SUPREME COURT OF NEW JERSEY
DOCKET NO. 06875

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

SUPPLEMENTAL BRIEF
ON BEHALF OF DEFENDANT-PETITIONER

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DEFENDANT IS NOT CONFINED

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PRELIMINARY STATEMENT

Technological advances in this modern era are unprecedented. Rapidly advancing technology has created a new age of surveillance in which law enforcement can comprehensively, continuously, and accurately track, monitor and record an individual's movements, allowing for surveillance of citizens on a scale that has not previously been seen or anticipated. Indeed, cell phone location tracking and similar technologies now enable law enforcement to acquire an individual's location in a hidden, intrusive, indiscriminate and continuous manner.

This case provides the Court with the opportunity to guarantee the continued vitality of constitutional privacy protections by ensuring that individuals not be subject to ubiquitous surveillance at the unrestricted whim of law enforcement. Specifically, defendant urges this Court to hold that individuals have a reasonable expectation of privacy in their cell phone location data, whether the data is prospective or historical, and that location data acquisition be subject to the protections of a warrant based upon a showing of probable cause.

We have not become a society that expects constant surveillance of our daily activities. Yet, the type and scope of information collected through cell phone location tracking enables the State to monitor countless details of our intimate lives, providing the State with detailed information about our movements, associations, contacts and activities, in a way that invades privacy and potentially chills expression of other fundamental rights. It is this remarkably intrusive nature of cell phone tracking as well as the ease in which the technology can be employed on a widespread basis that threatens to render constitutional privacy protections obsolete.

A judicial check on law enforcement's decision to subject an individual to superhuman surveillance is, therefore, essential to keep constitutional protections in line with changing technology. Without a warrant requirement, the thousands of cell phones currently in use by individuals in this State will effectively become instruments of state surveillance, allowing for a technological end-run around the constitution.

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 marijuana, contrary to N.J.S.A. 2C:35-10a(3) (Count Four). (Da 1-31)[1]

Defendant filed a motion to suppress evidence seized without a warrant, and the motion was heard by the Honorable Paul F. Chaiet, J.S.C., in April 2007. (1T; 2T; 3T) On April 27, 2007, Judge Chaiet granted in part and denied in part the motion to suppress. (4T; Da 4)

Defendant appeared before Judge Chaiet on September 28, 2007, and entered into a plea agreement with the State. Under the terms of the plea agreement, defendant pled guilty to Count One (third-degree burglary) and Count Two (third-degree theft),

[1] "Da" - Defendant's appendix to this brief.
"1T" - Motion transcript, dated April 3, 2007.
"2T" - Motion transcript, dated April 4, 2007.
"3T" - Motion transcript, dated April 17, 2007.
"4T" - Motion transcript, dated April 27, 2007.
"5T" - Plea transcript, dated September 28, 2007.
"6T" - Sentencing transcript, dated November 2, 2007.

and the State agreed to recommend a prison term of seven years with three years of parole ineligibility. (5T; Da 5-7) On November 2, 2007, Judge Chaiet sentenced defendant in accordance with the plea agreement to an aggregate term of seven years with three years of parole ineligibility. (6T; Da 8-9)

On July 11, 2011, the Appellate Division issued a published opinion, affirming the denial of defendant's motion to suppress. State v. Earls, 420 N.J. Super 583 (App. Div. 2011), certif. granted, 209 N.J. 97 (2011). On December 13, 2011, this Court granted defendant's petition for certification, limited to the issues of "the validity of defendant's arrest based on law enforcement's use of information from defendant's cell phone provider about the general location of the cell phone and the application of the plain view requirement to the warrant requirement." State v. Earls, 209 N.J. 97 (2011).

