BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 15-CF-322

PRINCE JONES, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

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Cr. No. 2013-CF1-18140

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* Authorities upon which we chiefly rely are marked with asterisks.

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ISSUE PRESENTED

Whether the trial court erred by denying appellant's motion to suppress evidence, where the use of a cell-site simulator does not implicate the Fourth Amendment and, even if an unlawful search occurred, the same evidence would lawfully have been inevitably discovered, or was otherwise not subject to exclusion.

COUNTERSTATEMENT OF THE CASE

On January 29, 2014, appellant was charged by indictment with two counts of first-degree sexual abuse while armed (D.C. Code §§ 22-3001(a)(1) and (2), -3020(a)(5), -3020(a)(6), -4502); two counts of armed kidnapping (D.C. Code §§ 22-2001, -4502); four counts of armed robbery (D.C. Code §§ 22-2801, -4502); and one count of threats (D.C. Code § 22-1810) (R. 25).[1] After a jury trial from October 29 to November 13, 2014, before the Honorable Jennifer A. Anderson, the jury found appellant guilty of all charges (R. A. at 29, 35-36; R. 58). On February 27, 2015, Judge Anderson sentenced appellant to a total of 792 months' incarceration, followed by lifetime supervised release (R. 71). Appellant noted a timely appeal on March 25, 2015 (R. 72).

Appellant's Motion to Suppress Evidence

On January 23, 2014, appellant moved to suppress evidence, alleging that "[a]t the time that MPD [Metropolitan Police Department] officers observed [appellant in the driver's seat of a car in the 4000 block of Minnesota Avenue], officers did not have a search or arrest warrant nor did they possess the required probable cause or articulable suspicion to conduct a legal search or seizure" (R. 24 at 2). The government's opposition stated that MPD used "data from the cellular phone companies as well as cellular tracking technology to track the complainants' [stolen phones] and [appellant's] phone[]" to the arrest location (R. 35 at 6). The government argued that this information, together with the fact that appellant matched the description provided by

[1] "R." refers to the record on appeal. "App." refers to the Limited Appendix for Appellant, which was filed with Appellant's Brief. "Tr." refers to the transcripts of the trial court proceedings on the date and page indicated.

the complainants and "had a phone in his hand that matched the description of one of the phones that was stolen" provided both reasonable, articulable suspicion to seize appellant and probable cause to arrest him (*id.* at 14-15).

In a series of subsequent discovery letters, the defense requested, and the government provided, additional details regarding how the phones were located (see R. 37-42).[2] Appellant filed a supplemental motion to suppress on October 17, 2014, asserting, *inter alia*, that the use of cell phone tracking technology violated the Fourth Amendment (R. 49 at 4).[3] The government filed an opposition on October 17, 2014 (App. 1).

A hearing on appellant's motion was held on October 17 and 24, 2014 (R. A at 26). The government presented two witnesses: MPD Sergeant Todd Perkins and Detective Rachel Pulliam. After the hearing, the trial court found that "the circumstantial evidence is very strong . . . that it was the complainant's phone and not the defendant's phone that they were using" with the cell-site simulator and that "the defendant clearly has no standing to object to that" (10/24/14 Tr. 101-02).

On October 27, 2014, appellant moved to reconsider the denial of his motion, asking that his motion be granted or, in the alternative, that the trial court reopen the hearing to allow him to

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[2] The government also moved to limit disclosure of law enforcement sensitive evidence after appellant moved to compel additional materials about the technology used to locate the phones (R. 48 at 9). The government explained that it "does not seek to protect the fact that a cell site simulator was used during the investigation of this case . . . nor does the Government seek to protect a general description of how the cell site simulator device operated;" rather, the government sought only to prevent the disclosure of "law enforcement operational details regarding the cell site simulator used in this case" (*id.* at 9-10). The trial court did not grant the government's motion, but instead explained that it was "inclined to hear [the government witness's] testimony and then kind of see where we are" (10/17/14 Tr. 7). Ultimately, the government did not invoke the law enforcement privilege.

[3] On appeal, appellant "challenges only the warrantless use of the cell site simulator" (Appellant's Brief at 3 n.1).

present expert testimony (R.53 at 5). The trial court allowed appellant to present expert testimony and, on October 29, 2014, appellant presented the testimony of Ben Levitan (10/29/14 Tr. 219). At the conclusion of the hearing on October 29, 2014, the trial court again denied appellant's motion to suppress (*id.* at 309-10).

The Government's Evidence

Around 12:30 a.m. on October 9, 2013, MPD's Sexual Assault Unit received a report that Tamara Shipp had been sexually assaulted and that she and her cousin, Christina Hancock, had also been robbed (10/24/14 Tr. 5-6, 9). Ms. Shipp told officers that she had advertised on the website "Backpage.com" and appellant contacted her on her cell phone in response to the advertisement (*id.* at 6-7).[4] They arranged to meet on B Street, SE (*id.*). Once there, they walked inside 4452 B Street, where appellant held a black and silver folding knife to her and forced her to perform oral sex (*id.*). Appellant then walked her back to her car where her cousin, Ms. Hancock, was waiting for her (*id.* at 6). Appellant robbed them of their cell phones, purse, and other items (*id.*). Ms. Shipp described appellant as "[a] black male, medium complexion, slim build . . . [with] a scraggly beard" and said that he was wearing a "hoodie and black Foamposites or Lebrons" (*id.* at 7).

Around 1:30 a.m. on October 11, 2013, officers received a report that Stephanie Hawkins-Ross had been sexually assaulted at 4452 B Street (10/24/14 Tr. 8-9). Ms. Hawkins-Ross informed officers that she had posted an escort advertisement on Backpage.com and was contacted by appellant (*id.* at 9). She met appellant on B Street and after walking into 4452 B

[4] Initially, Ms. Shipp did not tell the officers that appellant had contacted her in response to her online advertisement because she was worried about what the officers would think about her and her children (10/24/14 Tr. 45-46).

Street, he brandished a silver folding knife with a sliver clip and forced her to perform oral sex on him at knifepoint (*id.*). Appellant then walked her back to her car, got into the car with her, and instructed her to drive to the back parking lot while he went through her belongings (*id.*). Appellant took two cell phones—a flip phone and a Samsung Galaxy phone—as well as her purse and other items (*id.* at 10-11). Ms. Hawkins-Ross described appellant as a "black male, medium complexion" with a "partial beard" in his twenties, wearing black-framed glasses and a "hoodie that was pulled around his face to obstruct anything past his immediate hairline" (*id.* at 11-12).

Detectives asked MPD's technical services unit to compare Ms. Shipp's and Ms. Hawkins-Ross's telephone records to determine if they were contacted by the same number (10/24/14 Tr. 12-13). The technical services unit obtained Ms. Shipp's and Ms. Hawkins-Ross's phone records from Sprint and Verizon, and found that the same number, 240-313-5281, had contacted both of them (10/17/14 Tr. 10-12). Officers then requested subscriber information, call records, and location information from AT&T for appellant's phone number, 240-313-5281 (*id.* at 16-17).[5] Because appellant's AT&T phone was a prepaid phone, no subscriber information was available (*id.* at 17). Every 15 minutes, AT&T sent the officers an email containing the

[5] Officers did not obtain a warrant for this information, but rather requested this information from AT&T after declaring "exigent circumstances" (10/17/14 Tr. 13-14). Sergeant Todd Perkins testified that "[t]he information that [he] had at the time was that there was a person attempting to arrange meetings with females using the same phone. As they would meet, some type of sexual offense would occur." (*Id.* at 15.) At the time, Sergeant Perkins believed that three sexual assaults had occurred within the previous 24-hours and that the suspect was armed; he later learned that only two of the offenses involved sexual assaults (*id.* at 15-16, 64). Based on this information, his "inference assuming there was going to be a fourth one" (*id.* at 79).

phone's approximate latitude and longitude (*id.* at 18). The officers used a mapping program to create a map using the AT&T location information (*id.*).[6]

At the same time, officers requested location information from Sprint for Ms. Shipp's stolen phone (10/17/14 Tr. 22-23). Sprint provided the location information for the phone at five-minutes intervals, and automatically generated a map for the stolen phone (*id.*). Based on the location information, officers determined that the two phones were near Minnesota Avenue and Benning Road and "were traveling in the same general direction, same general area as if they were together" (*id.* at 26-27).[7]

Officers went to the area around Minnesota Avenue and Benning Road, NE and used a cell-site simulator to more precisely locate one of the phones (10/17/14 Tr. 29, 41-42; *see also* App. F and G).[8] Sergeant Perkins could not recall which phone – appellant's AT&T phone or the stolen Sprint phone – the cell-site simulator was used to locate (10/17/14 Tr. 42).[9]

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[6] The AT&T location information included the location of the cell tower that the phone was communicating with and the side of the tower that the signal was coming from (10/17/14 Tr. 80). This allowed the officers to estimate the phone's location within a "several hundred meter" area (*id.*).

[7] Ms. Hawkins-Ross's Sprint phone was turned off, and therefore its location information was not available (10/17/14 Tr. 26; *see also* App. E, Ex. 1). Ms. Hawkins-Ross's other stolen phone was a Verizon phone, which "is much harder to locate" because Verizon does not provide GPS information to law enforcement (*id.* at 24). For the Verizon phone, the officers requested the installation of a pen register, which captures information when a call is made or received, including the cell tower that the phone communicated with (*id.* at 23-24). MPD accesses this information on a computer located in an MPD facility with third-party software (*id.* at 25).

[8] Initially, the AT&T and Sprint location information indicated that the phones were in Capitol Heights, but then the phones started moving toward Kenilworth Avenue (10/17/14 Tr. 95-96).

[9] Sergeant Perkins pointed to two facts that suggested to him that they had used the cell-site simulator on the stolen Sprint phone: (1) the information from Sprint included the MSID number necessary to use the cell-site simulator, but on the radio run, the officers repeatedly asked for the IMSI number for the AT&T phone that is necessary to use the cell-site simulator and (2) the phone records for stolen Sprint phone contain an entry at 10:19 CST (*i.e.*, 11:19 ET) where

(continued . . .)

MPD has two trucks containing cell-site simulators, but only one simulator was working at the time (10/17/14 Tr. 66). Officers program a unique identification number (i.e., an MSID or IMSI number) that corresponds to a particular cell phone into the simulator (*id.* at 44). The simulator then "listens" for the signals that a phone constantly transmits as it communicates with nearby cell towers (*id.* at 44, 97). When the simulator finds the phone it is listening for, "it grabs it and holds on to it for a minute" (*id.*).[10] The simulator has a directional antenna that measures signal strength and points the officers toward the phone it is programmed to search for (*id.* at 45-46, 49). The simulator indicates the direction of the phone with an arrow on a 360-degree antenna and communicates the signal strength "by saying something like 75 to 80 and 22 feet" (*id.* at 98-99).[11] It can locate a cell phone as long as the phone is "powered on," and does not require any type of "active use" of the phone, "because [a] phone is always transmitting and receiving data to and from the cell phone tower" (*id.* at 99-100).

