Supreme Court of New Jersey

DOCKET NO. 68,765

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

SUPPLEMENTAL BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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PRELIMINARY STATEMENT

Considering the tone and focus of the briefs submitted by defendant and the various amici, it seems more important to stress what this case does not involve rather than what it does. This case does not involve the use of a "global positioning system" ("GPS") in a phone, a beeper or otherwise. It does not involve GPS tracking at all. Nor does it involve anything akin to high-accuracy cell-site tracking or even cell-tower "triangulation," (AC1b6)[1], let alone "superhuman surveillance," (Dsb2), "warrantless, pervasive mass surveillance of the public by law enforcement agents," (AC1b2), or any other such Orwellian variation of a "paranoid post-modern police state."

What this case does involve is an out-dated cell phone trackable in early 2006 by methods that today's standards would already generously consider little more than primitive – the determination, through the cell-phone provider, of the cell tower which most recently received the phone's signals, which generally would place that phone within one or two miles of that tower.

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[1] 1T refers to the transcript of April 3, 2007.
2T refers to the transcript of April 4, 2007.
3T refers to the transcript of April 17, 2007.
4T refers to the transcript of April 27, 2007.
5T refers to the transcript of September 28, 2007.
6T refers to the transcript of November 2, 2007.
Db refers to defendant's Appellate Division brief.
Da refers to defendant's Appellate Division brief appendix.
DPC refers to defendant's Petition for Certification.
Dsb refers to defendant's supplemental Supreme Court brief.
AC1b refers to amicus brief of the Electronic Privacy Information Center.
AC2b refers to amicus brief of the American Civil Liberties Union and the Association of Criminal Defense Lawyers.

Whereas a warrant might be required in scenarios involving the more specific private location information readily available now, this defendant could not possibly have held any reasonable expectation of privacy in the sort of generalized information involved here. The information here was so general, in fact, that it merely directed investigators to a broad zone approximately two miles in diameter that they then had to patrol before happening to observe in plain view defendant's car in a motel parking lot. That is how defendant was found.

Moreover, defendant and amici mostly ignore the exigencies that fully justified the police conduct in this case. Defendant, for whom an arrest warrant already had been issued, had discovered that his girlfriend had cooperated with police and allowed them to search her storage unit, where he was hiding much of his stolen property. Consequently, he threatened to harm her. Upon learning this, that the girlfriend had not been seen since the unit's search, and that a confirmed history of domestic violence existed between her and defendant, police feared for her safety and thus contacted defendant's cell phone carrier, T-Mobile, in an effort to find her. The record plainly shows that the priority in obtaining defendant's general location information was to secure the girlfriend's safety, not necessarily defendant's capture.

Indeed, the more that defendant's and the amicus briefs in this case stray from the specific facts toward unrelated and sensational hypotheticals, the more that two separate and

discrete issues tend to emerge. First, there is the privacy interest (not at issue here) one can arguably hold in the more specific and private location of one's cell phone, on which the defendant and amici seem to focus and for which the State acknowledges, absent exigent circumstances, the current practice generally is to obtain a warrant. And then second, there is the actual case at hand, which the amicus briefs minimally address, if at all, and which involved exceptionally generalized location information generated by out-dated methods from an out-dated phone where police had ample justification for bypassing the warrant process due to the emergency and exigent circumstances. As such, defendant presents no legitimate basis whatsoever for reversing his convictions. Nor do defendant and amici offer any reasonable grounds to disturb the Appellate Division's specific ruling below that defendant had no reasonable expectation of privacy in the generalized location of his cell phone. Not only did the panel limit that decision to the sort of generalized information involved here in a factual scenario unlikely to arise again – considering the constant technological advances in this field – it expressly noted that its determination did not reach the Fourth Amendment implications that might arise from more sophisticated and precise location information. This Court should affirm.

COUNTER-STATEMENT OF PROCEDURAL HISTORY

A Monmouth County Grand Jury returned Indictment Number 07-06-1340 charging defendant, Thomas W. Earls, with: third-degree burglary, in violation of N.J.S.A. 2C:18-2 (Count One); third-degree theft, in violation of N.J.S.A. 2C:20-3a (Count Two); third-degree receiving stolen property, in violation of N.J.S.A. 2C:20-7a (Count Three); and fourth-degree possession of a controlled dangerous substance (marijuana), in violation of N.J.S.A. 2C:35-10a(3) (Count Four). (Da1 to 3).

Defendant filed a motion to suppress evidence, which was heard on April 3, 4, and 17, 2007, by the Honorable Paul F. Chaiet, J.S.C. (1T; 2T; 3T). On April 27, 2007, Judge Chaiet granted in part and denied in part defendant's motion. (4T31-10 to 14; Da4).

On September 28, 2007, defendant appeared before Judge Chaiet and entered a plea agreement, pleading guilty to Counts One and Two of the Indictment in exchange for the State's recommendation of a prison term of seven years with three years of parole ineligibility. (5T3-1 to 20; Da5 to 7). In accordance with that plea agreement, Judge Chaiet imposed that sentence on November 2, 2007. (6T13-14 to 16; Da8 to 9).

Defendant filed a pro se Notice of Appeal on December 4, 2007, and on May 2, 2008, the Office of the Public Defender filed a Notice of Appearance on defendant's behalf. (Da10). The case was then argued before the Appellate Division on the Sentencing Oral Argument Calendar on June 23, 2009, and that court affirmed

on July 6, 2009. (Da11).

