Appeal No. 15-CF-322

**Special Sitting: April 18, 2017**

DISTRICT OF COLUMBIA COURT OF APPEALS

PRINCE JONES,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the Superior Court of the District of Columbia
Criminal Division

# REPLY BRIEF

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## ARGUMENT

### THE GOVERNMENT'S WARRANTLESS USE OF A CELL SITE SIMULATOR TO TRACK THE PRECISE LOCATION OF MR. JONES'S CELL PHONE VIOLATED THE FOURTH AMENDMENT, AND NO EXCEPTION TO THE EXCLUSIONARY RULE APPLIES.

Without getting a warrant, the police used a cell site simulator to track the location of Mr. Jones's cell phone to a parked car on the 4000 block of Minnesota Avenue, N.E., where they recovered the bulk of the evidence against Mr. Jones. In his opening brief, Mr. Jones argued that the warrantless use of a cell site simulator was an illegal search that violated his Fourth Amendment rights under two independent theories. First, it was a trespassory search, *see United States v. Jones*, 565 U.S. 400, 404 (2012), because the cell site simulator interfered with the functioning of his phone, resulting in a dropped call and seven failed call attempts. Second, the police violated Mr. Jones's reasonable expectations of privacy by converting his cell phone into a tracking device. *See Katz v. United States*, 389 U.S. 347, 359 (1967).

Since Mr. Jones filed his opening brief, two courts have held that the Fourth Amendment requires the government to get a warrant before using a cell site simulator to track a person's location. In *State v. Andrews*, the Maryland Court of Special Appeals held that "people have a reasonable expectation that their cell phones will not be used as real-time tracking devices by law enforcement," and that the "use of a cell site simulator requires a valid search warrant, . . . unless an established exception to the warrant requirement applies." 134 A.3d 324, 327 (Md. Ct. Spec. App. 2016). Likewise, in *United States v. Lambis*, the court held

that "use of a cell-site simulator constitutes a Fourth Amendment search and "[a]bsent a search warrant, the Government may not turn a citizen's cell phone into a tracking device." 197 F. Supp. 3d 606, 611 (S.D.N.Y. 2016).

In its response, the government acknowledges *Andrews* and *Lambis*, but asks this Court not to follow these decisions. It then devotes the majority of its brief to an array of ancillary doctrines which it claims preclude the application of the exclusionary rule even if this Court finds that the search was illegal. Because none of these arguments have merit, this Court must reverse.

## A. USE OF THE SIMULATOR WAS AN ILLEGAL SEARCH.

### 1. The Government Violated Mr. Jones's Reasonable Expectations of Privacy

In addition to being contrary to *Andrews* and *Lambis*, the government's claim that "MPD's use of a cell-site simulator to locate appellant's phone did not violate appellant's reasonable expectation of privacy," Gov't Br. at 22, is wrong on both the subjective and objective prongs of the test. Mr. Jones "exhibited an actual (subjective) expectation of privacy," *Katz*, 389 U.S. at 361 (Harlan, J., concurring), when he secured a prepaid phone unconnected with his name or address and turned off the GPS function so that neither his wireless carrier nor any third party cell phone applications had access to his precise location—facts the government ignores in its brief. Mr. Jones's expectation of privacy was "reasonable," because a reasonable person would not expect that the government could, at any moment in time and without a warrant, determine his precise location by converting his personal cell phone into a tracking device. *Andrews*, 134 A.3d at 327.

The suggestion that people have no reasonable expectation of privacy in their location when their phones are on because they should know the government can track their movements, Gov't Br. at 23, is unavailing. The government's cell site simulator program was kept secret for years pursuant to "non-disclosure agreements that bound law enforcement not to reveal their use of these devices." Staff of H.R. Comm. on Oversight and Gov't Reform, 114th Cong., Rep. on *Law Enforcement Use of Cell-Site Simulation Technologies: Privacy Concerns and Recommendations* 7 (Dec. 19, 2016) ("House Report").[1] Moreover, irrespective of what the public knows about the technological capabilities and practices of law enforcement, it is unreasonable to expect citizens to forfeit use of a cell phone, "a pervasive and insistent part of daily life," *Riley v. California*, 134 S. Ct. 2473, 2484 (2014), to ensure that the government will not convert their personal property into a tracking device. *See Andrews*, 134 A.3d at 348 ("We cannot accept the proposition that cell phone users volunteer to convey their location information simply by choosing to activate and use their cell phones and to carry the devices on their person." (citation omitted)).

Indeed, when media reports surfaced that law enforcement was using cell site simulators without judicial oversight,[2] federal and local lawmakers responded with alarm to curb this warrantless intrusion of privacy. Both the House and

[1] Links to online sources provided in Table of Authorities.