Because a cell-site simulator does not work until it is close to the phone it is tracking, the officers drove around for approximately 30-45 minutes using the simulator before it directed them to the 4000 block of Minnesota Avenue (10/17/14 Tr. 89-90, 94-95). There, the simulator

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(. . . continued)
Sprint was "unable to locate that phone," which is consistent with what happens when the cell-site simulator is connected to the phone (10/17/14 Tr. 42-43, 121).

The prosecutor later informed the court that, after rehearing the radio run, she heard Sergeant Perkins ask for a password to access records from AT&T and another voice stated "something to the effect of it's the same as on the e-mail" (1029/14 Tr. 286-87). Sergeant Perkins had no independent recollection about whether he then accessed the AT&T records to get the IMSI number for appellant's phone (*id.*).

[10] While the simulator is communicating with the phone, the phone "cannot contact immediately with an actual [cell] tower," because the simulator generally prevents communication between the phone and the cell tower (10/17/14 Tr. 44, 103)

[11] The simulator does not capture voice or call data (10/17/14 Tr. 100).

pointed to a red Saturn parked on the west side of Benning Road (*id.* at 48-49). As the officers drove by the Saturn, they could see appellant, a tall, thin, black male with a long scruffy beard and glasses, sitting in the driver's seat with a black flip phone in his hand (*id.* at 49-50).[12] A woman was in the passenger seat (*id.* at 49). The officers stopped; Detective Regan and Officer Overmyer walked over to appellant, told him that they were investigating a criminal matter, and asked him to step out of the car (*id.* at 51-52, 111). Appellant complied, and Officer Overmyer "almost immediately" saw the clip of a folding knife protruding from appellant's pocket (*id.* at 53, 111, 114-15). Appellant was handcuffed, and Officer Overmyer retrieved the knife (*id.* at 54). Sergeant Perkins started calling the stolen phones and heard the flip phone sitting on the Saturn's driver's seat or center console ring (*id.* at 55).[13]

Officers from the technical services unit informed the sexual assault detectives assigned to the case that they had located appellant (10/24/14 Tr. 16). Detectives Pulliam and Griffin arrived five to ten minutes later (*id.* at 59). When they arrived, Detective Griffin spoke with appellant, who was standing under a covered area along the side of a building (*id.* at 19-21, 66). Detective Griffin asked appellant for his "biographical information" and appellant stated that he lived at 566 Wilson Bridge, the address listed on Ms. Hawkins-Ross's stolen identification card (*id.*).

Detective Pulliam, and later Detective Griffin, spoke with the woman sitting in the Saturn, appellant's girlfriend Nora Williams (10/24/14 Tr. 21-22). They offered to speak with her

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[12] Appellant's appearance was consistent with the lookout description the officers had received, except for his clothing (10/17/14 Tr. 107-09). The officers asked for a hairstyle description over the radio, but did not receive a response (*id.* at 107-08).

[13] Cell phone records show that two calls were placed by officers to the stolen flip phone at 10:27 a.m. and 11:38 a.m. (10/17/14 Tr. 56).

inside their police vehicle because it was raining, and informed her that she was not under arrest (*id.* at 22-23). During their conversation, the detectives heard phones ringing in Ms. Williams's purse (*id.* at 23). Ms. Williams told them that one of the phones belonged to appellant, and the detectives asked her for consent to search her purse (*id.* at 23-25).[14] Ms. Williams consented to a search, and detectives recovered four phones from her purse: Ms. Williams's phone; appellant's black AT&T iPhone; Ms. Hancock's phone; and Ms. Hawkins-Ross's Samsung Galaxy phone (*id.* at 26, 28). The police subsequently obtained a search warrant to search the red Saturn, and recovered Ms. Shipp's phone, Ms. Hawkins-Ross's flip phone, and other stolen items from inside the car (*id.* at 30; *see also* App. H). Officers later obtained search warrants to search the contents of appellant's phone, Ms. Williams's phone, and the four stolen phones (*id.* at 31; *see also* App. I). After appellant's arrest, photo arrays were shown to Ms. Shipp, Ms. Hancock, and Ms. Hawkins-Ross (*id.* at 31-34).[15]

As noted *supra*, the trial court denied appellant's motion after hearing the government's evidence, finding that "the circumstantial evidence is very strong . . . that it was the complainant's phone and not the defendant's phone that they were using" with the cell-site simulator, and that "the defendant clearly has no standing to object to that" (10/24/14 Tr. 101-02).

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[14] Detective Griffin "explained to her what was going on, that the defendant was going to be placed under arrest, and that [the police] believe[d] that there might be evidence inside her purse . . . and would either have to take the purse and put it into police custody until [they] could get a search warrant and then search it or that she could give [them] consent to search it" (10/24/14 Tr. 25).

[15] Appellant withdrew his motion to suppress two of the three identifications because Ms. Shipp initially stated that "none of these are him" and Ms. Hancock "said she was not sure" (10/24/14 Tr. 31-33). Only Ms. Hawkins-Ross identified appellant by pointing to his photograph and saying "it kind of looks like him" (*id.* at 34).

The Defense Evidence

Pursuant to appellant's request to reopen the motions hearing, appellant presented the testimony of Ben Levitan, a telecommunications consultant and engineer, who testified as an expert in the area of "cell phone networks and systems forensics and analysis" (10/29/14 Tr. 223).[16] Mr. Levitan explained that when a cell phone is on, it will "connect to the strongest signal, which is generally going to be the closest cell tower" and that "[w]hen a cell phone and a cell tower are connected, they exchange information" (*id.* at 227-28). A cell phone may be unable to connect to a cell tower for a number of reasons: the cell phone is off; there is poor coverage; something is "blocking" the cell tower; there is interference or "electronic noise" in the area; or a stronger signal is present such as a cell-site simulator (*id.* at 228). If a cell phone is not connected to a cell tower, any attempt to communicate will fail (*id.* at 230, 237).

Mr. Levitan reviewed the phone records for the stolen Sprint phone and noted that the "request for a location failed" at 11:19 a.m., and also at 9:09 a.m. and 9:19 a.m. (*id.* at 234-37).[17] The failure could have been for any of the reasons previously noted, or simply because "[t]his stuff [*i.e.*, GPS] only works 95 percent of the time, so it could have failed just because the system didn't work" (*id.* at 237, 269). The Sprint phone successfully connected to a Sprint tower several times (*id.* at 237).[18]

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[16] Mr. Levitan adopted as part of his testimony an affidavit filed in connection with appellant's supplemental motion to suppress (10/29/14 Tr. 225-26; *see also* App. E, Ex. 2).

[17] The times reflected in the Sprint records are 10:19 CST, 8:09 CST, and 8:18 CST (10/29/14 Tr. 234-37). Other than when specifically noted, the times referenced herein are adjusted to Eastern Time.

[18] The Sprint phone contacted a Sprint tower at 10:56 a.m., 11:12 a.m., 11:20 a.m., 11:27 a.m., and 11:45 a.m. (10/29/14 Tr. 234-37; *see also* App. E, Ex. 1).

Mr. Levitan also reviewed the phone records for appellant's AT&T phone (10/29/14 Tr. 238-39). The records indicate that seven calls failed between 11:23 and 11:31 a.m. (*id.* at 239).[19] Again, there was no way to determine why the calls failed (*id.* at 241).

Finally, Mr. Levitan noted that the subscriber information for the AT&T phone includes the IMSI number for that phone (10/29/14 Tr. 243-44).

The Trial Court's Factual Findings and Ruling

The trial court did not find that the police had used the cell-cite simulator to track appellant's phone rather than Ms. Shipp's phone. Instead, the trial court concluded that "I can't tell with any great degree of certainty whose phone was [tracked]" by the simulator (10/29/14 Tr. 302-303). Appellant suggested that the 11:19 a.m. entry on Ms. Shipp's Sprint phone records stating that no location information was available indicated that MPD had unsuccessfully attempted to use the simulator on that phone; but the trial court could not "determine, based upon that, that it must have been that he was using Sprint and was unsuccessful with using Sprint" (*id.* at 302). Rather, the trial court noted that "there are multiple reasons for a call not to connect" (*id.*). The trial court further found that "[t]here was no testimony about switching phones" and, therefore, the court could not "conclude, based on that record, that he switched phones" (*id.* at 306).

Instead, the trial court found that, even assuming that the police had used the simulator on appellant's phone, they would have inevitably discovered the same evidence had they used the simulator on Ms. Shipp's Sprint phone:

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[19] A text message was sent from appellant's phone at 11:25 a.m. that says "Our call dropped" (10/29/14 Tr. 248-50).

> [The sergeant's testimony was that when they were tracking the cell site information, before they got to the use of the cell site simulator, he testified that they were able to tell that the phones were together. So I do think that even if – even if they were using the AT&T phone on the cell site simulator, that had they switched over to the Sprint – to use the Sprint number instead . . . I think they would have eventually gotten to the exact same place because the phones were together. And it's the same technology . . . . So, I do think, in terms of inevitable discovery, they would have gotten to the exact same place. (10/29/14 Tr. 309-10).

Accordingly, the trial court denied appellant's motion (*id.* at 310).[20]

The Trial

The Government's Evidence

On October 8, 2013, Tamara Shipp, who was an escort on Backpage.com, posted an advertisement containing her telephone number (10/30/14 at 51-55, 95-96). Appellant called Ms. Shipp and arranged to meet her (*id.* at 54-56, 100, 114). Appellant texted Ms. Shipp with the address where they arranged to meet – 4452 B Street, SE (*id.*).

Ms. Shipp and her cousin, Christina Hancock, drove from Maryland to the B Street address (*id.* at 58, 116). Appellant was standing outside the building and was wearing a grey sweatshirt with the hood up and string tied, grey jean shorts, and black tennis shoes (*id.* at 58). Ms. Hancock remained in the car while Ms. Shipp approached appellant (*id.* at 58-59). Appellant led Ms. Shipp down to the basement (*id.* at 58-59). Once inside, appellant pushed Ms. Shipp

[20] The trial court declined to address whether use of a cell-site simulator implicates the Fourth Amendment. The trial court further found that, if a warrant was required, exigent circumstances did not justify the warrantless use of the simulator here (10/29/14 Tr. 311). The trial court noted the amount of time that had elapsed before the cell-phone tracking began and the fact that two different police units were working on the case (*id.* at 310-11).

against a wall, held a folding knife with a black handle to her neck, and forced her to perform oral sex on him (*id.* at 59, 65-67).[21]

Appellant forced Ms. Shipp back to her car at knifepoint (10/30/14 Tr. 67-68). Appellant told Ms. Hancock to "open the fucking door," and got into the back seat (10/29/14 Tr. 393-94). Appellant ordered Ms. Shipp and Ms. Hancock to "give me everything you got" (*id.* at 394). Appellant took a Sprint cell phone, a pink and green striped purse, and $140 from Ms. Shipp,[22] as well as an iPhone from Ms. Hancock (10/30/14 Tr. 70-71, 74-75). Appellant demanded their passwords to both phones (*id.* at 70, 74, 75). Appellant then exited the car and fled (*id.* at 75). Ms. Shipp and Ms. Hancock flagged down two nearby officers, and Ms. Shipp reported that she had been robbed and forced to perform oral sex at knifepoint (10/29/14 Tr. 359, 403, 427).[23]

On October 9, 2013, appellant drove his fiancée, Nora Williams, to her internship (11/4/14 Tr. 380). When Ms. Williams got into appellant's car, she saw a white iPhone and tried to use it, but it was locked (*id.* at 386). She handed the phone to appellant and he handed it back to her unlocked (*id.* at 388). Ms. Williams saw that the email on the phone was associated with Christina Hancock, which she did not recognize (*id.* at 390). Ms. Williams reset the phone and told appellant she was going to sell it (*id.* at 393).

