Supreme Court of New Jersey

DOCKET NO. 68,765

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Petition for Certification to the Superior Court of New Jersey, Appellate Division.
v.	:	
THOMAS W. EARLS,	:	Sat Below: Hon. Anthony J. Parrillo, P.J.A.D Hon. Stephen Skillman, J.A.D. Hon. Patricia B. Roe, J.A.D.
Defendant-Petitioner.	:	

SUPPLEMENTAL BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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PRELIMINARY STATEMENT

It goes without saying that the technology with which a given cell phone may be located has advanced rapidly over the past several years. And as that technology continues to evolve, it yields ever more precise location information that, in turn, naturally evokes increasing privacy considerations. Today, some providers can determine a phone's location to within a matter of feet. But six or seven years ago when police located defendant through his phone, however, his provider could only determine that location to within a mile in any direction of a given cell tower. The appellate panel thus correctly found, in properly limiting its determination to the facts and circumstances of the case at hand, that no one could hold a reasonable expectation of privacy in such generalized location information, as it reveals virtually nothing about a person beyond his vaguest whereabouts.

Currently, and looking forward as this Court requests in its present order for supplemental briefing, the availability of far more specific location information might naturally alter the expectation of privacy calculus. But no New Jersey court has as yet held that a person holds a reasonable expectation of privacy in the location of his cell phone, let alone that the procurement of such information necessitates the highest constitutional protections of a warrant based on the probable cause standard without even considering the duration or precision of such tracking. Any holding on the subject, particularly one so extreme, must therefore apply only on a purely prospective basis.

Indeed, to the extent that any reasonable expectation of privacy has been acknowledged in this state regarding a person's cell phone location information, that expectation arises through legislative creation embodied in New Jersey's Wiretapping and Electronic Surveillance Control Act. And in creating that expectation as to cell phone location, lawmakers statutorily acknowledged its limited reach by expressly rendering it accessible to law enforcement by court order on a standard less than probable cause; police need only show the issuing judge its relevance to an ongoing investigation unless an emergency exists, in which case they need not even do that. The statute thus creates both the limited expectation and the means with which to safeguard it by judicial oversight. Moreover, this Court as well has recognized the very same such limited privacy expectations not warranting the heightened protections of a probable cause standard in similar instances involving, for example, bank, utility or internet service provider ("ISP") records.

Regardless, that previously non-existent statutory creation by amendment to the wiretapping act did not even enter the picture until its 2010 effective date. Yet, defendant was convicted and sentenced in 2007 for crimes he committed in 2005 and early 2006, when he was found through his cell phone – which could only be located at the time within a mile in any direction of a given cell tower to which it may have been connecting – based on an emergent situation that arose following the disappearance of his girlfriend, whom he had just threatened to

harm after learning of her cooperation with police.

One, no reasonable expectation of privacy can possibly arise from such generalized location information. Two, as explained previously at oral argument and through the State's prior briefs, abundant exigent circumstances fully supported the police actions here. And three, the only expression in this state of a reasonable expectation of privacy in cell phone location information appears via a statutory amendment that did not even exist until years after defendant committed his crimes.

Should this Court now hold that probable cause is necessary to obtain cell phone location information, it would undercut the existing legislative determination on the subject while effectively nullifying it on constitutional grounds, even though it remains wholly inapplicable to this case.[1] Just as disturbing, such a decision would tacitly grant approval to the entirely inappropriate attempts by amicus to interject this issue into this case – making a constitutional challenge not even raised by defendant himself to a statutory provision not even implicated by the facts at hand.[2]

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[1] This Court generally addresses constitutional questions only when their disposition is necessary to the resolution of the case at issue. Likewise, it is this Court's practice to address issues only presented by the facts of the case before it and, for that reason, this Court has acknowledged its disinclination to issue advisory opinions. See G.H. v. Township of Galloway, 199 N.J. 135, 136 (2009).

[2] It is well settled that any entity appearing as amicus curiae under Rule 1:13-9 must accept the case as presented by the parties and cannot raise new issues. See, e.g., State v. Harris, 209 N.J. 431, 445 (2012); State v. Lazo, 209 N.J. 9, 25 (2012).

PROCEDURAL HISTORY AND STATEMENT OF FACTS

This supplemental brief incorporates the procedural history and statement of facts provided in the State's Appellate Division brief and in its initial supplemental brief filed July 11, 2012. Additionally, oral arguments were held in this matter on October 22, 2012. By letter dated November 21, 2012, this Court then requested additional briefing on the following questions: (1) if this Court were to require a warrant to obtain a person's cell phone location data, whether that would constitute a new rule of law under State v. Knight, 145 N.J. 233 (1996); (2) if it would, whether that decision should apply prospectively to future cases, to future cases and the pending matter, to future cases and those on direct appeal, or completely retroactively; (3) the extent to which law enforcement officials rely on cell phone location tracking as an investigative tool; (4) the current state of technology relating to cell phone location tracking; and (5) whether cell phone users today have a reasonable expectation of privacy in the location of modern cell phones under the federal and state constitutions.[3]

[3] For organizational purposes better suited to the logical progression of its argument, the State will address this series of questions in somewhat different order.

LEGAL ARGUMENT

POINT I

TO THE EXTENT THAT THE MORE SPECIFIC AND PRECISE CELL PHONE LOCATION INFORMATION AVAILABLE TODAY IMPLICATES A REASONABLE EXPECTATION OF PRIVACY, THAT EXPECTATION REPRESENTS A LIMITED ONE CREATED IN 2010 BY LEGISLATIVE ACTION THAT SIMULTANEOUSLY PROVIDED ITS EXPRESS PROCEDURAL SAFEGUARDS.

