction of language," "there is no 'search' or 'seizure' when a defendant is required to produce a document in the orderly process of a court's procedure." *Olmstead v. United States,* 277 U.S. 438, 476, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (dissenting opinion).[1]

Nor is there any reason to believe that the Founders intended the Fourth Amendment to regulate courts' use of compulsory process. American colonists rebelled against the Crown's physical invasions of their persons and their property, not against its acquisition of information by any and all means. As Justice Black once put it, "[t]he Fourth Amendment was aimed directly at the abhorred practice of breaking in, ransacking and searching homes and other buildings and seizing people's personal belongings without warrants issued by magistrates." *Katz,* 389 U.S., at 367, 88 S.Ct. 507 (dissenting opinion). More recently, we have acknowledged that "the Fourth Amendment was the founding generation's response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity." *Riley v. California,* 573 U.S. ——, ——, 134 S.Ct. 2473, 2494, 189 L.Ed.2d 430 (2014).

General warrants and writs of assistance were noxious not because they allowed the Government to acquire evidence in criminal investigations, but because of the *means* by which they permitted the Government to acquire that evidence. Then, as today, searches could be quite invasive. Searches generally begin with officers "mak[ing] nonconsensual entries into areas not open to the public." *Donovan v. Lone Steer, Inc.,* 464 U.S. 408, 414, 104 S.Ct. 769, 78 L.Ed.2d 567 (1984). Once there, officers are necessarily in a position to observe private spaces generally shielded from the public and discernible only with the owner's consent. Private area after private area becomes exposed to the officers' eyes as they rummage through the owner's property in their hunt for the object or objects of the search. If they are searching for documents, officers may additionally have to rifle through many other papers—potentially filled with the most intimate details of a person's thoughts and

life—before they find the specific information ***2252** they are seeking. See *Andresen v. Maryland,* 427 U.S. 463, 482, n. 11, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976). If anything sufficiently incriminating comes into view, officers seize it. *Horton v. California,* 496 U.S. 128, 136–137, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990). Physical destruction always lurks as an underlying possibility; "officers executing search warrants on occasion must damage property in order to perform their duty." *Dalia v. United States,* 441 U.S. 238, 258, 99 S.Ct. 1682, 60 L.Ed.2d 177 (1979); see, *e.g., United States v. Ramirez,* 523 U.S. 65, 71–72, 118 S.Ct. 992, 140 L.Ed.2d 191 (1998) (breaking garage window); *United States v. Ross,* 456 U.S. 798, 817–818, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982) (ripping open car upholstery); *Brown v. Battle Creek Police Dept.,* 844 F.3d 556, 572 (C.A.6 2016) (shooting and killing two pet dogs); *Lawmaster v. Ward,* 125 F.3d 1341, 1350, n. 3 (C.A.10 1997) (breaking locks).

Compliance with a subpoena *duces tecum* requires none of that. A subpoena *duces tecum* permits a subpoenaed individual to conduct the search for the relevant documents himself, without law enforcement officers entering his home or rooting through his papers and effects. As a result, subpoenas avoid the many incidental invasions of privacy that necessarily accompany any actual search. And it was *those* invasions of privacy—which, although incidental, could often be extremely intrusive and damaging—that led to the adoption of the Fourth Amendment.

Neither this Court nor any of the parties have offered the slightest bit of historical evidence to support the idea that the Fourth Amendment originally applied to subpoenas *duces tecum* and other forms of compulsory process. That is telling, for as I have explained, these forms of compulsory process were a feature of criminal (and civil) procedure well known to the Founders. The Founders would thus have understood that holding the compulsory production of documents to the same standard as actual searches and seizures would cripple the work of courts in civil and criminal cases alike. It would be remarkable to think that, despite that knowledge, the Founders would have gone ahead and sought to impose such a requirement. It would be even more incredible to believe that the Founders would have imposed that requirement through the inapt vehicle of an amendment directed at different concerns. But it would blink reality entirely to argue that this entire process happened without anyone saying *the least thing about it*—not during the drafting of the Bill of Rights, not during any of the subsequent ratification debates, and not for most of the century that followed. If the Founders thought the Fourth Amendment applied to the compulsory production of documents, one would imagine that there would be *some* founding-era evidence of the Fourth Amendment being applied to the compulsory production of documents. Cf. *Free Enterprise Fund v. Public Company Accounting Oversight Bd.,* 561 U.S. 477, 505, 130 S.Ct. 3138, 177 L.Ed.2d 706 (2010); *Printz v. United States,* 521 U.S. 898, 905, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997). Yet none has been brought to our attention.

C

Of course, our jurisprudence has not stood still since 1791. We now evaluate subpoenas *duces tecum* and other forms of compulsory document production under the Fourth Amendment, although we employ a reasonableness standard that is less demanding than the requirements for a warrant. But the road to that doctrinal destination was anything but smooth, and our initial missteps—and the subsequent struggle to extricate ourselves from their consequences—should provide an object ***2253** lesson for today's majority about the dangers of holding compulsory process to the same standard as actual searches and seizures.

For almost a century after the Fourth Amendment was enacted, this Court said and did nothing to indicate that it might regulate the compulsory production of documents. But that changed temporarily when the Court decided *Boyd v. United States,* 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886), the first—and, until today, the only—case in which this Court has ever held the compulsory production of documents to the same standard as actual searches and seizures.

The *Boyd* Court held that a court order compelling a company to produce potentially incriminating business records violated both the Fourth and the Fifth Amendments. The Court acknowledged that "certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching amongst his papers, are wanting" when the Government relies on compulsory process. *Id.,* at 622, 6 S.Ct. 524. But it nevertheless asserted that the Fourth Amendment ought to "be liberally construed," *id.,* at 635, 6 S.Ct. 524, and further reasoned that compulsory process "effects the sole object and purpose of search and seizure" by "forcing from a party evidence against himself," *id.,* at 622, 6 S.Ct. 524. "In this regard," the Court concluded, "the Fourth and Fifth Amendments run almost into each other." *Id.,* at

630, 6 S.Ct. 524. Having equated compulsory process with actual searches and seizures and having melded the Fourth Amendment with the Fifth, the Court then found the order at issue unconstitutional because it compelled the production of property to which the Government did not have superior title. See *id.,* at 622–630, 6 S.Ct. 524.

In a concurrence joined by Chief Justice Waite, Justice Miller agreed that the order violated the Fifth Amendment, *id.,* at 639, 6 S.Ct. 524, but he strongly protested the majority's invocation of the Fourth Amendment. He explained: "[T]here is no reason why this court should assume that the action of the court below, in requiring a party to produce certain papers ..., authorizes an unreasonable search or seizure of the house, papers, or effects of that party. There is in fact no search and no seizure." *Ibid.* "If the mere service of a notice to produce a paper ... is a search," Justice Miller concluded, "then a change has taken place in the meaning of words, which has not come within my reading, and which I think was unknown at the time the Constitution was made." *Id.,* at 641, 6 S.Ct. 524.

Although *Boyd* was replete with stirring rhetoric, its reasoning was confused from start to finish in a way that ultimately made the decision unworkable. See 3 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 8.7(a) (4th ed. 2015). Over the next 50 years, the Court would gradually roll back *Boyd* 's erroneous conflation of compulsory process with actual searches and seizures.

That effort took its first significant stride in *Hale v. Henkel,* 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652 (1906), where the Court found it "quite clear" and "conclusive" that "the search and seizure clause of the Fourth Amendment was not intended to interfere with the power of courts to compel, through a *subpoena duces tecum,* the production, upon a trial in court, of documentary evidence." *Id.,* at 73, 26 S.Ct. 370. Without that writ, the Court recognized, "it would be 'utterly impossible to carry on the administration of justice.' " *Ibid.*

Hale, however, did not entirely liberate subpoenas *duces tecum* from Fourth ***2254** Amendment constraints. While refusing to treat such subpoenas as the equivalent of actual searches, *Hale* concluded that they must not be unreasonable. And it held that the subpoena *duces tecum* at issue was "far too sweeping in its terms to be regarded as reasonable." *Id.,* at 76, 26 S.Ct. 370. The *Hale* Court thus left two critical questions unanswered: Under the Fourth Amendment, what makes the compulsory production of documents "reasonable," and how does that standard differ from the one that governs actual searches and seizures?

The Court answered both of those questions definitively in *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946), where we held that the Fourth Amendment regulates the compelled production of documents, but less stringently than it does full-blown searches and seizures. *Oklahoma Press* began by admitting that the Court's opinions on the subject had "perhaps too often ... been generative of heat rather than light," "mov[ing] with variant direction" and sometimes having "highly contrasting" "emphasis and tone." *Id.,* at 202, 66 S.Ct. 494. "The primary source of misconception concerning the Fourth Amendment's function" in this context, the Court explained, "lies perhaps in the identification of cases involving so-called 'figurative' or 'constructive' search with cases of actual search and seizure." *Ibid.* But the Court held that "the basic distinction" between the compulsory production of documents on the one hand, and actual searches and seizures on the other, meant that two different standards had to be applied. *Id.,* at 204, 66 S.Ct. 494.

Having reversed *Boyd* 's conflation of the compelled production of documents with actual searches and seizures, the Court then set forth the relevant Fourth Amendment standard for the former. When it comes to "the production of corporate or other business records," the Court held that the Fourth Amendment "at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described,' if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant." *Oklahoma Press, supra,* at 208, 66 S.Ct. 494. Notably, the Court held that a showing of probable cause was not necessary so long as "the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry." *Id.,* at 209, 66 S.Ct. 494.

Since *Oklahoma Press,* we have consistently hewed to that standard. See, *e.g., Lone Steer, Inc.,* 464 U.S., at 414–415, 104 S.Ct. 769; *United States v. Miller,* 425 U.S. 435, 445–446, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976); *California Bankers Assn. v. Shultz,* 416 U.S. 21, 67, 94 S.Ct. 1494, 39 L.Ed.2d 812 (1974); *United States v. Dionisio,* 410 U.S. 1, 11–12, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973); *See v. Seattle,* 387 U.S. 541, 544, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967); *United States v. Powell,* 379 U.S. 48, 57–58, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964); *McPhaul v. United States,* 364 U.S. 372, 382–383, 81 S.Ct. 138, 5 L.Ed.2d 136 (1960); *United States v. Morton Salt Co.,* 338 U.S. 632, 652–653, 70 S.Ct. 357, 94 L.Ed. 401 (1950); cf. *McLane Co. v. EEOC,* 581 U.S. ——, ——, 137 S.Ct. 1159, 1169–1170, 197 L.Ed.2d 500 (2017). By

applying *Oklahoma Press* and thereby respecting "the traditional distinction between a search warrant and a subpoena," *Miller, supra,* at 446, 96 S.Ct. 1619, this Court has reinforced "the basic compromise" between "the public interest" in every man's evidence and the private interest "of men to be free from officious meddling." *Oklahoma Press, supra,* at 213, 66 S.Ct. 494.

***2255** D

Today, however, the majority inexplicably ignores the settled rule of *Oklahoma Press* in favor of a resurrected version of *Boyd*. That is mystifying. This should have been an easy case regardless of whether the Court looked to the original understanding of the Fourth Amendment or to our modern doctrine.

As a matter of original understanding, the Fourth Amendment does not regulate the compelled production of documents at all. Here the Government received the relevant cell-site records pursuant to a court order compelling Carpenter's cell service provider to turn them over. That process is thus immune from challenge under the original understanding of the Fourth Amendment.

As a matter of modern doctrine, this case is equally straightforward. As Justice KENNEDY explains, no search or seizure of Carpenter or his property occurred in this case. *Ante,* at 2226 - 2235; see also Part II, *infra*. But even if the majority were right that the Government "searched" Carpenter, it would at most be a "figurative or constructive search" governed by the *Oklahoma Press* standard, not an "actual search" controlled by the Fourth Amendment's warrant requirement.

And there is no doubt that the Government met the *Oklahoma Press* standard here. Under *Oklahoma Press,* a court order must " 'be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.' " *Lone Steer, Inc., supra,* at 415, 104 S.Ct. 769. Here, the type of order obtained by the Government almost necessarily satisfies that standard. The Stored Communications Act allows a court to issue the relevant type of order "only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that ... the records ... sough[t] are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). And the court "may quash or modify such order" if the provider objects that the "records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider." *Ibid.* No such objection was made in this case, and Carpenter does not suggest that the orders contravened the *Oklahoma Press* standard in any other way.

That is what makes the majority's opinion so puzzling. It decides that a "search" of Carpenter occurred within the meaning of the Fourth Amendment, but then it leaps straight to imposing requirements that—until this point—have governed only *actual* searches and seizures. See *ante,* at 2220 - 2221. Lost in its race to the finish is any real recognition of the century's worth of precedent it jeopardizes. For the majority, this case is apparently no different from one in which Government agents raided Carpenter's home and removed records associated with his cell phone.

Against centuries of precedent and practice, all that the Court can muster is the observation that "this Court has never held that the Government may subpoena third parties for records in which the suspect has a reasonable expectation of privacy." *Ante,* at 2221. Frankly, I cannot imagine a concession more damning to the Court's argument than that. As the Court well knows, the reason that we have never seen such a case is because—until today—defendants categorically had no "reasonable expectation of privacy" and no property interest in records belonging to third parties. See Part II, *infra*. By implying otherwise, the Court tries the nice trick of seeking shelter under the cover of precedents that it simultaneously perforates.

***2256** Not only that, but even if the Fourth Amendment permitted someone to object to the subpoena of a third party's records, the Court cannot explain why that individual should be entitled to *greater* Fourth Amendment protection than the party actually being subpoenaed. When parties are subpoenaed to turn over their records, after all, they will at most receive the protection afforded by *Oklahoma Press* even though they will own and have a reasonable expectation of privacy in the records at issue. Under the Court's decision, however, the Fourth Amendment will extend greater protections to someone else who is not being subpoenaed and does not own the records. That outcome makes no sense, and the Court does not even attempt to defend it.

We have set forth the relevant Fourth Amendment standard for subpoenaing business records many times over. Out of those dozens of cases, the majority cannot find even one that so much as suggests an exception to the

Oklahoma Press standard for sufficiently personal information. Instead, we have always "described the constitutional requirements" for compulsory process as being " 'settled' " and as applying categorically to all " 'subpoenas [of] corporate books or records.' " *Lone Steer, Inc.,* 464 U.S., at 415, 104 S.Ct. 769 (internal quotation marks omitted). That standard, we have held, is "*the most* " protection the Fourth Amendment gives "to the production of corporate records and papers." *Oklahoma Press,* 327 U.S., at 208, 66 S.Ct. 494 (emphasis added).[2]

Although the majority announces its holding in the context of the Stored Communications Act, nothing stops its logic from sweeping much further. The Court has offered no meaningful limiting principle, and none is apparent. Cf. Tr. of Oral Arg. 31 (Carpenter's counsel admitting that "a grand jury subpoena ... would be held to the same standard as any other subpoena or subpoena-like request for [cell-site] records").

Holding that subpoenas must meet the same standard as conventional searches will seriously damage, if not destroy, their utility. Even more so than at the founding, today the Government regularly uses subpoenas *duces tecum* and other forms of compulsory process to carry out its essential functions. See, *e.g., Dionisio,* 410 U.S., at 11–12, 93 S.Ct. 764 (grand jury subpoenas); *McPhaul,* 364 U.S., at 382–383, 81 S.Ct. 138 (legislative subpoenas); *Oklahoma Press, supra,* at 208–209, 66 S.Ct. 494 (administrative subpoenas). Grand juries, for example, have long "compel[led] the production of evidence" in order to determine "*whether* there is probable cause to believe a crime has been committed." *Calandra,* 414 U.S., at 343, 94 S.Ct. 613 (emphasis added). Almost by definition, then, grand juries will be unable at first to demonstrate "the probable cause required for a warrant." *Ante,* at 2221 (majority opinion); see also *Oklahoma Press, supra,* at 213, 66 S.Ct. 494. If they are required to do so, the effects are as predictable as they are alarming: Many investigations will sputter out at the start, and a host of criminals will be able to evade law enforcement's reach.

"To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence." *Nixon,* 418 U.S., at 709, 94 S.Ct. 3090. For over a hundred years, we have understood that holding ***2257** subpoenas to the same standard as actual searches and seizures "would stop much if not all of investigation in the public interest at the threshold of inquiry." *Oklahoma Press, supra,* at 213, 66 S.Ct. 494. Today a skeptical majority decides to put that understanding to the test.

II

Compounding its initial error, the Court also holds that a defendant has the right under the Fourth Amendment to object to the search of a third party's property. This holding flouts the clear text of the Fourth Amendment, and it cannot be defended under either a property-based interpretation of that Amendment or our decisions applying the reasonable-expectations-of-privacy test adopted in *Katz,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576. By allowing Carpenter to object to the search of a third party's property, the Court threatens to revolutionize a second and independent line of Fourth Amendment doctrine.

A

It bears repeating that the Fourth Amendment guarantees "[t]he right of the people to be secure in *their* persons, houses, papers, and effects." (Emphasis added.) The Fourth Amendment does not confer rights with respect to the persons, houses, papers, and effects of others. Its language makes clear that "Fourth Amendment rights are personal," *Rakas v. Illinois,* 439 U.S. 128, 140, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), and as a result, this Court has long insisted that they "may not be asserted vicariously," *id.,* at 133, 99 S.Ct. 421. It follows that a "person who is aggrieved ... only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." *Id.,* at 134, 99 S.Ct. 421.

In this case, as Justice KENNEDY cogently explains, the cell-site records obtained by the Government belong to Carpenter's cell service providers, not to Carpenter. See *ante,* at 2229 - 2230. Carpenter did not create the cell-site records. Nor did he have possession of them; at all relevant times, they were kept by the providers. Once Carpenter subscribed to his provider's service, he had no right to prevent the company from creating or keeping the information in its records. Carpenter also had no right to demand that the providers destroy the records, no right to prevent the providers from destroying the records, and, indeed, no right to modify the records in any way

whatsoever (or to prevent the providers from modifying the records). Carpenter, in short, has no meaningful control over the cell-site records, which are created, maintained, altered, used, and eventually destroyed by his cell service providers.

Carpenter responds by pointing to a provision of the Telecommunications Act that requires a provider to disclose cell-site records when a customer so requests. See 47 U.S.C. § 222(c)(2). But a statutory disclosure requirement is hardly sufficient to give someone an ownership interest in the documents that must be copied and disclosed. Many statutes confer a right to obtain copies of documents without creating any property right.[3]

***2258** Carpenter's argument is particularly hard to swallow because nothing in the Telecommunications Act precludes cell service providers from charging customers a fee for accessing cell-site records. See *ante,* at 2229 - 2230 (KENNEDY, J., dissenting). It would be very strange if the owner of records were required to pay in order to inspect his own property.
Nor does the Telecommunications Act give Carpenter a property right in the cell-site records simply because they are subject to confidentiality restrictions. See 47 U.S.C. § 222(c)(1) (without a customer's permission, a cell service provider may generally "use, disclose, or permit access to individually identifiable [cell-site records]" only with respect to "its provision" of telecommunications services). Many federal statutes impose similar restrictions on private entities' use or dissemination of information in their own records without conferring a property right on third parties.[4]

***2259** It would be especially strange to hold that the Telecommunication Act's confidentiality provision confers a property right when the Act creates an express exception for any disclosure of records that is "required by law." 47 U.S.C. § 222(c)(1). So not only does Carpenter lack " 'the most essential and beneficial' " of the " 'constituent elements' " of property, *Dickman v. Commissioner,* 465 U.S. 330, 336, 104 S.Ct. 1086, 79 L.Ed.2d 343 (1984)—*i.e.,* the right to use the property to the exclusion of others—but he cannot even exclude the party he would most like to keep out, namely, the Government.[5]

For all these reasons, there is no plausible ground for maintaining that the information at issue here represents Carpenter's "papers" or "effects."[6]

B

In the days when this Court followed an exclusively property-based approach to the Fourth Amendment, the distinction between an individual's Fourth Amendment rights and those of a third party was clear cut. We first asked whether the object of the search—say, a house, papers, or effects—belonged to the defendant, and, if it did, whether the Government had committed a "trespass" in acquiring the evidence at issue. *Jones,* 565 U.S., at 411, n. 8, 132 S.Ct. 945.

When the Court held in *Katz* that "property rights are not the sole measure of Fourth Amendment violations," *Soldal v. Cook County,* 506 U.S. 56, 64, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992), the sharp boundary between personal and third-party rights was tested. Under *Katz,* a party may invoke the Fourth Amendment whenever law enforcement officers violate the party's "justifiable" or "reasonable" expectation of privacy. See 389 U.S., at 353, 88 S.Ct. 507; see also *id.,* at 361, 88 S.Ct. 507 (Harlan, J., concurring) (applying the Fourth Amendment where "a person [has] exhibited an actual (subjective) expectation of privacy" and where that "expectation [is] one that society is prepared to recognize as 'reasonable' "). Thus freed from ***2260** the limitations imposed by property law, parties began to argue that they had a reasonable expectation of privacy in items owned by others. After all, if a trusted third party took care not to disclose information about the person in question, that person might well have a reasonable expectation that the information would not be revealed.

Efforts to claim Fourth Amendment protection against searches of the papers and effects of others came to a head in *Miller,* 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71, where the defendant sought the suppression of two banks' microfilm copies of his checks, deposit slips, and other records. The defendant did not claim that he owned these documents, but he nonetheless argued that "analysis of ownership, property rights and possessory interests in the determination of Fourth Amendment rights ha[d] been severely impeached" by *Katz* and other recent cases. See Brief for Respondent in *United States v. Miller,* O.T.1975, No. 74–1179, p. 6. Turning to *Katz,* he then argued that he had a reasonable expectation of privacy in the banks' records regarding his accounts. Brief for Respondent in No. 74–1179, at 6; see also *Miller, supra,* at 442–443, 96 S.Ct. 1619.

Acceptance of this argument would have flown in the face of the Fourth Amendment's text, and the Court rejected that development. Because Miller gave up "dominion and control" of the relevant information to his bank,

439 U.S., at 149, 99 S.Ct. 421, the Court ruled that he lost any protected Fourth Amendment interest in that information. See *Miller, supra,* at 442–443, 96 S.Ct. 1619. Later, in *Smith v. Maryland,* 442 U.S. 735, 745, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979), the Court reached a similar conclusion regarding a telephone company's records of a customer's calls. As Justice KENNEDY concludes, *Miller* and *Smith* are thus best understood as placing "necessary limits on the ability of individuals to assert Fourth Amendment interests in property to which they lack a 'requisite connection.' " *Ante,* at 2227.

The same is true here, where Carpenter indisputably lacks any meaningful property-based connection to the cell-site records owned by his provider. Because the records are not Carpenter's in any sense, Carpenter may not seek to use the Fourth Amendment to exclude them.

By holding otherwise, the Court effectively allows Carpenter to object to the "search" of a third party's property, not recognizing the revolutionary nature of this change. The Court seems to think that *Miller* and *Smith* invented a new "doctrine"—"the third-party doctrine"—and the Court refuses to "extend" this product of the 1970's to a new age of digital communications. *Ante,* at 2216 - 2217, 2220. But the Court fundamentally misunderstands the role of *Miller* and *Smith*. Those decisions did not forge a new doctrine; instead, they rejected an argument that would have disregarded the clear text of the Fourth Amendment and a formidable body of precedent.

In the end, the Court never explains how its decision can be squared with the fact that the Fourth Amendment protects only "[t]he right of the people to be secure in *their* persons, houses, papers, and effects." (Emphasis added.)

* * *

Although the majority professes a desire not to " 'embarrass the future,' " *ante,* at 2220, we can guess where today's decision will lead.

One possibility is that the broad principles that the Court seems to embrace will be applied across the board. All subpoenas *duces tecum* and all other orders compelling ***2261** the production of documents will require a demonstration of probable cause, and individuals will be able to claim a protected Fourth Amendment interest in any sensitive personal information about them that is collected and owned by third parties. Those would be revolutionary developments indeed.

The other possibility is that this Court will face the embarrassment of explaining in case after case that the principles on which today's decision rests are subject to all sorts of qualifications and limitations that have not yet been discovered. If we take this latter course, we will inevitably end up "mak[ing] a crazy quilt of the Fourth Amendment." *Smith, supra,* at 745, 99 S.Ct. 2577.

All of this is unnecessary. In the Stored Communications Act, Congress addressed the specific problem at issue in this case. The Act restricts the misuse of cell-site records by cell service providers, something that the Fourth Amendment cannot do. The Act also goes beyond current Fourth Amendment case law in restricting access by law enforcement. It permits law enforcement officers to acquire cell-site records only if they meet a heightened standard and obtain a court order. If the American people now think that the Act is inadequate or needs updating, they can turn to their elected representatives to adopt more protective provisions. Because the collection and storage of cell-site records affects nearly every American, it is unlikely that the question whether the current law requires strengthening will escape Congress's notice.

Legislation is much preferable to the development of an entirely new body of Fourth Amendment caselaw for many reasons, including the enormous complexity of the subject, the need to respond to rapidly changing technology, and the Fourth Amendment's limited scope. The Fourth Amendment restricts the conduct of the Federal Government and the States; it does not apply to private actors. But today, some of the greatest threats to individual privacy may come from powerful private companies that collect and sometimes misuse vast quantities of data about the lives of ordinary Americans. If today's decision encourages the public to think that this Court can protect them from this looming threat to their privacy, the decision will mislead as well as disrupt. And if holding a provision of the Stored Communications Act to be unconstitutional dissuades Congress from further legislation in this field, the goal of protecting privacy will be greatly disserved.

The desire to make a statement about privacy in the digital age does not justify the consequences that today's decision is likely to produce.

Justice GORSUCH, dissenting.

In the late 1960s this Court suggested for the first time that a search triggering the Fourth Amendment occurs when the government violates an "expectation of privacy" that "society is prepared to recognize as 'reasonable.' "

Katz v. United States, 389 U.S. 347, 361, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring). Then, in a pair of decisions in the 1970s applying the *Katz* test, the Court held that a "reasonable expectation of privacy" *doesn't* attach to information shared with "third parties." See *Smith v. Maryland,* 442 U.S. 735, 743–744, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979); *United States v. Miller,* 425 U.S. 435, 443, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976). By these steps, the Court came to conclude, the Constitution does nothing to limit investigators from searching records you've entrusted to your bank, accountant, and maybe even your doctor.

***2262** What's left of the Fourth Amendment? Today we use the Internet to do most everything. Smartphones make it easy to keep a calendar, correspond with friends, make calls, conduct banking, and even watch the game. Countless Internet companies maintain records about us and, increasingly, *for* us. Even our most private documents—those that, in other eras, we would have locked safely in a desk drawer or destroyed—now reside on third party servers. *Smith* and *Miller* teach that the police can review all of this material, on the theory that no one reasonably expects any of it will be kept private. But no one believes that, if they ever did.

What to do? It seems to me we could respond in at least three ways. The first is to ignore the problem, maintain *Smith* and *Miller,* and live with the consequences. If the confluence of these decisions and modern technology means our Fourth Amendment rights are reduced to nearly nothing, so be it. The second choice is to set *Smith* and *Miller* aside and try again using the *Katz* "reasonable expectation of privacy" jurisprudence that produced them. The third is to look for answers elsewhere.

*

Start with the first option. *Smith* held that the government's use of a pen register to record the numbers people dial on their phones doesn't infringe a reasonable expectation of privacy because that information is freely disclosed to the third party phone company. 442 U.S., at 743–744, 99 S.Ct. 2577. *Miller* held that a bank account holder enjoys no reasonable expectation of privacy in the bank's records of his account activity. That's true, the Court reasoned, "even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." 425 U.S., at 443, 96 S.Ct. 1619. Today the Court suggests that *Smith* and *Miller* distinguish between *kinds* of information disclosed to third parties and require courts to decide whether to "extend" those decisions to particular classes of information, depending on their sensitivity. See *ante,* at 2216 - 2221. But as the Sixth Circuit recognized and Justice KENNEDY explains, no balancing test of this kind can be found in *Smith* and *Miller*. See *ante,* at 2231 - 2232 (dissenting opinion). Those cases announced a categorical rule: Once you disclose information to third parties, you forfeit any reasonable expectation of privacy you might have had in it. And even if *Smith* and *Miller* did permit courts to conduct a balancing contest of the kind the Court now suggests, it's still hard to see how that would help the petitioner in this case. Why is someone's location when using a phone so much more sensitive than who he was talking to (*Smith*) or what financial transactions he engaged in (*Miller*)? I do not know and the Court does not say.

The problem isn't with the Sixth Circuit's application of *Smith* and *Miller* but with the cases themselves. Can the government demand a copy of all your e-mails from Google or Microsoft without implicating your Fourth Amendment rights? Can it secure your DNA from 23andMe without a warrant or probable cause? *Smith* and *Miller* say yes it can—at least without running afoul of *Katz*. But that result strikes most lawyers and judges today—me included—as pretty unlikely. In the years since its adoption, countless scholars, too, have come to conclude that the "third-party doctrine is not only wrong, but horribly wrong." Kerr, The Case for the Third–Party Doctrine, 107 Mich. L. Rev. 561, 563, n. 5, 564 (2009) (collecting criticisms but defending the doctrine (footnotes omitted)). The reasons are obvious. "As an empirical statement about subjective ***2263** expectations of privacy," the doctrine is "quite dubious." Baude & Stern, The Positive Law Model of the Fourth Amendment, 129 Harv. L. Rev. 1821, 1872 (2016). People often *do* reasonably expect that information they entrust to third parties, especially information subject to confidentiality agreements, will be kept private. Meanwhile, if the third party doctrine is supposed to represent a normative assessment of when a person should expect privacy, the notion that the answer might be "never" seems a pretty unattractive societal prescription. *Ibid.*

What, then, is the explanation for our third party doctrine? The truth is, the Court has never offered a persuasive justification. The Court has said that by conveying information to a third party you " 'assum[e] the risk' " it will be revealed to the police and therefore lack a

reasonable expectation of privacy in it. *Smith, supra,* at 744, 99 S.Ct. 2577. But assumption of risk doctrine developed in tort law. It generally applies when "by contract or otherwise [one] expressly agrees to accept a risk of harm" or impliedly does so by "manifest[ing] his willingness to accept" that risk and thereby "take[s] his chances as to harm which may result from it." Restatement (Second) of Torts §§ 496B, 496C(1), and Comment *b* (1965); see also 1 D. Dobbs, P. Hayden, & E. Bublick, Law of Torts §§ 235–236, pp. 841–850 (2d ed. 2017). That rationale has little play in this context. Suppose I entrust a friend with a letter and he promises to keep it secret until he delivers it to an intended recipient. In what sense have I agreed to bear the risk that he will turn around, break his promise, and spill its contents to someone else? More confusing still, what have I done to "manifest my willingness to accept" the risk that the government will pry the document from my friend and read it *without* his consent?

One possible answer concerns knowledge. I know that my friend *might* break his promise, or that the government *might* have some reason to search the papers in his possession. But knowing about a risk doesn't mean you assume responsibility for it. Whenever you walk down the sidewalk you know a car may negligently or recklessly veer off and hit you, but that hardly means you accept the consequences and absolve the driver of any damage he may do to you. Epstein, Privacy and the Third Hand: Lessons From the Common Law of Reasonable Expectations, 24 Berkeley Tech. L.J. 1199, 1204 (2009); see W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser & Keeton on Law of Torts 490 (5th ed.1984).

Some have suggested the third party doctrine is better understood to rest on consent than assumption of risk. "So long as a person knows that they are disclosing information to a third party," the argument goes, "their choice to do so is voluntary and the consent valid." Kerr, *supra,* at 588. I confess I still don't see it. Consenting to give a third party access to private papers that remain my property is not the same thing as consenting to a *search of those papers by the government.* Perhaps there are exceptions, like when the third party is an undercover government agent. See Murphy, The Case Against the Case Against the Third–Party Doctrine: A Response to Epstein and Kerr, 24 Berkeley Tech. L.J. 1239, 1252 (2009); cf. *Hoffa v. United States,* 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966). But otherwise this conception of consent appears to be just assumption of risk relabeled—you've "consented" to whatever risks are foreseeable.

Another justification sometimes offered for third party doctrine is clarity. You (and the police) know exactly how much protection you have in information confided ***2264** to others: none. As rules go, "the king always wins" is admirably clear. But the opposite rule would be clear too: Third party disclosures *never* diminish Fourth Amendment protection (call it "the king always loses"). So clarity alone cannot justify the third party doctrine.

In the end, what do *Smith* and *Miller* add up to? A doubtful application of *Katz* that lets the government search almost whatever it wants whenever it wants. The Sixth Circuit had to follow that rule and faithfully did just that, but it's not clear why we should.

*

There's a second option. What if we dropped *Smith* and *Miller* 's third party doctrine and retreated to the root *Katz* question whether there is a "reasonable expectation of privacy" in data held by third parties? Rather than solve the problem with the third party doctrine, I worry this option only risks returning us to its source: After all, it was *Katz* that produced *Smith* and *Miller* in the first place.

Katz's problems start with the text and original understanding of the Fourth Amendment, as Justice THOMAS thoughtfully explains today. *Ante,*at 2237 - 2244 (dissenting opinion). The Amendment's protections do not depend on the breach of some abstract "expectation of privacy" whose contours are left to the judicial imagination. Much more concretely, it protects your "person," and your "houses, papers, and effects." Nor does your right to bring a Fourth Amendment claim depend on whether a judge happens to agree that your subjective expectation to privacy is a "reasonable" one. Under its plain terms, the Amendment grants you the right to invoke its guarantees whenever one of your protected things (your person, your house, your papers, or your effects) is unreasonably searched or seized. Period.

History too holds problems for *Katz*. Little like it can be found in the law that led to the adoption of the Fourth Amendment or in this Court's jurisprudence until the late 1960s. The Fourth Amendment came about in response to a trio of 18th century cases "well known to the men who wrote and ratified the Bill of Rights, [and] famous throughout the colonial population." Stuntz, The Substantive Origins of Criminal Procedure, 105 Yale L.J. 393, 397 (1995). The first two were English cases

invalidating the Crown's use of general warrants to enter homes and search papers. *Entick v. Carrington,* 19 How. St. Tr. 1029 (K.B. 1765); *Wilkes v. Wood,* 19 How. St. Tr. 1153 (K.B. 1763); see W. Cuddihy, The Fourth Amendment: Origins and Original Meaning 439–487 (2009); *Boyd v. United States,* 116 U.S. 616, 625–630, 6 S.Ct. 524, 29 L.Ed. 746 (1886). The third was American: the Boston Writs of Assistance Case, which sparked colonial outrage at the use of writs permitting government agents to enter houses and business, breaking open doors and chests along the way, to conduct searches and seizures—and to force third parties to help them. Stuntz, *supra,* at 404–409; M. Smith, The Writs of Assistance Case (1978). No doubt the colonial outrage engendered by these cases rested in part on the government's intrusion upon privacy. But the framers chose not to protect privacy in some ethereal way dependent on judicial intuitions. They chose instead to protect privacy in particular places and things—"persons, houses, papers, and effects"—and against particular threats—"unreasonable" governmental "searches and seizures." See *Entick, supra,* at 1066 ("Papers are the owner's goods and chattels; they are his dearest property; and so far from enduring a seizure, that they will hardly bear an inspection"); see also *ante,* at 2235 - 2246 (THOMAS, J., dissenting).

***2265** Even taken on its own terms, *Katz* has never been sufficiently justified. In fact, we still don't even know what its "reasonable expectation of privacy" test *is*. Is it supposed to pose an empirical question (what privacy expectations do people *actually* have) or a normative one (what expectations *should* they have)? Either way brings problems. If the test is supposed to be an empirical one, it's unclear why judges rather than legislators should conduct it. Legislators are responsive to their constituents and have institutional resources designed to help them discern and enact majoritarian preferences. Politically insulated judges come armed with only the attorneys' briefs, a few law clerks, and their own idiosyncratic experiences. They are hardly the representative group you'd expect (or want) to be making empirical judgments for hundreds of millions of people. Unsurprisingly, too, judicial judgments often fail to reflect public views. See Slobogin & Schumacher, Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society," 42 Duke L.J. 727, 732, 740–742 (1993). Consider just one example. Our cases insist that the seriousness of the offense being investigated does *not* reduce Fourth Amendment protection. *Mincey v. Arizona,* 437 U.S. 385, 393–394, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978). Yet scholars suggest that most people *are* more tolerant of police intrusions when they investigate more serious crimes. See Blumenthal, Adya, & Mogle, The Multiple Dimensions of Privacy: Testing Lay "Expectations of Privacy," 11 U. Pa. J. Const. L. 331, 352–353 (2009). And I very much doubt that this Court would be willing to adjust its *Katz* cases to reflect these findings even if it believed them.

Maybe, then, the *Katz* test should be conceived as a normative question. But if that's the case, why (again) do judges, rather than legislators, get to determine whether society *should be* prepared to recognize an expectation of privacy as legitimate? Deciding what privacy interests *should be* recognized often calls for a pure policy choice, many times between incommensurable goods—between the value of privacy in a particular setting and society's interest in combating crime. Answering questions like that calls for the exercise of raw political will belonging to legislatures, not the legal judgment proper to courts. See The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton). When judges abandon legal judgment for political will we not only risk decisions where "reasonable expectations of privacy" come to bear "an uncanny resemblance to those expectations of privacy" shared by Members of this Court. *Minnesota v. Carter,* 525 U.S. 83, 97, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998) (Scalia, J., concurring). We also risk undermining public confidence in the courts themselves.