STATEMENT OF FACTS

Motion to Suppress

In January 2006 Middletown Police Detective William Strohkirch was investigating several burglaries that had occurred in Middletown. As part of the investigation, the police learned that a cell phone taken during one of the burglaries was still active, and the police subsequently discovered that the cell phone had been used at the Gold Digger Bar in Asbury Park and at the home of someone by the name of Tanya Smith. (1T 33-5 to 36-5) On January 24, 2006, Detective Strohkirch went to the home of Tanya Smith and spoke with an individual in the home, Darren Coles, who agreed to call the cell phone number to see if he recognized the voice of the person who answered the phone. (1T 36-12 to 21) An individual identifying himself as "Born" answered the phone, and Coles told Detective Strohkirch that "Born" was dating Tanya Smith's sister. (1T 37-3 to 6) Later that day Strohkirch saw Coles again and Coles told him that "Born" was inside the Gold Digger Bar. (1T 37-7 to 16)

Detective Strohkirch went to the bar, called the cell phone, and then arrested Carlton Branch, who had the phone in his possession. (1T 38-1 to 15) Branch claimed that he had acquired the phone from defendant, whom he knew as "Fallah." (1T 38-16 to 22) Branch told police that defendant had been

involved in other burglaries and that defendant kept the proceeds in a storage unit that was rented in his name or in the name of Desiree Gates. (1T 39-20 to 40-3)

On January 25, 2006, Detective Strohkirch learned that a laptop stolen during a separate burglary contained a tracking device. Police tracked the laptop to the home of Carl Morgan, who informed police that he had bought the laptop from "Fallah."

That same day Detective Gerald Weimer went to the home of Alecia Butler and confronted Desiree Gates, asking for consent to search a storage unit that had been rented in her name. (1T 43-10 to 47-25) Weimer denied telling Gates that she would face criminal charges if she did not sign the consent form. (1T 81-17 to 83-12) Gates, on the other hand, said that Weimer had told her that he would obtain a warrant in twenty minutes if she did not sign the consent to search. In addition, Gates said that although Weimer told her that she was not in trouble, he also told her that if she didn't cooperate she would be criminally charged in this matter. (2T 19-22 to 21-12)

In any event, Gates apparently consented to the search. Although Gates had signed the rental agreement for the storage unit and had put a few of her personal belongings in the unit, she had not been to the unit since November 2005 when it was first rented and defendant paid the monthly bill. In addition, only defendant had a key to the unit, so police had to cut the

lock to the unit in order to conduct the search. Inside the storage unit police recovered cell phones, golf clubs, a flat screen television, jewelry, cameras and other electronic equipment that police believed to be stolen. (1T 65-23 to 66-21) At that point, the police obtained a warrant for defendant's arrest.

Later that day Detective Strohkirch also learned that there was a history of domestic violence between defendant and Gates. Strohkirch spoke with Gates' cousin, who indicated that defendant was angry that Gates had cooperated with police and that he had threatened to harm her. (1T 53-2 to 22)

Hoping to locate defendant in order to execute the search warrant and assure Gates' safety, police contacted defendant's cell-phone carrier, T-Mobile. Pursuant to the technology existing at the time, T-Mobile was able to determine defendant's general location by tracing signals emitted from defendant's phone. Specifically, every seven seconds scan defendant's cell phone would for the strongest signal, which was usually from the nearest cell tower, and then send a signal to the tower. Accordingly, T-Mobile, by tracing which towers defendant's cell emitted signals to, was able to provide police with information about defendant's current location. Police sought this information from T-Mobile without a warrant.

At about 8:00 p.m., a T-Mobile employee informed police that he had traced defendant's location to Route 35 in Eatontown. Police again contacted T-Mobile at 9:30 p.m., at which point T-Mobile traced defendant's location to the area around Routes 33 and 18 in Neptune. Police searched for but were unable to locate defendant in that area. After police called T-Mobile again at 11:00 p.m., defendant's location was traced to Route 9 in Howell. After receiving the location information from T-Mobile, police searched the area and found defendant's car in the parking lot of the Caprice Motel on Route 9 South in Howell. (1T 57-4 to 59-5)

Detective Strohkirch and another detective maintained surveillance on the motel. At about 3:00 a.m., the detectives and members of the Middletown Police Department spoke to the motel clerk who told them that Gates was with a black male inside a motel room. Police called Gates on the phone and asked her to come to the door, at which point defendant came to the door and was placed under arrest. (1T 59-16 to 25) Police observed and seized a flat screen television and luggage sitting in the middle of the room.