As the State previously asserted and the Appellate Division held in this case, a person has no reasonable expectation of privacy in the generalized location of his or her cell phone. State v. Earls, 420 N.J. Super. 583 (App. Div. 2011). Such location information indeed has become far more precise than what was available at the time of defendant's arrest. Technology that in 2005 and early 2006 could only locate him to within a mile or so in any direction of whatever cell tower with which his phone may have been connecting can, in some instances today seven years later, pinpoint a given phone's position to within several feet. But New Jersey's Legislature has kept pace with this rapidly evolving technology and enacted statutory protections, effective in early 2010, that now recognize both a limited expectation of privacy in cell phone location information, and the specific means with which to protect that expectation — absent emergency or exigent circumstances, police must obtain a warrant based on probable cause or a court order based on the lesser relevancy standard. This Court has likewise previously recognized the same such limited expectation and accompanying procedural safeguards

with regard to other personal information, including bank, utility and ISP records. In looking forward beyond the circumstances of this particular case, this Court should defer to the Legislature's prior determination in holding similarly now, and it should further affirm the well-reasoned Appellate Division decision below.

Aside from the lower court's ruling here, no New Jersey court has previously tackled directly the privacy interests implicated by cell phone location information. But see State v. Laboo, 396 N.J. Super. 97, 107-08 (App. Div. 2007) (considering tracking by police of stolen cell phone "reasonable investigative endeavor," but limiting validation of warrantless search there, based primarily on exigent circumstances, to facts before that court while finding no "general justification of warrantless searches of premises located by the use of electronic communication tracking devices").[4] To the extent that any reasonable expectation of privacy in this information has been acknowledged at all in this state, it has been through New

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[4] Although this case appears to be the first in New Jersey's state courts to directly address the privacy implications of cell phone location information, the Appellate Division is now considering the issue again in another matter. A panel below will be determining whether a defendant's custodial statement should be suppressed where police used his cell phone number to locate him through his service provider, without a warrant, but under exigent circumstances in which the defendant had just telephoned his paramour and told her he had a gun and was at a central New Jersey train station on his way to New York to kill that paramour's suspected lover. See State v. Frank P. Rendfrey, Docket No. A-3897-11T1 (App. Div.) (defendant's appellate brief filed November 30, 2012).

Jersey's Wiretapping and Electronic Surveillance Control Act — more specifically, through a 2009 amendment which, effective January 12, 2010, expanded the provision's scope to also cover the obtaining of "location information for a subscriber's or customer's mobile or wireless communications device."[5] The section setting forth the "requirements for access" to such information by a law enforcement agency enumerates four specific methods. See N.J.S.A. 2A:156A-29c. That is, police can obtain (1) a warrant, (2) consent of the subscriber or customer, or (3) a court order. Ibid. Also, under the same 2009 amendment and "with respect to only the location information for a subscriber's or customer's mobile or wireless communications device and not to a record or other subscriber or customer information," police can obtain such information (4) without prior judicial authorization when they believe in good faith "that an emergency involving danger of death or serious bodily injury to the subscriber or customer requires disclosure without delay of information relating to the emergency." N.J.S.A. 2A:156A-29c(4), adopted as P.L. 2009, c. 184, § 2.

So, as of 2010, the wiretapping act indeed suggests an expectation of privacy in this sort of information. But that expectation is a limited one, as police can obtain such

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[5] The statute defines "location information" as "global positioning system data, enhanced 9-1-1 data, cellular site information, and any other information that would assist a law enforcement agency in tracking the physical location of a cellular telephone or wireless mobile device." N.J.S.A. 2A:156A-2w.

information not only without any prior judicial authorization where they reasonably believe an emergency exists, but also even absent any emergency, under a lesser standard for such prior authorization than probable cause. Police can obtain a court order for disclosure under a basic reasonable suspicion or relevancy standard by offering:

> specific and articulable facts showing that there are reasonable grounds to believe that the record or other information pertaining to a subscriber or customer of an electronic communication service or remote computing service or communication common carrier is relevant and material to an ongoing criminal investigation.
>
> [N.J.S.A. 2A:156A-29e.]

That provision basically mirrors its federal counterpart, which likewise accounts for emergency situations while also allowing law enforcement to procure location information on the lower relevancy standard. See 18 U.S.C. §§ 2703, 3121, 3122, and 3123. Specifically, the federal provision governing "Stored Wire and Electronic Communications and Transactional Records Access" provides in pertinent part:

> A court order for disclosure under subsection (b) or (c) may be issued by any court that is a court of competent jurisdiction and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation. In the case of a State governmental authority, such a court order shall not issue if prohibited by the law of such State.

[18 U.S.C. § 2703(d).]