Ms. Williams spent the next day, October 10, 2013, with appellant (11/4/14 Tr. 395-96). They had sex in appellant's car outside Ms. Williams's grandfather's house in Capitol Heights

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[21] Appellant put on a condom before ejaculating (10/30/14 Tr. 66-67).

[22] Ms. Shipp testified that she had $140 from an earlier escort call in Oxon Hill, Maryland, however, neither Ms. Shipp's nor Ms. Hancock's cell phone records confirmed that they had been in Oxon Hill, Maryland earlier that night (10/30/14 Tr. 67, 108-09, 151; 11/5/14 Tr. 502, 538-39).

[23] Ms. Shipp did not wait for sexual assault unit detectives or see a sexual assault nurse examiner ("SANE") (10/29/14 Tr. 360, 363; 10/30/14 Tr. 126-27).

from 11:00 p.m. on October 10, 2013, until approximately 1:00 a.m. on October 11, 2013 (*id.*). Ms. Williams then went inside to take a shower, and when she got out of the shower, she called appellant's phone, but he did not answer (*id.* at 396-98). Ms. Williams did not look to see whether he was still parked outside (*id.* at 400).

Meanwhile, on the evening of October 10, 2013, Stephanie Hawkins-Ross posted an advertisement on Backpage.com that included her phone number (11/3/14 Tr. 33, 36, 101-04). Just after midnight on October 11, 2013, appellant called Ms. Hawkins-Ross and arranged to meet her at 4452 B Street (*id.* at 38-39, 42, 106). When she arrived, she saw appellant, who had a beard and wore a hoodie and rectangular glasses (*id.* at 44-45). Appellant led her downstairs to a laundry room and put a silver folding knife with a silver clip to her neck (*id.* at 43-47). Appellant ordered her to the ground and forced her to take off her clothes (*id.* at 48). Appellant stole her Verizon flip phone and $100 (*id.* at 49, 52, 58). Appellant then ordered Ms. Hawkins-Ross to get dressed and remain on her knees, and then forced her to perform oral sex on him without a condom (*id.* at 50-51). Appellant ejaculated in her mouth (*id.*).

Appellant then forced Ms. Hawkins-Ross to her car at knifepoint and got into the passenger seat (*id.* at 55). He stole her black Anne Klein purse containing $60, her driver's license, SmarTrip cards, a social security card a Bank of America card, and a Navy Federal Credit Union card, as well as a Sprint Samsung Galaxy cell phone and her cell phone chargers (*id.* at 55-58). Ms. Hawkins-Ross jumped out of the car and ran toward Benning Road (*id.* at 59-60). Appellant chased her and yelled, "I'm really going to kill you now, bitch" (*id.* at 60). Ms. Hawkins-Ross flagged down a bystander and used that person's cell phone to call the police (*id.* at 61, 64).

After returning to 4452 B Street with the police, Ms. Hawkins-Ross coughed up mucus and spit it onto the grass (11/3/14 Tr. 66). The police collected the spit and samples from a SANE examination Ms. Hawkins-Ross subsequently underwent at Washington Hospital Center (*id.* at 10, 16, 140). DNA testing identified appellant's semen in the spit collected from the grass and in oral swabs from the SANE examination (11/4/14 Tr. 324, 327).[24]

After Ms. Hawkins-Ross ran from appellant, he called Ms. Williams back and told her that he had been asleep (11/4/14 Tr. 398-400). Ms. Williams came out and got into his car (*id.* at 400-01). She noticed a pink striped bag in appellant's car, and when she looked through it she saw two SmarTrip cards, a Bank of America card, a Navy Federal bank card, and a piece of paper with numbers written on it that she assumed were personal identification numbers (*id.* at 402-04). Ms. Williams also saw a black Samsung Galaxy phone and a black flip phone, and put the pink and black case that was on the black Samsung Galaxy phone on her phone (*id.* at 404, 407).

Appellant drove Ms. Williams to Wawa, where they used Ms. Hawkins-Ross's Bank of America card to buy things (11/4/14 Tr. 409-10; 11/5/14 Tr. 492). They went to a Bank of America ATM, where Ms. Williams used a PIN number that appellant gave her to withdraw over $100 from Ms. Hawkins-Ross's account (11/4/14 Tr. 411, 413). The ATM security camera showed Ms. Williams reacting excitedly when she successfully withdrew the money (*id.* at 412-13). Appellant then took her back to her grandfather's house (*id.* at 414).

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[24] After appellant's arrest, police obtained a buccal swab that was used to develop appellant's DNA profile (11/5/14 Tr. 495-96). The sperm-fraction of the material recovered from the grass matched appellant's DNA profile from the buccal swab, and the non-sperm fraction matched Ms. Hawkins-Ross's DNA profile (11/4/14 Tr. 324, 327). Police also photographed appellant's shaved groin and introduced the photograph at trial (11/5/14 Tr. 221-22).

Later during the day on October 11, 2013, appellant picked Ms. Williams up to drive her to her internship (11/4/14 Tr. 415). Appellant parked in the 4000 block of Minnesota Avenue, NE, near Ms. Williams's internship site (11/3/14 Tr. 174; 11/4/14 Tr. 415-16). While they sat in the car, police approached and arrested appellant (11/3/14 Tr. 174-76). A black and silver folding knife was recovered from appellant's pocket (*id.* at 176, 196). When Detective Griffin arrived, he asked appellant where he lived and appellant responded, "566 Wilson Bridge Road . . . in Oxon Hill, Maryland," the address listed on Ms. Hawkins-Ross's stolen identification card (*id.* at 188-89).

Detectives spoke with Ms. Williams and recovered four cell phones from her purse: (1) Ms. Hancock's white iPhone; (2) Ms. Williams's Samsung Galaxy phone; (3) Ms. Hawkins-Ross's Samsung Galaxy phone; and (4) appellant's black iPhone (11/3/14 Tr. 199, 201-03).[25] Officers later searched appellant's car and found Ms. Hawkins-Ross's Verizon flip phone, Ms. Shipp's Sprint phone, and a Cricket phone belonging to appellant (*id.* at 195, 206, 207).[26] Other

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[25] Ms. Hancock identified her white iPhone (10/29/14 at 397). Ms. Hawkins-Ross identified her Samsung Galaxy phone and her pink and black cell phone case, which was on Ms. Williams's Samsung Galaxy phone (11/3/14 Tr. 74-76, 79, 81-83). Ms. Williams identified her Samsung Galaxy phone and appellant's black iPhone (11/4/14 Tr. 363, 371, 373, 375).

Detective Pulliam testified that the black iPhone was associated with the number 240-313-5281, and that the web history revealed numerous visits to Backpage.com including visits to Ms. Shipp's and Ms. Hawkins-Ross's advertisements (11/4/14 Tr. 252-53, 255-59). Extraction reports and call logs from Ms. Shipp's and Ms. Hawkins-Ross's phones showed calls and text messages from appellant's number on October 9 and 11, 2013, respectively (*id.* at 267, 273-76, 347-48).

[26] Ms. Hawkins-Ross identified her Verizon flip phone (11/3/14 Tr. 74-76, 79, 81-83). Ms. Williams testified that appellant had a cracked Cricket phone in October 2013 and was switching to his iPhone (11/4/14 Tr. 366-67, 371).

items including Ms. Shipp's green and pink purse and Ms. Hawkins-Ross's cell phone chargers and SmarTrip cards were also found in appellant's car (*id.* at 210, 212-14).[27]

An expert in the analysis of call detail and historical cell-site records examined the records from appellant's iPhone and the complainant's phones (11/5/14 Tr. 502-04). Approximately 12 hours after Ms. Shipp was sexually assaulted and she and Ms. Hancock were robbed, Ms. Shipp's, Ms. Hancock's, and appellant's iPhone were all used to make calls near 1679 Fort Davis Street, SE, where appellant's mother lived (*id.* at 525-29; 11/4/14 Tr. 341). Shortly after Ms. Hawkins-Ross was sexually assaulted and robbed, her phone and appellant's iPhone were used in close proximity (11/5/14 Tr. 535).

After appellant's arrest, Ms. Shipp, Ms. Hancock, and Ms. Hawkins-Ross were separately shown photo arrays containing appellant's photograph. Ms. Shipp initially stated, "[N]one of these are him," and then selected someone other than appellant (10/29/14 Tr. 376). Ms. Hancock did not identify any photographs (*id.* at 382). Ms. Hawkins-Ross pointed to appellant's photograph and said, "[I]t kind of looks like him" (11/3/14 Tr. 155-56). None of the complainants identified appellant in court.

The government also introduced evidence that appellant used to stay at 4452 B Street, SE, in 2005 and 2006 (11/4/14 Tr. 345; 11/5/14 Tr. 490).

[27] Ms. Shipp identified her green and pink purse (10/30/14 Tr. 70-71).

ARGUMENT

The Trial Court Did Not Err by Denying Appellant's Motion to Suppress.

Contrary to appellant's argument (at 24-50), the trial court did not err by denying his motion to suppress. The warrantless use of a cell-site simulator to locate a cell phone is not a search under the Fourth Amendment. Moreover, even assuming *arguendo* that it is, and that appellant's phone was unlawfully searched, appellant's motion to suppress was properly denied under the inevitable-discovery doctrine.