Police entered the room and seized the television and luggage. In addition, although Gates did not appear to be harmed or in any physical danger, Detective Strohkirch decided to search the room for weapons and also for proceeds of the

burglaries. Inside a closed dresser drawer, police recovered a pillow case containing stolen jewelry.[2] (1T 60-1 to 8; 1T 76-24 to 77-23)

Back at police headquarters, police obtained consent from defendant to search the suitcases that had been seized from the motel room. Inside the suitcases police found jewelry, rare coins, and marijuana. (1T 90-10 to 95-15)

At the suppression hearing, defendant testified that the police began surveillance of the motel as early as 6:00 p.m. on January 26, 2006. (2T 69-8 to 21) Defendant acknowledged signing the consent form at the police station, but indicated that he had done so only because he had wanted to be issued a receipt for his personal property. (2T 84-3 to 86-21)

In ruling on the motion to suppress, Judge Chaiet concluded that defendant had a reasonable expectation of privacy in the location of his cell phone and that the police were therefore required to obtain a warrant prior to obtaining cell phone tracking information. (4T 22-6 to 13) Nevertheless, the court determined that the actions of the police were justified under the emergency aid exception to the warrant requirement on the theory that the police were attempting to protect Gates from

[2] Strohkirch claimed that defendant and Gates both consented to a search of the room after being told that they had the right not to consent, although Gates and defendant both indicated that the police just immediately began searching without even asking for consent. (2T 32-6 to 25)

possible domestic violence. (4T 22-14 to 25-1)

With respect to the items seized from the motel room, Judge Chaiet ruled that the State had not proven by a preponderance of the evidence that a valid consent to search was given at the motel room. (4T 25-18 to 26-11) Accordingly, the court held that the search of the dresser drawer in the motel room and the seizure of the pillowcase from the motel room were invalid. As to the television and luggage, however, Judge Chaiet concluded that they were properly seized under the plain view exception to the warrant requirement. (4T 26-17 to 29-6) In so ruling, the court noted that although the initial search of the motel room was unlawful, the detectives did not search the luggage until after they obtained consent at the police station, and thus, the evidence would be admissible at trial.[3]

Appellate Division Opinion

Affirming Judge Chaiet's ruling, the Appellate Division held that "defendant had no constitutionally protected privacy interest in preventing T-Mobile from disclosing information concerning the general location of his cell phone." Earls, 420

[3] Judge Chaiet also ruled that the search of the storage unit was valid. Rejecting the argument that Gates did not have authority to consent to the search of the unit, Judge Chaiet relied upon the fact that Gates had stored items in the unit along with defendant and that her name was on the rental agreement for the unit. The court concluded therefore that even though defendant had the only key to the unit, he had "assumed the risk that she would consent to a search." (4T 16-13 to 17-6) The Appellate Division affirmed this ruling, and this Court did not grant certification on the issue.

N.J. Super. at 591. In addition, the Appellate Division concluded that the seizure of the flat screen television and luggage was justified under the plain view exception to the warrant requirement. Id.

LEGAL ARGUMENT

POINT ONE

IN ORDER TO GUARANTEE THE CONTINUED VITALITY OF CONSTITUTIONAL PRIVACY PROTECTIONS IN THIS MODERN TECHNOLOGICAL AGE, THIS COURT MUST RECOGNIZE A REASONABLE EXPECTATION OF PRIVACY IN CELL PHONE LOCATION DATA AND REQUIRE LAW ENFORCEMENT TO OBTAIN A WARRANT PRIOR TO OBTAINING AN INDIVIDUAL'S CELL PHONE LOCATION DATA.

Ubiquitous law enforcement surveillance through means such as cell phone location tracking, inconceivable twenty years ago, is now a reality. As is apparent in this case, the State now has the ability to comprehensively monitor an individual's private life without necessarily conducting the type of physical intrusion historically contemplated by the Fourth Amendment and Article I, Paragraph 7 of the New Jersey Constitution. Hence, along with the benefits of technological gains comes the formidable risk that modern technology will "shrink the guaranteed realm of privacy" (Kyllo v. United States, 533 U.S. 27, 34 (2001)), and increase the potential for law enforcement abuse. As the march of technological progress continues, it is therefore incumbent upon courts to steadfastly preserve privacy and individual rights and to protect the public from overuse of law enforcement surveillance by ensuring that these advancing technologies are used only "in a manner which will conserve…the interests and rights of individual citizens." Carroll v. United States, 267 U.S. 132, 149 (1925).