Defendant subsequently filed a motion to reopen his appeal to challenge the denial of his motion to suppress, and the Appellate Division granted that motion. (Da12). In a published opinion issued on July 11, 2011, a three-judge panel affirmed the suppression motion's denial. State v. Earls, 420 N.J. Super. 583 (App. Div. 2011) (concluding that the use, without a warrant, of cell phone site "information to determine a suspect's general location on public roadways or other places in which there is no legitimate expectation of privacy does not violate the suspect's constitutional rights").

Defendant then on July 20, 2011, filed his Notice of Petition for Certification with this Court, which granted that petition on December 13, 2011. State v. Earls, 209 N.J. 97 (2011). On March 15, 2012, this Court granted the Electronic Privacy Information Center's motion to appear as amicus curiae. And on June 15, 2012, this Court further granted a motion to appear as amicus curiae as jointly filed by the American Civil Liberties Union of New Jersey Foundation and the Association of Criminal Defense Lawyers of New Jersey.

COUNTER-STATEMENT OF FACTS

Defendant's appeal below stemmed solely from the trial court's denial of his motion to suppress an array of stolen property which he unlawfully obtained through a string of burglaries committed in 2005. Defendant had been concealing much of that property in a storage unit leased by his girlfriend, and he also had a large amount of it with him – in his car and hotel room – at the time of his arrest, which occurred after police determined his general location via his cell phone. Defendant's petition before this Court focuses more specifically on law enforcement's use of that general cell phone location information, which investigators obtained without a warrant in an emergency situation under exigent circumstances as detailed below.

While investigating a series of burglaries in Middletown Township in January 2006, police discovered that a cell phone stolen during one of the incidents was still active and had been used at the Gold Digger Bar in Asbury Park and at the home of a woman named Tanya Smith. (4T3-7 to 16). On January 24, 2006, Middletown Police Detective William Strohkirch went to Smith's home and spoke with a man there named Darren Coles, who agreed to call the cell phone to see if he recognized the voice. (4T3-17 to 22). Coles called the phone and determined that the person on the other end was a man named "Born" who had been dating Smith's sister. Ibid. Later that day, Coles told Detective Strohkirch that "Born" was at the Gold Digger Bar. Ibid.

The detective went to the bar, called the phone and then arrested the man with the phone in his possession, Carlton Branch. (4T3-23 to 24). Branch told Strohkirch that he had acquired the phone from defendant, whom he knew as "Fallah" and who had been involved in other burglaries from which he kept the proceeds in a storage unit rented in his name or that of Desiree Gates. (4T3-25 to 4-5). The next day, January 25, 2006, Detective Strohkirch discovered that a laptop computer stolen during another burglary contained a tracking device, which ultimately led police to the home of a man, Carl Morgan, who told them he had purchased the computer from defendant, whom he also knew as "Fallah." (4T4-8 to 13).

That same day, two other investigators – Detective Gerald Weimer and Detective Steven Dollinger – located Desiree Gates at the home of her cousin, Alecia Butler. Police obtained written consent from Gates to search the storage unit, which she acknowledged was hers, after explaining their investigation of the burglaries and their belief that stolen property was being kept in the unit. (1T47-1 to 13; 1T49-25 to 50-3; 4T4-14 to 24). At that time, both Gates and Butler indicated that they feared defendant. Ibid. Additionally, although Gates had signed the rental agreement for the unit and stored some of her things in it, she had not been to the unit since renting it a couple of months earlier in November 2005; apparently only defendant had a key to the unit's lock, which police had to cut, again with Gates's consent, to enter. (4T5-3 to 6-8). Inside, police found

cell phones, golf clubs, cameras, a flat-screen television and other electronics. Ibid.

The next afternoon, on January 26, police learned from Butler not only that she had not seen Gates since the previous day at the storage facility, but also that a history of domestic violence existed between defendant and Gates. (1T53-8 to 54-22; 3T5-16 to 6-18; 4T6-9 to 17). The police also learned that defendant had telephoned Butler, expressed his anger with Gates for cooperating with police and threatened to harm Gates. Ibid. Investigators verified the domestic violence history through Asbury Park police reports. Ibid. Fearing that defendant had found and harmed Gates, police then determined defendant's general location through his cell phone. (4T6-17 to 8-1).

More specifically, after signing a complaint against defendant charging him with receiving the stolen laptop computer and obtaining a warrant for his arrest, Detective Strohkirch contacted T-Mobile at about 6:00 p.m. on January 26 to see if defendant could be located by a cell phone that he used; Butler had provided the phone's number. (1T56-6 to 24; 3T6-19 to 15-12; 4T6-21 to 7-20). By about 8:00 p.m., T-Mobile determined that the phone was being used within a one-mile radius of a cell tower at the intersection of Highways 35 and 36 in Eatontown; a general search by police of the area failed to locate defendant. Ibid. Then, at about 9:30 p.m., T-Mobile determined that the phone was being used within a one-mile radius of the cell tower at the intersection of Routes 33 and 18 in Neptune; again, a general

search of the area proved unsuccessful. Ibid. Finally, at about 11:00 p.m., T-Mobile informed police that the phone was being used within a one-mile radius of the cell tower at the intersection of Route 9 and Friendship Road in Howell. Ibid. Police then patrolled that vast area until eventually discovering defendant's car just before midnight at the Caprice Motel on Route 9 South in Howell, where Detective Strohkirch and another investigator maintained surveillance. Ibid.