My concerns about *Katz* come with a caveat. *Sometimes,* I accept, judges may be able to discern and describe existing societal norms. See, *e.g., Florida v. Jardines,* 569 U.S. 1, 8, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013) (inferring a license to enter on private property from the " 'habits of the country' " (quoting *McKee v. Gratz,* 260 U.S. 127, 136, 43 S.Ct. 16, 67 L.Ed. 167 (1922))); Sachs, Finding Law, 107 Cal. L. Rev. (forthcoming 2019), online at https://ssrn.com/abstract=3064443 (as last visited June 19, 2018). That is particularly true when the judge looks to positive law rather than intuition for guidance on social norms. See *Byrd v. United States,* 584 U.S. ——, —— – ——, 138 S.Ct. 1518, 1527, —— L.Ed.2d —— (2018) ("general property-based concept[s] guid[e] the resolution of this case"). So there may be *some* occasions where *Katz* is capable of principled application— ***2266** though it may simply wind up approximating the more traditional option I will discuss in a moment. Sometimes it may also be possible to apply *Katz* by analogizing from precedent when the line between an existing case and a new fact pattern is short and direct. But so far this Court has declined to tie itself to any significant restraints like these. See *ante,* at 2214, n. 1 ("[W]hile property rights are often informative, our cases by no means suggest that such an interest is 'fundamental' or 'dispositive' in determining which expectations of privacy are legitimate").

As a result, *Katz* has yielded an often unpredictable—and sometimes unbelievable—jurisprudence. *Smith* and *Miller* are only two examples; there are many others. Take *Florida v. Riley,* 488 U.S. 445, 109 S.Ct. 693, 102 L.Ed.2d 835 (1989), which says that a police helicopter hovering 400 feet above a person's property invades no reasonable expectation of privacy. Try that one out on your neighbors. Or *California v. Greenwood,* 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988), which holds that a person has no reasonable expectation of privacy in the garbage he puts out for collection. In that case, the Court said that the homeowners forfeited their privacy interests because "[i]t is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public." *Id.,* at 40, 108 S.Ct. 1625 (footnotes omitted). But the habits of raccoons don't prove much about the habits of the country. I doubt, too, that most people spotting a neighbor rummaging through their garbage would think they lacked reasonable grounds to confront the rummager. Making the decision all the stranger, California state law expressly *protected* a homeowner's property rights in discarded trash. *Id.,* at 43, 108 S.Ct. 1625. Yet rather than defer to that as evidence of the people's habits and reasonable expectations of privacy, the Court substituted its own curious judgment.

Resorting to *Katz* in data privacy cases threatens more of the same. Just consider. The Court today says that judges should use *Katz* 's reasonable expectation of privacy test to decide what Fourth Amendment rights people have in cell-site location information, explaining that "no single rubric definitively resolves which expectations of privacy are entitled to protection." *Ante,* at 2213 - 2214. But then it offers a twist. Lower courts should be sure to add two special principles to their *Katz* calculus: the need to avoid "arbitrary power" and the importance of "plac[ing] obstacles in the way of a too permeating police surveillance." *Ante,* at 2214 (internal quotation marks omitted). While surely laudable, these principles don't offer lower courts much guidance. The Court does not tell us, for example, how far to carry either principle or how to weigh them against the legitimate needs of law enforcement. At what point does access to electronic data amount to "arbitrary" authority? When does police surveillance become "too permeating"? And what sort of "obstacles" should judges "place" in law enforcement's path when it does? We simply do not know.

The Court's application of these principles supplies little more direction. The Court declines to say whether there is any sufficiently limited period of time "for which the Government may obtain an individual's historical [location information] free from Fourth Amendment scrutiny." *Ante,* at 2217, n. 3; see *ante,* at 2216 - 2219. But then it tells us that access to seven days' worth of information *does* trigger Fourth Amendment scrutiny—even though here the carrier "produced only two days of records." *Ante,* at 2217, n. 3. Why is the relevant fact the seven days of ***2267** information the government *asked for* instead of the two days of information the government *actually saw* ? Why seven days instead of ten or three or one? And in what possible sense did the government "search" five days' worth of location information it was never even sent? We do not know.

Later still, the Court adds that it can't say whether the Fourth Amendment is triggered when the government collects "real-time CSLI or 'tower dumps' (a download of information on all the devices that connected to a particular cell site during a particular interval)." *Ante,* at 2220. But what distinguishes historical data from real-time data, or seven days of a single person's data from a download of *everyone* 's data over some indefinite period of time? Why isn't a tower dump the *paradigmatic* example of "too permeating police surveillance" and a dangerous tool of "arbitrary" authority—the touchstones of the majority's modified *Katz* analysis? On what possible basis could such mass data collection survive the Court's test while collecting a single person's data does not? Here again we are left to guess. At the same time, though, the Court offers some firm assurances. It tells us its decision does *not* "call into question conventional surveillance techniques and tools, such as security cameras." *Ibid.* That, however, just raises more questions for lower courts to sort out about what techniques qualify as "conventional" and why those techniques would be okay *even if* they lead to "permeating police surveillance" or "arbitrary police power."

Nor is this the end of it. After finding a reasonable expectation of privacy, the Court says there's still more work to do. Courts must determine whether to "extend" *Smith* and *Miller* to the circumstances before them. *Ante,* at 2216, 2219 - 2220. So apparently *Smith* and *Miller* aren't quite left for dead; they just no longer have the clear reach they once did. How do we measure their new reach? The Court says courts now must conduct a *second Katz*-like balancing inquiry, asking whether the fact of disclosure to a third party outweighs privacy interests in the "category of information" so disclosed. *Ante,* at 2218, 2219 - 2220. But how are lower courts supposed to weigh these radically different interests? Or assign values to different categories of information? All we know is that historical cell-site location information (for seven days, anyway) escapes *Smith* and *Miller* 's shorn grasp, while a

lifetime of bank or phone records does not. As to any other kind of information, lower courts will have to stay tuned.

In the end, our lower court colleagues are left with two amorphous balancing tests, a series of weighty and incommensurable principles to consider in them, and a few illustrative examples that seem little more than the product of judicial intuition. In the Court's defense, though, we have arrived at this strange place not because the Court has misunderstood *Katz*. Far from it. We have arrived here because this is where *Katz* inevitably leads.

*

There is another way. From the founding until the 1960s, the right to assert a Fourth Amendment claim didn't depend on your ability to appeal to a judge's personal sensibilities about the "reasonableness" of your expectations or privacy. It was tied to the law. *Jardines,* 569 U.S., at 11, 133 S.Ct. 1409; *United States v. Jones,* 565 U.S. 400, 405, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012). The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." True to those words and their original understanding, the traditional approach ***2268** asked if a house, paper or effect was *yours* under law. No more was needed to trigger the Fourth Amendment. Though now often lost in *Katz* 's shadow, this traditional understanding persists. *Katz* only "supplements, rather than displaces the traditional property-based understanding of the Fourth Amendment." *Byrd,* 584 U.S., at ——, 138 S.Ct., at 1526 (internal quotation marks omitted); *Jardines, supra,* at 11, 133 S.Ct. 1409 (same); *Soldal v. Cook County,* 506 U.S. 56, 64, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992) (*Katz* did not "snuf[f] out the previously recognized protection for property under the Fourth Amendment").

Beyond its provenance in the text and original understanding of the Amendment, this traditional approach comes with other advantages. Judges are supposed to decide cases based on "democratically legitimate sources of law"—like positive law or analogies to items protected by the enacted Constitution—rather than "their own biases or personal policy preferences." Pettys, Judicial Discretion in Constitutional Cases, 26 J.L. & Pol. 123, 127 (2011). A Fourth Amendment model based on positive legal rights "carves out significant room for legislative participation in the Fourth Amendment context," too, by asking judges to consult what the people's representatives have to say about their rights. Baude & Stern, 129 Harv. L. Rev., at 1852. Nor is this approach hobbled by *Smith* and *Miller,* for those cases are just *limitations* on *Katz,* addressing only the question whether individuals have a reasonable expectation of privacy in materials they share with third parties. Under this more traditional approach, Fourth Amendment protections for your papers and effects do not automatically disappear just because you share them with third parties.

Given the prominence *Katz* has claimed in our doctrine, American courts are pretty rusty at applying the traditional approach to the Fourth Amendment. We know that if a house, paper, or effect is yours, you have a Fourth Amendment interest in its protection. But what kind of legal interest is sufficient to make something *yours* ? And what source of law determines that? Current positive law? The common law at 1791, extended by analogy to modern times? Both? See *Byrd, supra,* at —— – ——, 138 S.Ct., at 1531 (THOMAS, J., concurring); cf. Re, The Positive Law Floor, 129 Harv. L. Rev. Forum 313 (2016). Much work is needed to revitalize this area and answer these questions. I do not begin to claim all the answers today, but (unlike with *Katz*) at least I have a pretty good idea what the questions *are*. And it seems to me a few things can be said.

First, the fact that a third party has access to or possession of your papers and effects does not necessarily eliminate your interest in them. Ever hand a private document to a friend to be returned? Toss your keys to a valet at a restaurant? Ask your neighbor to look after your dog while you travel? You would not expect the friend to share the document with others; the valet to lend your car to his buddy; or the neighbor to put Fido up for adoption. Entrusting your stuff to others is a *bailment*. A bailment is the "delivery of personal property by one person (the *bailor*) to another (the *bailee*) who holds the property for a certain purpose." Black's Law Dictionary 169 (10th ed. 2014); J. Story, Commentaries on the Law of Bailments § 2, p. 2 (1832) ("a bailment is a delivery of a thing in trust for some special object or purpose, and upon a contract, expressed or implied, to conform to the object or purpose of the trust"). A bailee normally owes a legal duty to keep the item safe, according to the terms of the parties' contract if they have one, and according to the "implication[s] from their ***2269** conduct" if they don't. 8 C.J. S., Bailments § 36, pp. 468–469 (2017). A bailee who uses the item in a different way than he's supposed to, or against the bailor's instructions, is liable for conversion. *Id.,* § 43, at 481; see *Goad v. Harris,* 207 Ala.

357, 92 So. 546 (1922); *Knight v. Seney,* 290 Ill. 11, 17, 124 N.E. 813, 815–816 (1919); *Baxter v. Woodward,* 191 Mich. 379, 385, 158 N.W. 137, 139 (1916). This approach is quite different from *Smith* and *Miller* 's (counter)-intuitive approach to reasonable expectations of privacy; where those cases extinguish Fourth Amendment interests once records are given to a third party, property law may preserve them.

Our Fourth Amendment jurisprudence already reflects this truth. In *Ex parte Jackson,* 96 U.S. 727, 24 L.Ed. 877 (1878), this Court held that sealed letters placed 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." *Id.,* at 733. The reason, drawn from the Fourth Amendment's text, was that "[t]he 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*." *Ibid.* (emphasis added). It did not matter that letters were bailed to a third party (the government, no less). The sender enjoyed the same Fourth Amendment protection as he does "when papers are subjected to search in one's own household." *Ibid.*

These ancient principles may help us address modern data cases too. Just because you entrust your data—in some cases, your modern-day papers and effects—to a third party may not mean you lose any Fourth Amendment interest in its contents. Whatever may be left of *Smith* and *Miller,* few doubt that e-mail should be treated much like the traditional mail it has largely supplanted—as a bailment in which the owner retains a vital and protected legal interest. See *ante,* at 2230 (KENNEDY, J., dissenting) (noting that enhanced Fourth Amendment protection may apply when the "modern-day equivalents of an individual's own 'papers' or 'effects' ... are held by a third party" through "bailment"); *ante,* at 2259, n. 6 (ALITO, J., dissenting) (reserving the question whether Fourth Amendment protection may apply in the case of "bailment" or when "someone has entrusted papers he or she owns ... to the safekeeping of another"); *United States v. Warshak,* 631 F.3d 266, 285–286 (C.A.6 2010) (relying on an analogy to *Jackson* to extend Fourth Amendment protection to e-mail held by a third party service provider).

Second, I doubt that complete ownership or exclusive control of property is always a necessary condition to the assertion of a Fourth Amendment right. Where houses are concerned, for example, individuals can enjoy Fourth Amendment protection without fee simple title. Both the text of the Amendment and the common law rule support that conclusion. "People call a house 'their' home when legal title is in the bank, when they rent it, and even when they merely occupy it rent free." *Carter,* 525 U.S., at 95–96, 119 S.Ct. 469 (Scalia, J., concurring). That rule derives from the common law. *Oystead v. Shed,* 13 Mass. 520, 523 (1816) (explaining, citing "[t]he very learned judges, *Foster, Hale,* and *Coke,*" that the law "would be as much disturbed by a forcible entry to arrest a boarder or a servant, who had acquired, by contract, express or implied, a right to enter the house at all times, and to remain in it as long as they please, as if the object were to arrest the master of the house or his children"). That is why tenants and resident family members—though they have no legal title—have standing to complain ***2270** about searches of the houses in which they live. *Chapman v. United States,* 365 U.S. 610, 616–617, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961), *Bumper v. North Carolina,* 391 U.S. 543, 548, n. 11, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968).

Another point seems equally true: just because you *have* to entrust a third party with your data doesn't necessarily mean you should lose all Fourth Amendment protections in it. Not infrequently one person comes into possession of someone else's property without the owner's consent. Think of the finder of lost goods or the policeman who impounds a car. The law recognizes that the goods and the car still belong to their true owners, for "where a person comes into lawful possession of the personal property of another, even though there is no formal agreement between the property's owner and its possessor, the possessor will become a constructive bailee when justice so requires." *Christensen v. Hoover,* 643 P.2d 525, 529 (Colo.1982) (en banc); Laidlaw, Principles of Bailment, 16 Cornell L.Q. 286 (1931). At least some of this Court's decisions have already suggested that use of technology is functionally compelled by the demands of modern life, and in that way the fact that we store data with third parties may amount to a sort of involuntary bailment too. See *ante,* at 2217 - 2218 (majority opinion); *Riley v. California,* 573 U.S. ——, ——, 134 S.Ct. 2473, 2484, 189 L.Ed.2d 430 (2014).

Third, positive law may help provide detailed guidance on evolving technologies without resort to judicial intuition. State (or sometimes federal) law often creates rights in both tangible and intangible things. See *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1001, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984). In the context of the Takings Clause we often ask whether those state-created rights are sufficient to make something someone's property for constitutional purposes. See *id.,* at 1001–1003, 104 S.Ct. 2862; *Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555, 590–595, 55 S.Ct. 854, 79 L.Ed. 1593 (1935). A

similar inquiry may be appropriate for the Fourth Amendment. Both the States and federal government are actively legislating in the area of third party data storage and the rights users enjoy. See, *e.g.,* Stored Communications Act, 18 U.S.C. § 2701 *et seq.*; Tex. Prop.Code Ann. § 111.004(12) (West 2017) (defining "[p]roperty" to include "property held in any digital or electronic medium"). State courts are busy expounding common law property principles in this area as well. *E.g., Ajemian v. Yahoo!, Inc.,* 478 Mass. 169, 170, 84 N.E.3d 766, 768 (2017) (e-mail account is a "form of property often referred to as a 'digital asset' "); *Eysoldt v. ProScan Imaging,* 194 Ohio App.3d 630, 638, 2011–Ohio–2359, 957 N.E.2d 780, 786 (2011) (permitting action for conversion of web account as intangible property). If state legislators or state courts say that a digital record has the attributes that normally make something property, that may supply a sounder basis for judicial decisionmaking than judicial guesswork about societal expectations.

Fourth, while positive law may help establish a person's Fourth Amendment interest there may be some circumstances where positive law cannot be used to defeat it. *Ex parte Jackson* reflects that understanding. There this Court said that "[n]o law of Congress" could authorize letter carriers "to invade the secrecy of letters." 96 U.S., at 733. So the post office couldn't impose a regulation dictating that those mailing letters surrender all legal interests in them once they're deposited in a mailbox. If that is right, *Jackson* suggests the existence of a constitutional floor below which Fourth Amendment rights may not descend. Legislatures cannot ***2271** pass laws declaring your house or papers to be your property except to the extent the police wish to search them without cause. As the Court has previously explained, "we must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.' " *Jones,* 565 U.S., at 406, 132 S.Ct. 945 (quoting *Kyllo v. United States,* 533 U.S. 27, 34, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001)). Nor does this mean protecting only the specific rights known at the founding; it means protecting their modern analogues too. So, for example, while thermal imaging was unknown in 1791, this Court has recognized that using that technology to look inside a home constitutes a Fourth Amendment "search" of that "home" no less than a physical inspection might. *Id.,* at 40, 121 S.Ct. 2038.

Fifth, this constitutional floor may, in some instances, bar efforts to circumvent the Fourth Amendment's protection through the use of subpoenas. No one thinks the government can evade *Jackson* 's prohibition on opening sealed letters without a warrant simply by issuing a subpoena to a postmaster for "all letters sent by John Smith" or, worse, "all letters sent by John Smith concerning a particular transaction." So the question courts will confront will be this: What other kinds of records are sufficiently similar to letters in the mail that the same rule should apply?

It may be that, as an original matter, a subpoena requiring the recipient to produce records wasn't thought of as a "search or seizure" by the government implicating the Fourth Amendment, see *ante,* at 2247 - 2253 (opinion of ALITO, J.), but instead as an act of compelled self-incrimination implicating the Fifth Amendment, see *United States v. Hubbell,* 530 U.S. 27, 49–55, 120 S.Ct. 2037, 147 L.Ed.2d 24 (2000) (THOMAS, J., dissenting); Nagareda, Compulsion "To Be a Witness" and the Resurrection of Boyd, 74 N.Y.U. L. Rev. 1575, 1619, and n. 172 (1999). But the common law of searches and seizures does not appear to have confronted a case where private documents equivalent to a mailed letter were entrusted to a bailee and then subpoenaed. As a result, "[t]he common-law rule regarding subpoenas for documents held by third parties entrusted with information from the target is ... unknown and perhaps unknowable." Dripps, Perspectives on The Fourth Amendment Forty Years Later: Toward the Realization of an Inclusive Regulatory Model, 100 Minn. L. Rev. 1885, 1922 (2016). Given that (perhaps insoluble) uncertainty, I am content to adhere to *Jackson* and its implications for now.

To be sure, we must be wary of returning to the doctrine of *Boyd v. United States,* 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746. *Boyd* invoked the Fourth Amendment to restrict the use of subpoenas even for ordinary business records and, as Justice ALITO notes, eventually proved unworkable. See *ante,* at 2253 (dissenting opinion); 3 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 8.7(a), pp. 185–187 (4th ed. 2015). But if we were to overthrow *Jackson* too and deny Fourth Amendment protection to *any* subpoenaed materials, we would do well to reconsider the scope of the Fifth Amendment while we're at it. Our precedents treat the right against self-incrimination as applicable only to testimony, not the production of incriminating evidence. See *Fisher v. United States,* 425 U.S. 391, 401, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976). But there is substantial evidence that the privilege against self-incrimination was also originally understood to protect a person from being forced to turn over potentially incriminating evidence. Nagareda, *supra,* at 1605–1623; *Rex v. Purnell,* 96 Eng. Rep. 20 (K.B. 1748); Slobogin, Privacy at Risk 145 (2007).

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What does all this mean for the case before us? To start, I cannot fault the Sixth Circuit for holding that *Smith* and *Miller* extinguish any *Katz*-based Fourth Amendment interest in third party cell-site data. That is the plain effect of their categorical holdings. Nor can I fault the Court today for its implicit but unmistakable conclusion that the rationale of *Smith* and *Miller* is wrong; indeed, I agree with that. The Sixth Circuit was powerless to say so, but this Court can and should. At the same time, I do not agree with the Court's decision today to keep *Smith* and *Miller* on life support and supplement them with a new and multilayered inquiry that seems to be only *Katz*-squared. Returning there, I worry, promises more trouble than help. Instead, I would look to a more traditional Fourth Amendment approach. Even if *Katz* may still supply one way to prove a Fourth Amendment interest, it has never been the only way. Neglecting more traditional approaches may mean failing to vindicate the full protections of the Fourth Amendment.

Our case offers a cautionary example. It seems to me entirely possible a person's cell-site data could qualify as *his* papers or effects under existing law. Yes, the telephone carrier holds the information. But 47 U.S.C. § 222 designates a customer's cell-site location information as "customer proprietary network information" (CPNI), § 222(h)(1)(A), and gives customers certain rights to control use of and access to CPNI about themselves. The statute generally forbids a carrier to "use, disclose, or permit access to individually identifiable" CPNI without the customer's consent, except as needed to provide the customer's telecommunications services. § 222(c)(1). It also requires the carrier to disclose CPNI "upon affirmative written request by the customer, to any person designated by the customer." § 222(c)(2). Congress even afforded customers a private cause of action for damages against carriers who violate the Act's terms. § 207. Plainly, customers have substantial legal interests in this information, including at least some right to include, exclude, and control its use. Those interests might even rise to the level of a property right.

The problem is that we do not know anything more. Before the district court and court of appeals, Mr. Carpenter pursued only a *Katz* "reasonable expectations" argument. He did not invoke the law of property or any analogies to the common law, either there or in his petition for certiorari. Even in his merits brief before this Court, Mr. Carpenter's discussion of his positive law rights in cell-site data was cursory. He offered no analysis, for example, of what rights state law might provide him in addition to those supplied by § 222. In these circumstances, I cannot help but conclude—reluctantly—that Mr. Carpenter forfeited perhaps his most promising line of argument.

Unfortunately, too, this case marks the second time this Term that individuals have forfeited Fourth Amendment arguments based on positive law by failing to preserve them. See *Byrd,* 584 U.S., at ——, 138 S.Ct., at 1526. Litigants have had fair notice since at least *United States v. Jones* (2012) and *Florida v. Jardines* (2013) that arguments like these may vindicate Fourth Amendment interests even where *Katz* arguments do not. Yet the arguments have gone unmade, leaving courts to the usual *Katz* handwaving. These omissions do not serve the development of a sound or fully protective Fourth Amendment jurisprudence.

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Justice KENNEDY believes that there is such a rubric—the "property-based concepts" that *Katz* purported to move beyond. *Post,* at 2224 (dissenting opinion). But while property rights are often informative, our cases by no means suggest that such an interest is "fundamental" or "dispositive" in determining which expectations of privacy are legitimate. *Post,* at 2227 - 2228. Justice THOMAS (and to a large extent Justice GORSUCH) would have us abandon *Katz* and return to an exclusively property-based approach. *Post,* at 2235 - 2236, 2244 - 2246 (THOMAS J., dissenting); *post,* at 2264 - 2266 (GORSUCH, J., dissenting). *Katz* of course "discredited" the "premise that property interests control," 389 U.S., at 353, 88 S.Ct. 507, and we have repeatedly emphasized that privacy interests do not rise or fall with property rights, see, *e.g., United States v. Jones,* 565 U.S. 400, 411, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012) (refusing to "make trespass the exclusive test"); *Kyllo v. United States,* 533 U.S. 27, 32, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001) ("We have since decoupled violation of a person's Fourth Amendment rights from trespassory

violation of his property."). Neither party has asked the Court to reconsider *Katz* in this case.

2 Justice KENNEDY argues that this case is in a different category from *Jones* and the dragnet-type practices posited in *Knotts* because the disclosure of the cell-site records was subject to "judicial authorization." *Post,* at 2230 - 2232. That line of argument conflates the threshold question whether a "search" has occurred with the separate matter of whether the search was reasonable. The subpoena process set forth in the Stored Communications Act does not determine a target's expectation of privacy. And in any event, neither *Jones* nor *Knotts* purported to resolve the question of what authorization may be required to conduct such electronic surveillance techniques. But see *Jones,* 565 U.S., at 430, 132 S.Ct. 945 (ALITO, J., concurring in judgment) (indicating that longer term GPS tracking may require a warrant).

3 The parties suggest as an alternative to their primary submissions that the acquisition of CSLI becomes a search only if it extends beyond a limited period. See Reply Brief 12 (proposing a 24–hour cutoff); Brief for United States 55–56 (suggesting a seven-day cutoff). As part of its argument, the Government treats the seven days of CSLI requested from Sprint as the pertinent period, even though Sprint produced only two days of records. Brief for United States 56. Contrary to Justice KENNEDY's assertion, *post,* at 2233, we need not decide whether there is a limited period for which the Government may obtain an individual's historical CSLI free from Fourth Amendment scrutiny, and if so, how long that period might be. It is sufficient for our purposes today to hold that accessing seven days of CSLI constitutes a Fourth Amendment search.

4 Justice GORSUCH faults us for not promulgating a complete code addressing the manifold situations that may be presented by this new technology—under a constitutional provision turning on what is "reasonable," no less. *Post,* at 2266 - 2268. Like Justice GORSUCH, we "do not begin to claim all the answers today," *post,* at 2268, and therefore decide no more than the case before us.

5 See *United States v. Dionisio,* 410 U.S. 1, 14, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973) ("No person can have a reasonable expectation that others will not know the sound of his voice"); *Donovan v. Lone Steer, Inc.,* 464 U.S. 408, 411, 415, 104 S.Ct. 769, 78 L.Ed.2d 567 (1984) (payroll and sales records); *California Bankers Assn. v. Shultz,* 416 U.S. 21, 67, 94 S.Ct. 1494, 39 L.Ed.2d 812 (1974) (Bank Secrecy Act reporting requirements); *See v. Seattle,* 387 U.S. 541, 544, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967) (financial books and records); *United States v. Powell,* 379 U.S. 48, 49, 57, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964) (corporate tax records); *McPhaul v. United States,* 364 U.S. 372, 374, 382, 81 S.Ct. 138, 5 L.Ed.2d 136 (1960) (books and records of an organization); *United States v. Morton Salt Co.,* 338 U.S. 632, 634, 651–653, 70 S.Ct. 357, 94 L.Ed. 401 (1950) (Federal Trade Commission reporting requirement); *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186, 189, 204–208, 66 S.Ct. 494, 90 L.Ed. 614 (1946) (payroll records); *Hale v. Henkel,* 201 U.S. 43, 45, 75, 26 S.Ct. 370, 50 L.Ed. 652 (1906) (corporate books and papers).

1 Justice Brandeis authored the principal dissent in *Olmstead*. He consulted the "underlying purpose," rather than "the words of the [Fourth] Amendment," to conclude that the wiretap was a search. 277 U.S., at 476, 48 S.Ct. 564. In Justice Brandeis' view, the Framers "recognized the significance of man's spiritual nature, of his feelings and of his intellect" and "sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations." *Id.,* at 478, 48 S.Ct. 564. Thus, "every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed," should constitute an unreasonable search under the Fourth Amendment. *Ibid.*

2 National Archives, Library of Congress, Founders Online, https://founders.archives.gov (all Internet materials as last visited June 18, 2018).

3 A Century of Lawmaking For A New Nation, U.S. Congressional Documents and Debates, 1774–1875 (May 1, 2003), https://memory.loc.gov/ammem/amlaw/lawhome.html.

4 Corpus of Historical American English, https://corpus.byu.edu/coha; Google Books (American), https://googlebooks.byu.edu/x.asp; Corpus of Founding Era American English, https://lawncl.byu.edu/cofea.

5 Readex, America's Historical Newspapers (2018), https://www.readex.com/content/americas-historical-newspapers.

6 Writs of assistance were "general warrants" that gave "customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws." *Stanford v. Texas,* 379 U.S. 476, 481, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965).

7 "Every subject has a right to be secure from all unreasonable searches and seizures of his person, his house, his papers, and all his possessions. All warrants, therefore, are contrary to right, if the cause or foundation of them be not previously supported by oath

or affirmation, and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the person or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws." Mass. Const., pt. I, Art. XIV (1780).

8 The answer to that question is not obvious. Cell-site location records are business records that mechanically collect the interactions between a person's cell phone and the company's towers; they are not private papers and do not reveal the contents of any communications. Cf. Schnapper, Unreasonable Searches and Seizures of Papers, 71 Va. L. Rev. 869, 923–924 (1985) (explaining that business records that do not reveal "personal or speech-related confidences" might not satisfy the original meaning of "papers").

9 Carpenter relies on an order from the Federal Communications Commission (FCC), which weakly states that " '*[t]o the extent* [a customer's location information] is property, ... it is better understood as belonging to the customer, not the carrier.' " Brief for Petitioner 34, and n. 23 (quoting 13 FCC Rcd. 8061, 8093 ¶ 43 (1998); emphasis added). But this order was vacated by the Court of Appeals for the Tenth Circuit. *U.S. West, Inc. v. FCC,* 182 F.3d 1224, 1240 (1999). Notably, the carrier in that case argued that the FCC's regulation of customer information was a taking of *its* property. See *id.,* at 1230. Although the panel majority had no occasion to address this argument, see *id.,* at 1239, n. 14, the dissent concluded that the carrier had failed to prove the information was "property" at all, see *id.,* at 1247–1248 (opinion of Briscoe, J.).

10 Kugler & Strahilevitz, Actual Expectations of Privacy, Fourth Amendment Doctrine, and the Mosaic Theory, 2015 S.Ct. Rev. 205, 261; Bradley, Two Models of the Fourth Amendment, 83 Mich. L. Rev. 1468 (1985); Kerr, Four Models of Fourth Amendment Protection, 60 Stan. L. Rev. 503, 505 (2007); Solove, Fourth Amendment Pragmatism, 51 Boston College L. Rev. 1511 (2010); Wasserstom & Seidman, The Fourth Amendment as Constitutional Theory, 77 Geo. L.J. 19, 29 (1988); Colb, What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy, 55 Stan. L. Rev. 119, 122 (2002); Clancy, The Fourth Amendment: Its History and Interpretation § 3.3.4, p. 65 (2008); *Minnesota v. Carter,* 525 U.S. 83, 97, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998) (Scalia, J., dissenting); *State v. Campbell,* 306 Ore. 157, 164, 759 P.2d 1040, 1044 (1988); Wilkins, Defining the "Reasonable Expectation of Privacy": an Emerging Tripartite Analysis, 40 Vand. L. Rev. 1077, 1107 (1987); Yeager, Search, Seizure and the Positive Law: Expectations of Privacy Outside the Fourth Amendment, 84 J.Crim. L. & C. 249, 251 (1993); Thomas, Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment, 80 Notre Dame L. Rev. 1451, 1500 (2005); *Rakas v. Illinois,* 439 U.S. 128, 165, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978) (White, J., dissenting); Cloud, Rube Goldberg Meets the Constitution: The Supreme Court, Technology, and the Fourth Amendment, 72 Miss. L.J. 5, 7 (2002).

1 Any other interpretation of the Fourth Amendment's text would run into insuperable problems because it would apply not only to subpoenas *duces tecum* but to all other forms of compulsory process as well. If the Fourth Amendment applies to the compelled production of documents, then it must also apply to the compelled production of testimony—an outcome that we have repeatedly rejected and which, if accepted, would send much of the field of criminal procedure into a tailspin. See, *e.g., United States v. Dionisio,* 410 U.S. 1, 9, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973) ("It is clear that a subpoena to appear before a grand jury is not a 'seizure' in the Fourth Amendment sense, even though that summons may be inconvenient or burdensome"); *United States v. Calandra,* 414 U.S. 338, 354, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) ("Grand jury questions ... involve no independent governmental invasion of one's person, house, papers, or effects"). As a matter of original understanding, a subpoena *duces tecum* no more effects a "search" or "seizure" of papers within the meaning of the Fourth Amendment than a subpoena *ad testificandum* effects a "search" or "seizure" of a person.

2 All that the Court can say in response is that we have "been careful not to uncritically extend existing precedents" when confronting new technologies. *Ante,* at 2222. But applying a categorical rule categorically does not "extend" precedent, so the Court's statement ends up sounding a lot like a tacit admission that it is overruling our precedents.

3 See, *e.g.,* Freedom of Information Act, 5 U.S.C. § 552(a) ("Each agency shall make available to the public information as follows ..."); Privacy Act, 5 U.S.C. § 552a(d)(1) ("Each agency that maintains a system of records shall ... upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof ..."); Fair Credit Reporting Act, 15 U.S.C. § 1681j(a)(1)(A) ("All consumer reporting agencies ... shall make all disclosures pursuant to section 1681g of this title once during any 12–month period upon request of the consumer and without charge to the consumer"); Right to Financial Privacy Act of 1978, 12 U.S.C. § 3404(c) ("The customer has the right ... to obtain a copy of the record which the financial institution shall keep of all instances in which the customer's record is disclosed to a Government authority pursuant to this section, including the identity of the Government authority to which such disclosure is made"); Government in the Sunshine Act, 5 U.S.C. § 552b(f)(2) ("Copies of such transcript, or minutes, or a transcription of such recording

disclosing the identity of each speaker, shall be furnished to any person at the actual cost of duplication or transcription"); Cable Act, 47 U.S.C. § 551(d) ("A cable subscriber shall be provided access to all personally identifiable information regarding that subscriber which is collected and maintained by a cable operator"); Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g(a)(1)(A) ("No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children.... Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made").

4 See, *e.g.,* Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g(b)(1) ("No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information ...) of students without the written consent of their parents to any individual, agency, or organization ..."); Video Privacy Protection Act, 18 U.S.C. § 2710(b)(1) ("A video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider shall be liable to the aggrieved person for the relief provided in subsection (d)"); Driver Privacy Protection Act, 18 U.S.C. § 2721(a)(1) ("A State department of motor vehicles, and any officer, employee, or contractor thereof, shall not knowingly disclose or otherwise make available to any person or entity ... personal information ..."); Fair Credit Reporting Act, 15 U.S.C. § 1681b(a) ("[A]ny consumer reporting agency may furnish a consumer report under the following circumstances and no other ..."); Right to Financial Privacy Act, 12 U.S.C. § 3403(a) ("No financial institution, or officer, employees, or agent of a financial institution, may provide to any Government authority access to or copies of, or the information contained in, the financial records of any customer except in accordance with the provisions of this chapter"); Patient Safety and Quality Improvement Act, 42 U.S.C. § 299b–22(b) ("Notwithstanding any other provision of Federal, State, or local law, and subject to subsection (c) of this section, patient safety work product shall be confidential and shall not be disclosed"); Cable Act, 47 U.S.C. § 551(c)(1) ("[A] cable operator shall not disclose personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber concerned and shall take such actions as are necessary to prevent unauthorized access to such information by a person other than the subscriber or cable operator").

5 Carpenter also cannot argue that he owns the cell-site records merely because they fall into the category of records referred to as "customer proprietary network information." 47 U.S.C. § 222(c). Even assuming labels alone can confer property rights, nothing in this particular label indicates whether the "information" is "proprietary" to the "customer" or to the provider of the "network." At best, the phrase "customer proprietary network information" is ambiguous, and context makes clear that it refers to the *provider* 's information. The Telecommunications Act defines the term to include all "information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship." 47 U.S.C. § 222(h)(1)(A). For Carpenter to be right, he must own not only the cell-site records in this case, but also records relating to, for example, the "technical configuration" of his subscribed service—records that presumably include such intensely personal and private information as transmission wavelengths, transport protocols, and link layer system configurations.

6 Thus, this is not a case in which someone has entrusted papers that he or she owns to the safekeeping of another, and it does not involve a bailment. Cf. *post,* at 2268 - 2269 (GORSUCH, J., dissenting).

132 A.3d 986
Superior Court of **Pennsylvania**.

COMMONWEALTH of **Pennsylvania**, Appellee
v.
Somwang Laos KAKHANKHAM, Appellant.

Submitted Jan. 28, 2015.
|
Filed Oct. 28, 2015.

Synopsis
Background: Defendant was convicted in the Court of Common Pleas, Cumberland County, Criminal Division, No. CP–21–CR–0003607–2012, Hess, J., of drug delivery resulting in death, and he appealed.

Holdings: The Superior Court, No. 712 MDA 2014, Stabile, J., held that:

[1] statute, prohibiting drug delivery resulting in death, was not unconstitutionally vague, and

[2] defendant's conduct satisfied both parts of the causation test under statute.

Affirmed.

West Headnotes (17)

[1] **Criminal Law**
Review De Novo

Analysis of the constitutionality of a criminal statute, and whether the Commonwealth met its prima facie case under the statute, are both questions of law, and therefore, appellate court's standard of review is de novo.

Cases that cite this headnote

[2] **Criminal Law**
Scope of Inquiry

Appellate court's scope of review, to the extent necessary to resolve the legal questions before it, is plenary, i.e., appellate court may consider the entire record before it.

Cases that cite this headnote

[3] **Constitutional Law**
Presumptions and Construction as to Constitutionality

Court presumes the statute to be constitutional and will only invalidate it as unconstitutional if it clearly, palpably, and plainly violates constitutional rights.

Cases that cite this headnote

[4] **Constitutional Law**
Avoidance of constitutional questions

Courts have the duty to avoid constitutional difficulties, if possible, by construing statutes in a constitutional manner.

Cases that cite this headnote

[5] **Constitutional Law**
Constitutional Rights in General
Constitutional Law
Statutes in general

As a general proposition, statutory limitations on citizens' individual freedoms are reviewed by courts for substantive authority and content, in addition to definiteness or adequacy of expression.