This Court has readily endorsed the same sort of qualified or limited expectation of privacy in other situations involving more or less personal information, none of which, unlike here, had been previously addressed by the people through the Legislature. In State v. McAllister, for example, this Court recently recognized that people indeed hold a reasonable expectation of privacy in their bank records – which, having "become an indispensable part of modern commerce," reveal like phone records "when compiled and indexed . . . many aspects of [one's] personal affairs, opinions, habits and associations." 184 N.J. 17, 30-31 (2005). Nevertheless, this Court further acknowledged that "circumstances will arise that justify State intrusion upon that interest," and thus any such privacy interest must be weighed against the legitimate investigatory needs of law enforcement. Id. at 32-33. Refusing to impose a probable cause standard as a precondition to law enforcement's obtaining such information, this Court instead held that the "issuance of a grand jury subpoena duces tecum based on a relevancy standard satisfies the constitutional prohibition against improper governmental intrusion." Id. at 33-34, 36. And under that standard, the records sought need only "bear some possible relationship, however indirect, to the grand jury investigation." Id. at 34 (internal quotations omitted).

More recently still, in State v. Domicz, this Court held the same with regard to utility records. 188 N.J. 285 (2006).

Noting that "[b]ank records expose much more about a person's private life and activities within the home than utility records" – including "all types of household items purchased and possessed by a person, such as furniture, artwork, and electronic equipment[,] . . . what a person eats and drinks, what newspapers and magazines he reads, and even where he vacations" – this Court reasoned that utility records by comparison reveal no more than the amount of power a person may be using and its relative cost. Id. at 299-300. This Court therefore found no basis to treat utility records any differently and held again that "whatever [the] privacy interest attached" to them, it finds sufficient protection through the use of a grand jury subpoena under a basic relevancy standard. Id. at 297, 300 (noting further that "no state court has interpreted its own constitution to mandate that the police first obtain a warrant to obtain electric utility records," while citing several cases finding no expectation of privacy in such records).

Even more recently in State v. Reid, this Court once again found the same sort of limited expectation of privacy in ISP information. 194 N.J. 386 (2008). There, this Court noted how "ISP records share much in common with long distance billing information and bank records," how "[a]ll are integrally connected to essential activities of today's society," how one needs a numerical ISP address to access the Internet, and how one's Internet service provider can not only associate that numerical address with one's identity, but also compile a

complete listing of Web addresses visited and thus "track a person's Internet usage." Id. at 398 (observing further how, thereby, "[t]he government can learn the names of stores at which a person shops, the political organizations a person finds interesting, a person's . . . fantasies, her health concerns, and so on") (citing Daniel Solove, The Future of Internet Surveillance Law, 72 Geo. Wash. L. Rev. 1264, 1287 (2004)). Regardless, even though such information "can reveal intimate details about one's personal affairs in the same way disclosure of telephone billing records does," and even though it is thus afforded a reasonable expectation of privacy, this Court held that such records again find adequate constitutional protection by requiring a grand jury subpoena upon a simple showing of relevance. Id. at 398-99.

Regarding such subpoenas, while acknowledging that "the probable cause required for a search warrant is foreign to [the grand jury] scene," this Court most recently in Reid stressed that a grand jury's investigative powers "would be feeble indeed if [it] had to know at the outset everything needed to arrest a man or to invade his home[, and n]or would it serve the public interest to stay a probe until the grand jury reveals what it has or what it seeks." Id. at 403 (quoting In re Addonizio, 53 N.J. 107, 126 (1968)) (internal quotations omitted). Further acknowledging how "New Jersey courts have consistently affirmed the expansive investigatory power of grand juries," this Court likewise noted how such

> power rests on the grand jury's ability to issue subpoenas to gather information – a power that must always be exercised in good faith and in accordance with established rules to avoid possible abuses. Under those rules, grand jury subpoenas may be issued based on a relevancy standard: the documents must "bear some possible relationship, however indirect, to the grand jury investigation."
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> [Id. at 403-04 (citations omitted).]

This Court has thus recognized that even under that lesser-than-probable-cause relevancy standard, "the grand jury remains a constitutional bulwark against hasty and ill-founded prosecutions and continues to lend legitimacy to our system of justice by infusing it with a democratic ethos." McAllister, supra, 184 N.J. at 36 (quoting State v. Fortin, 178 N.J. 540, 638 (2004)) (internal quotations omitted). As this Court repeatedly has observed, "[o]ur grand jury process – bounded by relevancy and safeguarded by secrecy – conforms to our jurisprudence," and "[t]he New Jersey Constitution does not require more." See Reid, supra, 194 N.J. at 404-05; McAllister, supra, 184 N.J. at 42; Addonizio, supra, 53 N.J. at 126-28. Here, however, the Legislature applied greater protection still, placing responsibility for safeguarding the privacy interest at stake instead in the hands of the Judiciary itself.

Further, in continuing this string of cases and holding similarly now – while affording due deference to the prior legislative determination on the issue – that a relevancy standard adequately protects the limited privacy expectation one

may have in cell phone location information, this Court would likewise find ample support for its decision in federal precedent. In In re United States for an Order Directing Provider of Electronic Communication Service, the Third Circuit rejected the district court's determination that cell phone location information amounted to data from a tracking device requiring probable cause for its production. 620 F.3d 304 (3d Cir. 2010). The panel instead acknowledged the prior legislative or federal statutory determination that cell phone location information was obtainable under an order, pursuant to 18 U.S.C. § 2703(d), and that such order expressly does not require a traditional probable cause determination. Id. at 313. Instead, the panel continued, the provision's text governs the proper standard, being that "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." Ibid. (quoting 18 U.S.C. § 2703(d)) (internal quotations omitted). The panel further noted that the provision's legislative history strongly supported the conclusion that the standard was an "intermediate" one, "higher than a subpoena, but not a probable-cause warrant," and sufficient to fulfill its intended purpose of guarding against "'fishing expeditions' by law enforcement." Id. at 314 (citations omitted). See also United States v. Skinner, 690 F.3d 772 (6th Cir. 2012) (finding no Fourth Amendment violation in law

enforcement's use of GPS data to determine real-time location of drug-transporting defendant's pay-as-you-go cell phone; no reasonable expectation of privacy in the data or the phone's location because the tracking involved a known number voluntarily used on public thoroughfares and no extreme comprehensive tracking occurred).[6]