Through a search of cell phone location data, the State now has the ability to track an individual's location and movements with a remarkable degree of precision and accuracy. In this regard, cell phones operate through a network of cell towers that emit radio frequencies capable of carrying calls, text messages, and other data. Cell phones constantly relay their locations to the cellular towers; this process occurs every seven seconds, without any action or knowledge necessary on the part of the user. Adam Koppel, Warranting a Warrant: Fourth Amendment Concerns Raised by Law Enforcement's Warrantless Use of G.P.S. and Cellular Phone Tracking, 64 U. Miami L. Rev. 1061, 1073–1083 (Apr. 2010). This information is automatically recorded and stored by cell phone service providers. Id.

Cell-site data, therefore, is a collection of a number of pieces of data "regarding the strength, angle, and timing of the caller's signal measured at two or more cell sites, as well as other system information such as a listing of all cell towers in the market area, switching technology, protocols, and network architecture." Ian Herbert, Where We Are with Location Tracking: A Look at the Current Technology and the Implications on Fourth Amendment, 16 Berkley J. Crim. Law 442, 478 (Fall 2011) (citing In re Pen Register, 396 F. Supp. 2d 747, 749 (S.D. Tex. 2005)). The person who receives this data is able to

pinpoint the location of the phone with remarkable accuracy, particularly in more urban areas with many cell towers. Id. With the assistance of cell phone companies, law enforcement officers have the capability to track cell phones in real time or check on their past locations by obtaining records all cell phone companies keep. Id. at 479. Furthermore, the ability to locate the device indoors, along with the fact that people often carry their phones with them at all times, makes cell phone tracking even more invasive than standalone satellite-based tracking devices in many respects. Pew Research Center's Internet and American Life Project (2010), available at http://pewresearch.org/databank/dailynumber/?NumberID=1090 (90% of people ages 18-29, 70% of people ages 30-49, and 50% of people ages 50-64 sleep with their cell phone on or right next to their bed).

In this case, law enforcement conducted a search of defendant's cell phone location data to track defendant to his location inside a private motel room. As the Appellate Division explained, defendant's cell phone carrier, T-Mobile, "was able to determine defendant's general location at any given time because every seven seconds, a cell phone scans for the strongest signal, which is usually from the nearest tower, and then registers with the tower by sending in a signal to identify itself." Earls, 420 N.J. Super at 589. In fact, law

enforcement obtained defendant's cell phone location information three times during a three-hour period, ultimately tracking defendant's location to Route 9 in Howell. Police then located defendant's car in a motel parking lot on Route 9 and found defendant inside a motel room.

In upholding the warrantless search of defendant's cell phone location data, the Appellate Division drew dubious parallels between cell phone location tracking and the beeper technology utilized in United States v. Knotts, 460 U.S. 276 (1983) and United States v. Karo, 468 U.S. 705 (1984). In Knotts, the United States Supreme Court held that the monitoring of a beeper in a drum of chloroform that was tracked as it was transported in the defendant's car along public roads did not constitute a search under the Fourth Amendment. 460 U.S. at 281-282. The battery-operated beeper acted as a tracking device by emitting a weak radio signal, which could be followed by a nearby police officer with a receiver. Pointing out that the only information provided by the beeper is what could have also been obtained through visual surveillance, such as the movements of an automobile on public thoroughfares, the Court concluded that law enforcement monitoring of the beeper's signals on public roadways did not amount to a search. Id. Because the beeper did not reveal anything to law enforcement that traditional surveillance would not have provided, the Court

noted that "[n]othing 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." Id. at 282; see also United States v. Karo, 468 U.S. 705 (1984) (distinguishing Knotts on basis that beeper in this case established a location inside a private home).