Cases that cite this headnote

[6] **Constitutional Law**
Certainty and definiteness; vagueness

Statute may be deemed to be unconstitutionally vague if it fails in its definiteness or adequacy of statutory expression, and this void-for-vagueness doctrine, as it is known, implicates due process notions that a statute must provide reasonable standards by which a person may gauge his future conduct, i.e., notice and warning. U.S.C.A. Const.Amend. 14.

2 Cases that cite this headnote

[7] **Constitutional Law**
Particular offenses in general
Homicide
Constitutional and statutory provisions

Statute prohibiting drug delivery resulting in death was sufficiently definite that ordinary people could understand what conduct was prohibited, and was not so vague that men of common intelligence had to necessarily guess at its meaning and differ as to its application. 18 Pa.C.S.A. § **2506**.

3 Cases that cite this headnote

[8] **Constitutional Law**
Particular offenses in general
Homicide
Constitutional and statutory provisions

Statute prohibiting drug delivery resulting in death was not unconstitutionally vague, and defendant failed to present any argument or analysis on how the statute was vague as applied to him; defendant intentionally dispensed, delivered, gave or distributed heroin to victim, and that victim died as a result of the heroin, and defendant's conduct was precisely what the legislature intended to proscribe when it enacted statute. 18 Pa.C.S.A. § **2506**.

4 Cases that cite this headnote

[9] **Constitutional Law**
Vagueness in General

Defendant who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others, and thus, court should examine the complainant's conduct before analyzing other hypothetical applications of the law.

Cases that cite this headnote

[10] **Homicide**
Controlled substances

Statute prohibiting drug delivery resulting in death defines the required mens rea for establishing guilt, and the mental state required is "intentionally" doing one of the acts described therein, namely, administering, dispensing, delivering, giving, prescribing, selling or distributing any controlled substance or counterfeit controlled substances. 18 Pa.C.S.A. § **2506**.

7 Cases that cite this headnote

[11] **Constitutional Law**
Particular offenses in general
Homicide
Constitutional and statutory provisions

Statute prohibiting drug delivery resulting in death required a "but-for" test of causation and, thus, was not unconstitutionally vague as to the level of causation necessary for guilt. 18 Pa.C.S.A. § **2506**.

2 Cases that cite this headnote

[12] **Criminal Law**
Criminal act or omission

Criminal causation requires the results of the defendant's actions cannot be so extraordinarily remote or attenuated that it would be unfair to hold the defendant criminally responsible.

1 Cases that cite this headnote

[13] **Criminal Law**
Acts prohibited by statute

Omission of an explicit mens rea element in a criminal statute is not alone sufficient evidence of the legislature's plain intent to dispense with a traditional mens rea requirement and impose absolute criminal liability.

Cases that cite this headnote

[14] **Homicide**
Controlled substances

Statute prohibiting drug delivery resulting in death does not regulate conduct that is the subject of the typical public welfare offense for which the legislature imposes absolute criminal liability (i.e., traffic and liquor laws), and instead, purpose of the statute is to criminalize conduct not otherwise covered by the Crimes Code, i.e., death resulting from using illegally transferred drugs. 18 Pa.C.S.A. § **2506**.

Cases that cite this headnote

[15] **Homicide**
Controlled substances

Legislature did not intend to impose absolute liability under statute prohibiting drug delivery resulting in death, and instead, the mens rea requirement is recklessness, i.e., death must be at least "reckless." 18 Pa.C.S.A. §§ 302(c), (b)(3), **2506**.

3 Cases that cite this headnote

[16] **Homicide**
Controlled substances

Defendant's conduct satisfied both parts of the causation test under statute, prohibiting drug delivery resulting in death; defendant "fronted" victim a bundle of heroin, eight packets were found next to the victim, two used and six unused, and victim died of a heroin overdose, and but for defendant selling victim a bundle of heroin, victim would not have died of a heroin overdose, and victim's death was a natural or foreseeable consequence of defendant's conduct. 18 Pa.C.S.A. § **2506**.

2 Cases that cite this headnote

[17] **Criminal Law**
Preliminary Proceedings

Once a defendant has gone to trial and has been found guilty of the crime or crimes charged, any defect in the preliminary hearing is rendered immaterial.

Cases that cite this headnote

Attorneys and Law Firms

***988** Gregory B. Abein, Carlisle, for appellant.

Matthew P. Smith, Assistant District Attorney, Carlisle, for Commonwealth, appellee.

BEFORE: MUNDY, STABILE, and FITZGERALD,* JJ.

Opinion

OPINION BY STABILE, J.:

Appellant, Somwang Laos Kakhankham, appeals from the judgment of sentence entered April 1, 2014 in the Court of Common Pleas of Cumberland County. For the reasons stated below, we affirm.

The trial court summarized the relevant factual background as follows:

> ***989** On February 6, 2012, [victim] was found deceased in his home at 328 West Penn Street in the borough of Carlisle. A search of [victim]'s home resulted in the discovery of a syringe, two (2) empty bags, stamped with the name Blackout, in addition to six (6) bags of heroin, also stamped with the name Blackout. A witness[, JL,] told police officers that [Appellant] entered [victim]'s home at approximately 1 A.M. the day [victim] was found. [Appellant] told a second witness that [Appellant] had provided the heroin to [victim].[1] This same witness, identified as DS, also purchased $100 worth of heroin from [Appellant,] which was stamped with the name Blackout. The next day, DS met with police officers to conduct a controlled purchase of heroin from [Appellant], during which DS purchased two (2) bags of Blackout-stamped heroin using $40 of official funds. On February 8, 2012, a probation check of [Appellant]'s residence found two (2) bags of heroin stamped with the name Blackout as well as $656 in cash which contained the $40 in official funds from the prior day's controlled purchase. On February 16, 2012, a third witness told police [that he, the witness] had purchased heroin with the stamp Blackout from [Appellant]. [Another witness, witness number four,] additionally told the police that [Appellant] told them he provided the heroin to [victim].[2,3] Finally, a Cumberland County Coroner's report dated October 4, 2012 stated that the level of morphine in [victim]'s bloodstream was 295 nanograms per millimeter. Heroin metabolizes into morphine upon being absorbed by the body. The therapeutic level for morphine is ten (10) nanograms per millimeter. The level of metabolized heroin was the cause of [victim]'s death.

Trial Court Opinion, 8/4/14, 1–3 (citation to stipulated record omitted).

As a result, Appellant was charged with drug delivery resulting in death, 18 Pa.C.S.A. § **2506**, and possession of a controlled substance with intent to deliver, 35 P.S. § 780–113(a)(30). Following a preliminary hearing, Appellant filed a petition for writ of habeas corpus alleging that the Commonwealth "failed to present sufficient evidence to establish a prima facie case of the elements of [18 Pa.C.S.A. § **2506**,]" requiring dismissal of the charges. Petition for Writ of Habeas Corpus, 8/28/14, at 1. After a hearing, the court denied the petition. *See* Order of Court, 12/18/13.

Following a trial,[4] Appellant was found guilty of drug delivery resulting in death. 18 Pa.C.S.A. § **2506**. The trial court sentenced Appellant, *inter alia,* to 78 months to 156 months' imprisonment. This appeal followed.

Appellant raises the following issues for our review:

> 1. Did the [h]abeas and [t]rial courts err in finding **Pennsylvania's** [d]rug [d]elivery [r]esulting in [d]eath [s]tatute (18 Pa.C.S.A. § **2506**) not ***990** unconstitutionally vague when (1) the statute fails to clearly indicate the requisite *mens rea* for conviction, and (2) the statute fails to clearly indicate the requisite level of causation for the result-of-conduct element, and the vagueness of the statute will result in arbitrary and discriminatory enforcement of the law?
>
> 2. Did the [h]abeas and [t]rial courts err in finding the Commonwealth established a *prima facie* case when the Commonwealth did not present any evidence related to [Appellant]'s culpability regarding the result-of-conduct element of

> **Pennsylvania's** [d]rug [d]elivery [r]esulting in [d]eath [s]tatute (18 Pa.C.S.A. § **2506**)?

Appellant's Brief at 4.

In his brief, Appellant essentially asks us to "measure the challenged statutory proscription, not against the specific conduct involved in this case, but against hypothetical conduct that the statutory language could arguably embrace." *Commonwealth v. Heinbaugh,* 467 **Pa**. 1, 354 A.2d 244, 245 (1976). However, "[i]t is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *Id.* (quotation omitted). "Therefore, we will address the alleged vagueness of § [**2506**] as it applies to this case." *Commonwealth v. Mayfield,* 574 **Pa**. 460, 832 A.2d 418, 422 (2003).

[1] [2] We review Appellant's claims under the following standard:

> Analysis of the constitutionality of a statute, and whether the Commonwealth met its *prima facie* case under Section **2506**, are both questions of law, therefore, our standard of review is de novo. *Commonwealth v. MacPherson,* 561 **Pa**. 571, 752 A.2d 384, 388 (2000); Pa.R.A.P. 2111(a)(2). Our scope of review, to the extent necessary to resolve the legal questions before us, is plenary, i.e., we may consider the entire record before us. *Buffalo Township v. Jones,* 571 **Pa**. 637, 813 A.2d 659, 664 n. 4 (2002); Pa.R.A.P. 2111(a)(2).

Commonwealth v. Ludwig, 583 **Pa**. 6, 874 A.2d 623, 628 n. 5 (2005).

[3] [4] [5] [6] In reviewing challenges to the constitutionality of a statute, and in particular whether a statute is unconstitutionally vague,

> [we presume the statute] to be constitutional and will only be invalidated as unconstitutional if it "clearly, palpably, and plainly violates constitutional rights." [*MacPherson,* 752 A.2d at 388] (citation omitted). Related thereto, courts have the duty to avoid constitutional difficulties, if possible, by construing statutes in a constitutional manner. *Harrington v. Dept. of Transportation, Bureau of Driver Licensing,* 563 **Pa**. 565, 763 A.2d 386, 393 (2000); *see also* 1 Pa.C.S. § 1922(3) (setting forth the presumption that the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth). Consequently, the party challenging a statute's constitutionality bears a heavy burden of persuasion. *MacPherson,* 752 A.2d at 388.

Turning to the constitutional challenge raised in this appeal, as a general proposition, statutory limitations on our individual freedoms are reviewed by courts for substantive authority and content, in addition to definiteness or adequacy of expression. *See, Kolender v. Lawson,* 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). A statute may be deemed to be unconstitutionally vague if it fails in its definiteness or adequacy of ***991** statutory expression. This void-for-vagueness doctrine, as it is known, implicates due process notions that a statute must provide reasonable standards by which a person may gauge his future conduct, i.e., notice and warning. *Smith v. Goguen,* 415 U.S. 566, 572, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974); [*Heinbaugh,* 354 A.2d at 246].

Specifically with respect to a penal statute, our Court and the United States Supreme Court have found that to withstand constitutional scrutiny based upon a challenge of vagueness a statute must satisfy two requirements. A criminal statute must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender,* 461 U.S. at 358, 103 S.Ct. 1855; [*Mayfield,* 832 A.2d at 422]; *Commonwealth v. Mikulan,* 504 **Pa**. 244, 470 A.2d 1339, 1342 (1983); *see also Heinbaugh,* 354 A.2d at 246; *see generally* Goldsmith, THE VOID–FOR–VAGUENESS DOCTRINE IN THE SUPREME COURT, REVISITED, 30 Am. J.Crim. L. 279 (2003).

In considering these requirements, both High Courts have looked to certain factors to discern whether a certain statute is impermissibly vague. For the most part, the Courts have looked at the statutory language itself, and have interpreted that language, to resolve the question of vagueness. *See Kolender,* 461 U.S. at 358, 103 S.Ct. 1855; *Mayfield,* 832 A.2d at 422; *Commonwealth v. Cotto,* 562 **Pa**. 32, 753 A.2d 217, 220 (2000). In doing so, however, our Court has cautioned that a statute "is not to be tested against paradigms of legislative draftsmanship," *Heinbaugh,* 354 A.2d at 246, and thus, will not be declared

> unconstitutionally vague simply because the Legislature could have "chosen 'clear and more precise language'...." *Id.* (citation omitted). The Courts have also looked to the legislative history and the purpose in enacting a statute in attempting to discern the constitutionality of the statute. *See United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers,* 413 U.S. 548, 570–575, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973); *Cotto,* 753 A.2d at 221. Consistent with our prior decisions, as well as United States Supreme Court case law, we will first consider the statutory language employed by the General Assembly in determining whether Section **2506** is unconstitutionally vague.

Ludwig, 874 A.2d at 628–29 (footnote omitted).

The statute challenged here, Section **2506**, reads as follows:

> **(a) Offense defined.**—A person commits a felony of the first degree if the person intentionally administers, dispenses, delivers, gives, prescribes, sells or distributes any controlled substance or counterfeit controlled substance in violation of section 13(a)(14) or (30) of the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act, and another person dies as a result of using the substance.
>
> **(b) Penalty.**—A person convicted under subsection (a) shall be sentenced to a term of imprisonment which shall be fixed by the court at not more than 40 years.

18 Pa.C.S.A. § **2506** (2011).

[7] [8] The crime described above consists of two principal elements:[5] (i) [i]ntentionally ***992** administering, dispensing, delivering, giving, prescribing, selling or distributing any controlled substance or counterfeit controlled substance and (ii) death caused by ("resulting from") the use of that drug. "It is sufficiently definite that ordinary people can understand what conduct is prohibited, and is not so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Mayfield,* 832 A.2d at 423 (internal quotation marks and citations omitted). As applied to Appellant, Section **2506** could not be any clearer. The record shows that Appellant intentionally dispensed, delivered, gave or distributed heroin to victim, and that victim died as a result of the heroin. *See* N.T. Stipulated Record, 1/14/14, at 6–7; *see also* Trial Court Opinion, 8/4/14, at 4. Appellant's conduct is precisely what the legislature intended to proscribe when it enacted Section **2506**. Accordingly, Section **2506** is not unconstitutionally vague.

[9] We do not need to address Appellant's argument advocating possible interpretations of Section **2506**. "[An appellant] who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law." *Commonwealth v. Costa,* 861 A.2d 358, 362 (Pa.Super.2004) (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 495, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982)). "In cases that do not implicate First Amendment freedoms, facial vagueness challenges may be rejected where an appellant's conduct is clearly prohibited by the statute in question." *Id.* (citing *Mayfield,* 832 A.2d at 467–68). Because Appellant failed to present any argument or analysis on how the statute was vague as applied to him, he is not entitled to relief. *See Costa,* 861 A.2d at 365.

To the extent we can construe Appellant's argument as an as-applied challenge, we would nonetheless find the statute is not unconstitutionally vague.

[10] Appellant argues the statute is vague as to the *mens rea* for the offense. We disagree. The statute is as clear and direct as a statute can be. The mental state required is "intentionally" doing one of the acts described therein, namely, administering, dispensing, delivering, giving, prescribing, selling or distributing any controlled substance or counterfeit controlled substances. Additionally, the Crimes Code defines "intentionally" as follows:

> (1) A person acts intentionally with respect to a material element of an offense when:
>
> (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
>
> (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

18 Pa.C.S.A. § 302(b)(1).

Thus, under the statute, the first element of the crime is met if one "intentionally" administers, dispenses, delivers, gives, prescribes, sells or distributes any controlled substance or counterfeit controlled substances. The first challenge is, therefore, meritless because the statute clearly defines the required *mens rea* for establishing guilt under Section **2506**.

[11] [12] Appellant next argues the statute is unconstitutional because it is vague as to the level of causation necessary for guilt. We disagree. The statute uses the ***993** phrases "results from," a concept which is defined also in the Crimes Code.[6] Section 303 of the Crimes Code, in relevant part, provides:

> **Causal relationship between conduct and result**
>
> **(a) General rule.**—Conduct is the cause of a result when:
>
> (1) it is an antecedent but for which the result in question would not have occurred; and
>
> (2) the relationship between the conduct and result satisfies any additional causal requirements imposed by this title or by the law defining the offense.

18 Pa.C.S.A. § 303(a).[7] The statute, therefore, is clear as to the level of causation. It requires a "but-for" test of causation. Additionally, criminal causation requires "the results of the defendant's actions cannot be so extraordinarily remote or attenuated that it would be unfair to hold the defendant criminally responsible." *Commonwealth v. Nunn,* 947 A.2d 756, 760 (Pa.Super.2008) (citing *Commonwealth v. Rementer,* 410 Pa.Super. 9, 598 A.2d 1300, 1305 (1991), *appeal denied,* 533 **Pa**. 599, 617 A.2d 1273 (1992)); *see also* 18 Pa.C.S.A. § 303(b)–(c); *Commonwealth v. Devine,* 26 A.3d 1139 (Pa.Super.2011). Thus, Section **2506** is not unconstitutionally vague as to the causal relationship under Section **2506** necessary to impose criminal liability.[8]

Appellant also argues that Section **2506** could be read to subject the second element of the crime ("results from") to the same *mens rea* required for the first element (conduct), *i.e.,* "intentionally."[9] As noted by the learned trial court, such a reading would make Section **2506** superfluous, for intentionally causing the death of another person is already criminalized (*i.e.,* first degree murder). *See* Trial Court Opinion, 8/7/14, at 4 n. 2.

***994** Appellant finally argues Section **2506** can also be read not to require any *mens rea* as to the second element of the crime. It would be, in essence, a case of absolute liability. The trial court disagreed with this potential reading of the provision, noting that strict liability criminal statutes are generally disfavored.[10] The trial court found that the mere absence of an explicit *mens rea* requirement should not be read as an indication that the legislature intended to create a strict liability statute. According to the trial court, Section 302(c) provides the culpability requirement for the second element of the crime, *i.e.,* death must be intentional, knowing, or reckless. 18 Pa.C.S.A. § 302(c).[11] In support, the trial court notes two statutes, as currently interpreted, provide support for its conclusion, namely 75 Pa.C.S.A. § 3735 (relating to homicide by vehicle while driving under the influence) and 18 Pa.C.S.A. § 2502(b) (relating to murder of the second degree). These statutes, according to the trial court, while they do not require any specific *mens rea* as to the result, are not interpreted as imposing absolute criminal liability.

While Section 302 of the Crimes Code provides default culpability standards to be applied where such standards are not provided, this provision is not applicable to summary offenses and offenses wherein the legislature's intent to impose absolute liability "plainly appears." 18 Pa.C.S.A. § 305(a)(2).[12] The issue here is whether it plainly appears the legislature intended not to subject the second element of Section **2506** ("results from") to any *mens rea.*

[13] No intent to impose absolute liability plainly appears in Section **2506**. "The omission of an explicit *mens rea* element in a criminal statute is not alone sufficient evidence of the legislature's plain intent to dispense with a traditional *mens rea* requirement and impose absolute criminal liability." *Commonwealth v. Parmar,* 551 **Pa**. 318, 710 A.2d 1083, 1089 (1998) (OISA) (citation omitted); *see also Commonwealth v. Gallagher,* 592 **Pa**. 262, 924 A.2d 636, 638–39 (2007). In the absence of plain legislative intent, "we must consider the purpose for the ... statute[ ], the severity of punishment and its effect on the defendant's reputation and, finally, the ***995** common law origin of the crimes to determine whether the legislature intended to impose absolute criminal liability." *Parmar,* 710 A.2d at 1089.[13]

[14] [15] Section **2506** does not regulate conduct "that is the subject of the typical public welfare offense for which the legislature imposes absolute criminal liability" (*i.e.,* traffic and liquor laws). *Id.* The purpose of the statute is to criminalize conduct not otherwise covered by the Crimes Code, *i.e.,* death resulting from using illegally transferred drugs. *See* Legislative Journal—House (2011) pages 757–58. The penalty imposed for its violation, *i.e.,* a sentence of imprisonment of up to 40 years, is clearly serious. Finally, the common law origin of the crime involved (homicide), traditionally has a *mens rea* requirement. These considerations strongly indicate that the legislature did not intend to impose absolute liability as to the second element of Section **2506**. Accordingly, we conclude Section 302(c) provides the *mens rea* requirement for the second element of Section **2506**, *i.e.,* death must be at least "reckless." 18 Pa.C.S.A. § 302(c).

The Crimes Code defines "recklessly" as follows:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and intent of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.

18 Pa.C.S.A. § 302(b)(3).

Additionally, when recklessly causing a particular result is an element of an offense,

> the element is not established if the actual result is not within the risk of which the actor is aware or, in the case of negligence, of which he should be aware unless:
>
> (1) the actual result differs from the probable result only in the respect that a different person or different property is injured or affected or that the probable injury or harm would have been more serious or more extensive than that caused; or
>
> (2) the actual result involves the same kind of injury or harm as the probable result and is not too remote or accidental in its occurrence to have a bearing on the liability of the actor or on the gravity of his offense.

18 Pa.C.S.A. § 303(c).

[16] Here, Appellant "fronted" victim a bundle of heroin. Eight packets were found next to the victim, two used and six unused. Victim died of a heroin overdose. Appellant's conduct, therefore, satisfied both parts of the causation test. *See* Pa.C.S.A. § 303; *Devine, supra; Nunn, supra.* But for Appellant selling victim a bundle of heroin, victim would not have died of a heroin overdose. Victim's death was a natural or foreseeable consequence of Appellant's conduct.

> [I]t is certain that frequently harm will occur to the buyer if one sells heroin. Not only is it criminalized because of the great risk of harm, but in this day and age, everyone realizes the dangers of heroin use. It cannot be said that [unauthorized ***996** heroin provider] should have been surprised when [victim] suffered an overdose and died. While not every sale of heroin results in an overdose and death, many do.

Minn. Fire and Cas. Co. v. Greenfield, 805 A.2d 622, 624 (Pa.Super.2002), *aff'd,* 579 **Pa**. 333, 855 A.2d 854 (2004).

On appeal, then-Justice Castille noted:

> Although the overwhelming majority of heroin users do not die from a single injection of the narcotic, it nevertheless is an inherently dangerous drug and the risk of such a lethal result certainly is foreseeable. *See Commonwealth v. Bowden,* 456 **Pa**. 278, 309 A.2d 714, 718 (1973) (plurality opinion) ("although we recognize heroin is truly a dangerous drug, we also recognize that the injection of heroin into the body does not generally cause death"). The intravenous self-administration of illegally-purchased heroin ... is a modern form of Russian roulette. Indeed, that is one of the reasons the drug is outlawed and why its use, no less than its distribution, is so heavily punished.
>
> .....
>
> . The General Assembly has classified heroin as a Schedule I controlled substance, which is the most serious of designations, and carries the heaviest of punishments. *See* 35 P.S. § 780–104(1)(ii)(10). A drug falls within this schedule because of its "high potential for abuse, no currently accepted medical use in the United States, and a lack of accepted safety for use under medical supervision." *Id.* § 780–104(1).

Minn. Fire and Cas. Co. v. Greenfield, 579 **Pa**. 333, 855 A.2d 854, 870–71 (2004) (Castille, J., concurring).[14] Accordingly, we conclude that reckless conduct, such as that in this case, may result in criminal liability under Section **2506**.

[17] Finally, Appellant argues that the Commonwealth did not establish a *prima facie* case at the preliminary hearing, and that the trial court erred in finding otherwise. The

claim fails. It is well-known that any defect in the preliminary hearing is cured by subsequent trial. "Once a defendant has gone to trial and has been found guilty of the crime or crimes charged, however, any defect in the preliminary hearing is rendered immaterial." *Commonwealth v. Melvin,* 103 A.3d 1, 35 (Pa.Super.2014) (citation omitted).

Judgment of sentence affirmed.

All Citations

132 A.3d 986

Footnotes

* Former Justice specially assigned to the Superior Court.

1 "During the purchase, [Appellant] told the witness, DS, that he had fronted the victim heroin the day before his death." N.T. Stipulated Record, 1/14/14, at 6.

2 Appellant "told this witness that [Appellant] had supplied the victim with the heroin that resulted in victim's death." N.T. Stipulated Record, 1/14/14, at 7.

3 Another witness, witness number five, stated that Appellant stated to the witness that "he had fronted the victim a bundle of heroin stamped Blackout." N.T. Stipulated Record, 1/14/14, at 8.

4 Appellant's trial consisted of a stipulated record whereby the district attorney read into the record the facts of the case. *See* Trial Court Opinion, 8/4/14, at 1.

5 *See also* the **Pennsylvania** Suggested Jury Criminal Instructions 15.**2506**.

6 "Where there is no textual or contextual indication to the contrary, courts regularly read phrases like 'results from' to require but-for causality." *Burrage v. United States,* —— U.S. ——, 134 S.Ct. 881, 888, 187 L.Ed.2d 715 (2014). 18 Pa.C.S.A. § 303(a)(1) "establishes the 'but-for' test of causation. Under existing law causation is established if the actor commits an act or sets off a chain of events from which in the common experience of mankind the result is natural or reasonably foreseeable." 18 Pa.C.S.A. § 303, Comment.

7 Subsection 303(a)(2) is not applicable here because there is no additional causal requirement imposed by Title 18 or Section **2506**.

8 In this context, Appellant argues that the "Commonwealth failed to present any evidence that heroin was the sole or even the primary cause of [victim's] death." Appellant's Brief at 13. Appellant fails to recognize that he stipulated that heroin caused the victim's death. *See* Stipulated Record, 1/14/14, at 8. We also note that:

> Defendant's conduct need not be the only cause of the victim's death in order to establish a causal connection. Criminal responsibility may be properly assessed against an individual whose conduct was a direct and substantial factor in producing the death even though other factors combined with that conduct to achieve the result.

Nunn, 947 A.2d at 760 (citations and quotations marks omitted). Here, as noted, Appellant stipulated that he "fronted" a bundle of heroin and that the victim died of a heroin overdose. Appellant's criminal liability for the victim's death cannot be any clearer.

9 *See* Section 302(d):

> **Prescribed culpability requirement applies to all material elements.**—When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.

18 Pa.C.S.A. 302(d).

10 *See Costa, supra:*

> Absolute criminal liability statutes are an exception to the centuries old philosophy of criminal law that imposed criminal responsibility only for an act coupled with moral culpability. A criminal statute that imposes absolute liability typically

> involves regulation of traffic or liquor laws. Such so-called statutory crimes are in reality an attempt to utilize the machinery of criminal administration as an enforcing arm for social regulation of a purely civil nature, with the punishment totally unrelated to questions of moral wrongdoing or guilt.
>
> *Costa,* 861 A.2d at 363–64 (citation omitted).

11 Section 302(c) reads as follows: "When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts intentionally, knowingly or recklessly with respect thereto." 18 Pa.C.S.A. § 302(c).

12 Section 305(a) reads as follows:

> **(a) When culpability requirements are inapplicable to summary offenses and to offenses defined by other statutes.**—The requirements of culpability prescribed by section 301 of this title (relating to requirement of voluntary act) and section 302 of this title (relating to general requirements of culpability) do not apply to:
>
> (1) summary offenses, unless the requirement involved is included in the definition of the offense or the court determines that its application is consistent with effective enforcement of the law defining the offense; or
>
> (2) offenses defined by statutes other than this title, in so far as a legislative purpose to impose absolute liability for such offenses or with respect to any material element thereof plainly appears.
>
> 18 Pa.C.S.A. § 305(a).

13 *See also Commonwealth v. Gallagher,* 874 A.2d 49, 52 n. 3 (Pa.Super.2005), *aff'd,* 592 Pa. 262, 924 A.2d 636 (2007); *Costa,* 861 A.2d at 363–64 (Pa.Super.2004).

14 *See also Commonwealth v. Catalina,* 407 Mass. 779, 556 N.E.2d 973, 980 (1990) ("[O]ne can reasonably conclude that the consumption of heroin in unknown strength is dangerous to human life, and the administering of such a drug is inherently dangerous and does carry a high possibility that death will occur.")

630 Pa. 374
Supreme Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellant
v.
Amy N. KOCH, Appellee.

Argued Oct. 16, 2012.
|
Resubmitted Feb. 19, 2014.
|
Decided Dec. 30, 2014.

No. 45 MAP 2012, Appeal from the order of Superior Court at No. 1669 MDA 2010, entered 09–16–2011, reconsideration denied 11–22–2011, reversing and remanding the judgment of sentence of the Cumberland County Court of Common Pleas, Criminal Division, at No. CP–21–CR–2876–2009, dated 07–20–2010, J. Wesley Oler, Jr., J.

Attorneys and Law Firms

David James Freed, Esq., Matthew Peter Smith, Esq., Cumberland County District Attorney's Office, for Commonwealth of Pennsylvania.

Michael Oresto Palermo Jr., Esq., Carlisle, Palermo Law Offices, for Amy N. Koch.

CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, STEVENS, JJ.

ORDER

PER CURIAM.

***375AND NOW,** this 30th day of December, 2014, the Court being evenly divided, the Order of the Superior Court is **AFFIRMED.**

Chief Justice CASTILLE files an opinion in support of affirmance in which Justices BAER and TODD join.

Justice SAYLOR files an opinion in support of reversal.

Justice EAKIN files an opinion in support of reversal in which Justice STEVENS joins.

****706** Chief Justice CASTILLE, in support of affirmance.

This discretionary appeal concerns the proper manner in which cell phone text messages can be authenticated and whether and when such messages are inadmissible hearsay. The trial court admitted the messages as sufficiently authenticated and not hearsay; the Superior Court reversed on both grounds in a unanimous published opinion that ordered a new trial. This Court accepted the Commonwealth's appeal, but has evenly divided. For the reasons set forth below, we would affirm.

***376** On March 14 and 24, 2009, North Middleton Township Police Officer Richard Grove and another officer, acting on suspicion that unlawful controlled substances were present and that drug sales activity was being transacted, conducted "trash pulls" of discarded garbage at a residence lived in by Amy Koch (appellee), her boyfriend, Dallas Conrad, and her brother, Norman Koch, also known as "Matt." Appellee's brother was the original target of the officers' suspicions after a confidential informant indicated that he was living at the residence and selling cocaine from his car. Based upon evidence recovered from the trash pulls, including plastic "baggies" containing residue of both cocaine and marijuana, the police obtained a search warrant, which was served and executed at appellee's residence on March 25, 2009, by Officer Grove and North Middleton Township Police Detective Timothy Lively. During the search, the officers found two baggies, each containing roughly ten grams of marijuana, and $700 cash in the drawer of a dresser in the master bedroom; in a shoebox on top of the same dresser, the officers found a used "bong," two marijuana pipes, a grinder (commonly used to separate marijuana seeds and stems from the leaves that are smoked), an open package of "Philly Blunts," empty baggies of various sizes, and the "end portion of a joint." Searching the basement of the residence, the officers found a small bag of marijuana inside a freezer and a "bud" of marijuana in a small woven basket.

During the search, the officers also found a used marijuana pipe and an electronic scale covered with marijuana residue on top of the refrigerator in the kitchen. Detective Lively looked for cell phones in the residence because drug dealers and users commonly use cell phones to communicate and arrange transactions. He seized two cell phones, one of which he found on the kitchen table near where appellee was during the search; appellee asked him several times "why her cell phone was being taken." Appellee was arrested, along with Dallas Conrad and Norman Koch.

After obtaining a warrant, Detective Lively searched for drug-related communications and information on appellee's ***377** cell phone. He read text messages stored on the phone, both sent and received, and transcribed the messages that he considered to be indicative of drug sales activity. These included the following outgoing messages, which were sent between March 15 and 21, 2009:

> To "Pam": "I got a nice gram of that gd Julie to get rid of dude didn't have enuff cash so I had 2 throw in but I can't keep it 8***o***g."
>
> To "Matt": "Can I get that other o from u"
>
> To "Tiff": "Sorry I didn't wait I wanted 2 smoke but call me then if u r cuming out."
>
> To "Pam": "Not lookn good on my end can u get a g 4 me"
>
> To "Pam": "no go 2 nite he only could split a ball w me but I got a new hook up and its cheap"
>
> ****707** To "Brian": "Call me I nd trees"
>
> To "Pam": "If do happen to cum across any 2 nite let me know this is not that gr8"

Detective Lively subsequently testified at trial that he believed these messages reflected drug sales activity due to references he understood from his training and experience: "Julie" refers to cocaine, an "O" is an ounce of drugs, "G" is a gram of drugs, "trees" refers to marijuana, and a "ball" is about 3.33 grams of cocaine, a common quantity about the size of a pool ball, which is also referred to as an "eight ball."

Along similar lines, Detective Lively transcribed the following incoming messages that were received on appellee's phone between March 18 and 21, 2009:

> From "Tam": "was wondering if u could hook me up then after work"
>
> From "Tam": "cool I neED a half r u gonna text me then"
>
> From "Tam": "cool when did u want me to come out"
>
> From "Pam": "let me know asap"
>
> From "Pam": [17 minutes later] "sweet how much?"
>
> From "Pam": [3 minutes later] "K"
>
> From "Pam": [45 minutes later] "well?"
>
> From "Pam": [1 minute later] "k"
>
> ***378** From "Pam": [33 minutes later] "hey u"
>
> From "Pam": [6 minutes later] "can u part with any?"
>
> From "Pam": [2 minutes later] "tks tree looks good"

Detective Lively interpreted the messages from "Tam" as drug-related, understanding "a half" to mean some manner in which drugs are measured, such as a half an ounce of marijuana, and the terms "hook me up" and "come out" to be arrangements for a sale. Likewise, Detective Lively concluded that the messages from "Pam" reflected a request for a price and, ultimately, a successful deal made for marijuana ("tree") nearly two hours later the same night.

In light of the foregoing, along with the physical evidence recovered from the search, appellee was charged with felony possession with intent to deliver (PWID) marijuana, both as a principal and an accomplice; criminal conspiracy with regard to the PWID charge; and unlawful possession (of marijuana), a misdemeanor.[1] Dallas Conrad's case was severed from appellee's prior to trial, and Norman Koch's case concluded after a preliminary hearing during which he pled guilty to possession of drug paraphernalia, leaving appellee the only defendant to stand trial.

At appellee's jury trial in May 2010, the Commonwealth called Officer Grove, who testified to the physical evidence of drug activity-marijuana, cash, baggies, and scales—that was found during the search; a forensic chemistry expert who confirmed that the confiscated substances were marijuana; and Detective Lively. When the prosecutor began to question Detective Lively about his interpretation of the text messages on appellee's cell phone, defense counsel, at sidebar, objected to the messages as hearsay, describing them as "unreliable because the phone was shared between two people" and

protesting against the detective "read[ing] a conversation between two people that have not been called as a witness [sic].... He cannot testify to the contents of ... a text message if he wasn't a party to it." The prosecutor responded ***379** that the messages were not hearsay because their import was only " that ****708** these things were said on this phone ... and that these [statements] would constitute drug receipts, drug statements, and orders." N.T., Trial, 5/26/10, at 10–75.

The court ruled that Detective Lively could testify about his impression of the messages on appellee's phone to show that, in the prosecutor's words, "[appellee's] phone was used in drug transactions, and, therefore, it makes it more probable than not when [appellee] possessed this marijuana that she did so with the intent to deliver as opposed to personal use." Defense counsel reiterated his objection, arguing that admission of the contents of the messages invited speculation by the jury as to "who is making those calls," and was prejudicial to appellee in regards to both the PWID and conspiracy charges. The court overruled appellee's objection but agreed to provide a cautionary instruction based on the outcome of Detective Lively's testimony regarding the text messages. *Id.* at 76–79.

Thereafter, Detective Lively read aloud and discussed the text messages and his understanding that they were related to drug sales activity; the messages were referred to neutrally as appearing on "this phone" as opposed to "appellee's phone" or to or from appellee herself. The detective's substantive testimony during direct examination focused on terms used in the text messages and his opinion of their drug-related meanings, such as "g's" and "o's" for grams and ounces, "Julie" for cocaine, "ball" for an "8–ball" of cocaine. *Id.* at 80–89.

During cross-examination, appellee elicited the detective's admission that he had not followed up by attempting to contact the purported recipients and authors of the text messages, whose numbers were in the phone, in order to ascertain whether appellee or someone else was the correspondent. *Id.* at 105–06. During both direct and cross-examination, Detective Lively testified that although the messages were in a phone that appellee had asserted she owned, he could not determine whether appellee had been the correspondent in the purported drug sales messages. At least one outgoing message, although non-incriminating in its content, suggested that appellee was not the author of certain messages, ***380** since appellee was referred to in the third person in an exchange concerning a baked goods fundraiser: "Let me know total, and I'll give [appellee] money 4 u." *Id.* at 82–84, 92, 103–06, 128–29. Appellee did not take the stand in her own defense.

The jury convicted appellee of felony PWID (as an accomplice) and the misdemeanor possession charge (also as an accomplice), but found her not guilty of the conspiracy charge. Appellee filed a post-verdict motion challenging admission of the content of the text messages as inadmissible hearsay. The motion also reiterated appellee's objection regarding authorship of the messages, arguing that the messages were "inherently unreliable as there is no competent way for a jury to decide which messages came from which sender [*i.e.*, appellee or Dallas [Conrad]]." Post–Verdict Motion, 6/4/10, at 2. The trial court denied appellee's post-verdict motion and sentenced her to 23 months of supervised probation. Appellee appealed to the Superior Court and filed a statement pursuant to Pa.R.A.P. 1925(b), again challenging admission at trial of the text messages as unauthenticated and hearsay, and also challenging the sufficiency and weight of the evidence supporting her convictions.

In its Pa.R.A.P. 1925(a) opinion, the trial court noted the dearth of contemporary Pennsylvania case law on the authentication of electronic and wireless communications, but then opined that the Commonwealth had presented sufficient ****709** circumstantial evidence to establish the authenticity of the messages, as required by Rule of Evidence 901 ("Authenticating or Identifying Evidence").[2] According to the court, the possibility that someone other than appellee was the author of all, some, or any of the outgoing drug-sales-related text messages went to the weight of the evidence. Trial Ct. Op., 11/30/10, at 12–13.