At about 3:00 a.m. that night, police spoke with the motel clerk, who told them that Gates was with a black male in a motel room. (4T8-2 to 5). An investigator called the room, Gates answered the phone, and the investigator asked her to come to the door, at which point defendant himself came to the door. (4T8-6 to 10). Placing defendant under arrest, police obtained consent from both him and Gates to search the room, where they found in plain view numerous suitcases and a flat-screen television. (4T8-11 to 22). In a drawer, police also discovered a pillowcase later determined to contain stolen jewelry. Ibid. Police found several more suitcases in defendant's car. Ibid. Officers brought all of the items to the station and then searched them after obtaining defendant's written consent; inside, they found more jewelry, rare coins, a bag of marijuana, and a 28-page book written by defendant entitled, "Let's Talk Burglary in New Jersey." (4T8-23 to 9-7).

The trial court admitted the majority of the stolen property evidence. The court found that the search of the storage unit

was proper based on the valid consent provided by Gates, who had control of the unit because she leased it and it contained her personal property which she stored inside. (4T15-16 to 24). The court then determined that defendant had a reasonable expectation of privacy in the location of his cell phone and in the cell tower records showing that location, and therefore that a warrant was generally required before police could obtain such information. (4T22-9 to 16). Nevertheless, the court ruled that, given the concern for Gates's safety, exigent circumstances and the emergency aid exception justified locating defendant's cell phone without a warrant, and thus that the police presence in defendant's hotel room to effect his arrest was lawful. (4T23-14 to 25-1). Although the court determined that police lacked consent to search defendant's motel room itself, and thus suppressed only the items in the pillowcase found in the drawer, it held that the remainder of the evidence found in the room was admissible under the plain view exception. (4T26-1 to 29-6).

Defendant subsequently pleaded guilty to one count each of third-degree burglary and third-degree theft, the court sentenced him in accordance with his plea agreement, and that sentence was affirmed on direct appeal on an excessive sentence calendar on June 23, 2009. (Da11). Defendant then moved to reopen his appeal to challenge the denial of his suppression motion, the Appellate Division granted the motion to reopen, (Da12), and in a published opinion issued on July 11, 2011, a three-judge panel affirmed the suppression motion's denial. State v. Earls, 420

N.J. Super. 583 (App. Div. 2011). In affirming, the panel found, contrary to the trial court below, that "defendant had no constitutionally protected privacy interest in preventing T-Mobile from disclosing information concerning the general location of his cell phone," and it therefore declined to consider the applicability of the emergency aid exception. Id. at 591 (emphasis added).

On December 13, 2011, this Court granted defendant's petition for certification. State v. Earls, 209 N.J. 97 (2011).

LEGAL ARGUMENT

POINT I

DEFENDANT HAD NO REASONABLE EXPECTATION OF PRIVACY IN THE GENERALIZED LOCATION OF HIS CELL PHONE.

As the Appellate Division correctly determined below, defendant had no constitutionally protected reasonable expectation of privacy in the generalized location of his cell phone. Through the cell phone company, police merely obtained basic information concerning the recent vicinity of defendant's phone within a one-mile radius of a given cell tower. That information simply resulted in police patrolling that broad area before ultimately discovering defendant's vehicle themselves in a motel parking lot. Investigators' use of the cell phone information ended there. Such non-specific, generalized location information which is sought over a brief time period and that only directs officers to vast stretches of fully public areas amounts to little more than an enhancement of the surveillance they might conduct with their own naked eyes, and hardly constitutes the more sophisticated and precise tracking of the sort that might raise Fourth Amendment concerns. This Court should affirm.

Citing United States v. Knotts, 460 U.S. 276, 103 S. Ct. 1081, 75 L. Ed. 2d 55 (1983), the panel below reasoned that other jurisdictions have similarly relied on that decision to likewise conclude "that the use of information derived from a suspect's

cell phone to determine his general location does not violate the Fourth Amendment." State v. Earls, 420 N.J. Super. 583, 597 (App. Div. 2011) (emphasis added) (citing United States v. Forest, 355 F.3d 942, 950-52 (6th Cir. 2004), remanded o.g., 543 U.S. 1100, 125 S. Ct. 1050, 160 L. Ed. 2d 1001 (2005); Devega v. State, 689 S.E.2d 293, 300-01 (Ga. 2010); Stone v. State, 941 A.2d 1238, 1249-50 (Md. App. 2008)). Noting the limited privacy protections afforded to the movements of people and vehicles on public roadways and in public places, the panel thus ruled that law enforcement's use here of "information obtained from T-Mobile concerning defendant's general location, derived from signals emitted by his cell phone, which together with visual surveillance resulted in discovery of his car in a motel parking lot, did not violate any legitimate expectation of privacy defendant may have had regarding the location of his car." Id. at 598-99 (emphasis added). The panel limited the reach of its ruling, however, adding that it had "no occasion in deciding this appeal to determine whether a warrant would be required for the police to obtain cell phone information to determine the specific location of a suspect, particularly the suspect's location in a private place." Id. at 599-600 (emphasis added).

Through his petition, defendant essentially asks this Court to recognize a reasonable expectation of privacy in cell phone location data and to require law enforcement to obtain a warrant prior to accessing such data. Yet the State readily acknowledges that such an expectation may arguably arise given the specificity

of location information possible today, and police already typically obtain such warrants, absent some exigent need or emergency, before seeking such cell phone location data. Moreover, defendant and the amici uniformly acknowledge the swiftly evolving technology and continuing advances in personal communications devices that now disclose highly – and ever-increasingly – specific location information that could pinpoint a given location to within a few feet. Yet those parties all apparently refuse to acknowledge the vast difference between contemporary cell phones and services and the far more simplistic, out-dated versions through which police determined defendant's generalized location, within one or two square miles, back in early 2006.