[2] *See, e.g.*, Justin Fenton, *Judge Threatens Detective with Contempt for Declining to Reveal Cellphone Tracking Methods*, BALTIMORE SUN, Nov. 17, 2014; *see also* ACLU Br. at 14-21 and authorities cited therein.

Senate launched investigations,[3] which led to the Department of Justice's current cell site simulator policy requiring a warrant.[4] On December 19, 2016, the House Committee on Oversight and Government Reform issued a comprehensive report on law enforcement use of cell site simulators and recommended legislation that would require "probable cause based warrants" to "ensure that the use of cell-site simulators and other similar tools does not infringe on the rights guaranteed in the Constitution." House Report at 35-36. On February 15, 2017, Representative Jason Chaffetz introduced the Cell Location Privacy Act of 2017, which would impose a national warrant requirement for cell site simulator use.[5] Various states have codified a warrant requirement.[6] The responses of society's elected officials reflect a community consensus that the warrantless use of a cell site simulator to track the location of a person's cell phone is an unacceptable invasion of privacy.

The government's reliance on the third-party doctrine announced in *Smith v. Maryland*, 442 U.S. 735, 743-45 (1979), is misplaced. As an initial matter, the claim that "[b]y turning his phone on, appellant 'voluntarily conveyed' and 'exposed' his location to the cell phone company," Gov't Br. at 23-24, is factually incorrect. The cell site simulator, which led police to Mr. Jones's parked car,

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[3] *See* Letter from Patrick Leahy and Charles Grassley, U.S. Senators, to Eric Holder, Att'y Gen., and Jeh Johnson, Sec'y of Homeland Sec. (Dec. 23, 2014); Letter from Jason Chaffetz et al., H.R. Comm. on Oversight and Gov't Reform, to Jeh Johnson, Sec'y of Homeland Sec. (Apr. 24, 2015).

[4] DOJ Policy Guidance: Use of Cell-Site Simulator Technology (Sept. 3, 2015).

[5] H.R. 1061, 115th Cong. (2017).

[6] *See* Cal. Penal Code § 1546.1 (2015); Va. Code Ann. § 19.2-70.3 (2016); Wash Rev. Code § 9.73.260 (2015); Utah Code Ann. § 77-23c-102 (2016).

generated far more specific location information than the cell tower information AT&T collects. *See* 10/17/14 at 80, 81 (explaining that AT&T provided a several-hundred-meter estimate of the area in which the cell phone might be located). Second, the third party doctrine does not apply here because the cell site simulator is *direct* government surveillance. The third party doctrine is premised on the notion that "a person has no legitimate expectation of privacy in information he voluntarily turns over *to third parties*." 442 U.S. at 744-45 (emphasis added). In *United States v. Graham*, the en banc Fourth Circuit differentiated between information obtained directly from a wireless carrier, which it concluded is subject to the third-party doctrine, and "direct surveillance," which is not. 824 F.3d 421, 425-26 (4th Cir. 2016) (en banc). The court specifically identified cell site simulators as an instance of direct government surveillance which requires more constitutional scrutiny. *Id.* at 426 n.4.

The government attempts to distinguish *Andrews* and *Lambis* on the ground that Mr. Jones was located on a public street rather than in his home. However, the *Andrews* court contemplated the present situation—where the simulator locates the phone outside the home—and concluded that because police cannot know in advance whether the target phone is in a public or private space, the only workable rule is a bright line requirement that police must obtain a warrant every time a cell site simulator is used, barring a recognized exception to the warrant requirement:

> It would be impractical 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. Such a rule would provide neither guidance nor deterrence, and would do nothing

to thwart unconstitutional intrusions.

134 A.3d at 349-50 (citations omitted). The rationale of *Andrews* is consistent with Supreme Court case law which has repeatedly reiterated that "if police are to have workable rules, the balancing of the competing interests . . . 'must in large part be done on a categorical basis—not in an ad hoc, case-by-case fashion by individual police officers.'" *Riley*, 134 S. Ct. at 2491-92 (quotation omitted). *See also Oliver v. United States*, 466 U.S. 170, 181-82 (1984).