***381** Turning to appellee's claim that the text messages were inadmissible hearsay, the trial court stated that the messages were not admitted to prove the truth of the matter asserted, but to demonstrate an operative fact of the crime of PWID—that appellee was sending and receiving communications intended to facilitate drug sales activity. The trial court finally addressed appellee's sufficiency and weight claims, stating that while the evidence was largely circumstantial, it was sufficient to support appellee's convictions and that the convictions were not against the weight of the evidence. *Id.* at 13–17.

In her brief to the Superior Court, appellee pursued both her sufficiency claim, arguing that the uncertain authorship of the text messages rendered the evidence insufficient to prove PWID, and her challenge to the admissibility of the text messages. Appellee also claimed that the text messages were improperly admitted because: "Although the District Attorney was clear that the text

messages were not being offered for the truth of the matter asserted, once admitted into evidence, the jury was then left to guess at which if any text messages were sent and received by [appellee] and then speculate on whether or not [appellee] was involved with delivering narcotics. In addition, certain text messages were clearly evidencing drug transactions; it was not a coincidence that [appellee] was then convicted of [PWID]." Appellee's Brief to Superior Court, at 16–20. In response, the Commonwealth posited, as the trial court had, that questions of authorship of the text messages went to the weight of the evidence. Regarding appellee's hearsay claim, the Commonwealth hewed to its position that the messages were not admitted to prove the truth of the matter asserted, but rather to show appellee's intentional involvement in selling drugs, not through the messages' content, but by the fact that she was actively engaged in making arrangements using her cell phone. Commonwealth's Brief to Superior Court, 5/23/11, at 6–9.

In a unanimous published opinion authored by the Honorable Mary Jane Bowes, *Commonwealth v. Koch,* 39 A.3d 996 (Pa.Super.2011), the Superior Court reversed and remanded ***382** for a new trial. The panel agreed with the trial court that the Commonwealth's evidence, considered collectively, was sufficient to support the PWID conviction. Nevertheless, the panel agreed with appellee that the text messages should not have been admitted at trial, and the error was not harmless; thus, a new trial was warranted.*Id.* at 1001–07.

The panel believed that the question of what proof is necessary to authenticate a text message raised an issue of first impression in Pennsylvania and began its inquiry by looking to cases involving other forms of electronic communication, such as instant messages, which were at issue in *In re F.P.,* 878 A.2d 91 (Pa.Super.2005). Briefly, in *F.P.,* the Superior Court concluded that sufficient evidence existed to authenticate and admit transcripts of instant message exchanges between F.P. ****710** and his assault victim. F.P. referred to himself by his first name in the exchanges and did not deny sending them during a school mediation; in addition, details in the transcripts foretold specifics about the dispute and the assault on the victim. *Id.* at 93–95. Notably, the *F.P.* panel recognized the difficulty in authenticating electronic communications and the dearth of applicable precedent, but declined to "create a whole new body of law just to deal with e-mails or instant messages." Rather, the court opined: "We believe that e-mail messages and similar forms of electronic communication can be properly authenticated within the existing framework of Pa.R.E. 901 and Pennsylvania case law." *Id.* at 95–96.

In this case, the panel recognized that establishing authorship of a text message can be difficult without direct evidence or an admission by a correspondent, but that circumstantial evidence, if sufficient, is also acceptable, as a number of other states have held, including cases the panel cited from North Dakota, Maryland, Illinois, and North Carolina. Although text messages are particular to the cell phone on which they are received or from which they are sent, the panel concluded that this fact alone is not sufficient, since it is simple enough for another person to use one's phone. And in this case, the Commonwealth's own witness, Detective Lively, agreed that authorship was unknown. The messages themselves did not ***383** contain any "contextual clues" like those in *F.P.,* and the mere fact that appellee admitted the phone itself was hers did not establish that she had been an active correspondent in these particular drug sales text messages. Thus, the panel concluded that authentication—the Commonwealth's assertion that these messages were sent by appellee to arrange and plan drug sales—had not been established. *Koch,* 39 A.3d at 1003–05.

The panel decided that the text messages were also inadmissible as hearsay that was not offered for any reason other than to show the truth of the matter asserted by the Commonwealth as to the content of the messages—that appellee used her phone to conduct drug sales and therefore possessed marijuana with the intent to deliver it and not merely for personal use. The panel added that the improper admission of the messages was compounded by their being used as the basis for an expert opinion by Detective Lively that appellee was using her cell phone to arrange drug sales via text messaging. And, according to the panel, the messages could not be admitted under any recognized exception to the hearsay rule. The panel again concluded that admission of the unauthenticated hearsay messages was not harmless error: "The prejudicial effect of the improperly admitted text message evidence was so pervasive in tending to show that [appellee] took an active role in an illicit enterprise that it cannot be deemed harmless. Even with the improperly admitted evidence, the jury only found [appellee] liable as an accomplice." For this independent reason, the panel held that a new trial was required.*Id.* at 1005–07.

This Court granted the Commonwealth's petition for allowance of appeal, which challenged both of the evidence-related grounds for the Superior Court's grant of a new trial. *Commonwealth v. Koch,* 615 Pa. 612, 44 A.3d 1147 (2012).

The standard of review governing evidentiary issues is

settled. The decision to admit or exclude evidence is committed to the trial court's sound discretion, and evidentiary rulings will only be reversed upon a showing that a court abused that discretion. A finding of abuse of discretion may ***384** not be made "merely because an appellate ****711** court might have reached a different conclusion, but requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous." *Commonwealth v. Laird,* 605 Pa. 137, 988 A.2d 618, 636 (2010) (citation and quotation marks omitted); *see also Commonwealth v. Sanchez,* 614 Pa. 1, 36 A.3d 24, 48 (2011). Matters within the trial court's discretion are reviewed on appeal under a deferential standard, and any such rulings or determinations will not be disturbed short of a finding that the trial court "committed a clear abuse of discretion or an error of law controlling the outcome of the case." *Commonwealth v. Chambers,* 602 Pa. 224, 980 A.2d 35, 50 (2009) (jury instructions); *see also Commonwealth v. Karenbauer,* 552 Pa. 420, 715 A.2d 1086, 1095 (1998) (scope of cross-examination).

I. *Authentication*

We address authentication first because, logically, it is the question precedent: if proffered evidence fails an authentication challenge, meaning that its proponent cannot prove that the evidence is what the proponent claims it to be, the evidence cannot be admitted, regardless of its potential relevance, and the hearsay query is not reached.

The Commonwealth argues that the Superior Court decision conflicts with Superior Court precedent, specifically the statement in *In re F.P.,* 878 A.2d at 96, that: "[w]e see no justification for constructing unique rules for admissibility of electronic communications such as instant messages; they are to be evaluated on a case-by-case basis as any other document to determine whether or not there has been an adequate foundational showing of their relevance and authenticity." To the Commonwealth, the panel decision here improperly elevates the standard for authentication of electronic communications, which often can only be established by recourse to circumstantial evidence, to *"prima facie* plus." The Commonwealth also believes the panel misread Rule of Evidence 901 and "infused" authentication with relevancy in a manner likely to have a far-ranging negative impact on prosecution of drug ***385** (and other) offenses where electronic communications are at issue. The Commonwealth asserts that while a communication from a physically nebulous source, such as an e-mail address or a phone number, may need additional circumstantial evidence to establish authenticity, this case involves a communication (text message) from an actual physical source (cell phone) that can be physically and directly attributed to the defendant (appellee). According to the Commonwealth, text messages require less support to be authenticated when the phone itself is available and part of the evidence. Here, the Commonwealth argues, there is no dispute that appellee claimed the actual phone was hers during the search, and when the messages were recovered from the phone, there was sufficient evidence of authorship by appellee to prove authentication. Commonwealth's Brief at 26–33.

Moreover, the Commonwealth avers, proof of authorship of the messages here is not required because appellee was charged as both a principal and an accomplice; thus, the Commonwealth asserts, the crucial fact is not that appellee did or did not write, send, and receive the drug sales text messages, but that the actual physical phone she acknowledged to be hers was used in drug transactions. According to the Commonwealth, "[t]he texts were not authenticated as ... authored by [appellee], but rather, as the prosecutor stated at trial: ... to show that [appellee's] phone was used in drug transactions," making it more probable than not that appellee was ****712** consciously involved in the subject drug sales. *Id.* at 33–38.

Appellee disputes the claim that the panel's decision created an improperly heightened burden of proof. Appellee asserts that, pursuant to Rule 901, all parties must show that proposed evidence can be identified as genuinely what the proponent claims it to be, here, drug sales text messages sent and received by appellee on her personal cell phone. Appellee adds that, the Commonwealth's case for authentication of the text messages at trial revealed its own weakness when Detective Lively conceded that someone other than appellee likely authored at least some of the text messages. Appellee avers ***386** that the Commonwealth was not held to a higher or "*prima facie* plus" standard, but that it simply could not make a sufficient case to satisfy Rule 901 that appellee herself was the author of the incriminating text messages. *Id.* at 10–13.

Appellee further asserts that mere possession of a cell phone does not prove authorship of text messages sent from that phone, and additional evidence to corroborate the identity of the sender, such as the context or content of the messages themselves, if unique to the parties

involved, is needed for authentication. Appellee concludes by stating that the drug sales text messages in this case were never authenticated as having been written by her, even though they were "in" her phone, and the Superior Court properly found that their admission against her as proof of intent to deliver was reversible error by the trial court, warranting a new trial. *Id.* at 13–15.

As both lower courts recognized, communications technology presents arguably novel questions with regard to evidentiary issues like authenticity and hearsay. It appears that there have been no further intermediate court developments in this specific area since the Superior Court's opinion in this case was published.

Pennsylvania Rule of Evidence 901, adopted as part of the Evidence Code promulgated in 1998, is titled "Authenticating or Identifying Evidence," and provides in relevant part:

> **(a) In General.** To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.
>
> **(b) Examples.** The following are examples only-not a complete list-of evidence that satisfies the requirement:
>
> (1) *Testimony of a Witness with Knowledge.* Testimony that an item is what it is claimed to be.
>
> * * *
>
> (4) *Distinctive Characteristics and the Like.* The appearance, contents, substance, internal patterns, or other distinctive ***387** characteristics of the item, taken together with all the circumstances.

Pa.R.E. 901(a) & (b).[3] Thus, evidence that cannot be authenticated directly pursuant to subsection (1) may be authenticated by other parts of section (b) of the Rule, including circumstantial evidence pursuant to subsection (4). In the context of a communication, subsection (4)'s "distinctive characteristics" may include information tending to specify an author-sender,[4] reference to or correspondence with relevant ****713** events that precede or follow the communication in question, or any other facts or aspects of the communication that signify it to be what its proponent claims. *Commonwealth v. Collins,* 598 Pa. 397, 957 A.2d 237, 265–66 (2008). Authentication generally entails a relatively low burden of proof; in the words of Rule 901 itself, simply "evidence sufficient to support a finding that the item is what the proponent claims." Pa.R.E. 901(a).

This Court has not yet spoken on the manner in which text messages may be authenticated where, as here, there is no first-hand corroborating testimony from either author or recipient. We are mindful, however, that the burden for authentication is low, and we agree with the Justices writing in support of reversal that the trial court did not abuse its discretion in finding that the Commonwealth met the burden here, albeit we see the question as close, and we view authorship as a potentially relevant part of authentication analysis.

As a predicate matter, we also agree with the panel below that modern communications technology can present arguably novel questions with regard to evidentiary issues like authenticity and hearsay. A handful of states' high courts have spoken on this issue since 2007, when the Supreme Court of Rhode Island decided *State v. McLaughlin,* 935 A.2d 938 (R.I.2007). In that case, threatening text messages sent by the defendant to his girlfriend were admitted at his probation violation hearing, albeit with the *caveat* that "[s]trict application ***388** of the rules of evidence is not required at a probation violation hearing." *Id.* at 942. The messages were authenticated by direct testimony from the recipient herself. *Rodriguez v. State,* ––Nev. ––––, 273 P.3d 845 (2012), involved incriminating text messages sent from the assault victim's cell phone, which had been stolen from her during the attack, to her boyfriend, who showed them to police detectives. After considering a number of cases from other states' courts, including the Superior Court's opinion in this case, Nevada's high court concluded:

> [E]stablishing the identity of the author of a text message through the use of corroborating evidence is critical to satisfying the authentication requirement for admissibility. We thus conclude that, when there has been an objection to admissibility of a text message, the proponent of the evidence must explain the purpose for which the text message is being offered and provide sufficient direct or circumstantial corroborating evidence of authorship in order to authenticate the text message as a condition precedent to its admission.

Id. at 849 (citations & footnote omitted). Other states' high courts also call for direct or circumstantial "corroborating evidence of authorship" to authenticate text messages.[5]

****714*389** On the other hand, one state's highest court has taken a position more aligned with that of the trial court, which is that a text message may be authenticated with only the cell phone number and possession of the phone on which the message appears. *See State v. Forde,* 233 Ariz. 543, 315 P.3d 1200, 1220 (2014) (because both sender and recipient were registered subscribers of phone numbers and both possessed phones used to send and receive, prosecution met its authentication burden).

In this case, the trial court shared Arizona's simple and permissive approach, while the Superior Court panel below aligned itself with the growing number of jurisdictions that require at least some corroboration of authorship, whether direct or circumstantial. The authentication inquiry will, by necessity, be fact-bound and case-by-case, but, like courts in many other states, we believe that authorship is relevant to authentication, particularly in the context of text messages proffered by the government as proof of guilt in a criminal prosecution. This is not an elevated *"prima facie* plus" standard or imposition of an additional requirement. Rather, it is a reasonable contemporary means of satisfying the core requirement of Rule 901 when a text message is the evidence the Commonwealth seeks to admit against a defendant; the Commonwealth must still show that the message is what the Commonwealth claims it to be, and authorship can be a valid (and even crucial) aspect of the determination.

Here, appellee admitted ownership of the cell phone, and other evidence from the Commonwealth showed that the content of the messages indicated drug sales activity. However, whether appellee was the author of the messages was not established by any evidence, either direct or circumstantial. Nevertheless, the burden for authentication is not high, and appellee was charged as both an accomplice and a conspirator ***390** in a drug trafficking enterprise. As such, authorship was not as crucial to authentication as it might be under different facts. For these reasons, we are satisfied that the trial court did not abuse its discretion in determining that the Commonwealth met its authentication burden as to the text messages.

II. *Hearsay*

In our view, however, the Commonwealth cannot have it both ways when it comes to appellee's separate and related challenge that the substance of the text messages was inadmissible hearsay. Of course, the concepts of inadmissible hearsay and non-hearsay, which can be admissible, are well-known evidentiary principles:

> Hearsay, which is a statement made by someone other than the declarant while testifying at trial and is offered into evidence to prove the truth of the matter asserted, is normally inadmissible at trial.... In the alternative, out-of-court statements may be admissible because they are non-hearsay, in which case they are admissible for some relevant purpose other than to prove the truth of the matter asserted. *See* ****715***Commonwealth v. [Raymond] Johnson,* 576 Pa. 23, 838 A.2d 663, 680 (2003) (defendant's statements threatening witness's family admissible as verbal acts, a form of non-hearsay, because evidence not offered to establish truth of matter asserted, but rather, to demonstrate fact of attempted influencing of witness); *Commonwealth v. Puksar,* 559 Pa. 358, 740 A.2d 219, 225 (1999) (statements by witness who overheard defendant and his brother (the victim) arguing were admissible as non-hearsay because not offered to prove truth of matter asserted, but rather to establish motive for killings).

Commonwealth v. Ali, 608 Pa. 71, 10 A.3d 282, 315–16 (2010) (quotation marks & some citations omitted). When this type of evidence is in question, the distinction can be subtle between a statement that, if admitted, would serve as affirmative and substantive evidence of the accused's guilt, and non-hearsay that may be admitted to establish some other aspect of a case, such as motive or a witness's relevant course of ***391** conduct. *Commonwealth v. Busanet,* 618 Pa. 1, 54 A.3d 35, 68–69 (2012);

Commonwealth v. Johnson, 615 Pa. 354, 42 A.3d 1017, 1035 (2012). On appeal, reviewing courts should be wary of proffered bases for admission that may be pretexts for getting fact-bound evidence admitted for a substantive purpose.*See Commonwealth v. Moore,* 594 Pa. 619, 937 A.2d 1062, 1071–73 (2007) (victim's statements to father, sister, and friend concerning bullying by defendant were not admissible under state of mind hearsay exception: "Commonwealth's allusions to the victim's state of mind in this passage and otherwise are tangential, and it is readily apparent that the state of mind hearsay exception was used as a conduit to support the admission of fact-bound evidence to be used for a substantive purpose.").

The Commonwealth argues here, as it did below, that the message contents were not offered for the truth of the matter asserted, but as "drug-related records" of the sort found admissible in *Commonwealth v. Glover,* 399 Pa.Super. 610, 582 A.2d 1111, 1113 (1990) (book recording dates and sums of money "was not offered to prove the truth of the sums and dates it contained, only that these types of records were kept and were in the possession of Glover. A written statement is not hearsay if offered to prove that it was made rather than its truth. This book was offered to show that it existed and was found in Glover's room; as offered, it is not hearsay.") (citation omitted). The Commonwealth also relies upon *Commonwealth v. Murphy,* 418 Pa.Super. 140, 613 A.2d 1215, 1225 n. 11 (1992), a case involving charges of, *inter alia,* murder, criminal conspiracy, and corrupt organizations, which held that the challenged documents "were not 'business records' in the ordinary sense, offered to establish the actual workings of a business or to prove the truth of the dealings contained in them. Instead, the evidence was offered and received to show that the parties mentioned therein were associated with one another. *See Commonwealth v. Glover* ...."

The Commonwealth also cites federal cases where "records" allegedly like those represented here in the text messages on appellee's phone, were found to be admissible non-hearsay ***392** because the evidence simply established the accused's relationship with other individuals in an illegal conspiracy or operation. In the alternative, the Commonwealth argues, the messages here were not hearsay because they were admissible as the statements of co-conspirators or co-participants in a crime, pursuant to Rule of Evidence 803(25)(E). Commonwealth's Brief at 22–26.

In response, appellee argues that, "in reality at trial," the messages here were obviously hearsay proffered (and wrongly ****716** admitted) solely for their content and truth. Appellee adds that the impropriety was compounded by the messages' use as a basis for the testimony by Detective Lively, the Commonwealth's expert. The purpose of the detective's testimony was to deconstruct and interpret the slang that was used in the messages—*i.e.*, their very text—to explain to the jury what was said out of court in the messages. And, of course, it just so happened that what the detective discerned in the messages was evidence of the very crimes with which appellee was charged. Thus, the detective opined that the text messages evidenced drug sales in a manner that implicated appellee, even though the detective admitted he could not prove she had been a correspondent. Appellee distinguishes *Glover* because, in that case, the notebook containing dates and sums was described as only possibly (not surely) indicating drug sales activity and was proffered not to prove the truth of its contents, but to show only "that these types of records were kept and were in [Glover's] possession." 582 A.2d at 1113.

Appellee further argues that the content of the text messages was offered and used by the Commonwealth at her trial purely to impress upon the jury that her possession of marijuana was with the intent to deliver; she asserts that without the "truth" revealed in the messages, her conviction on the PWID charge, even as an accomplice, would have been unlikely. Appellee avers that the Commonwealth's expressed reason for seeking to submit the message contents (which clearly imply drug sales) to the jury, "under the guise" that they were not being admitted for the truth of the matter asserted, was to prove her intent to deliver, and not merely to show the ***393** otherwise irrelevant fact that she just happened to own a phone that had messages on it referring to what a police expert thought were drug sales. Appellee's Brief at 5–9.

Taking into account the foregoing arguments, we note the following. Lawyers with trial experience know that when a party has classic hearsay evidence that it knows is harmful to the opposing party, but cannot actually identify a theory to overcome exclusion on hearsay grounds, a common fallback position is to declare that the out-of-court statements are not being offered for their truth. Counsel in such circumstances recognize that if they can manage to get the evidence admitted this way, the party's cause will be advanced, irrespective of reliability or relevancy. But, the required analytical response to this facile fallback position is: if the hearsay is not being offered for its truth, then what exactly is its relevance? And, assuming some such tangential relevance, does the probative value of the evidence outweigh the potential for prejudice? In this case, the

inquiry is not difficult because the only relevance of this evidence—drug sales text messages on appellee's cell phone—is precisely for the truth of the matter asserted, and we have little doubt that that is precisely how the lay jury construed it.

At trial, after appellee lodged her hearsay objection while Detective Lively was on the stand, the prosecutor responded that he was not trying to prove the truth of the matter asserted in the messages, but wanted the detective to testify that he understood the messages to be similar to "buy sheets" recording and arranging drug sales and to show that "these statements were on the phone that belonged to her and that—that these other types of statements then would constitute drug receipts, drug statements, and orders." The prosecutor later added: "[T]he purpose of this evidence is to show that [appellee's] phone was used in drug transactions, **and, therefore, **717 it makes it more probable than not when the Defendant possessed this marijuana that she did so with the intent to deliver as opposed to personal use.**" N.T., Trial, 5/26/10, at 73–79 (emphasis supplied).

***394** The trial prosecutor's candor should be determinative here. The prosecutor conceded that he sought to admit the message contents as substantive evidence probative of appellee's alleged intent to engage in drug sales activity. And that is certainly how the jury would construe the messages. It requires a suspension of disbelief to conclude that the messages had any relevance beyond their substantive and incriminating import, especially because they served as a platform for the crucial expert testimony of Detective Lively. Furthermore, as the panel below recognized, the Commonwealth's evidence of appellee's intent to deliver, without the truth revealed in the messages (via the expert testimony of the detective), was negligible. Simply put, the messages were out-of-court statements that were relevant, and indeed proffered, for a purpose that depended upon the truth of their contents, as probative of appellee's alleged intent to deliver. Accordingly, appellee's hearsay objection had merit and, in light of the paucity of other evidence that she possessed illegal drugs with the intent to deliver, the trial court's abuse of discretion in admitting the message contents was not harmless error.

In closing, we note that all sorts of inadmissible evidence may exist that might be helpful to a party's cause, and we understand the special incentive for the Commonwealth, in criminal cases, in perfect good faith, to attempt to make use of all the helpful "evidence" it may have. This is so because, unlike the defendant, the Commonwealth generally only gets one opportunity in a case; there is a very limited prospect of appeal. But, courts must remain mindful of those legal precepts that regulate unreliable evidence, in service of higher principles, such as the right to a fair trial.

We would affirm.

Justices BAER and TODD join this opinion.

Justice SAYLOR, in support of reversal.

I am in alignment with Mr. Justice Eakin's Opinion in Support of Reversal relative to the authenticity issue, as well ***395** as its reasoning that the messages were properly authenticated as being drug-related and sent to and from Appellee's phone. Accordingly, I too would reverse the Superior Court. However, as to the authorship aspect of authentication, I have reservations with the notion that "any question concerning the actual author or recipient of the text messages bore on the evidentiary weight to be afforded them." Opinion in Support of Reversal, at 721 (Eakin, J., joined by Stevens, J.). In this regard, my view is closer to that expressed in Mr. Chief Justice Castille's Opinion in Support of Affirmance, namely, that authorship is a relevant consideration in most electronic communication authentication matters. *See* Opinion in Support of Affirmance, at 712–13 (Castille, C.J.). As it concerns the present matter, my position in support of reversal is grounded in the Commonwealth's offer of the messages at trial, which did not rely on who drafted the messages (a fact that the Commonwealth readily conceded it could not demonstrate), but rather as circumstantial evidence of Appellee's complicity in dealing drugs in the same way that drug records or receipts may be relevant.

As it pertains to the hearsay question, I believe the reasoning advanced in Justice Eakin's Opinion in Support of Reversal is materially incomplete; it concludes, on the **718 basis of one example—"tree looks good"-that all of the text messages were non-hearsay, since they were not offered to prove the truth of the matter asserted. Opinion in Support of Reversal, at 722 (Eakin, J.).[1] In my view, this reliance on a single example overlooks the hearsay concerns implicated by other messages and fails to account for one text message that, indeed, was offered to prove its assertion.

The Commonwealth's primary argument is that the text

messages stored on Appellee's cell phone were offered into evidence, not for the truth of the matters asserted in them, but rather, solely to show that statements pertaining to illegal drugs were made utilizing Appellee's cell phone.[2] In terms of ***396** the elements of the hearsay rule, the Commonwealth's position appears to be that the messages should not be regarded as containing any " assertions" at all, but rather, they merely reflect the subject matter of the participants' conversation (*i.e.,* illegal drugs). Pa.R.E. 801(a) (defining "statement," for purposes of the rule against hearsay, in terms of assertive verbal or non-verbal conduct).

The rule against hearsay and the expansive scheme of exceptions that has evolved around it have been roundly criticized on various fronts. *See, e.g.,*IRVING YOUNGER, ABA SECTION OF LITIGATION MONOGRAPH SERIES NO. 3, AN IRREVERENT INTRODUCTION TO HEARSAY 18–19 (ABA Press 1977) ("I put to you that any rule which begins by telling us that hearsay is not admissible, but which ends with a dozen major exceptions and a list of about a hundred exceptions all told, is not much of a rule."); *id.* at 20 (describing the author's practice of arranging the hearsay exceptions "in ascending order of absurdity"); Edmund M. Morgan & John M. Maguire, *Looking Backward and Forward at Evidence,* 50 HARV. L.REV. 909, 921 (1937) (positing that the exceptions to the hearsay rule resemble "an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists"). Putting aside controversies about the exceptions, the general hearsay rule itself is problematic on account of the difficulty in distinguishing between speech which is assertive and that which is to be regarded as non-assertive. *See* 4 JONES ON EVIDENCE § 24.12 n. 40 (7th ed. 2013) ("No authoritative single definition of the distinction between assertive and nonassertive verbal conduct exists." (quoting Roger C. Park, *"I Didn't Tell Them About You": Implied Assertions as Hearsay Under the Federal Rules of Evidence,* 74 MINN. L.REV. 783, 794 (1990))).

***397** For example, speech often contains underlying information or assumptions in the nature of implied assertions, and courts and rulemakers in various jurisdictions have taken differing approaches to these. Much of the older common law would seem to hold that implied assertions are hearsay, at least where used to prove the truth of the matter to be taken as impliedly asserted. In this regard, English courts seem to recognize that conversations similar to those presently in issue implicate the ****719** rule against hearsay on the basis that they contain implied assertions. Along these lines, in *Regina v. Kearley,* [1992] 2 A.C. 228 (H.L.) (U.K.), a jurist discussed the implied assertions in one such conversation as follows:

> [The government] frankly concedes that if the inquirer had said in the course of making his request "I would like my usual supply of amphetamine at the price which I paid you last week" or words to that effect, then although the inquirer could have been called to give evidence of the fact that he had in the past purchased from the appellant his requirement of amphetamine and had made his call at the appellant's house for a further supply on the occasion when he met and spoke to the police, the hearsay rule prevents the prosecution from calling police officers to recount the conversation which I have described. This is for the simple reason that the request made in the form set out above contains an express assertion that the premises at which the request was being made was being used as a source of supply of drugs and the supplier was the appellant.
>
> If, contrary to the view which I have expressed above, the simple request or requests for drugs to be supplied by the appellant, as recounted by the police, contains in substance, but only by implication, the same assertion, then I can find neither authority nor principle to suggest that the hearsay rule should not be equally applicable and exclude such evidence. *What is sought to be done is to use the oral assertion, even though it may be an implied assertion, as evidence of the proposition asserted. That the proposition is asserted by way of necessary implication rather than expressly cannot, to my mind, make any difference.*

398Regina v. Kearley,* [1992] 2 A.C. 228 (H.L.) 254–55 (Ackner, J.) (U.K.) (emphasis added), *quoted in* David E. Seidelson, *Implied Assertions and Federal Rule of Evidence 801: A Continuing Quandary for Federal Courts,* 16 MISS. C.L.REV. 33, 50–51 (1995); *cf. United States v. McGlory,* 968 F.2d 309, 332 (3d Cir.1992) (explaining, in the implied assertion context, that the court "disfavored the admission of statements which are not technically admitted for the truth of the matter asserted, whenever the matter asserted, without regard to its truth value, implies that the defendant is guilty of the crime charged.").

In the United States, however, a strong countercurrent has emerged, as reflected in an advisory committee note to the Federal Rules of Evidence (upon which, notably, the Pennsylvania Rules of Evidence were, in large part, modeled). According to the advisory committee,

> The effect of the definition of "statement" is to exclude from the operation of the hearsay rule all evidence of

> conduct, verbal or nonverbal, not intended as an assertion. The key to the definition is that nothing is an assertion unless intended to be one....
>
> ... Similar considerations govern nonassertive verbal conduct and verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted, also excluded from the definition of hearsay by the language of subdivision (c).

Fed.R. Evid. 801 advisory committee's note; *accord United States v. Boswell,* 530 Fed.Appx. 214, 216 (4th Cir.2013) (taking the position that a text message containing a drug solicitation was non-hearsay); *United States v. Rodriguez–Lopez,* 565 F.3d 312, 314–15 (6th Cir.2009) (holding that drug solicitations directed to a defendant's cell phone, answered by an arresting officer, were not hearsay).

****720** The federal advisory committee's approach to the text of Federal Rule of Evidence 801 has been criticized as "lend[ing] itself to a rigid literalism which can produce absurd results," and as "ignor[ing] how difficult it sometimes is to distinguish verbal conduct that is assertive from that which is nonassertive." ***399** 4 JONES ON EVIDENCE § 24.12; *cf.* Christopher B. Mueller & Laird C. Kirkpatrick, 4 FED. EVID. § 8.6 (4th ed. 2013) (denoting a constrained approach to defining the boundaries of assertive verbal or non-verbal conduct as "almost certainly wrong").[3] Nevertheless, Pennsylvania Rule of Evidence 801 is patterned after its federal analogue and, although the specific language from the federal advisory committee was not incorporated into the commentary, such comments reflect a categorical and literalistic approach which would appear to exclude implied assertions from the reach of the hearsay rule in a broad range of contexts. *See, e.g.,*Pa.R.E. 801, cmt. (indicating that "questions, greetings, expressions of gratitude, exclamations, offers, instructions, warnings, etc." simply are not hearsay, without reference to the fact that such verbalizations may contain strong implied assertions).[4]

In the present matter, Justice Eakin's Opinion in Support of Reversal concludes that the "messages were offered to demonstrate activity involving the distribution or intent to distribute drugs and the relationship between the parties sending and receiving the messages [and, thus] were not hearsay statements." Opinion in Support of Reversal, at 722 (Eakin, J.) (citations omitted). As it pertains to the relationship aspect, I agree that the message sent from the phone to a number listed as "Matt" (identified as one of ***400** Appellee's alleged co-accomplices) was properly admitted as non-hearsay, since the relationship of the parties is demonstrated by the name of the contact (*i.e.,* "Matt") and not any assertion in the accompanying drug-related message, "can I get that other o from u." R.R. at 226.[5,6]

Relative to the Commonwealth's proffer of the messages as evincing drug distribution, I would conclude that one message sent from the phone, "I got a nice gram of that gd julie to get rid of dude didn't have enuff cash so I had to throw in but I cant ****721** keep it 8***ø***g," asserts the very matter for which it was offered. *Id.* The testifying detective explained that "julie" is a reference to cocaine, and that the sender had used his own money to buy some cocaine, but needed to sell it. *See* N.T., May 26–27, 2010, at 85. Stated plainly, the assertion of this message is that the sender possesses drugs with the intent to sell them. Thus, the assertion is the same as what the Commonwealth attempted to prove true, namely, possession with the intent to distribute an illegal substance. In my view, this corresponds to the commonly understood definition of hearsay as an "out-of-court statement offered to prove the truth of the matter asserted." Pa.R.E. 801, cmt.

On the whole, it may be worth considering refinements to our evidentiary rules based on accumulating wisdom and reflection.[7] For the present, however, I do not believe the ***401** hearsay rule in Pennsylvania operates to preclude the admission into evidence of implied assertions such as those arising from at least the majority of the text messages in issue here. Thus, I am of the view that, although one message was improperly admitted, the other drug-related messages and the other circumstantial evidence of drug distribution obviate the need for a new trial under the harmless error standard. *See Commonwealth v. Johnson,* 576 Pa. 23, 41–42, 838 A.2d 663, 674 (2003) (explaining that an error in admitting hearsay evidence is harmless where such evidence is cumulative of other untainted, substantially similar evidence). Accordingly, I would reverse the Superior Court's order relative to the hearsay issue.

Justice EAKIN, in support of reversal.

I agree with the Opinion in Support of Affirmance that the trial court did not abuse its discretion in determining the Commonwealth met its burden as to the text messages. However, I write separately because I disagree with the view that authorship is a relevant part of authentication analysis. *See* Opinion in Support of Affirmance, at 712–13. I also disagree that the text messages were hearsay.

Regarding authentication, Rule 901 requires only that the

proponent of the item establish it is what he claims it is. *See*Pa.R.E. 901(a). As the Commonwealth established the criminal content of the text messages and the ownership of the cell phone, the threshold requirement for authentication was met, and any question concerning the actual author or recipient of the text messages bore on the evidentiary weight to be afforded to them. *See* Trial Court Opinion, 11/30/10, at 13 ("[T]here was sufficient circumstantial evidence to authenticate the cellular phone as belonging to [appellee], and sufficient authenticity of the messages contained therein. The possibility that a person other than [appellee] was the author of the drug-related text messages went ... to the weight of the evidence rather than admissibility of the messages."). ***402** Respectfully, I believe the Opinion in Support of Affirmance mistakenly conflates authentication and authorship; the latter is not a requirement of the former under the Rule or the ****722** facts of this case. Authorship may be pertinent to the value of the evidence, but it is not a part of authenticating it.

I also disagree that modern communications technology can present "novel questions" with regard to authentication issues and that the authentication inquiry must be fact-bound and case-by-case. *See* Opinion in Support of Affirmance, at 712–13, 714. There is no reason to analyze these electronic messages differently than a "traditional" handwritten note; there is no need for a new rule of law for authentication simply because recordation is electronic. Rule 901 rightly requires evidence that an item such as a note, be it electronic or quill on papyrus, is what the proponent of the item says it is. The logic of authentication does not change with the nature of the message or its recording, and the mysteries of ever-changing technology offer no reason to change venerable legal concepts and principles in response.

Application of the principles can be adaptable, but the principles are unchanging. We cannot alter our manner of review every time there is new technology—technology changes every day, but the rules under which we operate, having the firmness of integrity in the first place, cannot ebb and flow with the perpetual creation of new manifestations to which they must be applied. The Rule, and the standards behind it, will accommodate the appropriate consideration of new technology. What must advance is our understanding of it, and we should not essay to reinvent the process because the details are electrons on a screen instead of paper and pencil. The factors that may bear on the evidentiary value of a message may vary with the nature of its recording, but relevance is a very discrete notion from authentication.

Regarding hearsay, Pennsylvania Rule of Evidence 802 provides: "Hearsay is not admissible except as provided by these rules, by other rules prescribed by the Pennsylvania Supreme Court, or by statute." Pa.R.E. 802. "Hearsay" is a statement, other than one made by the declarant while testifying ***403** at the trial or hearing, offered in evidence to prove the truth of the matter asserted. *Id.,* 801(c). A "statement," as pertinent to this instance, is an oral or written assertion, *id.,* 801(a), and a "declarant" is a person who makes a statement, *id.,* 801(b). Thus, any "out[-]of[-]court statement offered not for its truth but to explain the witness's course of conduct is not hearsay." *Commonwealth v. Rega,* 593 Pa. 659, 933 A.2d 997, 1017 (2007) (citing *Commonwealth v. Sneed,* 514 Pa. 597, 526 A.2d 749, 754 (1987)).

In the instant case, the text messages were not offered to prove the truth of the matter asserted—*i.e.,* that the "tree look[ed] good[.]" Trial Court Opinion, 11/30/10, at 9. Rather, the messages were offered to demonstrate activity involving the distribution or intent to distribute drugs and the relationship between the parties sending and receiving the messages. *See Commonwealth v. Murphy,* 418 Pa.Super. 140, 613 A.2d 1215, 1225 n. 11 (1992) (business papers, receipt books, and other memoranda were not hearsay because they were offered only "to show that the parties mentioned therein were associated with one another" (citation omitted)); *Commonwealth v. Glover,* 399 Pa.Super. 610, 582 A.2d 1111, 1113 (1990) (book noting dates and sums of money was not hearsay because it was offered "only [to show] that these types of records were kept and were in the possession of [the defendant]"). The trial court properly admitted the text messages because they were not hearsay statements. Accordingly, I would reverse the decision of the ****723** Superior Court and reinstate appellee's judgment of sentence.

Justice STEVENS joins this opinion.

All Citations

630 Pa. 374, 106 A.3d 705 (Mem)

Footnotes

1 Respectively, 35 P.S. § 780–113(a)(30), 18 Pa.C.S. § 306, *id.* § 903(a)(1), and 35 P.S. § 780–113(a)(16).

2 The Rule states: "(a) **In General**. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Pa.R.E. 901(a).

3 Subsection (b) provides ten ways that evidence can be authenticated and states clearly that these are simply examples, not a complete list.

