No. _____

IN THE

Supreme Court of the United States

QUARTAVIOUS DAVIS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, as in thousands of cases each year, the government sought and obtained the cell phone location data of a private individual pursuant to a disclosure order under the Stored Communications Act (SCA) rather than by securing a warrant. Under the SCA, a disclosure order does not require a finding of probable cause. Instead, the SCA authorizes the issuance of a disclosure order whenever the government "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).

As a result, the district court never made a probable cause finding before ordering Petitioner's service provider to disclose 67 days of Petitioner's cell phone location records, including more than 11,000 separate location data points. Reversing a unanimous panel opinion, a majority of the *en banc* Eleventh Circuit held that there is no reasonable expectation of privacy in these location records and, even if there were such an expectation, a warrantless search would be reasonable nonetheless.

The Questions Presented are:

1) Whether the warrantless seizure and search of historical cell phone records revealing the location and movements of a cell phone user over the course of 67 days is permitted by the Fourth Amendment.

2) Whether the good-faith exception to the exclusionary rule applies where the search was based on a court order sought by a prosecutor rather than a warrant sought by police, particularly when the

governing statute provided the prosecutor with the option to pursue a warrant but the prosecutor ignored it.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION & STATUTES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Quartavius Davis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in Case No. 12-12928.

OPINIONS BELOW

The opinion of the *en banc* Eleventh Circuit (Pet. App. 1a) is reported at 785 F.3d 498. An earlier opinion of a three-judge panel of the Eleventh Circuit (Pet. App. 102a) is reported at 754 F.3d 1205. The relevant district court orders (Pet. App. 137a, 140a) were issued orally and are unpublished.

JURISDICTION

The *en banc* Eleventh Circuit issued its opinion on May 5, 2015. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

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

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

The Stored Communications Act, 18 U.S.C. § 2703, provides in relevant part:

> **(c) Records concerning electronic communication service or remote computing service.--(1)** A governmental entity may require a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications) only when the governmental entity—
>
> > **(A)** obtains a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) by a court of competent jurisdiction; [or]
> >
> > **(B)** obtains a court order for such disclosure under subsection (d) of this section; *** * ***
>
> **(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. * * *

STATEMENT OF THE CASE

This case presents the pressing question of whether the Fourth Amendment protects against warrantless acquisition of sensitive and voluminous digital records of people's locations and movements over time.

1. In February 2011, in the course of an investigation into seven armed robberies that occurred in the greater Miami area in 2010, an Assistant United States Attorney submitted to a magistrate judge an application for an order granting access to 67 days of Quartavius Davis's historical cell-phone location records.[1] Pet. App. 5a–6a, 143a. The application, which was unsworn, did not seek a warrant based on probable cause, but rather an order under the Stored Communications Act, 18 U.S.C. § 2703(d). Such an order may issue when the government "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." *Id.*

The application sought to compel a number of cellular service providers to disclose records related to several suspects in the robberies, including Davis. Specifically, the application sought "stored telephone subscriber records, phone toll records, and corresponding geographic location data (cell site)." Pet. App. 6a, 143a–144a. The application recited information regarding robberies of retail businesses that occurred on August 7, August 31, September 7,

[1] Although Petitioner's first name was spelled "Quartavious" in the case caption in the courts below, the correct spelling is "Quartavius." *See* Pet. App. 2a n.1.

September 15, September 25, September 26, and October 1, 2010, in and around Miami, Florida, and asserted that the records sought were "relevant" to the investigation of those offenses.[2] Pet. App. 148a. Rather than restricting the request to only the days on which the robberies occurred, however, the application sought records "for the period from August 1, 2010 through October 6, 2010," a total of 67 days. Pet. App. 149a.

The magistrate judge issued an "Order for Stored Cell Site Information" on February 2, 2011. Pet. App. 151a. The order directed MetroPCS, Davis's cellular service provider, to produce "all telephone toll records and geographic location data (cell site)" for Davis's phone for the period of August 1 through October 6, 2010. Pet. App. 7a–8a. MetroPCS complied, providing 183 pages of Davis's cell phone records to the government.[3] Those records show each of Davis's incoming and outgoing calls during the 67-day period, along with the cell tower ("cell site") and directional sector of the tower that Davis's phone connected to at the start and end of most of the calls, which was "typically the '[n]earest

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[2] Although none of the offenses under investigation were bank robberies, the application erroneously stated that the information sought was relevant to an investigation into offenses under the federal bank robbery statute, 18 U.S.C. § 2113. Pet. App. 148a–149a.

[3] Sample pages from Davis's records are included at Pet. App. 154a–158a. The full records were entered as Government Exhibit 35 at trial and were included in the parties' joint appendix in the court of appeals.

and strongest' tower."[4] Pet. App. 8a, 91a (quoting Trial Tr. 221, Feb. 6, 2012, ECF No. 283).

MetroPCS also produced a list of its cell sites in Florida, providing the longitude, latitude, and physical address of each cell site, along with the directional orientation of each sector antenna. Gov't Trial Ex. 36. By cross-referencing the information in Davis's call detail records with MetroPCS's cell-site list, the government could identify the area in which Davis's phone was located and could thereby deduce Davis's location and movements at multiple points each day.

2. The precision of a cell phone user's location reflected in cell site location information ("CSLI") records depends on the size of the cell site sectors in the area. Most cell sites consist of three directional antennas that divide the cell site into three sectors, but an increasing number of towers have six sectors. Pet. App. 91a. The coverage area of cell site sectors is smaller in areas with greater density of cell towers, with urban areas having the greatest density and thus the smallest coverage areas.[5] *Id.*

The density of cell sites continues to increase as data usage from smartphones grows. Because each cell site can carry only a fixed volume of data required for text messages, emails, web browsing,

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[4] Cell sites, which are the transmitting towers through which cell phones communicate with the telephone network, consist of antennas facing different directions that cover distinct wedge-shaped "sectors."

[5] For example, in 2010 MetroPCS, the carrier used by Davis, operated a total of 214 cell sites comprising 714 sector antennas within Miami-Dade County. *See* Gov't Trial Ex. 36.

streaming video, and other uses, as smartphone data usage increases carriers must erect additional cell sites, each covering smaller geographic areas. *See* CTIA – The Wireless Association, *Annual Wireless Industry Survey* (2014)[6] (showing that the number of cell sites in the United States nearly doubled from 2003 to 2013); *id.* (wireless data usage increased by 9,228% between 2009 and 2013). This means that in urban and dense suburban areas like Miami, many sectors cover small geographic areas and therefore can provide relatively precise information about the location of a phone. Pet. App. 91a.

Although in this case MetroPCS provided only information identifying Davis's cell site and sector at the start and end of his calls, service providers increasingly retain more granular historical location data. *See, e.g.*, Verizon Wireless, *Law Enforcement Resource Team (LERT) Guide* 25 (2009)[7] (providing sample records indicating caller's distance from cell site to within .1 of a mile). Location precision is also increasing as service providers deploy millions of "small cells," which provide service to areas as small as ten meters, and can allow callers to be located with a "'high degree of precision, sometimes effectively identifying individual floors and rooms within buildings.'" Pet. App. 94a.

3. Davis's call detail records obtained by the government contain a wealth of location data. The records provide CSLI relating to 5,803 phone calls,

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[6] *Available at* http://www.ctia.org/your-wireless-life/how-wireless-works/ annual-wireless-industry-survey.

[7] *Available at* http://publicintelligence.net/verizon-wireless-law-enforcement-resource-team-lert-guide/.

identifying 11,606 separate location data points (this accounts for cell site location information logged for the start and end of the calls). Pet. App. 91a. "This averages around one location data point every five and one half minutes for those sixty-seven days, assuming Mr. Davis slept eight hours a night." *Id.* These records reveals a large volume of sensitive and private information about Davis's locations, movements, and associations:

> The amount and type of data at issue revealed so much information about Mr. Davis's day-to-day life that most of us would consider quintessentially private. For instance, on August 13, 2010, Mr. Davis made or received 108 calls in 22 unique cell site sectors, showing his movements throughout Miami during that day. And the record reflects that many phone calls began within one cell site sector and ended in another, exposing his movements even during the course of a single phone call.
>
> Also, by focusing on the first and last calls in a day, law enforcement could determine from the location data where Mr. Davis lived, where he slept, and whether those two locations were the same. As a government witness testified at trial, "if you look at the majority of . . . calls over a period of time when somebody wakes up and when somebody goes to sleep, normally it is fairly simple to decipher where

> their home tower would be." Trial Tr. 42, Feb. 7, 2012, ECF No. 285. For example, from August 2, 2010, to August 31, 2010, Mr. Davis's first and last call of the day were either or both placed from a single sector—purportedly his home sector. But on the night of September 2, 2010, Mr. Davis made calls at 11:41pm, 6:52am, and 10:56am—all from a location that was not his home sector. Just as Justice Sotomayor warned [in *United States v. Jones*, 132 S. Ct. 945 (2012)], Mr. Davis's "movements [were] recorded and aggregated in a manner that enable[d] the Government to ascertain, more or less at will, . . . [his] sexual habits, and so on." *Jones*, 132 S. Ct. at 956 (Sotomayor, J., concurring).

Pet. App. 92a.

4. Prior to trial, Davis moved to suppress the CSLI records on the basis that their acquisition constituted a Fourth Amendment search and required a warrant. Pet. App. 8a–9a. The district court denied the motion without elaboration at the conclusion of the suppression hearing, stating that it intended to issue a written opinion on the matter at a later date. Pet. App. 138a. Davis renewed the suppression motion during trial, which the court again denied while reserving explanation until a later written opinion. Pet. App. 142a. The court never issued any written opinion explaining its denial of the motion.

At trial, the government introduced the entirety of Davis's CSLI records as evidence, Gov't Ex. 35, and relied on them to establish Davis's location on the days of the charged robberies. A detective with the Miami-Dade Police Department testified that Davis's CSLI records placed him near the sites of six of the robberies. Pet. App. 11a–12a. The detective also produced maps showing the location of Davis's phone relative to the locations of the robberies, which the government introduced into evidence. *Id.*; Gov't Ex. 37A–F. Thus, "[t]he government relied upon the information it got from MetroPCS to specifically pin Mr. Davis's location at a particular site in Miami." Pet. App. 93a. The prosecutor asserted to the trial judge, for example, that "Mr. Davis's phone [was] literally right up against the America Gas Station immediately preceding and after [the] robbery occurred," *id.* (quoting Trial Tr. 58, Feb. 7, 2012, ECF No. 285), and argued to the jury in closing that the records "put [Davis] literally right on top of the Advance Auto Parts one minute before that robbery took place," Trial Tr. 13, Feb. 8, 2012, ECF No. 287.

The jury convicted Davis of two counts of conspiracy to interfere with interstate commerce by threats or violence in violation of the Hobbs Act, 18 U.S.C. § 1951(a); seven Hobbs Act robbery offenses; and seven counts of using, carrying, or possessing a firearm in each robbery in violation of 18 U.S.C. § 924(c). All but the first of the § 924(c) convictions carried mandatory consecutive minimum sentences of 25 years each. As a result, the court sentenced Davis to nearly 162 years' imprisonment (1,941

months).[8] The court stated at sentencing that in light of Davis's young age (18 and 19 years old at the time of the offenses) and the nature of the crimes, the court believed a sentence of 40 years would have been appropriate. Sentencing Tr. 33, July 17, 2012, ECF No. 366. Because the court was afforded no discretion in sentencing, however, it sentenced Davis to 162 years in prison.

5. On appeal, a unanimous three-judge panel of the Eleventh Circuit held that the government violated Davis's Fourth Amendment rights by requesting and obtaining his historical cell site location information without a warrant. Pet. App. 102a, 118a. Writing for the panel, Judge Sentelle[9] opined that Davis had a reasonable expectation of privacy in his CSLI because it could reveal information about his whereabouts in private spaces, thereby "convert[ing] what would otherwise be a private event into a public one." Pet. App. 119a. Judge Sentelle explained that "[t]here is a reasonable privacy interest in being near the home of a lover, or a dispensary of medication, or a place of worship, or a house of ill repute." Pet. App. 120a. The panel further held that MetroPCS's possession of Davis's CSLI did not deprive Davis of a reasonable expectation of privacy in that information because he did not voluntarily disclose his location information to the company. Pet. App. 121a–122a. The panel affirmed the district court's denial of Davis's

[8] The court of appeals reduced the sentence for one of the counts of conviction by two years, resulting in a sentence of nearly 160 years. Pet. App. 129a–130a.

[9] Judge Sentelle sat on the panel by designation from the D.C. Circuit.

suppression motion, however, on the grounds that the government relied in good faith on the magistrate judge's order issued under the Stored Communications Act, and therefore the exclusionary rule did not apply. Pet. App. 122a–124a.

The government petitioned for rehearing *en banc*, and a divided Eleventh Circuit vacated the panel opinion.[10] Writing for the majority, Judge Hull held that no Fourth Amendment search occurred because Davis had no reasonable expectation of privacy in cell phone location records held by his service provider. Pet. App. 30a. She further concluded that, even if a Fourth Amendment search had taken place, use of an SCA order rather than a warrant is reasonable because the privacy intrusion was minor and the government has a compelling interest in investigating crimes.[11] Pet. App. 40a–41a.

Five of the *en banc* court's eleven judges expressed misgivings. Judge Jordan, joined by Judge Wilson, wrote separately to express the concern that

> [a]s technology advances, location information from cellphones (and, of course, smartphones) will undoubtedly become more precise and easier to obtain, and if there is no expectation of

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[10] Only one member of the original panel participated in *en banc* reconsideration. Judge Sentelle was not permitted to participate because he had participated in the panel as a visitor from the D.C. Circuit. Judge Dubina has taken senior status, and opted not to participate in *en banc* reconsideration. *See* 11th Cir. R. 35-10.

[11] The court held in the alternative that the good-faith exception to the exclusionary rule applies. Pet. App. 43a n.20, 75a n.35.

> privacy here, I have some concerns about the government being able to conduct 24/7 electronic tracking (live or historical) in the years to come without an appropriate judicial order.

Pet. App. 50a (internal citation omitted). Judge Jordan did not join the court's conclusion that there is no reasonable expectation of privacy in CSLI records, but concurred that a search of CSLI is reasonable if conducted with an SCA order. Pet. App. 51a.

Judge Rosenbaum also wrote separately to sound a note of caution:

> In our time, unless a person is willing to live "off the grid," it is nearly impossible to avoid disclosing the most personal of information to third-party service providers on a constant basis, just to navigate daily life. And the thought that the government should be able to access such information without the basic protection that a warrant offers is nothing less than chilling.

Pet. App. 58a.

Judge Martin, joined by Judge Jill Pryor, dissented and opined that there is a reasonable expectation of privacy in CSLI, and that law enforcement should need a warrant to access it. Pet. App. 75a–101a.

REASONS FOR GRANTING THE WRIT

I. THE QUESTION PRESENTED IS ONE OF NATIONAL IMPORTANCE, OVER WHICH COURTS ARE DIVIDED.

A. The Question Presented Is One Of National Importance.

In two of the last three terms, this Court has confronted crucial questions regarding the application of the Fourth Amendment in the digital age. *See Riley v. California*, 134 S. Ct. 2473 (2014) (warrant required for search of cell phone seized incident to lawful arrest); *United States v. Jones*, 132 S. Ct. 945 (2012) (tracking car with GPS device is a Fourth Amendment search). This case raises an important and pressing question left open by those decisions.

The records at issue in this case reveal extraordinarily sensitive details of a person's life, "reflect[ing] a wealth of detail about her familial, political, professional, religious, and sexual associations." *Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring). The court of appeals held that this voluminous transcript of a person's movements in public *and* private spaces is unprotected by the Fourth Amendment by analogizing to the kinds of limited analog data at issue in this Court's third-party records decisions from the 1970s. Pet. App. 26a–30a (citing *Smith v. Maryland*, 442 U.S. 735 (1979), and *United States v. Miller*, 425 U.S. 435 (1976)). This Court recently cautioned that "any extension of . . . reasoning [from decisions concerning analog searches] to digital data has to rest on its own bottom." *Riley*, 134 S. Ct. at 2489. The court of

appeals did not take to heart the crucial lesson that relying blindly on "pre-digital analogue[s]" risks causing "a significant diminution of privacy." *Id.* at 2493.

In *United States v. Jones*, this Court addressed the pervasive location monitoring made possible by GPS tracking technology surreptitiously and warrantlessly attached to a vehicle. All members of the Court agreed that attaching a GPS device to a vehicle and tracking its movements constitutes a search under the Fourth Amendment. In so holding, the Court made clear that the government's use of novel digital surveillance technologies not in existence at the framing of the Fourth Amendment does not escape the Fourth Amendment's reach. 132 S. Ct. at 950–51 ("[W]e must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001))); *id.* at 963–64 (Alito, J., concurring in the judgment) ("[S]ociety'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.").

In *Riley v. California*, the Court addressed Americans' privacy rights in the contents of their cell phones, unanimously holding that warrantless search of the contents of a cell phone incident to a lawful arrest violates the Fourth Amendment. In so doing, the Court rejected the government's inapt analogy to other physical objects that have historically been subject to warrantless search incident to an arrest. 134 S. Ct. at 2489 ("Cell phones

differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person.").

This case raises a hotly contested question that sits at the confluence of *Jones* and *Riley*: whether the pervasive location data generated by use of a cell phone is protected from warrantless search by the Fourth Amendment. Resolution of this question is a matter of great and national importance.

1. The volume and frequency of law enforcement requests for CSLI make resolution of the question in this case of paramount importance. Cell phone use is now ubiquitous, with "[m]ore than 90% of American adults . . . own[ing] a cell phone." *Riley*, 134 S. Ct. at 2490. As of December 2013, there were more than 335 million wireless subscriber accounts in the United States,[12] and 44 percent of U.S. households have *only* cell phones.[13] When "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," *Riley*, 134 S. Ct. at 2490, the privacy implications of warrantless law enforcement access to cell phone location data are difficult to overstate.

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[12] CTIA – The Wireless Association, *Annual Wireless Industry Survey* (2014), *available at* http://www.ctia.org/your-wireless-life/how-wireless-works/annual-wireless-industry-survey.

[13] Stephen J. Blumberg & Julian V. Luke, Ctr. For Disease Control & Prevention, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January–June 2014* 1 (Dec. 2014), http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201412.pdf.

This is not an isolated or occasional concern. Law enforcement is requesting staggering volumes of CSLI from service providers. In 2014, for example, AT&T received 64,073 requests for cell phone location information.[14] Verizon received approximately 21,800 requests for cell phone location data in just the first half of 2015.[15]

The government often obtains large volumes of CSLI pursuant to such requests. In this case the government seized 67 days' worth of Davis's location data comprising 11,606 location data points. Pet. App. 75a. A request for two months of data is no aberration: according to T-Mobile, which now owns Davis's service provider, MetroPCS, the average law enforcement request "asks for approximately fifty-five days of records." T-Mobile, *Transparency Report for 2013 & 2014*, at 5 (2015).[16] Other cases pending in the courts of appeals involve even greater quantities of sensitive location information obtained without a warrant. In one case, the government obtained 221 days (more than seven months) of cell site location information, revealing 29,659 location points for one defendant. J.A. 2668–3224, *United States v. Graham*, No. 12-4659 (4th Cir. June 24, 2013). In another case, the government obtained 127 days of CSLI containing 12,898 cell site location data

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[14] AT&T, *Transparency Report* 4 (2015), *available at* http://about.att.com/content/dam/csr/Transparency%20Reports/ATT_Transparency%20Report_January_2015.pdf.

[15] Verizon, *Verizon's Transparency Report for the First Half of 2015* (2015), *available at* http://transparency.verizon.com/us-report?/us-data.

[16] *Available at* http://newsroom.t-mobile.com/content/1020/files/NewTransparencyReport.pdf.

points. Brief of *Amici Curiae* American Civil Liberties Union, et al., at 9, *United States v. Carpenter*, No. 14-1572 (6th Cir. Mar. 9, 2015), 2015 WL 1138148.

In *Jones*, Justice Alito recognized that cell phones are "[p]erhaps most significant" of the "many new devices that permit the monitoring of a person's movements." 132 S. Ct. at 963 (Alito, J., concurring in the judgment). Yet most law enforcement agencies are obtaining these large quantities of historical CSLI without a probable cause warrant. *See* American Civil Liberties Union, Cell Phone Location Tracking Public Records Request (Mar. 25, 2013)[17] (responses to public records requests sent to roughly 250 local law enforcement agencies show that "few agencies consistently obtain warrants" for CSLI). The volume of warrantless requests for CSLI and the ubiquity of cell phones make the question presented one of compelling national importance.

Indeed, easy access to a comprehensive transcript of a person's movements raises questions long recognized as particularly significant. "The Supreme Court in [*United States v.*] *Knotts*[, 460 U.S. 276, 283–84 (1983)] expressly left open whether 'twenty-four hour surveillance of any citizen of this country' by means of 'dragnet-type law enforcement practices' violates the Fourth Amendment's guarantee of personal privacy." *United States v. Pineda-Moreno*, 617 F.3d 1120, 1126 (9th Cir. 2010) (Kozinski, C.J., dissenting from denial of rehearing *en banc*). As Judge Kozinski has opined, "[w]hen

[17] https://www.aclu.org/cases/cell-phone-location-tracking-public-records-request.

requests for cell phone location information have become so numerous that the telephone company must develop a self-service website so that law enforcement agents can retrieve user data from the comfort of their desks, we can safely say that 'such dragnet-type law enforcement practices' are already in use." *Id.* This Court's intervention is needed now to ensure that the Fourth Amendment does not become dead letter as police accelerate their warrantless access to rich troves of sensitive personal location data.

2. This case also squarely presents the broader question of how the protections of the Fourth Amendment apply to sensitive and private data in the hands of trusted third parties.

As Justice Sotomayor noted in *Jones*,

> it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks.

132 S. Ct. at 957 (Sotomayor, J., concurring). It is not necessary in this case to wholly reassess the third-party doctrine. But it is critically important to clarify the scope of analog-age precedents to digital surveillance techniques.

Lower courts are struggling with how to apply pre-digital precedents from *United States v. Miller* and *Smith v. Maryland* to newer forms of pervasive

digital data. In *Smith*, this Court held that the short-term use of a pen register to capture the telephone numbers a person dials is not a search under the Fourth Amendment. 442 U.S. at 739, 742. The Court relied heavily on the fact that when dialing a phone number, the caller "voluntarily convey[s] numerical information to the telephone company." *Id.* at 744. The Court also assessed the degree of invasiveness of the surveillance to determine whether the user had a reasonable expectation of privacy. The Court noted the "pen register's limited capabilities," *id.* at 742, explaining that "'a law enforcement official could not even determine from the use of a pen register whether a communication existed.'" *Id.* at 741 (citation omitted). *Miller*, which involved records about a bank depositor's transactions voluntarily conveyed to the bank, reached much the same conclusion. 425 U.S. at 440–42. The principle sometimes discerned from these cases, that certain records or information shared with third parties deserve no Fourth Amendment protection, is known as the "third-party doctrine."

In this case, Judge Sentelle, writing for the original Eleventh Circuit panel, concluded that the third-party doctrine does not apply to CSLI because of its sensitivity and the lack of voluntary conveyance to service providers. Pet. App. 120a–122a. Judge Martin, in dissent from the *en banc* majority opinion, agreed, and expressed alarm that "the majority's blunt application of the third-party doctrine threatens to allow the government access to a staggering amount of information that surely must be protected under the Fourth Amendment." Pet. App. 81a. The *en banc* majority, on the other hand, concluded that this case is resolved by a straight

application of the holding of *Smith*, without regard for the significant changes in technology and expectations of privacy over the intervening 35 years. Pet. App. 26a–28a. Yet three concurring judges wrote separately to register their concerns about exempting the CSLI records at issue from Fourth Amendment protections, inviting this Court to clarify the scope of the rule announced in *Miller* and *Smith*. *See* Pet. App. 50a–51a (Jordan, J., concurring); *id.* at 58a–59a (Rosenbaum, J., concurring).

Other courts are similarly divided. *Compare In re Application of the U.S. for Historical Cell Site Data*, 724 F.3d 600, 612–13 (5th Cir. 2013) ["*Fifth Circuit CSLI Opinion*"] (no expectation of privacy in CSLI under *Smith*), *with In re Application of the U.S. for an Order Directing a Provider of Elec. Commc'n Serv. to Disclose Records to the Gov't*, 620 F.3d 304, 317 (3d Cir. 2010) ["*Third Circuit CSLI Opinion*"] (distinguishing *Smith* and holding that cell phone users may retain a reasonable expectation of privacy in CSLI).

Lower courts' struggles to define the scope of the Fourth Amendment's protections for newer forms of sensitive digital data are reflected in widespread scholarly criticism of the expansive application of the third-party doctrine beyond the kinds of records at issue in *Smith* and *Miller*. *See, e.g.*, Sherry F. Colb, *What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 Stan. L. Rev. 119 (2002); Daniel Solove, *Conceptualizing Privacy*, 90 Calif. L. Rev. 1087, 1151–52 (2002). These scholars and judges have called on this Court to ensure that the Fourth

Amendment keeps pace with the rapid advance of technology.

This case presents a good vehicle for addressing application of the Fourth Amendment warrant requirement to sensitive and private records held by a third party. Without guidance from this Court, a cell phone user "cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority." *New York v. Belton*, 453 U.S. 454, 459–60 (1981). As law enforcement seeks ever greater quantities of location data and other sensitive digital records, the need for this Court to speak grows daily more urgent.

B. Federal Courts of Appeals and State High Courts Are Divided Over Several Issues.

The Eleventh Circuit's decision in this case widens the conflict over whether, or in what circumstances, sensitive cell phone location data held in trust by a service provider is protected by a warrant requirement.

1. State and federal courts in Florida are split over the existence of a reasonable expectation of privacy in CSLI. In *Tracey v. State*, 152 So. 3d 504, 526 (Fla. 2014), the Supreme Court of Florida held that under the Fourth Amendment there is a reasonable expectation of privacy in real-time cell phone location data, and that accordingly a warrant is required when law enforcement seeks access to it. Although historical CSLI records were not at issue in *Tracey*, *see id.* at 516, the court concluded that the same principles that courts have held to create a reasonable

expectation of privacy in historical CSLI also require protection of real-time CSLI, *id.* at 523. Indeed, for Fourth Amendment purposes, there is little meaningful difference between historical and real-time records, as both provide information about a person's location in private spaces and allow police to learn a large quantity of private information about a person's activities and movements. If anything, search of historical records is more invasive because it provides law enforcement with a completely new investigative power to go backward in time and track someone's location in the past—a veritable time machine with no analogue in the capabilities of the founding-era constabulary.

Florida law enforcement agents now must choose whether to follow the holding of *Tracey* and obtain a warrant before seizing CSLI, or to follow the Eleventh Circuit's holding in this case and forgo the warrant requirement. And even if state and local law enforcement agencies decide that *Tracey* articulates the controlling rule, residents of Florida will remain subject to disparate Fourth Amendment protections depending on whether they are investigated by state or federal agents. The practical protections of the Fourth Amendment should not turn on which uniform the investigators are wearing.

Likewise, a number of states require a warrant for historical CSLI by statute or under their state constitution as interpreted by the state's highest court. *See Commonwealth v. Augustine*, 4 N.E.3d 846 (Mass. 2014); Colo. Rev. Stat. § 16-3-303.5(2); Me. Rev. Stat. tit. 16, § 648; Minn. Stat. §§ 626A.28(3)(d), 626A.42(2); Mont. Code Ann. § 46-5-110(1)(a); Utah Code Ann. § 77-23c-102(1)(a); 2015

N.H. Laws ch. 262 (to be codified at N.H. Rev. Stat. Ann. § 644-A:2). Additional states require a warrant for real-time cell phone location data. *See, e.g.*, *State v. Earls*, 70 A.3d 630 (N.J. 2013); 725 Ill. Comp. Stat. 168/10; Ind. Code 35-33-5-12; Md. Code Ann. Crim. Proc. § 1-203.1(b); Va. Code Ann. § 19.2-70.3(C). Requiring a warrant for CSLI would harmonize the protections available in state and federal investigations in these states as well.

2. The circuits are split over whether the third-party doctrine eliminates people's reasonable expectation of privacy in their historical CSLI. The Eleventh Circuit joins the Fifth Circuit in holding that there is no reasonable expectation of privacy in historical cell site location information under the Fourth Amendment, and therefore that no warrant is required. In *In re Application of the U.S. for Historical Cell Site Data*, 724 F.3d 600 (5th Cir. 2013), a magistrate judge rejected a government application for an order pursuant to the Stored Communications Act, 18 U.S.C. § 2703(d), seeking historical CSLI, holding that a warrant is required under the Fourth Amendment. On appeal, the Fifth Circuit held that any expectation of privacy in CSLI is vitiated by the cell service provider's creation and possession of the records. 724 F.3d at 613. The court rejected the argument that cell phone users retain an expectation of privacy in the data because they do not voluntarily convey their location information to the service provider. *Id.* at 613–14; *see also United States v. Guerrero*, 768 F.3d 351, 358–59 (5th Cir. 2014)

(applying *In re Application* in the context of a suppression motion).[18]

The Third Circuit takes the contrary position. In a decision issued more than a year before this Court's opinion in *Jones*, the Third Circuit held that magistrate judges have discretion to require a warrant for historical CSLI if they determine that the location information sought will implicate the suspect's Fourth Amendment privacy rights by showing, for example, when a person is inside a constitutionally protected space. *Third Circuit CSLI Opinion*, 620 F.3d at 319. In reaching that conclusion, the court rejected the argument that a cell phone user's expectation of privacy is eliminated by the service provider's ability to access that information:

> A cell phone customer has not "voluntarily" shared his location information with a cellular provider in any meaningful way. . . . [I]t is unlikely that cell phone customers are aware that their cell phone providers collect and store historical location information. Therefore, "[w]hen a cell

[18] The Sixth Circuit has held that the Fourth Amendment does not apply to shorter-term real-time tracking of a cell phone user's location during a single three-day multi-state trip on public highways. *United States v. Skinner*, 690 F.3d 772 (6th Cir. 2012). The court reserved decision about "situations where police, using otherwise legal methods, so comprehensively track a person's activities that the very comprehensiveness of the tracking is unreasonable for Fourth Amendment purposes." *Id.* at 780 (citing *Jones*, 132 S. Ct. at 957–64).

> phone user makes a call, the only information that is voluntarily and knowingly conveyed to the phone company is the number that is dialed and there is no indication to the user that making that call will also locate the caller; when a cell phone user receives a call, he hasn't voluntarily exposed anything at all."

Id. at 317–18 (last alteration in original). Therefore, the court held, the third-party doctrine does not apply to historical CSLI records. *Id.*

3. The circuits are split over whether there is a reasonable expectation of privacy in longer-term location information collected by electronic means. In *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010), *aff'd on other grounds sub nom. Jones*, 132 S. Ct. 945, the D.C. Circuit held that using a GPS device to surreptitiously track a car over the course of 28 days violates reasonable expectations of privacy and is therefore a Fourth Amendment search. *Id.* at 563. The court explained that "[p]rolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble. These types of information can each reveal more about a person than does any individual trip viewed in isolation." *Id.* at 562. Therefore, people have a reasonable expectation of privacy in the intimate and private information revealed by "prolonged GPS monitoring." *Id.* at 563.

Although this Court affirmed on other grounds, relying on a trespass-based rationale, the

D.C. Circuit's approach under the *Katz* reasonable-expectation-of-privacy test remains controlling law in that circuit.[19] And that holding does not depend on the nature of the tracking technology at issue: prolonged electronic surveillance of the location of a person's cell phone is at least as invasive as prolonged electronic surveillance of the location of her car. *See Jones*, 132 S. Ct. at 963 (Alito, J., concurring in the judgment) (explaining that law enforcement access to cell phone location information is "[p]erhaps most significant" of the "many new devices that permit the monitoring of a person's movements.").

The Eleventh Circuit rejected this reasoning when it opined that "reasonable expectations of privacy under the Fourth Amendment do not turn on the quantity of non-content information MetroPCS collected in its historical cell tower location records." Pet. App. 36a. In doing so, the court of appeals widened the circuit split over whether people have a reasonable expectation of privacy in their longer-term location information—a split that existed prior to *Jones* and continues today. *Compare Maynard*, 615 F.3d at 563 (prolonged electronic location tracking is a search under the Fourth Amendment), *with Pineda-Moreno*, 591 F.3d at 1216–1217 (prolonged electronic location tracking is not a search under the Fourth Amendment), *United States v. Garcia*, 474 F.3d 994, 996–99 (7th Cir. 2007) (same),

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[19] *See* Will Baude, *Further Thoughts on the Precedential Status of Decisions Affirmed on Alternate Grounds*, The Volokh Conspiracy (Dec. 3, 2013, 7:27 PM), http://volokh.com/2013/12/03/thoughts-precedential-status-decisions-affirmed-alternate-grounds/.

and United States v. Marquez, 605 F.3d 604, 609 (8th Cir. 2010) ("A person traveling via automobile on public streets has no reasonable expectation of privacy in his movements from one locale to another.").