Importantly, the Knotts court qualified its position on the constitutionality of using surveillance technology to track the movements of suspects. The Court stated that "different constitutional principles may be applicable" where such technology is used to implement "twenty-four hour surveillance of any citizen of this country ... without judicial knowledge or supervision." Knotts, 460 U.S. at 283–284. While the use of short-range beeper transmitters, which merely augmented the sensory faculties of the police, "hardly suggest[ed] abuse," id., the use of cell phone location tracking as a substitute for visual surveillance allows for exactly the sort of "dragnet-type law enforcement practices" that the Knotts court expressly excluded from the scope of its holding. Id. at 284; see also United States v. Pineda-Moreno, 617 F.3d 1120, 1126 (9th Cir.2010) (Kozinski, J., dissenting) ("When requests for cell phone location information have become so numerous that the telephone company must develop a self-service website so that

law enforcement agents can retrieve user data from the comfort of their desks, we can safely say that such 'dragnet-type law enforcement practices' are already in use. This is precisely the wrong time ... to say that the Fourth Amendment has no role to play in mediating the voracious appetites of law enforcement.").

Here, the Appellate Division, with its misplaced reliance on Knotts, failed to recognize that cell phone location tracking is wholly distinguishable from beeper-assisted surveillance, as cell phone tracking is a very different method of gathering information. The beeper utilized by law enforcement in Knotts was primitive compared to more modern cell phone tracking technology. For one, beepers are incapable of storing data; cell phone tracking information, on the other hand, is obtained by cell phone towers and automatically recorded and stored. In addition, the beeper in Knotts, unlike cell phone location tracking, required continual visual surveillance by vehicles and helicopters to ensure continued reception of the beeper's radio signals. Furthermore, the beeper in Knotts was a law enforcement device planted for the purpose of tracking the defendant, while defendant's cell phone was his own personal property, effectively converted by law enforcement into a tracking device without defendant's knowledge or consent.

While a beeper enhances a human sense, cell phone location tracking replaces a human sense with a technological one. Cell phone location tracking is a technological substitute for traditional visual surveillance and substantially expands human capabilities far beyond naked-eye surveillance. The information generated by cell phone location tracking, therefore, is fundamentally different from what may be obtained through human observation – in its precision, in its duration, in its scope, and in the means by which it is collected.

As the Knotts Court prophesied, this type of technological development brings with it the risk that technology will erode privacy rights. Significantly, technology has blurred the line between public and private realms as technology such as cell phone location tracking can now be used to monitor an individual's movements in and out of public and private areas over a period of time. And, this can be accomplished without the type of physical intrusion into person or property historically contemplated by the constitution. Yet, under traditional search and seizure jurisprudence, electronic surveillance of an individual in a public area would typically be permissible, only becoming constitutionally problematic if the individual were to cross into a private area while under electronic surveillance.

Such a result is incongruous. Search and seizure jurisprudence must continue to evolve with technology; the alternative would eventually render the Fourth Amendment largely obsolete. As the United States Supreme Court has aptly advised, "the Fourth Amendment must keep pace with the inexorable march of technological progress, or its guarantees will wither and perish." Kyllo, 533 U.S. 27, 34 (2001); see also United States v. Warshak, 631 F.3d 266, 286 (6th Cir. 2010) ("[a]s some forms of communication begin to diminish, the Fourth Amendment must recognize and protect nascent ones that arise.").

Hence, another critical error in the Appellate Division's reasoning – and one likely to have a profound impact on privacy rights as technology continues to advance – is the court's insistence on analyzing this issue as one of public v. private realms. In other words, the Appellate Division, in mischaracterizing the issue as whether an individual has a "constitutionally protected right of privacy in the movements of his car on public roadways" (Earls, 420 N.J. Super. at 599), failed to recognize that the distinction between public and private areas is no longer an apt one. As technology accomplishes things never previously thought possible, it changes what it means to cross into the private realm. See Susan Brenner, Ubiquitous Technology, 75 Miss. L.J. 1, 83 (2005) ("The physical and informational barriers we once used to

differentiate between our 'private' and 'public' selves are being eroded by technology, and the erosion is accelerating.").

Cell phone location tracking provides law enforcement with a powerful method of tracking individuals as they traverse between public and private zones. An individual, while carrying a cell phone, will often travel between public and private areas, leaving police no way to anticipate prior to obtaining and utilizing the cell phone tracking information whether cell phone location tracking will lead to the discovery of an individual in a public or private area. Thus, were the constitutional analysis to turn on public versus private areas, courts would be required to decide the constitutionality of a search post hoc based on the information the search produced. Yet, just as the State cannot justify a search of a home because the search uncovered evidence, the State should not be permitted to justify a search of the defendant's cell phone location data because the result of the search uncovered a public location. Put differently, privacy rights would be meaningless if the determination of whether a warrant was required could only be made after the search had occurred and the privacy incursion was complete.