4 Or, as the case may be, the recipient, although in practice, the question almost invariably concerns authorship.

5 *Gulley v. State,* 2012 Ark. 368, 423 S.W.3d 569, 578–79 (2012) (recipient testimony and corresponding specific facts in message contents sufficient to authenticate text messages as written by defendant); *Holloman v. State,* 293 Ga. 151, 744 S.E.2d 59, 61–62 (2013) (recipient, the infant murder victim's mother, authenticated messages through testimony that she knew defendant and recognized text messages she received on her phone as from him); *State v. Koch,* 157 Idaho 89, 334 P.3d 280, 288 (2014) ("[E]stablishing the identity of the author of a text message or e-mail through the use of corroborating evidence is critical to satisfying the authentication requirement for admissibility."); *State v. Elseman,* 287 Neb. 134, 841 N.W.2d 225, 233 (2014) (text messages sufficiently authenticated by testimony of defendant's girlfriend that she and defendant exchanged the messages); *State v. Thompson,* 777 N.W.2d 617, 625–26 (N.D.2010) (testimony of husband sufficient to authenticate threatening text messages written and sent to him by wife); *Tienda v. State,* 358 S.W.3d 633, 642 (Tex.Crim.App.2012); ("[T]hat a text message emanates from a cell phone number assigned to the purported author—none of these circumstances, without more, has typically been regarded as sufficient to support a finding of authenticity"); *see also Smith v. State,* 136 So.3d 424, 433 (Miss.2014) (citing with approval Texas case of *Tienda v. State* for principle that "something more" is needed when authentication of electronic communication is at issue); *State v. Lampman,* 190 Vt. 512, 22 A.3d 506, 516 (2011) (origin of allegedly threatening text messages from victim to defendant would need to be shown to lay foundation for question involving contents of messages).

1 The testifying detective explained that "tree" is code for marijuana. *See* N.T., May 26–27, 2010, at 87.

2 Parenthetically, in its present brief, the Commonwealth advances the theory that, even if the text messages in issue amount to hearsay, they were admissible under various exceptions to the hearsay rule, including those pertaining to admissions and coconspirator's statements. *See*Pa.R.E. 803(25). These bases, however, do not appear to have been advanced in the trial and intermediate courts and, in any event, are plainly outside the scope of the issues on which appeal was allowed by this Court. *See Commonwealth v. Koch,* 615 Pa. 612, 44 A.3d 1147 (2012) (*per curiam*).

3 Consistent with these criticisms, and in a factual context similar to the present case, one court reasoned as follows:

> The text messages here purport to be expressions of a desire to engage in a drug transaction. This is a drug case. We therefore disagree with the State that the text messages were not offered for the truth of the matter asserted.

Black v. State, 358 S.W.3d 823, 831 (Tex.Ct.App.2012). Some commentators also express the concern that implied assertions arguably impose higher risks of inaccuracy and ambiguity than direct ones. *See, e.g., State v. Palmer,* 229 Ariz. 64, 270 P.3d 891, 900–01 (Ct.App.2012) (Eckstrom, P.J., dissenting) (collecting articles).

4 While our rules, in this regard, may appear to be vulnerable to the criticism that they are more reflexive than analytical, it should be noted that trial judges are invested with discretion to exclude evidence (including statements containing implied assertions), where the probative value is outweighed by dangers of unfair prejudice, confusion of the issues, or misleading jurors. *See*Pa.R.E. 403.

5 In any event, the message is phrased as a question, which, as explained by the comments to Rule 801, means that it is not an assertion and, thus, not hearsay. *See*Pa.R.E. 801, cmt. ("Communications that are not assertions are not hearsay. These would include questions, greetings, expressions of gratitude, exclamations, offers, instructions, warnings, etc.").

6 The detective explained that "o" is a reference to an ounce, a commonly used weight measurement for illicit drugs. *See* N.T., May 26–27, 2010, at 86.

7 In such an undertaking, however, it would also be worth considering the perspective that implied assertions arising out of performance-based or instrumental verbal conduct (such as drug solicitations) should be treated as non-hearsay, at least where the assertive quality of the speech fairly can be viewed as subordinate to the instrumental aspect. *See, e.g.,* Mueller & Kirkpatrick, 4 FED. EVID. § 8:24; *accord People v. Morgan,* 125 Cal.App.4th 935, 23 Cal.Rptr.3d 224, 229–30 (2005) (treating

drug-solicitation text messages as primarily conduct-based as opposed to assertive).

114 A.3d 1072
Superior Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellee
v.
Donte MOSLEY, Appellant.

Argued Dec. 9, 2014.
Filed April 20, 2015.

Synopsis

Background: Defendant was convicted following a jury trial in the Court of Common Pleas, Delaware County, Criminal Division, Nos. CP–23–CR–0007437–2012, Capuzzi, J., of possession of a controlled substance and possession with intent to deliver a controlled substance. He appealed, following denial of his post-sentence motion for a new trial, 2014 WL 8105549.

Holdings: The Superior Court, No. 827 EDA 2014, Lazarus, J., held that:

[1] trial court abused its discretion in admitting hearsay statements testified to by officer regarding telephone call he received and statement made at scene;

[2] trial court's error in admitting hearsay statements was harmless;

[3] any improper viewing by officer of text messages on cell phones confiscated incident to defendant's arrest on drug charges was harmless;

[4] drug-related text messages recovered from cell phones confiscated incident to defendant's arrest were not properly authenticated, as required for admission into evidence; and

[5] trial court's error in admitting drug-related text messages recovered from cell phones confiscated incident to defendant's arrest was harmless.

Convictions affirmed, judgment of sentence vacated, and case remanded.

West Headnotes (22)

[1] **Criminal Law**
Evidence as to information acted on
Criminal Law
Identity

Trial court abused its discretion in admitting hearsay statements testified to by officer regarding a telephone call he received, indicating that defendant and a third party were "squatters" selling drugs out of caller's apartment, as well as a statement made at the scene to effect that caller pointed at vehicle driven by defendant, indicating to officer that the occupants were the two men who had been involved in drug activity at his apartment, in prosecution for possession and possession with intent to deliver controlled substance; such statements would unavoidably have prejudicial impact, and trial court did not give jury a cautionary instruction, despite defense's objections to officer's statements.

1 Cases that cite this headnote

[2] **Criminal Law**
Evidence as to information acted on

While certain out-of-court statements offered to explain a course of police conduct are admissible because they are offered merely to show the information upon which police acted, some out-of-court statements bearing upon police conduct are inadmissible because they may be considered by the jury as substantive evidence of guilt, especially where the accused's right to cross-examine and confront witnesses against him would be nullified.

4 Cases that cite this headnote

[3] **Criminal Law**
Prejudice to Defendant in General

Not all error at trial entitles a defendant to a new trial, and the harmless error doctrine reflects the reality that the accused is entitled to a fair trial, not a perfect trial.

1 Cases that cite this headnote

[4] **Criminal Law**
Curing Error by Facts Established Otherwise

An error which, when viewed by itself, is not minimal, may nonetheless be determined harmless if properly admitted evidence is substantially similar to the erroneously admitted evidence.

2 Cases that cite this headnote

[5] **Criminal Law**
Admissions, declarations, and hearsay; confessions

Trial court's error in admitting hearsay statements testified to by officer regarding a telephone call he received, indicating that defendant and a third party were "squatters" selling drugs out of caller's apartment, as well as a statement made at the scene to effect that caller pointed at vehicle driven by defendant, indicating to officer that the occupants were the two men who had been involved in drug activity at his apartment, was harmless, in prosecution for possession and possession with intent to deliver controlled substance; there was relevant, cumulative evidence indicative of drug activity, including evidence that defendant threw bags of drugs from vehicle he was driving, while being pursued by police, as well as defendant's possession of two cell phones and currency on his person which was consistent with drug activity.

Cases that cite this headnote

[6] **Criminal Law**
Causal nexus; independent discovery or basis or source

Any improper viewing by officer of text messages on cell phones confiscated incident to defendant's arrest on drug charges was harmless, even if viewing amounted to improper search; applying independent source doctrine, probable cause existed to support subsequent issuance of valid warrant to search phones. U.S.C.A. Const.Amend. 4.

1 Cases that cite this headnote

[7] **Criminal Law**
Causal nexus; independent discovery or basis or source

There is a two-prong test governing the application of the independent source doctrine as applied to evidence recovered during an illegal search or seizure: (1) whether the decision to seek a warrant was prompted by what was seen during the initial warrantless entry, and, (2) whether the magistrate was informed at all of the information improperly obtained. U.S.C.A. Const.Amend. 4.

1 Cases that cite this headnote

[8] **Criminal Law**
Necessity and scope of proof
Criminal Law
Reception and Admissibility of Evidence

Admission of evidence is within the sound discretion of the trial court and will be reversed only upon a showing that the trial court clearly abused its discretion.

4 Cases that cite this headnote

[9] **Criminal Law**
Telecommunications

With regard to the admissibility of electronic communication, such messages are to be evaluated on a case-by-case basis as any other document to determine whether or not there has been an adequate foundational showing of their relevance and authenticity. Rules of Evid., Rule 901(a), 42 Pa.C.S.A.

2 Cases that cite this headnote

[10] **Criminal Law**
Telecommunications

Authentication of electronic communications, like documents, requires more than mere confirmation that the number or address belonged to a particular person; circumstantial evidence, which tends to corroborate the identity of the sender, is required. Rules of Evid., Rule 901(a), 42 Pa.C.S.A.

3 Cases that cite this headnote

[11] **Courts**
Number of judges concurring in opinion, and opinion by divided court
Courts
Opinion by divided court

When a judgment of sentence is affirmed by an equally divided court, no precedent is established and the holding is not binding on other cases.

4 Cases that cite this headnote

[12] **Criminal Law**
Telecommunications

Drug-related text messages recovered from cell phones confiscated incident to defendant's arrest were not properly authenticated, as required for admission into evidence in drug prosecution; while there were similar "contacts" in both phones, defendant's mother was a contact on both phones, there were texts from mother of defendant's child on both phones, and prior incoming texts referenced defendant's first name, the texts referencing defendant's first name occurred more than one week earlier, texts from defendant's mother were sent weeks to months earlier, there was no reference to defendant's name in any of drug-related text messages, nor was there any corroborating witness testimony regarding authenticity of the messages. Rules of Evid., Rule 901(a), 42 Pa.C.S.A.

1 Cases that cite this headnote

[13] **Criminal Law**
Particular cases
Criminal Law
Telephone records

Drug-related text messages recovered from cell phones confiscated incident to defendant's arrest were not admissible, in drug prosecution, under hearsay exception allowing for introduction of statements offered against an opposing party and made by the party in an individual or representative capacity or when the statements were ones the party manifested that it adopted or believed to be true, despite prosecution's assertion that defendant's responses to drug requests that were in the form of questions were admitted to provide context for outgoing text messages or statements he sent; only relevance of such evidence was to prove truth of matter asserted, which was that there were drug-related text messages on the phones. Rules of Evid., Rules 801(c), 802, 803(25), 42 Pa.C.S.A.

4 Cases that cite this headnote

[14] **Criminal Law**
Documentary and demonstrative evidence

Trial court's error in admitting drug-related text messages recovered from cell phones confiscated incident to defendant's arrest was harmless, in drug prosecution, where there was substantially similar evidence showing that defendant possessed drugs with intent to deliver.

2 Cases that cite this headnote

[15] **Controlled Substances**
Possessory offenses
Controlled Substances
Possession for sale or distribution

Evidence was sufficient to establish defendant's conscious dominion over drugs, as required to establish possession needed for convictions of possession of a controlled substance and possession with intent to distribute a controlled substance; defendant was driving car from which two clear plastic bags were thrown out of driver's side window, no drugs, paraphernalia or other incriminating drug evidence was found on vehicle's passenger, and expert testimony confirmed that packaging, weight, and type of drugs, in addition to cash and cell phones found on defendant's person at time of his arrest were all indicative of possessing drugs with intent to deliver.

Cases that cite this headnote

[16] **Controlled Substances**
Possessory offenses
Controlled Substances
Possession for sale or distribution

Verdict convicting defendant of possession of a controlled substance and possession with intent to distribute a controlled substance was not against the weight of the evidence, despite defendant's claim that actual possessor of drugs thrown from vehicle could not be determined; jury heard evidence that defendant was driver of vehicle, that two bags later identified as containing drugs were discarded from driver's side window while vehicle was being pursued by police, and that over $100 in currency and two cell phones were found on defendant's person upon being stopped and searched, which an expert testified was indicative of drug possession and possession with intent to distribute.

Cases that cite this headnote

[17] **Criminal Law**
Weight and sufficiency of evidence in general

When a defendant challenges the weight of the evidence, relief in the form of a new trial may be granted only where the verdict shocks one's sense of justice.

1 Cases that cite this headnote

[18] **Criminal Law**
Sufficiency of evidence

Appellate court reviews the trial court's exercise of discretion in ruling on a weight claim, not the underlying question of whether the verdict was against the weight of the evidence.

5 Cases that cite this headnote

[19] **Criminal Law**
Province of jury or trial court

In reviewing the trial court's decision concerning the weight of the evidence, an appellate court is not passing on the credibility of witnesses; this is a function that is solely within the province of the finder of fact which is free to believe all, part, or none of the evidence.

11 Cases that cite this headnote

[20] **Criminal Law**
Mootness

Defendant's challenge to trial court's denial of his request, at end of suppression hearing, to reopen record to permit him to introduce testimony regarding operation of and access to cell phones confiscated incident to his arrest, in order to show, in support of claim of improper viewing by police, that some affirmative action by officer who read text messages on phones was required, was rendered moot, on appeal, by fact that appellate court determined that any improper viewing of messages was harmless error in light of subsequently and independently secured search warrant. U.S.C.A. Const.Amend. 4.

1 Cases that cite this headnote

[21] **Criminal Law**
Right to jury determination
Criminal Law
In General; Necessity of Motion
Criminal Law
Allowance or leave from appellate court

Defendant's challenge to trial court's application of mandatory minimum to his sentence, as being illegal under *Alleyne v. United States*, was not waivable, and could be raised sua sponte by the appellate court, despite defendant's failure to include *Alleyne*-based sentence challenge at sentencing, in his post-sentence motion, or in his concise statement of errors complained of on appeal. 18 Pa.C.S.A. § 7508.

30 Cases that cite this headnote

[22] **Jury**
Statutory provisions

Trial court's act of permitting jury, on special verdict slip, to determine beyond a reasonable doubt the factual predicate of aggregate weight of drugs, as required for mandatory minimum sentencing for possession of and possession with intent to distribute a controlled substance, was an impermissible legislative function that did not cure unconstitutionality of mandatory minimum sentencing statute in delegating fact-finding authority to sentencing judge rather than to the jury. 18 Pa.C.S.A. § 7508.

12 Cases that cite this headnote

West Codenotes

Held Unconstitutional
18 Pa.C.S.A. § 7508.

Attorneys and Law Firms

***1076** Lawrence R. Dworkin, Wallingford, for appellant.

William R. Toal, III, Assistant District Attorney, Media, for Commonwealth, appellee.
BEFORE: LAZARUS, J., WECHT, J., and STRASSBURGER, J.*

Opinion

OPINION BY LAZARUS, J.:

Donte Mosley appeals from his judgment of sentence, entered in the Court of Common Pleas of Delaware County, after being convicted by a jury of three counts of possession of a controlled substance[1] and one count of possession with the intent to deliver a controlled substance (cocaine).[2] The Commonwealth sought, and the sentencing court applied, the mandatory minimum sentence of five years' imprisonment pursuant to 18 Pa.C.S. § 7508 (drug trafficking sentencing/penalties). Mosley was sentenced to a term of 66–132 months' imprisonment for the intent to deliver charge, an aggravated-range sentence.[3] After careful review, we affirm Mosley's convictions, vacate his judgment of sentence and remand for resentencing.

On August 13, 2012, at approximately 2:00 p.m., Ridley Township Police Officer Leo Doyle was on patrol in the

Secane area in response to a complaint about illegal drug activity at the Presidential Square Apartments on South Avenue. James Latticlaw, the complainant, had told the police that squatters were selling drugs out of his apartment. Sergeant Charles Palo and Corporal Daniel Smith, also members of the Ridley Township Police Department, accompanied Officer Doyle to the Secane address in a separate police vehicle. When the two police vehicles arrived at the apartment complex, the police observed a black Cadillac driving towards them and saw Latticlaw pointing toward the Cadillac.

After seeing Latticlaw gesture toward the Cadillac, both police vehicles followed the car as it pulled out of the parking lot. While only a few feet behind the Cadillac, Officer Doyle saw Mosley, the driver of the Cadillac, put his arm out of the driver's side window and drop two clear plastic bags.[4] Corporal Smith picked up the two bags while Officer Doyle activated his siren and police lights and pulled the Cadillac over. Corporal Smith contacted Officer Doyle to tell him the baggies contained narcotics.[5] Doyle arrested Mosley and, in ***1077** a search incident to arrest, recovered two cellular phones and $117.00 in cash from his person. Affidavit of Probable Cause, 8/13/12, at 1. No drugs or drug paraphernalia were found on the passenger in the Cadillac.

Prior to trial, Mosley filed a motion to suppress text messages that were viewed by a police officer on the two cell phones[6] confiscated from him during the search incident to his arrest. Ridley Township Police Officer John McDevitt testified that as Mosley was being processed at the police station on the instant charges, the officer viewed texts that kept "popping up" on the screens of the mobile phones. Officer McDevitt first testified that the phones were already powered on and they required no password or other manipulation (like "swiping") to view the texts. However, the officer later testified that he was unable to recall whether he had to swipe anything to view the text messages.

Mosley filed a pretrial motion to suppress the search of the two cell phones and the numerous text messages found on them, basing his arguments on authentication and hearsay grounds. Mosley filed a second motion seeking to suppress all data obtained as a result of a subsequent search warrant for the phones. After the suppression hearing, but before the court rendered a decision, Mosley filed a motion to open the hearing in order to present testimony to prove that the texts could not have been viewed by the police unless they took some affirmative action to read them. On April 22, 2013, all pretrial motions were denied.

On September 16–17, 2013, a jury trial was held. At trial, Sergeant Kenneth Rutherford, an expert in the field of drugs and drug investigations, testified for the Commonwealth. Officer Doyle had contacted Sgt. Rutherford about the instant case, gave him basic information about the arrest (including what was confiscated at the stop) and asked the sergeant to prepare a search warrant. In response, Sgt. Rutherford prepared an application for a search warrant,[7] specifically requesting that the contents of the cell phones found on Mosley be searched. Text messages from both cell phones revealed personal messages received by Mosley from friends and family. Several other text messages were indicative of drug related sales/activity. The cell phone report records were marked and admitted into evidence at trial. The trial court gave the jury a limiting instruction on the text messages.[8]

***1078** At the conclusion of trial, Mosley was found guilty of possession of a controlled substance (oxycodone), possession of a controlled substance (heroin), possession of a controlled substance (cocaine), and possession with intent to deliver. Mosley was sentenced to 66–132 months' imprisonment, followed by 5 years of state probation. Mosley filed an unsuccessful motion in arrest of judgment and/or for a new trial. This appeal follows.

On appeal, Mosley raises the following issues for our consideration:[9]

> (1) Did the lower court err in admitting the hearsay statements testified to by Officer Leo Doyle regarding a telephone call he received as well as a statement made at the scene?
>
> (2) Did the lower court err in allowing evidence of text messages despite the fact that said messages were not properly authenticated, but were also hearsay?
>
> (3) Did the lower court err in failing to suppress evidence of text messages taken from the cellphones by the arresting officers?
>
> (4) Did the lower court err in failing to suppress the information and/or text messages taken from the above cellphones as a result of a search warrant since said evidence was the "fruit of the poisonous tree"?
>
> (5) Did the lower court err in failing to suppress the said text messages taken pursuant to a search warrant from the cell phones found on the person of the Appellant as a violation of the

> United States Constitution, Amendments 4 and 14[,] and the Pennsylvania Constitution, Article 1, Section 8[,] for failure to link the items requested to be searched with the alleged crime committed?
>
> (6) Did the lower court err in finding that there was sufficient evidence to uphold the verdict and also err in finding that the verdict was not against the weight of the evidence?
>
> (7) Did the lower court err in failing to reopen the suppression hearing to allow Appellant to introduce evidence contradicting the police officers concerning their reading of the text messages?
>
> (8) Was sentencing the Appellant to a five year mandatory minimum sentence pursuant to 18 Pa.C.S. [§]7508 illegal because the statute was unconstitutional? *Admission of Officer Doyle's Statements*

[1] Mosley asserts that the trial court erred in admitting hearsay evidence regarding "drug activity" offered by Commonwealth witness, Officer Leo Doyle. Officer Doyle was the first officer to appear at the scene to investigate Latticlaw's complaint, which led to him following, stopping and arresting Mosley. Mosley claims that this hearsay testimony was highly prejudicial because it negated his defense (that the passenger in the vehicle was the one who controlled the drugs and not him). Mosley also contends that admission of the testimony was reversible error as evidence of his guilt was not overwhelming.

[2] While certain out-of-court statements offered to explain a course of police conduct are admissible because they are offered merely to show the information upon which police acted, some out-of-court statements bearing upon police conduct ***1079** are inadmissible because they may be considered by the jury as substantive evidence of guilt, especially where the accused's right to cross-examine and confront witnesses against him would be nullified. *Commonwealth v. Palsa,* 521 Pa. 113, 555 A.2d 808, 810 (1989).

Mosley's arresting officer, Officer Leo Doyle, testified at trial regarding a phone call he received from James Latticlaw, who indicated that Mosley and a third party were "squatters" selling drugs out of Latticlaw's apartment. Officer Doyle also testified that when he arrived at the apartment complex to investigate the matter, Latticlaw pointed at the black Cadillac driven by Mosley, indicating to Officer Doyle that the occupants were the two men who had been involved in drug activity at his apartment. Specifically, the prosecutor questioned Officer Doyle at trial as follows:

> Q: What area did they make a complaint? A specific type of crime or of a specific incident that happened in a certain place?
>
> A: Yes.
>
> Q: What—what was that?
>
> A: Drug activity.
>
> Q: Drug activity. And what location?
>
> A: At the 640 South. I forget the exact apartment, but James Latticelaw [sic]'s apartment in 640 South Avenue, Presidential Square.
>
> * * *
>
> A: I was—the van was in front of me with Sergeant Paylow and Corporal Smith and I was behind the van and the black Cadillac was coming towards me occupied by two black males. Okay. And I also then observed James Latticelaw [sic], who I know from running that area and having calls, pointing at the car making a motion that that's the car that was—that had the two occupants in it that were why we were there.

N.T. Jury Trial, 9/16/13, at 122–24.

The trial court justified its decision to admit Officer Doyle's testimony as follows:

> This [c]ourt properly admitted the statements, as they were introduced by the prosecution to show why Officer Doyle went to the Presidential Apartments and why his attention was drawn to the black Cadillac, not to prove the truth of the matter asserted.

Trial Court Opinion, 5/15/14, at 6.

In *Commonwealth v. Yates,* 531 Pa. 373, 613 A.2d 542 (1992), the defendant was convicted of possession and possession with the intent to deliver. At trial, two officers testified why they went to the specific area where the defendant was arrested. In their testimony, the officers stated "that an informant had notified them that a large

black male, i.e. [defendant], was 'dealing drugs' at that location." *Id.* at 543. The trial court admitted the testimony, reasoning that the testimony explained the course of police conduct and that, without the testimony, the jury would not have any way of knowing why the police went to that location. Even though the trial court gave the jury a cautionary instruction, the Supreme Court reversed the defendant's conviction and granted a new trial since the informant's statements were of a highly incriminating nature, contained specific assertions of criminal conduct, and would have the unavoidable effect of prejudice. *Id.*

Similarly, Mosley was charged and convicted of possession and possession with the intent to deliver. Therefore, Officer Doyle's statement that he responded to Latticlaw's apartment complex in response to a complaint that defendant was conducting "drug activity" would likewise unavoidably "have had a prejudicial impact." *Id.* Moreover, unlike the trial court ***1080** in *Yates,* here the judge did not give the jury a cautionary instruction despite the defense's objections to the police officer's alleged hearsay statements. Where Officer Doyle's testimony contained specific assertions of criminal conduct, it was likely that the jury would interpret this testimony from a police officer as substantive evidence of Mosley's guilt; it also deprived Mosley of his right to confront and cross-examine Latticlaw at trial. *Cf. Commonwealth v. Taggart,* 997 A.2d 1189 (Pa.Super.2010) (where officer testified that defendant fit description of robber, and prosecutor cut him off and elicited testimony that defendant was not one of robbers described in flash information, defendant not deprived of opportunity to confront informant who provided information in flash report).

[3] [4] However, "not all error at trial ... entitles a [defendant] to a new trial, and [t]he harmless error doctrine ... reflects the reality that the accused is entitled to a fair trial, not a perfect trial[.]" *Commonwealth v. West,* 834 A.2d 625, 634 (Pa.Super.2003). Moreover, it is well established that "an error which, when viewed by itself, is not minimal, may nonetheless be determined harmless if properly admitted evidence is substantially similar to the erroneously admitted evidence." *Commonwealth v. Story,* 476 Pa. 391, 383 A.2d 155, 165 (1978).

[5] Because there is relevant, cumulative evidence indicative of drug activity, we find that the admission of this out-of-court statement, while an abuse of the trial court's discretion, was harmless error. Here, there was independent evidence showing that Mosley threw bags of drugs from a car he was driving, while being pursued by the police. Mosley's possession of two cell phones and U.S. currency on his person was consistent with drug activity, while the weight and packaging of the drugs was indicative of possession with the intent to deliver. *See Commonwealth v. Watson,* 945 A.2d 174 (Pa.Super.2008) (harmless error exists where erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to erroneously admitted evidence); *see also Commonwealth v. Williams* (erroneous admission of evidence does not necessarily entitle defendant to relief if error is harmless).

Failure to Suppress Text Messages

[6] Mosley contends that Officers McDevitt and Doyle should have secured a search warrant before reading the text messages on the cell phones. Recently, in *Commonwealth v. Stem,* 96 A.3d 407 (Pa.Super.2014), our Court addressed this issue, relying upon the legal analysis and holding of the United States Supreme Court in *Riley v. California,* —— U.S. ——, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014). In *Riley,* the Supreme Court determined that warrantless searches of a cellular telephone conducted incident to a defendant's arrest are unconstitutional. *Id.* at 2495.

Here, there is no question that Officer McDevitt viewed the text messages on the cell phones without first securing a warrant. The record is unclear,[10] however, regarding whether Officer McDevitt actually "searched" the phones (i.e., by scrolling through messages, swiping the phone on, or otherwise pulling up the texts) like ***1081** in *Stem,* where a police officer inspected the cell phone after the defendant's arrest, turned on the phone, hit the picture icon and then searched cell phone data. *Stem,* 96 A.3d at 408. However, even if Officer McDevitt improperly searched and viewed text messages on the cell phones confiscated incident to Mosley's arrest, we find that because a valid warrant was subsequently issued to search the phones, any improper viewing by Officer McDevitt was harmless error.

[7] Our Supreme Court has held that "where there is probable cause independent of police misconduct that is sufficient in itself to support the issuance of a warrant, the police should not be placed in a worse situation than they would have been absent the error or violation under which the evidence was seized." *Commonwealth v. Brundidge,* 533 Pa. 167, 620 A.2d 1115, 1119–20 (1993).

> There is a two-prong test governing the application of the independent source doctrine: (1) whether the decision to seek a warrant was prompted by what was seen during the initial warrantless entry; and, (2) whether the magistrate was informed at all of the information improperly obtained.

Commonwealth v. Ruey, 854 A.2d 560, 564–65 (Pa.Super.2004).

Here, Sgt. Rutherford, who prepared the warrant, testified at the suppression hearing that he never spoke with Officer McDevitt prior to or during the process of securing the search warrant for the cellphones. Moreover, while Sgt. Rutherford did speak with Mosley's arresting officer, Officer Doyle, who was aware of the content of the text messages and who asked Sgt. Rutherford to prepare the warrant, the record shows that Officer Doyle did not discuss the content of the text messages with Sgt. Rutherford. N.T. Suppression Hearing, at 4/18/13, at 11–12, 56. Accordingly, we find that there was probable cause independent of any alleged misconduct on the part of Officer McDevitt in viewing the text messages prior to the issuance of a warrant. This probable cause is sufficient in itself to support the subsequent warrant secured by Sgt. Rutherford. *Ruey, supra.*

Admission of Text Messages at Trial

Authentication/Authorship

Mosley next asserts that the trial court improperly permitted testimony at trial regarding text messages from the two cellphones taken from his person, incident to his arrest, where the messages had never been authenticated and constituted inadmissible hearsay.

[8] Admission of evidence is within the sound discretion of the trial court and will be reversed only upon a showing that the trial court clearly abused its discretion. *Commonwealth v. Lilliock,* 740 A.2d 237 (Pa.Super.1999). Generally, the requirement of authentication or identification as a condition precedent to the admissibility of evidence is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Pa. R.E. 901(a).

[9] [10] With regard to "the admissibility of electronic communication, such messages are to be evaluated on a case-by-case basis as any other document to determine whether or not there has been an adequate foundational showing of their relevance and authenticity." *In the Interest of F.P.,* 878 A.2d 91, 96 (Pa.Super.2005). "[A]uthentication of electronic communications, like documents, requires more than mere confirmation that the number or address belonged to a particular person. Circumstantial evidence, which tends to corroborate the identity of the sender, is required." ***1082** *Commonwealth v. Koch,* 39 A.3d 996, 1005 (Pa.Super.2011) (*Koch*).

[11] In *Commonwealth v. Koch,* —— Pa. ——, 106 A.3d 705 (2014) (*Koch II*), an equally divided Supreme Court[11] affirmed our Court's grant of a new trial, wherein we held that: (1) the defendant's text messages had not been authenticated; (2) the messages were inadmissible hearsay that were not offered for any reason other than to show the truth of the matter asserted as to the content of the messages; and (3) admission of the unauthenticated hearsay messages was not harmless error because the prejudicial effect of the evidence was "so pervasive in tending to show that [defendant] took an active role in an illicit [drug selling] enterprise that it [could not] be deemed harmless." *Koch,* 39 A.3d at 1005–07.

While the defendant in *Koch* admitted to owning the cell phone, and the content of the messages on the phone indicated drug sale activity, it was also conceded at trial that someone other than the defendant likely authored at least some of the text messages. Even so, the mere assertion of ownership of the phone did not establish that defendant was an active correspondent in the particular drug sales text messages. *Id.* at 1003. Moreover, confirmation that the number or address belongs to a particular person also did not satisfy the authentication requirement under the Rules of Evidence. *Id.* at 1005. Ultimately, the Court found that the Commonwealth failed to establish, either by direct or circumstantial evidence, whether defendant was the author of the texts. *Id.*

However, the *Koch* Court, referencing Rule 901, explained the ways in which text messages could be authenticated by using: (1) first-hand corroborating testimony from either the author or the sender; and/or (2) circumstantial evidence, which includes distinctive characteristics like information specifying the author-sender, reference to or correspondence with relevant events preceding or following the communication in question; or (3) any other facts or aspects of the

communication that signify it to be what its proponent claims it to be. *Id.* at 1002. Ultimately, the Court found that the trial court abused its discretion in admitting the text messages where the cell phone's physical proximity to the defendant at the time of her arrest had no probative value with regard to whether she authored the messages. *Id.* at 1005. Finally, because there was no evidence substantiating that defendant had written the drug-related text messages, it was improper to find that the identity of the sender had been corroborated. *Id.*

As the Court in *Koch* acknowledged, the authentication inquiry will, by necessity, "be evaluated on a case-by-case basis as any other document to determine whether there has been an adequate foundation showing of its relevance and authenticity." *Id.* at 1003 (citation omitted). Instantly, Mosley denied that he owned the two cell phones that were confiscated from his person incident to his arrest. Moreover, there was no first-hand corroborating testimony from a witness regarding the authenticity of the text messages. Pa. R.E. 901(b)(1). In addition, there were two email addresses attached to the cell phones, which could indicate that someone else had access to or owned the phones. Finally, while several of the text messages could be interpreted as indicative of drug dealing, none of the specific drug-related communications identified Mosley. In ***1083** fact, Donte (Mosley's first name) is only referenced in a few text messages dated months prior to the instant investigation. None of the text messages sent from the Samsung phone concerned drugs and there were no drug-related text messages sent from the phones around the time of Mosley's arrest.

Unlike the defendant in *Koch,* who had been charged as both an accomplice and a conspirator, here Mosley was charged with purely possessory offenses, including with the intent to deliver. Therefore, the authorship of the texts is more critical to an authentication analysis under the facts of this specific case. The fact that that the trial court failed to give an authentication instruction to the jury further compounds the effect that the issue of authorship has on the case. Here, the court generally instructed the jury with regard to circumstantial evidence and the weight to be accorded it in terms of evaluating whether Mosley was the transmitter or receiver of the messages.[12] However, the court did not instruct the jury that in order to prove authentication, circumstantial evidence which tends to corroborate the identity of the sender *is required.*

[12] Instantly, the trial court found that the Commonwealth authenticated the messages based on the following facts: (1) similar contacts in both phones; (2) Donte Mosley's mother ("Momma Dooks") as a contact on both phones; (3) mother of Mosley's child texting similar messages on both phones; (4) prior incoming texts referencing "Donte". N.T. Jury Trial, 4/18/13, at 93. While these facts may support authentication, the court does not take into account the fact that the texts referencing "Donte" occurred more than one week prior to the current incident and that the texts from Momma Dooks were sent in April, June and July of 2012—weeks to months before Mosley's arrest. Finally, and most relevant to the issue of authorship, the court does not discuss the fact that there is no reference to Donte in any of the drug-related text messages.

Like *Koch,* this is a close case regarding authorship and authentication. Here, there is no evidence, direct or circumstantial, tending to substantiate that Mosley was the author of the drug-related text messages. Moreover, no testimony was presented from persons who sent or received the text messages. While there may be contextual clues with regard to some texts, (i.e., one of the text messages is from Mosley's mother on July 26, 2012, just 18 days before his arrest, wishing Mosley a happy birthday), there are no such clues in the drug-related texts messages themselves tending to reveal the identity of the sender. *Compare Koch, supra* ("reference to or correspondence with relevant events that precede or follow the communication in question" may be a distinctive characteristic under Rule 901(b)(4)). Additionally, the fact that a text message corroborates the "crazy horse" stamp on one of the baggies of drugs discarded by Mosley just prior to his arrest is merely circumstantial evidence of authentication. Nothing in that specific message, however, indicates the identity of the author or recipient of the message.

***1084** As the United States Supreme Court noted in *Riley, supra,* more substantial privacy interests are at stake when digital data is in play:

> Cell phones differ in both a quantitative sense from other objects that might be kept on an arrestee's person. The term "cell phone" is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers.

Id. at 2489. Moreover, due to their immense capacity to store data, cell phones "have several interrelated consequences for privacy[,]" including the different types of data (i.e., addresses, notes, bank statements, prescriptions, videos) that can be stored on them, the sheer amount of information with regard to each type of stored data, and the fact that the data stored on the cell phone can date back months or even years to the original purchase of the phone (or even beyond that date with the ability to transfer data from an older phone to a newer one). *Id.* Finally, due to the fact that most people in the general population carry a cell phone on their person throughout the day, "more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate." *Id.* at 2490 (citation omitted).

Bearing in mind the unique nature of a cell phone and its pervasiveness in everyday society, we believe that in order to use content from a cell phone as testimonial evidence in a criminal prosecution, the Commonwealth must clearly prove its authentication. Because there was no evidence, direct or circumstantial, clearly proving that Mosley was the author of the drug-related text messages, or any corroborating witness testimony regarding authenticity of the messages, we find that the trial court erred in determining that the drug-related texts were authenticated properly in the instant case.[13]

Hearsay

Even concluding that the text messages were not properly authenticated, we must still address Mosley's claims that the text messages were inadmissible hearsay. Hearsay is an out-of-court statement offered for the truth of the matter asserted and is inadmissible unless it falls within an exception to the hearsay rule. *See* Pa. R.E. 801(c); Pa. R.E. 802; *Commonwealth v. May,* 587 Pa. 184, 898 A.2d 559, 565 (2006). When this type of evidence is in question, the distinction can be subtle between a statement that, if admitted, would serve as affirmative and substantive evidence of the accused's guilt, and non-hearsay that may be admitted to establish some other aspect of a case, such as motive or a witness's relevant course of conduct.

[13] Here, the Commonwealth argues that the texts are admissible under the hearsay exception set forth in Pa. R.E. 803(25), which states, "[t]he statement is offered against an opposing party and: (A) was made by the party in an individual or representative capacity; [or] (B) is one the party manifested that it adopted or believed to be true." Specifically, the Commonwealth claims that Mosley's responses to drug requests that were in the form of questions falls within the section 803(25) hearsay exception because they were admitted ***1085** to provide context for the outgoing text messages (statements) he sent.