4. The circuits are split over whether the warrant requirement applies when there is a reasonable expectation of privacy in CSLI or other electronically collected location information. A majority of the *en banc* Eleventh Circuit held that, even if Petitioner had a reasonable expectation of privacy in his CSLI, the government's warrantless seizure and search of the records was reasonable. Pet. App. 39a–43a. That alternate holding creates a split with the courts that have found there is a reasonable expectation of privacy in CSLI or other electronically collected location information, and that have required a warrant for law enforcement access to it.[20] *See Tracey* 152 So.3d at 526 (probable cause warrant required for tracking CSLI); *Augustine*, 4 N.E. 3d at 866 (same, under state constitution); *Earls*, 70 A.3d at 588 (same); *see also Maynard*, 615 F.3d at 566–67 (holding that warrant is required for prolonged GPS tracking of a car); *People v. Weaver*, 909 N.E.2d 1195, 1203 (N.Y. 2009) (warrant required for GPS tracking under state constitution).

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[20] *See* Orin Kerr, *Eleventh Circuit Rules for the Feds on Cell-Site Records – But Then Overreaches*, Wash. Post (May 5, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/05/eleventh-circuit-rules-for-the-feds-on-cell-site-records-but-then-overreaches/ ("[T]he en banc court's alternative holding . . . [is] a novel development of the law that cuts against a lot of practice and precedent.").

II. THE *EN BANC* ELEVENTH CIRCUIT ERRED IN HOLDING THAT THE CONDUCT HERE WAS NOT A SEARCH.

A. The Eleventh Circuit Erred in Holding That There Is No Reasonable Expectation of Privacy in Historical CSLI.

The Eleventh Circuit majority held that the mere fact that the government obtained the CSLI records from Petitioner's service provider, rather than from Petitioner himself, dooms his Fourth Amendment claim in light of *United States v. Miller* and *Smith v. Maryland*. This Court should make clear that a cell service provider's ability to access customers' location data does not in itself eliminate cell phone users' reasonable expectation of privacy in that data.

The mere fact that another person or entity has access to or control over private records does not in itself destroy an otherwise reasonable expectation of privacy. Though third-party access to records may be one factor weighing on the *Katz* reasonable-expectation-of-privacy analysis, the third-party doctrine elucidated in *Miller* and *Smith* is not and never has been an on-off switch. *See Florida v. Jardines*, 133 S. Ct. 1409, 1418–19 (2013) (Kagan, J., concurring) (expectation of privacy in odors detectable by a police dog that emanate from a home); *Jones*, 132 S. Ct. at 964 (Alito, J., concurring in the judgment); (information about location and movement in public, even though exposed to public view); *Kyllo*, 533 U.S. 27 (thermal signatures emanating from a home); *Ferguson v. City of*

Charleston, 532 U.S. 67, 78 (2001) ("The reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent."); *Bond v. United States*, 529 U.S. 334, 336 (2000) (bag exposed to the public on luggage rack of bus); *Minnesota v. Olson*, 495 U.S. 91, 98–99 (1990) ("an overnight guest has a legitimate expectation of privacy in his host's home" even though his possessions may be disturbed by "his host and those his host allows inside"); *United States v. Jacobsen*, 466 U.S. 109, 115 (1984) (reasonable expectation of privacy in letters and sealed packages entrusted to private freight carrier); *Katz v. United States*, 389 U.S. 347 (1967) (reasonable expectation of privacy in contents of phone call even though call is conducted over private companies' networks); *Stoner v. California*, 376 U.S. 483, 487–90 (1964) (implicit consent to janitorial personnel to enter motel room does not amount to consent for police to search room); *Chapman v. United States*, 365 U.S. 610, 616–17 (1961) (search of a house invaded tenant's Fourth Amendment rights even though landlord had authority to enter house for some purposes).

The Eleventh Circuit erred in treating the fact of third party access to the records as dispositive. Pet. App. 26a–30a. This Court should make clear that the reasonable-expectation-of-privacy test relies on a totality-of-the-circumstances analysis. Avoiding mechanical applications of holdings from the analog age is of paramount importance when dealing with highly sensitive and voluminous digitized records. *See Riley*, 134 S. Ct. at 2489. It is virtually impossible to participate fully in modern life without

leaving a trail of digital breadcrumbs that create a pervasive record of the most sensitive aspects of our lives. Ensuring that technological advances do not "erode the privacy guaranteed by the Fourth Amendment," *Kyllo*, 533 U.S. at 34, requires nuanced applications of analog-age precedents.

This is not to say that proper resolution of this case requires wholesale rejection of *Smith* and *Miller*'s holdings. Even on the plain terms of those decisions, Petitioner retains a reasonable expectation of privacy in his CSLI.

To assess an individual's expectation of privacy in records held by a third party this Court has looked to, among other factors, whether the records were "voluntarily conveyed" to that entity, *Miller*, 425 U.S. at 442; *Smith*, 442 U.S. at 744, and what privacy interest a person has in the information the records reveal, *Miller*, 425 U.S. at 442; *Smith*, 442 U.S. at 741–42. Unlike the dialed phone numbers and limited bank records at issue in *Smith* and *Miller*, "[a] cell phone customer has not 'voluntarily' shared his location information with a cellular provider in any meaningful way." *Third Circuit CSLI Opinion*, 620 F.3d at 317. Location information is not entered by the user into the phone, nor otherwise affirmatively transmitted to the service provider. This is doubly true when a person receives a call, thereby taking *no* action that would knowingly or voluntarily reveal location.

Moreover, the transcript of a person's movements, locations, and activities over the course of time contained in CSLI records is exceedingly sensitive and private. This is so for at least two reasons. First, because people carry their phones

with them virtually everywhere they go, including inside their homes and other constitutionally protected spaces, cell phone location records can reveal information about presence, location, and activity in those spaces. Pet. App. 92a, 119a–120a. In *United States v. Karo*, 468 U.S. 705 (1984), this Court held that location tracking implicates Fourth Amendment privacy interests when it may reveal information about individuals in areas where they have reasonable expectations of privacy. The Court explained that using an electronic device—there, a beeper—to infer facts about "location[s] not open to visual surveillance," like whether "a particular article is actually located at a particular time in the private residence," or to later confirm that the article remains on the premises, was just as unreasonable as physically searching the location without a warrant. *Id.* Such location tracking "falls within the ambit of the Fourth Amendment when it reveals information that could not have been obtained through visual surveillance" from a public place. *Id.* at 707; *see also Kyllo*, 533 U.S. at 36 (use of thermal imaging device to learn information about interior of home constitutes a search).

Second, CSLI reveals a great sum of sensitive and private information about a person's movements and activities in public and private spaces that, at least over the longer term, violates expectations of privacy. In *Jones*, although the majority opinion relied on a trespass-based rationale to determine that a search had taken place, 132 S. Ct. at 949, it specified that "[s]ituations involving merely the transmission of electronic signals without trespass would remain subject to *Katz* [reasonable-expectation-of-privacy] analysis." *Id.* at 953. Five

Justices conducted a *Katz* analysis, and concluded that at least longer-term location tracking violates reasonable expectations of privacy. *Id.* at 960, 964 (Alito, J., concurring in the judgment); *id.* at 955 (Sotomayor, J., concurring).

This conclusion did not depend on the particular type of tracking technology at issue in *Jones*, and Justice Alito identified the proliferation of mobile devices as "[p]erhaps most significant" of the emerging location tracking technologies. *Id.* at 963. As Justice Sotomayor explained, electronic location tracking implicates the Fourth Amendment because it "generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations." *Id.* at 955. This Court recently amplified that point when it explained that cell phone location data raises particularly acute privacy concerns because it "can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building." *Riley*, 134 S. Ct. at 2490 (citing *Jones,* 132 S. Ct. at 955 (Sotomayor, J., concurring)).

The records obtained by the government in this case implicate both the expectation of privacy in private spaces and the expectation of privacy in longer-term location information. They allow the government to know or infer when Davis slept at home and when he didn't. Pet. App. 92a. They show his movements around town, nearly down to the minute. *Id.* at 91a–93a. They even allow the government to learn whom he associated with and when. *See* Trial Tr. 13, Feb. 8, 2012, ECF No. 287.

It is not surprising, therefore, that recent polling data shows that more than 80 percent of people consider "[d]etails of [their] physical location over time" to be "sensitive"—evincing greater concern over this information than over the contents of their text messages, a list of websites they have visited, or their relationship history. Pew Research Ctr., *Public Perceptions of Privacy and Security in the Post-Snowden Era*, 32, 34 (Nov. 12, 2014).[21] Historical CSLI enables the government to "monitor and track our cell phones, and thus ourselves, with minimal expenditure of funds and manpower, [which] is just the type of gradual and silent encroachment into the very details of our lives that we as a society must be vigilant to prevent." *Tracey*, 152 So. 3d at 522 (internal quotation marks omitted).[22]

B. The Eleventh Circuit Erred in Holding That Even if There Is a Reasonable Expectation of Privacy in Historical CSLI, Warrantless Search is Nonetheless Reasonable.

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[21] http://www.pewinternet.org/files/2014/11/PI_PublicPerceptionsofPrivacy_111214.pdf.

[22] In concluding that acquisition of historical CSLI is a Fourth Amendment search, this Court need not hold the Stored Communications Act unconstitutional. The SCA contains a mechanism for law enforcement to obtain a warrant for CSLI. *See* 18 U.S.C. § 2703(c)(1)(A). "Section 2703(c) may be fairly construed to provide for 'warrant procedures' to be followed when the government seeks customer records that may be protected under the Fourth Amendment, including historical cell site location information." *Fifth Circuit CSLI Opinion*, 724 F.3d at 617 (Dennis, J., dissenting).

In an alternate holding, the Eleventh Circuit majority concluded that even if obtaining historical CSLI is a Fourth Amendment search, warrantless seizure and search of the records is reasonable without a warrant. Pet. App. 39a–43a. That conclusion conflicts with this Court's longstanding admonition that warrantless searches are "'*per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions.'" *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2452 (2015) (quoting *Arizona v. Gant*, 556 U.S. 332, 338 (2009)) (alteration in original).

This Court has recognized that certain searches outside the scope of traditional law enforcement, or aimed at categories of people under circumstances where they enjoy reduced expectations of privacy, may not require probable cause warrants. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000). Here, however, no "special need" beyond normal law enforcement was served by the request for Petitioner's CSLI. Instead, even the *en banc* Eleventh Circuit acknowledged that the government's search of Petitioner's CSLI served "[t]he societal interest in promptly apprehending criminals and preventing them from committing future offenses." Pet. App. 42a. Nor did Petitioner have a reduced expectation of privacy justifying rejection of the warrant requirement. *Compare Samson v. California*, 547 U.S. 843, 850 (2006) (parolees); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995) (student athletes). The Eleventh Circuit's alternate holding thus conflicts with longstanding precedent of this Court.

III. THE ELEVENTH CIRCUIT ERRED BY APPLYING THE GOOD-FAITH EXCEPTION TO THE EXCLUSIONARY RULE.

The Eleventh Circuit held that, even if warrantless acquisition of Petitioner's historical cell phone location records violated the Fourth Amendment, denial of the suppression motion would have been proper because the government relied in good faith on the magistrate judge's issuance of an order under the Stored Communications Act. Pet. App. 43a n.20, 75a n.35, 122a–124a. In doing so, the court cited *United States v. Leon*, 468 U.S. 897 (1984), which held that evidence will not be suppressed if obtained by police in reliance on a facially valid warrant that later was invalidated. Here, however, the government did not seek or rely on a warrant; it relied on a court order obtained without reference to probable cause. Further, it was a prosecutor charged with knowing and upholding the Constitution, rather than a police officer "'engaged in the often competitive enterprise of ferreting out crime,'" *United States v. Chadwick*, 433 U.S. 1, 9 (1977), who sought and obtained the order. Therefore, the good-faith exception to the exclusionary rule does not apply.

Without the exclusionary rule, the Fourth Amendment would be "of no value" and "might as well be stricken from the Constitution." *Weeks v. United States*, 232 U.S. 383, 393 (1914). Nonetheless, the exclusionary rule does not apply automatically. The purpose of the rule "is to deter future Fourth Amendment violations." *Davis v. United States*, 131 S. Ct. 2419, 2426 (2011). That purpose would be

served by suppressing the unconstitutionally obtained evidence here.

The reasoning of *Leon* does not extend to the circumstances of this case for two reasons. First, the role of the judge is different. In *Leon*, the judge's role in considering a probable cause affidavit and issuing a warrant was to assess the adequacy of the factual probable cause recitation in the officer's sworn declaration and to determine whether the warrant was sufficiently particularized. Those are decisions well within the competence and experience of a judge when acting ex parte.

When considering an application for a 2703(d) order, however, an additional question arises, one ill-suited to an ex parte proceeding. The judge must decide whether the records requested are properly obtainable with such an order, or whether a warrant is required by the Fourth Amendment instead. But considering legal arguments of that nature in an ex parte proceeding, with only the government in attendance, places the court at the government's mercy. When a prosecutor makes the choice to submit an application under 18 U.S.C. § 2703(d) seeking CSLI, without alerting the court to the possible constitutional deficiency of such application, she should bear the risk of the court being ignorant of arguments on the other side, and of the order being subsequently ruled unconstitutional.

Second, suppression will provide deterrence because, unlike in *Leon* where the *police* relied on the warrant, here a *prosecutor* was the relevant actor. Unlike police, a prosecutor, as an attorney and officer of the court, "'may properly be charged with knowledge[] that the search was unconstitutional

under the Fourth Amendment.'" *Illinois v. Krull*, 480 U.S. 340, 348–49 (1987) (citation omitted). Prosecutors are bound "to interpret the Constitution" and to "enforce the law within constitutional boundaries." Russell M. Gold, *Beyond the Judicial Fourth Amendment: The Prosecutor's Role*, 47 U.C. Davis L. Rev. 1591, 1623 (2014).

The Stored Communications Act makes available to the government two relevant types of legal process: a court order based on "reasonable grounds" that the records sought are "relevant and material" to an investigation, 18 U.S.C. § 2703(c)(1)(b), (d); and a probable cause warrant, *id.* § 2703(c)(1)(a). By the time the prosecutor applied for the SCA order in this case in February 2011, a number of magistrate judges had held that the Fourth Amendment compels the government to use the warrant mechanism under the SCA rather than an order under § 2703(d), casting the constitutionality of the latter procedure in significant doubt. *See, e.g.*, *In re Application of U.S. for Historical Cell Site Data*, 747 F. Supp. 2d 827 (S.D. Tex. 2010); *In re Application of U.S. for an Order Authorizing the Release of Historical Cell-Site Information*, 736 F. Supp. 2d 578 (E.D.N.Y. 2010), *rev'd without explanation*, Nov. 29, 2010; *In re Application of U.S. for an Order Directing a Provider of Elec. Commc'n Serv. to Disclose Records to the Gov't*, 534 F. Supp. 2d 585 (W.D. Pa. 2008) (opinion joined by all magistrate judges in the district), *vacated and remanded for further factfinding and analysis*, 620 F.3d 304 (3d Cir. 2010). The D.C. Circuit had also decided *Maynard*, holding that longer-term electronic location tracking is a Fourth Amendment search. 615 F.3d 544.

In light of these authorities, a cautious and responsible prosecutor should have known that seeking historical CSLI using a § 2703(d) order seriously risked violating the Constitution. The prudent course would have been to seek a warrant instead. Suppressing the evidence in this case would deter future violations by incentivizing prosecutors to choose the more constitutionally valid course when faced with a decision of what legal process to use.[23]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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[23] Even if the Court determines that the good-faith exception applies, it should still grant certiorari to decide the underlying Fourth Amendment question. As this Court has explained, "applying the good-faith exception in this context will not prevent judicial reconsideration of prior Fourth Amendment precedents." *Davis*, 131 S. Ct. at 2433. Unless the Court opines on what the Fourth Amendment means and requires in the context of searches based on new and evolving technologies, the law will stagnate and law enforcement and the public will be left without the guidance they so acutely require.

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Dated: July 30, 2015

APPENDIX

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 12-12928

D.C. Docket No. 1:10-cr-20896-JAL-2

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

QUARTAVIOUS DAVIS,
Defendant-Appellant.

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

(May 5, 2015)

Before ED CARNES, Chief Judge, TJOFLAT, HULL, MARCUS, WILSON, WILLIAM PRYOR, MARTIN, JORDAN, ROSENBAUM, JULIE CARNES, and JILL PRYOR, Circuit Judges.

HULL, Circuit Judge:

I. BACKGROUND

Appellant Quartavius Davis[1] was convicted by a jury on several counts of Hobbs Act robbery, 18 U.S.C. § 1951(b)(1), (3), conspiracy, Id. § 1951(a), and knowing possession of a firearm in furtherance of a crime of violence, Id. §§ 924(c)(1)(A)(ii), 2. The district court entered judgment on the verdict, sentencing Davis to consecutive terms of imprisonment totaling 1,941 months. In this appeal, we are called on to decide whether the court order authorized by the Stored Communications Act, Id. § 2703(d), compelling the production of a third-party telephone company's business records containing historical cell tower location information, violated Davis's Fourth Amendment rights and was thus unconstitutional. We hold it did not and was not.

Therefore, the district court did not err in denying Davis's motion to suppress and we affirm Davis's convictions. We reinstate the panel opinion, United States v. Davis, 754 F.3d 1205 (11th Cir.), reh'g en banc granted, opinion vacated, 573 F. App'x 925 (11th Cir. 2014), with respect to all issues except those addressed in Parts I and II, 754 F.3d at 1210-18, which are now decided by the en banc court.[2]

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[1] The Presentence Investigation Report notes that "Quartavius" is the correct spelling of appellant's first name, despite the spelling in the caption.

[2] Davis's advisory guidelines range was 57 to 71 months' imprisonment for his Hobbs Act robberies. However, each of his seven § 924(c) convictions required consecutive sentences. 18 U.S.C. § 924(c)(1)(D)(ii). The district court sentenced Davis to concurrent terms of 57 months imprisonment on counts 1, 2, 4,

A. Seven Armed Robberies in a Two-Month Period

Quartavius Davis committed seven separate armed robberies in a two-month period. From the beginning of August 2010 to the beginning of October 2010, Davis and accomplices, bearing an array of firearms, terrorized a wide range of South Florida businesses, including a pizzeria, a gas station, a drugstore, an auto parts store, a beauty salon, a fast food restaurant, and a jewelry store.

On February 18, 2011, a federal grand jury returned a seventeen-count indictment against Davis and five codefendants. Davis was named in sixteen of the seventeen counts. The indictment charged violations of the Anti-Racketeering Act, 18 U.S.C. § 1951 (Hobbs Act), and conspiracy to violate the Hobbs Act. The indictment specifically charged Davis with conspiracy to engage in Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (Counts 1, 15); seven Hobbs Act armed robberies, in violation of 18 U.S.C. §§ 1951(a), 2 (Counts 2, 4, 6, 8, 10, 13, 16); and knowingly using, carrying, and possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii), 2 (Counts 3, 5, 7, 9, 11, 14, 17).

6, 8, 10, 13, 15, and 16, plus a consecutive term of 84 months on count 3, plus consecutive terms of 300 months' imprisonment on counts 5, 7, 9, 11, 14, and 17.

The panel opinion affirmed Davis's convictions but vacated the application of the guidelines sentencing increase for "brandishing" of a firearm. Davis, 754 F.3d at 1220-21, 1223. To be clear, that disposition stands.

All of Davis's codefendants pled guilty to various counts. Davis alone went to trial. The jury convicted Davis on all charged counts.

At trial, the prosecution offered evidence of two conspiracies to commit Hobbs Act robbery and evidence that Davis took part in each conspiracy and each robbery. The prosecution further presented evidence that the conspirators committed such robberies. One member of each conspiracy testified for the government. Codefendant Willie Smith ("Smith") testified as to the first conspiracy, encompassing six robberies at commercial establishments, including a Little Caesar's restaurant, an Amerika Gas Station, a Walgreens drug store, an Advance Auto Parts store, a Universal Beauty Salon, and a Wendy's restaurant. Codefendant Michael Martin ("Martin") testified as to the second conspiracy, encompassing the robbery of a Mayors Jewelry store. Smith and Martin testified that Davis was involved in each robbery, where they wore masks, carried guns, and stole items such as cash, cigarettes, and watches.

Separately, an eyewitness, Edwin Negron, testified regarding Davis's conduct at the Universal Beauty Salon and the adjacent martial arts studio. He testified that Davis pointed a gun at his head, pushed both a 77-year-old woman and Negron's wife to the ground, and took several items from Negron and others. Another eyewitness, Antonio Brooks, testified that Brooks confronted Davis and his accomplices outside the Wendy's after that robbery. Brooks testified that Davis fired a gun at Brooks, and that Brooks returned fire towards the getaway car.

Beyond the accomplice and eyewitness testimony, the government produced additional evidence. Surveillance videos showed a man matching Davis's description participating in the robberies at Walgreens, Advance Auto Parts, Wendy's, and Mayors Jewelry. Smith and Martin identified Davis on the videos. DNA shown to be Davis's was recovered from the getaway car used to flee the scene of the Universal Beauty Salon robbery and the Mayors Jewelry store robbery.

In addition, the prosecution introduced telephone records obtained from MetroPCS for the 67-day period from August 1, 2010, through October 6, 2010, the time period spanning the first and last of the seven armed robberies.[3] The toll records show the telephone numbers for each of Davis's calls and the number of the cell tower that connected each call. A MetroPCS witness identified his company's cell tower glossary, which lists the physical addresses, including longitude and latitude, of MetroPCS's cell towers. A police witness then located on a map the precise addresses (1) of the robberies and (2) of the cell towers connecting Davis's calls around the time of six of the seven robberies. While there was some distance between them, the cell tower sites were in the general vicinity of the robbery sites.

The location of the cell user, though, is not precise. The testimony tells us (1) the cell tower used will typically be the cell tower closest to the user, (2) the cell tower has a circular coverage radius of

[3] The first robbery took place on August 7, 2010, and the final robbery took place on October 1, 2010.

varying sizes, and (3) although the tower sector number indicates a general direction (North, South, etc.) of the user from the tower, the user can be anywhere in that sector. Despite this lack of precision as to where Davis's cell phone was located, the cell tower evidence did give the government a basis for arguing calls to and from Davis's cell phone were connected through cell tower locations that were near the robbery locations, and thus Davis necessarily was near the robberies too.

This appeal concerns the introduction of MetroPCS's toll records and glossary as evidence against Davis at trial. We thus review in more detail how the government acquired MetroPCS's records, the types of data in the records, and the witnesses' testimony about the records.

B. Court Order Regarding MetroPCS Business Records

After Davis's arrest, the government acquired MetroPCS's business records by court order. In February 2011, the government applied to a federal magistrate judge for a court order directing various phone companies to disclose stored telephone communications records for four subject telephone numbers that included a number ending in 5642 (the "5642 number"). The application requested production of stored "telephone subscriber records" and "phone toll records," including the "corresponding geographic location data (cell site)," for the 5642 number. The government requested only records "for the period from August 1, 2010 through October 6, 2010." The government sought clearly-delineated records that were both historical and tailored to the crimes under investigation.

The government did so following the explicit design of the governing statute, the Stored Communications Act ("SCA"), 18 U.S.C. § 2701 et seq. Section 2703 of the SCA provides that a federal or state governmental entity may require a telephone service provider to disclose "a record . . . pertaining to a subscriber to or a customer of such service (not including the contents of communications)" if "a court of competent jurisdiction" finds "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." Id. § 2703(c)(1)(A), (B), (d). The court order under subsection (d) does not require the government to show probable cause.

No one disputes that the government's § 2703 application to the magistrate judge contained "specific and articulable facts" showing "reasonable grounds" to believe MetroPCS's business records—pertaining to Davis's 5642 cell phone number—were "relevant and material" to the government's investigation. The government's § 2703 application provided a detailed summary of the evidence implicating Davis in the seven robberies, including post-Miranda statements from two accomplices and the DNA evidence found in two getaway cars. Undisputedly, a sufficient showing was made to satisfy the SCA's statutory requirements.

The magistrate judge's order granted the § 2703 application. The court order required MetroPCS, the third-party cellular telephone service provider, to produce "all telephone toll records and geographic location data (cell site)" for the 5642

number during the period August 1, 2010 through October 6, 2010.

MetroPCS complied. For this two-month time period, MetroPCS produced its stored telephone records for number 5642 showing these five types of data: (1) telephone numbers of calls made by and to Davis's cell phone; (2) whether the call was outgoing or incoming; (3) the date, time, and duration of the call; (4) the number assigned to the cell tower that wirelessly connected the calls from and to Davis; and (5) the sector number associated with that tower. For ease of reference, the fourth and fifth items are collectively called "historical cell tower location information."

Importantly though, MetroPCS's business records did not show (1) the contents of any call; (2) the contents of any cell phone; (3) any data at all for text messages sent or received; or (4) any cell tower location information for when the cell phone was turned on but not being used to make or receive a call. The government did not seek, nor did it obtain, any GPS or real-time (also known as "prospective") location information.

Before trial, Davis moved to suppress MetroPCS's business records for number 5642. Although the government obtained them through a statutorily-prescribed judicial order, Davis argued the evidence should be suppressed because the § 2703(d) production of MetroPCS's records constituted a search under the Fourth Amendment and thus

required probable cause and a search warrant. The district court denied the motion.[4]

C. Evidence at Trial

During the jury trial, the government introduced the MetroPCS records for the 5642 number, which was registered to "Lil Wayne."[5] The government also introduced evidence tying Davis to the 5642 phone number. One of Davis's codefendants testified that Davis used the 5642 number from August 2010 to October 2010. And a codefendant's cell phone, which was entered into evidence, listed the 5642 number under Davis's nickname, "Quat," in the phone's contact list.[6]

Michael Bosillo, a custodian of records from MetroPCS, identified and testified about the business records regarding number 5642. He testified that MetroPCS's toll records, described above, are created and maintained in the regular course of its business.

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[4] Davis did not present any evidence in support of his Fourth Amendment claim, either at the suppression hearing or at trial.

[5] MetroPCS had not required the subscriber Davis to give his true name. Instead, MetroPCS sells phones with monthly plans—averaging $40 a month—paid up front. When that plan expires, the subscriber pays another monthly payment up front or the plan is cancelled.

[6] The government also obtained MetroPCS records for three other cell phone numbers used by Davis's co-conspirators, which were registered under the alias names of "Nicole Baker," "Shawn Jay," and "Dope Boi Dime." The issue before us involves only Davis's cell phone number, the 5642 number registered to "Lil Wayne." In this en banc appeal, Davis did not raise arguments about the other cell phone numbers.

As to cell tower location, Bosillo explained that, when a cellular phone user makes a call, the user's cell phone sends a signal to a nearby cell tower, which is typically but not always the closest tower to the phone. Two people driving together in the same car might be using different cell towers at the same time. Each cell phone tower has a circular coverage radius, and the "coverage pie" for each tower is further divided into either three or six parts, called sectors.

Bosillo testified that a cell tower would generally have a coverage radius of about one to one-and-a-half miles and that an individual cell phone user could "be anywhere" in the specified sector of a given cell tower's range. Bosillo also testified that the density of cell towers in an urban area like Miami would make the coverage of any given tower smaller, but he never said how much smaller.[7]

Bosillo also testified that the toll records for Davis's cell number 5642 show only (1) the number of the cell tower used to route Davis's call, and (2) the sector number associated with that tower. Thus, to determine the location of any cell tower used, Bosillo identified and explained the cell tower glossary created and kept by MetroPCS. The MetroPCS

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[7] Davis and various amici argue that some cellular telephone companies have now increased their network coverage by augmenting their cell tower network with low-power small cells, or "femtocells," which can cover areas as small as ten meters. There is no evidence, or even any allegation, that the MetroPCS network reflected in the records in this case included anything other than traditional cell towers and the facts of this case do not require, or warrant, speculation as to the newer technology.

glossary listed (1) each of its cell tower numbers, (2) the physical address, including latitude and longitude, of that cell tower, and (3) how many sectors are within each cell tower's range.

This MetroPCS glossary, along with its toll records, allowed the government to determine the precise physical location of the cell towers that connected calls made by and to Davis's cell phone around the time of the robberies, but not the precise location of that cell phone or of Davis.

Davis objected to the introduction of the toll records for the account corresponding to the 5642 number, the subscriber records, and MetroPCS's cell-tower glossary. The district court overruled those objections.

The government also introduced into evidence maps that showed the locations of six of the armed robberies in relation to certain cell towers. Detective Mitch Jacobs examined the records, analyzing the records only for the days the armed robberies occurred. Detective Jacobs had, at that time, been employed by the Miami-Dade Police Department for 27 years and for the last ten years had worked with cases involving cell tower location information. He had utilized cell tower location information for his investigations of homicides, parental kidnappings, robberies, fugitives, and various other types of crime.

Detective Jacobs created the maps introduced at trial based on MetroPCS's records. These maps showed that, at or near the time of the armed robberies, cell phones linked to Davis and his codefendants made and received numerous calls routed through cell towers located in the general

vicinity of the robbery locations. Detective Jacobs testified, and the maps showed, that this was true for six of the seven armed robberies. On the maps, Jacobs placed: (1) the location of the robberies and (2) the location of the cell towers that routed calls from Davis and his codefendants' phones.[8]

The distance between the robbery and cell tower locations was never quantified. The distance between the cell user and the cell tower was never quantified, but the evidence—records and testimony—as a whole suggests Davis's calls occurred within an area that covers at least several city blocks. The government argued the cell tower evidence showed Davis was near the robberies when they occurred.

D. The Appeal

Following his convictions by the jury, Davis appealed. A panel of this Court affirmed his convictions, but held that the government violated Davis's rights under the Fourth Amendment by obtaining stored telephone communications records from MetroPCS, a third-party telephone service provider, pursuant to the order of the magistrate judge issued under the SCA, 18 U.S.C. § 2703(c)(1)(B), (d). United States v. Davis, 754 F.3d 1205, 1217 (11th Cir. 2014). Nevertheless, the panel affirmed Davis's convictions based on the good-faith exception to the exclusionary rule. Id. at 1217-18. This Court vacated the panel's decision and granted the government's petition for rehearing en banc.

[8] The maps did not show any cell tower's coverage radius or display any cell tower's sectors.

United States v. Davis, 573 F. App'x 925 (11th Cir. 2014).

II. STANDARD OF REVIEW

This Court reviews de novo constitutional challenges to a federal statute. United States v. Campbell, 743 F.3d 802, 805 (11th Cir.), cert. denied, 135 S. Ct. 704 (2014). We review the district court's legal conclusions de novo and its findings of fact for clear error. United States v. Jordan, 635 F.3d 1181, 1185 (11th Cir. 2011). In the context of an appeal from the denial of a suppression motion, all facts are construed in the light most favorable to the party prevailing below—here, the government. United States v. Gibson, 708 F.3d 1256, 1274 (11th Cir. 2013).

III. DISCUSSION

On appeal, Davis argues the government violated his Fourth Amendment rights by obtaining historical cell tower location information from MetroPCS's business records without a search warrant and a showing of probable cause. Davis contends that the SCA, as applied here, is unconstitutional because the Act allows the government to obtain a court order compelling MetroPCS to disclose its historical cell tower location records without a showing of probable cause. Davis claims the Fourth Amendment precludes the government from obtaining a third-party company's business records showing historical cell tower location information, even for a single day, without a search warrant issued to that third party.

In the controversy before us, there is no GPS device, no physical trespass, and no real-time or prospective cell tower location information. This case narrowly involves only (1) government access to the existing and legitimate business records already created and maintained by a third-party telephone company and (2) historical information about which cell tower locations connected Davis's cell calls during the 67-day time frame spanning the seven armed robberies. We start by reviewing the SCA, which authorized the production of MetroPCS's business records.

A. The Statute

Under the SCA, Congress authorized the U.S. Attorney to obtain court orders requiring "a provider of electronic communication service . . . to disclose a record or other information pertaining to a subscriber to . . . such service (not including the contents of communications)." 18 U.S.C. § 2703(c). Section 2703 directs that a judge "shall issue" the order if the government "offers specific and articulable facts showing that there are reasonable grounds to believe that the . . . records or other information sought[ ] are relevant and material to an ongoing criminal investigation." Id. § 2703(d) (emphasis added). While this statutory standard is less than the probable cause standard for a search warrant, the government is still required to obtain a court order and present to a judge specific and articulable facts showing reasonable grounds to believe the records are relevant and material to an ongoing criminal investigation. See Id.

The SCA does not lower the bar from a warrant to a § 2703(d) order. Rather, requiring a court order under § 2703(d) raises the bar from an ordinary subpoena to one with additional privacy protections built in. The government routinely issues subpoenas to third parties to produce a wide variety of business records, such as credit card statements, bank statements, hotel bills, purchase orders, and billing invoices.[9] In enacting the SCA, Congress has required more before the government can obtain telephone records from a third-party business. The SCA goes above and beyond the constitutional requirements regarding compulsory subpoena process.

A number of the SCA's privacy-protection provisions warrant mention. First, the SCA affords citizens protection by "interpos[ing] a 'neutral and detached magistrate' between the citizen and the officer engaged in the often competitive enterprise of ferreting out crime." See United States v. Karo, 468 U.S. 705, 717, 104 S. Ct. 3296, 3304 (1984) (internal quotation marks omitted). Congress made review by a judicial officer a pre-condition for the issuance of a § 2703(d) order. Moreover, the telephone records are made available only if a judicial officer finds (or the government shows) a factual basis for why the

[9] See, e.g., United States v. Willis, 759 F.2d 1486, 1498 (11th Cir. 1985) (motel registration records); United States v. Phibbs, 999 F.2d 1053, 1077 (6th Cir. 1993) (credit card statements). Those statements not only show location at the time of purchase, but also reveal intimate details of daily life, such as shopping habits, medical visits, and travel plans.

records are material to an ongoing criminal investigation.