Thus, in *Riley*, the Supreme Court adopted a bright line rule that law enforcement must obtain a warrant before searching a cell phone and rejected the government's proposal that the warrant requirement turn on whether police access data stored on the phone or in the cloud. 134 S. Ct. at 2491-93 (explaining that officers searching a phone would not typically know where the data they viewed was stored). Likewise, in *Kyllo v. United States*, the Court declined to adopt a Fourth Amendment standard that would bar only the use of thermal imaging to discern "intimate details" in the home because "no police officer would be able to know *in advance* whether his through-the-wall surveillance picks up 'intimate' details—and thus would be unable to know in advance whether it is constitutional." 533 U.S. 27, 38-39 (2001). Here, because cell phones travel fluidly between the public and private sphere, the only workable rule is a requirement that law enforcement obtain a warrant.[7]

[7] The government's reliance (at 25-26) on *United States v. Karo*, 468 U.S. 705 (1984), to suggest that no warrant is necessary when a cell phone is located in a public space, is misplaced. Critically, in *Karo*, the police knew the starting point of the beeper-containing canister they were tracking and, with sufficient manpower, could have tracked the location of the canister with pure visual

Finally, this Court should reject the government's suggestion that it need not worry about providing police with guidance or deterrence in light of the September 3, 2015, DOJ policy requiring law enforcement to obtain a search warrant prior to using a cell site simulator. Gov't Br. at 26. Unlike a binding judicial ruling, a DOJ policy reflects a political determination about best practices and is subject to change at the whim of the political leadership. *See* House Report (chronicling evolving DOJ policies on cell site simulators). There is no reason to think that the new administration will keep in place this Obama-era policy.

2. The Government Committed a Trespassory Search

The government's use of a cell site simulator to track Mr. Jones's phone violated his Fourth Amendment rights for a second reason: it was a government trespass of his property. The cell site simulator "grab[bed]" Mr. Jones's phone and forced it to disconnect from the AT&T network, thereby rendering it nonoperational for making and receiving calls. 10/17/14 at 44. The government erroneously maintains that no trespass occurred, notwithstanding that the cell site simulator disrupted Mr. Jones's use of his phone, because it did so electronically without any "physical contact." Gov't Br. at 19.

There is no question that the law on the intersection of the Fourth Amendment and electronic trespass is undeveloped and that Mr. Jones raises an

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surveillance. A cell site simulator, in contrast, locates a person at any moment in time without prior information about location. Moreover, because cell phones are generally with their owners at all times, a cell site simulator search is far more likely to intrude upon the home and to reveal intimate information.

issue of first impression. This is because the Supreme Court's jurisprudence on trespassory searches largely predates the computer era. Indeed, since *Katz* was decided in 1967, most jurists and scholars, including four Supreme Court justices, believed that the reasonable expectation of privacy test had replaced the trespass test. *See Jones*, 565 U.S. at 422-23 (Alito, J., concurring). The trespass doctrine lay dormant until 2012 when it was reinvigorated by *Jones.* Given this history, the fact that "the Supreme Court has not applied the Fourth Amendment trespass theory to cases involving less than physical contact" is true, but a red herring. Gov't Br. at 19-20.

In his opening brief, Mr. Jones cited cases in an analogous context where courts have held that unauthorized electronic contact with a person's digital device constitutes trespass to chattels if it interferes with its functioning. *See* Appellant Br. at 28-29. Mr. Jones argued that where an electronic trespass to chattels is committed by the government "for the purpose of obtaining information," *Jones*, 565 U.S. at 404, it is a Fourth Amendment search. Here, because the cell site simulator obtained Mr. Jones's location by interfering with the operation of his phone, it was a trespassory search subject to the warrant requirement.

The dicta in *Jones* that "[s]ituations involving merely the transmission of electronic signals *without trespass* would *remain* subject to the *Katz* analysis" is consistent with Mr. Jones's argument. *Jones*, 565 U.S. at 415 (first emphasis added) (citation omitted). Mr. Jones does not dispute that if the cell site simulator had been able to determine the location of his phone by *merely* transmitting electronic signals, without interfering with the functioning of his phone, no

trespass would have occurred. But here, because the cell site simulator forced Mr. Jones's phone to disconnect from the AT&T network, resulted in a dropped call, and precluded Mr. Jones from making or receiving calls, the government activity directly impeded his use and enjoyment of his property.[8] The government offers nothing to undermine the strength of this analysis.

B. MR. JONES HAS STANDING.

The government does not dispute that Mr. Jones has standing to challenge a cell site simulator search of *his* phone. Instead, it suggests that Mr. Jones lacks standing because it is "plausible" that the police used the cell site simulator on the complainant's phone. Gov't Br. at 17-18. The government maintains that it was Mr. Jones's burden to show that the police tracked his phone and that he failed to meet this burden because "the trial court made no factual finding that appellant's phone was tracked." *Id.* at 18. The government is mistaken on both counts.