Moreover, the Appellate Division's reasoning erroneously suggests that as long as one individual fact is susceptible to human observation in a public place – such as individual's

location at a particular moment on a public road – the State may use any means to monitor and record the individual's location on a continuous basis. This theory has been squarely rejected by the Supreme Court. Kyllo, 533 U.S. at 35. In Kyllo, law enforcement, believing the defendant to be growing marijuana in his house, employed a thermal imager to scan his house and reveal heat signatures. Id. at 29. The thermal scan revealed that a portion of the roof and one wall of the house were relatively hot compared to the remainder of the house and surrounding houses, leading law enforcement to seek a warrant, based on a belief that defendant was employing special lamps to grow marijuana in his home. Id. at 30.

Reversing the denial of the defendant's motion to suppress, the Court held that "[w]here, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." Id. at 40.

The same is true here. T-Mobile's tracking technology is not in general public use, and when the police used this unavailable technology, they located defendant inside a motel room — an area protected by the Fourth Amendment like a home. Stoner v. California, 376 U.S. 483 (1964).

Also critical to the Court's decision in Kyllo was the fact that a technology capable of obtaining images of heat by itself had created a new sense, substituting for human senses, and acting without human limitation or reasoning. 533 U.S. at 40. In addition, the Court, rejecting the State's argument to the contrary, noted that the fact an outside observer might be able to perceive the heat of the home was "quite irrelevant." Kyllo, Id. at 35, n.2. As the Court explained, "[t]he fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment."). Id.

This Court has similarly rejected such an analysis. Notably, this Court has found a legitimate expectation of privacy in phone records, even though the records are disclosed to the phone company (State v. Hunt, 91 N.J. 338, 347 (1982)); in curbside garbage even though the garbage is subject to examination by third parties (State v. Hempele, 120 N.J. 182, 209 (1990)); in bank records, even though the bank records are viewable by bank employees (State v. McAllister, 184 N.J. 17, 26-33 (2005)); and in Internet service provider information even though the information is supplied to the service provider (State v. Reid, 194 N.J. 38 (2008)). Accordingly, the fact that defendant may have partially exposed his location through his travel on public roadways does not justify law enforcement's

warrantless seizure of his cell phone location data. See Cardwell v. Lewis, 417 U.S. 583, 590 (1970) ("The exercise of a desire to be mobile does not…waive one's right to be free of unreasonable government intrusion."); Katz v. United States, 389 U.S. 347, 351 (1967) (suggesting that what an individual "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.").

In fact, individuals, regardless of whether they are traveling on public roadways, reasonably expect their cell phone location information to remain private.[4] Most cell phone users are unaware that cell phone providers automatically obtain and record their cell phone location information. And, perhaps even fewer users consider that this technology "yields and records with breathtaking quality and quantity, [] a highly detailed profile, not simply of where we go, but by easy inference, of our associations-political, religious, amicable and amorous, to name only a few-and of the pattern of our professional and avocational pursuits." People v. Weaver, 12 N.Y.3d 433, 441-42 (2009). Moreover, even if individuals were to have some concept

[4] Underscoring the reasonableness of this expectation are state and federal statutes limiting law enforcement's acquisition of cell phone location data. Under the New Jersey Wiretap Act, N.J.S.A. 2A:156A-1 et seq., law enforcement must, with certain narrow exceptions, obtain a warrant or court order for disclosure of cell phone location data. Similarly, the federal Stored Communications Act, 18 U.S.C. §2703(c)(1), requires a warrant, court order, or consent for the disclosure of cell phone location data.

that their cell phone continuously communicates its location to cell towers, their expectation would be that it was a limited disclosure to the cell phone provider for the purpose of cell phone use; they would not anticipate that their willingness to disclose this information to the cell phone provider to obtain cell phone service would result in release of this information to law enforcement.[5]