In addition, the SCA generally prohibits telephone companies from voluntarily disclosing such records to "a governmental entity." Id. § 2702(a)(3), (c)(4), (c)(6). As that prohibition underscores, a telephone company (like MetroPCS) would, absent privacy-protecting laws (like the SCA), be free to disclose its historical cell tower location records to governmental and non-governmental entities alike—without any judicial supervision and without having to satisfy the statutory standard in § 2703(d).

Further, the SCA bars "[i]mproper disclosure" of records obtained under § 2703(d). See Id. § 2707(g). The SCA also provides remedies and penalties for violations of the Act's privacy-protecting provisions, including money damages and the mandatory commencement of disciplinary proceedings against offending federal officers. See Id. §§ 2707(a), (c), (d), 2712(a), (c).

Despite the SCA's protections, Davis claims the court's § 2703(d) order compelling the production of MetroPCS records violated his Fourth Amendment rights. To prevail on his Fourth Amendment claim, Davis must show both (1) that the application of the SCA to the facts of his case involved a "search" within the meaning of the Fourth Amendment, and (2) that such search was unreasonable. This Davis cannot do.

B. What Constitutes a "Search"

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures." U.S. Const. amend. IV. A party may establish a Fourth Amendment search by showing that the government engaged in conduct that "would have constituted a 'search' within the original meaning of the Fourth Amendment," United States v. Jones, 565 U.S. __, __, 132 S. Ct. 945, 950 n.3 (2012). "Search" originally was tied to common-law trespass and involved some trespassory intrusion on property. See, e.g., Kyllo v. United States, 533 U.S. 27, 31-32, 121 S. Ct. 2038, 2042 (2001).

Davis makes no trespass claim, nor could he.

In 1967, the Supreme Court added a separate test—the reasonable-expectation-of-privacy test—to analyze whether a search occurred for purposes of the Fourth Amendment. See Smith v. Maryland, 442 U.S. 735, 739-40, 99 S. Ct. 2577, 2579-80 (1979) (citing Katz v. United States, 389 U.S. 347, 88 S. Ct. 507 (1967)). The reach of the Fourth Amendment now does not turn on the presence or absence of a physical intrusion. Katz, 389 U.S. at 353, 88 S. Ct. at 512.

Thus, to determine whether the government's obtaining access to MetroPCS's records constitutes a search within the meaning of the Fourth Amendment, our lodestar is Katz's reasonable-expectation-of-privacy test. Smith, 442 U.S. at 739, 99 S. Ct. at 2579-80 (citing Katz, 389 U.S. 347, 88 S. Ct. 507).

"Katz posits a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search?" California v. Ciraolo, 476 U.S. 207, 211, 106 S. Ct. 1809, 1811 (1986). "Second, is society willing to

recognize that expectation as reasonable?" Id. Thus, "a party alleging an unconstitutional search under the Fourth Amendment must establish both a subjective and an objective expectation of privacy to succeed." United States v. Robinson, 62 F.3d 1325, 1328 (11th Cir. 1995).

Notably, it was the interception and recording of conversations reasonably intended to be private that drove the new test and result in Katz. See 389 U.S. at 351-53, 88 S. Ct. at 511-12. The government recorded Katz's conversations by attaching an electronic listening and recording device to the outside of a public phone booth in which Katz made calls. Id. at 348, 88 S. Ct. at 509. The government had no warrant or court order of any sort. See id. at 354-56, 88 S. Ct. at 512-514. The Supreme Court held that the government's conduct in "electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth," and thus constituted a "search and seizure" under the Fourth Amendment. Id. at 353, 88 S. Ct. at 512. The critical fact was that one who enters a telephone booth, "shuts the door behind him, and pays the toll that permits him to place a call" is entitled to assume that his conversation is not being intercepted and recorded. Id. at 352, 88 S. Ct. at 511-12; Id. at 361, 88 S. Ct. at 516-17 (Harlan, J., concurring).

C. Third Party's Business Records

In subsequently applying Katz's test, the Supreme Court held—in both United States v. Miller and Smith v. Maryland—that individuals have no reasonable expectation of privacy in certain business

records owned and maintained by a third-party business.

In United States v. Miller, during an investigation into tax fraud, federal agents presented subpoenas to the presidents of two banks, seeking to obtain from those banks all of Miller's bank account records. 425 U.S. 435, 437-38, 96 S. Ct. 1619, 1621 (1976). The issue was whether the defendant Miller had a "legitimate expectation of privacy" in the documents' contents. See id. at 440-43, 96 S. Ct. at 1622-24. The Supreme Court held that Miller had no protectable Fourth Amendment interest in the account records because the documents were: (1) business records of transactions to which the banks were parties and (2) Miller voluntarily conveyed the information to the banks. Id. Miller had "neither ownership nor possession" over the papers and the records. Id. at 437, 440, 96 S. Ct. at 1621, 1623. Rather, the papers were "the business records of the banks." Id. at 440-41, 96 S. Ct. at 1623. All of the bank records contained information "voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business." Id. at 442, 96 S. Ct. at 1624. The Supreme Court noted "that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, 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." Id. at 443, 96 S. Ct. at 1624; see also In re Grand Jury Proceeding, 842 F.2d 1229, 1234 (11th Cir. 1988) ("[A]n individual has no claim under the fourth amendment to resist the production of business records held by a third party.").

Then, in Smith v. Maryland, the Supreme Court held that telephone users have no reasonable expectations of privacy in dialed telephone numbers recorded through pen registers and contained in the third-party telephone company's records. 442 U.S. at 742-46, 99 S. Ct. at 2581-83. The Supreme Court determined that Smith had no subjective or objective expectation of privacy in the numbers he dialed on the telephone and thus the installation of the pen register, by the telephone company at the government's request, did not constitute a search under the Fourth Amendment. Id.

As to the subjective expectation of privacy, the Supreme Court in Smith doubted that "people in general entertain any actual expectation of privacy in the numbers they dial" because "[a]ll telephone users realize that they must 'convey' phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed." Id. at 742, 99 S. Ct. at 2581. The Supreme Court stated that "[t]elephone users, in sum, typically know that they must convey numerical information to the phone company; that the phone company has facilities for recording this information; and that the phone company does in fact record this information for a variety of legitimate business purposes." Id. at 743, 99 S. Ct. at 2581. "Although subjective expectations cannot be scientifically gauged, it is too much to believe that telephone subscribers, under these circumstances, harbor any general expectation that the numbers they dial will remain secret." Id. The Supreme Court stressed that "a pen register differs significantly from the listening device employed in Katz, for pen

registers do not acquire the contents of communications." Id. at 741, 99 S. Ct. at 2581.

More telling in Smith though for this case is the location information revealed through the telephone records. Smith argued that, "whatever the expectations of telephone users in general, he demonstrated an expectation of privacy by his own conduct here, since he us[ed] the telephone in his house to the exclusion of all others." Id. at 743, 99 S. Ct. at 2582 (internal quotation marks omitted). The Supreme Court expressly rejected Smith's argument that he demonstrated an expectation of privacy in his own conduct here by using the telephone only in his house. The Supreme Court found that "[a]lthough [Smith's] conduct may have been calculated to keep the contents of his conversation private, his conduct was not and could not have been calculated to preserve the privacy of the number he dialed." Id. The Supreme Court reasoned: "[r]egardless of his location, [Smith] had to convey that number to the telephone company in precisely the same way if he wished to complete his call. The fact that he dialed the number on his home phone rather than on some other phone could make no conceivable difference, nor could any subscriber rationally think that it would." Id.

As to the objective expectation of privacy, the Supreme Court determined that, "even if [Smith] did harbor some subjective expectation that the phone numbers he dialed would remain private, this expectation is not 'one that society is prepared to recognize as reasonable.'" Id. (quoting Katz, 389 U.S. at 361, 88 S. Ct. at 516) (internal quotation marks omitted). The Supreme Court "consistently has held

that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." Id. at 743-44, 99 S. Ct. at 2582. The Supreme Court found that, "[w]hen he used his phone, [Smith] voluntarily conveyed numerical information to the telephone company." Id. at 744, 99 S. Ct. at 2582. The Supreme Court explained: "[t]he switching equipment that processed those numbers is merely the modern counterpart of the operator who, in an earlier day, personally completed calls for the subscriber." Id.

In Smith, the Supreme Court decided that "a different constitutional result is [not] required because the telephone company has decided to automate." Id. at 744-45, 99 S. Ct. at 2582. "The fortuity of whether or not the phone company in fact elects to make a quasi-permanent record of a particular number dialed does not in our view, make any constitutional difference." Id. at 745, 99 S. Ct. at 2583. The Supreme Court concluded: "[Smith] in all probability entertained no actual expectation of privacy in the phone numbers he dialed, and . . . even if he did, his expectation was not 'legitimate.'" Id.

D. Fifth Circuit Decision

Before turning to Davis's case, we review the Fifth Circuit's recent decision holding that a court order under § 2703(d) compelling production of business records—showing this same cell tower location information—does not violate the Fourth Amendment and no search warrant is required. In re Application of the United States for Historical Cell Site Data ("In re Application (Fifth Circuit)"), 724

F.3d 600, 611-15 (5th Cir. 2013).[10] At the outset, the Fifth Circuit stressed who had collected the cell tower information. See id. at 609-10. The telephone company, not the government, collected the cell tower location information in the first instance and for a variety of legitimate business purposes. Id. at 611-12. The Fifth Circuit emphasized:

> The Government does not require service providers to record this information or store it. The providers control what they record and how long these records are retained . . . . In the case of such historical cell site information, the Government merely comes in after the facts and asks a

[10] The dissent mistakenly argues that we are faced with "persuasive . . . authority on both sides of the debate . . . ." Dissenting Op. at 79 n. 2. To purportedly illustrate this, the dissent cites a Third Circuit decision, but that decision did not hold, as the dissent would, that a search warrant is required to obtain historical cell tower location data. In re Application of U.S. for an Order Directing a Provider of Elec. Commc'n Serv. to Disclose Records to Gov't ("In re Application (Third Circuit)"), 620 F.3d 304 (3d Cir. 2010). Rather, after the lower courts denied the government's § 2703(d) application for historical cell tower data, the government appealed and the Third Circuit actually vacated that denial. Id. at 319. The Third Circuit concluded that the SCA itself gave the magistrate judge the discretionary option to require a warrant showing probable cause and that the discretionary warrant option should "be used sparingly because Congress also included the option of a § 2703(d) order." Id.

The dissent also cites a Florida Supreme Court decision, but that case involved real-time data and did not involve a § 2703(d) order. Tracey v. State, 152 So. 3d 504, 507-08 (Fla. 2014).

> provider to turn over records the provider has already created.

Id. at 612.

The Fifth Circuit reasoned these are the telephone company's "own records of transactions to which it is a party." Id. The telephone company created the record to memorialize its business transactions with the customer. Id. at 611-12. The Fifth Circuit was careful to define business records as records of transactions to which the record-keeper business is a party. See id. It also pointed out that these business records contained no content of communications, such as the content of phone calls, letters, or emails. Id.

After discussing the nature of the business records, the Fifth Circuit, relying on Smith, explained why the cell user had no subjective expectation of privacy in such business records showing cell tower locations. The court reasoned: (1) the cell user has knowledge that his cell phone must send a signal to a nearby cell tower in order to wirelessly connect his call; (2) the signal only happens when a user makes or receives a call; (3) the cell user has knowledge that when he places or receives calls, he is transmitting signals through his cell phone to the nearest cell tower and thus to his service provider; (4) the cell user thus is aware that he is conveying cell tower location information to the service provider and voluntarily does so when he uses his cell phone for calls. Id. at 613-14.

The Fifth Circuit concluded that "[c]ell phone users, therefore, understand that their service providers record their location information when

they use their phones at least to the same extent that the landline users in Smith understood that the phone company recorded the numbers they dialed." Id. at 613.[11] Just as the petitioner in Smith knew that when he dialed telephones, he was conveying and exposing those numbers to electronic equipment, cell phone users have knowledge they are conveying signals and exposing their locations to the nearest cell tower. Id. at 612-14.

The Fifth Circuit agreed "that technological changes can alter societal expectations of privacy," but reasoned, "[a]t the same time, '[l]aw enforcement tactics must be allowed to advance with technological changes, in order to prevent criminals from circumventing the justice system.'" Id. at 614 (quoting United States v. Skinner, 690 F.3d 772, 778 (6th Cir. 2012)). The Fifth Circuit concluded that "[a] legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive

[11] In the Fifth Circuit case, the court stated that the "contractual terms of service and providers' privacy policies expressly state[d] that a provider uses a subscriber's location information to route his cell phone calls" and, moreover, "that the providers not only use the information, but collect it." In re Application (Fifth Circuit), 724 F.3d at 613. The government stresses that MetroPCS's privacy policy, accessible from the company website, plainly states that cell tower location data may be recorded, stored, and even shared with law enforcement. Although Davis would have signed a contract when beginning service with MetroPCS, that contract does not appear on this record to have been entered into evidence here. Thus we cannot consider it, or MetroPCS's privacy policy, in this particular case.

way." Id. (quoting Jones, 565 U.S. at __, 132 S. Ct. at 964 (Alito, J., concurring)). In the end, the Fifth Circuit determined: (1) "Congress has crafted such a legislative solution in the SCA," and (2) the SCA "conforms to existing Supreme Court Fourth Amendment precedent." Id. The Fifth Circuit "decline[d] to create a new rule to hold that Congress's balancing of privacy and safety is unconstitutional." Id. at 615.

E. Davis's Case

Based on the SCA and governing Supreme Court precedent, we too conclude the government's obtaining a § 2703(d) court order for the production of MetroPCS's business records did not violate the Fourth Amendment.

For starters, like the bank customer in Miller and the phone customer in Smith, Davis can assert neither ownership nor possession of the third-party's business records he sought to suppress. Instead, those cell tower records were created by MetroPCS, stored on its own premises, and subject to its control. Cell tower location records do not contain private communications of the subscriber. This type of non-content evidence, lawfully created by a third-party telephone company for legitimate business purposes, does not belong to Davis, even if it concerns him. Like the security camera surveillance images introduced into evidence at his trial, MetroPCS's cell tower records were not Davis's to withhold. Those surveillance camera images show Davis's location at the precise location of the robbery, which is far more than MetroPCS's cell tower location records show.

More importantly, like the bank customer in Miller and the phone customer in Smith, Davis has no subjective or objective reasonable expectation of privacy in MetroPCS's business records showing the cell tower locations that wirelessly connected his calls at or near the time of six of the seven robberies.

As to the subjective expectation of privacy, we agree with the Fifth Circuit that cell users know that they must transmit signals to cell towers within range, that the cell tower functions as the equipment that connects the calls, that users when making or receiving calls are necessarily conveying or exposing to their service provider their general location within that cell tower's range, and that cell phone companies make records of cell-tower usage. See In re Application (Fifth Circuit), 724 F.3d at 613-14. Users are aware that cell phones do not work when they are outside the range of the provider company's cell tower network. Id. at 613. Indeed, the fact that Davis registered his cell phone under a fictitious alias tends to demonstrate his understanding that such cell tower location information is collected by MetroPCS and may be used to incriminate him.

Even if Davis had a subjective expectation of privacy, his expectation of privacy, viewed objectively, is not justifiable or reasonable under the particular circumstances of this case. The unreasonableness in society's eyes dooms Davis's position under Katz. In Smith, the Supreme Court presumed that phone users knew of uncontroverted and publicly available facts about technologies and practices that the phone company used to connect calls, document charges, and assist in legitimate law-enforcement investigations. See 442 U.S. at 742-43,

99 S. Ct. at 2581. Cell towers and related records are used for all three of those purposes. We find no reason to conclude that cell phone users lack facts about the functions of cell towers or about telephone providers' recording cell tower usage.

Smith's methodology should not be set aside just because cell tower records may also be used to decipher the approximate location of the user at the time of the call. Indeed, the toll records for the stationary telephones at issue in Smith included location data far more precise than the historical cell site location records here, because the phone lines at issue in Smith corresponded to stationary landlines at known physical addresses. At the time of Smith, telephone records necessarily showed exactly where the user was—his home—at the time of the call, as the user's telephone number was tied to a precise address. And the number dialed was also tied to a precise address, revealing if the user called a friend, a business, a hotel, a doctor, or a gambling parlor.

In certain respects, Davis has an even less viable claim than the defendant in Miller. For example, the Supreme Court in Miller held that a customer did not have a reasonable expectation of privacy in records made and kept by his bank even where the bank was required by law to maintain those records. See Miller, 425 U.S. at 436, 440-41, 96 S. Ct. at 1621, 1623. Here, federal law did not require that MetroPCS either create or retain these business records.

Admittedly, the landscape of technology has changed in the years since these binding decisions in Miller and Smith were issued. But their holdings did not turn on assumptions about the absence of

technological change. To the contrary, the dispute in Smith, for example, arose in large degree due to the technological advance from call connections by telephone operators to electronic switching, which enabled the electronic data collection of telephone numbers dialed from within a home. See 442 U.S. at 744-45, 99 S. Ct. at 2582-83. The advent of mobile phones introduced calls wirelessly connected through identified cell towers. This cell tower method of call connecting does not require "a different constitutional result" just "because the telephone company has decided to automate" wirelessly and to collect the location of the company's own cell tower that connected the calls. See id. at 744-45, 99 S. Ct. at 2582. Further, MetroPCS's cell tower location information was not continuous; it was generated only when Davis was making or receiving calls on his phone. The longstanding third-party doctrine plainly controls the disposition of this case.[12]

The use of cell phones is ubiquitous now and some citizens may want to stop telephone companies from compiling cell tower location data or from

[12] To avoid the third-party doctrine, the dissent claims that "[t]he extent of voluntariness of disclosure by a user is simply lower for cell site location data." Dissenting Op. at 80. Not so. Cell phone users voluntarily convey cell tower location information to telephone companies in the course of making and receiving calls on their cell phones. Just as in Smith, users could not complete their calls without necessarily exposing this information to the equipment of third-party service providers. The government, therefore, did not search Davis when it acquired historical cell tower location information from MetroPCS. In order to reach its result, the dissent effectively would cast aside longstanding and binding Supreme Court precedents in favor of its own view of the Fourth Amendment.

producing it to the government. Davis and amici advance thoughtful arguments for changing the underlying and prevailing law; but these proposals should be directed to Congress and the state legislatures rather than to the federal courts. As aptly stated by the Fifth Circuit, "the recourse for these desires is in the market or the political process; in demanding that service providers do away with such records (or anonymize them) or in lobbying elected representatives to enact statutory protections." In re Application (Fifth Circuit), 724 F.3d at 615; See also In re Application (Third Circuit), 620 F.3d at 319 ("The considerations for and against [§ 2703(d) orders not requiring a warrant] would be for Congress to balance. A court is not the appropriate forum for such balancing, and we decline to take a step as to which Congress is silent.").

Following controlling Supreme Court precedent most relevant to this case, we hold that the government's obtaining a § 2703(d) court order for production of MetroPCS's business records at issue did not constitute a search and did not violate the Fourth Amendment rights of Davis.[13]

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[13] Rather than legal analysis, the dissent consists mainly of myriad hypothetical fact patterns and a tabloid-type parade of horribles. As the dissenting author well knows, our "decision can hold nothing beyond the facts of [this] case." Edwards v. Prime, Inc., 602 F.3d 1276, 1298 (11th Cir. 2010) (citing Watts v. BellSouth Telecomms., Inc., 316 F.3d 1203, 1207 (11th Cir. 2003) ("Whatever their opinions say, judicial decisions cannot make law beyond the facts of the cases in which those decisions are announced."); United States v. Aguillard, 217 F.3d 1319, 1321 (11th Cir. 2000) ("The holdings of a prior decision can reach only as far as the facts and circumstances presented to

F. United States v. Jones

Instead of focusing on the SCA and Smith, Davis relies on United States v. Jones, 565 U.S. __, 132 S. Ct. 945 (2012), where the government surreptitiously attached a GPS device to a private vehicle and used its own device to track the vehicle's movements over a four-week period. Id. at ___, 132 S. Ct. at 948. In Jones, the Supreme Court hed that the government's physical instruction on the defendant's provate property[14] was a "search" and violated the Fourth Amendment. Id. at __, 132 S. Ct. at 949. Significantly, the government-initiated physical trespass in Jones led to constant and real-time GPS tracking of the precise location of the defendant's vehicle. Id. at __, 132 S. Ct. at 948.[15] "The Government physically occupied private property for the purpose of obtaining information." Id. at __, 132 S. Ct. at 949. The Supreme Court had "no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." Id.

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the Court in the case which produced that decision." (quotation marks omitted))).

[14] The Fourth Amendment provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. "It is beyond dispute that a vehicle is an 'effect' as that term is used in the Amendment." Jones, 565 U.S. at __, 132 S. Ct. at 949.

[15] The Supreme Court explained: "By means of signals from multiple satellites, the device established the vehicle's location within 50 to 100 feet, and communicated that location by cellular phone to a Government computer. It relayed more than 2,000 pages of data over the 4–week period." United States v. Jones, 565 U.S. at __, 132 S. Ct. at 948.

The majority opinion in Jones acknowledged that "later cases, of course, have deviated from [an] exclusively property-based approach" and have adopted an alternative "reasonable expectation of privacy" standard. Id. at __, 132 S. Ct. at 950 (citing Katz, 389 U.S. at 351, 360, 88 S. Ct. at 511, 516 (majority opinion and opinion of Harlan, J., concurring)). But the result in Jones required nothing other than the property-based approach. Though the government argued Jones had no "reasonable expectation of privacy," the Supreme Court majority determined it "need not address the Government's contentions, because Jones's Fourth Amendment rights d[id] not rise or fall with the Katz formulation." Id.

Explaining the distinction, the majority opinion stressed that "the Katz reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test." Id. at __, 132 S. Ct. at 952. But the majority holding in Jones turned on the physical intrusion of the government placing a GPS device on a private vehicle. Id. at __, 132 S. Ct. at 949.

That is not this case. The government's obtaining MetroPCS records, showing historical cell tower locations, did not involve a physical intrusion on private property or a search at all. The records belonged to a private company, not Davis. The records were obtained through a court order authorized by a federal statute, not by means of governmental trespass. MetroPCS, not the government, built and controlled the electronic mechanism (the cell towers) and collected its cell

tower data for legitimate business purposes. Jones is wholly inapplicable to this case.

Davis and the dissent attempt to deploy the concurrences in Jones to argue that historical cell tower location data is the equivalent of GPS and constitutes the sort of precise, long-term monitoring requiring the government to show probable cause. This attempt misreads the concurrences. We review the concurrences in detail because they leave the third-party doctrine untouched and do not help Davis's case. If anything, the concurrences underscore why this Court remains bound by Smith and Miller.

Justice Sotomayor concurred in the majority opinion, but was concerned because the government's GPS monitoring had "generate[d] a precise, comprehensive record of a person's public movements" and gave the government "unrestrained power to assemble data." Id. at __, 132 S. Ct. at 955-56. She found the "[r]esolution of [that] difficult question[]" was "unnecessary . . . because the Government's physical intrusion on Jones' Jeep supplie[d] a narrower basis for decision." Id. at __, 132 S. Ct. at 957 (emphasis added). In joining the majority's opinion, she provided the fifth vote for the physical trespass holding. Id.

Justice Sotomayor did state: "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties." Id. (citing Smith, 442 U.S. at 742, 99 S. Ct. at 2581; Miller, 425 U.S. at 443, 96 S. Ct. at 1624). But she quickly added and countered her own suggestion, stating: "[p]erhaps, as Justice ALITO notes, some

people may find the 'tradeoff' of privacy for convenience 'worthwhile,' or come to accept this 'diminution of privacy' as 'inevitable,' post, at 962, and perhaps not." Id. Justice Sotomayor, writing alone, raised a question, but did not even purport to answer it.

Justice Alito's concurrence further underscores why this Court is bound by Supreme Court precedent in Smith and Miller. Justice Alito concurred in the judgment and explained why the government-initiated, and government-controlled, real-time constant GPS monitoring violated the Fourth Amendment. Id. at __, 132 S. Ct. at 957-64. Only the government did the tracking and its tracking was not authorized or regulated by a federal statute. See id. at __, 132 S. Ct. at 956 (Sotomayor, J., concurring); id. at __, 132 S. Ct. at 964 (Alito, J., concurring in the judgment). Justice Alito's focus is on unrestrained government power.

The context of his concurrence is critical. Nothing Justice Alito says contravenes the third-party doctrine. His concurring opinion does not question, or even cite, Smith, Miller, or the third-party doctrine in any way. The opinion never uses the words "third party" or "third-party doctrine." It would be a profound change in jurisprudence to say Justice Alito was questioning, much less casting aside, the third-party doctrine without even mentioning the doctrine.

Further, Justice Alito's concurrence speaks only at a high level of abstraction about the government's placement and control of an electronic GPS mechanism on a private vehicle that did the precise, real-time, and long-term monitoring. See id.

at __, 132 S. Ct. at 962-64. In stark contrast, the mechanism in Davis's case is MetroPCS's own electronic mechanism—the cell tower. MetroPCS created and assembled the electronic data. The government obtained access only through judicial supervision and a court order. Nothing in Justice Alito's concurrence in any way undermines the third-party doctrine. If anything, Justice Alito's concurrence, joined by three others, suggests that a legislative solution is needed. Id. at __, 132 S. Ct. at 964 ("In circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative. A legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way." (citation omitted)). At present, the SCA is that solution.

Not only are Davis and the dissent ignoring controlling law, but even the internal logic of their arguments fails.[16]

First, historical cell tower location data is materially distinguishable from the precise, real-time GPS tracking in Jones, even setting aside the

[16] The dissent remarks that we "ignore[ ] the opinion of five Justices of the Supreme Court at [our] own risk." Dissenting Op. at 91, n.7. Quite the contrary, the majority opinion has faithfully recounted the two concurring opinions in Jones in the factual context of the case actually decided by the Supreme Court. Furthermore, because Jones involved a government trespass and not the third-party doctrine, eight of the nine Justices did not write or join one word about the "third-party doctrine," much less criticize it. It is the dissent that ignores, and fails to follow, binding Supreme Court precedent.

controlling third-party doctrine discussed above. Historical cell tower location data does not identify the cell phone user's location with pinpoint precision—it identifies the cell tower that routed the user's call. The range of a given cell tower will vary given the strength of its signal and the number of other towers in the area used by the same provider. While the location of a user may be further defined by the sector of a given cell tower which relays the cell user's signal, the user may be anywhere in that sector. This evidence still does not pinpoint the user's location. Historical cell site location data does not paint the "intimate portrait of personal, social, religious, medical, and other activities and interactions" that Davis claims.

Second, reasonable expectations of privacy under the Fourth Amendment do not turn on the quantity of non-content information MetroPCS collected in its historical cell tower location records. The § 2703(d) order covered 67 days of MetroPCS records. In his brief before this en banc Court, Davis argued that the length of the records covered by the order made the production an unconstitutional "search." But at oral argument Davis's counsel firmly contended that even one day of historical cell tower location information would require a search warrant supported by probable cause. Counsel's response at oral argument is faithful to Davis's broader claim, but misapprehends the governing law. Because Davis has no reasonable expectation of privacy in the type of non-content data collected in MetroPCS's historical cell tower records, neither one day nor 67

days of such records, produced by court order, violate the Fourth Amendment.[17]

As an extension of the argument above, Davis and various amici argue that cell tower data potentially implicating the home is due particular Fourth Amendment protection. In addition to noting the Supreme Court's clear rejection of this argument as it concerned toll records in Smith, we find it useful to recount the manner in which the evidence about Davis's home tower arose in this case.

On cross-examination by Davis's trial counsel, Detective Jacobs was asked whether a person's calls made from his or her home may be connected through a single cell tower—the "home tower." Detective Jacobs responded that they may be. Defense counsel followed up, asking whether, "[o]n the other hand . . . you might see more than one tower" even though the person remains in his or her house? Again, Detective Jacobs responded yes. At that time, defense counsel was arguing the imprecision of the data collected. Like two riders in the same car, a user's calls from his home may be connected by different towers if more than one tower is located in range of the home. The government only discussed Davis's home tower after it was introduced by the defense, and only did so to illustrate that none of the robberies were committed in the vicinity of the home tower.

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[17] The SCA necessarily limits the time span of telephone records for which the government may secure a court order, as the government must show that such records are "relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d).

MetroPCS produced 67 days of historical cell site location information for Davis's cellular phone. Davis, a prolific cell phone user, made approximately 86 calls a day.[18] Without question, the number of calls made by Davis over the course of 67 days could, when closely analyzed, reveal certain patterns with regard to his physical location in the general vicinity of his home, work, and indeed the robbery locations. But no record evidence here indicates that the cell tower data contained within these business records produces precise locations or anything close to the "intimate portrait" of Davis's life that he now argues.[19] The judicial system does not engage in monitoring or a search when it compels the production of preexisting documents from a witness.

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[18] This number comes from an analysis of Davis's cell phone usage by the American Civil Liberties Union in its capacity as amicus curiae in this case. While all 67 days of toll records were placed in evidence against Davis, the government witnesses analyzed Davis's cell phone usage only for the seven days on which the armed robberies occurred.

[19] Davis now also argues that the Supreme Court's recent decision in Riley v. California, 573 U.S. __, 134 S. Ct. 2473 (2014), where law enforcement officers seized the cell phones of arrestees and then searched the contents of the phones without obtaining warrants, supports his claim of an unconstitutional search. Riley held that this warrantless search of the contents of a cell phone obtained incident to an arrest violated the Fourth Amendment. Id. at __, 134 S. Ct. at 2485. But the Supreme Court in Riley made a special point of stressing that the facts before it "do not implicate the question whether the collection or inspection of aggregated digital information amounts to a search under other circumstances." Id. at __, 134 S. Ct. at 2489 n.1. It is not helpful to lump together doctrinally unrelated cases that happen to involve similar modern technology.

G. Reasonableness

Even if this Court were to hold that obtaining MetroPCS's historical cell tower locations for a user's calls was a search and the Fourth Amendment applies, that would begin, rather than end, our analysis. Maryland v. King, 569 U.S. __, __, 133 S. Ct. 1958, 1969 (2013). The Fourth Amendment prohibits unreasonable searches, not warrantless searches. As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is "reasonableness." Fernandez v. California, 571 U.S. __, __, 134 S. Ct. 1126, 1132 (2014). "[A] warrant is not required to establish the reasonableness of all government searches; and when a warrant is not required (and the Warrant Clause therefore not applicable), probable cause is not invariably required either." Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653, 115 S. Ct. 2386, 2390-91 (1995).

Simply put, the reasonableness of a search or seizure is evaluated "under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." Wyoming v. Houghton, 526 U.S. 295, 300, 119 S. Ct. 1297, 1300 (1999). In addition, "there is a strong presumption of constitutionality due to an Act of Congress, especially when it turns on what is 'reasonable'" within the meaning of the Fourth Amendment. United States v. Watson, 423 U.S. 411, 416, 96 S. Ct. 820, 824 (1976) (internal quotation marks omitted).

This traditional Fourth Amendment analysis supports the reasonableness of the § 2703(d) order in this particular case. As outlined above, Davis had no reasonable expectation of privacy in business records made, kept, and owned by MetroPCS. At most, Davis would be able to assert only a diminished expectation of privacy in MetroPCS's records. See King, 569 U.S. at __, 133 S. Ct. at 1969 (identifying "diminished expectations of privacy" as one of the factors that "may render a warrantless search or seizure reasonable") (quotation marks omitted).

Further, any intrusion on Davis's alleged privacy expectation, arising out of MetroPCS's production of its own records pursuant to a § 2703(d) order, was minimal for several reasons. First, there was no overhearing or recording of any conversations. Second, there is no GPS real-time tracking of precise movements of a person or vehicle. Even in an urban area, MetroPCS's records do not show, and the examiner cannot pinpoint, the location of the cell user. Ironically, Davis was using old technology and not the new technology of a smartphone equipped with a GPS real-time, precise tracking device itself.

Third, a § 2703(d) court order functions as a judicial subpoena, but one which incorporates additional privacy protections that keep any intrusion minimal. The SCA guards against the improper acquisition or use of any personal information theoretically discoverable from such records. See King, 569 U.S. at __, 133 S. Ct. at 1979-80. Under § 2703(d), investigative authorities may not request such customer-related records merely to satisfy prurient or otherwise insubstantial

governmental interests. Instead, a neutral and detached magistrate must find, based on "specific and articulable facts," that there are "reasonable grounds to believe" that the requested records are "relevant and material to an ongoing criminal investigation." Such protections are sufficient to satisfy "the primary purpose of the Fourth Amendment," which is "to prevent arbitrary invasions of privacy." Brock v. Emerson Elec. Co., Elec. & Space Div., 834 F.2d 994, 996 (11th Cir. 1987); see, e.g., Terry v. Ohio, 392 U.S. 1, 21 n.18, 88 S. Ct. 1868, 1880 n.18 (1968) (explaining that the "demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence").