It is well-established that where a defendant claims a Fourth Amendment violation in a case involving a warrantless search or seizure, "the defendant has the burden of making a prima facie showing of illegality and demonstrating a causal connection between the illegality and the seized evidence." *Duddles v. United States*, 399 A.2d 59, 63 (D.C. 1979). "Upon such a showing, the burden of producing evidence that will bring the case within one or more exceptions to the exclusionary rule rests squarely upon the prosecution." *Id.* at 63 n.9 (quotation

[8] That the interference with Mr. Jones's cell phone was "brief," Gov't Br. at 21, is irrelevant to the trespass analysis. *See Florida v. Jardines*, 133 S. Ct. 1409, 1413, 1417-18 (2013) (finding trespass due to brief sniff of porch by police dog).

omitted). The government bears this burden because evidence of circumstances justifying an exception to the warrant requirement is "particularly within the knowledge and control" of the police. *Malcolm v. United States*, 332 A.2d 917, 918 (D.C. 1975). Here, Mr. Jones made a prima facie showing that his phone was searched by the cell site simulator. The government had the burden to show that it used the simulator on the complainant's phone—evidence "particularly within [its] knowledge and control"—if it wanted to defeat Mr. Jones's motion.[9]

*Commonwealth v. Lewin*, 557 N.E.2d 721 (Mass. 1990), is on point. In that case, where the police were unable to say whether the challenged evidence was recovered from the warrantless search of defendant's apartment or a neighboring apartment, the court held that because the police were the "source of information as to the particulars of the searches and seizures," the government "cannot avoid a motion to suppress simply by showing that the police cannot explain where, when, or how the evidence was seized." *Id.* at 727. Here, Sergeant Perkins testified that he could not recall whether he used the cell site simulator on Mr. Jones's phone or the complainant's phone. 10/17/14 at 42, 97. The government failed to present any police notes, police reports, or computer forensics to shed light on this question. As in *Lewin*, the trial judge could "resolve doubts against the police and

[9] The government's argument presents a different issue than the prototypical "standing" inquiry where the question is whether the defendant "has a legitimate expectation of privacy in the invaded place." *Rose v. United States*, 629 A.2d 526, 530 (D.C. 1993) (quotation omitted). In such cases, evidence of the defendant's privacy interest (*e.g.*, status as an overnight guest) is particularly within his control. Here, there is no question that Mr. Jones has an expectation of privacy in his own cell phone. The standing cases cited by the government are therefore inapposite.

conclude that failure in a very primary task leaves the record devoid of a factual basis to justify a finding that the contested evidence was lawfully seized." 557 N.E.2d at 727. Moreover, the parties agreed below that "it's the government's burden to prove that it was not the defendant's phone . . . by a preponderance of the evidence standard," and that the government did not meet this burden. 10/29/14 at 301, 303 (prosecutor conceding it was "ambiguous" which phone was used and asking court to move onto inevitable discovery). The government cannot take a contrary position on appeal. *Brown v. United States*, 627 A.2d 499, 508 (D.C. 1993).[10]

C. INEVITABLE DISCOVERY DOES NOT APPLY.

The government's argument (at 29) that the exclusionary rule does not apply because "MPD inevitably would have located appellant by using the simulator on Ms. Shipp's Sprint phone" is unavailing. In order to prevail on the inevitable discovery exception to the exclusionary rule, the government must show that (1) "the lawful process which would have ended in the inevitable discovery . . .

[10] Even assuming *arguendo* that it was Mr. Jones's burden to establish that the government used the cell site simulator on his phone, he met this burden through the defense expert's testimony about seven failed call attempts and a text message that said, "Our call dropped," when, during this same time period, the complainant's phone was communicating with the Sprint network. 10/29/14 at 233, 239-40, 247-50, 266-67. The trial judge concluded that the police "seem to be using the . . . AT&T [phone]" and that it was "probably" Mr. Jones's phone. *Id.* at 305. Her finding that the police "probably" tracked Mr. Jones's phone is equivalent to a finding that Mr. Jones established as much by a preponderance of the evidence. *See United States v. Matlock*, 415 U.S. 164, 177 n.14 (1974) (setting preponderance standard for suppression hearings); *Hagans v. United States*, 96 A.3d 1, 34 (D.C. 2014) (defining standard as a "more-likely-than-not finding").

commenced before the constitutionally invalid [search or seizure]" *and* (2) the "requisite actuality that the discovery would have ultimately been made by lawful means." *Hicks v. United States*, 730 A.2d 657, 659 (D.C. 1999) (quotation omitted). The government failed to meet its burden on either prong.