Although it has not specifically addressed cell phone tracking, the Supreme Court recently in United States v. Jones, __ U.S. __, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012), however, determined in a 5-4 decision that the use of a GPS tracking device – installed without a warrant by agents on defendant's vehicle while they monitored his driving for a month – did equate to a Fourth Amendment search. Writing for the majority, Justice Scalia suggested a shift in the applicable analysis, noting that the reasonable expectation of privacy test should supplement the physical trespass (to property) approach, and that a Fourth Amendment search could occur in either case; there, though, he

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[6] In distinguishing between stored past location information and prospective live location information, the D.C. Circuit just this month acknowledged a split among federal courts as to whether 18 U.S.C. § 2703(c)(1) applied to both or only the former, and whether the latter should instead require a showing of probable cause. United States v. Jones, 2012 U.S. Dist. LEXIS 177294 (D. D.C. Dec. 14, 2012) (citing cases). That court declined to "weigh in on this debate," however, but noted nevertheless that "even if a defendant could argue that the government did not comply with the [Stored Communications Act], all courts that have addressed the issue have held that the SCA does not provide for a suppression remedy." Ibid. (citing United States v. Ferguson, 508 F. Supp. 2d 7, 10 (D. D.C. 2007) (additional citation omitted). Likewise, with regard to such location information, New Jersey's wiretapping act does not provide for a suppression remedy.

found the violation occurred solely on the property-based principle. Id. at 949-54, 181 L. Ed. 2d at 918-23. The majority thus ruled that by placing the device on the defendant's car, the government physically occupied private property for the purpose of obtaining information, triggering a search for Fourth Amendment purposes. Ibid.

In a concurring opinion joined by three other justices, though, Justice Alito rejected that property rationale and instead found that a reasonable expectation of privacy had been violated, reasoning that the most important consideration was the use of GPS for the purpose of long-term tracking:

> Under this approach, relatively 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.
>
> [Id. at 964, 181 L. Ed. 2d at 934 (citation omitted).]

Notably, Justice Sotomayor joined in the majority decision, but nevertheless filed a separate concurrence embracing Justice Alito's reasoning, thus affording the reasonableness approach approval by a five-justice majority. Id. at 955-57, 181 L. Ed. 2d at 924-27. In that sense, rather than merely considering whether surveillance occurred in public or private spaces, under the majority rationale a court should direct its analysis to the quantity and quality of that surveillance, not just the specificity of the information obtained, but the amount acquired and the extent of time during which such repeated acquisition or

monitoring occurred. Ibid.

That said, this Court has indeed departed from federal precedent in the past — regardless of the questionable extent to which such precedent definitively exists on the particular issue concerning cell phone location information here.[7] In that respect, both the Fourth Amendment to the United States Constitution and Article 1, paragraph 7 of the New Jersey Constitution impose a standard of reasonableness on the exercise of discretion by government officials to protect people against arbitrary invasions. State v. Maristany, 133 N.J. 299, 304 (1993). Although both provisions, in nearly identical language, generally protect citizens from "unreasonable searches and seizures," this Court has on certain limited occasions recognized that New Jersey's Constitution "affords our citizens greater protection against unreasonable searches and seizures" than the federal counterpart. See State v. Novembrino, 105 N.J. 95, 145 (1987) (departing from federal constitutional standard to find no

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[7] See State v. Hempele, 120 N.J. 182 (1990) (finding an expectation of privacy in garbage bags left for curbside collection such that a warrant is required to search them, while noting such ruling squarely conflicted not only with California v. Greenwood, 486 U.S. 35, 108 S. Ct. 1625, 100 L. Ed. 2d 30 (1988), but also with virtually every other court that has considered the issue); State v. Hunt, 91 N.J. 338, 345-48 (1982) (declining to follow federal precedent to the contrary in Smith v. Maryland, 442 U.S. 735, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979), and instead finding privacy interest in telephone toll billing records while barring their procurement by police "without any judicial sanction or proceeding"). See also State v. Mollica, 114 N.J. 329 (1989) (noting departure from federal standard, holding that telephone billing or toll records were subject to the issuance of a search warrant based on probable cause).

"good faith" exception to exclusionary rule under New Jersey Constitution); State v. Alston, 88 N.J. 211, 225-28 (1981) (finding person's standing to challenge search and seizure violations broader under New Jersey, as opposed to federal, constitution). But such specific rulings stand as exceptions to the more general rule that, "[w]henever possible, we endeavor to harmonize our interpretation of the [New Jersey] State Constitution with federal law." State v. Knight, 145 N.J. 233, 254 (1996); State v. Tucker, 137 N.J. 259, 291 (1994). That is particularly so in the context of Fourth Amendment claims, as "[e]nforcement of criminal laws in federal and state courts . . . encourages application of uniform rules governing search and seizure." Hunt, supra, 91 N.J. at 345. And thus, "[d]ivergent interpretations are unsatisfactory from the public perspective, particularly where the historical roots and purposes of the federal and state provisions are the same." Ibid.[8]