The stored telephone records produced in this case, and in many other criminal cases, serve compelling governmental interests. Historical cell tower location records are routinely used to investigate the full gamut of state and federal crimes, including child abductions, bombings, kidnappings, murders, robberies, sex offenses, and terrorism-related offenses. See, e.g., United States v. Troya, 733 F.3d 1125, 1136 (11th Cir. 2013) ("quadruple homicide" involving the "gangland-style murder of two children"); United States v. Mondestin, 535 F. App'x 819, 821 (11th Cir. 2013) (unpublished) (per curiam) (armed robbery); United States v. Sanders, 708 F.3d 976, 982-83 (7th Cir. 2013) (kidnapping). Such evidence is particularly valuable during the early stages of an investigation, when the police lack probable cause and are confronted with multiple suspects. In such cases, § 2703(d) orders—like other forms of compulsory

process not subject to the search warrant procedure—help to build probable cause against the guilty, deflect suspicion from the innocent, aid in the search for truth, and judiciously allocate scarce investigative resources.

The societal interest in promptly apprehending criminals and preventing them from committing future offenses is "compelling." See United States v. Salerno, 481 U.S. 739, 750-51, 107 S. Ct. 2095, 2103 (1987). But so too is the societal interest in vindicating the rights of innocent suspects. See King, 569 U.S. at __, 133 S. Ct. at 1974. Both interests are heavily implicated when the government seeks to compel the production of evidence "relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). Cell tower location records have the capacity to tell the police investigators that an individual suspect was in the general vicinity of the crime scene or far away in another city or state.

In sum, a traditional balancing of interests amply supports the reasonableness of the § 2703(d) order at issue here. Davis had at most a diminished expectation of privacy in business records made, kept, and owned by MetroPCS; the production of those records did not entail a serious invasion of any such privacy interest, particularly in light of the privacy-protecting provisions of the SCA; the disclosure of such records pursuant to a court order authorized by Congress served substantial governmental interests; and, given the strong presumption of constitutionality applicable here, any residual doubts concerning the reasonableness of any arguable "search" should be resolved in favor of the

government. Hence, the § 2703(d) order permitting government access to MetroPCS's records comports with applicable Fourth Amendment principles and is not constitutionally unreasonable.[20]

IV. CONCLUSION

For the reasons set forth above, we affirm the judgment of conviction and vacate only that portion of the sentence attributable to the enhancement for brandishing.[21]

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[20] In the alternative, we hold that the prosecutors and officers here acted in good faith and therefore, under the well-established Leon exception, the district court's denial of the motion to suppress did not constitute reversible error. See United States v. Leon, 468 U.S. 897, 919-21, 104 S. Ct. 3405, 3418-19 (1984).

[21] Because there are multiple opinions, it may be helpful to summarize the final count. Nine members of the en banc court agree there was no Fourth Amendment violation in this case. Seven members of the court join the majority opinion. Two members of the court, Judges Wilson and Jordan, join the majority opinion as to its reasonableness holding.

WILLIAM PRYOR, Circuit Judge, concurring:

I join the majority opinion in full, but I write separately to explain that a court order compelling a telephone company to disclose cell tower location information would not violate a cell phone user's rights under the Fourth Amendment even in the absence of the protections afforded by the Stored Communications Act, 18 U.S.C. §§ 2701–2712, and as judges of an inferior court, we must leave to the Supreme Court the task of developing exceptions to the rules it has required us to apply.

It is well-established that "the application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." *Smith v. Maryland*, 442 U.S. 735, 740, 99 S. Ct. 2577, 2580 (1979) (citations omitted). And the Supreme Court has made clear that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Id.* at 743–44, 99 S. Ct. at 2582. There is no doubt that Davis voluntarily disclosed his location to a third party by using a cell phone to place or receive calls. For that reason, this appeal is easy.

Smith controls this appeal. In *Smith*, the Supreme Court held that, because telephone users voluntarily convey the phone numbers they dial to their telephone companies, the installation of a pen register at police request to record those numbers did not constitute a "search" under the Fourth Amendment. *Id.* at 742–46, 99 S. Ct. at 2581–83. But just as telephone users voluntarily convey the phone

numbers they dial to a telephone company's switching equipment, cell phone users too voluntarily convey their approximate location to a carrier's cell towers.

To the extent that *Smith* is distinguishable from this appeal, *Smith* presents a *closer* question, because in this appeal the government did not request that MetroPCS maintain records of its customers' cell phone calls. MetroPCS decided what business records to maintain, and the government sought the records of Davis's calls after the fact. And those records contained location information that Davis voluntarily conveyed to MetroPCS by placing calls that were routed through nearby cell towers, which are a familiar part of our landscape.

That Davis had no legitimate expectation of privacy in the information he conveyed to MetroPCS follows from a straightforward application of the third-party doctrine, completely aside from the additional protections of the Stored Communications Act. The Act provides that a court order for disclosure "shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the . . . records or other information sought[] are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). Davis does not dispute that the government complied with the Act. But the greater protections afforded telephone customers under the Act do not disturb the constitutional principle that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith*, 442 U.S. at 743–44, 99 S. Ct. at 2582. So Davis would have no legitimate expectation

of privacy in the information he conveyed to MetroPCS even if Congress repealed the Act tomorrow. A court order compelling a carrier to disclose cell tower location information does not violate a cell phone user's rights under the Fourth Amendment any more than a court order compelling a bank to disclose customer account information, *see United States v. Miller*, 425 U.S. 435, 96 S. Ct. 1619 (1976).

The dissent's argument that *Smith* is distinguishable from this appeal because the disclosure of location information to cell carriers is less "voluntary" and less "knowing," Dissenting Op. at 78-80, than the disclosure of dialed telephone numbers makes no sense. The dissent argues that the disclosure of location information is less "voluntary" than the disclosure of dialed telephone numbers because "cell phone users do not affirmatively enter their location in order to make a call," *Id.* at 78, but in neither case is a phone user coerced to reveal anything. If a telephone caller does not want to reveal dialed numbers to the telephone company, he has another option: don't place a call. If a cell phone user does not want to reveal his location to a cellular carrier, he also has another option: turn off the cell phone. That Davis had to disclose his location in order to place or receive a call does not distinguish this appeal from *Smith*, because, as the dissent admits, telephone callers "have to" convey dialed numbers to the telephone company in order to place calls, Dissenting Op. at 78. That a caller "affirmatively enter[s]" phone numbers but a cell phone user does not "affirmatively enter" his location when he places or receives a call may implicate the user's *knowledge* that he is conveying information to

a third party, but it does not make the latter disclosure less *voluntary* than the former. Davis's disclosure of his location was also no less "knowing" than the disclosure at issue in *Smith*. In *Smith*, the Supreme Court explained that "[a]ll telephone users realize that they must 'convey' phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed." 442 U.S. at 742, 99 S. Ct. at 2581. Similarly, cell phone users realize that their calls are routed through nearby cell towers. It is no state secret that cell phones work less effectively in remote areas without cell towers nearby. As the Court made clear in *Smith*, that "most people may be oblivious to" the "esoteric functions" of a technology is consistent with most people having "some awareness" of its purpose. *Id.* at 742, 99 S. Ct. at 2581. In the light of common experience, it is "too much to believe," *Id.* at 743, 99 S. Ct. at 2581, that cell phone users lack "some awareness," *Id.* at 742, 99 S. Ct. at 2581, that they communicate information about their location to cell towers.

If the rapid development of technology has any implications for our interpretation of the Fourth Amendment, it militates in favor of judicial caution, because Congress, not the judiciary, has the institutional competence to evaluate complex and evolving technologies. "Judges cannot readily understand how . . . technologies may develop, cannot easily appreciate context, and often cannot even recognize whether the facts of the case before them raise privacy implications that happen to be typical or atypical." Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 Mich. L. Rev.

801, 858–59 (2004). Our decisions resolve adversarial proceedings between parties. Legislatures, by contrast, must consider "a wide range" of factors and balance the opinions and demands of competing interest groups. *Id.* at 875. "The task of generating balanced and nuanced rules requires a comprehensive understanding of technological facts. Legislatures are well-equipped to develop such understandings; courts generally are not." *Id.* Simply put, we must apply the law and leave the task of developing new rules for rapidly changing technologies to the branch most capable of weighing the costs and benefits of doing so.

As judges of an inferior court, we have no business in anticipating future decisions of the Supreme Court. If the third-party doctrine results in an unacceptable "slippery slope," Dissenting Op. at 85, the Supreme Court can tell us as much. *See, e.g.*, *Hohn v. United States*, 524 U.S. 236, 252–53, 118 S. Ct. 1969, 1978 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 1921–22 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); *Evans v. Sec'y, Fla. Dep't of Corr.*, 699 F.3d 1249, 1263 (11th Cir. 2012) ("We must not, to borrow Judge Hand's felicitous words, 'embrace the exhilarating opportunity of anticipating' the overruling of a Supreme Court decision.") (internal

citation omitted). That is, if "the Supreme Court has given reasons to doubt the rule's breadth," Dissenting Op. at 80, it alone must decide the exceptions to its rule.

JORDAN, Circuit Judge, concurring, in which WILSON, Circuit Judge, joins:

This case is certainly about the present, but it is also potentially about the future. Although the Court limits its decision to the world (and technology) as we knew it in 2010, *see* Maj. Op. at 10 n.7 & 31 n.13, its holding that Mr. Davis lacked an expectation of privacy in service provider records used to establish his cell site location may have implications going forward, particularly given the Court's reliance on the third-party doctrine. *See, e.g., Smith v. Maryland*, 442 U.S. 735, 743-44 (1979); *United States v. Miller*, 425 U.S. 435, 442-43 (1976). As technology advances, location information from cellphones (and, of course, smartphones) will undoubtedly become more precise and easier to obtain, *see generally Planet of the Phones*, THE ECONOMIST (Feb. 28, 2015), and if there is no expectation of privacy here, I have some concerns about the government being able to conduct 24/7 electronic tracking (live or historical) in the years to come without an appropriate judicial order. And I do not think I am alone in this respect. *See United States v. Jones*, 132 S. Ct. 945, 964 (2012) (Alito, J., concurring, joined by Ginsburg, Breyer, and Kagan, JJ.) ("[T]he use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy."); *Id.* at 955 (Sotomayor, J., concurring) ("I agree with Justice Alito that, at the very least, 'longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.'").[1]

[1] Three decades ago, a defendant in a case before the Supreme Court argued that allowing the police to place a digital beeper

As a result, I would decide the Fourth Amendment question on reasonableness grounds and leave the broader expectation of privacy issues for another day, much like the Supreme Court did in *City of Ontario v. Quon*, 560 U.S. 746, 759-60 (2010) (assuming that police officer had an expectation of privacy in text messages he sent from his city-provided pager, even though those messages were routed through and kept by a third-party service provider, and resolving the case on reasonableness grounds). I would assume that Mr. Davis had a reasonable expectation of privacy—albeit a diminished one—and hold that the government satisfied the Fourth Amendment's reasonableness requirement by using the procedures set forth in 18 U.S.C. § 2703(d) to obtain a court order for Mr. Davis' cell site records.

I

The Fourth Amendment's "basic purpose . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Mun. Court of City & Cnty. of S.F.*, 387 U.S. 523, 528 (1967). "As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness.'" *Maryland v. King,* 133 S.Ct. 1958,

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in a container filled with chloroform, in order to monitor the container's location, would lead to "twenty-four hour surveillance of any citizen in this country . . . without judicial knowledge or supervision." *United States v. Knotts*, 460 U.S. 276, 283-84 (1983). The Supreme Court's response to that assertion was that "if such dragnet type law enforcement practices as [the defendant] envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable." *Id.*

1969 (2013) (citation and internal punctuation omitted).

"The reasonableness of a search," the Supreme Court recently explained, "depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Grady v. North Carolina*, 135 S. Ct. 1368, 1371 (2015). These circumstances include, among others, "the means adopted" by the government to effectuate the search. *See Carroll v. United States,* 267 U.S. 132, 168 (1925).

II

At times, circumstances may render a warrantless search or seizure reasonable. One such scenario is when there are "diminished expectations of privacy." *King*, 133 S. Ct. at 1969 (citation and internal punctuation omitted). Although I am prepared to assume that Mr. Davis enjoyed some expectation of privacy, *cf.* STEPHEN J. SCHULHOFER, MORE ESSENTIAL THAN EVER: THE FOURTH AMENDMENT IN THE TWENTY-FIRST CENTURY 8 (2012) (defining privacy, in today's digital world, in terms of control rather than secrecy, because practical necessities now require individuals to share information about themselves "with trusted individuals and institutions for limited purposes"), I think it is fair to say that such an expectation was somewhat diminished, and not full-throated, due to the third-party doctrine. After all, *Smith* indicates that a person gives up control of certain information when he makes and receives calls from a phone. Although *Smith* does not fit this case like a glove—cellphones and smartphones (and the vast amounts

of information they contain and can generate) are qualitatively different from land-line phones—it is nevertheless relevant that the cell site information the government obtained existed due to calls Mr. Davis made and received on his cellphone.[2]

On the other side of the ledger, Mr. Davis' cell site information was not obtained or seized "outside the judicial process, without prior approval by a judge or magistrate." *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971). *Cf. Johnson v. United States*, 333 U.S. 10, 13-14 (1948) (noting that the Fourth Amendment's "protection consists in requiring that . . . inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime"). The government secured the cell site records under a provision of the Stored Communications Act. And that provision requires a magistrate judge—a neutral judicial officer—to review an application and determine whether the government has offered "specific and articulable facts showing that there are reasonable grounds to believe that the [cell cite location information] sought [is] relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d).

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[2] I recognize that some of the cell site information resulted from calls Mr. Davis received but never answered. For obvious reasons, however, Mr. Davis did not make (and has not made) a nuanced Fourth Amendment argument differentiating between data generated from calls he made and answered and data generated from calls he merely received without answering. Such an argument would not have been of much help to Mr. Davis, who sought to suppress all of the cell site data the government obtained.

Significantly, "there is a strong presumption of constitutionality due to an Act of Congress, especially when it turns on what is 'reasonable[,]'" *United States v. Watson*, 423 U.S. 411, 416 (1976) (citation and some internal punctuation omitted), and this strong presumption attaches to § 2703(d).

As explained briefly below, the government articulated the necessary "specific and articulable facts." I therefore agree with the Court that the magistrate judge's order, which authorized the government to obtain the cell site information, satisfied the reasonableness requirement of the Fourth Amendment. *See Camara*, 387 U.S. at 528.[3]

The government's application for Mr. Davis' cell site information stated the following: Willie Smith confessed that he and Mr. Davis were involved in the robberies of a Little Caesar's restaurant, the Universal Beauty Salon, and a Wendy's restaurant in Miami, Florida; Jamarquis Terrell Reid admitted that he had participated with Mr. Davis in the robberies of an Amerika gas station, a Walgreens store, and an Advance Auto Parts store in Miami,

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[3] For whatever it is worth, the Supreme Court has on occasion held that the phrase "reasonable grounds," as used in certain federal narcotics laws, is essentially the same as "probable cause" for purposes of the Fourth Amendment. *See Draper v. United States,* 358 U.S. 307, 310 n.3 (1959); *Wong-Sun v. United States,* 371 U.S. 471, 478 n.6 (1963). And it has said that "[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt." *Maryland v. Pringle,* 540 U.S. 366, 371 (2003) (citation and internal punctuation omitted). So maybe the evidentiary showing required by § 2703(d) is not too far removed from the probable cause normally demanded for warrants under the Fourth Amendment. *But cf. Griffin v. Wisconsin*, 483 U.S. 868, 872-77 (1987) (differentiating between "reasonable grounds" standard and "probable cause" standard).

Florida; Michael Martin told the authorities that he and Mr. Davis had robbed a Mayor's jewelry store in Weston, Florida; Mr. Davis' DNA was recovered from a stolen BMW that was used as the getaway car in the Mayor's jewelry store robbery; the robberies in question took place between August 7, 2010, and October 1, 2010; and Mr. Smith and Mr. Reid each said that, at the time of certain of the robberies (those of the Little Caesar's restaurant, the Amerika gas station, the Advance Auto Parts store, and the Universal Beauty Salon), Mr. Davis' cellphone number was the 5642 number. Not surprisingly, Mr. Davis conceded at oral argument that the government could have secured a warrant (had it elected to do so) for the cell site information because it had the necessary probable cause.

The temporal scope of the request, moreover, was reasonable. The government sought cell site information spanning from August 1, 2010, to October 6, 2010—a 67-day period which began six days before the first known robbery and ended six days after the last known robbery. The government explained in its application that those records would "assist law enforcement in determining the locations of [Mr. Davis] on days when robberies in which [he was] suspected to have participated occurred," and "whether [he] communicated with [the] other [individuals] on the days of the robberies and, if so, how many times."

Finally, it is important to reiterate that the cell site information was generated from calls Mr. Davis made and received on his cellphone, and was not the result of his merely having his cellphone turned on. There was, in other words, no passive tracking based on Mr. Davis' mere possession of a

cellphone, and I do not read the Court's opinion as addressing such a situation. *See* Maj. Op. at 8, 30.

III

For me, this is one of those cases where it makes sense to say less and decide less. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME 4-10 (1999); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 111-13 (1st ed. 1962). "Prudence counsels caution before the facts in the instant case are used to establish . . . premises that define the existence, and extent, of privacy expectations." *Quon*, 560 U.S. at 759.

With these thoughts, I join Parts I, II, III.G, and IV of the Court's opinion and concur in the judgment.

ROSENBAUM, Circuit Judge, concurring.

I concur in the Majority's opinion. I write separately, though, because, like the Dissent, I think that the third-party doctrine,[1] as it relates to modern technology, warrants additional consideration and discussion. I view the third-party doctrine as applying in this case because *Smith v. Maryland*, 442 U.S. 735, 99 S. Ct. 2577 (1979), implicitly found no historical expectation of privacy implicated by the information that we give to a service provider for the purpose of making a telephone call other than the expectation of privacy that we generally do not have in information that we voluntarily convey to a third party. Since, like *Smith*, this case involves information that we knowingly expose to a service provider for the purpose of making a telephone call and no more specific historically recognized privacy interest is implicated by cell-site location information, this case is necessarily controlled by *Smith*.

But when, historically, we have a more specific expectation of privacy in a particular type of information, the more specific privacy interest must govern the Fourth Amendment analysis, even though we have exposed the information at issue to a third party by using technology to give, receive, obtain, or otherwise use the protected information. In other words, our historical expectations of privacy do not change or somehow weaken simply because we now

[1] The third-party doctrine applies when a person voluntarily entrusts information to a third party, and it generally renders the Fourth Amendment's warrant requirement inapplicable as it pertains to the procurement of the exposed information from the third party. *See United States v. Miller*, 425 U.S. 435, 442-43, 96 S. Ct. 1619, 1624 (1976).

happen to use modern technology to engage in activities in which we have historically maintained protected privacy interests. Neither can the protections of the Fourth Amendment. *See Kyllo v. United States*, 533 U.S. 27, 34, 121 S. Ct. 2038, 2043 (2001) ("To withdraw protection of this minimum expectation [of privacy] would be to permit . . . technology to erode the privacy guaranteed by the Fourth Amendment."). So reliance on the third-party doctrine must be limited to those cases involving alleged privacy interests that do not implicate a more specific historically recognized reasonable privacy interest.

I.

Before exploring why this is so, I pause to express my view that the Dissent is right to raise its concerns. In our time, unless a person is willing to live "off the grid," it is nearly impossible to avoid disclosing the most personal of information to third-party service providers on a constant basis, just to navigate daily life. And the thought that the government should be able to access such information without the basic protection that a warrant offers is nothing less than chilling. Today's world, with its total integration of third-party-provided technological services into everyday life, presents a steroidal version of the problems that Justices Marshall and Brennan envisioned when they dissented in *United States v. Miller*, 425 U.S. 435, 447, 454, 96 S. Ct. 1619, 1626, 1629 (1976) (Brennan, J., and Marshall, J., dissenting, respectively), and its progeny, including *Smith v. Maryland*, 442 U.S. 735, 748, 99 S. Ct. 2577, 2584 (1979) (Marshall, J., dissenting). As Justice Marshall

aptly explained the problem, under the third-party doctrine, "unless a person is prepared to forgo use of what for many has become a personal or professional necessity, he cannot help but accept the risk of surveillance." *Smith*, 442 U.S. at 750, 99 S. Ct. 2577, 2585 (Marshall, J., dissenting). Perhaps it was this type of realization that caused Justice Sotomayor to write, "[I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties." *United States v. Jones*, ___ U.S. ___, 132 S. Ct. 945, 957 (Sotomayor, J., concurring). Since we are not the Supreme Court and the third-party doctrine continues to exist and to be good law at this time, though, we must apply the third-party doctrine where appropriate.

But, as the Dissent points out, the mere fact that the third-party doctrine could have been applied to an alleged privacy interest does not mean that it always has been. To ensure that this is a case where the third-party doctrine should be applied, I think it important to consider what sets apart those cases where the Supreme Court has chosen not to apply the third-party doctrine, despite the fact that a party has exposed its effects or information to a third party.

II.

The Supreme Court has explained that, in analyzing a Fourth Amendment claim, we begin by determining "whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed." *Wyoming v. Houghton*, 526 U.S. 295, 299, 119 S. Ct. 1297, 1300 (1999). We do this because, "[a]t bottom, we must

'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'"[2] *United States v. Jones*,

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[2] Some might suggest that we must first determine whether a search within the meaning of the Fourth Amendment has occurred, and only if one has should we then assess whether that search has violated a constitutionally protected expectation of privacy, in the context of engaging in a reasonableness analysis. But generally, when the alleged search is of information and it is not accompanied by a concurrent physical trespass, we must evaluate whether a reasonable expectation of privacy existed in the information in the first place in order to determine whether a "search" has occurred. *See Katz v. United* States, 389 U.S. 347, 88 S. Ct. 507 (1967); *Smith*, 442 U.S. 735, 99 S. Ct. 2577. That inquiry requires us to resolve the conflict between the historical expectation of privacy allegedly violated by the search and the third-party doctrine's rule that no expectation of privacy exists when a person voluntarily exposes information to a third party. And under the reasonableness analysis, we balance the degree to which a search or seizure "intrudes upon an individual's privacy" against "the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming v. Houghton*, 526 U.S. 295, 300, 119 S. Ct. 1297, 1300 (1999). So we would again need to figure out the relationship between the competing historical expectation of privacy and the third-party doctrine to determine the ultimate expectation of privacy to weigh against the government's interest. As a result, this two-step analysis becomes redundant in the context of an alleged search of information without a concurrent physical trespass.

Moreover, if, in conducting the reasonableness analysis, we ignore the historical privacy interest and always defer to the third-party doctrine, that does not account for the way in which the Supreme Court has resolved the conflict between the historical privacy interest and the third-party doctrine in cases like *Katz*, 389 U.S. 347, 88 S. Ct. 507, because ignoring the historical privacy interest in favor of the third-party doctrine would always result in a determination that no warrant is required under a reasonableness evaluation. This is necessarily so because when the third-party doctrine applies, by definition, there is no reasonable privacy interest to weigh on the

individual's side of the scale against the government's interest in crime fighting. But "the normal need for law enforcement" generally cannot exempt a search from the warrant requirement where the searched party enjoys a reasonable expectation of privacy, *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653, 115 S. Ct. 2386, 2391 (1995), such as when the privacy interest at stake has historically been recognized—unless, of course, it is impracticable to obtain a warrant under the circumstances. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1967). And if we resolved the conflict between the historically existing privacy interest and the third-party doctrine by assuming a diminished expectation of privacy in the historical interest being weighed against the government's general interest in crime fighting, that still would not seem to account for cases like *Katz*, 389 U.S. 347, 88 S. Ct. 507, even if the Court found that satisfying a lesser requirement than probable cause, such as that set forth by § 2703(d), was necessary to obtain the information. Indeed, I am aware of no case where the Court has expressly found an expectation of privacy diminished because of the third-party doctrine and yet has concluded that a warrant was required. *But cf. Riley v. California*, ___ U.S. ___, 134 S. Ct. 2473, 2488 (2014) (holding that a warrant is generally required to search an arrestee's cell phone, even though arrestees have a diminished expectation of privacy because of their status as arrestees). Whether we ignored the more specific historical privacy interest in favor of the third-party doctrine or found that the historical privacy interest was diminished, though, privacy interests long recognized as reasonable by society, which therefore historically necessitated a showing of probable cause and a warrant under the Fourth Amendment in order to breach, would be violated without a warrant and on a showing of less than probable cause, simply because we happen to use technology to do more efficiently what we used to do without technology. I do not believe that Supreme Court precedent supports the conclusion that the long-established privacy interests protected by the Fourth Amendment should be subject to the whims of technology. *See Kyllo*, 533 U.S. at 34, 121 S. Ct. at 2043 (2001) ("To withdraw protection of this minimum expectation [of privacy] would be to permit . . . technology to erode the privacy guaranteed by the Fourth Amendment."). And even if the Court were prepared to conclude that a privacy interest diminished by

___ U.S. ___, 132 S. Ct. 945, 950 (2012) (citation omitted). So it seems to me that existing Supreme Court precedent may fairly be construed to suggest that where society has historically recognized a legitimate expectation of privacy, we must continue to do so for purposes of Fourth Amendment analysis, even if, in our modern world, we must now expose to a third party information that we would have previously kept private, in order to continue to participate fully in society. If we do not, we will face the Hobson's choice of leaving our historically recognized Fourth Amendment rights at the door of the modern world or finding ourselves locked out from it. That the Constitution will not abide.

A.

As the Dissent points out, the Supreme Court has held that "[a] hotel room can clearly be the object of Fourth Amendment protection as much as a home or an office." *Hoffa v. United States*, 385 U.S. 293, 301, 87 S. Ct. 408, 413 (1966); *see also Minnesota v. Carter*, 525 U.S. 83, 95-96, 119 S. Ct. 469, 476 (1998) (Scalia, J., concurring) (citing *Oystead v. Shed*, 13 Mass. 520 (1816), for the proposition that a trespass occurs when the sheriff breaks into a dwelling to capture a boarder living there); *Minnesota v. Olson*,

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the third-party doctrine nonetheless required a warrant to breach, it would still need to articulate why one particular expectation of privacy diminished by the third-party doctrine was sufficient to outweigh the government's general interest in crime fighting, while a different expectation of privacy diminished by the third-party doctrine was not, unless the more specific historical expectation of privacy negates the effects of the third-party doctrine in evaluating the privacy interest for purposes of conducting the reasonableness analysis.

495 U.S. 91, 96-97, 110 S. Ct. 1684, 1688 (1990) (holding that overnight guests in the homes of a third person can have a reasonable expectation of privacy in those premises). This is so, even though housekeepers and maintenance people commonly have access to hotel rooms during a guest's stay and can view and even move around a guest's belongings in order to conduct their duties. But the fact that a hotel guest has exposed his or her belongings to hotel workers does not, in and of itself, entitle the government to enter a rented hotel room and conduct a warrantless search.

Similarly, historically, human operators were known to eavesdrop on the contents of telephone calls in the early days of telephone usage. *See* Jeff Nilsson, *What the Operators Overheard in* 1907, The Saturday Evening Post, June 30, 2012, http://www.saturdayeveningpost.com/2012/06/30/history/post-perspective/operators-heard-1907.html (last visited Apr. 16, 2015). And, as Justice Stewart observed, even after human operators were taken out of the equation, telephone conversations may have been "recorded or overheard by the use of other [telephone] company equipment." *Smith v. Maryland*, 442 U.S. 735, 746, 99 S. Ct. 2577, 2583 (1979) (Stewart, J., dissenting). But the fact that, historically, we exposed our private conversations to third parties did not stop the Supreme Court from holding in *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507 (1967), that we have a reasonable expectation of privacy in telephone communications and that the government generally must obtain a warrant before intercepting them.

Why should that be so when the third-party doctrine also speaks to what a reasonable

expectation of privacy is (none where it applies), and the doctrine seemingly applies to these situations? I believe that Supreme Court precedent fairly may be read to suggest that the third-party doctrine must be subordinate to expectations of privacy that society has historically recognized as reasonable. Indeed, our privacy expectations in modern-day hotels and the content of our telephone conversations hearken back to historically recognized reasonable expectations of privacy.

As Justice Scalia has explained, "The people's protection against unreasonable search and seizure in their 'houses' was drawn from the English common-law maxim, 'A man's home is his castle.'" *Carter*, 525 U.S. at 95, 119 S. Ct. at 475 (Scalia, J., concurring) (emphasis omitted). And a person enjoys a recognized expectation of privacy in that home, provided he or she actually is living there. *Id*. at 95-96, 119 S. Ct. at 476. So, when a person rents and dwells in a hotel room,[3] that hotel room becomes that person's "home" and "castle," for purposes of the Fourth Amendment, regardless of who else may enter the premises.

As for the telephone, it, of course, was not invented until the late 1800's and was not widely used until well after the Framers' time.[4] Until then,

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[3] I recognize that inns existed in the Framers' Day.

[4] Alexander Graham Bell obtained a patent for the telephone on March 7, 1876. *See* http://www.pbs.org/transistor/album1/addlbios/bellag.html (last visited Apr. 16, 2015). He successfully transmitted speech over the line five days later. *Id.* But the United States House of Representatives has since recognized Antonio Meucci as the inventor of the telephone. H.R. Res. 269, 107th Cong. (June 11, 2002). Meucci reportedly developed the first version of a working telephone in 1860. *See id.*

people who were not closely located to each other typically communicated by letter. *See, e.g.*, https://jeffersonpapers.princeton.edu/ (last visited Apr. 16, 2015) (noting that Thomas Jefferson wrote and received letters). As the Supreme Court has noted, "Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy . . . ." *United States v. Jacobsen*, 466 U.S. 109, 114, 104 S. Ct. 1652, 1657-58 (1984); *see also Ex parte Jackson*, 96 U.S. 727, 733, 24 L. Ed. 877 (1877).

While the Supreme Court did not mention society's reasonable expectation of privacy in the content of communications sent by letter through third parties when it found a reasonable expectation of privacy in the content of communications transmitted by telephone through third parties in *Katz*, it is clear that the historical expectation of privacy in communications by letter is the same expectation of privacy that we continue to have in communications that we conduct by telephone. And the fact that we have always had to rely on third parties to engage in telephone calls—even when the third parties were known to eavesdrop from time to time—does not somehow change our reasonable expectation of privacy in personal telephone calls. Put simply, the fact that we have changed the way that we conduct personal communications does not mean that we have altered our expectation of privacy in our personal communications.

B.

To help explain how the conflict between historically recognized privacy interests and the third-party doctrine plays out in light of modern

technology—and why the cell-site location information at issue in this case is subject to the third-party doctrine—consider a few examples of historical privacy interests implicated by modern technology.

If our expectation of privacy in our personal communications has not changed from what it was when we only wrote letters to what it is now that we use telephones to conduct our personal interactions, it has not changed just because we now happen to use email to personally communicate.[5] *See United*

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[5] The Supreme Court has held that addressing and other routing information on paper letters, like pen-register and trap-and-trace information (including the date and time of listed calls) regarding telephone calls, is accessible to the government without a warrant. *See Ex parte Jackson*, 96 U.S. 727, 736, 24 L. Ed. 877; *Smith*, 442 U.S. 735, 99 S. Ct. 2577. Email routing information, such as the sender, the receiver, the date, the time, and other routing information (such as Internet Protocol addresses) implicates the same expectations of privacy as older versions of routing information found on paper letters and in pen-register and trap-and-trace information. *See United States v. Forester*, 512 U.S. 500, 511 (9th Cir. 2007). The lack of a reasonable expectation of privacy in routing information as it pertains to paper letters and telephone conversations does not change just because the medium for engaging in personal conversations does. Subject lines in emails, however, are not in any way related to the routing or transaction information of an email; no one writes the subject matter of the letters they send on the outside of the envelope, and people do not give the telephone service provider a general overview of the telephone conversations they are about to have. So subject-matter lines on emails cannot be governed by the lack of an expectation of privacy attending paper-letter or telephone-call routing information. Instead, subject-matter lines usually disclose a summary or general statement about the content of the email communication itself, and the privacy interest implicated by subject-matter lines is therefore the same as the privacy interest in personal communications conducted by paper letters

States v. Warshak, 631 F.3d 266, 288 (6th Cir. 2010). Just as the need to entrust third parties with our personal conversations when we communicate by written letter or by telephone does not affect the analysis, the need to rely on third parties to provide Internet service when we communicate by email cannot do so, either.

The same is true for our other historically recognized reasonable expectations of privacy. So, for instance, while the Internet and its search engines obviously did not exist in the 18th century, libraries did. *See, e.g.,* http://franklinma.virtualtownhall.net/Pages/FranklinMA_Library/libraryhistory (last visited Apr. 13, 2015) (discussing the establishment of the Franklin Public Library in 1790). And, though libraries no doubt have always kept track of the books checked out, they have not monitored what a person reviews within the borrowed books, and library users have traditionally been free to anonymously peruse materials at the library without checking them out and creating a record. This anonymity is critical to First Amendment rights. *See, e.g., United States v. Rumely*, 345 U.S. 41, 57-58, 73 S. Ct. 543, 551-42 (1953) (Douglas, J., concurring) ("When the light of publicity may reach any student, any teacher, inquiry will be discouraged. . . . If [a reader] can be required to disclose what she read yesterday and what she will read tomorrow, fear will take the place of freedom in the libraries . . . of the land).