With respect to the issue of inadmissible hearsay in *Koch,* a detective, who was a Commonwealth expert witness, testified that in his opinion the text messages found on the defendant's cell phone, in conjunction with other factors (bongs, pipes, large amounts of cash, drug scales) were consistent with drug sales that implicated the defendant, even though the detective conceded that the author of the drug-related text messages could not be definitively ascertained, that several texts were incomplete and that some messages referenced the defendant in the third person. *Koch,* 39 A.3d at 1002–1003. In addition, the prosecutor acknowledged that the purpose of the text evidence was to show that defendant's phone was used in drug transactions, and, therefore, that it makes it more probable than not that when the defendant possessed the drugs she did so with the intent to deliver it as opposed to for personal use. *Id.* at 1005–06. As a result, the Court concluded that the only relevance of the evidence was to prove the truth of the matter asserted—that there were drug-related text messages on defendant's cell phone and, therefore, that admission of the messages was an abuse of discretion and not harmless error. *Id.* at 1006–07.

Similarly, here Sgt. Rutherford testified that there were several text messages on the cell phones that, in his professional opinion, appeared to involve drug trafficking or setting up deals. N.T. Jury Trial, 9/17/13, at 55. He also testified that drug dealers often carry two phones, one personal and one for business, and that cell phones are the main mode of communication in the drug dealing trade. *Id.* at 55–56, 41. However, Sgt. Rutherford testified that there was no identifying information regarding Mosley in any of the drug-related texts on either phone. *Id.* at 59–62, 71. On direct examination, Sgt. Rutherford testified that narcotics sales are frequently set up with text messaging, *id.* at 26, and that because there were similar numbers on both cell phones and some of the text messages included Mosley's name, such facts were consistent with a pattern of drug sales.

On direct examination by the prosecution, Sgt. Rutherford testified that the phones contained text messages from various people indicating "there was a sale of narcotics, there was a request for different types of narcotics, drugs, meet, locations, places to meet, things like that." *Id.* at 29. Sergeant Rutherford consistently testified to common street terms used in illegal drug sales, the manner in

which dealers often stamp their bags of drugs with symbols and wording, and that text messages are often sent to a phone in an attempt to buy drugs. Ultimately, the prosecutor asked Sgt. Rutherford if, based on his expertise, he had formed an opinion that the drugs and cell phones confiscated from Mosley were associated with the distribution of drugs, or just mere possession for personal use, to which he replied:

> Yes. A combination. I take into account everything, the totality of everything. You know, a combination of the packaging, the text messages, this is consistent with someone who is involved with the sale of narcotics. And in this case, different types of narcotics.

* * *

> A lot of times dealers—I mean, especially with the heroin because the weights can really affect severe jail terms. They don't like to carry a whole lot. I mean, they'd rather have less. A lot of times you'll see—in some of the text messages he says what do you need. What do you need because sometimes—depending on where they set up their operation, they ***1086** may only come out with what you ask for.

Id. at 46, 52.

[14] Taking into account the content of the texts in this case, as well as the erroneously admitted evidence of Officer Doyle's statement regarding drug activity, we conclude that under *Koch* the admission of the messages was an abuse of discretion where the texts were admitted to prove the truth of the matter asserted—that Mosley possessed the drugs with the intent to deliver. However, if we discount the improperly admitted text messages and Officer Doyle's statement, we conclude that there is substantially similar evidence showing that Mosley possessed the drugs with the intent to deliver. *See infra* at 1086–87. Therefore, we find that the improper admission of the statement and text messages was harmless error, did not unduly prejudice Mosley, and still resulted in a fair trial. *See Watson, supra; West, supra; Story, supra.*

Sufficiency & Weight of the Evidence

[15] Mosley contends that there was insufficient evidence to prove that he committed the crimes of possession and possession with intent to deliver. Specifically, he argues that the passenger in the Cadillac was just as likely to have possessed the drugs as he was and that the Commonwealth failed to show that he exercised conscious dominion over the drugs.

In reviewing a challenge to the sufficiency of the evidence, we must determine whether, viewing the evidence in the light most favorable to the Commonwealth as verdict winner, together with all reasonable inferences therefrom, the trier of fact could have found that each and every element of the crimes charged was established beyond a reasonable doubt. *Commonwealth v. Randall,* 758 A.2d 669, 674 (Pa.Super.2000).

First, Mosley was driving the car from which two clear plastic bags (each containing multiple baggies within) were thrown out of the driver's side window. Second, no drugs, paraphernalia or other incriminating drug evidence was found on the passenger in the Cadillac. Third, expert testimony by Sgt. Rutherford confirmed that the packaging, weight and type of drugs, in addition to the $117.00 and cell phones found on Mosley's person at the time of his arrest, are all indicative of possessing drugs with the intent to deliver. Accordingly, we find that there was sufficient evidence to support Mosley's conviction for possession and possession with the intent to deliver. *Cf. Koch, supra* at 1007 (Commonwealth failed to present overwhelming properly admitted evidence regarding defendant's involvement in drug transactions; prosecution's case consisted of text message evidence and that drugs were found in defendant's shared bedroom, in common areas of home, and no drugs or money found on defendant's person).

[16] Next, Mosley contends that the verdict is against the weight of the evidence, where the actual possessor of the drugs thrown from the car was not and could not be determined. We disagree.

[17] [18] [19] When a defendant challenges the weight of the evidence, relief in the form of a new trial may be granted only where the verdict shocks one's sense of justice. This Court reviews the trial court's exercise of discretion in ruling on the weight claim, not the underlying question of whether the verdict was against the weight of the evidence. *Commonwealth v. Champney,* 574 Pa. 435, 832 A.2d 403, 408 (2003); *Commonwealth v. Rabold,* 920 A.2d 857, 860–61 (Pa.Super.2007), *aff'd* 597 Pa. 344, 951 A.2d 329 (2008). In reviewing the trial court's decision concerning the weight of the evidence, an appellate court ***1087** is not passing on the credibility of witnesses. *Commonwealth v. Woody,* 451 Pa.Super. 324, 679 A.2d 817, 819–20 (1996). This is a function that is solely within the province of the finder of fact which is free to believe all, part of none of the evidence. *Id.*

Here, the jury heard the evidence that Mosley was the driver of the black Cadillac, that two bags later identified as containing drugs were discarded from the driver's side window while the vehicle was being pursued by the police, and that $117 in U.S. currency, and two cell phones were found on his person upon being stopped and searched. A Commonwealth expert testified that this evidence was indicative of drug possession and possession with the intent to deliver. Accordingly, we find that given the evidence presented to prove that Mosley committed these possessory offenses, the verdict does not shock one's sense of justice; the court's decision to deny the challenge to the weight of the evidence is not contrary to law, manifestly unreasonable or the result of bias, prejudice, partiality or ill-will. *Champney, supra.*

Reopen Suppression Hearing

[20] Mosley next contends that the trial court improperly denied his request, at the end of the suppression hearing, to reopen the record to permit him to introduce testimony regarding the operation of and access to the cell phones. Specifically, Mosley asserted that because defense counsel was surprised at the hearing by Officer McDevitt's testimony regarding the operation of the cell phone, counsel needed proof that in order to view the texts, some affirmative action by the officer (such as swiping or unlocking with a password) needed to occur. Having found that any improper viewing of the text messages, by Officer McDevitt, on the cell phones confiscated incident to Mosley's arrest was harmless error in light of the subsequently and independently secured search warrant, we find this issue moot on appeal.

Alleyne Sentencing Issue

Finally, Mosley contends that the trial court's application of the mandatory minimum to his sentence is illegal because the United States Supreme Court's decision, *Alleyne v. United States,* —— U.S. ——, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), has rendered the sentencing scheme under section 7508 constitutionally suspect. Additionally, he claims that even though the jury used a special verdict to allow the factfinder to determine the weight of the drugs possessed, by a reasonable doubt, the verdict still violates section 7508 and its plain legislative intent. We agree.

[21] First, we must address the Commonwealth's contention that Mosley has waived this issue on appeal due to his failure to include an *Alleyne*-based sentence challenge at sentencing, in his post-sentence motion, or in his Pa. R.A.P. 1925(b) concise statement of errors complained of on appeal. In *Commonwealth v. Watley,* 81 A.3d 108, 118 (Pa.Super.2013) (en banc),[14] our Court observed that "where [a]pplication of a mandatory minimum sentence gives rise to illegal sentence concerns, even where the sentence is within the statutory limits[,] [sic] [l]egality of sentence questions are not waivable" and may be raised *sua sponte* by this Court.[15] ***1088** Because Mosley's claim falls within this narrow ambit of cases and, therefore, is not subject to traditional issue preservation, we will address its merits.

In *Alleyne, supra,* a case concerning the application of a federal mandatory minimum statute, the Supreme Court held that any fact that triggers an increase in the mandatory minimum sentence for a crime is necessarily an element of the offense. *Id.* at 2163–64. The Supreme Court reasoned that "the core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime" and consequently, the Sixth Amendment requires that every element of the crime, including any fact that triggers the mandatory minimum, must be alleged in the charging document, submitted to a jury, and found beyond a reasonable doubt. *Id.* at 2160–64.

In *Commonwealth v. Munday,* 78 A.3d 661 (Pa.Super.2013), our Court discussed the application of *Alleyne* to this Commonwealth's mandatory minimum statutes:

> This term, in *Alleyne,* the United States Supreme Court expressly overruled *Harris,* holding that any fact that increases the mandatory minimum sentence for a crime "is 'an element' that must be submitted to the jury and found beyond a reasonable doubt." *Alleyne,* 133 S.Ct. at 2155, 2163. The *Alleyne* majority reasoned that "[w]hile Harris limited *Apprendi* to facts increasing the statutory maximum, the principle applied in *Apprendi* applies with equal force to facts increasing the mandatory minimum." [*Id.*] at 2160. This is because "[i]t is impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime[,]" and "it is impossible to dispute that facts increasing the legally prescribed floor aggravate the punishment." *Id.* at 2161. Thus, "[t]his reality demonstrates that the core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury." *Id.*

Id. at 665. In *Munday,* the Court held that even where a

statute specifically stated that its "provisions ... shall not be an element of the crime,"[16] the sentencing factor [or factual predicate] at issue still had to be determined by the factfinder, beyond a reasonable doubt. *Id.* at 666. Thus, the Court found that the defendant's sentence, which included the mandatory minimum sentence under section 9712.1 (sentences for certain drug offenses committed with firearms), violated the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment. As a result, the Court vacated the defendant's judgment of sentence and remanded for resentencing. *Id.* at 667.

[22] Instantly, Mosley was sentenced pursuant to the mandatory minimum statute, section 7508 of the Sentencing Code, which states, in pertinent part:

> (a) General rule.—Notwithstanding any other provisions of this or any other act to the contrary, the following provisions shall apply:
>
> ***1089** (3) *A person who is convicted of violating section 13(a)(14), (30) or (37) of The Controlled Substance, Drug, Device and Cosmetic Act where the controlled substance is coca leaves* or is any salt, compound, derivative or preparation of coca leaves or is any salt, compound, derivative or preparation which is chemically equivalent or identical with any of these substances or is any mixture containing any of these substances except decocainized coca leaves or extracts of coca leaves which (extracts) do not contain cocaine or ecgonine *shall, upon conviction, be sentenced to a mandatory minimum term of imprisonment and a fine as set forth in this subsection:*
>
> (ii) ***when the aggregate weight of the compound or mixture containing the substance involved is at least ten grams and less than 100 grams****;* three years in prison and a fine of $ 15,000 or such larger amount as is sufficient to exhaust the assets utilized in and the proceeds from the illegal activity; however, if at the time of sentencing the defendant has been convicted of another drug trafficking offense: five years in prison and $ 30,000 or such larger amount as is sufficient to exhaust the assets utilized in and the proceeds from the illegal activity[.]
>
> (b) Proof of sentencing.—*Provisions of this section shall not be an element of the crime.* Notice of the applicability of this section to the defendant shall not be required prior to conviction, but reasonable notice of the Commonwealth's intention to proceed under this section shall be provided after conviction and before sentencing. *The applicability of this section shall be determined at sentencing. The court shall consider evidence presented at trial, shall afford the Commonwealth and the defendant an opportunity to present necessary additional evidence and shall determine, by a preponderance of the evidence, if this section is applicable.*

18 Pa.C.S. § 7508(a)(3)(ii) (emphasis added), (b) (emphasis added). Therefore the factual predicate of section 7508 is that the aggregate weight of the prohibited substance possessed by the defendant be at least 10 and no more than 100 grams.

In *Commonwealth v. Thompson,* 93 A.3d 478 (Pa.Super.2014), the trial court applied the mandatory minimum provisions of section 7508 to the defendant's sentence. On appeal, our Court held that because the weight of the drugs possessed by the defendant had not been determined by the fact-finder, nor proven beyond a reasonable doubt, the defendant's sentence was illegal and required vacation. Specifically, the Court noted that section 7508(a) cannot be constitutionally applied in light of *Alleyne,* or it would result in an illegal sentence. Similarly, in *Commonwealth v. Fennell,* 105 A.3d 13 (Pa.Super.2014), where the defendant stipulated to the weight of the drugs for purposes of applying the mandatory minimum to his sentence, our Court also concluded that section 7508(b), which permits the trial court to find the necessary elements by a preponderance of the evidence, was not severable from the rest of the statute. The Court concluded that stipulating to the drug's weight, in effect, allows a trial court to impose a mandatory minimum outside the statutory framework, where such procedures are solely within the province of the factfinder. *Id.* at 20. As a result the Court deemed section 7508 unconstitutional and that any mandatory minimum imposed under this statute is illegal. *Id.* at 15–18.

Although the principles of *Alleyne* and it progeny apply to Mosley's section 7508 ***1090** mandatory minimum sentence, the sentencing procedure in the instant case differs from that employed in *Thompson* and *Fennell.*[17] As a result, the Commonwealth contends that Mosley's sentence should not be deemed illegal. We disagree.

Here, the jury was presented with a special verdict form that included the specific issue:

> If you find the defendant guilty of Count 4(c): possession with intent to deliver, do you find the

> defendant guilty of possession with intent to deliver **greater than 10 grams of cocaine?**

Jury Verdict Form, 9/17/13 (emphasis added). Therefore, the issue regarding the weight of the drugs possessed by Mosley appears to have been determined, beyond a reasonable doubt, by the jury as factfinder. However, our Court has held that trial courts lack the authority to employ special verdict slips in cases involving mandatory minimum sentences that implicate *Alleyne. See Commonwealth v. Valentine,* 101 A.3d 801 (Pa.Super.2014); *Commonwealth v. Newman,* 99 A.3d 86 (Pa.Super.2014) (en banc).

In *Valentine,* the defendant had been convicted by a jury of robbery and sentenced to 5–10 years' imprisonment, which included application of two mandatory minimum sentencing provisions, 42 Pa.C.S. §§ 9712 (visible possession of firearm) and 9713 (offense committed in/near public transportation). *Valentine,* 101 A.3d at 804–805. Similar to the instant case, the trial court presented the jury with a special verdict slip, asking it to determine whether the factual predicates had been proven beyond a reasonable doubt. *Id.* On appeal, the defendant, like Mosley, raised the issue whether the mandatory minimum sentence imposed was illegal since the provisions of the sentencing statutes were rendered unconstitutional in light of *Alleyne.* In coming to its decision, the *Valentine* Court found *Newman, supra,* instructive, which also reviewed the constitutionality of section 9712 and determined that the factual predicate of that statute (visible possession of firearm) must be presented to the factfinder and determined beyond a reasonable doubt. Notably, the *Newman* Court declined to accept the Commonwealth's proposed remedy to have the case remanded for a sentencing jury to determine beyond a reasonable doubt whether the Commonwealth had proven the factual predicates of section 9712.

In reaching its holding, the *Newman* Court stated:

> The Commonwealth's suggestion that we remand for a sentencing jury would require this court to manufacture whole cloth a replacement enforcement mechanism for Section 9712.1; in other words, the Commonwealth is asking us to legislate. We recognize that in the prosecution of capital cases in Pennsylvania, there is a similar, bifurcated process where the jury first determines guilt in the trial proceeding (the guilt phase) and then weighs aggravating and mitigating factors in the sentencing proceeding (the penalty phase). However, this mechanism was created by the General Assembly and is enshrined in our statutes at 42 Pa.C.S.[ ] § 9711. We find that it is manifestly the province of the General Assembly to determine what new procedures must be created in order to impose mandatory minimum sentences in Pennsylvania following *Alleyne.* We cannot do so.

***1091** *Newman,* 99 A.3d at 102. Ultimately, the *Valentine* Court applied the holding of *Newman* to conclude that "the trial court performed an impermissible legislative function by creating a new procedure in an effort to impose the mandatory minimum sentences in compliance with *Alleyne.*" *Valentine,* 101 A.3d at 811. Because *Newman* makes it clear that it is the General Assembly's function to determine what new procedures must be created to impose mandatory minimum sentences in this Commonwealth, the trial court exceeded its authority by asking the jury to determine the factual predicates of sections 9712(c) and 9713(c). *Id.* at 812.

Similarly, here the trial court exceeded its authority by permitting the jury, via a special verdict slip, to determine beyond a reasonable doubt the factual predicate of section 7508—whether Mosley possessed cocaine that weighed greater than 10 grams. Even though the jury responded "yes" to the inquiry, the trial court performed an impermissible legislative function by creating a new procedure in an effort to impose the mandatory minimum sentence in compliance with *Alleyne.* Accordingly, we must vacate the defendant's judgment of sentence and remand for resentencing without the mandatory minimum. *Valentine, supra. See also Commonwealth v. Ferguson,* 2015 PA Super 1, 107 A.3d 206 (Pa.Super.2015) (defendant's sentence vacated and remanded for resentencing without consideration of mandatory minimum sentences where trial court lacked authority to have jury determine, via verdict slip, factual predicate under section 9712).

Convictions affirmed. Judgment of sentence vacated. Case remanded. Jurisdiction relinquished.

All Citations

Footnotes

* Retired Senior Judge assigned to the Superior Court.

1 35 P.S. § 780–113(a)(16).

2 35 P.S. § 780–113(a)(30).

3 The possession charges merged, for sentencing purposes, with the intent to deliver charge.

4 Each bag was knotted at the top. One bag contained five bags (baggies) of a white powdery substance. N.T. Trial Testimony, 9/16/13, at 177. The other bag contained three bags (baggies) of suspected heroin. *Id.*

5 The parties stipulated that the Pennsylvania State Police Crime Lab evaluated the substances found in the two plastic bags discarded from the Cadillac and determined the interior baggies contained 10.5 grams of cocaine, 0.64 grams of heroin, and 6 oxycontin pills. The baggies of heroin had the words "crazy horse" written on them.

6 One cell phone was a Samsung and the other phone was an HTC.

7 The search warrant identified the following items to be searched and seized:

> Any and all text messages (incoming and outgoing), email messages (incoming and outgoing), photographs, contacts and other forms of electronic communication. Any items used to keep drug transaction records (spreadsheets etc.). Any and all secondary cell phone applications (and its contents) which are capable of sending receiving voice calls, text messages, and emails. Any and all other contraband.

Application for Search Warrant and Authorization, 2/28/13, at 1, 4.

8 The trial judge gave the following limiting instruction as to text messages:

> This evidence is before you for a limited purpose and it is for the **purpose of tending to show the Defendant is fluent in the language used by those persons who deal in illegal drug transactions.** This evidence must not be construed by you or considered by you in any way other than for the purpose I just stated. You must not regard this evidence as showing that the Defendant is a person of bad character or criminal tendencies from which you might include—be inclined to infer guilt. The Defendant contends that he is not the transmitter or receiver of the text messages. However, you may consider circumstantial evidence in evaluating this issue and provide whatever weight you deem appropriate thereto.

N.T. Jury Trial, 9/17/13, at 165 (emphasis added).

9 We have consolidated our review of issues 2–5, as they are intertwined.

10 *Compare* N.T. Suppression Hearing, 4/18/13 (McDevitt testifying that he did not click on any icon to view messages, but that they just "were popping up ... coming up on the screen") and *id.* at 83–84 (McDevitt testifying that he did not have to do anything to view the messages on the cell phone) *with id.* at 84 (McDevitt testifying that he didn't recall whether he had to swipe anything to view the text messages).

11 When a judgment of sentence is affirmed by an equally divided court, as in the *Koch* case, no precedent is established and the holding is not binding on other cases. *Commonwealth v. James,* 493 Pa. 545, 427 A.2d 148 (1981).

12 Interestingly, the trial court stated:

> In light of the testimony that's been presented[,] I'm going to say the authentication of electronic communications—like documents, requires more than mere confirmation that the number address belonged to a particular person. Circumstantial evidence which tends to corroborate the identity of the sender is required. I'm going to give that instruction.

N.T. Jury Trial, 9/17/13, at 101. Despite this statement, the court never gave an instruction specifically referencing authentication of the messages; defense counsel objected to this omission. *Id.* at 112.

13 We leave for another day the quantum and quality of evidence necessary to "clearly" prove authentication of text messages.

14 In *Watley,* the defendant did not even raise his *Alleyne* argument on appeal. Rather, this Court raised the issue *sua sponte.*

15 We are aware that our Supreme Court has accepted allowance of appeal on the issue of whether *Alleyne* relates to the legality of sentence, stating as the issue follows:

> Whether a challenge to a sentence pursuant to *Alleyne v. United States* [—— U.S. ——], 133 S.Ct. 2151 [186 L.Ed.2d 314] (2013), implicates the legality of the sentence and is therefore non-waivable.

Commonwealth v. Johnson, 625 Pa. 562, 93 A.3d 806 (2014). However, until the Supreme Court overrules the non-waivability language found in *Watley*, we are bound by that case and its progeny.

16 We note that section 7508 contains identical language in its "proof at sentencing" subsection as that found in other mandatory minimum statutes. *See also* 18 Pa.C.S. § 6317(b) & 42 Pa.C.S. § 9712.1(c) (identical proof of sentencing provision language).

17 *See also Commonwealth v. Vargas,* 2014 PA Super 289, 108 A.3d 858 (2014) (relying on *Fennell* which held section 7508 unconstitutional, as applied in light of *Alleyne,* and that even though defendant stipulated to weight of drugs, sentence applying mandatory minimum was illegal).

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196 A.3d 661
Superior Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellant
v.
Sabine I. GRAHAM

No. 1438 MDA 2017
|
Submitted April 30, 2018
|
Filed September 24, 2018

Synopsis

Background: Defendant was charged with one count of drug delivery resulting in death, possession with intent to deliver a controlled substance, and delivery of a controlled substance. The Court of Common Pleas, Centre County, Criminal Division, No. CP-14-CR-0000758-2017, Thomas King Kistler, J., granted defendant's motion to transfer venue. Commonwealth appealed.

[Holding:] The Superior Court, No. 1438 MDA 2017, Olson, J., held that venue existed in both county where defendant conveyed the controlled substance to victim and county where victim ingested controlled substance and died.

Vacated and remanded.

Kunselman, J. joined the opinion.

Musmanno, J., filed a dissenting opinion.

West Headnotes (2)

[1] **Criminal Law**
Jurisdiction and venue
Criminal Law
Jurisdiction and venue

Appellate review of venue challenges, similar to that applicable to other pre-trial motions, should turn on whether the trial court's factual findings are supported by the record and its conclusions of law are free of legal error.

Cases that cite this headnote

[2] **Criminal Law**
Homicide

Venue existed in both county where defendant conveyed the controlled substance to victim and county where victim ingested the controlled substance, her body was recovered, law enforcement started an investigation, the autopsy was performed, witnesses resided, and physical evidence was collected, and thus, trial court was required to assess the convenience of the parties in going forward with the prosecution for drug delivery resulting in death and other offenses. 18 Pa. Cons. Stat. Ann. §§ 102, 2506(a).

Cases that cite this headnote

***662** Appeal from the Order Entered August 15, 2017, In the Court of Common Pleas of Centre County, Criminal Division at No(s): CP-14-CR-0000758-2017. Thomas King Kistler, J.

Attorneys and Law Firms

Sean P. McGraw, Assistant District Attorney, Bellefonte, for Commonwealth, appellant.

Steven P. Trialonas, State College, for appellee.

BEFORE: OLSON, J., KUNSELMAN, J., and MUSMANNO, J.

Opinion

OPINION BY OLSON, J.:

The Commonwealth of Pennsylvania (Commonwealth) appeals from the order entered on August 15, 2017 which

granted Sabine I. Graham's (Graham) motion to transfer venue and transferred this case from Centre County to Clinton County.[1] After careful consideration, we vacate and remand.

The trial court summarized the relevant facts as follows:

> The Commonwealth alleges that on February 13, 2016, [Graham], along with Maria Gilligan [(Gilligan)] and Corinne Pena [(Pena)], traveled from State Collage, in Centre County, to Lock Haven, in Clinton County. The purpose of this trip was for [Graham] to obtain heroin to sell to Gilligan and Pena. [Graham] met with a man named "Jay" in the Lock Haven area and obtained twenty-two (22) bags of what [Graham] believed to be heroin. [Graham] then gave fourteen (14) of those bags to Pena before [Graham], Gilligan, and Pena drove back to State College. When Pena returned to State College, her friend[,] Robert Moir [(Moir),] picked her up from the parking lot near Walmart on North Atherton Street and drove her to his home. Later that evening, Pena ingested eight (8) bags of what she believed was heroin. The bags actually contained fentanyl[,] and Pena subsequently died of a fentanyl overdose [in Moir's home].

Trial Court Opinion, 8/15/17, at 1-2.

Graham was charged in Centre County with one count of drug delivery resulting in death, possession with intent to deliver a controlled substance, and delivery of a controlled substance.[2] ***See*** 18 Pa.C.S.A. § 2506(a); 35 P.S. § 780-113(a)(30). Graham filed a motion to transfer on June 28, ***663** 2017,[3] asserting that venue in Centre County was improper, and that the case should be transferred to Clinton County. Following a hearing and an opportunity for both parties to submit briefs on the issue, the trial court granted Graham's motion to transfer and directed that the case be transferred to Clinton County.

The Commonwealth filed a timely notice of appeal. On September 14, 2017, the trial court ordered the Commonwealth to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). After receiving an extension of time to file its concise statement, the Commonwealth complied.

The Commonwealth's brief raises the following question for our review:

> Whether Centre County has properly exercised venue over a prosecution for a criminal episode that began in Centre County with an agreement to obtain heroin and ended in Centre County with a deceased overdose victim whose body was found in Centre County?

Commonwealth's Brief at 4.

[1]"Appellate review of venue challenges, similar to that applicable to other pre-trial motions, should turn on whether the trial court's factual findings are supported by the record and its conclusions of law are free of legal error." ***Commonwealth v. Gross***, 627 Pa. 383, 101 A.3d 28, 33-34 (2014).

[2]The Commonwealth argues that the trial court erred in granting Graham's motion to transfer. Commonwealth's Brief at 10. Characterizing this case as a homicide, the Commonwealth argues that "jurisdiction is conferred upon Centre County by statute" because Pena's body was recovered in Centre County. ***Id.*** (quotation and ellipses omitted); ***see also*** 18 Pa.C.S.A. § 102(c) (stating that [w]hen the offense is homicide ..., either the death of the victim ... or the bodily impact causing death constitutes a 'result' ..., and if the body of a homicide victim ... is found within this Commonwealth, it is presumed that such result occurred within this Commonwealth[ ]").[4] Additionally, the Commonwealth argues that Centre County is the proper venue because it is the county where (1) law enforcement started an investigation; (2) the autopsy was performed; (3) witnesses reside; and, (4) physical evidence was collected. Commonwealth's Brief at 15. The Commonwealth also points out that both Graham and co-defendant Gilligan were residents of Centre County. ***Id.***

Our Supreme Court has explained the concept of venue under Pennsylvania law and contrasted that concept with

the closely-related subject of jurisdiction.

> Jurisdiction relates to the court's power to hear and decide the controversy presented. ***Commonwealth v. Bethea***, 574 Pa. 100, 828 A.2d 1066, 1074 (Pa. 2003) (citation omitted). "[A]ll courts of common pleas have statewide subject matter jurisdiction in cases arising under the Crimes Code." ***Id.*** ... Venue, on the other hand, refers to the convenience and locality of trial, or "the right of a party to have the controversy brought and heard in a particular judicial district." ***Bethea***, at 1074 (citation omitted). Venue assumes jurisdiction exists ***664** and it "can only be proper where jurisdiction already exists." ***Id.*** at 1074–1075 (citation omitted). Even though all common pleas courts may have jurisdiction to resolve a case, such should only be exercised in the judicial district in which venue lies. ***See id.*** at 1075 ("Rules of venue recognize the propriety of imposing geographic limitations on the exercise of jurisdiction."). "Venue in a criminal action properly belongs in the place where the crime occurred." ***Id.*** (citation omitted).
>
> Our criminal procedural rules provide a system in which defendants can seek transfer of proceedings to another judicial district due to prejudice or pre-trial publicity. Such decisions are generally left to the trial court's discretion. ***See Commonwealth v. Chambers***, 546 Pa. 370, 685 A.2d 96, 103 (1996) (citation omitted). Venue challenges concerning the locality of a crime, on the other hand, stem from the Sixth Amendment to the United States Constitution and Article I, § 9 of the Pennsylvania Constitution, both of which require that a criminal defendant stand trial in the county in which the crime was committed, protecting the accused from unfair prosecutorial forum shopping. Thus, proof of venue, or the locus of the crime, is inherently required in all criminal cases.
>
> The burden of proof in relation to venue challenges has not been definitively established in our decisional law or our criminal procedural rules. Because the Commonwealth selects the county of trial, we now hold it shall bear the burden of proving venue is proper—that is, evidence an offense occurred in the judicial district with which the defendant may be criminally associated, either directly, jointly, or vicariously. Although our sister states are not in agreement as to the requisite degree of proof, [the Pennsylvania Supreme Court finds that] the Commonwealth should prove venue by a preponderance of the evidence once the defendant properly raises the issue. Venue merely concerns the judicial district in which the prosecution is to be conducted; it is not an essential element of the crime, nor does it relate to guilt or innocence. Because venue is not part of a crime, it need not be proven beyond a reasonable doubt as essential elements must be. Accordingly, applying the preponderance-of-the-evidence standard to venue challenges allows trial courts to speedily resolve this threshold issue without infringing on the accused's constitutional rights. Like essential elements of a crime, venue need not be proven by direct evidence but may be inferred by circumstantial evidence. ***See***, ***e.g.***, ***Commonwealth v. Cooper***, 596 Pa. 119, 941 A.2d 655, 662 (2007) (citation omitted)[.]

Commonwealth v. Gross, 627 Pa. 383, 101 A.3d 28, 32-34 (Pa. 2014) (parallel citations omitted).

Although there is no exclusive provision which sets forth the statutory grounds for establishing venue in a particular county within Pennsylvania, "our courts frequently [look to 18 Pa.C.S.A. § 102] in determining the proper county in which a criminal trial should take place." ***Commonwealth v. Field***, 827 A.2d 1231, 1233 (Pa. Super. 2003) (citing cases), *appeal denied*, 847 A.2d 1279 (Pa. 2004). Looking to this provision, § 102 provides, in relevant part, that an individual may be convicted in a county if, among other things, his "conduct which is an element of the offense **or** the result of which is such an element occurs within the [county]." 18 Pa.C.S.A. § 102(a)(1) (emphasis added). Under § 102, then, venue is proper in a county where either an element of an offense **or** a required result occurs. An "element of an ***665** offense" consists of conduct which is "included in the description of the forbidden conduct in the definition of the offense." ***See*** 18 Pa.C.S.A. § 103. Section 102 further provides that in the case of a homicide, "either the death of the victim ... or the bodily impact causing death constitutes a result within the meaning of paragraph (a)(1) of this section[.]" 18 Pa.C.S.A. 102(c) (internal citations omitted). In the present case, the Commonwealth charged the defendant with drug delivery resulting in death, which involves two principal elements: (1) an intentional conveyance of any controlled substance or counterfeit controlled substance, and (2) death resulting from the use of the conveyed substance. ***See Commonwealth v. Kakhankham***, 132 A.3d 986, 991-992 (Pa. Super. 2015), *appeal denied*, 635 Pa. 773, 138 A.3d 4 (2016).

The trial court concluded that while the victim died in Centre County, and while the death of an individual is an element of the instant offense, it would be inappropriate for Centre County to exercise venue since the only overt act was the defendant's conveyance of drugs to the victim, which occurred in Clinton County. ***See*** Trial Court Opinion, 8/15/17, at 3. In resolving the venue question presented in this case, the trial court relied solely on the

defendant's overt act of conveying a controlled substance to the victim without regard to the resulting death that occurred in Centre County.

The trial court misconstrued the plain language of § 102. The court seems to conclude that venue is proper only where an overt act occurred, regardless of the location where an elemental result transpires. Under the plain terms of § 102, however, venue is proper where **either** an element of the offense occurred **or** a required result took place. Here, the defendant conveyed a controlled substance to the victim in Clinton County and, thereafter, the victim ingested the drugs and died in Centre County. Under § 102, the statutory requirements for venue exist in both Clinton and Centre Counties. Since venue would be proper in either county under § 102, it was incumbent upon the trial court to assess the convenience of the parties in going forward with the proceedings in either Clinton County or Centre County. ***See Bethea***, 828 A.2d at 1074-1075 ("venue pertains to the locality most convenient to the proper disposition of a matter"). Because it was error for the trial court to exclude Centre County as a viable venue option, we vacate the court's transfer order and remand this matter for further proceedings in which the convenience of the parties can be assessed.

Order vacated. Case remanded. Jurisdiction relinquished.

Judge Kunselman joins.

Judge Musmanno files a Dissenting Opinion.

DISSENTING OPINION BY MUSMANNO, J.:

I respectfully disagree with the Majority's conclusion that the trial court erred by failing to assess the convenience of the parties, relative to each locality, before transferring the case from Centre County to Clinton County.

"Venue in a criminal action properly belongs in the place where the crime occurred." ***Commonwealth v. Bethea***, 574 Pa. 100, 828 A.2d 1066, 1075 (2003). Pursuant to 18 Pa.C.S.A. § 102(a)(1), a person may be convicted in this Commonwealth if "the conduct which is an element of the offense or the result which is such an element occurs within this Commonwealth." 18 Pa.C.S.A. § 102(a)(1); ***see also Commonwealth v. Field***, 827 A.2d 1231, 1233 (Pa. Super. 2003) (stating that our courts have looked to the provisions of ***666** section 102 in determining the proper county in which a criminal trial should take place). "For a county to exercise jurisdiction over a criminal case, an overt act involved in the crime must have occurred within that county." ***Commonwealth v. Passmore***, 857 A.2d 697, 709 (Pa. Super. 2004). "In order to base jurisdiction on an overt act, the act must have been essential to the crime[.]" ***Commonwealth v. Donahue***, 428 Pa.Super. 259, 630 A.2d 1238, 1243 (1993) (citation omitted); ***see also Field***, 827 A.2d at 1234 (stating that, while not constitutionally prohibited, "trial outside the county [where the offense occurred] is a mechanism which must be used sparingly, to prohibit dragging the accused all over the [C]ommonwealth...." (citation omitted)).

In considering Graham's Motion to Transfer, the trial court acknowledged that the death of an individual is an element of the crime of drug delivery resulting in death, and that the death occurred in Centre County. ***See*** Trial Court Opinion, 8/15/17, at 3. The trial court rejected the Commonwealth's argument, based on 18 Pa.C.S.A. § 102(c) (concerning homicide offenses), that venue is proper in Centre County because Pena's body was found in Centre County.[1] The trial court granted Graham's Motion to Transfer, reasoning that the only overt act, *i.e.*, Graham's delivery of the drugs to Pena, occurred in Clinton County. ***See id.*** at 3-4. Here, Graham traveled from Centre County to Clinton County for the purpose of obtaining heroin, and delivered the drugs to Pena while they were in Clinton County. After the delivery had been completed, Graham no longer exercised control over the drugs, and did not control where or when Pena ingested the drugs, the quantity of the drugs she consumed, or whether she died as a result. Thus, the facts support the trial court's determination.

On review, the Majority concludes that the venue requirements set forth in section 102 exist in both Clinton and Centre County, and remands the case for the trial court to assess the convenience of the parties with respect to proceeding in either locality. However, as the Majority acknowledges, venue may be proper in either county, and therefore, I cannot agree that the trial court's decision to transfer the case to Clinton County was clearly erroneous. ***See Commonwealth v. Gross***, 627 Pa. 383, 101 A.3d 28, 33-34 (2014) (stating that our review of venue challenges "should turn on whether the trial court's factual findings are supported by the record and its conclusions of law are free of legal error."). While acknowledging that a venue challenge generally encompasses the question of which locality is most convenient to the disposition of the case, ***see Bethea***, 828 A.2d at 1074-75, I cannot agree with the Commonwealth's assertion that "transferring this case ...

would significantly disrupt the execution of justice." Commonwealth's Brief at 16. Indeed, Centre County and Clinton County are adjacent to one another, and their respective courthouses are located less than 30 miles apart. ***See*** ***667** ***Commonwealth v. Miskovitch***, 64 A.3d 672, 689 (Pa. Super. 2013) (concluding that appellant was not prejudiced by transfer of venue from Allegheny to Westmoreland County, because they are adjoining counties, and "the burdens associated with traveling to the other venue are minimal"). Based upon the foregoing, I would affirm the Order of the trial court.

Judgment Entered.

All Citations

196 A.3d 661

Footnotes

1 An appeal from an interlocutory order transferring venue in a criminal case is reviewable as of right. ***See*** Pa.R.A.P. 311(3).