Indeed, this Court's relevant holdings here finding an expectation of privacy in bank, utility and ISP records all depart directly from contrary federal constitutional rulings

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[8] In his concurring opinion in Hunt, Justice Handler set forth seven factors for determining whether our state constitution diverges from cognate provisions in the Federal Constitution: (1) textual language; (2) legislative history; (3) pre-existing state law; (4) structural differences between the federal and state constitutions; (5) matters of particular state interest or local concern; (6) state traditions; and (7) public attitudes. 91 N.J. at 364-67. This Court subsequently has regularly applied that framework to determine whether the state constitution diverges from the federal. See, e.g., State v. Stanton, 176 N.J. 75, 89, cert. denied, 540 U.S. 903, 124 S. Ct. 259, 157 L. Ed. 2d 187 (2003); State v. Muhammad, 145 N.J. 23, 41-44 (1996).

identifying no privacy expectation at all in such information. See United States v. Miller, 425 U.S. 435, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976) (finding no privacy interest in bank records); Reid, supra, 194 N.J. at 396 (collecting federal cases interpreting Fourth Amendment to find no expectation of privacy in ISP information); Domicz, supra, 188 N.J. at 297, 300 (citing various cases finding no expectation of privacy whatsoever in utility records). But in each of those instances where this Court has found such a privacy interest, it has been a limited one adequately protected by grand jury subpoena on a less-than-probable-cause relevancy standard.

Thus, to the extent that an expectation of privacy in cell phone location information does independently exist under our State Constitution, it would certainly seem that the lesser relevancy standard would likewise sufficiently address the task, depending on the nature and extent of the particular intrusion in a given case. Here, for example, the extremely generalized information and limited duration of the intrusion would appear to easily fall within the lesser standard, had our current statute even then existed. And in that respect, in none of those other contexts — bank, utility or ISP records — had the Legislature previously even spoken.[9] Not only has it done so here in

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[9] See Orin S. Kerr, The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution, 102 Mich. L. Rev. 801 (2004) (discussing how Fourth Amendment should govern changing technology and how, when technology is in flux and institutional barriers such as ex post facto review and limited information persist, "the legislative branch rather than the

acknowledging a limited privacy interest in such location information as of 2010, but it further created the means with which to safeguard it while placing the responsibility for such protection – higher even than what this Court has afforded by grand jury subpoena in those other contexts – instead in the hands of the Judiciary itself.

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judiciary should create the primary investigative rules"; further advocating "judicial caution" because courts should "be wary of imposing broad privacy protections against the government's use of new technologies").

POINT II

COMPARED TO WHAT EXISTED JUST FIVE TO SEVEN YEARS AGO, THE CURRENT STATE OF TECHNOLOGY IS CAPABLE OF YIELDING FAR MORE SPECIFIC AND PRECISE CELL PHONE LOCATION INFORMATION, BUT THE SPECIFICITY AND PRECISION OF SUCH INFORMATION VARIES WIDELY FROM CARRIER TO CARRIER BASED ON GEOGRAPHIC LOCALE AND THE SIZE OF GIVEN CELLULAR NETWORKS.

It is easy to claim, as defendant and the amici have been doing in this case, that rapid and ever-evolving technological advances have resulted in incredibly specific and precise cell phone location information that is available at the mere touch of a button or placement of a call today, particularly when compared to what was available just a few years ago, let alone seven years ago when defendant in this case was eventually located through his own cell phone. That claim is easy, but also inaccurate, in its overly generalized depiction of a technology that, despite its advances, varies greatly in terms of its availability from cell phone carrier to carrier. Some carriers are more advanced than others, retain a given customer's daily accruing information longer than others, have larger, more expansive networks than others. And the size of those networks – the number of towers or cell sites and the like – also vary from one location to another, appear in far greater density in urban areas with larger populations than in suburban or rural areas, where their placement from one to another occurs over larger distances, which in turn yield increasingly generalized, decreasingly specific,

location information. The point being, situations will differ from case to case, and such variations again highlight the need for restraint here.

According to the New Jersey Division of Criminal Justice's Electronic Surveillance Unit, the primary providers of cell phone services through New Jersey include AT&T, Verizon, Sprint, MetroPCS, Cricket, T-Mobile and Boost Mobile. Aside from those seven companies, numerous smaller providers, or "resellers," also provide such services. Among them, there generally exists no uniform standard in terms of the specificity or precision of location information of which their networks are capable, nor even of the length of time they store historical or past location information. Regarding a given phone's present location, some providers may be able to make such determination only when calls are placed, whereas others can do so regardless of the phone's use during set intervals – every 10 or 15 seconds, for example. And regarding records of a given phone's past locations, providers generally retain such historical data for varying durations, some for as long as 18 to 24 months, others for as short as just 30 days.[10]

It should also be pointed out that the availability and relative strength of this technology only varies all the more so when considering tracking devices more generally, beyond the

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[10] This information stems from recent discussions with Detective Joseph C. Saiia, Jr., of the Division's Electronic Surveillance Unit.