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and telephone calls. As a result, as with the content of paper letters and telephone conversations, a reasonable expectation of privacy exists in the subject-matter lines of emails.

This privacy interest is no less important simply because many of us now use the Internet to do what we used to do at the library. We do not have lower expectations of privacy in what we research—particularly with respect to our expectations that the government will not be looking over our shoulders to review our work—merely because we research and read it online at home or in a coffee shop instead of in hard copies of books and periodicals in the stacks of the library, even though the only way that we can conduct online research is through a third-party service provider. In short, the expectation of privacy in reading and researching what we want, free from government surveillance without a warrant, has not changed just because the mechanism we use for engaging in this conduct has evolved.

As for documents that we store in the Cloud, our privacy interest there is the same as that recognized in documents and other items maintained in a rented office or residence, or a hotel room during a paid visit. As discussed previously, the Supreme Court has plainly recognized as reasonable under the Fourth Amendment the privacy interest in effects held in such places, even though a straight-forward application of the third-party doctrine would suggest the opposite conclusion, particularly in the case of a hotel room, where housekeeping and maintenance workers can be expected to enter the premises. The privacy expectation has not abraded simply because the effect to be searched is virtual and the "place" of storage is now the intangible Cloud. *Cf. Riley v. California*, ___ U.S. ___, 134 S. Ct. 2473, 2494-95 (2014) (recognizing that searches of cell phones implicate the same type of privacy interest invaded by 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," and holding that a warrant is generally required to search a cell phone in an arrestee's possession at the time of arrest, despite the historical rule allowing for a search of effects on an arrestee at the time of arrest). "For the Fourth Amendment protects people, not places." *Katz*, 389 U.S. at 351, 88 S. Ct. at 511.

C.

And Justice Alito's concurrence in *Jones*, 132 S. Ct. at 964 (Alito, J., concurring in the judgment), suggests a viable and apt historical privacy interest that pertains to global-positioning system information: the expectation of privacy as it regards incessant surveillance. Justice Alito has described this expectation of privacy as follows:

> [R]elatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable. . . . But the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy. For such offenses, 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.

Three other Justices joined in Justice Alito's *Jones* concurrence, and another, Justice Sotomayor, expressed her agreement with the idea that, "at the very least, 'longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.'" *Id.* at 955 (Sotomayor, J., concurring) (quoting *id.* at 964 (Alito, J., concurring)). While this view may not constitute binding Supreme Court precedent, it certainly suggests that society has long viewed as reasonable the expectation of privacy in not being subjected to constant, longer-term surveillance. And if that's the case, the only question that remains about whether the government must obtain a warrant to engage in longer-term GPS monitoring is where we draw the line establishing what constitutes "longer-term" GPS monitoring. But that is not a question that we must answer today.

Nevertheless, in my opinion, the longer-term GPS issue necessarily means that the Dissent is correct in its concerns that the expectation of privacy that is infringed by longer-term GPS monitoring may, at some point, become the same expectation of privacy implicated by more and more precise cell-site location technology. When that happens, the historical reasonable expectation of privacy in not being subjected to longer-term surveillance may well supersede the third-party doctrine's applicability to information entrusted to third parties as it pertains to cell-site location information.[6] But that is not this case.

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[6] One other perhaps significant difference between GPS technology and precise cell-site location information also exists: GPS monitoring is constant, whereas cell-site location information is produced only when a cell-phone user makes or

According to the MetroPCS records custodian who testified in this case, the radii of the cell towers at issue were approximately a mile to a mile and a half. Since a sector is generally a one-third to a one-sixth pie slice of the roughly circular tower range, that means that, at best, the government was able to determine where Davis was within approximately 14,589,696 square feet.[7] In an urban environment, this is not precise enough to rival the invasion of privacy that pinpoint-longer-term surveillance represents.

Since no specific historical privacy interest is implicated by cell-site location information, and further, because the privacy interest in the cell-site location information at issue here is materially indistinguishable from the privacy interest in the pen-register information at stake in *Smith*,[8] we must

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receives a call. If a person is usually on the cell phone, that may be a distinction without a difference. But if a person is not, that may be a meaningful dissimilarity. We conduct Fourth Amendment jurisprudence "with an eye to the generality of cases." *See Houghton*, 526 U.S. at 304, 119 S. Ct. at 1303 (balancing interests under the Fourth Amendment's reasonableness approach). So that factual issue may require resolution at a future time.

[7] A one-mile radius (5,280 feet), squared (27,878,400), times Π, equals 87,538,176 square feet, divided by six (one sector), equals 14,589,696 square feet.

[8] I respect the Dissent's thought process in attempting to distinguish the concept of whether cell-phone users know that they are disclosing to their service providers the fact that they are usually located in the range of the nearest cell towers that their cell phones are using when they make and receive calls, from the Supreme Court's conclusion in *Smith* that standard telephone users know that they are disclosing the telephone numbers that they are calling when they dial. But it seems to me that the average cell-phone user knows that cell phones

apply the third-party doctrine, as the Supreme Court did in *Smith*. I read *Smith*, in turn, as implicitly finding no historical privacy interest implicated by information provided to the telephone company to allow a call to be made, other than the general third-party doctrine.[9] Because no specific historical privacy interest is implicated by pen-register-type information, the more general historical privacy expectation associated with the third-party doctrine governed in *Smith*. The same is true with respect to the cell-site location information at issue in this case.

III.

Nevertheless, where, as here, no historical privacy interest exists in the information sought, Congress always has the option of legislating higher standards for the government to obtain information.

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work only when they are within service range of a cell tower. Advertising campaigns are built on this concept. *See, e.g.*, https://www.youtube.com/watch?v=OPwPo-IAQ-E (last visited Apr. 13, 2015) ("Can you hear me now?"); https://www.youtube.com/watch?v=VZPjJI0K7Bk (last visited Apr. 13, 2015) ("There's a map for that"). In *Smith*, similar to the Dissent here, Justice Marshall argued that the third-party doctrine did not apply, in part, because people do not "'typically know' that a phone company monitors call[] [information] for internal reasons." 442 U.S. at 748-49, 99 S. Ct. at 2584-85. Right or wrong, he lost that battle. And, while cell-site location information is certainly not pen-register information and I can understand where the Dissent is coming from, I do not feel comfortable taking the position that the average cell-phone user does not know that he or she is disclosing location information to the cell-service provider.

[9] This makes sense, as the privacy interest in discreet routing information is the same as the privacy interest in address information on letters, which, in turn, has always been subject to the third-party doctrine. *See supra* at n.5.

Justice Alito has opined, "In circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative. *Jones*, 132 U.S. at 964 (Alito, J., concurring in the judgment). This is certainly one potential limitation on the third-party doctrine. And we have seen Congress enact legislation in response to the application of the third-party doctrine to our modern world. *See, e.g.*, the Right to Financial Privacy Act, 12 U.S.C. § 2701, *et seq*.[10] Indeed, the Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2510, *et seq.*, of which the Stored Communications Act, 18 U.S.C. §§ 2701-2712, is a part—the statute under which the government obtained the order authorizing it to receive Davis's historical cell-site location information in this case—was enacted (and later amended), in part, to protect what Congress recognized as "privacy interests in personal and proprietary information" that travels and is maintained in electronic form by third-party service providers. *See* H.R. Rep. No. 99-541 at § I (1986).

But legislation should fill only the gaps that occur when no historically recognized privacy interest is implicated by the technology under review. The legislature, after all, does not have the power to entirely redefine the protections of the Fourth Amendment each time that it enacts a new law. While providing more protection than the

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[10] *See* H.R. Rep. No. 95-1383 at 9306 (1978) ("The Title is a congressional response to the Supreme Court decision in the *United States v. Miller* . . . . The Court did not acknowledge the sensitive nature of [financial records], and instead decided that since the records are the 'property' of the financial institution, the customer has no constitutionally recognizable privacy interest in them.").

Fourth Amendment requires represents a choice that Congress may, within its power, make, providing less is not a constitutional option. If it were, the Fourth Amendment would be meaningless because it would simply be whatever Congress said it was at any given time.

That cannot be right under our Constitution. So Congress's ability to legislate reasonable expectations of privacy (other than when Congress elects to increase expectations above the Fourth Amendment baseline) must be limited to, at most, only those circumstances where no historical privacy interest implicated by the technology under review exists.

IV.

For all of these reasons, I believe that *Smith* (and therefore, the third-party doctrine) inescapably governs the outcome of this case. But when we must necessarily expose information to third-party technological service providers in order to make use of everyday technology, and the technological service merely allows us to engage in an activity that historically enjoyed a constitutionally protected privacy interest, Supreme Court precedent can be viewed as supporting the notion that the historically protected privacy interest must trump the third-party doctrine for purposes of Fourth Amendment analysis. If the historically protected privacy interest does not, then with every new technology, we surrender more and more of our historically protected Fourth Amendment interests to unreasonable searches and seizures.

MARTIN, Circuit Judge, dissenting,[1] in which JILL PRYOR, Circuit Judge, joins:

In this case, the government got 67 days of cell site location data disclosing Quartavious Davis's location every time he made or received a call on his cell phone. It got all this without obtaining a warrant. During that time, Mr. Davis made or received 5,803 phone calls, so the prosecution had 11,606 data points about Mr. Davis's location. We are asked to decide whether the government's actions violated Mr. Davis's Fourth Amendment rights. The majority says our analysis is dictated by the third-party doctrine, a rule the Supreme Court developed almost forty years ago in the context of bank records and telephone numbers. But such an expansive application of the third-party doctrine would allow the government warrantless access not only to where

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[1] The en banc court voted to vacate the panel opinion which held that the warrantless search of Mr. Davis's cell site location data was unconstitutional, but upheld Mr. Davis's conviction based on the good-faith exception. The good-faith exception says that where officers' conduct is based on their good-faith understanding of an existing statute, the exclusionary rule will not apply. See, e.g., United States v. Williams, 622 F.2d 830, 843 (5th Cir. 1980); see also Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981). The majority here refers to the good-faith exception as an alternative basis for affirming Mr. Davis's conviction. Maj. Op. 44 n.20. I agree with them about that. My disagreement is with the majority's Fourth Amendment analysis, which permits government access to Mr. Davis's cell site location data without a warrant. I understand the Fourth Amendment to require the government to get a warrant for that information, while the majority does not. I refer to this opinion as a dissent, not a concurrence in the judgment, for that reason.

we are at any given time, but also to whom we send e-mails, our search-engine histories, our online dating and shopping records, and by logical extension, our entire online personas.

Decades ago, the Supreme Court observed that "[i]f times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, . . . the values served by the Fourth Amendment [are] more, not less, important." Coolidge v. New Hampshire, 403 U.S. 443, 455, 91 S. Ct. 2022, 2032 (1971). This is even truer today. The judiciary must not allow the ubiquity of technology—which threatens to cause greater and greater intrusions into our private lives—to erode our constitutional protections. With that in mind, and given the striking scope of the search in this case, I would hold that the Fourth Amendment requires the government to get a warrant before accessing 67 days of the near-constant cell site location data transmitted from Mr. Davis's phone. I respectfully dissent.

I.

I turn first to the third-party doctrine, which the majority believes decides this case for us. They say: "Davis can assert neither ownership nor possession of the third-party's business records he sought to suppress." Maj. Op. 27; see also William Pryor Concurrence 45 ("Smith controls this appeal."). My reading of Supreme Court precedent suggests that things are not so simple.

The Supreme Court announced the third-party doctrine nearly forty years ago in United States v. Miller, 425 U.S. 435, 96 S. Ct. 1619 (1976). The Court

said that "the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, 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." Id. at 443, 96 S. Ct. at 1624. Three years later, in Smith v. Maryland, 442 U.S. 735, 99 S. Ct. 2577 (1979), the Court applied that doctrine to hold that a defendant did not have a reasonable expectation of privacy in the numbers he dialed on his home telephone, recorded by means of a pen register at a telephone company's central office. Id. at 742, 99 S. Ct. at 2581. The Court reasoned that "[w]hen he used his phone, petitioner voluntarily conveyed numerical information to the telephone company and 'exposed' that information to its equipment in the ordinary course of business." Id. at 744, 99 S. Ct. at 2582. The Court reminisced that "[t]he switching equipment that processed those numbers is merely the modern counterpart of the operator who, in an earlier day, personally completed calls for the subscriber." Id. The government believes that Smith controls the outcome of this case, and the majority apparently agrees. I do not.

First, the phone numbers a person dials are readily distinguishable from cell site location data. Smith involved "voluntarily conveyed numerical information"—voluntary because phone dialers have to affirmatively enter the telephone number they are dialing in order to place a call. By contrast, cell phone users do not affirmatively enter their location in order to make a call. Beyond that, the ACLU informs us that "[p]hones communicate with the wireless network when a subscriber makes or

receives calls." ACLU Amicus Br. 5 (emphasis added). As our sister Circuit observed, "when a cell phone user receives a call, he hasn't voluntarily exposed anything at all." In re Application of U.S. for an Order Directing a Provider of Elec. Commc'n Serv. to Disclose Records to the Gov't, 620 F.3d 304, 317–18 (3d Cir. 2010) (Third Circuit Case) (emphasis added) (quotation marks omitted).[2]

The Smith Court also emphasized that the numbers a person dials appear on the person's telephone bill and referenced the pre-automation process that required the caller to recite phone numbers out loud to a phone operator in order to make a call. Thus, the Court concluded that

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[2] The majority extensively recounts the Fifth Circuit's decision in In re Application of the U.S. for Historical Cell Site Data, 724 F.3d 600 (5th Cir. 2013), which said that a "cell user ha[s] no subjective expectation of privacy in such business records showing cell tower locations." Maj. Op. 25. That Fifth Circuit case, of course, does not bind us. And in any event, other courts have held that people do have a reasonable expectation of privacy in cell site location data, whether historical or real-time in nature. The Third Circuit Case, for example, rejected the government's argument that "no [cell site location data] can implicate constitutional protections because the subscriber has shared its information with a third party. . . ." 620 F.3d at 317. Similarly, the Florida Supreme Court has held that cell phone users have a reasonable expectation of privacy in real-time cell site location data. Tracey v. State, 152 So. 3d 504, 526 (Fla. 2014). And a recent decision from the Northern District of California addressed the very same question we address here and held that a person has a reasonable expectation of privacy in 60 days of historical cell site location data. United States v. Cooper, No. 13-cr-00693-SI-1, 2015 WL 881578, at *6–8 (N.D. Cal. Mar. 2, 2015). In short, we are faced with persuasive, albeit not binding, authority on both sides of the debate, but none controls the outcome of this case.

"[t]elephone users . . . typically know that they must convey numerical information to the phone company." Smith, 442 U.S. at 743, 99 S. Ct. at 2581 (emphasis added). There is not the same sort of "knowing" disclosure of cell site location data to phone companies because there is no history of cell phone users having to affirmatively disclose their location to an operator in order to make a call. The extent of voluntariness of disclosure by a user is simply lower for cell site location data than for the telephone numbers a person dials. For that reason, I don't think Smith controls this case.

Second, although the Miller/Smith rule appears on its own to allow government access to all information that any third-party obtains, in rulings both before and since those cases, the Supreme Court has given reasons to doubt the rule's breadth. For instance, in Ferguson v. City of Charleston, 532 U.S. 67, 121 S. Ct. 1281 (2001), the Court stated that "[t]he reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent." Id. at 78, 121 S. Ct. at 1288. Though the majority did not mention the third-party doctrine, Justice Scalia noted the incongruity between that doctrine and the Ferguson holding in his dissent. As he stated:

> Until today, we have never held—or even suggested—that material which a person voluntarily entrusts to someone else cannot be given by that person to the police, and used for whatever evidence it may contain. Without so

> much as discussing the point, the Court today opens a hole in our Fourth Amendment jurisprudence, the size and shape of which is entirely indeterminate.

Id. at 95–96, 121 S. Ct. at 1297–98 (Scalia, J., dissenting). Further, and again without mentioning the third-party doctrine, the Court has routinely recognized that people retain a reasonable expectation of privacy in things that they have arguably exposed to third parties. See, e.g., United States v. Jacobsen, 466 U.S. 109, 114, 104 S. Ct. 1652, 1657 (1984) (holding that "[l]etters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy" even though they touch the hands of third-party mail carriers); Stoner v. California, 376 U.S. 483, 487–88, 490, 84 S. Ct. 889, 892, 893 (1964) (finding unpersuasive the argument that "the search of [a] hotel room, although conducted without the petitioner's consent, was lawful because it was conducted with the consent of the hotel clerk," because a hotel guest's constitutional protections should not be "left to depend on the unfettered discretion of an employee of the hotel"); see also Smith, 442 U.S. at 746–47, 99 S. Ct. at 2583 (Stewart, J., dissenting) (noting that in Katz v. United States, 389 U.S. 347, 88 S. Ct. 507 (1967), the Court held that a person has a reasonable expectation of privacy in the contents of phone conversations made in telephone booths even though calls "may be recorded or overheard by the use of other company equipment"). I am well aware that each of these cases can be distinguished from Mr. Davis's case. I mean only to say that a

comprehensive review of Supreme Court precedent reveals that the third-party doctrine may not be as all-encompassing as the majority seems to believe.

Third and most importantly, the majority's blunt application of the third-party doctrine threatens to allow the government access to a staggering amount of information that surely must be protected under the Fourth Amendment. Consider the information that Google gets from users of its e-mail and online search functions.[3] According to its website, Google collects information about you (name, e-mail address, telephone number, and credit card data); the things you do online (what videos you watch, what websites you access, and how you view and interact with advertisements); the devices you use (which particular phone or computer you are searching on); and your actual location. See Privacy Policy, http://www.google.com/intl/en/policies/privacy/ (last accessed March 30, 2015). Beyond that, in its "Terms of Service," Google specifies that "[w]hen you upload, submit, store, send or receive content to or through our Services, you give Google (and those we work with) a worldwide license to use, host, store, reproduce, modify, create derivative works, . . . communicate, publish, publicly perform, publicly display and distribute such content." See Google Terms of Service, http://www.google.com/intl/en/policies/terms/ (last accessed March 30, 2015). Like in Miller and Smith, Google even offers a legitimate business purpose for such data storage and mining: "Our automated systems analyze your content

[3] I refer to Google only as an example. The same analysis applies to most other online search engine or e-mail service providers.

(including emails) to provide you personally relevant product features, such as customized search results, tailored advertising, and spam and malware detection." Id. Under a plain reading of the majority's rule, by allowing a third-party company access to our e-mail accounts, the websites we visit, and our search-engine history—all for legitimate business purposes—we give up any privacy interest in that information.

And why stop there? Nearly every website collects information about what we do when we visit. So now, under the majority's rule, the Fourth Amendment allows the government to know from YouTube.com what we watch, or Facebook.com what we post or whom we "friend," or Amazon.com what we buy, or Wikipedia.com what we research, or Match.com whom we date—all without a warrant. In fact, the government could ask "cloud"-based file-sharing services like Dropbox or Apple's iCloud for all the files we relinquish to their servers. I am convinced that most internet users would be shocked by this. But as far as I can tell, every argument the government makes in its brief regarding cell site location data applies equally well to e-mail accounts, search-engine histories, shopping-site purchases, cloud-storage files, and the like. See, e.g., Appellee's Br. 21–22 ("Davis can assert neither ownership nor possession of the third-party records he sought to suppress."); id. at 22 ("Evidence lawfully in the possession of a third party is not his, even if it has to do with him."); id. at 23 ("Davis is not in a good position to complain that the government improperly obtained 'his location data,' since he himself exposed and revealed to MetroPCS the very information he now seeks to keep private."); id. at 24 ("It is not

persuasive to argue that phone users do not knowingly or intentionally disclose any location-related information to their service providers."); id. at 25 ("For purposes of the Fourth Amendment, it makes no difference whether Davis knew that MetroPCS was collecting location-related information."); id. at 27–28 ("[S]ervice contracts and privacy policies typically warn cell-phone customers that phone companies collect location-related information and may disclose such data to law-enforcement authorities.").

The enormous impact of this outcome is probably why at least one Circuit has held that a person's Fourth Amendment rights are violated when the government compels an internet service provider to turn over the contents of e-mails without a warrant. See United States v. Warshak 631 F.3d 266, 286–88 (6th Cir. 2010). Surely the majority would agree and would also shield e-mails from government snooping absent a warrant. But if e-mails are protected despite the fact that we have surrendered control of them to a third party, then the rule from Smith and Miller has its limits.

The majority suggests that e-mails can be distinguished because cell site location data is "non-content evidence." Maj. Op. 27 (emphasis omitted). The majority offers no coherent definition of the terms "content" and "non-content," and I am hard-pressed to come up with one. For instance, would a person's Google search history be content or non-content information? Though a person's search terms may seem like "content," a search term exists in the

web address generated by a search engine.[4] And web addresses, like phone numbers, seem like quintessentially non-content information that merely direct a communication. But regardless, although this content–non-content distinction could—maybe—shield the body of e-mail messages, the government may presumably still access the time and date that we send e-mails, the names of the people who receive them, and the names of the people who email us, without a warrant. Likewise, although our actual activities on a dating or shopping website might be protected, the fact that we visited those websites or any other would still be freely discoverable. The government agreed at oral argument that under its theory, it could at the very least obtain records like the sender and receiver of e-mails, the time of day e-mails are sent, the number of e-mails a person sends, the websites that a person visits, and maybe even the connections a person communicates with on a dating website and whom she meets in person—all without a warrant.

This slippery slope that would result from a wooden application of the third-party doctrine is a perfect example of why the Supreme Court has insisted that technological change sometimes requires us to consider the scope of decades-old Fourth Amendment rules. See Kyllo v. United States, 533 U.S. 27, 35, 121 S. Ct. 2038, 2044 (2001) (rejecting a "mechanical interpretation of the Fourth Amendment" in the face of "advancing technology"); cf. Katz, 389 U.S. at 353, 88 S. Ct. at 512 ("To read

[4] For example, a search of "Eleventh Circuit" on google.com produces the web address: "https://www.google.com/?gws_rd=ssl#q=eleventh+circuit."

the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication."). For instance, in Riley v. California, 573 U.S. ___, 134 S. Ct. 2473 (2014), the Court was asked to decide whether the decades-old search-incident-to-arrest exception to the warrant requirement applied to cell phones on an arrestee's person. Id. at 2480. California argued that the Court's 41-year-old decision in United States v. Robinson, 414 U.S. 218, 94 S. Ct. 467 (1973), controlled the outcome in Riley because the Court held that a search of objects on an arrestee's person was categorically reasonable. See Riley, 134 S. Ct. at 2491. The Riley Court agreed that "a mechanical application of Robinson might well support the warrantless searches at issue." Id. at 2484. But it nonetheless unanimously rejected that argument, saying that cell "phones are based on technology nearly inconceivable just a few decades ago, when . . . Robinson w[as] decided." Id. Thus, to say that a search of cell phone data is "materially indistinguishable" from a search of physical items

> is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together. Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse.

Id. at 2488–89.

Likewise here, the extent of information that we expose to third parties has increased by orders of

magnitude since the Supreme Court decided Miller and Smith. Those forty years have seen not just the proliferation of cell phones that can be tracked, but also the advent of the internet. Given these extraordinary technological advances, I believe the Supreme Court requires us to critically evaluate how far to extend the third-party doctrine. As Justice Sotomayor observed:

> [I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. . . . I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection.

United States v. Jones, 565 U.S. ___, ___, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring) (citations omitted). Neither would I assume as much. Though the doctrine may allow the government access to some information that we disclose to third parties, I would draw the line short of the search at issue here. Sixty-seven days of near-constant location tracking of a cell phone—a technological feat impossible to imagine when Miller and Smith were decided—is an application of the doctrine that goes too far.

II.

Because I believe that the third-party doctrine does not dictate the outcome of this case, I turn to fundamental Fourth Amendment principles. The Fourth Amendment says:

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

U.S. Const. amend. IV. "As the text makes clear, the ultimate touchstone of the Fourth Amendment is reasonableness." Riley, 134 S. Ct. at 2482 (quotation marks omitted). Our analysis is two-fold: "First, we ask whether the individual, by his conduct, has exhibited an actual expectation of privacy; that is, whether he has shown that he sought to preserve something as private." Bond v. United States, 529 U.S. 334, 338, 120 S. Ct. 1462, 1465 (2000) (quotation omitted) (alteration adopted). "Second, we inquire whether the individual's expectation of privacy is one that society is prepared to recognize as reasonable." Id. (quotation omitted). If we conclude that a particular search violates a defendant's reasonable expectation of privacy, the government must get a search warrant.

For me, the answer to the subjective inquiry is easy. It seems obvious that Mr. Davis never intended to disclose his location to the government every time

he made or received calls. Recent polling data tells us that 82% of adults "feel as though the details of their physical location gathered over a period of time" is "very sensitive" or "somewhat sensitive." Mary Madden, Public Perceptions of Privacy and Security in the Post-Snowden Era 34, Pew Research Center (Nov. 12, 2014), http://www.pewinternet.org/files/2014/11/PI_PublicPerceptionsofPrivacy_ 1112 14.pdf. This supports the common-sense notion that people do not expect the government to track them simply as a consequence of owning and using what amounts to a basic necessity of twenty-first century life—the cell phone.[5] Beyond that, the prosecutor in this case specifically admitted at closing argument that "what this defendant could not have known was that . . . his cell phone was tracking his every moment." Trial Tr. 4–5, Feb. 8, 2012, ECF No. 287 (emphasis added); see also id. at 14 (arguing that Mr. Davis and his co-conspirators "had no idea that by bringing their cell phones with them to these robberies they were

[5] The government argues that regardless of what people think, "MetroPCS's current privacy policy . . . advises its wireless customers that the company 'may disclose, without your consent, the approximate location of a wireless device to a governmental entity or law enforcement authority when we are served with lawful process.'" Appellee Br. 28 (citation omitted). But as another court recently noted, "[t]he fiction that the vast majority of the American population consents to warrantless government access to the records of a significant share of their movements by 'choosing' to carry a cell phone must be rejected." In re Application of the U.S. for an Order Authorizing the Release of Historical Cell-Site Info., 809 F. Supp. 2d 113, 127 (E.D.N.Y. 2011). Regardless, and as the majority acknowledges, the "contract does not appear on this record to have been entered into evidence here," so "we cannot consider it." Maj. Op. 25 n.11.

allowing MetroPCS and now [the jury] to follow their movements"). In short, I believe that Mr. Davis—like any other person interacting in today's digital world—quite reasonably had a subjective expectation that his movements about town would be kept private.[6]

The more important and more difficult question we must consider is whether Mr. Davis's expectation of privacy is one society is objectively prepared to recognize as reasonable. I believe the answer is yes. The Supreme Court recently reminded us that "there is an element of pervasiveness that characterizes cell phones." Riley, 134 S. Ct. at 2490. Today, "it is the person who is not carrying a cell phone . . . who is the exception." Id. The Court noted 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." Id. (quoting Harris Interactive, 2013 Mobile Consumer Habits Study (June 2013)). In other words, "modern cell phones . . . are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." Id. at 2484; see also City of Ontario, Cal. v. Quon, 560 U.S. 746, 760, 130 S. Ct. 2619, 2630

[6] The majority does not explain why it believes that "the fact that Davis registered his cell phone under a fictitious alias tends to demonstrate his understanding that such cell tower location information is collected by MetroPCS and may be used to incriminate him." Maj. Op. 28. Mr. Davis's use of an alias more naturally evidences his desire not to tie his identity to his phone's account with MetroPCS. For me, Mr. Davis's use of an alias says nothing about his subjective expectation of privacy in his location.

(2010) ("Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification.").

Since we constantly carry our cell phones, and since they can be used to track our movements, the recent opinions of five Justices in United States v. Jones that long-term location-monitoring generally violates expectations of privacy are instructive. In Jones, the Supreme Court considered whether warrantless monitoring of the location of a person's car for twenty-eight days by means of a GPS tracker violated the defendant's rights under the Fourth Amendment. 132 S. Ct. at 948–49. All nine Justices said yes. Five Justices held that such tracking violated the Fourth Amendment under a trespass theory that considered the government's physical intrusion of the car. Id. at 949. Important for Mr. Davis's case, however, a different set of five Justices were in agreement that "longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy." Id. at 955 (Sotomayor, J., concurring) (quoting id. at 964 (Alito, J., joined by Ginsburg, Breyer, and Kagan, JJ., concurring in the judgment)). Said one Justice, "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations." Id. at 955 (Sotomayor, J., concurring). Said four other Justices, "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 964 (Alito, J., concurring in the judgment).[7]

The search at issue here similarly impinged on expectations of privacy. The location data the government collected, though not quite as precise as the GPS data in Jones, still revealed Mr. Davis's comings and goings around Miami with an unnerving level of specificity. Each time he made or received a call, MetroPCS catalogued the cell tower to which his cell phone connected, typically the "[n]earest and strongest" tower. Trial Tr. 221, Feb. 6, 2012, ECF No. 283. In a "cosmopolitan area [like] Miami," there are "many, many towers" whose coverage radii are "much smaller" than a "mile-and-a-half." Id. at 222–23. Each coverage circle is further subdivided into "three or six portions." Id. at 222. The data the government obtained in this case specified the sector within a tower's coverage radius in which Mr. Davis made or received a call.

The amount of data the government got is also alarming. The government demanded from MetroPCS sixty-seven days of cell site location data—more than double the time at issue in Jones. In total, this data included 5,803 separate call records. Since MetroPCS cataloged the cell tower sector where each phone call started and ended, the government had 11,606 cell site location data points. This averages around one location data point every five and one half minutes for those sixty-seven days, assuming Mr. Davis slept eight hours a night.

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[7] The majority chides Mr. Davis for "deploy[ing] the concurrences in Jones," Maj. Op. 33, but a lower federal court ignores the opinion of five Justices of the Supreme Court at its own risk.

The amount and type of data at issue revealed so much information about Mr. Davis's day-to-day life that most of us would consider quintessentially private. For instance, on August 13, 2010, Mr. Davis made or received 108 calls in 22 unique cell site sectors, showing his movements throughout Miami during that day. And the record reflects that many phone calls began within one cell site sector and ended in another, exposing his movements even during the course of a single phone call.

Also, by focusing on the first and last calls in a day, law enforcement could determine from the location data where Mr. Davis lived, where he slept, and whether those two locations were the same. As a government witness testified at trial, "if you look at the majority of . . . calls over a period of time when somebody wakes up and when somebody goes to sleep, normally it is fairly simple to decipher where their home tower would be." Trial Tr. 42, Feb. 7, 2012, ECF No. 285. For example, from August 2, 2010, to August 31, 2010, Mr. Davis's first and last call of the day were either or both placed from a single sector—purportedly his home sector. But on the night of September 2, 2010, Mr. Davis made calls at 11:41pm, 6:52am, and 10:56am—all from a location that was not his home sector. Just as Justice Sotomayor warned, Mr. Davis's "movements [were] recorded and aggregated in a manner that enable[d] the Government to ascertain, more or less at will, . . . [his] sexual habits, and so on." Jones, 132 S. Ct. at 956 (Sotomayor, J., concurring); see also United States v. Maynard, 615 F.3d 544, 562 (D.C. Cir. 2010) ("A person who knows all of another's travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful

husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups—and not just one such fact about a person, but all such facts.").

Importantly, the specificity of the information that the government obtained was highlighted by the way the government used it at trial. The government relied upon the information it got from MetroPCS to specifically pin Mr. Davis's location at a particular site in Miami. See, e.g., Trial Tr. 58, Feb. 7, 2012, ECF No. 285 (noting that "Mr. Davis's phone [was] literally right up against the America Gas Station immediately preceding and after [the] robbery occurred"); Id. at 61 (noting "the presence of his cell phone literally . . . right next door to the Walgreen's just before and just after that store was robbed"). On this record, Mr. Davis had a reasonable expectation of privacy in the cell site location data the government obtained, and his expectation was one that society should consider reasonable. I would therefore hold that absent a warrant, a Fourth Amendment violation occurred.

III.

The majority, of course, believes that Mr. Davis had no reasonable expectation of privacy in the cell site location data obtained in his case. It emphasizes the large size of the sectors that each location data point revealed as evidence that the privacy intrusion was not so great. See Maj. Op. 5–6, 10–12. It also says we need not consider more invasive technologies that have developed since the search that took place here. Id. at 11 n.7 ("There is no evidence, or even any allegation, that the

MetroPCS network reflected in the records included anything other than traditional cell towers and the facts of this case do not require, or warrant, speculation as to the newer technology."). Yet the Supreme Court has cautioned us that "[w]hile the technology used in the present case [may be] relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development." Kyllo, 533 U.S. at 36, 121 S. Ct. at 2044. Just as the majority appropriates decades-old precedent from Miller and Smith and applies it to new technologies, the rule we make today necessarily will apply to everyone else's case going forward.