A. Standard of Review

"On appeal from the denial of a motion to suppress, the scope of [this Court's] review is limited." *Womack v. United States*, 673 A.2d 603, 607 (D.C. 1996) (citations omitted). This Court merely ensures that the trial court had a substantial basis for concluding that no constitutional violation occurred. *Umanzor v. United States*, 803 A.2d 983 (D.C. 2003) (citing *Thompson v. United States*, 745 A.2d 308, 312 (D.C. 2000)). In addition, this Court views the evidence presented at the suppression hearing in the light most favorable to the prevailing party, drawing all reasonable inferences in that party's favor, and reviews factual findings only for clear error. *See Robinson v. United States*, 76 A.3d 329, 335 (D.C. 2013). This Court reviews de novo the trial court's finding that no Fourth Amendment violation occurred. *Id.*

B. The Use of a Cell-Site Simulator Did Not Violate the Fourth Amendment.

Appellant alleges (at 24-50) that the government used a cell-site simulator to locate his cell phone and asks this Court to suppress a number of pieces of evidence as fruits of that search. But the record does not establish that any search of appellant's cell phone occurred. As the trial

court found, "based upon this evidence, I can't conclude which phone [MPD] was using" with the cell-site simulator (10/29/14 Tr. 302-03). Appellant bears the burden of proving that the police violated his Fourth Amendment rights. *Gordon v. United States*, 120 A.3d 73, 78 (D.C. 2015). In *(Cecil) Jones v. United States*, 362 U.S. 257 (1960), the Supreme Court concluded that it was "entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy." *Id.* at 261; *see also United States v. Salvucci*, 448 U.S. 83, 85-86, 95 (1980) (concluding that "the values of the Fourth Amendment are preserved by a rule which limits the availability of the exclusionary rule to defendants who have been subjected to a violating of their Fourth Amendment rights" and rejecting automatic-standing rule). In *Nardone v. United States*, 308 U.S. 338 (1939), where the defendant contended that the case against him was based upon evidence acquired from an illegal wiretap, the Supreme Court held that the burden was on the defendant to show that such a wiretap had occurred. *Id.* at 341. Here, appellant has not demonstrated that any search of his phone occurred, let alone a search that violated the Fourth Amendment, given that the trial court made no factual finding that appellant's phone was tracked, because it was also plausible that the cell-site simulator was used to track one of the stolen phones.[28] Moreover, even assuming *arguendo* that MPD used the simulator on appellant's phone, the use of the simulator to determine that appellant's phone was in a car parked in the 4000 block of Minnesota Avenue was not a search under either a trespass or a reasonable expectation of privacy theory.

[28] Appellant lacks standing to challenge the simulator's use on the stolen phone. *See Blackmon v. United States*, 835 A.3d 1070, 1073 (D.C. 2003); *see also Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978); *Alderman v. United States*, 394 U.S. 165, 174 (1967) ("Fourth Amendment rights are personal rights which . . . may not be vicariously asserted.") (citations omitted).

1. The Use of a Cell-Site Simulator Is Not a Trespassory Search Under *Jones*.

MPD's use of a cell-site simulator to locate appellant's phone was not a trespassory search under the Fourth Amendment. The Supreme Court has explained that a trespassory search occurs when the government obtains information through an unlicensed "physical[] intru[sion] on constitutionally protected areas." *Florida v. Jardines*, 133 S. Ct. 1409, 1417 (2013); *United States v. (Antoine) Jones*, 132 S. Ct. 945, 949 (2012) (holding that a trespassory search occurred where "[t]he Government physically occupied private property for the purpose of obtaining information"). Constitutionally protected areas include persons, houses, papers, and effects. *(Antoine) Jones*, 132 S. Ct. at 953 n.8 ("The Fourth Amendment protects against trespassory searches only with regard to those items ('persons, houses, papers, and effects') that it enumerates."). Contrary to appellant's arguments (at 26-31), the cell-site simulator did not accomplish a trespassory search on appellant's phone or any constitutionally protected area.

MPD's use of a cell-site simulator did not cause any physical contact with a constitutionally protected area. A search occurs when, to obtain information, the government "physically occupie[s]" a defendant's private property. *(Antoine) Jones*, 132 S. Ct. at 1409; *see also Jardines*, 133 S. Ct. 1417. The Court's focus on a "physical intrusion," *Jardines*, 133 S. Ct. at 1409, reflects the common-law prerequisite of physical contact for a trespass. For a common-law trespass to land, "the defendant's act must result in an invasion of a tangible matter." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts*, § 13, at 71 (5th ed. 1984). A "historical requirement," has been "an intrusion by a person or some tangible thing." *Id.* at 72. Likewise, "[t]respass to chattels has traditionally required a physical touching of the property." *(Antoine) Jones*, 132 S. Ct. 945, 962 (Alito, J., concurring) (citing Restatement (Second) of Torts § 217 cmt. E (1965)). The cell-site simulator used by MPD interacts with cell phones only by

sending and receiving wireless radio signals (10/17/14 Tr. 44-46, 97-101). The government did not "obtain[] information by physical intruding 'on persons, houses, papers, or effects,'" *Jardines*, 133 S. Ct. at 1413, and accordingly did not effect a trespassory search.

Appellant cites no authority finding a trespassory search under the Fourth Amendment based on unauthorized electronic communication. Instead, he cites tort cases that make no mention of the Fourth Amendment, and argues (at 28-29) that "modern courts have held that common law trespass to chattels encompasses unauthorized electronic contact which interferes or threatens to interfere with a computer system's functioning." However, the Supreme Court has not applied the Fourth Amendment trespass theory to cases involving less than physical contact. To the contrary, it has suggested that "cases that do not involve physical contact, such as those that involve the transmission of electronic signals" are properly evaluated under the reasonable-expectation-of-privacy framework. *(Antoine) Jones*, 132 S. Ct. at 953. As *Jones* explained, "[s]ituations involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis." *Id.* at 953 (emphasis in original) (citing *Katz v. United States*, 389 U.S. 347 (1967).[29]

Appellant further argues (at 29-31) that the use of the cell-site simulator was a trespass to chattels because it "interfered with the functioning of his cell phone," "render[ing] it non-

[29] Appellant thus errs in suggesting (at 25) that *Jones* supports his trespass theory. Appellant strays even farther afield in suggesting (*id.*) that *Riley v. California*, 134 S. Ct. 2473 (2014), supports his trespass theory. *Riley* involved searches incident to arrest and did not address trespass at all, but instead found that the warrantless search of data stored on Riley's cell phone invaded the defendant's privacy interests. *Riley's* only citation to *Jones* was to Justice Sotomayor's concurrence, which discussed the *Katz* privacy implications of GPS tracking. *Riley*, 134 S. Ct. at 2490 (citing *Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring). Indeed, in her *Jones* concurrence, Justice Sotomayor described the government's possible use of "factory- or owner-installed vehicle tracking devices or GPS-enabled smartphones" to track defendants as "nontrespassory surveillance techniques" for which "the majority opinion's trespassory test may provide little guidance." 132 S. Ct. at 955 (Sotomayor, J., concurring).

operational for making calls." Here again, the trial court made no finding that the simulator communicated with appellant's phone (as opposed to a stolen phone) at all, much less that it interfered with the phone's operation. In any event, contrary to appellant's suggestion (at 30), a cell-site simulator does not "disable" the targeted cell phone, "'convert[]' it into a government tracking device," or otherwise interfere with use of the phone for more than a brief period of time (10/17/14 Tr. 44 ("As soon as [the cell-site simulator] comes across [the target phone], it grabs it and it holds on to it for a minute. Once it grabs it and holds on to it for a minute, it cannot contact immediately with an actual Sprint tower.").[30] This same type of interference can occur where there is something physically blocking the transmission of signals from the cell phone to the cell tower, where there is electronic interference in the area (*e.g.*, a generator), or where there is otherwise "weak coverage" (10/29/14 Tr. 228, 237). The cell-site simulator does not gain access to "any voice content, any numbers you've called" (*id.* at 100-101). Such a brief interference with the functioning of a cell phone does not amount to a physical occupation sufficient to constitute a trespassory search. Moreover, the simulator, unlike the "spike mike" in *Silverman v. United States*, 365 U.S. 505 (1961), does not physically intrude on a cell phone. *Id.* at 509, 511-12 (finding a trespassory search where "the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the petitioners"). Indeed, appellant has not cited, and we are unaware of, any cases holding that the use of a cell-site simulator is a trespassory search under *Jones*.

[30] Although the call detail records for appellant's phone show a series of seven attempted phone calls that failed between 11:23 a.m. and 11:31 a.m., even appellant's expert acknowledged that there was no way to tell why the calls failed (10/29/14 Tr. 241).

2. Cell-Phone Users Have No Reasonable Expectation of Privacy in Identifying Signals or Location Information Emitted by Their Phones.

MPD's use of a cell-site simulator to locate appellant's phone did not violate appellant's reasonable expectation of privacy. The Fourth Amendment places limits on the authority of the government to invade "persons, houses, papers, and effects" and comparable areas where "a person has a constitutionally protected reasonable expectation of privacy." *Katz*, 389 U.S. at 360 (Harlan, J., concurring). "[I]t is not enough that an individual have a subjective expectation of privacy. Rather, the expectation must be one 'which the law recognizes as legitimate.'" *United States v. Gray*, 491 F.3d 138, 145 (4th Cir. 2007) (quoting *Rakas v. Illinois*, 439 U.S. 128, 144 n.12 (1978)). "To be legitimate, an expectation of privacy must be objectively reasonable: it must flow from 'a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.'" *Id.* (quoting *Minnesota v. Carter*, 525 U.S. 83, 88 (1998)). Here, appellant had no reasonable expectation of privacy in his phone's identifying information or in its location.

There is at most a de minimis expectation of privacy in the identifying signals or unique identifier of an individual's phone. *See Smith v. Maryland*, 442 U.S. 735, 741 (1979) (citing *United States v. New York Tel. Co.*, 434 U.S. 159, 167 (1977)). The signals reveal no communication by the user and are transmitted even when the phone is not in use, as long as the phone is turned on (10/17/14 Tr. 44-46, 97-101). The only control the user has over the transmission of an identifying signal is to turn off the phone and render it inoperable (*id.* at 99-101). Otherwise, transmission of the identifying signal occurs without the user's permission or notification (*id.* at 100-01).

In *Smith*, the Supreme Court held that a defendant has no reasonable expectation of privacy in phone numbers dialed from within his home and which were collected by a pen register. *Id.* at 745-46. That decision is controlling here. *Smith* held that no expectation of privacy exists in dialed telephone numbers because "[a]ll telephone users realize that they must 'convey' phone numbers to the telephone company, since it is through the telephone company's switching equipment that their calls are completed." *Id.* at 741-42. The Court explained that although the defendant's use of the telephone within his home "may have been calculated to keep the *contents* of his conversation private, his conduct was not and could not have been calculated to preserve the privacy of the numbers he dialed" because he "had to convey the number to the telephone company . . . if he wished to complete his call." *Id.* at 743 (emphasis in original). Similarly, to use a cell phone, the user must continuously broadcast a signal. Such conduct is not calculated to keep the user's location private and the user, thus, has no reasonable expectation of privacy in his location. *See generally United States v. Wheeler*, No. 15-cr-216, 2016 WL 1048989, at *10 (E.D. Wis. Mar. 14, 2016) (noting that "[t]he media is rife with information – and sometimes warnings – about the fact that one's location can be tracked from one's cell phone" and "[p]opular culture promotes the notion that the government, too, can determine extensive information about an individual from, among other things, one's phone"); *cf. United States v. Caraballo*, No. 12-3839, 2016 WL 4073248, at *9 (2d Cir. Aug. 1, 2016) ("any expectation of privacy that Caraballo had in his cell-phone location was dubious at best").