In that respect, a brief primer on this technology and its basic evolution is telling. See In re United States ex rel. Historical Cell Site Data, 747 F. Supp. 2d 827, 831-35 (S.D. Texas 2010). Generally, this sort of location information comes from data that is either "handset-based" or "network-based." Ibid. The former, which involves "high accuracy" GPS, can now identify the location of a given cell phone to within 10 meters or less. Ibid. The latter cell-site information, on the other hand, the variety involved here, is still not as accurate, but is rapidly improving. Ibid. To explain, cell phones periodically identify themselves to nearby base stations as they move about a given coverage area in a process called "registration," which occurs automatically whenever the phone is on. Ibid. From that

basic set-up arise various techniques to determine "network-based" location information. Ibid. The most basic technique, the sort involved here, identifies the particular base station or sector with which the phone was communicating when making or receiving a call or moving from one sector to another. Ibid. The relative precision of such cell site location depends on the size of the cell sector; the smaller the sector, the more precise the location. Ibid.

In earlier systems, base stations were placed as far apart as possible to provide maximum coverage and, at that time, a sector might extend for several miles or more. Ibid. Today, such drawn-out placement appears predominantly in sparsely populated, rural vicinities; more generally, though, 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 smaller still 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.

That said, despite the increasing precision of such location information that is possible today, historically carrier call detail records typically revealed no more than the relatively broad cell sector that handled a given call. Ibid. And that is just what occurred here, within the specific factual context of this particular case in 2006 – an anomalous set of facts, as such, unlikely to recur given the ever-increasing specificity of location information made possible by ever-advancing technology, as the defendant and amici point out in exhaustive detail. In that respect, those briefs repeatedly refer to notions of "cell phone tracking," yet the term "tracking" so loosely applies in this case that one might analogize the distinction between defendant's and amici's depictions and the actual facts here to a comparison of military radar to a hound dog, a very infirm one at that. Simply put, based on the facts at hand, given the extremely generalized nature of the location information involved and the extremely limited duration of its use, defendant cannot possibly claim any reasonable expectation of privacy in it that would invoke Fourth Amendment protections. The Appellate Division below, unlike the parties here, correctly limited its

discussion and its ruling to the facts of this case in holding the same. This Court should, too.

Consideration by New Jersey courts of the general issue of police tracking or locating cell phones without warrants appears minimal, although at least one of this state's courts has determined that officers' tracking of a stolen cell phone is "a reasonable investigative endeavor." See State v. Laboo, 396 N.J. Super. 97, 107 (App. Div. 2007).[2] Additionally, the state's recently amended Wiretapping and Electronic Surveillance Control Act expressly allows law enforcement, under certain emergency circumstances, to obtain without a warrant "location information" for a person's cell phone from his electronic communication service provider. See N.J.S.A. 2A:156A-29c(4), adopted as P.L. 2009, c. 184, § 2.[3] The amendment, effective January 12, 2010,

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[2] In Laboo, supra, police used a handheld tracking device to track one of two cell phones stolen by three defendants during a string of armed robberies committed over the course of an hour. 396 N.J. Super. at 97. Officers tracked the phone to a three-family home, wherein they determined the exact apartment of defendants with the tracking device; hearing defendants inside, police entered and searched. Ibid. In upholding the search based on exigent circumstances, the Appellate Division further ruled that the tracking by police of the stolen cell phone was "a reasonable investigative endeavor," but noted that its validation of the warrantless search was limited to the facts before it and "should not be construed as a general justification of warrantless searches of premises located by the use of electronic communication tracking devices." Id. at 107-08.

[3] 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.

permits the obtaining of such information without a warrant "when the law enforcement agency believes 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). Although events here occurred in early 2006 before enactment of this provision and the subject phone did not belong to the actual person in danger, this recent statement of public policy highlights the notion that defendant indeed has no reasonable expectation of privacy in the general location of his cell phone. And that is especially so in emergency situations, such as what police reasonably believed existed here.

In that respect, generally, to warrant protection under the Fourth Amendment, expectations of privacy in the context of searches and other such governmental intrusions must be reasonable. See State v. Bruzzese, 94 N.J. 210, 217 (1983), cert. denied, 465 U.S. 1030, 104 S. Ct. 1295, 79 L. Ed. 2d 695 (1984). And an analysis of federal and state cases from other jurisdictions suggests that the reasonableness of an individual's expectation of privacy in the location of his or her cell phone or pager depends in large part on the specificity of the location information – and the duration of its use – as it is sought by, or even available to, police, and whether that "intrusion" involves a home or residence as opposed to a more or less public location, such as a street or parking lot, where activities occur in open view.

For example, the United States Supreme Court has held that the tracking of a vehicle on public streets by use of a device such as a beeper is not a search. See Knotts, supra, 460 U.S. at 276, 103 S. Ct. at 1081, 75 L. Ed. 2d at 55. In Knotts, supra, the Court held that investigators did not violate the Fourth Amendment by placing a "beeper" tracking device[4] on a barrel that suspects had placed in their vehicle. Ibid. The Court reasoned that a person traveling in a vehicle on public thoroughfares, where that vehicle's occupants and contents are in plain view, has "no reasonable expectation of privacy in his movements from one place to another." Id. at 281, 103 S. Ct. at 1085, 75 L. Ed. 2d at 62 (citation omitted). The Court therefore held that, because the investigators used the beeper only to assist them in following the suspects' vehicle, the use of such a device was no more intrusive on privacy than that of other such devices, such as searchlights or field glasses, that merely enhance officers' sensory abilities. Id. at 283, 103 S. Ct. at 1086, 75 L. Ed. 2d at 63 ("Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case.").