First, at the time of the illegal cell site simulator search, the police had not commenced the "lawful process" that allegedly would have located Mr. Jones—*i.e.*, tracking the complainant's Sprint phone with the cell site simulator. The government argues that it is sufficient that the police requested location information for Ms. Shipp's phone, tracked its general location, and obtained its MSID—prerequisite steps to using a cell site simulator on Ms. Shipp's phone. Gov't Br. at 29-30. The problem with the government's argument is that the police abandoned this alternative investigative route when they elected to use the cell site simulator on Mr. Jones's phone. Only one cell site simulator was functional at the time of the search. 10/17/14 at 65-66, 97. Because a cell site simulator can locate only one phone at a time, *id.* at 96-97, the police reached a fork in the road and had to decide whether to use the simulator on Ms. Shipp's phone (a lawful search) or Mr. Jones's phone (an unlawful search). The police elected to track Mr. Jones's phone, in violation of his Fourth Amendment rights.

The government has not cited any cases in which the government received the benefit of the inevitable discovery doctrine after abandoning a lawful investigative process in favor of an unlawful one.[11] To the contrary, in an

[11] In *Hicks* and *Pinkney v. United States*, 851 A.2d 479 (D.C. 2004), the cases cited by the government (at 28, 30-31), the police responded to a lookout and lawfully

analogous context where the police *could have* obtained a warrant prior to a search, but chose not to, this Court rejected the argument that the inevitable discovery doctrine applies. *United States v. Griffin*, 502 F.2d 959, 961 (D.C. 1974) (per curiam); *Gore v. United States*, 145 A.3d 540, 549 (D.C. 2016). "The argument that 'if we hadn't done it wrong, we would have done it right' is far from compelling." *Gore*, 145 A.3d at 549 n.32 (quotation omitted).

The inevitable discovery exception does not apply for a second reason: it is speculative whether the cell site simulator would have successfully located Ms. Shipp's phone or the evidence obtained. Although it was the government's burden to establish the "requisite actuality," *Hicks*, 730 A.2d at 659 (citation omitted), the government chose not to present expert testimony about the reliability of cell site simulators. Sergeant Perkins's lay testimony about police use of cell site simulators in the field shed no light on this key question. Because the technical capabilities and limitations of cell site simulators are beyond the ken, the trial court had no way of knowing whether the failure rate of the cell site simulator was 50% or 1%—information necessary for it to conclude "with certainty," *United States v. Allen*, 436 A.2d 1303, 1310 (D.C. 1981), that the police would have inevitably located Ms. Shipp's phone. Because Ms. Shipp's phone was a different model (HTC v. iPhone), with an MSID instead of an IMSI, on a different network (Sprint v. AT&T), the trial court could not simply assume that success in locating Mr.

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stopped the appellant *for the purpose* of a show up. 730 A.2d at 662; 851 A.2d at 484. The police then conducted an illegal search. In each case, the lawful show-up that inevitably would have led to an arrest and recovery of contraband was set in motion prior to, and continued at the same time as, the illegal search.

Jones's phone would be predictive of success in locating Ms. Shipp's phone.[12]

The "requisite actuality" is also missing because the government presented no evidence about *when* the police would have tracked Ms. Shipp's phone with the cell site simulator. Because a cell site simulator can locate only one phone at a time and the government used it on Mr. Jones's phone, the government asks this Court to find inevitable discovery based on a counterfactual. This case is a far cry from *Nix v. Williams*, 467 U.S. 431 (1984), where the Supreme Court emphasized that discovery of the body was "inevitable" because an ongoing search party was "approaching the *actual* location of the body" at the time of the constitutional violation. *Id.* at 449 (emphasis added). Because the legal cell site simulator search of Ms. Shipp's phone was never initiated, the required "demonstrated historical facts capable of ready verification," *id.* at 444 n.5, are missing.[13]

Furthermore, even assuming that the cell site simulator was capable of tracking Ms. Shipp's phone, the difference of a few minutes could have made a huge difference in the results. When the police stopped Mr. Jones, he was in his car, dropping his girlfriend off at her internship. Had Mr. Jones driven away, the

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[12] This Court should reject the government's request for a remand to elicit facts about "the capabilities of the cell-site simulator used to locate appellant." Gov't Br. at 34 n.35. Inevitable discovery was the government's principal argument below, and "it had a full and fair opportunity to present whatever facts it chose to meet its burden of justifying the warrantless [search]." *Barnett v. United States*, 525 A.2d 197, 200 (D.C. 1987) (denying government request for a remand).

[13] Unlike *Logan v. United States*, 147 A.3d 292 (D.C. 2016), the government failed to present any evidence of police protocols relating to cell site simulator use. *See id.* at 299 (holding that where "police protocol dictates" procedure, inevitable discovery applies).

police would have had to revert to cell tower communications and wait until the phone was stationary, at which point they could use the cell site simulator. During this time period, any number of things could have happened to thwart the investigation: the phone could have run out of batteries; Mr. Jones could have discarded the phone and/or the alleged robbery proceeds; or Mr. Jones or the proceeds may not have remained in the car. The government simply failed to show that an alternative cell site simulator search would have yielded the same evidence.