Whether the police collected the signals directly or through a phone company is irrelevant under *Smith*. The relevant question is whether appellant's conduct was reasonably calculated to preserve the privacy of the information at issue. *Smith*, 442 U.S. at 743. By turning his phone on, appellant "voluntarily conveyed" and "exposed" his location to the cell phone

company. *Id.* at 744. Thus, appellant's conduct was not reasonably "calculated to preserve the privacy" of his location, regardless of whether he knew that the police were among the third parties making use of it. *Cf. Maryland v. Macon*, 472 U.S. 463, 469 (1985) (undercover officer's action in entering a "bookstore and examining the wares that were intentionally exposed to all who frequent the place of business did not infringe a legitimate expectation of privacy and hence did not constitute a search within the meaning of the Fourth Amendment"); *Lewis v. United States*, 385 U.S. 206, 209 (1966) ("in the detection of many types of crime, the Government is entitled to use decoys and to conceal the identity of its agents").

3. Recent Cases From Other Jurisdictions Are Neither Persuasive Nor Binding.

Since appellant filed his opening brief, two courts have found that the warrantless use of a cell-site simulator violated the defendant's reasonable expectation of privacy under the Fourth Amendment. *See State v. Andrews*, 134 A.3d 324 (Md. App. 2016); *United States v. Lambis*, No. 15-cr-734, 2016 WL 3870940 (S.D.N.Y. July 12, 2016). But in both cases, unlike here, the cell-site simulator located the defendant's phone inside a home, thus implicating Fourth Amendment privacy concerns not raised here.[31] Accordingly, these cases is neither persuasive nor binding on this Court.

In *Lambis*, the district court found that "[t]he use of a cell-site simulator constitutes a Fourth Amendment search within the contemplation of *Kyllo*." 2016 WL 3870940, at *3 (citing *Kyllo v. United States*, 533 U.S. 27, 33, 40 (2001) (holding that a Fourth Amendment search occurred, in violation of the defendant's reasonable expectation of privacy, when a thermal-

[31] Similarly, in *State v. Tate*, 849 N.W.2d 798, 804 (Wis. 2014), a case cited by appellant (at 24, 29), the cell-site simulator located the defendant inside his home.

imaging device was used to detect infrared radiation emanating from within a home)). *Kyllo*'s holding applies only to emissions, such as heat, that provide information regarding the interior of a home or other constitutionally protected area. *Id.* at 39-40. Here, appellant has never alleged that the cell-site simulator captured information emanating from the interior of a home, nor could he. Instead, the simulator revealed appellant's location in plain view on a public street. Accordingly, the police did not obtain any information pertaining to the private contents of appellant's home, or any other area as to which appellant had a reasonable expectation of privacy.

In *Andrews*, the court noted that "because the use of the cell site simulator in this case revealed the location of the phone and Andrews inside a residence, we are presented with the additional concern that an electronic device not in general public use has been used to obtain information about the contents of a home, not otherwise discernible without physical intrusion." 134 A.3d at 349 (citing *Kyllo*, 533 U.S. at 34-35). The court went on to "agree with the Fourth Circuit's observation that 'the government cannot know in advance of obtaining this information how revealing it will be or whether it will detail the cell phone user's movements in private spaces." *Id.* (quoting *United States v. Graham*, 796 F.3d 332, 350 (4th Cir. 2015)). Accordingly, the *Andrews* court declined to "fashion a rule prohibiting a warrantless search only retrospectively based on the fact that the search resulted in locating the cell phone inside a home or some other constitutionally protected area." *Id.*

The court's reasoning, however, is flawed in at least three ways. First, the Supreme Court established precisely this distinction in *United States v. Karo*, 468 U.S. 705 (1984). *Karo* upheld the warrantless use of a beeper to locate a container of ether in a warehouse because the police did not use the beeper to identify the specific locker in which the ether was stored. In doing so,

the Court expressly noted that "[h]ad the monitoring disclosed the presence of the container within a particular locker the result would be otherwise, for surely [the defendants] had a reasonable expectation of privacy in their own storage locker." *Id.* at 720 n.6.[32] Second, *Andrews*'s concern that "[s]uch a rule would provide neither guidance nor deterrence, and would do nothing to thwart unconstitutional intrusions," 134 A.3d at 350, is not a concern here given the September 3, 2015, Department of Justice Policy Guidance mandating, "as a matter of policy, [that] law enforcement agencies must now obtain a search warrant supported by probable cause" except where there are exigent or exceptional circumstances. DOJ Policy Guidance: Use of Cell-Site Simulator Technology, (Sept. 3, 2015), *available at* http://www.justice.gov/opa/file/767321/download (last visited Aug. 7, 2016). Third, the Fourth Circuit panel decision in *Graham*, cited in *Andrews*, has since been vacated and superseded by an *en banc* decision. *United States v. Graham*, No. 12-4659, 2016 WL 3068018 (4th Cir. May 31, 2016) (en banc) (holding that the government's acquisition of historical CSLI did not violate the Fourth Amendment and applying the third-party doctrine, but not addressing the constitutionality of cell-site simulators).

Finally, both *Andrews* and *Lambis* rejected the application of the third-party doctrine to cell-site simulators. But as discussed *supra*, this Court should reject the conclusion that cell

[32] For the same reason, the analysis in *Tracey v. State*, 152 So.3d 504 (Fla. 2014) (rejecting the "mosaic theory" (*i.e.*, distinguishing between acts that may be lawful in isolation, but that infringe on reasonable expectations of privacy in the aggregate)), is flawed. Moreover, *Tracey* involved long-term tracking and surveillance in areas including the home — two facts not present here. *Id.* at 507-08.

phone users have a reasonable expectation of privacy in the signals emitted by cell phones, even where the signals are transmitted to a cell-site simulator.[33]

C. Suppression is Unwarranted

Appellant fails to show that the trial court erred in finding that the evidence was not subject to suppression because it would have been inevitably discovered by lawful means. In any event, the deterrent purposes that underlie the exclusionary rule would not be served by suppression here. And, finally, much of the evidence appellant seeks to suppress is not a fruit of the allegedly illegal search.

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[33] Appellant argues (at 35-36) that "several courts have held that cell phone users have a reasonable expectation of privacy in historical and real time CSLI collected by their wireless carriers." But as the en banc Fourth Circuit noted in *Graham*, every Circuit that has considered the issue has agreed that individuals do not have a reasonable expectation of privacy in historical cell-site location information ("CSLI"). 2016 WL 3068018, at *1 (citing cases). Moreover, as *Graham* recognized, two of the state cases cited by appellant interpret broader state constitutional protections than the Fourth Amendment. *Id.* at *4 n.7; *see also Commonwealth v. Augustine*, 4 N.E.3d 846, 858 (Mass. 2014) (finding "no need to wade into the[] Fourth Amendment waters" when the court could rely on article 14 of the Massachusetts Declaration of Rights); *State v. Earls*, 70 A.3d 630, 641-42 (N.J. 2013) (explaining that New Jersey does not recognize the third-party doctrine).

Amicus's speculation regarding a cell-site simulator's impact on bystanders and third-parties are not ripe for resolution here. First, appellant lacks standing to assert a third-party's Fourth Amendment rights. Second, there is no record evidence, much less trial court findings, as to whether, or to what degree, the MPD simulator communicated with phones other than the target phone, much less captured identifying or location information or interfered with the operation of those other phones. Moreover, as noted *supra*, the DOJ policy governing the use of cell-site simulators addresses such concerns.

1. The Evidence Would Have Been Inevitably Discovered.

a. Applicable Legal Principles

The inevitable-discovery doctrine provides that evidence is admissible where it inevitably would have been discovered by lawful means had the police error or misconduct not occurred. *Hicks v. United States*, 730 A.2d 657, 659 (D.C. 1999); *see also Nix v. Williams*, 467 U.S. 431, 443-44 (1984); *Pinkney v. United States*, 851 A.2d 479, 495 (D.C. 2004). The government must establish by a preponderance of the evidence that the evidence ultimately or inevitably would have been discovered by lawful means. *Hicks*, 730 A.2d at 659. The inevitable discovery doctrine seeks to put police in the same position as if no error had occurred. *See Nix*, 467 U.S. at 443 n.4 ("The purpose of the inevitable discovery rule is to block setting aside convictions that would have been obtained without police misconduct.").

To satisfy the inevitable-discovery doctrine, "the lawful process which would have ended in the inevitable discovery [must] have been commenced before the constitutionally invalid seizure." *Douglas-Bey v. United States*, 490 A.2d 1137, 1139 n.6 (D.C. 1985). "[T]here must also be the 'requisite actuality' that the discovery would have ultimately been made by lawful means." *Hicks*, 730 A.2d at 659 (quoting *Hilliard v. United States*, 638 A.2d 698, 707 (D.C. 1994)); *see also United States v. Johnson*, 777 F.3d 1270, 1274 (11th Cir. 2015) (requiring a "reasonable probability that the evidence in question would have been discovered by lawful means" (citation omitted)).

The trial court's factual findings regarding the application of the inevitable-discovery doctrine are reviewed in the light most favorable to the prevailing party, here the government, and only for clear error. *Robinson*, 76 A.3d at 335; *see also Nix*, 467 U.S. at 438, 449-50 (relying on trial court's factual finding that search party inevitably would have found body of murdered

girl in essentially the same condition as it was actually found); *United States v. Gale*, 952 F.2d 1412, 1414, 1416 (D.C. Cir. 1992) (relying on trial court's factual finding that evidence recovered as a result of illegal interrogation would inevitably have been discovered in a search incident to arrest).

b. Discussion

Even assuming that MPD used the cell-site simulator to locate appellant's phone, and that this violated the Fourth Amendment, the police inevitably would have located appellant and the evidence in his car by using the simulator to locate Ms. Shipp's stolen Sprint phone.

Appellant does not contest (at 3 n.1) that the officers used lawfully obtained information to ascertain the general area where they ultimately found appellant. Ms. Shipp and Ms. Hawkins-Ross provided their phone number to the police, who obtained appellant's AT&T phone number from their call records (10/17/14 Tr. 10-12). MPD then requested location information for Ms. Shipp's Sprint phone, Ms. Hawkins-Ross's Sprint and Verizon phones, and appellant's AT&T phone (*id.* at 16-22). MPD received location information from Sprint for Ms. Shipp's phone and from AT&T for appellant's phone, which showed that those two phones appeared to be moving together (*id.* at 27). That location information led the officers to Minnesota Avenue and Benning Road (*id.* at 29, 90). Upon arriving there, officers used the simulator to more precisely locate one of the phones (*id.* at 42). Assuming *arguendo* that MPD unlawfully used the simulator on appellant's phone, the preponderance of the evidence shows that MPD inevitably would have located appellant by using the simulator on Ms. Shipp's Sprint phone.