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[5] While the United States Supreme Court has adopted a theory of third-party disclosure, concluding that disclosure of information to a third party automatically extinguishes privacy rights, this Court has firmly rejected this approach. State v. Reid, 194 N.J. 386 (2008) ("It is well settled under New Jersey law that disclosure to a third-party provider, as an essential step to obtaining service altogether, does not upend the privacy interest at stake."). As one commentator explained:

> The [United States Supreme Court's] jurisprudence in [third-party disclosure] cases conceptualizes privacy as a form of total secrecy; however, this conception is ill-suited for the circumstances involved in these cases. The people we call, the papers we discard, and our financial records are commonly understood as private matters even though third-parties may have access to (or even possess) that information. We expect privacy because we do not expect unauthorized persons to delve through this information. Indeed, we often share information in various relationships, some of which the law strongly protects, such as those between attorney and client and between patient and physician. Life in the modern Information Age often involves exchanging information with third parties, such as phone companies, Internet service providers, cable companies, merchants, and so on. Thus, clinging to the notion of privacy as total secrecy would mean the practical extinction of privacy in today's

Although a handful of lower courts have addressed the issue of cell phone surveillance, several requiring probable cause for disclosure of cell phone location information,[6] the United States Supreme Court's recent decision in Jones offers little guidance. United States v. Jones, 565 U.S. ___, 132 S.Ct. 945 (2012). In Jones, the Court held that "the attachment of a Global-Positioning-System (GPS) tracking device to an individual's vehicle, and subsequent use of that device to monitor the vehicle's movements on public streets" constitutes a search or seizure within the meaning of the Fourth Amendment." Jones, 132 S.Ct. at 948. The Court reached this conclusion, however,

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> world. In contrast to the notion of privacy as secrecy, privacy can be understood as an expectation in a certain degree of accessibility of information.

Daniel J. Solove, Conceptualizing Privacy, 90 Cal. L. Rev. 1087, 1151-52 (2002) (citations omitted).

[6] In re Application of the U.S. for Historical Cell Site Data, 747 F. Supp. 2d 827 (S.D. Tex. 2010); In re Application of the U.S. for Orders Authorizing the Installation & Use of Pen Registers & Caller Identification Devices on Tel. Nos. [Sealed] & [Sealed], 416 F. Supp. 2d 390 (D. Md. 2006); In re Application of the U.S. for an Order Authorizing the Disclosure of Prospective Cell Site Info., 412 F. Supp. 2d 947 (E.D. Wis. 2006); In re Pen Register, 396 F. Supp. 2d 747 (S.D. Tex. 2005); In the Matter of an Application of the United States for an Order (1) Authorizing the Use of a Pen Register and a Trap and Trace Device and (2) Authorizing Release of Subscriber Information and/or Cell Site Information, 384 F. Supp. 2d 562 (E.D.N.Y. 2005). Other courts have not required probable cause for release of this data. See In re Application of the United State for an Order Relating to Target Phone 2, 733 F. Supp. 2d 939, 941, n. 1 (N.D. Ill. 2009) (listing authorities).

without finding a reasonable expectation of privacy in GPS tracking information. Instead, the Court concluded that because the government had "trespassorily inserted" the GPS tracking device when officers attached the device to the undercarriage of the target vehicle before monitoring the vehicle for four weeks. Id. at 948, 952; see also id. at 957 (Alito, J. concurring) (accusing majority of resolving case involving "a 21st-century surveillance technique" by resorting to "18th-century tort law" concepts of trespass).

To the extent that the United Supreme Court has hesitated to analyze this issue outside of the traditional concepts of physical trespass, this Court should rely on Article I, Paragraph 7 of the New Jersey Constitution to preserve privacy rights in this new age of surveillance technology by recognizing an expectation of privacy in cell phone location data. This Court has been resolute in its willingness to "part company" with the United States Supreme Court when that Court "has provided our citizens with inadequate protection against unreasonable searches and seizures."[7] State v. Hempele, 120 N.J.