D. THE GOOD FAITH EXCEPTION DOES NOT APPLY.

The government's scattershot invocation of the good faith doctrine is similarly misplaced. First, the government asks this Court not to apply the exclusionary rule because the police mistakenly believed there were exigent circumstances. Gov't Br. at 35. The government cites no cases in support of this broad proposition, which would eviscerate the strict requirements of the exigent circumstances doctrine.[14] Moreover, Officer Perkins's subjective belief that exigent circumstances excused him from getting a warrant was not "objectively

[14] The cases cited by the government are inapposite. *Herring v. United States*, 555 U.S. 135 (2009), stands for the limited proposition that the exclusionary rule does not apply where an officer reasonably believes there is an outstanding warrant based on an isolated instance of negligent police record-keeping. *Davis v. United States*, 564 U.S. 229, 241 (2011), holds that the exclusionary rule does not apply when police conduct a search in objectively reasonable reliance on binding judicial precedent. Finally, *Heien v. North Carolina*, 135 S. Ct. 530, 539-40 (2014), addresses the "antecedent question" of whether there is a Fourth Amendment violation where a stop is based on an objectively reasonable mistake of law. This "exceedingly rare" circumstance arises only when the statute that was allegedly violated is "genuinely ambiguous" or poses a "very hard question of statutory interpretation." *Id.* at 541 (Kagan, J., concurring) (quoting Solicitor General).

reasonable." *Id.* at 35-36. His mistaken belief that there had been three sexual assaults within twenty-four hours is beside the point. The critical facts, as the trial judge correctly observed, are that many hours elapsed between the middle-of-the-night offense and the government's use of the cell site simulator at approximately 11 a.m., and that one of the *two* MPD teams working the case could have applied for a warrant during that interval. 10/29/14 at 311. The law is clear that "[w]here police officers can reasonably obtain a warrant . . . without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *Missouri v. McNeely*, 133 S. Ct. 1552, 1561-63 (2013). Notably, the government does not defend this case on exigency grounds.

Second, the good faith doctrine does not permit the introduction of the evidence subsequently obtained pursuant to the search warrants and court order, as the government suggests. The proceeds in the car, cell phone extraction reports, and DNA profile are derivative fruits of the poisonous tree because the warrants and court order were issued on the basis of evidence illegally recovered pursuant to the cell site simulator search. *Evans v. United States*, 122 A.3d 876, 886 (D.C. 2015) (exclusionary rule applied where warrant was based on information obtained during prior, unlawful entry);[15] *see also United States v. Wanless*, 882 F.2d 1459,

[15] The government is wrong to suggest that the basis for *Evans* has been undermined because *Smith v. United States*, 111 A.3d 1 (D.C. 2014), a case cited by *Evans*, "has since been vacated in light of the Supreme Court's contrary holding in *Heien*." Gov't Br. at 37 n.6. The "contrary holding in *Heien*," *id.*, involved the antecedent question of whether the traffic stop violated the Fourth Amendment. The *Evans* court was well-aware of the government's pending petition for rehearing and specifically noted that the government "did not seek rehearing with

1466 (9th Cir. 1989) ("[T]he good faith exception does not apply where a search warrant is issued on the basis of evidence obtained as the result of an illegal search."); *United States v. McGough*, 412 F.3d 1232, 1240 (11th Cir. 2005) (same).

Moreover, even under *United States v. McClain*, 444 F.3d 556 (6th Cir. 2006), the principal case cited by the government, the good faith doctrine does not apply because the police officer failed to disclose the warrantless use of the cell site simulator to the judges who issued the search warrants and DNA order. The good faith exception is premised on the notion that where a police officer conducts a search in *reasonable* reliance on a search warrant that is subsequently found to be defective, there is only marginal deterrent value in excluding the evidence. *United States v. Leon*, 468 U.S. 897, 919-20 (1984). In holding that the good faith exception applied notwithstanding a prior illegal search, the *McClain* court emphasized that the "warrant affidavit *fully disclosed* to a neutral and detached magistrate the *circumstances surrounding the initial warrantless search*" and "[o]n the basis of that affidavit, the magistrate issued the search warrant[]." 444 F.3d at 566 (emphases added). There was "*nothing more that [the officer] could have or should have done* under th[o]se circumstances to be sure that his search would be legal." *Id.* (emphasis added) (quotation omitted).

Here, in contrast, the warrant affidavits omitted any mention of the cell site simulator and simply stated that "the Defendant was located by members of the Washington, D.C. Metropolitan Police Department in the 4000 block of Minnesota

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respect to *Smith*'s exclusionary-rule analysis." 122 A.3d at 886 n.4. *Evans*'s exclusionary rule analysis thus remains binding precedent independent of *Smith*.