That future impact is troubling. As technology advances, the specificity of cell site location information has increased. Cell phone companies are constantly upgrading their networks with more and more towers. As the ACLU explains:

> Cell site density is increasing rapidly, largely as a result of the growth of internet usage by smartphones. . . . As new cell sites are erected, the coverage areas around existing nearby cell sites will be reduced, so that the signals sent by those sites do not interfere with each other. In addition to erecting new conventional cell sites, providers are also increasing their network coverage using low-power small cells, called "microcells," "picocells," and "femtocells" (collectively,"femtocells"), which provide service to areas as small as ten meters. . . . Because the coverage area of femtocells is so small, callers connecting

> to a carrier's network via femtocells can be located to a high degree of precision, sometimes effectively identifying individual floors and rooms within buildings.

ACLU Amicus Br. 7–8 (quotations, citations omitted); see also id. at 7 (noting that "the number of cell sites in the United States has approximately doubled in the last decade"); id. at 8 (noting that "[f]emtocells with ranges extending outside of the building in which they are located can also provide cell connections to passersby, providing highly precise information about location and movement on public streets and sidewalks"). The location features on smartphones are even more precise. See Riley, 134 S. Ct. at 2490 ("Historic location information is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building.").

Beyond that, today, the vast majority of communications from cell phones are in the form of text messages and data transfers, not phone calls. The frequency of text messaging is much greater than the frequency of phone calling—particularly among young cell phone users. See Amanda Lenhart, Teens, Smartphones & Texting (available at http://www.pewinternet.org/2012/03/19/teens-smartphones-texting/) (finding that the median number of texts sent per day by teens ages 12 to 17 rose from 50 in 2009 to 60 in 2011). Also, "smartphones, which are now used by more than six in ten Americans, communicate even more frequently with the carrier's network, because they typically

check for new email messages or other data every few minutes." ACLU Amicus Br. 5 (citations omitted). Each of these new types of communications can generate cell site location data. See, e.g., United States v. Cooper, No. 13-cr-00693-SI-1, 2015 WL 881578, at *8 n.6 (N.D. Cal. Mar. 2, 2015) (noting the government's admission that "cell site data is recorded for both calls and text messages").

Finally, not only are cell sites fast growing in number, but the typical user has no idea how precise cell site location data is at any given location. As a person walks around town, particularly a dense, urban environment, her cell phone continuously and without notice to her connects with towers, antennas, microcells, and femtocells that reveal her location information with differing levels of precision—to the nearest mile, or the nearest block, or the nearest foot. And since a text or phone call could come in at any second—without any affirmative act by a cell phone user—a user has no control over the extent of location information she reveals.

The government tells us these technological advances do not change our analysis. At oral argument, it admitted that its theory requires us to hold that it could obtain location data without a warrant even when technology someday allows it to know a person's location to within six inches, and when tracking is continuous and does not require making or receiving a phone call. I reject a theory that allows the government such expansive access to information about where we are located, no matter how detailed a picture of our movements the government may receive.

But we need not fear the threat of increasing precision of location information, says the majority. At the same time it suggests that today's ruling might not apply to future technology, however, the majority's opinion offers absolutely no guidance to the judges who authorize searches of cell site location data and the officers who conduct them. As the ACLU pointed out, "[a]gents will not have prior knowledge of whether the surveillance target was in a rural area with sparse cell sites, an urban area with dense cell sites or six-sector antennas, or a home, doctor's office, or church with femtocells." ACLU Amicus Br. 9. Thus, a judge will authorize a search of a person's cell site location data for a certain period of time without knowing how precise the location information will be. While I admire the majority's attempt to cabin its holding to the technology of five years ago, its assurances in this regard seem naïve in practice. As a result of today's decision, I have little doubt that all government requests for cell site location data will be approved, no matter how specific or invasive the technology.

IV.

The majority offers dire warnings of the consequences of restricting the government's access to cell site location data, suggesting that without it, all manner of horrific crimes—from child abductions to terrorism—would go uninvestigated. See Maj. Op. 42. But if my view of the Fourth Amendment were to prevail, all the officers in this case had to do was get a warrant for this search. That is no great burden. "Under the Fourth Amendment, an officer may not properly issue a warrant . . . unless he can find probable cause therefor from facts or circumstances

presented to him under oath or affirmation." Nathanson v. United States, 290 U.S. 41, 47, 54 S. Ct. 11, 13 (1933). The probable-cause standard is not onerous. See Illinois v. Gates, 462 U.S. 213, 291, 103 S. Ct. 2317, 2360 (1983) (Brennan, J., dissenting) (criticizing a probable-cause standard that "imposes no structure on magistrates' probable cause inquiries . . . and invites the possibility that intrusions may be justified on less than reliable information from an honest or credible person"); Ricardo J. Bascuas, Property and Probable Cause: The Fourth Amendment's Principled Protection of Privacy, 60 Rutgers L. Rev. 575, 592–93 (2008) ("The Supreme Court has set the standard for the quality of information that can support a warrant so low that judges can hardly be expected to uncover a baseless request."); cf. Riley, 134 S. Ct. at 2493 (noting that "[r]ecent technological advances . . . have . . . made the process of obtaining a warrant itself more efficient"). Nor is cell site data the type of information which would spoil or perish during the short time it takes to get a warrant. Finally, requiring a warrant would not do away with the other well-established exceptions to the warrant requirement, like exigent circumstances. Cf. Riley, 134 S. Ct. at 2494 (noting that "the availability of the exigent circumstances exception . . . address[es] some of the more extreme hypotheticals that have been suggested"). Imposing the requirement for a warrant under these circumstances would hardly shackle law enforcement from conducting effective investigations.

But regardless of how easy it might be to get warrants, the Supreme Court has reminded us time and again of how important they are.

> The warrant requirement has been a valued part of our constitutional law for decades, and it has determined the result in scores and scores of cases in courts all over this country. It is not an inconvenience to be somehow 'weighed' against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the 'well-intentioned but mistakenly over-zealous, executive officers' who are a part of any system of law enforcement.

Coolidge, 403 U.S. at 481, 91 S. Ct. at 2046 (citation omitted). The majority emphasizes that the Stored Communications Act (SCA) requires the government to "offer[] 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." 18 U.S.C. § 2703(d). But it does not contest—nor could it—that this standard falls below the probable-cause standard that courts usually demand. See Maj. Op. 15.[8]

[8] Certainly the Stored Communications Act is better than nothing. See Maj. Op. 15 (noting that the SCA "raises the bar from an ordinary subpoena to one with additional privacy protections built in"). But the mere fact that the Act provides some judicial oversight before the government can get cell site location data does not answer the question whether the government is constitutionally required to have a warrant.

Once again, the Supreme Court's analysis in Riley is instructive.[9] There, the Court recognized:

> We cannot deny that our decision today will have an impact on the ability of law enforcement to combat crime. Cell phones have become important tools in facilitating coordination and communication among members of criminal enterprises, and can provide valuable incriminating information about dangerous criminals. Privacy comes at a cost.

Riley, 134 S. Ct. at 2493. But still, the Court insisted that law enforcement officers get a warrant before searching a cell phone incident to arrest. So too here. I would simply require the government do what it has done for decades when it seeks to intrude upon a reasonable expectation of privacy. That is, "get a warrant." Id. at 2495.

V.

The majority proclaims that its holding today is "narrow[]," Maj. Op. 14, limited only to cell site location data, and only to the kind of data the government could obtain in 2010. But "[s]teps innocently taken may one by one lead to the irretrievable impairment of substantial liberties." Glasser v. United States, 315 U.S. 60, 86, 62 S. Ct. 457, 472 (1942). Under the reasoning employed by the majority, the third-party doctrine may well

[9] "[T]here is dicta and then there is dicta, and then there is Supreme Court dicta." Schwab v. Crosby, 451 F.3d 1308, 1325 (11th Cir. 2006).

permit the government access to our precise location at any moment, and in the end, our entire digital lives. And although Mr. Davis—as the majority reminds us in great detail, see Maj. Op. 3–5—has been convicted of very serious crimes and is not therefore the most sympathetic bearer of this message,[10] "the rule[s] we fashion [are] for the innocent and guilty alike." Draper v. United States, 358 U.S. 307, 314, 79 S. Ct. 329, 333 (1959) (Douglas, J., dissenting). I would not subject the citizenry to constant location tracking of their cell phones without requiring the government to get a warrant. The Fourth Amendment compels this result. I respectfully dissent.

[10] Though regardless of the outcome of this en banc appeal, Mr. Davis's convictions will stand and he will remain incarcerated due to the good-faith exception. See supra note 1.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 12-12928

D.C. Docket No. 1:10-cr-20896-JAL-2

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

QUARTAVIOUS DAVIS,
Defendant-Appellant.

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

(June 11, 2014)

Before MARTIN, DUBINA, and SENTELLE,* Circuit Judges.

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* Honorable David Bryan Sentelle, United States Circuit Judge for the District of Columbia, sitting by designation.

SENTELLE, Circuit Judge:

Appellant Quartavius Davis[1] was convicted by a jury on several counts of Hobbs Act robbery, 18 U.S.C. § 1951(b)(1), (3), conspiracy, 18 U.S.C. § 1951(a), and knowing possession of a firearm in furtherance of a crime of violence, 18 U.S.C. §§ 924(c)(1)(A)(ii) and 2. The district court entered judgment on the verdict, sentencing Davis to consecutive terms of imprisonment totaling 1,941 months. Davis appeals, assigning several grounds for reversal. His principal argument is that the court admitted location evidence based on stored cell site information obtained by the prosecution without a warrant, in violation of his Fourth Amendment rights. He assigns other grounds of error going to prosecutorial misconduct, evidentiary sufficiency, and sentencing. For the reasons set forth below, we hold that there is no reversible error, although we do find merit in one argument that the sentence was improperly enhanced. We therefore affirm the judgment below in large part, but vacate a sentencing enhancement regarding "brandishing" a firearm.

BACKGROUND

On February 18, 2011, a grand jury for the Southern District of Florida returned a seventeen-count indictment against Davis and five co-defendants. Davis was named as a defendant in sixteen of the seventeen counts. Generally, the indictment charged violations of the Anti-Racketeering Act, 18 U.S.C. § 1951 (Hobbs Act), and

[1] The Presentence Investigation Report notes that "Quartavius" is the correct spelling of appellant's first name, despite the spelling in the caption. PSR at 5.

conspiracy to violate the Hobbs Act. More specifically, the indictment charged Davis with conspiracy to engage in Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (Counts 1, 15); Hobbs Act robbery, in violation of 18 U.S.C. §§ 1951(a) and 2 (Counts 2, 4, 6, 8, 10, 13, 16); and with knowingly using, carrying, and possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii) and 2 (Counts 3, 5, 7, 9, 11, 14, 17).

As part of the pretrial proceedings, Davis moved to suppress electronic location evidence that the government had obtained "without a warrant," claiming that the obtaining of that evidence violated his Fourth Amendment rights. The district court denied the motion. Davis renewed the motion during trial, and the district court again denied it. These rulings give rise to Davis's principal claim on appeal, which we will discuss further below. The prosecution proceeded to offer evidence of two conspiracies to commit Hobbs Act robbery and that Davis was part of each conspiracy. The prosecution further presented evidence that the conspirators committed such robberies.

During the trial, one member of each conspiracy testified for the United States. Willie Smith ("Smith") testified as to the first conspiracy, encompassing six robberies at commercial establishments including a Little Caesar's restaurant, an Amerika Gas Station, a Walgreens drug store, an Advance Auto Parts store, a Universal Beauty Salon, and a Wendy's restaurant. Michael Martin ("Martin") testified as to the second conspiracy, encompassing the robbery of a Mayor's

Jewelry store. Smith and Martin testified that Davis was involved in each robbery, where they wore masks, carried guns, and took items such as cigarettes and cash.

Additionally, an eyewitness, Edwin Negron, testified regarding Davis's conduct at Universal Beauty Salon and the adjacent Tae Kwon Do studio. He testified that Davis pointed a gun at his head, pushed a 77 year-old woman and Negron's wife to the ground, and took several items from Negron and others. Another eyewitness, Antonio Brooks, testified that he confronted Davis and his accomplices outside the Wendy's restaurant after that robbery and tried to write down the license plate of their getaway car. Brooks testified that Davis fired his gun at him, and that he returned fire towards the car.

Beyond the testimony, the government produced additional evidence. Surveillance videos showed a man matching Davis's description participating in the robberies at Walgreens, Advance Auto Parts, Wendy's, and Mayor's Jewelry. Smith and Martin identified Davis on the videos. DNA shown to be Davis's was recovered from the getaway car used to flee the scene of the Universal Beauty Salon robbery and the Mayor's Jewelry store robbery.

The prosecution also offered records obtained from cell phone service providers evidencing that Davis and his co-defendants had placed and received cell phone calls in close proximity to the locations of each of the charged robberies around the time that the robberies were committed, except for the Mayor's Jewelry store robbery. Davis preserved his objection to the cell phone location evidence and his claim that the government's obtaining such evidence without a

warrant issued upon a showing of probable cause violated his rights under the Fourth Amendment.

The court submitted all counts to the jury. During jury arguments, the prosecutor made several questionable statements, including some apparently vouching for the credibility of the government's witnesses. Upon objections by the defense, the court instructed the jury to disregard the statements by the prosecution. The jury returned a verdict of guilty on all counts.

Subsequently, the district court sentenced Davis on all counts, and conducted a careful sentencing analysis on the record. Of particular note to the issues in this appeal, in the sentence on Count 3, which charged the use and carrying of a firearm during and in relation to a crime of violence, the court imposed a seven-year statutory mandatory enhancement pursuant to 18 U.S.C. § 924(c)(1)(A)(ii), which provides for such enhancement where "the firearm is brandished . . . ." On Counts 5, 7, 9, 11, 14, and 17, which also charged the defendant with using and carrying a firearm during and in relation to a crime of violence, the court imposed a "second or subsequent" enhancement required by 18 U.S.C. § 924(c)(1)(C)(i), as each of these offenses was subsequent to the similar violation charged in Count 3. Noting that 18 U.S.C. § 924(c)(1)(D)(ii) requires consecutive sentences, the court imposed a total term of imprisonment of 1,941 months, approximately 162 years.

Davis raises several allegations of error on appeal. First, he argues that the district court's denial of his motion to suppress the cell site location information and the admission of that evidence

violated his constitutional rights under the Fourth Amendment. Second, he argues that the prosecutor's misconduct during closing argument rendered his trial unfair, entitling him to a new trial. Third, he raises sentencing arguments, contending that the district court's applications of the mandatory penalty for second or subsequent offenses and for brandishing a firearm on Count 3 were in violation of his Sixth Amendment rights, and that the 162-year sentence of imprisonment constituted a cruel and unusual punishment in violation of his Eighth Amendment rights. Further, he raises an issue as to the sufficiency of evidence on the aiding and abetting the use of a firearm charge in connection with a crime of violence in Count 17. Finally, he makes a broad challenge that "the cumulative effect and prejudice arising from multiple trial errors compels reversal." We consider each of the listed arguments in turn.

I. *Fourth Amendment Issue*

Davis's Fourth Amendment argument raises issues of first impression in this circuit, and not definitively decided elsewhere in the country. The evidence at issue consists of records obtained from cell phone service providers pursuant to the Stored Communications Act ("SCA"), 18 U.S.C. §§ 2703(c) and (d). Under that Act, the government can obtain from providers of electronic communication service records of subscriber services when the government has obtained either a warrant, § 2703(c)(A), or, as occurred in this case, a court order under subsection (d), *see* § 2703(c)(B). The order under subsection (d) does not require the government to show probable cause.

The evidence obtained under the order and presented against Davis in the district court consisted of so-called "cell site location information." That location information includes a record of calls made by the providers' customer, in this case Davis, and reveals which cell tower carried the call to or from the customer. The cell tower in use will normally be the cell tower closest to the customer. The cell site location information will also reflect the direction of the user from the tower. It is therefore possible to extrapolate the location of the cell phone user at the time and date reflected in the call record. All parties agree that the location of the user will not be determined with pinpoint precision, but the information is sufficiently specific that the prosecutor expressly relied on it in summing up to the jury in arguing the strength of the government's case for Davis's presence at the crime scenes. Indeed, it is not overstatement to say that the prosecutor stressed that evidence and the fact that the information reflected Davis's use of cell phone towers proximate to six of the seven crime scenes at or about the time of the Hobbs Act robberies.

Davis objected to the admission of the location information in the district court and now argues to us that the obtaining of that evidence violated his constitutional rights under the Fourth Amendment. That Amendment, of course, provides that "no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation . . . ." U.S. CONST. AMEND. IV. It is a "basic principle of Fourth Amendment law" that searches and seizures without a warrant "are presumptively unreasonable." *See, e.g.*, *Groh v. Ramirez*, 540 U.S. 551, 559 (2004). The SCA does provide for governmental entities requiring

records from communication service providers by warrant under subsection (c)(A). However, as noted above, the prosecution obtained the evidence against Davis, not by warrant under subsection (c)(A), but by order under subsection (d). As further noted above, that section does not require probable cause, but only a showing "that there are *reasonable grounds to believe* that the . . . records or other information sought, are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d) (emphasis added). Davis contends that the obtaining of the evidence required a warrant upon probable cause. The government argues that the evidence is not covered by the Fourth Amendment and was properly obtained under a court order.

As we suggested above, the question whether cell site location information is protected by the Fourth Amendment guarantees against warrantless searches has never been determined by this court or the Supreme Court. Two circuits have considered the question, but not in the context of the use of the evidence in a criminal proceeding. Also, one of those opinions issued before the Supreme Court's decision in *United States v. Jones*, ___ U.S. ___ , 132 S. Ct. 945 (2012), the most relevant Supreme Court precedent.

The Third Circuit in *In re Application of U.S. for an Order Directing a Provider of Elec. Commc'n. Serv. to Disclose Records to Gov't*, 620 F.3d 304, 317–18 (3d Cir. 2010), heard the government's appeal from an order of a magistrate judge declining to direct a service provider to furnish information by order under subsection (d) and requiring instead that the government pursue a warrant upon probable cause under subsection (c)(A). Briefly put, that

circuit did vacate the magistrate judge's denial, but opined that the magistrate judge in appropriate circumstances might "require a warrant showing probable cause . . . ." *Id.* at 319.

The Fifth Circuit, in *In re Application of U.S. for Historical Cell Site Data*, 724 F.3d 600, 612 (5th Cir. 2013), reviewed an application in a similar posture. In the Fifth Circuit case, the district court had denied orders for which the government had applied under subsection (d). The Fifth Circuit clearly held that compelling production of the records on the statutory "reasonable grounds" basis is not "per se unconstitutional." *Id.* at 602. We will not review at this point the reasoning of either of our sibling circuits, given that the context of the cases is different, and one of those circuits opined before issuance of *Jones*, the most instructive Supreme Court decision in the field.

While *Jones* is distinguishable from the case before us, it concerned location information obtained by a technology sufficiently similar to that furnished in the cell site location information to make it clearly relevant to our analysis. The present case, like *Jones*, brings to the fore the existence of two distinct views of the interests protected by the Fourth Amendment's prohibition of unreasonable searches and seizures. The older of the two theories is the view that the Fourth Amendment protects the property rights of the people. This view is sometimes referred to as the "trespass" theory and "our Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century." *Jones*, 132 S. Ct. at 949 (collecting authorities). However, in the twentieth century, a

second view gradually developed: that is, that the Fourth Amendment guarantee protects the privacy rights of the people without respect to whether the alleged "search" constituted a trespass against property rights.

The privacy theory began to emerge at least as early as *Olmstead v. United States*, 277 U.S. 438 (1928). In *Olmstead*, the government had obtained conversations of the defendants by warrantless wiretap. Because the wires that were tapped were outside the premises of the defendants, the majority of the court, relying on the trespass theory, held that the tapping did not constitute a search within the meaning of the Fourth Amendment. Justice Brandeis, in dissent, expressly viewed the provision against unlawful searches as protecting against "invasion of 'the sanctities of a man's home and the *privacies of life*.'" *Id.* at 473 (Brandeis, J., dissenting) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886) (emphasis added)). Despite Justice Brandeis's criticism, the trespass theory continued to hold sway.

In *Goldman v. United States*, 316 U.S. 129 (1942), the petitioners complained against the government's electronically overhearing conversations in petitioners' offices by the warrantless placement of a listening device on an exterior wall. Because the Court, in what might be described as an esoteric discussion of the placement of the device, concluded that the interception of petitioners' conversation was not aided by trespass, there was no Fourth Amendment violation. However, the privacy theory again advanced in dissent. Chief Justice Stone and Justice Frankfurter, in a two-sentence separate opinion, simply stated their

agreement with the dissent in *Olmstead*, and lamented the unwillingness of the majority to overrule that case. Justice Murphy dissented separately, expressly referencing the "right of personal privacy guaranteed by the Fourth Amendment." *Id.* at 136 (Murphy, J., dissenting).

The minutiae involved in the application of the trespass theory to the world of electronic information stood out sharply in *Silverman v. United States*, 365 U.S. 505 (1961). In *Silverman*, police officers testified to the contents of conversations upon which they eavesdropped. The Supreme Court noted the argument of the defendants that the rationale of *Olmstead* should be reexamined, but concluded that such a reexamination was unnecessary given that the conversations were overheard by means of a "spike mike" driven into the wall of the defendant's premises and making contact with a heat duct therein so as to use the entire heating system as a listening device. Because that penetration constituted a trespass, the Court did not deem it necessary to reconsider its earlier rationale.

Finally, in *Katz v. United States*, 389 U.S. 347 (1967), the majority of the Supreme Court accepted and relied upon the privacy theory to hold interception of a conversation unconstitutional even in the absence of a physical trespass. In *Katz*—on facts somewhat reminiscent of *Goldman*—the Court considered evidence obtained by FBI agents through a device attached to the exterior of a telephone booth but not penetrating the wall. As the government argued that there was no Fourth Amendment violation because there was no trespass, the Court squarely considered the dichotomy between the

property and privacy protection theories. The Court held that such a warrantless interception did violate privacy interests protected by the Fourth Amendment. Indeed, it did so construing language from *Silverman* as already establishing "that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements overheard without any 'technical trespass under . . . local property law.'" *Id.* at 353 (quoting *Silverman*, at 511). Only one justice dissented in *Katz* and it became indisputable in 1967 that the privacy protection theory was indeed viable.

Therefore, it cannot be denied that the Fourth Amendment protection against unreasonable searches and seizures shields the people from the warrantless interception of electronic data or sound waves carrying communications. The next step of analysis, then, is to inquire whether that protection covers not only content, but also the transmission itself when it reveals information about the personal source of the transmission, specifically his location. The Supreme Court in *Jones* dealt with such an electronic seizure by the government and reached a conclusion instructive to us in the present controversy.

The *Jones* case involved not cell site location data, but the somewhat similar location data generated by a Global-Positioning-System (GPS) tracking device attached to the automobile of a suspected drug dealer by law enforcement agents. Although the agents originally attached the device and gathered the information transmitted by it under the authority of a warrant, that warrant authorized installation in the District of Columbia for a period of

ten days. The agents installed the device on the eleventh day outside the District of Columbia. The government then tracked the vehicle's movements for twenty-eight days. The prosecution offered the resulting record of the defendant's movements and whereabouts over that period of time in evidence against him in his trial for drug trafficking conspiracy.

The trial court in *Jones* suppressed the location evidence generated by the device on Jones's vehicle while it was parked in his own premises, but admitted the data reflecting its movements on the streets and highways in the belief that Jones would have no reasonable expectation of privacy when the vehicle was on public streets. *See United States v. Jones*, 451 F. Supp. 2d 71, 87–89 (D.D.C. 2006). On conviction, Jones and a codefendant, Maynard, appealed. The Court of Appeals for the District of Columbia Circuit reviewed the Fourth Amendment issue and noted that the prosecution had employed the GPS device to track Jones's "movements continuously for a month." *United States v. Maynard*, 615 F.3d 544, 549 (D.C. Cir. 2010). The court considered the government's argument that each of Jones's movements over the month was exposed to the public, and that therefore, he had no reasonable expectation of privacy in them. The court rejected this argument, noting that "the whole of one's movements over the course of a month . . . reveals far more than the individual movements that it comprises. The difference is not one of degree but of kind, for no single journey reveals the habits and patterns that mark the distinction between a day in the life and a way of life, nor the departure from a

routine that . . . may reveal even more." *Id.* at 561–62.

By way of example, the court noted that "[r]epeated visits to a church, a gym, a bar, or a bookie tell a story not told by a single visit . . . ." *Id.* at 562. The court noted further that "the sequence of a person's movements can reveal still more; a single trip to a gynecologist's office tells little about a woman, but that trip followed a few weeks later by a visit to a baby supply store tells a different story." *Id.*

The court recalled the "mosaic theory" often relied upon by the government "in cases involving national security information." *Id.* As the Supreme Court has observed in that context, "what may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context." *CIA v. Simms*, 471 U.S. 159, 170 (1985) (internal quotation marks and citations omitted). The circuit reasoned that although each element of Jones's movements throughout the month might have been exposed to the public, the "aggregation of [those] movements over the course of a month," was not so exposed, and his expectation of privacy was reasonable. *Maynard*, 615 F.3d at 563. The court reversed Jones's conviction. The United States sought and obtained *certiorari*. The Supreme Court affirmed. Like the Court of Appeals, the High Court concluded that the warrantless gathering of the GPS location information had violated Jones's Fourth Amendment rights.

While the *Jones* case does instruct our analysis of the controversy before us, it does not conclude it. As discussed at length above, Fourth Amendment

jurisprudence has dual underpinnings with respect to the rights protected: the trespass theory and the privacy theory. In *Jones*, Justice Scalia delivered the decision of the Court in an opinion that analyzed the facts on the basis of the trespass theory. Because the agents had committed a trespass against the effects of Jones when they placed the GPS device on his car, the opinion of the Court did not need to decide whether Jones's reasonable expectation of privacy had been violated because his rights against trespass certainly had.

As the United States rightly points out, in the controversy before us there was no GPS device, no placement, and no physical trespass. Therefore, although *Jones* clearly removes all doubt as to whether electronically transmitted location information can be protected by the Fourth Amendment, it is not determinative as to whether the information in this case is so protected. The answer to that question is tied up with the emergence of the privacy theory of Fourth Amendment jurisprudence. While *Jones* is not controlling, we reiterate that it is instructive.

In *Jones*, Justice Scalia's opinion for the Court speaks on behalf of the author and three other Justices, Chief Justice Roberts, and Justices Kennedy and Thomas. It is, however, a true majority opinion, as Justice Sotomayor, who wrote separately, "join[ed] the majority's opinion." *Jones*, 132 S. Ct. at 957. However, she did so in a separate concurrence that thoroughly discussed the possible applicability of the privacy theory to the electronic data search. We note that she fully joined the majority's opinion, and was

certainly part of the majority that held that such a search is violative under the trespass theory.

Four other justices concurred in the result in an opinion authored by Justice Alito, which relied altogether on the privacy theory. Justice Alito wrote, "I would analyze the question presented in this case by asking whether respondent's reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove." *Id.* at 958 (Alito, J., concurring in the result). Justice Alito and the justices who joined him ultimately concurred in the result because they did conclude that "the lengthy monitoring that occurred in this case constituted a search under the Fourth Amendment." *Id.* at 964. Justice Sotomayor, in her separate concurrence, opined that it was not necessary to answer difficult questions concerning the applicability of the reasonable-expectation-of-privacy test to the *Jones* facts "because the government's physical intrusion on Jones' jeep supplies a narrower basis for decision." *Id.* at 957 (Sotomayor, J., concurring). Conspicuously, she also noted that "in cases involving even short- term monitoring, some unique attributes of GPS surveillance relevant to the *Katz* analysis will require particular attention." *Id.* at 955. She noted that electronic "monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations." *Id.* (citing *People v. Weaver*, 909 N.E. 2d 1195, 1199 (NY 2009).

Even the opinion of the Court authored by Justice Scalia expressly did not reject the

applicability of the privacy test. While chiding the concurrence for "mak[ing] *Katz* the exclusive test," the opinion of the Court expressly noted that "[s]ituations involving merely the transmission of electronic signals without trespass would *remain* subject to [the] *Katz* [privacy] analysis." *Id.* at 953. In light of the confluence of the three opinions in the Supreme Court's decision in *Jones*, we accept the proposition that the privacy theory is not only alive and well, but available to govern electronic information of search and seizure in the absence of trespass.

Having determined that the privacy theory of Fourth Amendment protection governs this controversy, we conclude that the appellant correctly asserts that the government's warrantless gathering of his cell site location information violated his reasonable expectation of privacy. The government argues that the gathering of cell site location information is factually distinguishable from the GPS data at issue in *Jones*. We agree that it is distinguishable; however, we believe the distinctions operate against the government's case rather than in favor of it.

Jones, as we noted, involved the movements of the defendant's automobile on the public streets and highways. Indeed, the district court allowed the defendant's motion to suppress information obtained when the automobile was not in public places. The circuit opinion and the separate opinions in the Supreme Court concluded that a reasonable expectation of privacy had been established by the aggregation of the points of data, not by the obtaining of individual points. Such a mosaic theory is not

necessary to establish the invasion of privacy in the case of cell site location data.

One's car, when it is not garaged in a private place, is visible to the public, and it is only the aggregation of many instances of the public seeing it that make it particularly invasive of privacy to secure GPS evidence of its location. As the circuit and some justices reasoned, the car owner can reasonably expect that although his individual movements may be observed, there will not be a "tiny constable" hiding in his vehicle to maintain a log of his movements. 132 S. Ct. at 958 n.3 (Alito, J., concurring). In contrast, even on a person's first visit to a gynecologist, a psychiatrist, a bookie, or a priest, one may assume that the visit is private if it was not conducted in a public way. One's cell phone, unlike an automobile, can accompany its owner anywhere. Thus, the exposure of the cell site location information can convert what would otherwise be a private event into a public one. When one's whereabouts are not public, then one may have a reasonable expectation of privacy in those whereabouts. Therefore, while it may be the case that even in light of the *Jones* opinion, GPS location information on an automobile would be protected only in the case of aggregated data, even one point of cell site location data can be within a reasonable expectation of privacy. In that sense, cell site data is more like communications data than it is like GPS information. That is, it is private in nature rather than being public data that warrants privacy protection only when its collection creates a sufficient mosaic to expose that which would otherwise be private.

The United States further argues that cell site location information is less protected than GPS data because it is less precise. We are not sure why this should be significant. We do not doubt that there may be a difference in precision, but that is not to say that the difference in precision has constitutional significance. While it is perhaps possible that information could be sufficiently vague as to escape the zone of reasonable expectation of privacy, that does not appear to be the case here. The prosecutor at trial stressed how the cell phone use of the defendant established that he was near each of six crime scenes. While committing a crime is certainly not within a legitimate expectation of privacy, if the cell site location data could place him near those scenes, it could place him near any other scene. There is a reasonable privacy interest in being near the home of a lover, or a dispensary of medication, or a place of worship, or a house of ill repute. Again, we do not see the factual distinction as taking Davis's location outside his expectation of privacy. That information obtained by an invasion of privacy may not be entirely precise does not change the calculus as to whether obtaining it was in fact an invasion of privacy.

Finally, the government argues that Davis did not have a reasonable expectation of privacy because he had theretofore surrendered that expectation by exposing his cell site location to his service provider when he placed the call. The government correctly notes that "the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to government authorities . . . ." *United States v. Miller*, 425 U.S. 435, 443 (1976). In *Smith v. Maryland*, 442 U.S. 735 (1979), at the

request of law enforcement authorities, a telephone company installed a pen register to record numbers dialed from the defendant's telephone. The *Smith* Court held that telephone users had no subjective expectation of privacy in dialed telephone numbers contained in telephone companies' records. *Id.* at 742–44. While the government's position is not without persuasive force, it does not ultimately prevail.

The Third Circuit considered this argument in *In re Electronic Communications Service to Disclose*, *supra*. As that circuit noted, the Supreme Court in *Smith* reasoned that phone subscribers "assumed the risk that the company would reveal to police the numbers [they] dialed." 442 U.S. at 744. *See also* 620 F.3d at 304. The reasoning in *Smith* depended on the proposition that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties," 442 U.S. at 743–44. The Third Circuit went on to observe that "a cell phone customer has not 'voluntarily' shared his location information with a cellular provider in any meaningful way." That circuit further noted that "it is unlikely that cell phone customers are aware that their cell phone providers collect and *store historical location information*." 620 F.3d at 317 (emphasis added). Therefore, as the Third Circuit concluded, "when a cell phone user makes a call, the only information that is voluntarily and knowingly conveyed to the phone company is the number that is dialed, and there is no indication to the user that making that call will also locate the caller." *Id.* Even more persuasively, "when a cell phone user receives a call, he hasn't voluntarily exposed anything at all." *Id.* at 317–18.

Supportive of this proposition is the argument made by the United States to the jury. The prosecutor stated to the jury "that obviously Willie Smith, like [Davis], probably had no idea that by bringing their cell phones with them to these robberies, they were allowing [their cell service provider] and now all of you to follow their movements on the days and at the times of the robberies . . . ." Just so. Davis has not voluntarily disclosed his cell site location information to the provider in such a fashion as to lose his reasonable expectation of privacy.

In short, we hold that cell site location information is within the subscriber's reasonable expectation of privacy. The obtaining of that data without a warrant is a Fourth Amendment violation. Nonetheless, for reasons set forth in the next section of this opinion, we do not conclude that the district court committed a reversible error.