2 Gilligan was also charged as a result of the incident, and on June 1, 2017, the Commonwealth issued notice of its intent to consolidate the cases pursuant to Pa.R.Crim.P. 582. Gilligan, however, is not a party to the instant appeal.

3 The motion was docketed on June 29, 2017.

4 The Commonwealth in its brief cites to ***Commonwealth v. Ludwig***, 583 Pa. 6, 874 A.2d 623 (2005) and asserts that 18 Pa.C.S.A. § 2506 classifies drug delivery resulting in death a murder of the third degree. Although the version of § 2506 challenged in ***Ludwig*** defined the offense as third-degree murder, the current version of § 2506 defines drug delivery resulting in death as a felony of the first-degree. ***See*** 18 Pa.C.S.A. § 2506.

1 The Commonwealth relied on—and the Majority cites to—section 102(c), which permits the presumption that if the body of a homicide victim is found within this Commonwealth, it is presumed that the death or bodily impact resulting in death also occurred within this Commonwealth. However, because the offense of drug delivery resulting in death is a first-degree felony, rather than a homicide offense, ***see*** 18 Pa.C.S.A. § 2506, section 102(c) is irrelevant to the venue analysis in the instant case. ***See generally*** ***Field***, 827 A.2d at 1234 (noting that the specific provision in section 102(c), which permits trial in the county where the victim is found, overrides the general rule that trial is proper only in the county where the criminal conduct occurred).

156 A.3d 261
Superior Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellee
v.
Jonathan Michael PROCTOR, Appellant

No. 168 WDA 2016
|
Argued November 30, 2016
|
FILED FEBRUARY 09, 2017
|
Reargument Denied April 19, 2017

Synopsis

Background: Defendant was convicted in the Court of Common Pleas, Potter County, Criminal Division, No. CP–53–CR–0000249–2014, Stephen P.B. Minor, J., of drug delivery resulting in death, flight to avoid apprehension, trial, or punishment, manufacture, delivery, or possession of a controlled substance with intent to manufacture or deliver, possession of a controlled substance, criminal conspiracy, and use or possession of drug paraphernalia, and was sentenced to an aggregate term of 12 years and 10 months to 26 years and 10 months of incarceration. Defendant appealed.

Holdings: The Superior Court, No. 168 WDA 2016, Strassburger, J., held that:

[1] statute prohibiting drug delivery resulting in death was not unconstitutionally vague as applied to defendant;

[2] defendant's conduct satisfied causation element of the crime of drug delivery resulting in death;

[3] trial court did not abuse its discretion in refusing to grant mistrial;

[4] trial court did not abuse its discretion in imposing aggravated sentence; and

[5] defendant's sentence was not grossly disproportionate to gravity of offenses in violation of the Eighth Amendment.

Affirmed.

Lazarus, J., joined.

Solano, J., concurred in the result.

West Headnotes (28)

[1] **Criminal Law**
Necessity

Defendant waived claims on direct appeal challenging sufficiency and weight of evidence of defendant's conviction for drug delivery resulting in death as it related to factual cause of victim's death, where defendant did not specify challenges in statement of matters complained of, and therefore trial court did not address them in its opinion. Pa. R. App. P. 1925(b).

2 Cases that cite this headnote

[2] **Criminal Law**
Necessity

Issues that are not set forth in an appellant's statement of matters complained of on appeal are deemed waived. Pa. R. App. P. 1925(b)(4)(vii).

8 Cases that cite this headnote

[3] **Criminal Law**
Review De Novo

Analysis of the constitutionality of a statute is a question of law and, thus, Superior Court's standard of review is de novo.

2 Cases that cite this headnote

[4] **Constitutional Law**
Drugs; controlled substances
Homicide
Constitutional and statutory provisions

Statute prohibiting drug delivery resulting in death was not unconstitutionally vague as applied to defendant, in violation of defendant's right to due process; although defendant contended that victim died not solely because of the heroin defendant supplied, but as a result of having already taken other drugs unbeknownst to defendant, and therefore statute as applied failed to provide adequate notice that engaging in criminal conduct that did not generally cause death could be source of criminal liability for the unforeseen and unforeseeable death of a third party, prosecution offered expert testimony that, notwithstanding the other drugs in victim's system, amount of heroin ingested was a lethal dose, and thus victim's death was foreseeable. U.S. Const. Amend. 14; 18 Pa. Cons. Stat. Ann. § 2506.

Cases that cite this headnote

[5] **Criminal Law**
Construction and Effect of Charge as a Whole

When evaluating the propriety of jury instructions, Superior Court will look to the instructions as a whole, and not simply isolated portions, to determine if the instructions were improper.

3 Cases that cite this headnote

[6] **Criminal Law**
Form and Language in General

A trial court has broad discretion in phrasing its jury instructions, and may choose its own wording so long as the law is clearly, adequately, and accurately presented to the jury for its consideration.

2 Cases that cite this headnote

[7] **Criminal Law**
Instructions
Criminal Law
Instructions in general

When evaluating the propriety of jury instructions, only where there is an abuse of discretion or an inaccurate statement of the law is there reversible error.

2 Cases that cite this headnote

[8] **Criminal Law**
Application of Instructions to Case

It is not improper for an instructing court to refer to the facts and/or the evidence of the case when giving a jury charge.

Cases that cite this headnote

[9] **Criminal Law**
Weight and Sufficiency of Evidence
Criminal Law
Issues and Theories of Case in General

Proper balance to be struck between trial court's duty to frame the legal issues for a jury and instruct the jury on the applicable law, while not usurping the power of the jury to be sole judge of the evidence, depends heavily on the facts and circumstances of each case.

Cases that cite this headnote

[10] **Criminal Law**
Instructions Invading Province of Jury

In instructing jury on the applicable law, trial court may not comment on, or give its opinion of, the guilt or innocence of the accused, and may not state an opinion as to the credibility of witnesses, or remove from the jury its responsibility to decide the degree of culpability.

Cases that cite this headnote

[11] **Criminal Law**
Weight and effect of evidence
Criminal Law
Necessity of instructions
Criminal Law
Statement and review of evidence

In instructing jury on the applicable law, trial court may summarize the evidence and note possible inferences to be drawn from it; in doing so, the court may express its own opinion on the evidence, including the weight and effect to be accorded it and its points of strength and weakness, providing that the statements have a reasonable basis and it is clearly left to the jury to decide the facts, regardless of any opinion expressed by the judge.

Cases that cite this headnote

[12] **Criminal Law**
Elements of offense and defenses

Defendant failed to object at trial to jury instruction relating to the causation element of the crime of drug delivery resulting in death after trial court instructed jury, and thus waived claims of error with respect to the instructions.

Cases that cite this headnote

[13] **Homicide**
Controlled substances

Defendant's actions satisfied causation element of crime of drug delivery resulting in death, despite fact that victim's cause of death was combined drug toxicity and not just victim's act of injecting himself with heroin supplied by defendant; criminal statute required a "but-for" test of causation, and defendant's conduct did not need to be sole cause of victim's death in order to establish a causal connection, but was assessed as to whether defendant's conduct was direct and substantial factor in producing death. 18 Pa. Cons. Stat. Ann. § 2506.

Cases that cite this headnote

[14] **Criminal Law**
Comments on accused's silence or failure to testify

Trial court did not abuse its discretion in refusing to grant mistrial after prosecution argued that jury should consider fact that defendant expressed no remorse as evidence of his guilt of crime of drug delivery resulting in death; although defendant asserted that comment was only relevant for improper purpose of implying that defendant lacked remorse because he had not testified in his own defense, prosecution's references to defendant's lack of remorse were not improper, and, prior to closing statements, trial court instructed jury that it was defendant's constitutional right not to call any witnesses either through his own testimony or other witnesses, that jury should make no inference concerning that decision, and that closing statements were not evidence. U.S. Const. Amend. 5.

Cases that cite this headnote

[15] **Criminal Law**
Arguments and statements by counsel

Superior Court's standard of review for a claim of prosecutorial misconduct is limited to whether the trial court abused its discretion.

3 Cases that cite this headnote

[16] **Criminal Law**
Statements as to Facts, Comments, and Arguments

A prosecutor's arguments to the jury are generally not a basis for the granting of a new trial unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility towards the accused which would prevent them from properly weighing the evidence and rendering a true verdict.

2 Cases that cite this headnote

[17] **Criminal Law**
Statements as to Facts and Arguments
Criminal Law
Rebuttal Argument; Responsive Statements and Remarks

A prosecutor must have reasonable latitude in fairly presenting a case to the jury and must be free to present his arguments with logical force and vigor; prosecutor is also permitted to respond to defense arguments.

2 Cases that cite this headnote

[18] **Criminal Law**
Arguments and conduct of counsel

In order to evaluate whether a prosecutor's comments to a jury were improper, Superior Court does not look at the comments in a vacuum; rather Superior Court must look at them in the context in which they were made.

2 Cases that cite this headnote

[19] **Sentencing and Punishment**
Factors Related to Offender
Sentencing and Punishment
Use and effect of report
Sentencing and Punishment
Total sentence deemed not excessive

Trial court did not abuse its discretion in imposing aggravated sentence for defendant's conviction for drug delivery resulting in death in addition to consecutive sentences for other convictions which resulted in an aggregate term of 12 years and 10 months to 26 years and 10 months of incarceration; although defendant argued that trial court failed to consider mitigating factors, including defendant's severe addiction to heroin, his attempts at getting treatment, his remorse, and his lack of intent, in sentencing defendant, trial court explained that it considered, inter alia, mitigating factors, presentence investigation report (PSI), and evidence presented at the hearing. 42 Pa. Cons. Stat. Ann. §§ 9721(b), 9781(b).

3 Cases that cite this headnote

[20] **Criminal Law**
Sentencing and Punishment
Criminal Law
In General; Necessity of Motion
Criminal Law
Allowance or leave from appellate court
Criminal Law
Notice of Appeal

An appellant challenging the discretionary aspects of his sentence must invoke Superior Court's jurisdiction by satisfying a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal, (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, (3) whether appellant's brief has a fatal defect, and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code. 42 Pa. Cons. Stat. Ann. § 9781(b); Pa. R. App. P. 902, 903, 2119(f); Pa. R. Crim. P. 720.

8 Cases that cite this headnote

providing victim with a dose of heroin that resulted in victim's death. U.S. Const. Amend. 8; 18 Pa. Cons. Stat. Ann. § 2506.

Cases that cite this headnote

[21] **Criminal Law**
Allowance or leave from appellate court

The determination of what constitutes a substantial question as to appropriateness of sentence, for purpose of determining whether discretionary aspect of sentence may be appealed, must be evaluated on a case-by-case basis. 42 Pa. Cons. Stat. Ann. § 9781(b).

3 Cases that cite this headnote

[22] **Criminal Law**
Allowance or leave from appellate court

A substantial question exists, for purpose of determining whether discretionary aspect of sentence may be appealed, only when the appellant advances a colorable argument that the sentencing judge's actions were either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process. 42 Pa. Cons. Stat. Ann. § 9781(b).

7 Cases that cite this headnote

[23] **Sentencing and Punishment**
Total sentence deemed not excessive
Sentencing and Punishment
Cumulative or consecutive sentences

Defendant's sentence to term of incarceration of 10 years to 20 years, consisting of 10 months for his drug delivery resulting in death conviction, and an aggregate sentence of 12 years and 10 months to 26 years and 10 months of incarceration, was not grossly disproportionate to gravity of offenses in violation of the Eighth Amendment's restriction against cruel and unusual punishment, where defendant was convicted of several crimes stemming from his

[24] **Constitutional Law**
Presumptions and Construction as to Constitutionality

All properly enacted statutes enjoy a strong presumption of constitutionality.

Cases that cite this headnote

[25] **Constitutional Law**
Presumptions and Construction as to Constitutionality
Constitutional Law
Doubt

A statute will not be declared unconstitutional unless it clearly, palpably, and plainly violates the Constitution, and all doubts are to be resolved in favor of finding that the legislative enactment passes constitutional muster.

1 Cases that cite this headnote

[26] **Constitutional Law**
Burden of Proof

There is a very heavy burden of persuasion upon one who challenges the constitutionality of a statute.

Cases that cite this headnote

[27] **Sentencing and Punishment**
Proportionality

The Eighth Amendment does not require strict proportionality between crime and sentence; rather, it forbids only extreme sentences which are grossly disproportionate to the crime. U.S. Const. Amend. 8.

Cases that cite this headnote

[28] **Criminal Law**
Scope of Inquiry
Criminal Law
Sentencing

Appellate review of constitutional challenges to statutes, disputes over the legality of a sentence, a court's application of a statute, and general questions of law involve a plenary scope of review.

1 Cases that cite this headnote

***265** Appeal from the Judgment of Sentence December 21, 2015, in the Court of Common Pleas of Potter County, Criminal Division at No(s): CP–53–CR–0000249–2014, Before MINOR, J.

Attorneys and Law Firms

Caleb J. Kruckenberg, Philadelphia, for appellant.

Rebecca D. Ross, Assistant District Attorney, Coudersport, for Commonwealth, appellee.

BEFORE: LAZARUS, SOLANO, and STRASSBURGER,* JJ.

Opinion

OPINION BY STRASSBURGER, J.:

Jonathan Michael Proctor (Appellant) appeals from the judgment of sentence imposed following his convictions for drug delivery resulting in death; flight to avoid apprehension, trial, or punishment; manufacture, delivery, or possession of a controlled substance with intent to manufacture or deliver; possession of a controlled substance; criminal conspiracy; and use or possession of drug paraphernalia. Upon review, we affirm.

On September 30, 2015, following a jury trial, Appellant was convicted of the aforementioned crimes stemming from an incident wherein Daniel Lowe (Lowe) died from an overdose after ingesting heroin that was provided to him by Appellant. Appellant was sentenced on December 21, 2015, to an aggregate term of 12 years and 10 months to 26 years and 10 months of incarceration.

Appellant filed post-sentence motions, which were denied. On January 22, 2016, Appellant filed a notice of appeal to this Court. On January 26, 2016, the trial court directed Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). After requesting and receiving an extension of time, Appellant filed his concise statement. The trial court issued its opinion pursuant to Pa.R.A.P. 1925(a) on April 28, 2016.

Appellant raises the following issues for our consideration:

> I. Did the Commonwealth present insufficient evidence to support [Appellant's] conviction for drug delivery resulting in death?
>
> II. Was [Appellant's] conviction for drug delivery resulting in death against the weight of the evidence?
>
> III. Is 18 Pa.C.S. § 2506 unconstitutionally vague and does § 2506 violate due process pursuant to the United States and Pennsylvania Constitutions because the statute does not provide sufficient notice as to what conduct it criminalizes and the statute encourages arbitrary enforcement?
>
> ***266** IV. Did the trial court err when the court instructed the jury the final element of drug delivery resulting in death is "that a person has died as a result of using the substance even if other substances were found in his system" and that ... Lowe "died as a result of using the substance even though other substances were found in his system[ ]"?
>
> V. Did the trial court err when the court denied defense counsel's request for a mistrial after the Commonwealth referred to [Appellant's] lack of remorse during [its] closing argument, thereby violating his right to remain silent?

> VI. Did the sentencing court abuse its discretion when the court imposed an aggravated sentence for Appellant[']s] conviction for drug delivery resulting in death and then imposed two additional consecutive sentences?
>
> VII. Does Appellant's sentence and § 2506 itself violate the Eighth Amendment's restriction against cruel and unusual punishment because Appellant was a drug addict and never intended to cause any loss of life and the statute permits severely disproportionate punishments of individuals tangentially involved in a drug overdose?

Appellant's Brief at 5 (unnecessary capitalization omitted).

[1]We address together Appellant's first two issues, wherein he challenges the sufficiency and weight of the evidence to support his conviction for the offense of drug delivery resulting in death. In support of his sufficiency challenge, Appellant argues that the Commonwealth failed to prove that (1) he acted with reckless disregard to the likelihood of Lowe's death from injecting himself with heroin, and (2) Lowe's death was reasonably foreseeable to Appellant and thus Appellant's conduct was the legal cause of his death. Appellant's Brief at 20–32. Appellant argues that the jury's guilty verdict for drug delivery resulting in death is against the weight of the evidence because (1) he lacked any culpable *mens rea* concerning the likelihood of Lowe's death and it was the "product of a legally invalid prosecution theory" that no *mens rea* in that regard was required, and (2) the "overwhelming medical evidence" suggests that Appellant did not proximately cause Lowe's death. ***Id.*** at 32–34.

Notwithstanding Appellant's claims on appeal, our review of the record reveals that the only issues Appellant included in his Rule 1925(b) statement relating to sufficiency or weight of the evidence state as follows:

> 3. Was [Appellant's] conviction for drug delivery resulting in death against the weight of the evidence because the cause of [Lowe's] death was combined drug toxicity?
>
> 4. Did the Commonwealth present insufficient evidence to support [Appellant's] conviction for drug delivery resulting in death because the cause of [Lowe's] death was combined drug toxicity?

Appellant's Rule 1925(b) Statement, 4/25/2016, at 2 (unnecessary capitalization omitted).

As written, Appellant's issues fail to make any mention of a challenge with respect to the *mens rea* required or whether Lowe's death was reasonably foreseeable to Appellant.[1] Rather, Appellant's issues ***267** challenge the sufficiency and weight of the evidence only as it relates to the factual cause of Lowe's death (which, as alleged by Appellant, was combined drug toxicity). Indeed, in its Rule 1925(a) opinion, the trial court addressed Appellant's issues as challenging whether the verdict was against the weight of the evidence and whether the Commonwealth failed to present sufficient evidence "because [Lowe's] death was caused by combined drug toxicity as opposed to being caused solely by the heroine [*sic*] provided by [Appellant]." Trial Court Opinion (TCO), 4/28/2016, at 1–2.

[2]A court-ordered concise statement "shall concisely identify each ruling or error that the appellant intends to challenge with sufficient detail to identify all pertinent issues for the judge." Pa.R.A.P. 1925(b)(4)(ii). "The Pennsylvania Supreme Court has explained that Rule 1925 is a crucial component of the appellate process, which is intended to aid trial judges in identifying and focusing upon those issues which the parties plan to raise on appeal." ***Commonwealth v. Freeman***, 128 A.3d 1231, 1248 (Pa. Super. 2015) (internal quotation marks and citation omitted). Moreover, it is well-settled that "[i]issues that are not set forth in an appellant's statement of matters complained of on appeal are deemed waived." ***Commonwealth v. Perez***, 103 A.3d 344, 347 n.1 (Pa. Super. 2014) (citing Pa.R.A.P. 1925(b)(4)(vii) ("Issues not included in the Statement and/or not raised in accordance with the provisions of this paragraph (b)(4) are waived.")).

Based on the foregoing, we conclude that Appellant has waived his sufficiency and weight challenges as presented on appeal,[2] as he did not specify them in his Rule 1925(b) statement and the trial court did not address them in its opinion. ***Commonwealth v. Reeves***, 907 A.2d 1, 2–3 (Pa. Super. 2006) (explaining that, from a reading of Reeves' Rule 1925(b) statement, "the trial court reasonably *thought* that Reeves was only complaining about the quantum of evidence, not the specific issue that SEPTA is not a 'person' under the terms of the statute" and concluding that "[b]ecause the specific issue as to whether SEPTA was a 'person' was not presented to the trial court to give [the trial court] a chance to address it in [its] opinion, the issue has been waived"); ***see also Commonwealth v. Lincoln***, 72 A.3d 606, 610 (Pa. Super. 2013) (quoting ***Commonwealth v. Rush***, 959 A.2d 945, 949 (Pa. Super. 2008) (stating "for any claim that was required to be preserved, this Court cannot review a legal theory in support of that claim unless that particular legal

theory was presented to the trial court")). Thus, he is not entitled to relief on those claims.

[3] [4]In his third issue, Appellant argues that, if we reject his sufficiency and weight challenges, then the drug delivery resulting in death statute is void for vagueness. ***268** Analysis of the constitutionality of a statute is a question of law and, thus, our standard of review is *de novo*. ***Commonwealth v. Kakhankham***, 132 A.3d 986, 990 (Pa. Super. 2015). "Our scope of review, to the extent necessary to resolve the legal question[ ] before us, is plenary..." ***Id.***

The offense of drug delivery resulting in death is defined as follows.

> **(a) Offense defined.**—A person commits a felony of the first degree if the person intentionally administers, dispenses, delivers, gives, prescribes, sells or distributes any controlled substance or counterfeit controlled substance in violation of section 13(a)(14) or (30) of the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act, and another person dies as a result of using the substance.

18 Pa.C.S. § 2506(a) (footnote omitted).

In ***Kakhankham***, this Court rejected a vagueness challenge to section 2506, explaining, in part, as follows:

> The crime ... consists of two principal elements: (i) [i]ntentionally administering, dispensing, delivering, giving, prescribing, selling or distributing any controlled substance or counterfeit controlled substance and (ii) death caused by ("resulting from") the use of that drug. It is sufficiently definite that ordinary people can understand what conduct is prohibited, and is not so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.

Kakhankham, 132 A.3d at 991–92 (footnote, citations, and some internal quotation marks omitted). The Court continued by concluding that Kakhankham's conduct in providing drugs to a person who died as a result of ingesting them was "precisely what the legislature intended to proscribe when it enacted Section 2506. Accordingly, Section 2506 is not unconstitutionally vague." ***Id.*** at 992.

In advancing his argument, Appellant contends that Lowe died not solely because of the heroin, but as a result of having already taken other drugs unbeknownst to Appellant. Appellant's Brief at 36–37. Appellant argues that, in light of these facts, the statute as applied fails to provide adequate notice "that engaging in criminal conduct, but conduct that does not generally cause death, can, in some rare and unlucky situations, be the source of criminal liability for the unforeseen and unforeseeable death of a third party." ***Id.*** (citation, internal quotation marks, and emphasis omitted).

The ***Kakhankham*** Court observed that

> [An appellant] who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law. In cases that do not implicate First Amendment freedoms, facial vagueness challenges may be rejected where an appellant's conduct is clearly prohibited by the statute in question.

Id. at 992 (internal quotation marks and citations omitted)).

Appellant's argument does not entitle him to relief under the facts of this case. Specifically, the Commonwealth offered expert testimony that, notwithstanding the other drugs in Lowe's system, the amount of heroin ingested by Lowe was a lethal dose. N.T., 9/29–30/2015, at 477–89 (Michael Coyer, forensic toxicologist, discussing one study wherein it was found that a ***269** morphine[3] level "over 100 nanograms is lethal" and another study finding "between 41.3 and 145.7 nanograms" is a fatal range; testifying that the level of 160 nanograms of morphine herein is a lethal dose by itself; and opining that the "[c]ause of [Lowe's] death is [h]eroin [ ] overdose"); ***see also id.*** at 348, 350 (Kevin Dusenbury, Sr., coroner of

Potter County, explaining that "[t]he level of the [h]eroin[ ] metabolite was a lethal level" and, when asked whether "[h]eroin[ ] in and of itself when you inject it is not lethal, correct?," answering, "It was in this case I believe."). Indeed, even Appellant's expert testified that the dose of heroin herein was "potentially fatal." ***Id.*** at 419, 428–49, 435, 437, 439–40 (Dr. Bill Manion explaining that the level of morphine in this case "could cause, can cause death" and "is potentially fatal"); ***see also id.*** at 452, 460 (Commonwealth witness Dr. Eric Vey, forensic pathologist, testifying that the level of morphine in this case is "a potentially lethal level"). Clearly, it is foreseeable that, if you give a person a lethal dose—or even a potentially lethal dose—of heroin, that person could die. Thus, as applied to Appellant, section 2506 is not vague.[4]

[5] [6] [7]In his fourth issue, Appellant challenges a portion of the jury instructions provided by the trial court.

> [W]hen evaluating the propriety of jury instructions, this Court will look to the instructions as a whole, and not simply isolated portions, to determine if the instructions were improper. We further note that, it is an unquestionable maxim of law in this Commonwealth that a trial court has broad discretion in phrasing its instructions, and may choose its own wording so long as the law is clearly, adequately, and accurately presented to the jury for its consideration. Only where there is an abuse of discretion or an inaccurate statement of the law is there reversible error.

Commonwealth v. Antidormi, 84 A.3d 736, 754 (Pa. Super. 2014) (quoting ***Commonwealth v. Trippett***, 932 A.2d 188, 200 (Pa. Super. 2007)).

[8] [9] [10] [11]Moreover, "it is not improper for an instructing court to refer to the facts and/or the evidence of the case when giving a charge." ***Commonwealth v. Meadows***, 567 Pa. 344, 787 A.2d 312, 318 (2001).

> On one hand, the trial court must frame the legal issues for the jury and instruct the jury on the applicable law, while on the other hand, it must not usurp the power of the jury to be sole judge of the evidence. Plainly, these principles may conflict with each other, for in order to instruct the jury on the law the court may have to refer to the evidence. The proper balance to be struck will depend heavily on the facts and circumstances of each case. However, some general guidelines have been formulated. Thus the court may not comment on, or give its opinion of, the guilt or innocence of the accused. Nor may it state an opinion as to the credibility of witnesses, nor ***270** remove from the jury its responsibility to decide the degree of culpability. However, the court may summarize the evidence and note possible inferences to be drawn from it. In doing so, the court may "....express [its] own opinion on the evidence, including the weight and effect to be accorded it and its points of strength and weakness, providing that the statements have a reasonable basis and it is clearly left to the jury to decide the facts, regardless of any opinion expressed by the judge."

Id. (citations omitted) (quoting ***Commonwealth v. Leonhard***, 336 Pa.Super. 90, 485 A.2d 444, 444 (1984)).

Appellant takes issue with the following specific instruction relating to the causation element of the crime of drug delivery resulting in death:

> And fourthly, that a person has died as a result of using the substance even if other substances were found in his system. I will say that again because that seemed to be [a] point of contention. He died as a result of using the substance even though other substances were found in his system.

N.T., 9/29–30/2015, at 641. Appellant argues that the above instruction improperly suggested that the jury should reach the conclusion that, despite Appellant's defense that the cause of death was combined drug toxicity and not just Lowe's act of injecting himself with heroin, Lowe died as a result of using the heroin even though other substances were found in his system. Appellant's Brief at 39. Appellant contends that this usurped the role of the jury and improperly expressed an opinion as to the existence of facts to support an element of the offense, warranting a new trial. ***Id.*** at 39. Appellant further contends that the instruction "completely ignore[d] the proximate causation requirement imposed by the law, and [wa]s a direct command to the jury to reject [Appellant's] defense." ***Id.*** at 39–40.

[12]Preliminarily, we observe that counsel did not lodge a contemporaneous objection to the trial court's instruction. N.T., 9/29–30/2015, at 641. Moreover, the trial court asked counsel if there were "any questions regarding the charges" after instructing the jury on them, and later asked if counsel had "anything further before release [*sic*] the jury." ***Id.*** at 650, 656. Appellant's trial counsel did not respond in either instance. This Court has held that "[a] specific and timely objection must be made to preserve a challenge to a particular jury instruction. Failure to do so results in waiver." ***Commonwealth v. Moury***, 992 A.2d 162, 178 (Pa. Super. 2010) (internal citations omitted) ("Generally, a defendant waives subsequent challenges to the propriety of the jury charge on appeal if he responds in the negative when the court asks whether additions or corrections to a jury charge are necessary"); ***Commonwealth v. McCloskey***, 835 A.2d 801, 812 (Pa. Super. 2003) (finding claims concerning jury instructions waived because McCloskey "did not object to the instructions at the time they were made and, further, did not mention the alleged errors at the close of the jury charge when the court specifically asked both parties if they were satisfied"). Thus, Appellant's claim is waived.

[13]Assuming *arguendo* that Appellant had not waived his claim, we would reject it on the merits. The trial court explained that the instruction

> was necessary to avoid jury confusion in this case as the defense had routinely drawn attention to the fact that other drugs were present in [Lowe's] body when he died and that the cause of death was combined drug toxicity. The ... instruction given at trial clarified that despite any defense assertions otherwise, ***271** the test for the final element of the offense is one of "but-for" causation.

TCO, 4/28/2016, at 3.

As explained by the trial court, the ***Kakhankham*** Court held that the statute "requires a 'but-for' test of causation." ***Kakhankham***, 132 A.3d at 993. In so doing, it noted that a defendant's "conduct need not be the only cause of the victim's death in order to establish a causal connection" and that "[c]riminal responsibility may be properly assessed against an individual whose conduct was a direct and substantial factor in producing the death even though other factors combined with that conduct to achieve the result."[5] ***Id.*** at 993 n.8 (quoting ***Commonwealth v. Nunn***, 947 A.2d 756, 760 (Pa. Super. 2008)). In light of the foregoing, we discern no error in the portion of the jury instruction challenged above. ***See Meadows***, 787 A.2d at 318–19 (concluding that "the trial court's instruction properly informed the jury of the law and, while noting certain facts of record, left the ultimate determination of the facts to the jury").

[14] [15] [16] [17] [18]Appellant next argues that "the [t]rial [c]ourt erred when it refused to grant a mistrial after the [Commonwealth] argued that the jury should consider the fact that [Appellant] expressed no remorse during the trial as evidence of his guilt." Appellant's Brief at 41. Appellant contends that the "prosecutor improperly suggested that the jury should use [Appellant's] decision [not to] testify as substantive evidence of guilt by imploring them, in his final substantive comment in closing argument, to consider whether they had 'seen one ounce of remorse' from [Appellant] through the trial." ***Id.*** at 41–42; ***see*** N.T., 9/29–30/2015, at 624 ("Have any of you during the facts of this case or observing [Appellant] these last 3 days have any of you seen one ounce of remorse? Have any of you seen one ounce of remorse?"). Appellant contends that the comment could only be relevant for the improper purpose of implying that Appellant lacked remorse because he had not testified in his own defense, and the trial court's handling of the comment by failing to give an immediate limiting instruction and instead simply giving general instructions regarding Appellant's right to remain silent did not remedy the harm that was caused. ***Id.*** at 42–43.

> Our standard of review for a claim of prosecutorial misconduct is limited to whether the trial court abused its discretion. In considering this claim, our attention is focused on whether the defendant was deprived of a fair trial, not a perfect one.
>
> > [A] prosecutor's arguments to the jury are [generally] not a basis for the granting of a new trial unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility towards the accused which would prevent them from properly weighing the evidence and rendering a true verdict.
> >
> > A prosecutor must have reasonable latitude in fairly presenting a case to the jury and must be free to present [his] arguments with logical force and vigor. The prosecutor is also permitted to respond to defense arguments. Finally, in order to evaluate whether the comments were improper, we do ***272**

> not look at the comments in a vacuum; rather we must look at them in the context in which they were made.

Commonwealth v. Solomon, 25 A.3d 380, 383 (Pa. Super. 2011) (internal quotation marks and citations omitted).

Appellant's claim does not entitle him to relief. First, we disagree that the Commonwealth's brief comments in this regard implied that Appellant lacked remorse because he had not testified in his own defense. ***Commonwealth v. Fletcher***, 580 Pa. 403, 861 A.2d 898, 918 (2004) (concluding that the prosecutor did not improperly comment on Fletcher's lack of remorse, explaining that the comments "did not inappropriately implicate [Fletcher's] constitutional right to remain silent," as "the prosecutor in no way inferred or implied that [Fletcher] had a duty to testify. Instead, the prosecutor explicitly limited his remorse comments to [Fletcher's] non-verbal demeanor and behavior during trial and on the morning of the murders"); ***Commonwealth v. Robinson***, 581 Pa. 154, 864 A.2d 460, 519 (2004) (explaining that the prosecutor's "brief statement ... did not contain a direct reference to the fact that [Robinson] did not testify during the trial"). Second, this Court has held that references to a defendant's lack of remorse is not improper. ***Commonwealth v. Tillia***, 359 Pa.Super. 302, 518 A.2d 1246, 1254 (1986) (rejecting Tillia's contention that the trial court permitted the prosecutor to make improper comments during closing argument regarding Tillia's lack of remorse, explaining that "[w]hether or not [Tillia] expressed remorse is irrelevant to the determination of guilt").

Finally, prior to closing statements, the trial court instructed the jury that Appellant "did not have to call any witnesses either through his own testimony or other witnesses and that is his constitutional right. You should make no inference whatsoever concerning that decision." N.T., 9/29–30/2015, at 585; ***see also id.*** at 494 ("Again, [Appellant] does not have to offer any evidence whatsoever. If they decide to offer nothing that's appropriate, you cannot use against them that fact. So we'll see when [the] appropriate time comes whether or not they want to present any evidence. Of course [Appellant] does not have to testify, that's his constitutional right and again you should not make any inference if he decides not to testify."). Following closing arguments, the trial court instructed the jury that

> [a] person accused of a crime is not required to present any evidence or to prove anything in his own defense. He doesn't have to call any witnesses. Any reference that he didn't call a witness is immaterial to your consideration. You are not to give any thought as to or any inference as to whether he didn't call any witnesses, that is [not] his responsibility. His responsibility is to not present anything in his own defense if he so wishes.

Id. at 633. The trial court also instructed that closing statements are not evidence, ***id.*** at 585, and that the jurors "should not base [their] decision on which attorney made the better speech or which attorney [they] like better that should not play any part in [their] decision." ***Id.*** at 632. As "[j]uries are presumed to follow a court's instructions," ***Commonwealth v. Mollett***, 5 A.3d 291, 313 (Pa. Super. 2010), Appellant's claim fails. ***See also Robinson***, 864 A.2d at 519–20 (explaining that the trial court's specific instruction that "[i]t is entirely up to the defendant whether to testify and you must not draw any adverse inference from his silence ... more than adequately cured any ill effect of this fleeting comment that ... did not even contain a direct reference to [Robinson's] exercise of his Fifth Amendment right").

[19] [20] ****273*** In his sixth claim of error, Appellant contends that the sentencing court abused its discretion by imposing an aggravated sentence for his conviction for drug delivery resulting in death in addition to consecutive sentences for other convictions.

> Challenges to the discretionary aspects of sentencing do not entitle an appellant to review as of right. An appellant challenging the discretionary aspects of his sentence must invoke this Court's jurisdiction by satisfying a four-part test:
>
> > We conduct a four-part analysis to determine: (1) whether appellant has filed a timely notice of appeal, ***see*** Pa.R.A.P. 902 and 903; (2) whether the issue was properly preserved at sentencing or in a motion to reconsider and modify sentence, ***see*** Pa.R.Crim.P. 720; (3) whether appellant's brief has a fatal defect, Pa.R.A.P. 2119(f); and (4) whether there is a substantial question that the sentence appealed from is not appropriate under the Sentencing Code, 42 Pa.C.S.[ ] § 9781(b).

Commonwealth v. Griffin, 65 A.3d 932, 935 (Pa. Super.

2013) (some citations omitted) (quoting ***Commonwealth v. Evans***, 901 A.2d 528, 533 (Pa. Super. 2006)).

Instantly, Appellant timely filed a notice of appeal, challenged the discretionary aspects of his sentence in his post-sentence motion, and included a statement pursuant to Rule 2119(f) in his brief. Thus, we now consider whether he has raised a substantial question worthy of appellate review.

[21] [22]The determination of what constitutes a substantial question must be evaluated on a case-by-case basis. ***Commonwealth v. Paul***, 925 A.2d 825, 828 (Pa. Super. 2007). "A substantial question exists only when the appellant advances a colorable argument that the sentencing judge's actions were either: (1) inconsistent with a specific provision of the Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process." ***Griffin***, 65 A.3d at 935 (citation and internal quotation marks omitted).

In his Rule 2119(f) statement, Appellant contends that he raises a substantial question in that "[t]he sentencing court did not place any valid reasons on the record pursuant to 42 [Pa.C.S.] § 9721(b) to justify the imposition of an aggravated sentence." Appellant's Brief at 19. "The failure to set forth adequate reasons for the sentence imposed has been held to raise a substantial question." ***Commonwealth v. Macias***, 968 A.2d 773, 776 (Pa. Super. 2009). Thus, we proceed to the merits.

> Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion. In this context, an abuse of discretion is not shown merely by an error in judgment. Rather, the appellant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision.

Commonwealth v. Gonzalez, 109 A.3d 711, 731 (Pa. Super. 2015) (citation omitted).

Appellant contends that the trial court did not give adequate reasons for its sentence. Specifically, the "trial court's sentence was unreasonable ... because it failed to account for any of the mitigating factors and imposed the same sentence it would have had none been present." Appellant's Brief at 45. Appellant specifically references his genuine remorse, his severe addiction to heroin and inability to attend a rehabilitation program despite numerous attempts, and Appellant's mother's testimony ***274** at the sentencing hearing that she had tried to help Appellant receive treatment but had not been able to because they lacked money and insurance coverage. ***Id.*** Appellant argues that, instead of accounting for these factors, the court "simply determined that ... Lowe's resulting death, even if accidental and unforeseen by [Appellant], warranted the maximum sentence," which represents a misunderstanding concerning the elements of the offense of drug delivery resulting in death and presents a profound unfairness. ***Id.*** Appellant further argues that "[e]ven if the court were correct concerning the legal requirements for liability, certainly the fact that ... Lowe's death was an unforeseeable accident bears some mitigation." ***Id.***

With respect to the mitigating factors Appellant sets forth above, the court heard testimony at the sentencing hearing from both Appellant and Appellant's mother, as well as argument from Appellant's counsel, regarding Appellant's severe addiction to heroin, his attempts at getting treatment, his remorse, and his lack of intent. N.T., 12/21/2015, at 9–25. Finally, the trial court had the benefit of a presentence investigation report (PSI). ***See Commonwealth v. Downing***, 990 A.2d 788, 794 (Pa. Super. 2010) ("Our Supreme Court has determined that where the trial court is informed by a [PSI], it is presumed that the court is aware of all appropriate sentencing factors and considerations, and that where the court has been so informed, its discretion should not be disturbed."). In sentencing Appellant, the trial court explained that it considered, *inter alia*, "the [PSI] and evidence that's been presented" at the hearing.[6] ***Id.*** at 69. Based on the foregoing, Appellant's arguments do not persuade us that the trial court abused its discretion in imposing sentence. The court did consider the above mitigating factors, and simply did not accord them the weight Appellant wished it did. ***See Commonwealth v. Raven***, 97 A.3d 1244, 1255 (Pa. Super. 2014) (in rejecting Raven's discretionary aspects of sentencing claim, explaining that "[t]he gist of Raven's argument is not that the court failed to consider the pertinent sentencing factors, but rather that the court weighed those factors in a manner inconsistent with his wishes" and that "the court carefully considered all of the evidence presented at the sentencing hearing"). No relief is due.