On the other hand, in United States v. Karo, the Court held that a search did in fact occur once a container, to which

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[4] The Knotts Court described the "beeper" as "a radio transmitter, usually battery operated, which emits periodic signals that can be picked up by a radio receiver." Id. at 277, 103 S. Ct. at 1083, 75 L. Ed. 2d at 59.

investigators had attached a similar beeper as that used in Knotts, was brought inside a home; this beeper signaled police when the container was opened. 468 U.S. 705, 707-08, 104 S. Ct. 3296, 3299, 82 L. Ed. 2d 530, 536-37 (1984). The Court reasoned that without a warrant and probable cause or reasonable suspicion, "the monitoring of a beeper in a private residence, a location not open to visual surveillance, violates the Fourth Amendment rights of those who have a justifiable interest in the privacy of the residence." Id. at 714, 104 S. Ct. at 3303, 82 L. Ed. 2d at 541. Likewise, in Kyllo v. United States, the Supreme Court held that the government's use of a thermal-imaging device to reveal information about the private goings-on inside a home constituted a search. 533 U.S. 27, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001). Noting that the Fourth Amendment "draws a firm line at the entrance to the house," the Court reasoned that the "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical intrusion into a constitutionally protected area, constitutes a search — at least where (as here) the technology in question is not in general public use." Id. at 34-35, 121 S. Ct. at 2043, 150 L. Ed. 2d at 102 (internal citation and quotations omitted).

While acknowledging the difference between more primitive tracking instruments, such as the beeper discussed in Knotts, and the more precise technology of GPS devices, some federal courts faced with the issue have nevertheless relied on Knotts to find

no Fourth Amendment violation in the use of the latter for surveillance or tracking in public areas despite the greater specificity of information they offer. In that respect, the Seventh Circuit has found no Fourth Amendment violation in the attachment by police of a GPS device to a suspect's car, analogizing such tracking to "following a car on a public street, [which] is unequivocally not a search within the meaning of the amendment." United States v. Garcia, 474 F.3d 994, 997 (7th Cir.), cert. denied, 552 U.S. 883, 128 S. Ct. 291, 169 L. Ed. 2d 140 (2007).[5] The Ninth Circuit likewise found no Fourth Amendment violation in the attachment by police of a similar mobile tracking device to a suspect's car, concluding that such monitoring of the vehicle did not amount to an impermissible search. United States v. Pineda-Moreno, 591 F.3d 1212, 1216-17 (9th Cir. 2010).[6]

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[5] The device there, which was "pocket-sized, battery-operated, [and] commercially available for a couple of hundred dollars," received and stored satellite signals showing its location, thus revealing the travel history of the vehicle to which it was attached. Id. at 995.

[6] The Court in Pineda-Moreno noted, however, that three state supreme courts have concluded otherwise, finding such use of a tracking device impermissible under their respective state constitutions. Id. at 1217 n. 2. See People v. Weaver, 909 N.E.2d 1195 (N.Y. 2009) (noting that GPS devices' "virtually unlimited and remarkably precise tracking capability" renders them different from mere enhancement of officers' own sensory impressions); State v. Jackson, 76 P.3d 217 (Wash. 2003) (under state constitutional provision more protective than Fourth Amendment, police may not use mobile tracking device without a warrant); State v. Campbell, 759 P.2d 1040 (Ore. 1988) (use of tracking device without a warrant or obviating exigency violates state constitution). But see Osburn v. State, 44 P.3d 523 (Nev. 2002) (holding that police use of a mobile tracking device does

More recently, in United States v. Jones, __ U.S. __, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012), the Supreme Court determined in a 5-4 decision that the use of a GPS tracking device did equate to a Fourth Amendment search, however. But there, federal agents not only installed it on the defendant's vehicle, but also continued to monitor his driving for a month without a warrant. 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 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 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:

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not infringe a reasonable expectation of privacy). Unlike here, however, those cases all involved either GPS devices or radio transmitters, installed by police on suspect vehicles, and in all instances offering precise location information far more specific than a general one or two mile area, as was provided by T-Mobile here.

> 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.
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> [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. Ibid.

In another recent ruling, the South Dakota Supreme Court relied on Jones under similar circumstances where police without a warrant placed a GPS tracking device on the defendant's vehicle for a month. State v. Zahn, 812 N.W.2d 490, 492 (S.D. 2012). Noting the exponential advancement of technology since the Knotts decision and stressing the "uniquely intrusive" nature of the "highly detailed" GPS-generated information involved, that Court likewise found a Fourth Amendment violation absent a warrant. Id. at 498-99. That particular device revealed more than merely the movements of a vehicle on public roads – it instead provided "an intimate picture of [the defendant's] life and habits." Id. at 497. More specifically, it permitted authorities to determine the defendant's speed, direction and geographic location within

five to 10 feet at any given time while revealing patterns in his movements during his monitoring over the course of an entire month. Ibid. Thus, the Court found that "the likelihood that another person would observe the whole of [the defendant's] movements for nearly a month is not just remote, it is essentially nil." Ibid. (internal quotations omitted). That Court therefore concluded that "[w]hen the use of a GPS device enables police to gather a wealth of highly detailed information about an individual's life over an extended period of time, its use violates an expectation of privacy that society is prepared to recognize as reasonable." Id. at 499-500.

The record clearly shows that no such extended monitoring occurred here, nor did the location information provided remotely approach the degree of specificity involved in those cases. As such, the Appellate Division decision below fully comports not only with the Jones majority's reasonableness rationale, but also with Justice Scalia's property-based approach, given that police placed nothing on defendant here, but instead relied solely on his cell phone to find him – to locate his girlfriend, whom he had threatened to harm – over the course of just a few hours. And the panel's decision only finds further support among other courts' decisions within the more specific, though less commonly addressed, cell phone context.