Ave N.E." App'x H at 3; App'x I at 5; App'x J.[16] Likewise, the government did not disclose its cell site simulator use at the probable cause hearing. The police cannot simultaneously withhold key information necessary to a judicial determination about the legality of a search and assert good faith in relying on the resulting search warrants and court orders. *See United States v. Reilly*, 76 F.3d 1271, 1281-82 (2d Cir. 1996) (holding good faith exception inapplicable where officers failed to disclose in their warrant affidavit the dubious circumstances of their pre-warrant search); *Leon*, 468 U.S. at 923 (noting that suppression is an appropriate remedy where magistrate is "misled by information in an affidavit"). The rationale of the exclusionary rule applies with full force here because suppression of the evidence will encourage officers to seek warrants prior to using a cell site simulator and to be forthcoming with courts in warrant applications.

### E. THE FRUITS OF THE ILLEGAL SEARCH SHOULD HAVE BEEN SUPPRESSED.

In his opening brief, Mr. Jones identified seven categories of evidence that should have been suppressed as fruits of the illegal search.[17] In its response, the government asks this Court to "remand the case for the trial court to hold hearings, make factual findings of fact, and reach legal conclusions on the application of the

[16] Appellant's copies of the warrant affidavits—provided by the government—are incomplete, *see* Appellant's Br. at 45 n.24, but there is no reason to believe there is mention of the cell site simulator in the missing pages.

[17] (1) Mr. Jones's knife and statement; (2) phones recovered from Ms. Williams's purse; (3) the evidence recovered from Mr. Jones's car; (4) extraction reports from the recovered phones; (5) Ms. Williams's testimony; (6) Ms. Hawkins-Ross's identification; and (7) Mr. Jones's DNA profile and photograph of his groin.

fruit-of-the-poisonous-tree doctrine." Gov't Br. at 38. Critically, the government references no findings that need to be made on the present record, nor does it explain why "specific arguments" would be needed in the trial court on legal issues that this Court reviews de novo. *Id.* at 39 n.39. Rather, the government seeks at this late stage to surface a new inevitable discovery argument,[18] and to suggest that it could establish an independent source for some of its evidence. *Id.* at 38 n.38.[19]

This Court should not entertain the government's request for a remand so that it may take a second bite at the apple. Mr. Jones sought to suppress all fruits of the illegal search, R. 24, 35, 49, and the government had the "burden . . . to go forward with evidence that w[ould] bring the case within one or more exceptions to the exclusionary rule." *Barnett*, 525 A.2d at 200. The government has not given any reason for its failure to raise in the trial court these arguments, or for its failure to elicit during the three-day evidentiary hearing the evidence that it mentions for the first time in its appellate brief. Under these circumstances, a remand is inappropriate. *See Giordenello v. United States*, 357 U.S. 480, 488 (1958) (rejecting government's request for a remand so that it could defend its warrantless arrest on a new theory); *see also Barnett*, 525 A.2d at 200. If, after reversal and on remand for a new trial here, the government desires to introduce new DNA evidence obtained through the CODIS hit it now references in its brief, it can seek

[18] The government suggests that it would have inevitably discovered Ms. Williams as a witness from an ATM video but proffers no specifics. *Id.* at 38 n.38.

[19] The government alludes in its brief to a CODIS hit, which was never provided to trial counsel or mentioned in the trial court, and which the government now claims is an "independent source" of Mr. Jones's identity. *Id.*

to establish that it has an independent source for that evidence, or any other, at a hearing prior to retrial. *In re T.L.L.*, 729 A.2d 334, 343-44 (D.C. 1999).[20]

If this Court declines to remand, the government only challenges Mr. Jones's fruits analysis with respect to three categories of evidence: (1) appellant's statement; (2) the contents of Ms. Williams's purse; (3) and Ms. Williams's testimony.[21] Because all of this evidence is tainted, it must be suppressed.

**Appellant's Statement**

The government cites no cases on point for its contention that Mr. Jones's statement that he lived at "566 Wilson Bridge Road in Oxon Hill Maryland," was not a fruit because it was elicited pursuant to "a routine police procedure." Gov't Br. at 40. *United States v. Olivares-Rangel*, 458 F.3d 1104 (10th Cir. 2006), the lead case cited by the government, reached the *opposite* conclusion and held that the defendant's statements about his "identity and nationality," which were made "directly after his illegal arrest and again at the border patrol station" were fruits because the "taint from [the] illegal arrest had not become sufficiently attenuated."