First, MPD had started "the lawful process which would have ended in the inevitable discovery" before using the cell-site simulator on appellant's phone. *Douglas-Bey*, 490 A.2d at 1139 n.6. Officers had requested and were receiving location information for Ms. Shipp's stolen

Sprint phone and were using this information to locate appellant (10/17/14 Tr. 26-27, 29). Specifically, officers had mapped the locations of Ms. Shipp's stolen Sprint phone and appellant's AT&T phone and had determined that the phones were traveling together and were in the general vicinity of Minnesota Avenue and Benning Road (*id.* at 27, 29, 39). Officers had also requested and obtained the MSID for Ms. Shipp's stolen Sprint phone, which is the number that is needed to program the cell-site simulator to search for that phone (*id.* at 44, 121). Thus, MPD had begun the process necessary to locate her phone with the cell-cite simulator. This is sufficient to satisfy this Court's requirement that the lawful process that would have ended in the inevitable discovery had been commenced before the allegedly illegal policy activity.

Contrary to appellant's argument (at 39-40), this Court's decisions require only that the police would have discovered the challenged evidence through a sequence of events already underway, not that the officers must have begun using the cell-site simulator on Ms. Shipp's stolen Sprint phone, for the inevitable-discovery doctrine to apply. In *Hicks*, this Court applied the inevitable-discovery doctrine where a shotgun was recovered from the defendant's car during an illegal search of the car. 730 A.2d at 659, 661-62. After the shotgun was recovered, officers arrested the defendant and held him at the scene of the stop to conduct a show-up identification with the victim, who had described a similar station wagon as being involved in the robbery. *Id.* at 658, 661. The victim identified the defendant after the illegal search. *Id.* at 658. This Court held that the identification would have led to the defendant's arrest, and the car would then have been searched incident to that arrest. *Id.* at 658, 662. Accordingly, this Court held that the shotgun inevitably would have been discovered even though the identification, which established the legal basis to arrest the defendant and search the car, had not yet occurred when the shotgun was found. *Id.* at 661-62.

Similarly, in *Pinkney*, this Court concluded that evidence inevitably would have been discovered even assuming officers had illegally frisked the defendant because, after the frisk, an eyewitness was brought to the scene and identified the defendant. 851 A.2d at 495. This Court concluded that the "identification, coupled with appellant's proximity to and flight from the crime scene, established probable cause to arrest, and the [evidence] would have been inevitably discovered in the course of a search incident to such an arrest." *Id.* Again, the inevitable-discovery doctrine applied even though the identification and arrest had not yet taken place at the time of the frisk. *Id.*

Thus, the inevitable-discovery doctrine does not require that officers have already started the lawful search that would have led to the discovery of the contested evidence. Accordingly, here, MPD need not have already started searching for Ms. Shipp's stolen Sprint phone using the cell-site simulator as long as they had begun the lawful process that would have ended in the inevitable discovery of the contested evidence. The record shows that MPD did precisely that in requesting location information for Ms. Shipp's stolen Sprint phone, tracking the location of that phone, and obtaining the MSID needed to locate that phone using the cell-site simulator.

Second, the evidence established the "requisite actuality" that MPD would have located appellant by using the cell-site simulator on Ms. Shipp's stolen Sprint phone. *Hicks*, 730 A.2d at 659. To locate a phone using a cell-site simulator, the phone must be powered on, the simulator must be sufficiently close to the phone, and the simulator must be programmed to search for the specific phone (10/17/14 Tr. 89-90; 97-101). Ms. Shipp's stolen phone was powered on and communicating with Sprint cell towers during the relevant time period (*id.* at 27, 29, 30, 33, 39,

41, 95-96; *see also* 10/29/14 Tr. 232-41; App. E, Ex. 1).[34] Using the location information provided by Sprint and AT&T, officers determined that the Sprint phone and appellant's AT&T phone were traveling together and were both in the same area around Minnesota Avenue and Benning Road (10/17/14 Tr. 26-27, 39, 41, 95-96). Indeed, the phones were ultimately found together in appellant's car (10/24/14 Tr. 21, 26-29). Thus, given that the simulator was close enough to locate one of the phones, it inevitably was close enough to locate the other. And finally, MPD had requested and obtained the MSID number for Ms. Shipp's Sprint phone (10/17/14 Tr. 121). Accordingly, the trial court did not err in finding that the officers "would have eventually gotten to the exact same place because the phones were together" (10/29/14 Tr. 309-10).

Appellant fails to show that the trial court's factual findings that the police would have inevitably discovered the evidence are clearly erroneous. *Robinson*, 76 A.3d at 335. Appellant faults (at 40) the government for failing to present testimony about the success rate of simulators generally and with particular phone models or networks. But Sergeant Perkins's testimony established that the simulator would have successfully located the Sprint phone.

First, Sergeant Perkins testified that the simulator receives cell phone signals and determine the direction and distance to the phone as long as the phone is powered on and nearby

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[34] As Officer Perkins explained, "phones are always talking back and forth with the tower" and the "phone is always transmitting and receiving data to and from the cell phone tower" (10/17/14 Tr. 97, 100).

The records for Ms. Shipp's Sprint phone show that it was powered on and communicated with Sprint cell towers six times between 10:37 a.m. and 11:27 a.m. (App. E, Ex. 1). During this time frame, one entry at 11:19 a.m. indicates that Sprint was unable to locate Ms. Shipp's phone (*id.*). But the phone successfully communicated with a Sprint cell tower one minute later (*id.*).

(10/17/14 Tr. 89, 97-100). As the trial court recognized, there is no suggestion in the record that a simulator would fail to locate a cell phone in these circumstances (*see* 10/29/14 Tr. 307-08).

Second, Sergeant Perkins testified that the simulator requires the cell phone's unique identification number, such as an MIN or MSID for Verizon, Cricket, and Sprint phones, or an IMSI for T-Mobile or Verizon phones (10/17/14 Tr. 97). Thus, the simulator can locate phones on many different cell phone networks, including Sprint. Moreover, there is no suggestion in the record that the simulator would not work on particular models of cell phones. Indeed, as the trial court recognized, "it's the same technology" (10/29/14 Tr. 310). Accordingly, there was sufficient information in the record for the trial court to conclude that the officers would have discovered the challenged evidence had they used the simulator on the complainant's Sprint phone.

Finally, the single failed communication between the Sprint cell tower and Ms. Shipp's Sprint phone does not suggest that the simulator would not have worked on that phone. The Sprint phone records indicate a location server error at 11:19 a.m. (10/17/14 Tr. 43; App. E, Ex. 1 at 1). But the Sprint phone records also indicate 11 successful communications with the cell tower between 9:19 a.m. and 11:19 a.m. and 6 successful communications with the cell tower between 11:19 a.m. and 12:42 p.m. (App. E, Ex. 1 at 1). And appellant's expert, Ben Levitan, listed several reasons that a cell tower might fail to communicate with a cell phone and testified that communications between a cell tower and a cell phone only work 95% of the time, so a communication error could be caused by a temporary failure of the cell tower system (10/29/14 Tr. 237). Thus, the trial court rejected appellant's suggestion that the officers might have

switched to using the cell-site simulator on appellant's phone because it was not working on the stolen Sprint phone (*id.* at 300-01).[35]

2. Application of the Exclusionary Rule is Not Warranted Here

a. Applicable Legal Principles

The Supreme Court has emphasized that the exclusion of evidence "has always been our last resort, not our first impulse." *Herring v. United States*, 555 U.S. 134, 140 (2009) (quoting *Hudson v. Michigan*, 547 U.S. 586, 591 (2006)). "[T]he Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands," *Arizona v. Evans*, 514 U.S. 1, 10 (1995), and it "has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons," *United States v. Leon*, 468 U.S. 897, 906 (1984) (internal quotation marks and citation omitted). Rather, the exclusionary rule "is a judicially created remedy" that is designed to deter police misconduct. *Illinois v. Krull*, 480 U.S. 340, 347 (1987); *see also Leon*, 468 U.S. at 916. "[T]he rule's operation [is limited] to situations in which this purpose is 'thought most efficaciously served'"; therefore, "[w]here suppression fails to yield 'appreciable deterrence,' exclusion is 'clearly unwarranted.'" *Davis v. United States*, 564 U.S. 229, 237 (2011) (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)).

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[35] If this Court determines that there is insufficient information in the present record to determine whether inevitable discovery should apply, this Court should remand for the trial court to make factual findings regarding the capabilities of the cell-site simulator used to locate appellant. *See McFerguson v. United States*, 770 A.2d 66, 76 (D.C. 2001) (remanding for the trial court to make factual findings regarding whether the officer would have arrested and searched the defendant on the basis of the officer's identification alone without information obtained through an illegal search).

"[E]vidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or properly may be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Leon*, 468 U.S. at 919 (internal quotation marks and citation omitted). In other words, "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the judicial system." *Herring*, 555 U.S. at 144. Thus, "an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus of applying the exclusionary rule," and, where police conduct is merely negligent but not reckless or deliberately in violation of a defendant's constitutional rights, "the error is not enough by itself to require the extreme sanction of exclusion." *Id.* at 143 (internal quotation marks and citation omitted); *see also Davis*, 564 U.S. at 238 ("when the police act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence, the deterrence rationale loses much of its force, and exclusion cannot pay its way") (citations omitted).

b. Discussion

Here, application of the exclusionary rule would not meaningfully deter police misconduct. Instead, the police conduct here is not the type of "flagrant" abuse for which the exclusionary rule was designed. *Herring*, 555 U.S. at 143-44. Officers were responding to two reports of armed sexual assaults that had occurred within days of each other. Indeed, as Officer Perkins acknowledged, at the time he mistakenly believed that three separate armed sexual assaults had occurred in the previous 24-hour period (10/17/14 Tr. 10, 15-16). Immediately after the second assault, police began gathering phone records. Once officers received information from the cell-phone providers that confirmed that some, but not all, of the phones were still

powered on and able to be located, they believed that exigent circumstances existed. The phones were a viable link to appellant, but officers were concerned that that link might be fleeting. Any Fourth Amendment violation was at most negligent, and thus were not of the nature to warrant exclusion of evidence. *See Davis*, 564 U.S. at 238 (deterrent value of exclusionary rule not strong absent "deliberate," "reckless," or "grossly negligent" disregard for Fourth Amendment rights); *cf. Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014) (objectively reasonable mistakes, whether of fact or law, do not violate the Fourth Amendment; noting that "[t]o be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials"). Indeed, at the time of this incident, no court had held that using a simulator to locate a phone violates the Fourth Amendment.