For one, the Georgia Supreme Court recently found no violation of a defendant's Fourth Amendment right against unreasonable search and seizure where police, after learning the

defendant had arranged to meet with and sell cocaine to the victim just before his death, had the defendant's cell phone provider "ping" his phone without obtaining a warrant. Devega, supra, 689 S.E.2d at 293. The "ping," which involved the phone company's sending a signal to defendant's phone to locate it by its GPS system, determined that the defendant was heading north on a specific road and allowed police to follow him via the signal to his ultimate destination. Id. at 12. The court there distinguished Karo, supra, which involved the monitoring of a beeper in a private residence not open to visual surveillance, and instead relied on Knotts, supra, where the warrantless monitoring involved beeper signals from a vehicle on public roads and did not reveal any information not available through visual surveillance. Id. at 12-13. Noting that the "GPS tracking device [and 'ping' information] in the case at bar is simply the next generation of tracking science and technology from the radio transmitter 'beeper' in Knotts, to which the Knotts Fourth Amendment analysis directly applies," the court concluded that "[b]ecause the warrantless monitoring of [defendant's] cell phone location revealed the same information as visual surveillance, there was no Fourth Amendment violation." Id. at 13-14 (citing Stone, supra, 941 A.2d at 1250 (no Fourth Amendment violation by warrantless use of cell phone "ping" information to locate suspect in public place)).

Federal courts have ruled similarly in regard to generalized cell phone location information. In United States v. Forest,

supra, the Sixth Circuit held that cell-site data is "simply a proxy for [a defendant's] visually observable location" and, moreover, relying on Knotts, supra, that a defendant has "no legitimate expectation of privacy in his movements along public highways." 355 F.3d at 951.[7] There, after losing sight of the defendant, a drug trafficker, while conducting surveillance, officers reestablished visual contact by dialing his cell phone several times (without allowing it to ring) and having his cell phone provider determine which cell towers were "hit" by the defendant's phone; the cell-site data revealed defendant's general location and the officers resumed their surveillance, following his vehicle before later arresting him. Id. at 947. Finding no search and no Fourth Amendment violation, the court held that, even though officers were unable to maintain visual contact with the defendant's vehicle at all times, "visual observation was possible by any member of the public" and the officers "simply used the cell-site data to 'augment[] the sensory faculties bestowed upon them at birth.'" Id. at 951 (quoting Knotts, supra, 460 U.S. at 283, 103 S. Ct. at 1086, 75 L. Ed. 2d at 63).[8]

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[7] In reaching its decision below, the Appellate Division relied on both Devega and Forest, neither of which, to note, involved the sort of exigencies that only further justified the police conduct here.

[8] But see In re Application for Order Authorizing Pen Register and Trap and Trace Device and Release of Subscriber Information, 384 F. Supp. 2d 562 (E.D. N.Y. 2005) (where government's request for cell phone information would reveal a person's location at any given time and effectively allow installation of a tracking

Here, after learning that defendant's girlfriend was missing, that she and defendant had a history of domestic violence, and that defendant, for whom police had an arrest warrant, had just threatened physical harm against her, investigators contacted T-Mobile to see whether he could be located by a cell phone that he used, and for which a number had been provided by his girlfriend's cousin. (1T56-6 to 24; 4T6-21 to 7-20). Specifically, investigators sought to determine a "general location through the use of cell site towers to . . . pin down an area that he might be in." (1T57-4 to 16). Initially, T-Mobile determined that the phone was being used within a one-mile radius of a cell tower in Eatontown, but a general search by police of the area failed to locate defendant. Ibid. T-Mobile then determined that the phone was being used within a one-mile radius of another cell tower in Neptune, but again, a general search of the area proved unsuccessful. Ibid. Finally, T-Mobile informed police that the phone was being used within a one-mile radius of a cell tower in Howell. Ibid.

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device without probable cause, and where cell carrier's assistance to law enforcement was ordered on basis of something less than probable cause, such assistance could not include disclosure of a subscriber's physical location); In re Pen Register & Trap/Trace Device with Cell Site Location Authority, 396 F. Supp. 2d 747 (S.D. Tex. 2005) (same). To the extent, however, that both of these cases involved efforts by federal law enforcement agents to secure court orders compelling cell phone companies to disclose customers' cell phone use records under federal law (namely 18 U.S.C. §§ 2703, 3122, and 3123), they are readily distinguishable. These cases also involved efforts by investigators to obtain significantly more information than the mere general vicinity, within a mile or two of a given cell tower, of a suspect's cell phone.

Officers in that area were notified with a description of defendant's vehicle, which was spotted not long after in the parking lot of a motel where he ultimately was found and arrested. (1T58-17 to 59-25). The time period from the first request to T-Mobile at 6:00 p.m. to the last at 11:00 p.m. was a mere five hours; defendant's vehicle was then observed less than an hour after that. (3T6-19 to 15-12).