context of just cell phones. Aside from basic cell site information, there are the far more specific satellite-based technologies or global positioning systems (GPS), which also appear in most contemporary cell phones as well as other non-communication devices designed solely to track and locate. There are basic beepers with far more limited range, such as those battery-powered radio transmitters involved in the more classic tracking cases, United States v. Karo, 468 U.S. 705, 707-08, 104 S. Ct. 3296, 3299, 82 L. Ed. 2d 530, 536-37 (1984), or United States v. Knotts, 460 U.S. 276, 103 S. Ct. 1081, 75 L. Ed. 2d 55 (1983). There are also infrared trackers that, similar to beepers, must be attached to the object being tracked, but instead of emitting a noise or signal they instead periodically emit an infrared beam of light. See, generally, Ian Herbert, Where We Are with Location Tracking: A Look at the Current Technology and the Implications on Fourth Amendment Jurisprudence, 16 Berkeley J. Crim. L. 442 (2011) (describing current technologies in greater detail, identifying four primary types, their respective methods of function and limitations, while proposing a technology-specific constitutional analysis of location tracking devices, given their accuracy, sources of power and differing levels of direct or active police involvement).

Narrowing the discussion to cell phones, however, despite the use of GPS in most if not all current devices, most providers continue to use cell-site data to track the location of phones across their networks. Whereas GPS can typically now identify

the location of a given cell phone to within about 30 feet or less, cell site data on the other hand generally offers far more mixed results – the location of a given phone in some instances to within several feet, in others to within an area of several miles. See In re United States ex rel. Historical Cell Site Data, 747 F. Supp. 2d 827, 831-35 (S.D. Texas 2010). So-called cell site data consists basically of an array of information such as the strength, angle and timing of a caller's phone's signal as measured by two or more cell sites, towers or base stations as that phone makes and maintains contact with them, whether during the placement of a call or when simply maintaining contact with the network while periodically scanning for the area's strongest signal. Ibid. See also In re Pen Register, 396 F. Supp. 2d 747, 750 (S.D. Tex. 2005); Tom Farley & Mark van der Hoek, Cellular Telephone Basics, Privateline (Jan. 1, 2006), available at http://www.privateline.com/mt_cellbasics/index.html. In either situation, in most basic terms, the contact made between the customer's phone and the provider's cell site or tower drives the data that can be used to determine that phone's location. See Susan Freiwald, Cell Phone Location Data and the Fourth Amendment: A Question of Law, Not Fact, 70 Md. L. Rev. 681 (2011) (discussing basic location technologies and data generated, including types (registration and duration data versus initiation and termination data) and methods of acquisition (such as pinging and triangulation)).

In short, as explained in the State's prior supplemental

brief, the relative precision of that cell site location information depends in large part on the size of the "cell sector," the geographic area covered by the signals of a given site, tower or station; the smaller the sector, the more precise the location. In re United States ex rel. Historical Cell Site Data, supra, 747 F. Supp. 2d at 831-35. In earlier systems, base stations were placed as far apart as possible to provide maximum coverage and a sector might extend for several miles or more. Ibid. Today, such drawn-out placement appears predominantly in sparsely populated, rural vicinities; otherwise, due to the increasing density in recent years of users in certain more populous locales, carriers have started dividing coverage areas into smaller and smaller sectors, each served by their own base stations and antennas. Ibid.

That trend toward ever smaller cell sectors has further accelerated with the use of smaller-scale base stations designed to serve still smaller areas, such as particular floors of buildings or individual homes and offices. Ibid. This results in the ability to determine, through the identification of a given base station within such tiny sectors, the location of a given user to within a very limited geographic area, to a few dozen feet or less, or in some very dense urban areas, to within individual floors and rooms of a given structure. Ibid. Beyond that, other new technology even permits providers to determine the location of some users not just by sector, but by their position within a sector; this is achieved by correlating the

precise time and angle at which a phone's signal arrives at multiple sector base stations, which in turn can pinpoint that phone's latitude and longitude to within 50 meters or less. Ibid.

Regardless, merely because such specificity is possible in certain situations under certain circumstances in certain areas by no means suggests that that is always the case. Again, capabilities vary from carrier to carrier and network to network, as affected in part by the density of cell site or tower locations in given areas, be they urban or rural, and their relative proximity to one another. And still other forces factor in. For example, when a given area may be experiencing particularly heavy cell phone signal traffic, especially during morning and evening "rush hours" in more densely populated areas, many calls will be redirected to other towers elsewhere to mitigate the congestion. For one attempting to locate a phone through such calls, the results will thus be totally inaccurate. See Anemona Hartocollis, When the Trill of a Cellphone Brings the Clang of Prison Doors, New York Times (July 16, 2007), available at http://www.nytimes.com/2007/07/16/nyregion/16cell.html ("[U]se [of cell-site data] in prosecutions is often challenged, for privacy reasons and for technical reasons, especially when the data comes during the morning or evening rush, when circuits are crowded and calls can be redirected to other towers. But it is often allowed and is used by both prosecutors and defense attorneys to buttress their cases.").

POINT III

A RAW POLL OF NEW JERSEY'S 21 COUNTY PROSECUTOR'S OFFICES SHOWS THAT THE VAST MAJORITY OF REQUESTS MADE FOR CELL PHONE LOCATION INFORMATION INVOLVE PRIOR JUDICIAL AUTHORIZATION, WHILE THOSE THAT DO NOT TYPICALLY INVOLVE CONSENT, STOLEN PHONES OR EMERGENCY SITUATIONS.