[7] For instance, in State v. Hunt, 91 N.J. 338, 348 (1982), the Court held that Article I, Paragraph 7 mandates that police may not seize telephone toll-billing records without a warrant, even though Smith v. Maryland, 442 U.S. 735 (1979), holds to the contrary under the Fourth Amendment. Likewise, citizens of New Jersey have automatic standing in search and seizure cases whenever they are charged with possession of the seized items, unlike under the federal constitution. State v. Alston, 88 N.J. 211, 226-229 (1981). Similarly, in State v. Novembrino, 105

182, 196 (1990). Indeed, this Court has a "steadily evolving commitment" to "provide enhanced protection for our citizens against encroachment of their right to be free from unreasonable searches and seizures." State v. Pierce, 136 N.J. 184, 209 (1994). Accordingly, this Court should rely upon the New Jersey Constitution to hold that defendant has a reasonable expectation of privacy in his cell phone location data and the warrantless acquisition of that data deprived defendant of his state constitutional rights, mandating suppression of the evidence ultimately seized from his motel room.

N.J. 95, 145 (1987), the Court held that the "good-faith exception" to the Fourth Amendment is not a valid exception to Article I, Paragraph 7, and in State v. Hempele, 120 N.J. 182, 195-215 (1990), this Court rejected the rule of California v. Greenwood, 486 U.S. 35, 39 (1988), that garbage may be seized from a homeowner's curb and searched by police without a warrant. Moreover, in State v. Tucker, 136 N.J. 158, 166-169 (1994), this Court held that, in contrast with the Fourth Amendment, the New Jersey Constitution prohibits the police from stopping a defendant solely because he ran when he saw them. In addition, in State v. Carty, 170 N.J. 632, 647 (2002), the Court ruled that for a consent to search a motor vehicle and its occupants to be valid under the New Jersey Constitution, law enforcement personnel must have a reasonable and articulable suspicion of criminal wrongdoing, beyond the initial valid motor vehicle stop, prior to seeking consent to search. And, in State v. McAllister, 184 N.J. 17 (2005), this Court held, in contrast to the United States Supreme Court's decision in United States v. Miller, 425 U.S. 435 (1976), that individuals have a legitimate expectation of privacy under the state constitution in their bank records. More recently, this Court, departing from New York v. Belton, 453 U.S. 454 (1981), held in State v. Eckel, 185 N.J. 523 (2006), that the New Jersey Constitution prohibits a search incident to arrest of a vehicle in cases where the occupant of the vehicle has already been removed from the vehicle and secured elsewhere.

Indeed, the degree of privacy encroachment posed by cell phone location tracking requires that acquisition of cell phone data be subject to the warrant requirement and that suppression be the remedy for the failure to obtain a warrant. A formidable investigative tool, cell phone tracking is hidden, intrusive, and far-reaching, and as such, should be subject to the same degree of constitutional protection as other searches and seizures. See American Civil Liberties Union, Cell Phone Location Tracking Public Records Request, (April 4, 2012), http://www.aclu.org/protecting-civil-liberties-digital-age/cell-phone-location-tracking-public-records-request (data requests from over 200 local law enforcement agencies regarding cell phone tracking reveal that cell phone tracking is "routine;" only ten agencies reported that they have never tracked cell phones). A grand jury subpoena relevancy standard, while perhaps sufficient for bank records or Internet service provider information, is not exacting enough to protect individuals from the dramatically intrusive nature of cell phone tracking. See United States v. Maynard, 615 F.3d 544, 562 (D.C. Cir. 2010), aff'd, United States v. Jones, 565 U.S. ___, 132 S.Ct. 945 (2012) ("A person who knows all of another's travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or

political groups—and not just one such fact about a person, but all such facts."); People v. Weaver, 909 N.E.2d 1195, 1199 (N.Y. 2009) (recognizing that electronic tracking "may reveal trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on.").

In sum, cell phone location tracking allows for an unprecedented incursion into privacy interests, requiring that law enforcement's use of this surveillance technology be subject to judicial oversight through a warrant requirement. As several courts have recognized, electronic surveillance can reveal not only a person's movements and location, but also a great deal about their values, associations and beliefs. Used with a warrant requirement, cell phone tracking technology gives law enforcement a powerful crime fighting tool that will not invade privacy unnecessarily. Without a warrant requirement, cell phone location tracking will lead to the evisceration of meaningful privacy rights.

CONCLUSION

In all other respects, defendant relies upon his Appellate Division brief. For the above stated reasons and for the reasons set forth in defendant's Appellate Division brief, the denial of defendant's motion to suppress must be reversed.

Respectfully submitted,

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