Defendant now calls for this Court to guarantee constitutional privacy protections by "ensuring that individuals not be subject to ubiquitous surveillance at the unrestricted whim of law enforcement." (Dsb1). One, the State agrees. Two, the record plainly shows that such a characterization could not be less applicable here. Further, despite depictions by the amici to the contrary, this case involves more than merely "whether an individual has a reasonable expectation of privacy in the current location of their cell phone," (AC1b3), or "whether a cell phone user has a constitutional right of privacy in his location," (AC2b4). Such overly simplistic framing inaccurately portrays both the State's position and the Appellate Division's determination below.[9] Although degrees of specificity vary

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[9] One amicus brief goes so far as to suggest that by ruling only on general location information while excluding the specific, the Appellate Division "implicitly rejected any privacy expectation in cell phone location information." (AC2b31). That brief further accuses the panel of "fail[ing] to understand how cell tracking technology differs, and is far more invasive, than past 'beeper' technology." Ibid. Whereas the panel properly issued its opinion based on the facts of this actual case, that particular brief seems to go out of its way to ignore them while instead focusing only on self-supporting hypotheticals. (See

greatly and have increased exponentially since defendant's arrest, at that time, the location information available was anything but specific. And the reasonableness of the use of such information in a given situation depends on not only its specificity, but also the duration of such use. As with any Fourth Amendment reasonableness analysis, determinations founded on stark black and white terms rarely yield fair, informed results.

The information made available by T-Mobile to police here involved nothing more than what would have been revealed through basic visual surveillance — and arguably less so, given the vagueness of the location information at issue, which required police to physically patrol areas of up to a mile around a given cell tower. In the end, officers simply happened to find defendant's vehicle in a parking lot based on their own physical observations. Such a means of locating a person could hardly be construed as "tracking" in the pure sense of the term, and even if it could be, it fails to amount to any sort of violation of defendant's Fourth Amendment rights given that he has no

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AC2b31 to 33). That brief likewise utterly misconstrues the State's continuing position while asserting "facts" not in the record that directly conflict with those actually in it. (See AC2b34 to 35). The State's position is now, as it has continued to be, that generally a warrant is sought for such information, unless an emergency or exigency exists, which was the case here; or unless, as the Appellate Division determined, the information obtainable was of such a generalized nature — which at the time of this request, it was — that no reasonable expectation of privacy (which one could not have when his location was only found to be within a certain mile or two) could arise.

reasonable expectation of privacy in his general whereabouts, particularly when in public places where he is visible to anyone. Moreover, the specificity of the location information voluntarily provided to police here by T-Mobile pales in comparison to that at issue in cases like Devega, Knotts, Forest and others, where no Fourth Amendment violations were found despite warrantless tracking by police using precision GPS technology that provided virtually exact locations of those suspects being monitored or sought. As did the Appellate Division below, this Court should likewise conclude that defendant had no reasonable expectation of privacy in the generalized location of his cell phone.

POINT II

TO THE EXTENT DEFENDANT DID HAVE SOME PRIVACY INTEREST IN THE GENERAL LOCATION OF HIS CELL PHONE, EXIGENT CIRCUMSTANCES AND THE EMERGENCY AID EXCEPTION TO THE WARRANT REQUIREMENT NEVERTHELESS FULLY JUSTIFIED THE POLICE USE OF CELL TOWERS WITHOUT A WARRANT TO DETERMINE THE PHONE'S GENERAL WHEREABOUTS.[10]

The exigent circumstances of an emergency situation here fully justified the conduct of police, who had a reasonable basis to believe that defendant's girlfriend, due to her cooperation in his investigation, was in danger. Defendant, for whom an arrest warrant already had been issued, discovered that his girlfriend had assisted police by allowing them to search her storage unit, where he was hiding much of his stolen property. In turn, he threatened to harm her. When police learned of this, that the girlfriend had not been seen since the search, and that a confirmed history of domestic violence existed between her and defendant, they feared for her safety and thus contacted defendant's cell phone carrier in an effort to find her. Through T-Mobile, investigators determined the phone's general whereabouts (within a mile of a certain cell tower) before eventually happening to spot defendant's car in that area, in the

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[10] Amicus EPIC does not address this issue. The ACLU-NJ and ACDL-NJ, on the other hand, merely dismiss the applicability of the emergency aid doctrine and exigent circumstances with no analysis or legal citation whatsoever, by saying little more than that the State is wrong, in two short paragraphs of a jointly filed 44-page brief. (AC2b36).

parking lot of the motel where defendant ultimately was arrested in his room. As such, even if this Court should rule that defendant had some privacy interest in the generalized location of his cell phone, that ruling nevertheless affords him no legitimate basis for reversal.

The Appellate Division never considered the applicability of the emergency aid exception to the warrant requirement because it instead found no privacy interest in defendant's cell phone's generalized location information. The trial court, however, denied defendant's suppression motion on that basis. In so doing, Judge Chaiet noted the history of domestic violence between defendant and his girlfriend, that defendant had made "violent threats towards [her for] assisting police in their investigation," and that she had not been seen since the search of her storage unit. (4T23-25 to 24-5). The court therefore found that police "possessed an objectively reasonable basis to believe that [defendant's girlfriend] was in physical danger," and although they may have had an arrest warrant for defendant and were aware that in locating him they might locate additional evidence, "their primary purpose was to prevent any harm" to her. (4T24-6 to 20) (emphasis added). The court thus held that exigent circumstances, specifically the emergency aid exception to the warrant requirement, justified the use by police of cell towers to find defendant through the general location of his phone. (4T22-9 to 25-1).