Given the Court's question concerning the extent to which law enforcement relies on cell phone location information, and the limited time afforded to gather data for a response, the State conducted a raw poll among New Jersey's 21 county prosecutor's offices. That poll sought the number of requests for such information each office made during the six-month period from June through November 2012, as well as how many of those requests were made with, as opposed to without, prior judicial authorization. While most of those offices provided data concerning only their own operations, about one-third of them provided aggregate numbers reflecting countywide totals that also included municipal police departments and other local law enforcement entities, so any county-by-county comparisons must take that into consideration. Additionally, most responses drew no distinction between requests for historical or past location information and those for live or active present tracking.

The results do show, however, that of the nearly 600 requests made across the state during that period, only about 90 were made without a warrant. Of those 90 requests, about 60 came from local or municipal police departments, and the specific

underlying reasons were not readily available. Of the rest of those warrantless requests, at least 20 involved either consent, stolen phones or emergency situations posing a risk of harm to the owner or pertaining to kidnappings or missing persons or children. The remaining few predominantly involved situations in which warrants were obtained afterward, within 24 hours of the initial information request.

Specific responses from each county prosecutor's office regarding the requests for cell phone location information made during the six-month period from June through November 2012 indicated the following:

- Atlantic County's office processed 25 requests, all were made pursuant to communications data warrants (CDW), and 19 involved historical information while six involved active location pinging.
- Bergen County's office processed four requests, three were made pursuant to CDW's, and just one was based on exigent circumstances, although a warrant (CDW) was still obtained within 24 hours.
- Burlington County's office processed a total of about 72 requests, roughly a dozen a month, half for its own investigators, the other half for local and state police, only 28 were made without a warrant on an emergent basis and all of those were for local departments.
- Camden County's office processed about four to six per month, all pursuant to CDW's, for requests from its own investigators, as well as the county sheriff's office and parole and the Department of Corrections.
- Cape May County's office processed 11 requests, six of which were for the State Police Fugitive Unit, and one of those was without a warrant on an emergent basis, although a CDW was obtained afterward, while all of the other requests were made pursuant to a warrant.
- Cumberland County's office processed eight requests,

all pursuant to a warrant.

- Essex County's office processed about 78 requests, all pursuant to a warrant.
- Gloucester County's office processed 33 requests for various law enforcement entities throughout the county and four additional ones for its own investigators, all but one were made pursuant to CDW's.
- Hudson County's office processed 10 requests, five involved criminal suspects and were made pursuant to CDW's, the other five involved missing children and were made without a warrant but with parental consent.
- Hunterdon County's office processed four requests, all pursuant to CDW's.
- Mercer County's office processed five requests, three with a warrant involving homicides, one with a federal order involving a kidnapping, and just one without a warrant on an emergency basis, also involving a kidnapping.
- Middlesex County's office processed 57 requests, all were made pursuant to CDW's but for one, which was made on an emergency basis involving a missing person.
- Monmouth County's office processed about 140 requests, all pursuant to CDW's.
- Morris County's office processed five requests, all were pursuant to CDW's but for one, which was made under exigent circumstances.
- Ocean County's office processed 10 requests for active location information, one was made pursuant to a warrant involving a fugitive murder suspect, while the rest were made without warrants, but each of those involved missing persons or stolen phones; the office also processed 41 requests for historical information, and all were made pursuant to CDW's, but primarily for phone records, not tracking.
- Passaic County's office processed six requests, all were made pursuant to CDW's.
- Salem County's office processed five requests, all involving pings, two were made with a court order, one with a retroactive court order, one with consent, and one was under exigent circumstances involving a

suicidal person.

- Somerset County's office processed six requests, all were made pursuant to CDW's.

- Sussex County's office processed 10 requests, including eight for cell tower locations and two for live track or ping information, and all were made pursuant to CDW's.

- Union County's office processed 23 requests, all but six were made pursuant to a warrant, the remaining six, all of which were handled for local police offices, were made on an emergent basis.

- Warren County's office processed four requests, two were made pursuant to CDW's, while the other two were made under the wiretapping act's provision covering emergencies or risk of harm to the given phone's owner.

POINT IV

ANY DETERMINATION BY THIS COURT THAT POLICE MUST FIRST OBTAIN A WARRANT BEFORE ACCESSING A PERSON'S CELL PHONE LOCATION INFORMATION WOULD CONSTITUTE A NEW RULE OF LAW THAT THEREFORE SHOULD APPLY ONLY PROSPECTIVELY TO FUTURE CASES.

Any determination by this Court that police must first obtain a warrant before accessing a person's cell phone location information would (1) create an expectation of privacy that did not exist at the time of this case and came to be only through a statutory amendment to the wiretapping act in 2010, and (2) directly contradict the express legislative determination through that amendment that a warrant is not always necessary for such information. As such, should this Court find differently now and demand a warrant based on probable cause, that decision would by all means encompass a new rule of law that should apply only prospectively to future cases.

In determining whether to retroactively apply a given decision, this Court must first decide whether the case at hand announces a "new rule of law." <u>See</u> <u>Knight</u>, <u>supra</u>, 145 <u>N.J.</u> at 250. A "case announces a new rule [1] when it breaks new ground or imposes a new obligation on the States or the Federal Government . . . [or 2] if the result was not dictated by precedent existing at the time the defendant's conviction became final." <u>Id.</u> at 250-51 (citing <u>Teague v. Lane</u>, 489 <u>U.S.</u> 288, 301, 109 <u>S. Ct.</u> 1060, 1070, 103 <u>L. Ed.</u> 2d 334, 349 (1989); <u>State v. Lark</u>, 117 <u>N.J.</u> 331, 339 (1989)) (internal quotations omitted).