[23]In his final issue, Appellant argues that his sentence and section 2506 violate the Eighth Amendment's restriction against cruel and unusual punishment. Appellant argues that his aggregate sentence is disproportionate to his culpability, as he had no idea that giving Lowe heroin would result in Lowe's death and his conduct does not reflect any particular depravity or callousness. Appellant's Brief at 47. Appellant argues that this was a tragic accident resulting from his drug addiction, which shows that he is "less culpable because his conduct was the product of impaired judgment and the simple failure to ***275** appreciate risks," and demonstrates his capacity to be rehabilitated. ***Id.***

[24] [25] [26] [27] [28]We address Appellant's claim mindful of the following.

> All properly enacted statutes enjoy a strong presumption of constitutionality.
>
> > Accordingly, a statute will not be declared unconstitutional unless it clearly, palpably, and plainly violates the Constitution. All doubts are to be resolved in favor of finding that the legislative enactment passes constitutional muster. Thus, there is a very heavy burden of persuasion upon one who challenges the constitutionality of a statute.
>
> Appellate review of constitutional challenges to statutes, disputes over the legality of a sentence, a court's application of a statute, and general questions of law involve a plenary scope of review. As with all questions of law, the appellate standard of review is *de novo*. ...
>
> ***
>
> > The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences which are grossly disproportionate to the crime. In ***Commonwealth v. Spells***, 417 Pa.Super. 233, 612 A.2d 458, 462 ([Pa.Super.] 1992) (*en banc*), the Superior Court applied the three-prong test for Eighth Amendment proportionality review set forth by the United States Supreme Court in ***Solem v. Helm***, 463 U.S. 277, 292, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), and determined that a five-year mandatory minimum sentence for offenses committed with a firearm does not offend the Pennsylvania constitutional prohibition against cruel punishments. The ***Spells*** court observed that the three-prong ***Solem*** proportionality test examines: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." The ***Spells*** court correctly observed that a reviewing court is not obligated to reach the second and third prongs of the test unless "a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." [4]
>
> [4] Justice Kennedy's understanding of the first prong of the ***Solem*** test as a threshold hurdle in establishing an Eighth Amendment violation has been recently cited with approval by the High Court as well. "A court must begin by comparing the gravity of the offense and the severity of the sentence." In the "rare case" in which this threshold comparison leads to an inference of gross disproportionality, the reviewing court "should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions." "If this comparative analysis 'validate[s] an initial judgment that [the] sentence is grossly disproportionate,' the sentence is cruel and unusual."

Commonwealth v. Colon–Plaza, 136 A.3d 521, 530–31 (Pa. Super. 2016) (some citations and internal quotation marks omitted).

Herein, Appellant was convicted of several crimes stemming from his providing Lowe with a dose of heroin that resulted in Lowe's death. Appellant was sentenced to a term of incarceration of 10 years to 20 years, 10 months for his drug-delivery-resulting-in-death conviction, and an aggregate sentence of 12 years and 10 ***276** months to 26 years and 10 months of incarceration. In light of the gravity of the offense(s) at issue, most importantly the death of a young man, and the severity of the sentences imposed, we conclude that this is not a "rare case" in which this threshold comparison leads to an inference of gross disproportionality. Thus, Appellant's claim is without merit.

Based on the foregoing, Appellant has failed to establish that he is entitled to relief. Accordingly, we affirm his judgment of sentence.

Judgment of sentence affirmed.

Judge Lazarus joins.

Judge Solano concurs in the result.

All Citations 156 A.3d 261, 2017 PA Super 30

Footnotes

* Retired Senior Judge assigned to the Superior Court.

1 To be clear, this Court has held that, with respect to the crime of drug delivery resulting in death, the statute requires "but-for" causation in addition to requiring that "the results of the defendant's actions cannot be so extraordinarily remote or attenuated that it would be unfair to hold the defendant criminally responsible." ***Commonwealth v. Kakhankham***, 132 A.3d 986, 993 (Pa. Super. 2015) (internal quotation marks and citation omitted). Moreover, the "results from" element of Section 2506 has a *mens rea* requirement; the "death must be at least 'reckless.' " ***Id.*** at 995.

2 In his sufficiency argument on appeal, Appellant also presents a separate claim that the trial court erred in relieving the prosecution of its burden to prove an element of the offense with respect to the requisite *mens rea*, which cannot be said to have been harmless error. Appellant's Brief at 25–27. Appellant likewise failed to raise any such issue in his Rule 1925(b) statement. Thus, any claim in this regard is waived as well. ***Perez***, 103 A.3d at 347 n.1; Pa.R.A.P. 1925(b)(4)(vii).

3 "Heroin[ ] technically is called diacetyl morphine." N.T., 9/29–30/2015, at 470; ***see also id.*** at 423 (explaining that morphine is the active ingredient in heroin).

4 Appellant also contends that the statute encourages arbitrary enforcement as exemplified by this case, as the person who sold the heroin to Appellant was not prosecuted with causing Lowe's death. Appellant's Brief at 37. We are unpersuaded that Appellant has met his "heavy burden" to show that the statute encourages arbitrary enforcement simply based on Appellant's representation that the person who supplied the heroin to Appellant was not charged in this case. ***See Kakhankham***, 132 A.3d at 991 ("[T]he party challenging a statute's constitutionality bears a heavy burden of persuasion." (citation omitted)).

5 To the extent Appellant argues that the instruction ignored the proximate cause requirement of causation, we note that Appellant did not include a challenge to the instructions with respect to proximate causation in his Rule 1925(b) statement. Thus, this claim is waived on this basis as well. ***Perez***, 103 A.3d at 347 n.1; Pa.R.A.P. 1925(b)(4)(vii); ***Lincoln***, 72 A.3d at 610.

6 Although the trial court offered reasons for its sentence in generic terms, we note that the evidence included, *inter alia*, testimony regarding Appellant's delivery of heroin to another individual at the scene of the death during the period of time in which Lowe was unresponsive. N.T., 12/21/2015, at 52. ***See also*** N.T., 9/29–30/2015, at 243–46 (testimony of Jacob Blass explaining that he had given Appellant money to buy heroin earlier in the day of Lowe's death and that, later that night, he contacted Appellant to make sure Appellant had obtained the heroin, at which point Appellant said Lowe was unresponsive; Blass went to the scene and, while Lowe was unresponsive, Appellant delivered two bags of heroin to Blass).

167 A.3d 750
Superior Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellee
v.
Zephaniah STOREY, Appellant

No. 1194 EDA 2016
|
Argued April 4, 2017
|
Filed July 20, 2017

Synopsis
Background: Defendant was convicted in the Court of Common Pleas, Monroe County, Criminal Division, No. CP–45–CR–0000342–2014, Stephen M. Higgins, J., of drug delivery resulting in death, two counts of possession with intent to deliver, two counts of possession of drug paraphernalia, and two counts of possession of a controlled substance. Defendant appealed.

Holdings: The Superior Court, No. 1194 EDA 2016, Lazarus, J., held that:

[1] statute proscribing drug delivery resulting in death with not void for vagueness;

[2] evidence supported conviction for drug delivery resulting in death;

[3] testimony by officer that phone of purchaser of drugs called certain number multiple times on days when drug deals occurred was admissible;

[4] prosecutor's statement during closing argument that prosecutor would not have called purchaser as witness if prosecutor did not believe him was not prosecutorial misconduct;

[5] instruction on accomplice liability did not include contradictory statements that confused jury; and

[6] guilty verdict for drug delivery resulting in death was not against weight of evidence.

Affirmed.

West Headnotes (32)

[1] **Constitutional Law**
Particular offenses in general
Homicide
Constitutional and statutory provisions

Statute proscribing drug delivery resulting in death was not unconstitutionally void for vagueness as applied to defendant, despite claims that he was unaware that victim would ultimately consume drugs he sold and, thus, he could not have known that his conduct could result in liability under statute and that, since he was not aware of victim's existence, he could not have had reckless state of mind that victim might die as result of his drug sales; statute only required that another person died as result of using substance sold and did not require death of person to whom defendant originally sold illegal substance and, thus, it applied to defendant, since, but for his illegal sale of drugs, victim would not have died, and statute did not impose strict liability. 18 Pa. Cons. Stat. Ann. § 2506.

2 Cases that cite this headnote

[2] **Constitutional Law**
Criminal Justice

To withstand constitutional scrutiny based on a challenge of vagueness, a criminal statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

1 Cases that cite this headnote

[3] **Constitutional Law**
Vagueness on face or as applied

Vagueness challenges which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand. U.S. Const. Amend. 1.

Cases that cite this headnote

[4] **Homicide**
Cause of death
Homicide
Commission of or Participation in Act by Accused; Identity

Sufficient evidence supported conviction for drug delivery resulting in death; testimony by purchaser of drugs identified defendant as dealer from whom he purchased drugs, cell phone data corroborated purchaser's testimony, officer observed drug paraphernalia around defendant's room, coroner discovered four empty wax pages stamped with same initials as drugs purchaser bought earlier in victim's pockets, and toxicology report concluded that victim died from heroin overdose. 18 Pa. Cons. Stat. Ann. § 2506.

Cases that cite this headnote

[5] **Criminal Law**
Construction of Evidence
Criminal Law
Reasonable doubt

The standard the Superior Court applies in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt.

5 Cases that cite this headnote

[6] **Criminal Law**
Weight of Evidence in General
Criminal Law
Weighing evidence

In applying the sufficiency of the evidence test, the Superior Court may not weigh the evidence and substitute its judgment for the fact-finder.

Cases that cite this headnote

[7] **Criminal Law**
Degree of proof

Under the sufficiency of the evidence test, the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence.

3 Cases that cite this headnote

[8] **Criminal Law**
Circumstantial evidence

Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances.

1 Cases that cite this headnote

[9] **Criminal Law**
Circumstantial Evidence
Criminal Law
Degree of proof

The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence.

4 Cases that cite this headnote

[10] **Criminal Law**
Weight and sufficiency
Criminal Law
Evidence considered; conflicting evidence

In applying the sufficiency of the evidence test, the entire record must be evaluated and all evidence actually received must be considered.

Cases that cite this headnote

[11] **Criminal Law**
Credibility of witnesses in general
Criminal Law
Weight and Sufficiency of Evidence in General

The trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

1 Cases that cite this headnote

[12] **Criminal Law**
Reception of evidence

Defendant waived for appellate review claim that trial court erred in allowing bad acts testimony, that defendant had a lot of customers, by purchaser of drugs from defendant without giving cautionary instruction in prosecution for drug delivery resulting in death, possession with intent to deliver, possession of drug paraphernalia, and possession of a controlled substance; while defendant objected at trial, he did not request cautionary instruction after judge sustained objection. 18 Pa. Cons. Stat. Ann. § 2506(a); 35 Pa. Stat. Ann. §§ 780-113(a)(16), 780-113(a)(30), 780-113(a)(32).

1 Cases that cite this headnote

[13] **Criminal Law**
Reception of evidence

Failure to request a cautionary instruction upon the introduction of evidence constitutes a waiver of a claim of trial court error in failing to issue a cautionary instruction.

1 Cases that cite this headnote

[14] **Criminal Law**
Admission of evidence

Testimony by officer, that phone of purchaser of drugs from defendant called certain number multiple times on days when drug deals occurred, was admissible in prosecution for drug delivery resulting in death, possession with intent to deliver, possession of drug paraphernalia, and possession of a controlled substance; testimony was originally elicited as result of objection interposed by defense regarding foundational basis for officer's knowledge of phone number of defendant's parents and, thus, it was defense that opened door to testimony, court issued cautionary instruction that jury was not to speculate as to how or why officer knew phone number, and evidence was relevant to prove that defendant was dealer purchaser met with. 18 Pa. Cons. Stat. Ann. § 2506(a); 35 Pa. Stat. Ann. §§ 780-113(a)(16), 780-113(a)(30), 780-113(a)(32).

Cases that cite this headnote

[15] **Criminal Law**
Necessity and scope of proof
Criminal Law
Reception and Admissibility of Evidence

The admission of evidence is a matter vested within the sound discretion of the trial court, and such a decision shall be reversed only upon a

showing that the trial court abused its discretion.

1 Cases that cite this headnote

[16] **Criminal Law**
Evidence calculated to create prejudice against or sympathy for accused

In determining whether evidence should be admitted, the trial court must weigh the relevant and probative value of the evidence against the prejudicial impact of that evidence.

4 Cases that cite this headnote

[17] **Criminal Law**
Relevancy in General

Evidence is "relevant" if it logically tends to establish a material fact in the case or tends to support a reasonable inference regarding a material fact.

2 Cases that cite this headnote

[18] **Criminal Law**
Evidence calculated to create prejudice against or sympathy for accused

Although a court may find that evidence is relevant, the court may nevertheless conclude that such evidence is inadmissible on account of its prejudicial impact.

2 Cases that cite this headnote

[19] **Criminal Law**
Custody and conduct of jury

If the trial judge gives curative instructions, it is presumed that the jury will follow the instructions of the court.

1 Cases that cite this headnote

[20] **Criminal Law**
Comments on evidence or witnesses

Prosecutor's statement during closing arguments, that prosecutor would not have called purchaser of drugs from defendant as witness if prosecutor did not believe him, was not prosecutorial misconduct in prosecution for drug delivery resulting in death, possession with intent to deliver, possession of drug paraphernalia, and possession of a controlled substance; defense, in its closing arguments, asserted that Commonwealth did not trust purchaser and, thus, it opened door to subject. 18 Pa. Cons. Stat. Ann. § 2506(a); 35 Pa. Stat. Ann. §§ 780-113(a)(16), 780-113(a)(30), 780-113(a)(32).

1 Cases that cite this headnote

[21] **Criminal Law**
Statements as to Facts, Comments, and Arguments

Generally, comments by a prosecutor do not constitute reversible error unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant so that they could not weigh the evidence objectively and render a true verdict.

Cases that cite this headnote

[22] **Criminal Law**
Arguments and conduct of counsel

When reviewing allegedly improper comments by a prosecutor, the Superior Court must do so

within the context of defense counsel's conduct.

Cases that cite this headnote

[23] **Criminal Law**
Form, requisites, and sufficiency of instructions

Instruction on accomplice liability, which stated that jury had to regard purchaser of drugs from defendant as accomplice in crime charged and then stated that it had to decide whether purchaser was accomplice, did not include contradictory statements that confused jury in prosecution for drug delivery resulting in death, possession with intent to deliver, possession of drug paraphernalia, and possession of a controlled substance; while, taken out of context, sentences seemed to contradict each other, taken as a whole, instruction made clear that jury was tasked with deciding if purchaser was accomplice and instructed jury on elements necessary to find that he was accomplice. 18 Pa. Cons. Stat. Ann. § 2506(a); 35 Pa. Stat. Ann. §§ 780-113(a)(16), 780-113(a)(30), 780-113(a)(32).

Cases that cite this headnote

[24] **Criminal Law**
Construction and Effect of Charge as a Whole

When evaluating jury instructions, the charge must be read as a whole to determine whether it was fair or prejudicial.

Cases that cite this headnote

[25] **Criminal Law**
Form and Language in General

The trial court has broad discretion in phrasing its instructions, and may choose its own wording so long as the law is clearly, adequately, and accurately presented to the jury for its consideration.

Cases that cite this headnote

[26] **Homicide**
Controlled substances
Homicide
Homicide in Commission of or with Intent to Commit Other Unlawful Act

Guilty verdict against defendant for drug delivery resulting in death was not against weight of evidence; while defendant had no connection to victim and neither intended to nor actually did distribute anything to victim, his knowledge of end-user, i.e., victim, was irrelevant to his guilt for drug delivery resulting in death, and verdict was not so against weight of evidence as to shock one's sense of justice. 18 Pa. Cons. Stat. Ann. § 2506.

1 Cases that cite this headnote

[27] **Criminal Law**
Weight and sufficiency of evidence in general

An allegation that the verdict is against the weight of the evidence is addressed to the discretion of the trial court.

1 Cases that cite this headnote

[28] **Criminal Law**
Weight and sufficiency of evidence in general

A new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion.

Cases that cite this headnote

[29] **Criminal Law**
Weight and sufficiency of evidence in general

On a claim that the verdict is against the weight of the evidence, a trial judge must do more than reassess the credibility of the witnesses and allege that he would not have assented to the verdict if he were a juror.

Cases that cite this headnote

[30] **Criminal Law**
Weight and sufficiency of evidence in general

Trial judges, in reviewing a claim that the verdict is against the weight of the evidence, do not sit as the 13th juror; rather, the role of the trial judge is to determine that notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice.

Cases that cite this headnote

[31] **Criminal Law**
Weight and sufficiency of evidence in general

A court may grant a new trial because the verdict is against the weight of the evidence only when the verdict rendered is so contrary to the evidence as to shock one's sense of justice.

1 Cases that cite this headnote

[32] **Criminal Law**
Weight and sufficiency of evidence in general
Criminal Law
Sufficiency of evidence

The determination of whether to grant a new trial because the verdict is against the weight of the evidence rests within the discretion of the trial court, and the Superior Court will not disturb this determination absent an abuse of discretion.

1 Cases that cite this headnote

***754** Appeal from the Judgment of Sentence December 2, 2015, In the Court of Common Pleas of Monroe County, Criminal Division at No(s): CP–45–CR–0000342–2014. Stephen M. Higgins, J.

Attorneys and Law Firms

John P. O'Neill, Philadelphia, for appellant.

Kimberly A. Metzger, Assistant District Attorney, Stroudsburg, for Commonwealth, appellee.
BEFORE: PANELLA, J., LAZARUS, J., and STEVENS, P.J.E.*

Opinion

OPINION BY LAZARUS, J.:

Zephaniah Storey appeals from his judgment of sentence, entered in the Court of Common Pleas of Monroe County, following his conviction for one count of drug delivery resulting in death,[1] two counts of possession with the intent to deliver,[2] two counts of possession of drug paraphernalia,[3] and two counts of possession of a controlled substance.[4] Upon review, we affirm.

***755** Nicholas Possinger testified that Donald J. O'Reilly, a recovering heroin addict, called him asking Possinger to obtain heroin for him. Possinger testified that he then telephoned Storey, his usual dealer, to secure the heroin. Possinger and Storey made arrangements to meet at the Mount Airy Casino parking lot on February 10, 2013, for the exchange. Possinger took O'Reilly's money and approached Storey's vehicle to purchase the heroin. Possinger was the only one who met with or saw Storey during the drug deal. Possinger bought ten bags of heroin, which he gave to O'Reilly. O'Reilly gave Possinger two bags as compensation for setting up the drug deal. O'Reilly contacted Possinger again on February 13, 2013, to have him set up another drug deal, again offering him two bags of heroin as compensation. This deal occurred at

the intersection of Abeel Road and Fish Hill Road. As in the previous deal, Possinger was the only person who saw or dealt with Storey. This time, Possinger purchased six bags of heroin, which were stamped with the initials A.O.N. Possinger testified that he recognized this stamp from heroin he had used in the past, and warned O'Reilly to be careful when taking his four bags, as this heroin was stronger than that purchased on February 10, 2013, and O'Reilly was just starting to use heroin again.

On February 14, 2013, at approximately 1:45 a.m., Officer Christopher Staples of the Pocono Township Police Department responded to a call regarding an unresponsive male with a possible drug overdose. Officer Staples testified that he found O'Reilly in his bedroom in the early stages of rigor mortis. Officer Staples observed drug paraphernalia around O'Reilly's room, including a lighter, a spoon, hypodermic needles, a measuring cup, and a belt. Deputy Coroner Teri Rovito subsequently pronounced O'Reilly dead. In O'Reilly's pockets, she discovered four empty wax paper bags stamped with the letters A.O.N. The toxicology report indicated that there were fatal levels of morphine in O'Reilly's blood.

Police obtained a search warrant for the cell phone records of Storey, Possinger, and O'Reilly in an attempt to determine their general location during the two drug transactions. The records indicated that Possinger's cell phone was utilizing towers in the general vicinity of the Mount Airy Casino on February 10, 2013, and that Storey was within the vicinity of the second transaction on February 13, 2013.

A jury convicted Storey of the aforementioned charges on September 10, 2015, and on December 2, 2015, he was sentenced to an aggregate term of not less than 108 months nor more than 276 months' imprisonment. Storey filed post-sentence motions on December 14, 2015, in which he requested reconsideration of sentence, arrest of judgment and a new trial. Post-sentence motions were denied on April 11, 2016. Storey filed a notice of appeal on April 18, 2016, followed by a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal on June 7, 2016. The trial court filed its Rule 1925(a) opinion on June 16, 2016.

Storey raises the following issues for our appeal, *verbatim*:

> 1. Whether the trial court erred in denying both pre- and post-trial motions arguing the drug delivery resulting in death statute, 18 Pa.C.S.A. § 2506, as applied, is unconstitutionally vague?
>
> 2. Whether the trial court erred in denying both pre- and post-trial motions arguing the drug delivery resulting in death statute, 18 Pa.C.S.A. § 2506, as applied, unconstitutionally rendered [Storey] strictly liable for the death of the decedent?
>
> ***756** 3. Whether the conviction for the drug delivery charge was insufficient as a matter of law?
>
> 4. Whether the trial court erred in allowing the highly prejudicial bad acts testimony by Nicholas Possinger without giving any cautionary instruction that [Storey] had a lot of customers?
>
> 5. Whether the trial court erred in allowing Officer Christopher Staples to respond to the Commonwealth's questions about whether he know [Storey's] phone number by stating "every day you respond to a call, it goes into the database," a statement which placed [Storey's] prior interaction with law enforcement before the jury?
>
> 6. Whether the Commonwealth committed prosecutorial misconduct by bolstering its case before the jury within the jury?
>
> 7. Whether the trial court erred in giving an accomplice liability charge to the jury that they could not understand, as clearly acknowledge by the attorneys and the trial judge on the record? This ambiguity was never cleared up with the trial judge even after the jury asked for clarification on the elements of the drug resulting in death charge and the confusing charge was left with them to decide whether [Storey] was guilty if either of the two drug delivery resulting in death charges in the alternative – either as a principal or as an accomplice.
>
> 8. Whether the conviction for the drug delivery resulting in death was against the greater weight of the evidence?

Brief of Appellant, at 5–6.

[1] [2] [3]Storey's first and second claims are that section 2506 is unconstitutionally void for vagueness as applied to Storey, because the vague language of the statute made it impossible for him to know what conduct was illegal. To withstand constitutional scrutiny based on a challenge of vagueness, a criminal statute must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." ***Kolender v. Lawson***, 461 U.S. 352, 358, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). In addition, "vagueness challenges which do not involve

First Amendment freedoms must be examined in the light of the facts of the case at hand." ***Commonwealth v. Heinbaugh***, 467 Pa. 1, 354 A.2d 244, 245 (1976) (quotation omitted).

Section 2506 provides, in relevant part:

> (a) Offense defined.—A person commits a felony of the first degree if the person intentionally administers, dispenses, delivers, gives, prescribes, sells or distributes any controlled substance or counterfeit controlled substance in violation of section 13(a)(14) or (30) of the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act, and another person dies as a result of using the substance.

18 Pa.C.S.A. § 2506(a). "When the words of a statute are clear and free from all ambiguity, the letter of the statute is not to be disregarded under the pretext of pursuing its spirit." 1 Pa.C.S.A. § 1921(c).

This Court has previously rejected a challenge to the constitutionality of section 2506 in ***Commonwealth v. Kakhankham***, 132 A.3d 986 (Pa. Super. 2015). In ***Kakhankham***, we examined the statute in the context of a drug dealer who sold heroin directly to the user, who subsequently died as a result of an overdose. In that case, we noted that section 2506 consists of two principal elements: (i) intentionally administering, delivering, giving, prescribing, selling, or distributing any controlled substance or counterfeit controlled substance, ***757** and (ii) death caused by the use of that drug. ***Id.*** at 991–92. We also found the level of causation necessary for guilt to be a "but-for" test. ***Id.*** at 993. Finally, we held that the *mens rea* for the first element of section 2506 requires "intentional" action, while the second element requires that death must be the result of at least "reckless" action. ***Id.*** at 992, 95. Since the dangers of heroin are so great and well-known, we concluded that the sale of heroin, itself, is sufficient to satisfy the recklessness requirement when a death occurs as a result of the sale. ***Id.*** at 995–96.

Storey attempts to distinguish his case from ***Kakhankham*** by referring to the fact that he was unaware of O'Reilly's existence and did not intend to sell drugs specifically to him. Because Storey was unaware that O'Reilly would ultimately consume the drugs he sold, he could not have known that his conduct could result in liability under the statute if his sale of drugs resulted in O'Reilly's death. Additionally, since he was not aware of O'Reilly's existence, he could not have had the reckless state of mind that O'Reilly might die as a result of Storey's drug sales. Under the holding of ***Kakhankham*** and the statute's own words, this difference is immaterial. The statute requires that "*another person* dies as a result of using the substance [sold]." 18 Pa.C.S.A. § 2506(a) (emphasis added). It does not require the death of the person to whom the defendant originally sold the illegal substance. ***See Orlosky v. Haskell,*** 304 Pa. 57, 155 A. 112 (1931) (holding that legislature must be intended to mean what it plainly expresses.) Therefore, section 2506 clearly applies to Storey's conduct; but for Storey's illegal sale of drugs, O'Reilly would not have died. ***Kakhankham***, 132 A.3d at 993. Additionally, ***Kakhankham*** held that section 2506 does not impose strict liability, so Storey's second claim must fail. ***Id.*** at 995. For the foregoing reasons, section 2506 is not unconstitutionally vague as applied to Storey.

[4] [5] [6] [7] [8] [9] [10] [11]Storey next claims that the there was insufficient evidence to support his section 2506 conviction. Our standard of review upon a challenge to the sufficiency of the evidence is well settled:

> The standard we apply in reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying [the above] test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving

> every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. DiStefano, 782 A.2d 574, 582 (Pa. Super. 2001), quoting ***Commonwealth v. Hennigan***, 753 A.2d 245, 253 (Pa. Super 2000) (citations and quotation marks omitted).

Storey again claims that, because he was unaware of O'Reilly's existence, he could ***758** not have been found to have intentionally sold heroin to him. As we have noted above, this is not what the jury had to find in order to find him guilty of the section 2506 charge. Instead, the jury must have found beyond a reasonable doubt that Storey: (i) intentionally sold a controlled substance, and (ii) the death of another person resulted from this sale. 18 Pa.C.S. § 2506(a).

Upon review of the record and viewing all evidence in a light most favorable to the Commonwealth, ***DiStefano, supra***, we find that there was sufficient evidence to support a finding beyond a reasonable doubt that Storey intentionally sold heroin to Possinger, and that the heroin Storey sold to Possinger caused the death of O'Reilly. Possinger's testimony identified Storey as the dealer from whom he had purchased the drugs. The cell phone data corroborated Possinger's testimony. Officer Staples observed drug paraphilia around O'Reilly's room, and the coroner discovered four empty wax pages stamped with the same initials as the drugs Possinger had purchased earlier in O'Reilly's pockets. Finally, the toxicology report concluded that O'Reilly died from a heroin overdose.

Storey is correct in noting that no "recklessness" instructions were given to the jury as to the second element of the charge. However since we have previously held that the sale of heroin satisfies the reckless element as to the possibility of death by the buyer, this argument garners Storey no relief. ***Kakhankham***, 132 A.3d at 995–96. Therefore, we find there was sufficient evidence to allow a jury to conclude beyond a reasonable doubt that Storey intentionally sold heroin to Possinger, and this sale was responsible for O'Reilly's death.

[12] [13]Storey next claims that the trial court erred in allowing bad acts testimony by Nicholas Possinger without giving a cautionary instruction. Specifically, Possinger testified that Storey had "a lot of customers." N.T. Trial, 9/9/15, at 15. While Storey objected to this at trial, he did not request a cautionary instruction after the judge sustained the objection. "Failure to request a cautionary instruction upon the introduction of evidence constitutes a waiver of a claim of trial court error in failing to issue a cautionary instruction." ***Commonwealth v. Bryant***, 579 Pa. 119, 855 A.2d 726, 739 (2004). Therefore, we find this claim waived.

[14] [15] [16] [17] [18] [19]Storey next claims that the trial court erred in allowing certain testimony of Officer Staples, and that the cautionary instruction regarding his testimony was insufficient. Our standard for examining if evidence was properly admitted is whether the trial court abused its discretion:

> The admission of evidence is a matter vested within the sound discretion of the trial court, and such a decision shall be reversed only upon a showing that the trial court abused its discretion. In determining whether evidence should be admitted, the trial court must weigh the relevant and probative value of the evidence against the prejudicial impact of that evidence. Evidence is relevant if it logically tends to establish a material fact in the case or tends to support a reasonable inference regarding a material fact. Although a court may find that evidence is relevant, the court may nevertheless conclude that such evidence is inadmissible on account of its prejudicial impact.

Commonwealth v. Reid, 571 Pa. 1, 811 A.2d 530, 550 (2002) (citations omitted). If the trial judge gives curative instructions, it is "presume[d] that the jury will follow the instructions of the court." ***759** ***Commonwealth v. Brown***, 567 Pa. 272, 786 A.2d 961, 971 (2001).

At trial, Officer Staples testified that Possinger's phone called a certain number multiple times on the days when the drug deals occurred. The Commonwealth attempted to prove that the number Possinger called was Storey's by showing that the number Possinger called also had frequent outgoing and incoming calls with the number assigned to Storey's parents' residence. Storey asserts that this testimony could have led the jury to infer that the police were aware of Storey's parents' number because of previous bad acts Storey may have committed when he resided with his parents. This claim is without merit.

We begin by noting that the information Storey now deems objectionable was originally elicited as the result of an objection interposed by the defense regarding the foundational basis for Officer Staples' knowledge of Staples' parents' phone number. Thus, it was the defense that "opened the door" to Officer Staples' testimony. Notwithstanding that fact, at the request of defense counsel, the court issued the following cautionary instruction to the jury:

> THE COURT: So members of the jury, there was just testimony of this witness that he knows Mr. and Mrs. Storey, the defendant's parents' phone number or contact information, all right. That's the evidence in this case. You're not to speculate, in any manner whatsoever, as to how or why that information is available to this particular witness.

N.T. Trial, 9/9/15, at 133.

In sum, because the evidence was relevant to prove that Storey was the dealer Possinger met with on February 10 and 13, 2013, and because the trial court provided a sufficient limiting instruction, we can discern no abuse of discretion by the trial court in allowing the testimony.

[20]Storey next claims that the Commonwealth committed prosecutorial misconduct when it bolstered Possinger's credibility by stating in its closing arguments that "I wouldn't have called him if I didn't believe him." N.T. Trial, 9/10/15, at 137. This claim is meritless.

[21] [22]Generally, comments by a prosecutor do not constitute reversible error unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant so that they could not weigh the evidence objectively and render a true verdict. ***Commonwealth v. Hawkins***, 549 Pa. 352, 701 A.2d 492, 503 (1997). When reviewing allegedly improper comments, we must do so within the context of defense counsel's conduct. ***Id.***

Here, the defense, in its closing arguments, asserted that the Commonwealth did not trust Possinger. N.T. Trial, 9/10/15, at 117 ("But why did the Commonwealth go to that length? It's because they don't trust Mr. Possinger either. They need something else. They don't trust Mr. Possinger, they don't believe him either."). Having "opened the door" to this subject, Storey cannot now complain because the Commonwealth chose to further comment on what was behind that door. ***Hawkins***, 701 A.2d at 503. Accordingly, Storey is entitled to no relief.

[23] [24] [25]Next, Storey claims that the trial court erred in its instructions as to accomplice liability. Our standard of review for evaluating jury instructions is as follows:

> When evaluating jury instructions, the charge must be read as a whole to determine whether it was fair or prejudicial. The trial court has broad discretion in phrasing its instructions, and may ***760** choose its own wording so long as the law is clearly, adequately, and accurately presented to the jury for its consideration.

Commonwealth v. Prosdocimo, 525 Pa. 147, 578 A.2d 1273, 1274 (1990).

Storey points to one line of the accomplice liability instruction that he believes polluted the verdict because the jurors were confused due to seemingly contradictory statements contained within. Specifically, Storey cites the following passage: "In reviewing the evidence and testimony of Nick Possinger's criminal involvement, you must regard him as an accomplice in the crime charged and apply the special rules to his testimony. You must decide whether Nick Possinger was an accomplice in the crimes charged." N.T. Trial, 9/10/15, at 174–75. We agree that, taken out of context, these two sentences may seem to contradict each other. However, taken as a whole, the trial court's instruction makes it clear to the jury that it was tasked with deciding if Possinger was, indeed, an accomplice, and instructed the jury on the elements

necessary to find that Storey was an accomplice. The relevant portion of the instruction reads in full as follows:

> Now I'm going to talk a little bit about the testimony in this case of the alleged accomplice which was Nick Possinger. Before I begin these instructions, let me define to you the term "accomplice."
>
> A person is an accomplice of another person in the commission of a crime if he or she has the intent of promoting or facilitating the commission of that crime and solicits the other person to commit it or aids or agrees or attempts to aid such other person in planning or committing a crime. Put simply, an accomplice is a person who knowingly and voluntarily cooperates with or aids another person is committing an offense.
>
> When a Commonwealth witness is an accomplice, his or her testimony must be judged by special precautionary rules. Experience shows that an accomplice, when caught, may often try to place the blame falsely on someone else. He or she may testify falsely in the hope of obtaining favorable treatment or for some corrupt or wicked motive. On the other hand, an accomplice may be a perfectly truthful witness. The special rules that I give you are meant to help you distinguish between truthful and false accomplice testimony.
>
> *In reviewing the evidence and the testimony of Nick Possinger's criminal involvement, you must regard him as an accomplice in the crime charged and apply the special rules to his testimony. You must decide whether Nick Possinger was an accomplice in the crime charged. If after considering all the evidence you find that he was an accomplice, then you must apply the special rules to his testimony, otherwise ignore those rules. Use this test to determine whether Nick Possinger was an accomplice*. Again, an accomplice is a person who knowingly and voluntarily cooperates with or aids another person in the commission of a crime.

See id. at 173–75 (emphasis added). Because the instruction governing the jury's determination of Possinger's accomplice liability, taken as a whole, clearly, adequately, and accurately states the law, Storey's claim is without merit.[5]

[26] [27] [28] [29] [30] [31] [32] ***761** Storey last claims that the verdict was against the weight of the evidence.

> An allegation that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. A new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion. A trial judge must do more than reassess the credibility of the witnesses and allege that he would not have assented to the verdict if he were a juror. Trial judges, in reviewing a claim that the verdict is against the weight of the evidence[,] do not sit as the thirteenth juror. Rather, the role of the trial judge is to determine that notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice.

Commonwealth v. Stokes, 78 A.3d 644, 650 (Pa. Super. 2013), quoting ***Commonwealth v. Widmer***, 560 Pa. 308, 744 A.2d 745, 751–52 (2000) (citations, quotation marks, and footnote omitted). In other words, a court may grant a new trial because the verdict is against the weight of the evidence only when the verdict rendered is so contrary to the evidence as to shock one's sense of justice. ***Id.*** at 651. The determination of whether to grant a new trial rests within the discretion of the trial court, and we will not disturb this determination absent an abuse of discretion. ***Id.***

Here, Storey again relies upon the fact that he had no connection to O'Reilly and neither intended to nor actually did distribute anything to O'Reilly. However, as we have noted in our earlier discussion, Storey's knowledge of the end-user—O'Reilly—is irrelevant to his guilt under section 2506. Upon review of the record as a whole, the jury's verdict is not so against the weight of the evidence as to shock one's sense of justice. ***See id.*** As such, the trial court did not abuse its discretion in denying Storey's motion for a new trial.

Judgment of sentence affirmed.

All Citations

167 A.3d 750, 2017 PA Super 237

Footnotes

* Former Justice specially assigned to the Superior Court.

1 18 Pa.C.S.A. § 2506(a).

2 35 P.S. § 780–113(a)(30).

3 35 P.S. § 780–113(a)(32).

4 35 P.S. § 780–113(a)(16).

5 Storey also argues that the jury's request for clarification on the drug delivery charge indicated that the jury was confused about the accomplice liability charge. However, since the jury never requested clarification on accomplice liability charge, this claim is nothing more than speculative and, as such, is without merit.

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