II. *The* Leon *Exception*

The United States contends that even if we conclude, as we have, that the gathering of the cell site location data without a warrant violated the constitutional rights of the defendant, we should nonetheless hold that the district court did not commit reversible error in denying appellant's motion to exclude the fruits of that electronic search and seizure under the "good faith" exception to the exclusionary rule recognized in *United States v. Leon*, 468 U.S. 897 (1984). We agree.

In *Leon*, the Court observed that "'[i]f the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search

should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.'" *Id.* at 919 (quoting *United States v. Peltier*, 422 U.S. 531, 542 (1975)). In *Leon*, the Supreme Court reviewed the exclusion of evidence seized "by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." 468 U.S. at 900. The High Court held that "when an officer acting with objective good faith has obtained a search warrant from a judge . . . and acted within its scope," the exclusionary rule should not be employed to "[p]enaliz[e] the officer for the magistrate's error." *Id.* at 920–21. As the Court observed in *Leon*, such an application of the exclusionary rule "cannot logically contribute to the deterrence of Fourth Amendment violations." *Id.*

The only differences between *Leon* and the present case are semantic ones. The officers here acted in good faith reliance on an order rather than a warrant, but, as in *Leon*, there was a "judicial mandate" to the officers to conduct such search and seizure as was contemplated by the court order. *See id.* at 920 n.21. As in *Leon*, the officers "had a sworn duty to carry out" the provisions of the order. *Id.* Therefore, even if there was a defect in the issuance of the mandate, there is no foundation for the application of the exclusionary rule.

We further add that *Leon* speaks in terms of the "magistrate's" error. Here, the law enforcement officers, the prosecution, and the judicial officer issuing the order, all acted in scrupulous obedience to

a federal statute, the Stored Communications Act, 18 U.S.C. § 2703. At that time, there was no governing authority affecting the constitutionality of this application of the Act. There is not even allegation that any actor in the process evidenced anything other than good faith. We therefore conclude that under the *Leon* exception, the trial court's denial of the motions to suppress did not constitute reversible error.

III. *Prosecutorial Misconduct*

Appellant argues that the trial prosecutor, in his summation to the jury, engaged in improper behaviors that irreparably tainted Davis's trial. While he refers to several parts of the argument, the two that typify his argument were the prosecutor's reference to a substance, perhaps blood, being "all over" a getaway car, when in fact there were only a few drops; and what appellant describes as "long strings of bolstering witnesses' testimony." We have reviewed the trial transcript of the closing argument and conclude that the prosecutor's statements warrant no relief on appeal.

As to the statements described by Davis as exaggeration of the evidence, we see no more than rhetorical flourish. The prosecution could, without violating Davis's rights, characterize the evidence as could the defense counsel in presenting Davis's case. The bolstering is admittedly troubling.

The problem of a prosecutor's vouching for government witnesses is indeed a very real one. In *United States v. Young*, 470 U.S. 1, 18–19 (1985), the Supreme Court observed that prosecutorial vouching

> can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.

The Supreme Court's analysis of the prosecutor's role draws a clean line. He may comment on the evidence before the jury, but he may not augment that evidence by implication that he or others on the prosecution team are aware of further evidence not presented in court. While we recognize that in the heat of the courtroom, an arguing lawyer may say things he would later regret, the record in this case discloses that the prosecutor did cross that line. Specifically, he stated, with respect to the government witness Martin, "he came clean and confessed [one hundred] percent and told the police precisely the same story that he told all of you, the story he has told me one hundred times since."

The evidence before the jury certainly did not demonstrate that Martin had told the prosecutor the same story one hundred times since his original confession. The government argued to us that the phrase "one hundred times" is only a colloquialism and that the argument "relied on facts in evidence." Appellee's Br. at 33. We cannot agree with this

styling, but nonetheless conclude that there is no ground for reversal here.

Prosecutorial misconduct will result in reversal only in those instances in which the misbehavior is so pervasive as to "permeate the entire atmosphere of the trial." *United States v. McLain*, 823 F.2d 1457, 1462 (11th Cir. 1987). We proceed under a two-part test. First, the comments at issue must actually be improper, and second, any comments found to be improper must prejudicially affect the substantial rights of the defendant. *United States v. Schmitz*, 634 F.3d 1247, 1267 (11th Cir. 2011).

We conclude that no such prejudicial effect is present. The improper remark here is a small item following a dense record of evidence against the defendant, and evidence which in fact included prior consistent statements by the witness Martin.

Further, and of great importance, the district court removed the comments from the jury's consideration and properly instructed the jurors on the nature of closing arguments. The court instructed that the prosecutor's statements were "not in evidence, and even if [they were], that doesn't make [them] true or not true." We must presume that a jury follows its instructions. *Richardson v. Marsh*, 481 U.S. 200 (1987). In short, the prosecutor's statements are not a basis for reversal.

IV. *The Sentencing Enhancements*

Davis raises two constitutional objections to the computation of his sentence. He contends that the enhancement for the second or subsequent offenses and for brandishing a weapon were imposed in violation of his Sixth Amendment right to trial by

jury; the underlying facts, in the one case "subsequence," and in the second case "brandishing," were not found by a jury beyond a reasonable doubt. Upon review, we conclude that his claim warrants no relief as to the second or subsequent enhancement, but is meritorious on the brandishing issue.

This sort of Sixth Amendment claim is governed by the Supreme Court decision in *United States v. Alleyne*, ___U.S. ___ , 133 S. Ct. 2151 (2013). In *Alleyne*, the Supreme Court overruled its prior opinion in *Harris v. United States*, 536 U.S. 545, 551–56 (2002), and held that the Sixth Amendment requires any fact which increases a mandatory minimum sentence to be submitted to the jury. *Alleyne*, 133 S. Ct. at 2162–63. However, the *Alleyne* decision does not warrant relief on the "second or subsequent" mandate for consecutive sentences. *Alleyne* relied heavily on *United States v. Apprendi*, in which the Court specifically excluded the fact of a prior conviction from its general holding requiring a jury to pass on those issues increasing the penalty beyond a statutory maximum. 530 U.S. 466, 490. In *Alleyne*, the Court declined to reconsider its holding in *Almendarez- Torrez v. United States*, 523 U.S. 224 (1998), that the fact of a prior conviction need not be treated as an element of an offense. *Alleyne*, 133 S. Ct. at 2160 n.1. It follows, then, that we may not revisit this holding either.

The jury did not make a specific finding that the convictions for Counts 5, 7, 9, 11, 14, and 17 were second or subsequent convictions under 18 U.S.C. § 924(c). However, there is no *Alleyne* violation where the judicial finding is the fact of a prior conviction, a finding the jury need not make. In any event, the

superseding indictment charged Davis separately as to each of the seven robberies that occurred on separate days. By virtue of logic, each of Counts 5, 7, 9, 11, 14, and 17 was second or subsequent when the jury found that they were committed as set forth in the superseding indictment. We can offer no relief based on Davis's contention that a concurrently found conviction should be treated differently for Sixth Amendment purposes from a conviction which predates the indictment in the current case. He cites *United States v. Shepard*, 544 U.S. 13, 26 (2005), but *Shepard* does not speak to the issue before us. It discusses only the types of documents a sentencing court can consider. Accordingly, the district court did not err in sentencing Davis to consecutive mandatory terms of imprisonment based on its finding that his convictions were second or subsequent enhancements within the meaning of 18 U.S.C. § 924(c).

The "brandishing" issue, however, does warrant relief. Although Davis did not raise the issue below, an appellate court can review for errors not raised at trial under the "plain error" standard. Under that standard, we may correct the error that the defendant did not raise only if there is "(1) error, (2) that is plain, and (3) that affects substantial rights." *United States v. McKinley*, 732 F.3d 1291, 1295 (11th Cir. 2013). If these three elements are met, we may then in our discretion correct the error, only if "(4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* For example, the fourth prong of plain error review would not be met "where the evidence of a statutory element of an offense is overwhelming and essentially uncontroverted." *Id.* at 1297.

A sentencing decision is in error when it violates a relevant Supreme Court ruling. *See United States v. Rodriguez*, 398 F.3d 1291, 1298 (11th Cir. 2005). An error is plain if it is "clear from the plain meaning of a statute or constitutional provision, or from a holding of the Supreme Court or this Court." *United States v. Pantle*, 637 F.3d 1172, 1174–75 (11th Cir. 2011). An error affects substantial rights if it affected the outcome of the district court proceedings. *Rodriguez*, 398 F.3d at 1299. The defendant bears the burden of persuasion to demonstrate such prejudice. *Id.* Finally, we consider whether the error had such an effect on the proceedings as to motivate use of our discretion to restore the equality and reliability of judicial proceedings in the eyes of the public. *United States v. Shelton*, 400 F.3d 1325, 1332–33 (11th Cir. 2005).

On Count 3, the jury found that Davis "possessed a firearm in furtherance of the robbery." At the sentencing hearing, the district court heard from the probation officer, who reported that "Count 3, which is possession of a firearm in furtherance of a crime of violence . . . calls for a minimum imprisonment sentence of seven years . . . ." The district court imposed then "84 months [seven years] as to Count 3 to be served consecutively to the terms imposed as to [the other counts]." The text of 18 U.S.C. § 924(c)(1)(A)(ii) requires that "if the firearm is brandished, [the defendant] be sentenced to a term of imprisonment of not less than 7 years." For possession, the applicable sentence is "a term of imprisonment of not less than 5 years." § 924(c)(1)(A)(i). The district court's finding vis á vis Count 3 is therefore inconsistent with the

superseding indictment's charge, and the jury's finding, of possession rather than brandishing.

In reviewing the prejudicial effect of the deviation, we note that the district judge candidly stated that if he were not constrained by statutory maxima, he "would impose a sentence here that would not be a life sentence." It therefore appears that the extra length on this count would not have been imposed in the absence of what we now view as a plain error. Additionally, we also find that this error "affected the fairness, integrity, or public reputation of the judicial proceedings." *McKinley*, 732 F.3d at 1297. The evidence that Davis personally brandished the firearm he possessed during the robbery of the Little Caesar's restaurant is not "overwhelming and essentially uncontroverted." *Id.* To the contrary, only one witness testified that a gun was pointed at her, and there is no evidence that Davis was the one who did it. Further, the jury had an opportunity to convict Davis of either (1) possessing a firearm in furtherance of the robbery or (2) using or carrying a firearm in furtherance of the robbery. Yet it only found that Davis possessed a firearm. We therefore will be constrained to vacate the extension of the sentence. In doing so, we observe on behalf of both the judge who entered the sentence and the counsel who did not raise the error that the trial in this case preceded the Supreme Court decision in *Alleyne*.

V. *Eighth Amendment Claim*

Davis argues that the 162-year sentence, which obviously amounts to a life sentence, constitutes cruel and unusual punishment. In support of this proposition, he stresses that he was

eighteen and nineteen years old at the time of the commission of the offenses, and suffered from bipolar disorder and a severe learning disability, and had no prior convictions. While these are no doubt significant factors, we can grant no relief on this issue.

Allegations of cruel and unusual punishment are legal questions subject to our *de novo* review. *United States v. Haile*, 685 F.3d 1211, 1222 (11th Cir. 2012), *cert. denied*, ___ U.S ___ , 133 S. Ct. 1723 (2013).

Davis argues that the mandatory consecutive nature of his sentence violated the Eighth Amendment's prohibition on cruel and unusual punishment. He views his sentence, totaling nearly 162 years, as grossly disproportionate when considering his youth, intellectual disability, and emotional maturity, and as especially harsh for a non-homicide offense. For its part, the Government relies on the rarity of successful proportionality cases for adult offenders outside the capital context.

As applied to noncapital offenses, the Eighth Amendment encompasses at most only a narrow proportionality principle. *United States v. Brant*, 62 F.3d 367, 368 (11th Cir. 1995) (citing *Harmelin v. Michigan*, 501 U.S. 957 (1991)). We accord substantial deference to Congress: "In general, a sentence within the limits imposed by statute is neither excessive nor cruel and unusual under the Eighth Amendment." *United States v. Johnson*, 451 F.3d 1239, 1243 (11th Cir. 2006) (quotation omitted). We must first make the determination whether a total sentence is grossly disproportionate to the offenses committed. *Id.* In *United States v. Farley*,

607 F.3d 1294, 1339 (11th Cir. 2010), we held that the mandatory nature of a noncapital penalty is irrelevant for proportionality purposes, and observed that we have never found a term of imprisonment to violate the Eighth Amendment. *Id.* at 1343. Nor do we do so now.

Here, Davis's total sentence is unmistakably severe. However, a gross proportionality analysis necessarily compares the severity of a sentence to the crimes of conviction, and Davis's crimes were numerous and serious. Multiple victims experienced being robbed and threatened with a handgun. Davis's use of a handgun entailed a risk or severe injury or death. Trial testimony established that Davis shot at a dog, and actually exchanged fire with a witness following the Wendy's robbery. We cannot conclude that such repeated disregard for the law and for victims should overcome Congress's determination of what constitutes an appropriate sentence, even when Eighth Amendment concerns are implicated.

VI. *Sufficiency of the Evidence on Count 17*

Davis contends that the district court erred by denying his motion for judgment of acquittal on Count 17 because, in his view, the evidence failed to establish that he facilitated a codefendant's use of a firearm during the Mayor's Jewelry Store robbery. We disagree.

We review *de novo* the district court's denial of a motion for a judgment of acquittal on sufficiency of evidence grounds. *United States v. Browne*, 505 F.3d 1229, 1253 (11th Cir. 2007). We consider the evidence in the light most favorable to the Government and draw all reasonable inferences and

credibility choices in the Government's favor. *United States v. Friske*, 640 F.3d 1288, 1290–91 (11th Cir. 2011).

Davis argues that there is insufficient evidence to support his conviction on Count 17 of the superseding indictment, which charges aiding and abetting a codefendant's possession of a firearm during the jewelry store robbery. In his estimation, the evidence does not show that he had prior knowledge of any gun before the jewelry store robbery. In fact, he tells us, the evidence establishes that he was not involved in the planning of the robbery, precluding his prior knowledge of the firearm. At most, the jury intuited that Davis had prior knowledge of the gun, which is an insufficient basis on which to sustain his conviction.

The Government argues that a reasonable construction of the evidence demonstrates that Davis knew his codefendant would be carrying a gun during the jewelry store robbery and that Davis enjoyed the protection of the firearm during the commission of the robbery. According to the Government, its evidence constitutes a showing sufficient to support a conviction for aiding and abetting a codefendant's possession of a firearm.

Recently, the Supreme Court decided *Rosemond v. United States*, ___U.S. ___ , 134 S. Ct. 1240 (2014), in which it clarified the standard regarding the precise question before us: What must the Government show when it seeks to establish that a defendant is guilty of aiding or abetting the offense of using or carrying a firearm during a crime of violence? In *Rosemond*, the Court held that the Government must prove that the defendant "actively

participated in the underlying. . . violent crime with advance knowledge that a confederate would use or carry a gun during the crime's commission." *Rosemond*, 134 S. Ct. at 1243.

The Government, as part of its sufficiency argument, notes that Davis must have seen the gun during the robbery, and thus the knowledge element is met. We note that under *Rosemond*, such a scenario may constitute insufficient evidence if it means that Davis "at that late point ha[d] no realistic opportunity to quit the crime." *Rosemond*, 134 S. Ct. at 1249. However, Davis does not argue his inability to retreat, and regardless, this point is beyond the scope of our analysis. We need only decide whether Davis had the requisite "advance knowledge" described in *Rosemond*.

After *Rosemond*, and considering the evidence in the light most favorable to the Government, a reasonable construction of the evidence supports conviction on Count 17. The Government established that Davis drove from Miami-Dade County to the robbery site in Broward County with his codefendant, Fisher, who was the gunman. Both Davis and Fisher sat in the backseat, and the driver of the car turned and handed Fisher the handgun that would be used during the robbery. We agree with the Government and the district court that the jury could reasonably infer Davis's knowledge of the gun, based on its evaluation of the evidence as tending to demonstrate that Davis saw the gun in the car. Likewise, the jury may have inferred knowledge based on its finding that Davis participated in prior robberies, or that he assisted in planning the jewelry store robbery. We leave the jury's finding on aiding and abetting in

Count 17 undisturbed, as it was based on sufficient evidence.

VII. *Accumulation of Trial Errors Claim*

We need not linger long over Davis's final claim. Davis contends that we should grant relief where "a combination of trial errors and prosecutorial misconduct [denies] a defendant a fair trial, regardless of whether the individual errors require reversal on their own." Appellant's Br. at 42 (citing *United States v. Elkins*, 885 F.2d 775 (11th Cir. 1989)). This is clearly correct as an abstract proposition of law, but it does not apply to this case.

Our precedent counsels that a combination of trial errors and prosecutorial misconduct can serve to render a trial unfair, despite no single error requiring reversal. *Id.* at 787. However, such a combination is rare because "a conviction should be reversed only if 'a miscarriage of justice would otherwise result.'" *Id.* (quoting *United States v. Young*, 470 U.S. 1, 15 (1985)). This is not one of those rare cases.

As we make clear in our discussion above, the limited misconduct by the prosecutor was readily cured by the instruction of the trial court. The only cognizable error by the trial court is the admission of the cell site location information, which was at best understandable, given the uncertainty of the law on the subject, and at worst harmless, given that the evidence was admissible against Davis, albeit on a different theory (the *Leon* exception) than that on which it was propounded.

CONCLUSION

For the reasons set forth above, we affirm the judgment of conviction and vacate only that portion of the sentence attributable to the enhancement for brandishing.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case 10-20896-CR-GOLD

***THE UNITED STATES OF AMERICA*,**

Plaintiff, **COURTROOM 11-1**

vs. **MIAMI, FLORIDA**

***QUARTAVIOUS DAVIS*,** **JANUARY 31, 2012**

Defendant. (Pages 1-59)

MOTION TO SUPPRESS
BEFORE THE HONORABLE ALAN S. GOLD
SENIOR UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT: **ROY K. ALTMAN, A.U.S.A**
AMANDA PERWIN, A.U.S.A.
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Miami, FL 33132 305. 961.9435

FOR THE: DEFENDANT: **MICHAEL ZELMAN, ESQ.**
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REPORTED BY: **JOSEPH A. MILLIKAN, RPR-CM-NSC-FCRR**
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specifically says that Jones does not overrule *Knotts* or *Karo* which address the hypothetical the Court gave, which is when a private company or the Government installs a tracking device in either a private company's possessions or something that is in the Government's possession and then provides it to the defendant, because in that situation the defendant did not have a reasonable expectation of privacy at the time that the, quote unquote, trespass occurred, so there would be no trespass and no violation of the Fourth Amendment.

THE COURT: All right. Thank you. I am going to deny the motion to suppress at this stage and allow the Government to go forward with proper foundation, of course, and attempt to introduce the evidence.

At the end of the trial I'll allow, if there is a guilty verdict, a motion for mistrial based on that now or a new trial. It is my intention to write something on this issue stating my reasons, but I don't want to do that prematurely at this stage, that is, write a written opinion, before I have a complete set of facts to work with.

So, it is, in effect, a conditional; denial of the motion at this stage based upon what I know and the proffer and what I believe is the appropriate application of the law, but at the end of the day, I will put it into written form if we are in that situation.

MR. ALTMAN: Does the Court want me to file a response before that time?

THE COURT: No. I think what I would prefer to do is see where this case goes, and then I think the

appropriate way to deal with this would be in any post-trial motions that Mr. Zelman would wish to make, if they are necessary, that preserves and reiterates this argument based upon the facts that are presented and, you know, the motions could be any one of a number of them. I think it would be appropriate for the United States to respond and for the Court to issue a written order on some new territory.

But doing anything more at this juncture on matters that have not been fully explicated seems to me not to be particularly helpful, but I am comfortable enough with the Government's position and explanation and analysis of the case law to allow the evidence to go forward, at least to be presented to the jury subjection to having further motions at a later time.

Thank you for your appearance. We will see you promptly at nine o'clock tomorrow.

Yes, sir.

MR. ALTMAN: Your Honor, if I may, and obviously UI know that we are not going to get to this now, but there are three issues that I believe we have to get to before several witnesses who may get on the stand tomorrow testify.

The first is, very simply, stipulations. Mr. Zelman

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case 10-20896-CR-GOLD

***THE UNITED STATES OF AMERICA*,**

Plaintiff, **COURTROOM 11-1**

vs. **MIAMI, FLORIDA**

***QUARTAVIOUS DAVIS*,** **FEBRUARY 7, 2012**

Defendant. (Pages 1-146)

JURY TRIAL PROCEEDING
BEFORE THE HONORABLE ALAN S. GOLD
SENIOR UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT: **ROY K. ALTMAN, A.U.S.A**
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FOR THE: DEFENDANT: **MICHAEL ZELMAN, ESQ.**
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MR. ZELMAN: Yes, Your Honor. That is the last count in the Indictment and the defendant moves for judgment of acquittal on Count 17. That count alleges the possession, use or the carrying of a firearm during the commission of the Mayors Broward crime. And the defendant believes that there is insufficient evidence that a firearm was involved, that Mr. Davis possessed it, or that he assisted or associated with others who did the possession or carrying or use of that firearm.

THE COURT: Go ahead. Response.

MR. ALTMAN: Your Honor, again I think the testimony of the DNA establishes that Mr. Davis was one of the robbers and also that during the robbery Mr. Sylvester Fisher brandished what Michael Martin said was a firearm, and that is shown in the surveillance video and came out in the victim's testimony.

THE COURT: I am going to deny the motion, again with all inference in favor of the United States, finding that the United States has presented sufficient evidence beyond a reasonable doubt so that a jury could conclude that all the elements of that count were met.

MR. ZELMAN: Judge, I would also like to renew, without elaborate argument, my motion to suppress based upon the Jones case. I believe that Detective Jacobs' testimony established position and location evidence with greater specificity than had been indicated earlier in the motion, and therefore I ask the Court to reconsider its ruling.

THE COURT: Anything else on that?

MR. ALTMAN: No, Your Honor.

THE COURT: I am going to deny the motion. Again, I opted to reserve to put my reasoning in a written order at such time as it is ripe and ready to proceed.

I also find that as to the 801(d)(2)(E) statement, the Government has met its obligations with respect to all the elements of that evidentiary section by evidence that certainly established the prima face case so s to allow that statement to be include as part of the evidence in the trial.

So, let me turn to the defense: What is ahead of us on your case? First let me ask you: Is Mr. Davis going to testify?

MR. ZELMAN: No. He has indicated that he will not.

THE COURT: Mr. Davis, would you raise your right hand and be sworn, sir. You can stay seated. It is all right.

[The defendant was sworn by the clerk at 11:13 a.m.]

THE COURT: Now, my questions are going to be directed only to your understanding about your right to testify or not, no other matter.

You have a right to take the witness stand and testify on your own behalf if that's your decision. It is really your decision. Now, you can make that decision after discussing it with your lawyer and with others and determine what is in your

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 11-2123-CMM

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER GRANTING DISCLOSURE OF STORED CELL SITE INFORMATION FOR TELEPHONE NUMBERS.
_____ /

APPLICATION FOR STORED CELL SITE INFORMATION

Pursuant to 18 U.S.C. § 2703(c) & (d), the United States of America, by and through the undersigned Assistant United States Attorney, hereby submits the following application requesting that this Court enter an order directing that Metro PCS, T-Mobile, Cellco Partnership, d/b/a Verizon Wireless, BellSouth, Cingular Wireless, American Telephone and Telegraph Company (AT&T), AT&T Wireless Services, Sprint Spectrum LP, MCI, Voicestream Wireless and/or any other provider of wire communication service as that term is defined in Title 18, United States Code, Section 2711 (hereinafter "wire communication service provider"), disclose certain stored telephone communication records for the cellular telephones assigned the following telephone numbers: (1) 561-767-5642, (2) 561-667-7105, (3) 305-834-3564, and (4) 239-244-5857 ("Subject Numbers"). Specifically, the United States requests the wire communication service provider produce stored telephone subscriber records, phone toll records, and corresponding geographic

location data (cell site) for the above-identified cellular telephones for the period from August 1, 2010 through October 6, 2010.

The requested telephone subscriber records are records concerning electronic communications service within the meaning of 18 U.S.C. § 2703(c)(l). Therefore, such records may be disclosed to the Government pursuant to a court order provided the Government "offers specific and articulable facts showing that there are reasonable grounds to believe that ... the records or other information sought are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). Accordingly, in support of this motion, the United States offers the following facts:

1. On August 7, 2010, the Little Caesar's Restaurant at 24655 SW 112th Avenue, Miami, Florida, was robbed by three black male gunmen whose faces were covered by t-shirts. On January 31, 2011, during an interview with the undersigned and with detectives of the Miami-Dade Police Department ("MDPD"), Willie SMITH confessed to his involvement in this robbery and said that he had committed the robbery with his half-brother, Jamarquis Terrell REID, and a friend, Quartavious DAVIS. According to statements given by both REID and SMITH, REID's cell phone number at the time of the robbery was 239-244-5857; SMITH's cell phone number at the time of the robbery was 561-667-7105; and DAVIS' cell phone number at the time of the robbery was 561-767-5642.

2. On August 31, 2010, the Amerika gas station at 1541 SE 12th Avenue, Miami, Florida, was robbed by three black male gunmen whose faces were

covered by t-shirts. On October 7, 2010, after being arrested in connection with a separate robbery, REID waived his *Miranda* rights and confessed that he had committed this robbery. In addition, on January 31, 2011, during an interview with the undersigned and with detectives of the MDPD, SMITH confessed that he had participated in this robbery with REID and DAVIS. According to both REID and SMITH, REID's cell phone number at the time of the robbery was 239-244-5857; SMITH's cell phone number at the time of the robbery was 561-667-7105; and DAVIS' cell phone number at the time ofthe robbery was 561-767-5642.

3. On September 7, 2010, the Walgreens at 11398 Quail Roost Drive, Miami, Florida, was robbed by three black male gunmen whose faces were covered by t-shirts. On October 7, 2010, after being arrested in connection with a separate robbery, REID waived his *Miranda* rights and confessed that he had committed this robbery. On January 31, 2011, during an interview with the undersigned and with detectives of the MDPD, SMITH confessed that he had also participated in this robbery with REID and DAVIS. According to both REID and SMITH, REID's cell phone number at the time of the robbery was 239-244-5857; SMITH's cell phone number at the time of the robbery was 561-667-7105; and DAVIS' cell phone number at the time of the robbery was 561-767-5642.

4. On September 15, 2010, the Advance Auto Parts store at 26859 S. Dixie Highway, Miami, Florida, was robbed by three black male gunmen whose faces were covered by t-shirts. On October 7, 2010, after being arrested in connection with a separate robbery, REID waived his *Miranda* rights

and confessed that he had committed this robbery. On January 31, 2011, during an interview with the undersigned and with detectives of the MDPD, SMITH confessed that he had also participated in this robbery with REID, DAVIS, and Jahmal Akeem MARTIN (who served as the getaway driver). According to both REID and SMITH, REID's cell phone number at the time of the robbery was 239-244-5857; SMITH's cell phone number at the time of the robbery was 561-667-7105; and DAVIS' cell phone number at the time of the robbery was 561-767-5642.

5. On September 25, 2010, the Universal Beauty Salon at 13374 S.W. 288th Street, was robbed by three black male gunmen whose faces were covered by t-shirts. Later that day, with the help of a victim of the robbery, police located the getaway car- a green Impala- in which the robbers had made their escape. That car was registered to MARTIN's girlfriend who told police that she had lent the car to MARTIN at 11:30 a.m., and that he had returned it to her at 1:30 p.m. The robbery took place at approximately 12:53 p.m. Inside the car, the officers found three t-shirts, each of which was tied in a knot as if it had recently been worn around a man's head. On one of the t-shirts, police investigators recovered a DNA profile that matched the DNA profile of DAVIS. On October 7, 2010, REID waived his *Miranda* rights and confessed that he had committed this robbery with SMITH, MARTIN (who, again, served as the getaway driver), and a third man he did not know. On October 11, 2010, SMITH was also arrested in connection with this robbery. SMITH likewise waived his *Miranda* rights and confessed that he had committed this robbery with REID,

MARTIN, and a third man he did not know. On January 31, 2011, however, during an interview with the undersigned and with detectives of the MDPD, SMITH confessed that the man he had claimed not to know was in fact DAVIS. According to both REID and SMITH, REID's cell phone number at the time of the robbery was 239-244-5857; SMITH's cell phone number at the time of the robbery was 561-667-7105; and DAVIS' cell phone number at the time of the robbery was 561-767-5642. When MARTIN was arrested on September 25, 2010 in connection with this robbery, he had a cell phone on his person. The number for that cell phone was 305-834-3564.

6. On September 26, 2010, the Wendy's restaurant at 13485 S.W. 288th Street, Miami, Florida, was robbed by three black male gunmen whose faces were covered with t-shirts. As the robbers made their escape, they exchanged fire with an armed customer. Later, police recovered the getaway car - a red Chevrolet sedan - in which the robbers had made their escape. On the front passenger side of the car, the officers found 2 bullet holes. On the front passenger seat, the officers found blood stains. The DNA profile recovered from these blood stains matched SMITH's DNA profile. On January 31, 2011, during an interview with the undersigned and with detectives of the MDPD, SMITH confessed that he had committed this robbery and said that he had committed it with REID, DAVIS, and a third as-yet unidentified man.

7. On October 1, 2010, the Mayor's Jewelry Store at 4471 Weston Road, Weston, Florida, was robbed by three black males - one of whom brandished a gun - whose faces were covered. The robbers made their escape in a blue BMW that police

recovered soon after the robbery. The BMW had been stolen several days earlier from a Weston woman. Inside the BMW, police found blood stains belonging to two different individuals. The DNA recovered from the first set of blood stains matched the DNA recovered from a blood stain inside the jewelry store. This DNA profile matched the DNA profile of Michael MARTIN. The DNA recovered from the second set of blood stains matched the DNA profile of DAVIS. In addition, a pair of sunglasses was found inside of the store. According to the store's employees, the glasses were not present in the store before the robbery. According to the Weston woman whose BMW was used in the robbery, the sunglasses are hers and were left by her in the BMW before it was stolen. The DNA profile recovered from the sunglasses matched the DNA profile of Sylvester FISHER. Days later, Michael MARTIN was arrested, and, after waiving his *Miranda* rights, he confessed that he had committed this robbery with DAVIS, FISHER, and REID.

8. The telephone records requested will assist law enforcement in determining the locations of each of the named subjects on days when robberies in which they are suspected to have participated occurred. The requested subscriber information and toll records will further allow law enforcement to determine whether the named subjects communicated with each other on the days of the robberies and, if so, how many times. This information is relevant to the ongoing criminal investigation.

Accordingly, the United States respectfully submits that there are reasonable grounds to find that the records sought are relevant to an ongoing

criminal investigation over which this Court has jurisdiction, including violations of Title 18, United States Code, Section 2113.

WHEREFORE, pursuant to Title 18, United States Code, Sections 2703(c) and (d), the United States requests that this Court issue an order requiring the wire communication service provider to disclose to the investigative agency toll records for the Subject Numbers (including any associated push-to-talk service) with the corresponding geographic location (cell site) data relating to the Subject Lines captured by the wire communication service provider. The United States requests that the Court order the wire communication service provider to provide the requested information for the Subject Numbers for the period from August 1, 2010 through October 6, 2010. The United States also requests the wire communication service provider to produce subscriber information for the person using this telephone number, including subscriber name, authorized users, billing address and service features, over the same period. And finally, the United States further requests that the wire communication service provider disclose the requested information to email address Carl.Rousseau@usdoj.gov, which belongs to ATF Task Force Officer Carl Rousseau.

The United States also requests that the Court seal this application and any resulting order with the exception of any copy required to be disclosed pursuant to discovery obligations of the United States, on the basis that disclosure of this request could jeopardize the ongoing investigation by alerting the target subjects, some of whom are not yet in

custody, to the existence of the investigation, which could cause them to flee.

In accordance with Title 18, United States Code, Section 2706(a), ATF will reimburse the wire communication service provider for the reasonably necessary costs the wire communication service provider may incur in providing the requested records, including any costs that are incurred due to necessary disruption of the normal operation of any electronic communications service in which said records may be stored.