Additionally, a decision involving an "accepted legal principle" announces a new rule for retroactivity purposes as long as that decision's application of that general principle is "sufficiently novel and unanticipated." Id. at 251 (citations omitted).

If it determines the decision does set forth a "new rule," this Court then generally considers three factors in weighing whether to apply it retroactively. See also State v. Nash, 64 N.J. 464, 469 (1974) (noting how the retroactivity determination as well may turn more generally on "the court's view of what is just and consonant with public policy in the particular situation presented"). The first factor, "often the pivotal consideration," looks to the rule's purpose and whether retroactive application would further it. Knight, supra, 145 N.J. at 251 (citing State v. Burstein, 85 N.J. 394, 406 (1981)) (additional citations omitted). In that sense, "if the old rule was altered because it substantially impaired the reliability of the truth-finding process, the interest in obtaining accurate verdicts may suggest that the new rule be given complete retroactive effect." Ibid. If, on the other hand, the newly announced rule serves an exclusionary purpose intended solely to discourage police misconduct, then applying that rule to conduct predating its announcement would hardly serve such purpose. Ibid. Such exclusionary rules are thus rarely afforded retroactive effect. Ibid.

Beyond that, the remaining two factors only warrant consideration where the Court's inquiry into that first factor,

the new rule's purpose, fails to show whether its retroactive application would be appropriate. Knight, supra, 145 N.J. at 252 (citing Burstein, supra, 85 N.J. at 408). The second factor, which looks to the degree of reliance placed upon the rule by those who administered it, is premised on the common-sense refusal to penalize state agents for "complying in good faith with prevailing constitutional norms when carrying out their duties." Id. at 252 (citing State v. Catania, 85 N.J. 418, 447 (1981)) (additional citations and internal quotations omitted). And the third factor, the effect a retroactive application would have on the administration of justice, acknowledges the need to avoid imposition of unjustified burdens on the criminal justice system by generally denying retroactive application of a new rule where such would undermine the validity of large numbers of convictions. Id. at 252 (citing Burstein, supra, 85 N.J. at 410). See also Lark, supra, 117 N.J. at 341 (noting concern with overwhelming courts with retrials, and awareness of difficulties in re-prosecuting cases where offenses occurred years in the past).[11]

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[11] To note, this Court acknowledged in Knight, supra, that although its three-pronged retroactivity analysis derived primarily from the test set forth in Linkletter v. Walker, 381 U.S. 618, 636, 85 S. Ct. 1731, 1741, 14 L. Ed. 2d 601, 612 (1965), the United States Supreme Court later replaced that test with "a more mechanical approach." 145 N.J. at 252. The Knight Court further acknowledged, nevertheless, the continued vitality of the three-pronged Linkletter approach in determining the retroactive application of new rules of New Jersey law. Id. at 253 (citing Lark, supra, 117 N.J. at 341-42). Under current federal law, on the other hand, new rules based on federal constitutional interpretation for the most part apply to all

Any determination by this Court now that the obtaining of cell phone location information by law enforcement first requires the procurement of a warrant, subject to probable cause, would clearly constitute a new rule of law. Such a holding would directly contradict the express determination by the people through the state Legislature that a warrant is not always required, and that instead such information implicates only a limited privacy expectation – and one that, moreover, may be sufficiently safeguarded through the same statutory expression by its imposition of a requirement for a court order on a relevancy standard, absent an emergency or exigent circumstances. N.J.S.A. 2A:156A-29e.

Additionally, that new rule, as such, would solely serve an exclusionary purpose intended to discourage police misconduct, misconduct that until now would have been anything but. Application of such a new rule in any way other than the purely prospective would serve no purpose whatsoever. It also would directly conflict with similar such rulings by this Court under comparable circumstances in the past. See, e.g., Hunt, supra, 91 N.J. at 348-49 (affording full prospective application to requirement of "judicial sanction or proceeding" prior to police obtaining toll billing records, as it "will cause a sharp break

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cases still on direct appeal, Griffith v. Kentucky, 479 U.S. 314, 328, 107 S. Ct. 708, 716, 93 L. Ed. 2d 649, 661 (1987), but still in rare circumstances to those cases as well where all avenues of direct review have been exhausted, Teague, supra, 489 U.S. at 310, 109 S. Ct. at 1075, 103 L. Ed. 2d at 356.

in the practice of the police authorities, announces a new rule, [] changes prior law . . . [and] retroactivity would have a considerable adverse impact on the administration of justice").

In short, no reasonable expectation of privacy exists in the sort of generalized cell phone location information involved in this case. To the extent one otherwise exists in the far more specific and precise location information available today, it is a creature of statute not even enacted until 2010, years after defendant here was located through his phone. And as that statute created that expectation, it accordingly created the means with which to protect it – imposing the requirement of a court order based on a mere relevancy standard. To require more now by demanding a warrant based on probable cause for that same information in every case, irrespective of the duration and intensity of a given intrusion, would not only contradict pre-existing legislative determination of the issue, but also clearly result in a new rule of law that should apply purely prospectively.

CONCLUSION

Based on the foregoing, this Court should affirm the judgment of the Appellate Division.

Respectfully submitted,

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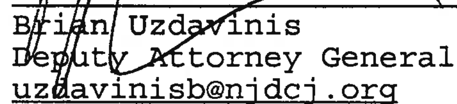

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DATED: December 21, 2012