Moreover, after the police believed that the exigency had abated, they properly obtained warrants to search appellant's car and the phones recovered from it (App. H, I, J). Similarly, appellant's buccal swab was obtained pursuant to a court order issued after a finding of probable cause (10/21/13 Tr. 117-18). Indeed, where the warrant is based upon evidence obtained as a result of a Fourth Amendment violation, courts have sought to "reconcile the good-faith exception established in *Leon* . . . with the fruit of the poisonous tree doctrine[.]" *United States v. McClain*, 444 F.3d 556, 565-66 (6th Cir. 2006) (citing cases reflecting a split in the Federal Circuits); *see also United States v. Massi*, 761 F.3d 512, 528 (5th Cir. 2014) (adopting *McClain*). Courts have declined to apply the exclusionary rule where the circumstances surrounding the Fourth Amendment violation were "close enough to the line of validity to make the officer's belief in the validity of the warrant objectively reasonable." *McClain*, 444 F.3d at 566 (citing *United States v. White*, 890 F.2d 1413, 1419 (8th Cir. 1989); *United States v. Thomas*, 757 F.2d 1359, 1368 (2nd Cir. 1985)); *see also Massi*, 761 F.3d at 528; *but see United States v. McGough*,

412 F.3d 1232, 1239-40 (11th Cir. 2005); *United States v. Wanless*, 882 F.2d 1459, 1466-67 (9th Cir. 1989).[36] Here, the officers' belief in the validity of the warrants and court order was reasonable.

The likelihood of deterring misconduct is further diminished by the government's actions since this incident occurred. As appellant (at 35) and *amicus* (at 3, 5, 7, 10) note, the Department of Justice ("DOJ") issued policy guidance on the use of cell-site simulator technology on September 3, 2015. *See* Dep't of Justice Policy Guidance: Use of Cell-Site Simulator Technology (Sept. 3, 2015), *available at* https://www.justice.gov/opa/file/767321/download (last visited Aug. 7, 2016). The September 3, 2015, DOJ policy requires that covered law enforcement agencies obtain a search warrant supported by probable cause before using a cell-site simulator unless exigent or exceptional circumstances, as defined in the policy, exist. Since the issuance of the DOJ policy, MPD has obtained a number of search warrants specifically authorizing the use of cell-site simulators. *Cf. Blair v. United States*, 114 A.3d 960, 970-76 (D.C. 2015) (finding that application of exclusionary rule would not have a significant deterrent effect in part because a subsequent change in the law made the acts unlikely to reoccur).[37]

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[36] The government has previously asked this Court to apply *McClain* in *Smith v. United States*, 111 A.3d 1 (D.C. 2014), in which this Court found that the issuance of an arrest warrant based on illegally obtained evidence did not "purge the taint" of the initial illegality. This Court then rejected the government's argument in *Evans v. United States*, 122 A.3d 876 (D.C. 2015), finding that it was "foreclosed by our decision in *Smith*." *Id.* at 885. *Smith*, however, has since been vacated in light of the Supreme Court's contrary holding in *Heien*; thus, the basis for *Evans* has been undermined.

[37] The DOJ policy also requires deletion of data in order to protect individuals' privacy interests, which further limits the need for deterrence here. *Cf. Maryland v. King*, 133 S. Ct. 1958, 1989-90 (2013) (noting that "statutory protections that guard against further invasion of privacy" are relevant to assessing whether collection of DNA is a "significant invasion of privacy that [is] impermissible under the Fourth Amendment").

3. Much of the Evidence is Not a Fruit of the Search.

Appellant identifies (at 40-50) as the fruit of the poisonous tree: (1) appellant's knife and statement to police; (2) the phones recovered from Ms. Williams's purse; (3) the other evidence recovered from appellant's car; (4) the extraction reports from the recovered phones; (5) the entirety of Ms. Williams's testimony; (6) Ms. Hawkins-Ross's out-of-court identification of appellant; and (7) appellant's DNA profile and the photograph of his groin.

As an initial matter, given its finding of inevitable discovery, the trial court did not reach the question of what evidence was a fruit of the alleged illegal search. Accordingly, if this Court holds that the search was unlawful and that the exclusionary rule applies, this Court should remand the case for the trial court to hold hearings, make factual findings of fact, and reach legal conclusions on the application of the fruit-of-the-poisonous-tree doctrine.[38] *See, e.g.*, *In re T.L.L.*, 729 A.2d 334, 344 (D.C. 1999) (reversing trial court's denial of motion to suppress show-up identification and "leav[ing] to the trial judge on remand, at least in the first instance, the

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[38] At such a hearing, the government would seek to admit, *inter alia*, evidence that independent of any evidence recovered from the use of the simulator, the government received an unsolicited offender hit from the FBI's Combined DNA Index System ("CODIS") indicating that a sample obtained from appellant in connection with his prior Maryland conviction matches the crime scene sample obtained in this case. The CODIS hit would have provided independent grounds to obtain a buccal swab and would have provided independent evidence of appellant's identity that would have led investigators to Ms. Williams.

The government would also seek to admit evidence establishing that Ms. Williams's testimony is also admissible under the theories of inevitable discovery and independent source. Here, the police possessed sufficient evidence both prior to and independent of the use of the cell-site simulator which would have been investigated and inevitably identified Ms. Williams as a witness. For example, the government obtained ATM video of Ms. Williams celebrating after withdrawing over $100 from Ms. Hawkins-Ross's bank account using her stolen Bank of America card shortly after appellant sexually assaulted and robbed Ms. Hawkins-Ross (11/4/14 Tr. 409-13). The government also had appellant's call records reflecting calls to and from Ms. Williams around this time (10/17/14 Tr. 86; 11/4/14 Tr. 398-400).

question whether" the in-court identification should also be suppressed as a fruit of the poisonous tree); *Martin v. United States*, 567 A.2d 896, 906 (D.C. 1989) (declining to decide whether confession should be suppressed as a fruit of illegal arrest because the question "was not presented to the trial court" and permitting the government to "attempt to show that the confession was not the fruit of the illegal arrest" on remand); *Smith v. United States*, 335 F.2d 270, 275, 277 (D.C. Cir. 1964) (remanding for trial court to determine whether officers' testimony should be suppressed as fruit of the poisonous tree).[39] If this Court nonetheless reaches the question of what evidence should be suppressed as a fruit of the alleged illegal search, the government agrees that some, but not all, of the challenged evidence is a fruit of the alleged poisonous tree.

a. Appellant's Statement is Not a Fruit.

Certain routine administrative procedures, such as getting a defendant's name and address, are incidental events accompanying an arrest and are necessary for orderly law enforcement. *United States v. Olivares-Rangel*, 458 F.3d 1104, 1113 (10th Cir. 2006) (citing 6 Wayne R. LaFave, *Search and Seizure*, § 11.4(g) (4th ed. 2004)); *cf. (Elton) Jones v. United States*, 779 A.2d 277, 283-84 (D.C. 2001) (en banc) (recognizing "routine booking exception" to *Miranda* rule). It would make little sense to suppress evidence obtained merely as part of a routine booking procedure given the purpose of the exclusionary rule. *Id.*; *see also Krull*, 480 U.S. at 347 (the exclusionary rule is designed to deter police misconduct).

[39] Although appellant sought generally to suppress all tangible evidence and statements obtained from appellant as fruits of the poisonous tree, neither party made specific arguments regarding the application of the fruit-of-the-poisonous-tree doctrine (R. 24, 35, 49, App. C).

Here, appellant gave Ms. Hawkins-Ross's address in response to Detective Griffin's request for "biographical" information (10/24/14 Tr. 19-21, 67). This request was not designed to elicit incriminating evidence, but was simply a routine police procedure. Accordingly, appellant's statement is not a fruit of the unlawful search and exclusion is not warranted.

b. Appellant Lacks Standing to Challenge the Search of Ms. Williams's Purse, and Ms. Williams's Consent Purged Any Taint.

Appellant does not have a reasonable expectation of privacy in the contents of Ms. Williams's purse, and thus lacks standing to seek to suppress the stolen phones recovered from her purse. *Rakas*, 439 U.S. at 143 (defendant has standing to seek suppression of evidence only if he "has had his own Fourth Amendment rights infringed by the search and seizure which he seeks to challenge"). This is arguably so even if the phones recovered from the purse are characterized as a fruit of the alleged illegal search. *See United States v. Bowley*, 435 F.3d 426, 430-31 (3d Cir. 2006) (declining to suppress immigration file as a fruit of defendant's unlawful arrest because "an alien has no reasonable expectation of privacy in [the] file"); *United States v. Pineda-Chinchilla*, 712 F.2d 942, 943-44 (5th Cir. 1983) (same); *but see Olivares-Rangel*, 458 F.3d at 1117.

In any event, the evidence obtained from Ms. Williams's purse was obtained through "means sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States*, 371 U.S. 471, 488 (1973). Here, Ms. Williams gave the officers consent to search her purse after they heard phones ringing inside her purse, which broke the causal connection between the illegal search and the evidence from Ms. Williams's purse.

In *Brown v. Illinois*, 422 U. S. 590, 602 (1975), the Supreme Court identified three factors for determining attenuation: (1) "[t]he temporal proximity" of the illegality and the acquisition of the evidence, (2) "the presence of intervening circumstances," and (3) "the purpose and flagrancy of the official misconduct." *Id.* at 603-604; *see also Florida v. Royer*, 460 U.S. 491, 501 (1983); *In re J.F.*, 19 A.3d 304 (D.C. 2011). Ultimately, the question is not whether the evidence "would not have come to light but for the illegal actions of the police," but rather whether the evidence came from the "exploitation of th[e] illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun*, 371 U.S. at 488; *see also Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016) (attenuation doctrine, an exception to the exclusionary rule, applies where "the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained") (internal quotation and citation omitted).

Here, applying *Brown*, the record reveals that Ms. Williams's consent was "sufficiently an act of free will to purge the primary taint" of the alleged unlawful use of the cell-site simulator to locate appellant's phone. As an initial matter, Ms. Williams's consent was voluntarily given. At the time she consented to the search of her purse, Ms. Williams had been informed that she was not under arrest and was sitting in the police vehicle with her purse and a bag of chips to avoid the rain (10/24/14 Tr. 22-23). Detective Griffin then explained that he believed that there may be evidence in her purse; requested her consent to search her purse; and informed her that if she did not wish to consent to the search of her purse, he would seek a warrant to search it (*id.* at 23-25). Ms. Williams's then signed a written consent to search form

that also informed her that she had the right to refuse to consent to the search (R. 11; R. 36 at 7).[40]

Although the use of the simulator and the police encounter with Ms. Williams was relatively close in time, the temporal proximity of the two events is not dispositive. *See United States v. Parker*, 469 F.3d 1074, 1077 (7th Cir. 2006); *United States v. Seidman*, 156 F.3d 542, 549 (4th Cir. 1998); *cf. Strieff*, 136 S. Ct. at 2062 (declining to apply exclusionary rule despite temporal proximity). Moreover, unlike in *In re J.F.*, the consent was not obtained from Ms. Williams "contemporaneously with the illegal seizure" or search. 19 A.3d at 311-12.