Respectfully submitted,

WIFREDO A. FERRER
UNITED STATES ATTORNEY

_____

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 11-2123-CMM

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER GRANTING DISCLOSURE OF STORED CELL SITE INFORMATION FOR TELEPHONE NUMBERS.
_____ /

ORDER FOR STORED CELL SITE INFORMATION

This matter came before the Court pursuant to an application under 18 U.S.C. § 2703(c) and (d), by Assistant United States Attorney Roy K. Altman, an attorney for the Government, requesting an order directing that Metro PCS, T-Mobile, Cellco Partnership, d/b/a Verizon Wireless, BellSouth, Cingular Wireless, American Telephone and Telegraph Company (AT&T), AT&T Wireless Services, Sprint Spectrum LP, MCI, Voicestream Wireless, Nextel and/or any other provider of wire communication service as that term is defined in Title 18, United States Code, Section 2711 (l) (hereinafter "wire communication service provider"), disclose certain stored telephone communication records for the cellular telephones assigned the following telephone numbers: (1) 561-767-5642) (2) 561-667-7105, (3) 305-834-3564, and (4) 239-244-5857 ("Subject Numbers"). Having reviewed the application, the Court finds that there are 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 of a violation of Title 18, United States Code, Section 2113, being conducted by the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF"), over which this Court has jurisdiction. It is therefore:

ORDERED AND ADJUDGED that the wire communication service provider(s) **FORTHWITH** shall provide the ATF ("investigative agency") records identifying the listed subscriber, billing address and service information, and any associated push-to-talk service, regarding the Subject Numbers for the period from August 1, 2010, through October 6, 2010; it is further

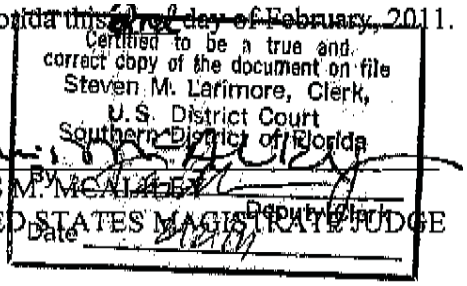
ORDERED AND ADJUDGED that the wire communication service provider(s) **FORTHWITH** shall provide to the investigative agencies all telephone toll records and geographic location data (cell site) and any associated push-to-talk service regarding the Subject Numbers for the period from August 1, 2010, through October 6, 2010; it is further

ORDERED and ADJUDGED that the investigative agency shall compensate the wire communication service provider(s) for such reasonably necessary costs as are incurred by the wire communication service provider(s) in providing the requested records, including any costs that are incurred due to necessary disruption of the normal operation of any electronic communications service in which said records may be stored,

ORDERED AND ADJUDGED that this order and the application for this order shall be SEALED until otherwise ordered by this Court, with the exception of any copy required to be disclosed

pursuant to discovery obligations of the United States.

DONE and ORDERED in Chambers in Miami, Florida this 23rd day of February, 2011.



CHRIS M. MCALILEY
UNITED STATES MAGISTRATE JUDGE

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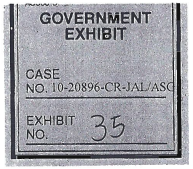
Call Details



Records for Target Number: 5617675642

Search Number: 5617675642 Search Dates: 8/1/2010 - 10/6/2010

8/1/2010	00:08:46	0:04	Outgoing Call	3053006601	3053006601	Not Answered	None		Plantation1(SW5)	3	129		3	129
8/1/2010	00:47:01	0:05	Outgoing Call	9548648388	9548648388	Not Answered	None		Plantation1(SW5)	2	129		2	129
8/1/2010	00:47:13	0:27	Outgoing Call	9547930872	9547930872	Answered	None		Plantation1(SW5)	2	129		2	129
8/1/2010	01:14:46	0:17	Incoming Call		5617675642	Not Answered	None	7863700245	Plantation1(SW5)	2	129		2	129
8/1/2010	01:15:45	0:15	Incoming Call		5617675642	Not Answered	None	7863700245	Plantation1(SW5)	2	129		2	129
8/1/2010	01:25:24	0:34	Outgoing Call	3053006601	3053006601	Answered	None		Plantation1(SW5)	2	129		2	129
8/1/2010	01:31:11	2:38	Outgoing Call	9544041812	9544041812	Answered	Outside Home Switch		Plantation2(SW6)					
8/1/2010	01:31:35	2:37	Incoming Call		5617675642	Answered	Outside Home Switch	3053006601	Plantation1(SW5)	2	129		2	129
8/1/2010	08:39:27	0:24	Incoming Call		5617675642	Not Answered	None	9548648388	Plantation1(SW5)	2	129		2	129
8/1/2010	08:47:28	1:03	Incoming Call		5617675642	Answered	None	9548648388	Plantation1(SW5)	2	129		2	129
8/1/2010	10:38:55	0:12	Incoming Call	4315617675642	5617675642	Answered	Call FWD - No Reply	2398877591	Plantation1(SW5)	2	129		2	129
8/1/2010	10:39:03	0:44	Outgoing Call	7865534013	7865534013	Answered			Plantation1(SW5)	2	129		2	129
8/1/2010	10:44:34	0:26	Outgoing Call	5616677105	5616677105	Answered	None		Plantation1(SW5)	2	129		2	129
8/1/2010	10:55:48	0:49	Incoming Call		5617675642	Answered	Outside Home Switch	7864571222	Plantation2(SW6)					
8/1/2010	10:56:21	0:56	Outgoing Call	7864541290	7864541290	Answered	Outside Home Switch		Boynton Beach1(SW3)					
8/1/2010	10:57:54	0:23	Outgoing Call	7864571222	7864571222	Answered			Plantation2(SW6)	3	526		3	526
8/1/2010	11:48:30	0:02	Outgoing Call	7862592059	7862592059	Not Answered			Plantation1(SW5)	2	129		2	129
8/1/2010	11:48:35	0:14	Incoming Call		5617675642	Answered	None	2398877591	Plantation1(SW5)	2	129		2	129
8/1/2010	11:51:16	1:38	Incoming Call		5617675642	Answered	None	5613059422	Plantation1(SW5)	2	129		2	129
8/1/2010	11:58:36	8:43	Incoming Call		5617675642	Answered	None	5613059422	Plantation1(SW5)	2	129		2	129
8/1/2010	12:07:32	2:18	Outgoing Call	7864446336	7864446336	Answered	None		Plantation1(SW5)	2	129		2	129
8/1/2010	12:11:29	2:15	Outgoing Call	3053006601	3053006601	Answered	None		Plantation1(SW5)	2	129		2	129
8/1/2010	12:17:13	0:31	Incoming Call		5617675642	Answered	Outside Home Switch	5616677105	Plantation2(SW6)					
8/1/2010	12:17:38	0:37	Outgoing Call	7864541384	7864541384	Answered	Outside Home Switch		Plantation1(SW5)					
8/1/2010	12:28:02	0:27	Outgoing Call	7863165346	7863165346	Answered	None		Plantation1(SW5)	2	129		2	129
8/1/2010	12:29:13	0:13	Outgoing Call	9544041464	9544041464	Answered	Outside Home Switch		Plantation2(SW6)					
8/1/2010	12:29:48	0:10	Incoming Call		5617675642	Answered	Outside Home Switch	2394400512	Plantation1(SW5)	2	129		2	129
8/1/2010	12:30:43	0:27	Outgoing Call	7863074592	7863074592	Answered	None		Plantation1(SW5)	2	129		2	129
8/1/2010	12:31:16	0:18	Incoming Call		5617675642	Answered	Outside Home Switch	7863074592	Plantation2(SW6)					
8/1/2010	12:31:41	0:26	Outgoing Call	7864541502	7864541502	Answered	Outside Home Switch		Plantation1(SW5)					
8/1/2010	12:37:18	0:28	Outgoing Call	7865534013	7865534013	Answered			Plantation1(SW5)	2	129		2	129
8/1/2010	13:00:22	0:34	Outgoing Call	7865534013	7865534013	Answered			Plantation1(SW5)	3	129		3	129
8/1/2010	13:12:48	0:10	Incoming Call	4315617675642	5617675642	Answered	Call FWD - No Reply	7864446336	Plantation1(SW5)	3	129		3	129
8/1/2010	13:14:03	0:02	Incoming Call	4315617675642	5617675642	Answered	Call FWD - No Reply	7864446336	Plantation1(SW5)	2	129		2	129
8/1/2010	13:28:03	0:43	Incoming Call		5617675642	Answered	None	3053006601	Plantation2(SW6)					
8/1/2010	13:40:22	0:25	Outgoing Call	7865534013	7865534013	Answered			Plantation1(SW5)	2	129		2	129
8/1/2010	13:40:51	0:36	Incoming Call		5617675642	Answered	None	5616677105	Plantation1(SW5)	2	129		2	129
8/1/2010	13:59:47	0:35	Outgoing Call	7862340920	7862340920	Answered	None		Plantation1(SW5)	2	129		2	129
8/1/2010	13:59:58	0:49	Outgoing Call	9544041282	9544041282	Answered	Outside Home Switch		Plantation2(SW6)					
8/1/2010	14:00:34	0:47	Incoming Call		5617675642	Answered	Outside Home Switch	7862340920	Plantation1(SW5)	2	129		2	129
8/1/2010	14:01:28	0:29	Outgoing Call	5616677105	5616677105	Answered	None		Plantation1(SW5)	2	129		2	129

Call Details

Records for Target Number: 5617675642

Search Number: 5617675642 Search Dates: 8/1/2010 - 10/6/2010

8/12/2010	13:22:26	0:07	Incoming Call	4315617675642	5617675642	Answered	Call FWD - No Reply	5616677105	Plantation1(SW5)	2	129		2	129
8/12/2010	14:21:00	1:50	Outgoing Call	3054842975	3054842975	Answered			Plantation1(SW5)	2	129		2	129
8/12/2010	14:24:21	0:26	Outgoing Call	15617675642	5617675642	Answered	None		Plantation1(SW5)	2	129		2	129
8/12/2010	14:24:22	0:25	Incoming Call	4315617675642	5617675642	Answered	Call FWD - Busy	5617675642	Plantation1(SW5)					
8/12/2010	14:25:13	0:36	Outgoing Call	3055065749	3055065749	Answered			Plantation1(SW5)	2	129		2	129
8/12/2010	14:26:01	3:20	Outgoing Call	7862983246	7862983246	Answered	None		Plantation1(SW5)	2	129		2	129
8/12/2010	14:32:47	0:40	Outgoing Call	2394400512	2394400512	Answered	None		Plantation1(SW5)	2	129		2	129
8/12/2010	14:48:33	0:04	Incoming Call	4315617675642	5617675642	Answered	Call FWD - No Reply	7862806103	Boynton Beach1(SW3)					
8/12/2010	14:48:36	0:26	Incoming Call		5617675642	Not Answered	Outside Home Switch	7862806103	Plantation1(SW5)	2	129		2	129
8/12/2010	14:49:19	0:04	Incoming Call	4315617675642	5617675642	Answered	Call FWD - No Reply	7862806103	Boynton Beach1(SW3)					
8/12/2010	14:49:21	0:26	Incoming Call		5617675642	Not Answered	Outside Home Switch	7862806103	Plantation1(SW5)	1	129		1	129
8/12/2010	15:12:28	0:24	Outgoing Call	7862806103	7862806103	Answered			Plantation1(SW5)	3	399		3	399
8/12/2010	15:13:08	0:53	Outgoing Call	7862806103	7862806103	Answered			Plantation1(SW5)	3	399		3	399
8/12/2010	16:12:33	0:05	Incoming Call	4315617675642	5617675642	Answered	Call FWD - No Reply	2392445857	Plantation2(SW6)					
8/12/2010	16:14:17	0:26	Incoming Call		5617675642	Not Answered	Outside Home Switch	2392445857	Plantation1(SW5)	1	129		2	129
8/12/2010	16:20:42	0:38	Outgoing Call	2392445857	2392445857	Answered	None		Plantation1(SW5)	3	129		3	129
8/12/2010	16:44:29	0:24	Incoming Call		5617675642	Not Answered	None	2392445857	Plantation2(SW6)	5	004		5	004
8/12/2010	16:44:57	0:18	Outgoing Call	2392445857	2392445857	Answered	None		Plantation2(SW6)	5	004		5	004
8/12/2010	17:03:29	0:23	Outgoing Call	2392445857	2392445857	Answered	None		Plantation1(SW5)	2	129		2	129
8/12/2010	17:37:04	0:39	Incoming Call		5617675642	Answered	None	5615414485	Plantation1(SW5)	3	399		3	399
8/12/2010	18:13:59	0:06	Outgoing Call	7862174381	7862174381	Answered	None		Plantation1(SW5)	3	399		3	399
8/12/2010	18:45:16	0:36	Outgoing Call	2394400512	2394400512	Answered	None		Plantation1(SW5)	3	129		3	129
8/12/2010	18:47:53	0:13	Outgoing Call	2394400512	2394400512	Answered	None		Plantation1(SW5)	3	129		3	129
8/12/2010	18:56:38	2:22	Outgoing Call	7862174381	7862174381	Answered	None		Plantation1(SW5)	3	399		3	399
8/12/2010	18:57:44	0:05	Outgoing Call	4315617675642	5617675642	Answered	Call Waiting		Plantation1(SW5)	3	399		3	399
8/12/2010	18:58:23	0:10	Outgoing Call	4315617675642	5617675642	Not Answered	Call Waiting		Plantation1(SW5)	3	399		3	399
8/12/2010	19:04:03	0:22	Incoming Call		5617675642	Answered	None	7862174381	Plantation1(SW5)	3	399		3	399
8/12/2010	19:51:30	0:06	Incoming Call	4315617675642	5617675642	Answered	Call FWD - No Reply	2392445857	Plantation1(SW5)					
8/12/2010	20:07:09	0:05	Incoming Call	4315617675642	5617675642	Answered	Call FWD - No Reply	7862806103	Boynton Beach1(SW3)					
8/12/2010	20:09:18	0:07	Incoming Call	4315617675642	5617675642	Answered	Call FWD - No Reply	2392445857	Plantation1(SW5)					
8/12/2010	20:43:25	0:17	Incoming Call	4315617675642	5617675642	Answered	Call FWD - No Reply	7863793607	Plantation2(SW6)					
8/12/2010	20:44:17	0:33	Incoming Call	4315617675642	5617675642	Answered	Call FWD - No Reply	7863793607	Plantation2(SW6)					
8/12/2010	20:50:34	0:07	Incoming Call	4315617675642	5617675642	Answered	Call FWD - No Reply	7863793607	Plantation1(SW5)					
8/12/2010	20:54:07	0:54	Outgoing Call	3053006601	3053006601	Answered	None		Plantation1(SW5)	2	129		2	129
8/12/2010	20:55:13	1:22	Outgoing Call	3058342713	3058342713	Answered	None		Plantation1(SW5)	2	129		2	129
8/12/2010	22:00:16	0:17	Outgoing Call	2392445857	2392445857	Not Answered	None		Plantation1(SW5)	2	129		2	129
8/12/2010	23:44:11	0:23	Incoming Call		5617675642	Not Answered	None	7869915995	Plantation1(SW5)	2	129		2	129
8/13/2010	00:01:15	0:15	Outgoing Call	9544041033	9544041033	Answered	Outside Home Switch		Boynton Beach1(SW3)					
8/13/2010	00:01:46	0:13	Incoming Call		5617675642	Answered	Outside Home Switch	8503338597	Plantation1(SW5)	2	129		2	129
8/13/2010	09:02:17	0:12	Incoming Call		5617675642	Answered	Outside Home Switch	2392445857	Plantation2(SW6)					
8/13/2010	09:04:22	0:26	Outgoing Call	7864541352	7864541352	Answered	Outside Home Switch		Plantation1(SW5)					

metroPCS®

Search Number: 5617675642 Search Dates: 8/1/2010 - 10/6/2010

8/13/2010	09:38:55	0:51	Incoming Call		5617675642	Answered	Outside Home Switch	2393210954	Plantation2(SW6)					
8/13/2010	09:41:09	0:56	Outgoing Call	7864541902	7864541902	Answered	Outside Home Switch		Plantation1(SW5)					
8/13/2010	09:43:37	0:13	Outgoing Call	9547930872	9547930872	Not Answered	None		Plantation1(SW5)	1	399		1	399
8/13/2010	09:43:56	0:05	Outgoing Call	2398877591	2398877591	Answered	None		Plantation1(SW5)	1	399		1	399
8/13/2010	09:44:06	0:31	Outgoing Call	7869915995	7869915995	Answered	None		Plantation1(SW5)	2	399		1	399
8/13/2010	09:47:32	0:39	Outgoing Call	3058342713	3058342713	Answered	None		Plantation1(SW5)	1	399		1	399
8/13/2010	09:54:39	0:22	Incoming Call		5617675642	Answered	None	2392445857	Plantation1(SW5)	1	399		1	399
8/13/2010	10:15:24	0:21	Outgoing Call	2394400512	2394400512	Answered	None		Plantation1(SW5)	3	129		3	129
8/13/2010	10:35:25	0:34	Outgoing Call	7864991455	7864991455	Answered	None		Plantation1(SW5)	2	129		2	129
8/13/2010	10:36:08	0:40	Outgoing Call	7865534013	7865534013	Answered			Plantation1(SW5)	2	129		2	129
8/13/2010	10:36:47	0:24	Outgoing Call	7863165346	7863165346	Not Answered	None		Plantation2(SW6)	3	526		3	526
8/13/2010	10:36:56	0:34	Outgoing Call	7863086623	7863086623	Answered	None		Plantation1(SW5)	2	129		2	129
8/13/2010	10:38:07	0:40	Outgoing Call	7863086623	7863086623	Answered	None		Plantation1(SW5)	2	129		2	129
8/13/2010	10:43:40	0:18	Incoming Call		5617675642	Answered	None	7863086623	Plantation1(SW5)	2	129		2	129
8/13/2010	10:55:41	0:21	Incoming Call		5617675642	Not Answered	None	7864991455	Plantation1(SW5)	2	129		2	129
8/13/2010	10:57:13	0:46	Outgoing Call	9544041901	9544041901	Answered	Outside Home Switch		Plantation2(SW6)					
8/13/2010	10:59:35	0:42	Incoming Call		5617675642	Answered	Outside Home Switch	7862945922	Plantation1(SW5)	2	129		2	129
8/13/2010	11:00:36	0:44	Incoming Call		5617675642	Answered	None	7863165346	Plantation1(SW5)	2	129		2	129
8/13/2010	11:01:26	0:15	Incoming Call		5617675642	Answered	None	5616677105	Plantation1(SW5)	2	129		2	129
8/13/2010	11:17:18	1:03	Outgoing Call	9544041417	9544041417	Answered	Outside Home Switch		Boynton Beach1(SW3)					
8/13/2010	11:17:53	1:00	Incoming Call		5617675642	Answered	Outside Home Switch	7862806103	Plantation1(SW5)	2	129		2	129
8/13/2010	11:19:59	0:07	Outgoing Call	7864541252	7864541252	Not Answered	Outside Home Switch		Boynton Beach1(SW3)					
8/13/2010	11:38:01	0:32	Outgoing Call	3053006601	3053006601	Answered	None		Plantation1(SW5)	2	129		2	129
8/13/2010	11:50:14	0:26	Outgoing Call	3053006601	3053006601	Answered	None		Plantation1(SW5)	2	129		2	129
8/13/2010	12:34:35	0:39	Outgoing Call	7869915995	7869915995	Answered	None		Plantation1(SW5)	2	129		2	129
8/13/2010	12:37:59	0:45	Outgoing Call	2393210954	2393210954	Answered	None		Plantation1(SW5)	2	129		2	129
8/13/2010	12:47:42	0:57	Outgoing Call	7862340799	7862340799	Answered	None		Plantation1(SW5)	2	129		2	129
8/13/2010	13:18:33	0:21	Incoming Call		5617675642	Answered	None	7862340799	Plantation1(SW5)	1	399		1	399
8/13/2010	13:19:18	0:48	Outgoing Call	7865534013	7865534013	Answered			Plantation1(SW5)	1	399		1	399
8/13/2010	14:03:18	0:14	Incoming Call		5617675642	Answered	None	7864446336	Plantation1(SW5)	1	399		1	399
8/13/2010	14:13:46	0:21	Incoming Call		5617675642	Answered	None	7863165346	Plantation1(SW5)	1	399		1	399
8/13/2010	14:31:23	1:26	Incoming Call		5617675642	Answered	None	7864991455	Plantation1(SW5)	1	399		1	399
8/13/2010	14:33:30	0:13	Outgoing Call	7869915995	7869915995	Answered	None		Plantation1(SW5)	1	399		1	399
8/13/2010	15:22:25	0:08	Outgoing Call	2392445857	2392445857	Answered	None		Plantation1(SW5)	3	129		3	129
8/13/2010	15:22:40	0:37	Outgoing Call	2392445857	2392445857	Answered	None		Plantation1(SW5)	3	129		3	129
8/13/2010	15:31:47	0:29	Outgoing Call	7865534013	7865534013	Answered			Plantation1(SW5)	3	129		3	129
8/13/2010	15:41:02	0:02	Outgoing Call	7865534013	7865534013	Not Answered			Plantation2(SW6)	6	542		6	542
8/13/2010	15:41:05	0:58	Outgoing Call	2392445857	2392445857	Answered	None		Plantation2(SW6)	6	542		6	542
8/13/2010	16:03:42	0:08	Outgoing Call	7864991455	7864991455	Answered	None		Plantation1(SW5)	2	129		2	129
8/13/2010	16:03:54	1:00	Outgoing Call	7864991455	7864991455	Answered	None		Plantation1(SW5)	2	129		2	129
8/13/2010	16:18:29	0:08	Outgoing Call	7865534013	7865534013	Not Answered			Plantation1(SW5)	2	129		2	129

156a

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Search Number: 5617675642 Search Dates: 8/1/2010 - 10/6/2010

8/13/2010	16:19:52	0:58	Outgoing Call	2392445857	2392445857	Answered			Plantation1(SW5)	2	129		2	129
8/13/2010	16:41:42	0:22	Outgoing Call	9544041617	9544041617	Answered	Outside Home Switch		Plantation2(SW6)					
8/13/2010	16:44:06	0:18	Incoming Call		5617675642	Answered	Outside Home Switch	2392445857	Plantation1(SW5)	2	129		2	129
8/13/2010	16:51:31	0:13	Incoming Call		5617675642	Answered	None	2392445857	Plantation1(SW5)	2	129		2	129
8/13/2010	16:56:10	0:29	Outgoing Call	9544041122	9544041122	Answered	Outside Home Switch		Boynton Beach1(SW3)					
8/13/2010	16:56:50	0:20	Incoming Call		5617675642	Answered	Outside Home Switch	7862806103	Plantation1(SW5)	2	129		2	129
8/13/2010	17:03:43	0:02	Incoming Call		5617675642	Not Answered	Outside Home Switch	2398877591	Plantation2(SW6)	6	542		6	542
8/13/2010	17:05:59	0:05	Outgoing Call	7864541701	7864541701	Not Answered	Outside Home Switch		Plantation1(SW5)					
8/13/2010	17:06:12	0:17	Outgoing Call	2398877591	2398877591	Answered	None		Plantation1(SW5)	2	129		2	129
8/13/2010	17:07:46	0:38	Incoming Call		5617675642	Answered	Outside Home Switch	3058342713	Plantation2(SW6)	6	542		6	542
8/13/2010	17:10:00	0:43	Outgoing Call	7864541374	7864541374	Answered	Outside Home Switch		Plantation1(SW5)					
8/13/2010	17:26:41	0:02	Outgoing Call	2398877591	2398877591	Not Answered			Plantation1(SW5)	3	129		3	129
8/13/2010	18:22:53	0:39	Incoming Call		5617675642	Answered	None	7862735607	Plantation1(SW5)	2	129		2	129
8/13/2010	18:35:27	0:25	Incoming Call		5617675642	Answered	Outside Home Switch	7862806103	Plantation2(SW6)					
8/13/2010	18:37:08	0:34	Outgoing Call	7864541749	7864541749	Answered	Outside Home Switch		Boynton Beach1(SW3)					
8/13/2010	19:02:54	0:26	Incoming Call		5617675642	Not Answered	Outside Home Switch	7862806103	Plantation2(SW6)	3	203		3	203
8/13/2010	19:03:32	0:20	Incoming Call		5617675642	Not Answered	Outside Home Switch	2393210954	Plantation2(SW6)	2	111		3	091
8/13/2010	19:05:09	0:26	Incoming Call		5617675642	Not Answered	Outside Home Switch	2393210954	Plantation2(SW6)	3	434		3	434
8/13/2010	19:05:11	0:03	Incoming Call	4315617675642	5617675642	Answered	Call FWD - No Reply	7862806103	Boynton Beach1(SW3)					
8/13/2010	19:05:46	0:27	Outgoing Call	7864541034	7864541034	Not Answered	Outside Home Switch		Plantation1(SW5)					
8/13/2010	19:06:45	0:26	Incoming Call		5617675642	Not Answered	Outside Home Switch	7863074592	Plantation2(SW6)	2	434		1	434
8/13/2010	19:07:24	0:33	Outgoing Call	7864541533	7864541533	Not Answered	Outside Home Switch		Plantation1(SW5)					
8/13/2010	19:07:25	0:25	Incoming Call		5617675642	Not Answered	Outside Home Switch	7863074592	Plantation2(SW6)	1	434		1	434
8/13/2010	19:09:32	0:06	Incoming Call	4315617675642	5617675642	Answered	Call FWD - No Reply	7863074592	Plantation1(SW5)					
8/13/2010	19:09:42	0:28	Outgoing Call	7864541035	7864541035	Not Answered	Outside Home Switch		Plantation1(SW5)					
8/13/2010	19:13:21	0:06	Incoming Call	4315617675642	5617675642	Answered	Call FWD - No Reply	7863074592	Plantation1(SW5)	3	094		3	094
8/13/2010	19:20:56	0:04	Incoming Call		5617675642	Not Answered	Outside Home Switch	7863074592	Boynton Beach2(SW4)	1	097		1	097
8/13/2010	19:21:21	0:05	Outgoing Call	7542420363	7542420363	Not Answered	Outside Home Switch		Plantation1(SW5)					
8/13/2010	19:25:22	0:26	Incoming Call		5617675642	Not Answered	Outside Home Switch	7863074592	Boynton Beach2(SW4)	3	097		3	097
8/13/2010	19:26:16	0:14	Incoming Call	4315617675642	5617675642	Answered	Call FWD - No Reply	7863074592	Plantation1(SW5)					
8/13/2010	19:42:55	0:08	Outgoing Call	3058343564	3058343564	Answered	None		Boynton Beach2(SW4)	3	097		3	097
8/13/2010	19:46:32	0:35	Outgoing Call	3058343564	3058343564	Not Answered	None		Plantation1(SW5)	1	096		3	096
8/13/2010	19:49:40	0:33	Incoming Call		5617675642	Answered	None	3058343564	Plantation1(SW5)	3	416		3	416
8/13/2010	19:57:11	0:06	Incoming Call		5617675642	Not Answered	Outside Home Switch	2398877591	Plantation2(SW6)	3	203		3	203
8/13/2010	19:59:39	0:08	Incoming Call	4315617675642	5617675642	Answered	Call FWD - No Reply	2398877591	Plantation1(SW5)					
8/13/2010	20:15:21	0:18	Outgoing Call	7865534013	7865534013	Answered			Plantation1(SW5)	2	129		3	129
8/13/2010	20:16:33	0:20	Outgoing Call	7865534013	7865534013	Answered			Plantation1(SW5)	3	129		3	129
8/13/2010	20:30:04	0:34	Outgoing Call	7865534013	7865534013	Answered			Plantation1(SW5)	1	002		1	002
8/13/2010	20:41:50	0:24	Incoming Call		5617675642	Answered	None	3058343564	Plantation1(SW5)	3	541		3	541
8/13/2010	21:07:02	0:05	Incoming Call	4315617675642	5617675642	Answered	Call FWD - No Reply	7863074592	Plantation1(SW5)	3	541		3	541
8/13/2010	21:18:55	0:30	Outgoing Call	15617675642	5617675642	Answered	None		Plantation1(SW5)	3	541		3	541

metroPCS®

Search Number: 5617675642 Search Dates: 8/1/2010 - 10/6/2010

8/13/2010	21:18:56	0:29	Incoming Call	4315617675642	5617675642	Answered	Call FWD - Busy	5617675642	Plantation1(SW5)					
8/13/2010	21:40:02	0:43	Incoming Call		5617675642	Answered	Outside Home Switch	7864449715	Plantation2(SW6)					
8/13/2010	21:41:56	0:04	Incoming Call	4315617675642	5617675642	Answered	Call FWD - Busy	3057216730	Boynton Beach1(SW3)					
8/13/2010	21:42:18	0:48	Outgoing Call	7864541924	7864541924	Answered	Outside Home Switch		Plantation1(SW5)					
8/13/2010	21:47:15	0:36	Outgoing Call	2398877591	2398877591	Answered	None		Plantation1(SW5)	2	129		2	129
8/13/2010	21:48:19	0:30	Incoming Call		5617675642	Answered	None	2398877591	Plantation1(SW5)	2	129		2	129
8/13/2010	21:48:35	1:03	Incoming Call		5617675642	Answered	Call Waiting	7864449715	Plantation1(SW5)	2	129		2	129
8/13/2010	21:53:39	0:22	Outgoing Call	9544041314	9544041314	Answered	Outside Home Switch		Plantation2(SW6)					
8/13/2010	21:56:06	0:18	Incoming Call		5617675642	Answered	Outside Home Switch	7862735607	Plantation1(SW5)	2	129		2	129
8/13/2010	22:00:18	0:23	Incoming Call		5617675642	Answered	Outside Home Switch	7863570151	Plantation2(SW6)					
8/13/2010	22:00:36	0:02	Incoming Call	4315617675642	5617675642	Answered	Call FWD - No Reply	7865534013	Boynton Beach1(SW3)					
8/13/2010	22:00:41	0:26	Incoming Call		5617675642	Not Answered	Outside Home Switch	7865534013	Plantation1(SW5)	2	129		2	129
8/13/2010	22:02:33	0:30	Outgoing Call	7864541237	7864541237	Answered	Outside Home Switch		Plantation1(SW5)					
8/13/2010	22:14:45	1:24	Outgoing Call	9544041150	9544041150	Answered	Outside Home Switch		Boynton Beach1(SW3)					
8/13/2010	22:15:20	1:22	Incoming Call		5617675642	Answered	Outside Home Switch	7862806103	Plantation1(SW5)	2	129		2	129
8/13/2010	22:19:56	1:21	Incoming Call		5617675642	Answered	None	3058343564	Plantation1(SW5)	2	129		2	129
8/13/2010	22:51:02	1:35	Outgoing Call	5616677105	5616677105	Answered	None		Plantation2(SW6)	2	400		1	400
8/13/2010	23:04:54	0:11	Incoming Call		5617675642	Answered	None	5616677105	Plantation1(SW5)	2	129		2	129
8/13/2010	23:21:26	3:22	Incoming Call		5617675642	Answered	Outside Home Switch	5616677105	Plantation2(SW6)					
8/13/2010	23:23:43	3:30	Outgoing Call	7864541344	7864541344	Answered	Outside Home Switch		Plantation1(SW5)					
8/13/2010	23:46:35	9:26	Outgoing Call	3053006601	3053006601	Answered	None		Plantation1(SW5)	2	129		2	129
8/13/2010	23:59:43	0:47	Outgoing Call	7869915995	7869915995	Answered	None		Plantation1(SW5)	2	129		2	129
8/14/2010	00:04:02	0:34	Incoming Call		5617675642	Answered	None	7863700245	Plantation1(SW5)	2	129		2	129
8/14/2010	00:06:12	0:21	Outgoing Call	7863074592	7863074592	Answered	None		Plantation1(SW5)	2	129		2	129
8/14/2010	00:08:16	0:18	Incoming Call		5617675642	Answered	None	7863700245	Plantation1(SW5)	2	129		2	129
8/14/2010	00:09:21	0:43	Outgoing Call	7863700245	7863700245	Answered	None		Plantation1(SW5)	2	129		2	129
8/14/2010	00:26:03	0:26	Incoming Call		5617675642	Not Answered	Outside Home Switch	2393210954	Plantation2(SW6)	3	400		3	400
8/14/2010	00:28:54	0:08	Incoming Call	4315617675642	5617675642	Answered	Call FWD - No Reply	2393210954	Plantation1(SW5)					
8/14/2010	00:37:07	0:02	Incoming Call	4315617675642	5617675642	Answered	Call FWD - No Reply	7867129361	Plantation2(SW6)	3	400		3	400
8/14/2010	00:52:15	0:17	Incoming Call		5617675642	Answered	Outside Home Switch	7862735607	Plantation2(SW6)	3	400		6	542
8/14/2010	00:54:34	0:21	Outgoing Call	7864541897	7864541897	Answered	Outside Home Switch		Plantation1(SW5)					
8/14/2010	00:55:40	0:26	Outgoing Call	9544041813	9544041813	Answered	Outside Home Switch		Plantation2(SW6)					
8/14/2010	00:58:06	0:24	Incoming Call		5617675642	Answered	Outside Home Switch	7862735607	Plantation1(SW5)	3	129		3	129
8/14/2010	01:01:00	0:37	Incoming Call		5617675642	Answered	None	3058342713	Plantation1(SW5)	3	129		3	129
8/14/2010	01:01:48	0:22	Incoming Call		5617675642	Not Answered	None	7864446336	Plantation1(SW5)	3	129		3	129
8/14/2010	01:22:17	0:40	Outgoing Call	9547930872	9547930872	Answered	None		Plantation1(SW5)	2	129		2	129
8/14/2010	01:28:56	0:20	Incoming Call		5617675642	Answered	None	7862735607	Plantation1(SW5)	2	129		2	129
8/14/2010	01:29:20	0:21	Outgoing Call	9547930872	9547930872	Answered	None		Plantation1(SW5)	2	129		2	129
8/14/2010	01:30:04	0:49	Outgoing Call	7862735607	7862735607	Answered	None		Plantation1(SW5)	2	129		2	129
8/14/2010	01:31:05	2:18	Outgoing Call	7862735607	7862735607	Answered	None		Plantation1(SW5)	3	129		2	129
8/14/2010	01:34:37	0:28	Incoming Call		5617675642	Answered	None	7863700245	Plantation1(SW5)	3	129		2	129

158a