Warrantless searches are permissible under both the state

and federal constitutions where certain exceptions apply, with the "predominant" exception being exigent circumstances. State v. Cassidy, 179 N.J. 150, 160 (2004) (citations omitted). "[U]nder certain exigent circumstances a search without a warrant is both reasonable and necessary." State v. Frankel, 179 N.J. 586, 598 (2004). Exigent circumstances are those which "preclude expenditure of the time necessary to obtain a warrant because of a probability that the suspect or the object of the search will disappear, or both." Cassidy, supra, 179 N.J. at 160 (citing State v. Smith, 129 N.J. Super. 430, 435, (App. Div.), certif. denied, 66 N.J. 327 (1974)). Any such search "must be reasonable, measured in objective terms by examining the totality of the circumstances." State v. Ravotto, 169 N.J. 227, 235 (2001). In that respect, exigent circumstances, coupled with probable cause, will excuse the failure of police to secure a written warrant prior to a search for criminal wrongdoing. Cassidy, supra, 179 N.J. at 160 (citing Bruzzese, supra, 94 N.J. at 217-18). A court's determination as to whether exigent circumstances justified police conduct in a given situation is fact-sensitive. See State v. DeLuca, 168 N.J. 626, 632-33 (2001); State v. Hutchins, 116 N.J. 457, 465-66 (1989); State v. Alvarez, 238 N.J. Super. 560, 568 (App. Div. 1990).

Likewise, the emergency aid exception derives "from the commonsense understanding" that exigent circumstances may justify certain warrantless governmental intrusions when conducted "for the purpose of protecting or preserving life, or

preventing serious injury." Frankel, supra, 179 N.J. at 598-99 (citations omitted). Neither the state nor the federal Constitution demands "that public safety officials stand by in the face of an imminent danger and delay potential lifesaving measures while critical and precious time is expended obtaining a warrant." Ibid.[11] In that respect, a court will examine the actions of such officials "in light of what was reasonable under the fast-breaking and potentially life-threatening circumstances that were faced at the time." Ibid. (citations omitted). Additionally, a reviewing court must "avoid viewing the events through the distorted prism of hindsight, recognizing that those who must act in the heat of the moment do so without the luxury of time for calm reflection or sustained deliberation." Ibid. (citations omitted).

New Jersey courts employ a three-part test to determine whether a warrantless search was permissible under the emergency aid doctrine, requiring that: police must have an objectively reasonable basis to believe that an emergency requires immediate assistance to protect life or prevent serious injury; their primary motivation must be to render assistance, not to find and seize evidence; and there must be a reasonable nexus between the

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[11] Again, acknowledging the special needs of law enforcement when confronted by situations requiring emergency aid, the State Legislature has amended New Jersey's Wiretapping and Electronic Surveillance Control Act to now expressly allow police to obtain without a warrant location information for cell phones and other electronic communications devices in certain circumstances involving "danger of death or serious bodily injury." See N.J.S.A. 2A:156A-29c(4). See also n. 3, supra.

emergency and the area or places to be searched. Frankel, supra, 179 N.J. at 600.[12] See also Cassidy, supra, 179 N.J. at 161 (citation omitted). Essentially, the emergency aid doctrine requires only that police possess "an objectively reasonable basis to believe – not certitude – that there is a danger and need for prompt action." Cassidy, supra, 179 N.J. at 161. See also Frankel, supra, 179 N.J. at 599. Moreover, the ultimate nonexistence of such a perceived danger will not invalidate the reasonableness of the decision to act at the time. Ibid. And the scope of a search under the emergency aid exception should be limited to the reasons and objectives that prompted the search in the first place. Frankel, supra, 179 N.J. at 599 (citation omitted).

To the extent that defendant had any privacy interest at all in the generalized location of his cell phone (within a one-mile radius of a given cell tower), sufficient exigent circumstances fully justified the actions of police here under the totality of the circumstances. Officers had a warrant for his arrest and defendant knew that they were in pursuit, raising the possibility of his imminent flight or destruction of evidence. Additionally, defendant was dangerous. The undisputed facts show that a

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[12] This Court's inclusion of an element in its emergency aid analysis focusing on the officer's subjective motivations is not consistent with federal law, in which those thoughts are considered "irrelevant." Michigan v. Fisher, __ U.S. __, 130 S. Ct. 546, 548, 175 L. Ed. 2d 410, 413 (2009); Brigham City v. Stuart, 547 U.S. 398, 404, 126 S. Ct. 1943, 1948, 164 L. Ed. 2d 650, 658 (2006).

history of domestic violence existed between the girlfriend and defendant, who had only threatened further violence against her upon learning of her cooperation with police. Further, investigators learned of the threats from the girlfriend's cousin, who had not seen the girlfriend since she let police into the storage unit.

Because investigators possessed an objectively reasonable basis to believe defendant's girlfriend was in danger, the police could have acted under their caretaking function of rendering emergency aid by locating defendant or his girlfriend as soon as possible before defendant could harm her. The officers' reasonable and well-founded fears for her safety thus trumped any concern over whatever minimal invasion of privacy such a generalized location as T-Mobile provided concerning defendant's cell phone might entail, to the extent defendant even had a legitimate expectation of privacy in that respect. That additional evidence was found with defendant, and whether or not police expected to find such evidence when finding defendant, is irrelevant where the primary concern was protecting his girlfriend from perceived danger, not discovering further evidence of defendant's crimes, which in this instance merely came as a fortuity.[13] See State v. Bogan, 200 N.J. 61, 77 (2009)

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[13] As Detective Strohkirch testified, in determining a rough location of defendant's cell phone, finding his girlfriend "was our primary goal" even though police believed they might locate additional evidence regarding defendant's crimes. (1T58-4 to 10). The trial court determined the detective's testimony to be credible. (4T24-6 to 20).

("[t]o hold that the police can never legitimately engage in community caretaking activities merely because they are also involved in the detection, investigation, or acquisition of evidence concerning the violation of a criminal statute could lead to absurd results") (citation and internal quotations omitted). This Court should therefore affirm.

CONCLUSION

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

Respectfully submitted,

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