Rather, the presence of intervening circumstances ensured that Ms. Williams's consent was not obtained by exploiting the initial illegality. Officers sought and received consent to search Ms. Williams's purse only after she informed them that it was appellant's phone that they could hear ringing from inside her purse, and after she signed the written consent form (10/24/14 Tr. 23; R. 11; R. 36 at 7). Thus, there were intervening circumstances sufficient to break the causal chain between the alleged Fourth Amendment violation and Ms. Williams's subsequent consent. *See United States v. Perry*, 437 F.3d 782, 786 (8th Cir. 2006) (earlier illegal search did not "contaminate" later consent where officer who requested defendant's consent advised defendant he had the right to refuse consent to search; "[s]uch an intervening circumstance . . . indicat[es] that the [officer] was not attempting to exploit an illegal situation"); *United States v. Kelley*, 981 F.2d 1464, 1470 (5th Cir. 1993) (voluntary consent validated search even if it was preceded by unreasonable detention in violation of the Fourth Amendment, where absence of any

[40] The voluntariness of a consensual search depends on the totality of the circumstances surrounding the search. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 248-49 (1973). Contrary to appellant's suggestion (at 43), where "a person consents to a search after officers state that they will attempt to obtain a warrant if the person does not consent, the consent is not necessarily coerced." *United States v. Larson*, 978 F.2d 1021, 1024 (8th Cir. 1992).

coercive tactics by police and the fact that the defendant was informed of the right to refuse to permit the search constituted "sufficient intervening circumstances to purge the taint of illegality from any unreasonable detention"); *State v. Lane*, 726 N. W.2d 371, 385 (Iowa 2007) ("A more widely recognized intervening circumstance is whether the police notified the person of his or her right to refuse consent."); *State v. Hight*, 781 A.2d 11, 15 (N. H. 2001) (same).

With respect to the third factor, the flagrancy and offensiveness of the officers' alleged misconduct in this case comes nowhere close to that of other cases where evidence has been held inadmissible on Fourth Amendment grounds. In *Wong Sun*, for example, six or seven officers went to the business of James Toy, a man alleged to have sold heroin, broke open his door, went into his bedroom, and almost immediately handcuffed and arrested him. 371 U. S. at 474. Similarly, in *Brown*, police officers broke into Brown's apartment and conducted a warrantless search without probable cause. 422 U. S. at 592. As Brown was returning to his apartment, a police officer pointed a revolver at him and told him he was under arrest. *Id.* Officers then held Brown at gunpoint and searched him. *Id.* at 593. Here, Officer Perkins believed that exigent circumstances justified the warrantless use of the cell-site simulator and any misconduct was neither "purpose[ful]" nor "flagran[t]," *see Brown*, 422 U. S. at 603-604; *see also Strieff*, 136 S. Ct. at 2063 (exclusion appropriate "only when the police misconduct is most in need of deterrence — that is, when it is purposeful or flagrant"; noting that although officer "should have asked Strieff whether he would speak with him, instead of demanding that Strieff do so," exclusion was unwarranted, because officer "was at most negligent"). Moreover, the simulator was not used for the "purpose" of locating evidence from Ms. Williams's purse. Rather, officers requested consent to search Ms. Williams's purse only *after* hearing appellant's phone ringing from inside it.

The third-party consent cases cited by appellant (at 42-43) are readily distinguishable. In *United States v. Maez*, 872 F.2d 1444 (10th Cir. 1989), the consent was obtained from the defendant's mother, who "was crying and upset" after seeing "her fifteen year old son walking across the street with his hands in the air" and who was "holding her two month old baby . . . throughout the signing of all three consent forms." *Id.* at 1455. Similarly, in *United States v. Oaxaca*, 233 F.3d 1154 (9th Cir. 2000), the defendant's sister gave consent "mere moments after running to the garage, where she saw several armed EA agents and her brother on his knees, already under arrest" and there was evidence that she was "freaking out" at the time. *Id.* at 1158. Here, Ms. Williams consented while eating a bag of chips and after being advised that she was not under arrest (10/24/14 Tr. 22-25). Indeed, Ms. Williams had no knowledge of the alleged illegal use of the cell-site simulator at the time she provided consent. Thus, this case differs significantly from *Brown*, where the "impropriety of the arrest was obvious" and "[t]he manner in which Brown's arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion." 422 U.S. at 605.[41]

c. Ms. Williams's Testimony Should Not be Excluded.

Appellant's claim (at 45-46) that all of Ms. Williams's testimony should be suppressed is without merit, as there was sufficient attenuation between the search and Ms. Williams's testimony to dissipate any taint and the record contains ample evidence that the government would have inevitably discovered Ms. Williams through independent sources.

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[41] If this Court were to find that any of the phones recovered from Ms. Williams's purse or appellant's car should be suppressed, the government does not challenge appellant's argument (at 44) that the extraction reports related to those phones should also be suppressed. However, other information related to the phones, such as call detail records and location information obtained from the provider, are not subject to exclusion.

The Supreme Court has held that "the exclusionary rule should be invoked with much greater reluctance where the claim is based on a causal relationship between a constitutional violation and the discovery of a lay witness than when a similar claim is advanced to support the suppression of an inanimate object." *United States v. Ceccolini*, 435 U.S. 268, 280 (1978). Several factors are relevant in assessing attenuation: (1) whether the testimony is a product of free will; (2) the role played by the illegally seized evidence in gaining the witness's cooperation; (3) the temporal proximity between an unlawful search, the government's initial contact with the witness, and the witness's testimony; and (4) the purpose of the unlawful police conduct and whether suppression of the testimony would likely deter future misconduct. *Id.* at 279-80; *Oliver v. United States*, 656 A.2d 1159, 1172 (D.C. 1995); *United States v. Hooton*, 662 F.2d 628, 632 (9th Cir. 1981); *United States v. Leonardi*, 623 F.2d 746, 752 (2d Cir. 1980).

Here, Ms. Williams did not refuse to speak to the police altogether before receiving immunity (11/4/14 Tr. 420-29). Initially, she was not forthcoming about her knowledge and use of the stolen items (*id.* at 420-23). Once the government sought and received a court order granting her immunity, Ms. Williams testified before the grand jury and ultimately at trial (*id.* at 428-29). Although the grant of immunity likely influenced her decision to testify, Ms. Williams's decision was not coerced.

Second, although Ms. Williams was confronted with the fact that stolen phones and other items were recovered from her purse and from the car, she was not initially forthcoming after being confronted with the allegedly tainted evidence recovered from appellant's car (11/4/14 Tr.

420-23).[42] Indeed, a key piece of evidence that Ms. Williams was confronted with — the ATM video showing her using a stolen bank card — was obtained independently of the simulator (*id.* at 409-13). Ms. Williams's testimony was not procured until she was represented by an attorney the government obtained court-ordered immunity (*id.* at 428-29). Thus, any illegally obtained evidence ultimately did not play a great role in obtaining Ms. Williams's testimony. *See generally Leonardi*, 623 F.2d at 746 (witness's cooperation obtained independently of illegal search when (1) witness admitted there was substantial evidence against him apart from fruit of illegal search; (2) witness's decision to testify resulted from subsequent plea agreement, not from initial admissions he made after being confronted with tainted evidence; and (3) witness's identity was known prior to illegal seizure); *People v. Bell*, 434 N.E.2d 35 (Ill. App. 1982) (attenuation when witness accompanied by lawyer during questioning by police and spoke voluntarily); *State v. Anderson*, 296 N.W.2d 440 (Neb. 1980) (attenuation found when witness's existence known to authorities prior to illegal wiretap and witness testified voluntarily in exchange for immunity).

Third, as discussed *supra*, although the police spoke with Ms. Williams shortly after locating appellant with the aid of the simulator, there were significant lapses of time between this initial conversation and Ms. Williams's grand jury and trial testimony (11/4/14 Tr. 420-27).

Fourth, there is no evidence suggesting that MPD's use of the simulator was motivated by a desire to find Ms. Williams. *Cf. Silver v. United States*, 73 A.3d 1022, 1027-28 (D.C. 2013) (exclusion of illegally seized drugs unwarranted as to subsequently-arising obstruction of justice charge, because no one "could reasonably conclude that the officers conducted the unlawful

[42] As discussed *supra*, the phones recovered from Ms. Williams's purse were not illegally seized. Accordingly, any use of these phones in questioning Ms. Williams does not implicate the second *Ceccolini* factor.

search with the expectation that Silver would subsequently attempt to persuade another to 'take the charge' for him"; "any incremental deterrent effect that might be achieved" by such exclusion "is speculative at best" (internal quotation marks, citation, and alteration omitted)). Thus, suppression of Ms. Williams's testimony would be costly to society and would not advance the exclusionary rule's purpose of deterring police misconduct.[43]

D. Harmlessness.

Any error in failing to exclude certain evidence would be harmless beyond a reasonable doubt if the remaining evidence proved appellant's identity beyond a reasonable doubt and defeated a consent defense. *Chapman v. California*, 386 U.S. 18, 24 (1967). Here, to the extent that this Court finds the exclusionary rule inapplicable to appellant's DNA profile and (1) the phones recovered pursuant to a search warrant from the vehicle, (2) the phones recovered from Ms. Williams's purse after she provided consent to search her purse, or (3) Ms. Williams's testimony is not warranted, any error in failing to suppress the other challenged evidence was harmless.

The DNA evidence overwhelmingly proved appellant's identity and that Ms. Hawkins-Ross performed oral sex on appellant. The phone records and striking similarities between the victims' accounts provide additional strong evidence that appellant committed both armed sexual

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[43] Given its limited probative value, we do not challenge appellant's claim (at 47-48) that Ms. Hawkins-Ross's identification should be suppressed (11/3/14 Tr. 155-56 (the photograph of appellant "kind of looks like him")).

If this Court reverses and finds that appellant's DNA profile from his buccal swab obtained after the preliminary hearing should be suppressed, we should not be precluded from seeking another buccal swab based on the independent and untainted CODIS hit.

assaults and the accompanying robberies.[44] And appellant's possession of the proceeds of both robberies (shown either by the phones recovered from appellant's car, the phones recovered from Ms. Williams's purse, or Ms. Williams's testimony), further corroborates the victims' testimony and rebuts any consent defense.

[44] Specifically, we note the evidence of how appellant contacted Ms. Hawkins-Ross and Ms. Shipp, the location of the assaults, the appearance of appellant's knife, and appellant's physical appearance.

CONCLUSION

WHEREFORE, the government respectfully submits that the judgment of the Superior Court should be affirmed.

Respectfully submitted,

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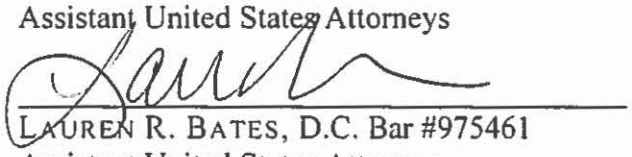

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused two copies of the foregoing Brief for Appellee to be mailed to counsel for appellant, Stefanie Schneider, Esq., Public Defender Service, 633 Indiana Avenue, NW, 2nd Floor, Washington, D.C. 20004, and to counsel for amicus, Arthur B. Spitzer, American Civil Liberties Union of the Nation's Capital, 4301 Connecticut Avenue, NW, Suite 434, Washington, D.C. 20008, on this 12th day of August, 2016.

LAUREN R. BATES
Assistant United States Attorney