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[20] The government suggests that *In re T.L.L.* supports its remand request, but it misreads the case when it suggests that it involved a pre-reversal remand. In *T.L.L.*, this Court "*reversed T.L.L.'s adjudication of guilt*, and . . . directed the trial court to consider, on remand, *and in advance of any new trial*, whether" the government can establish an independent source for any of its proposed evidence at a new trial. *Ellis v. United States*, 941 A.2d 1042, 1049 (D.C. 2008) (emphases added). This Court should follow the same course here.

[21] The government concedes that Ms. Hawkins-Ross's identification should be suppressed. Gov't Br. at 47 n.43. It likewise concedes that if any of the phones are suppressed, the extraction reports must also be suppressed. *Id.* at 44 n.41. The government does not challenge that the knife, evidence recovered from Mr. Jones's car, photograph of Mr. Jones's groin, and DNA profile are fruits.

*Id.* at 1112. The same is true here.[22]

**Phones Recovered from Ms. Williams's Purse**

As Mr. Jones explained in his opening brief, under the factors enumerated in *Brown v. Illinois*, 422 U.S. 590, 602, 604-05 (1975), the phones recovered from Ms. Williams's purse should have been suppressed because Ms. Williams's consent was tainted by the Fourth Amendment violation.[23] The government concedes that "the use of the simulator and police encounter with Ms. Williams were relatively close in time" but erroneously maintains Ms. Williams's signing of the consent form was an "intervening circumstance[] sufficient to break the causal chain between the alleged Fourth Amendment violation and Ms. Williams's subsequent consent." Gov't Br. at 42.[24]

The signing of a consent form is not sufficient to purge the taint because the request for consent was made "immediately" following the illegality, and the officers told Ms. Williams that "if she refused consent they could simply get a

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[22] *(Elton) Jones v. United States*, 779 A.2d 277, 283-84 (D.C. 2001), a *Miranda* case cited by the government which held that questions about identity are not interrogation, is inapposite because Mr. Jones is not alleging a *Miranda* violation.

[23] The government conflates standing and fruits analyses when it suggests that Mr. Jones lacks standing because he "does not have a reasonable expectation of privacy in the contents of Ms. Williams's purse," Gov't Br. at 40. The relevant question is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

[24] The government asserts in passing that the ringing of Mr. Jones's phone was also an intervening circumstance but provides no argument to explain why this would be sufficient to break the causal chain.

warrant." *United States v. Maez*, 872 F.2d 1444, 1455-56 (10th Cir. 1989) (consent tainted where wife signed consent form immediately after police arrested husband and told her they would get a warrant if she refused); *see also United States v. Oaxaca*, 233 F.3d 1154, 1156, 1158 (9th Cir. 2000) (consent tainted where sister signed consent form "moments after" agents arrested her brother and told her they would get a warrant if she declined). Here, the police questioned Ms. Williams in a police cruiser as Mr. Jones stood on the sidewalk in handcuffs. Their statement that Mr. Jones was going to be arrested, that they believed there was evidence of a crime in her purse, and that if she did not consent to a search, they would seize it and get a warrant, "tends to undermine any salutary effect that advice of the right to refuse consent might have." *Maez*, 872 F.2d at 1456.[25]

The third *Brown* factor—the flagrancy of the misconduct—also weighs in Mr. Jones's favor. Not only did the police fail to get a warrant prior to using the cell site simulator, they did not disclose its use to the court when they sought additional warrants. *See* discussion pp. 17-18. If the police truly, but mistakenly, believed that exigent circumstances justified the warrantless use of a cell site simulator, one would expect them to reference it *somewhere* in their *five-page*

[25] The fruits cases cited by the government (at 42-43) are distinguishable because the police did not threaten to get a warrant. The government's reliance on the voluntariness analysis in *United States v. Larson*, 978 F.2d 1021, 1024 (8th Cir. 1992), is also misplaced because *Larson* does not address the fruit of the poisonous tree doctrine. "The mere fact that a consent to search is "voluntary" within the meaning of *Schneckloth v. Bustamonte*[, 412 U.S. 218 (1973),] does not mean that it is untainted by the prior illegal arrest." 6 Wayne R. LaFave, *Search & Seizure* § 11.4(d), 315-16 (4th ed. 2004) (citing *Brown*, 422 U.S. 590).

affidavit. The wholesale police concealment of the cell site simulator from the court is precisely the type of "police misconduct [that] is most in need of deterrence." *Utah v. Strieff*, 136 S. Ct. 2056, 2063 (2016).

**Ms. Williams's Testimony**

As Mr. Jones explained in his opening brief, all of the *Ceccolini* factors weigh in favor of excluding Ms. Williams's testimony because there is a "direct link" between the illegal cell site simulator search and her testimony. *United States v. Ceccolini*, 435 U.S. 268, 278 (1978). Critically, the government does not (and cannot) show that Ms. Williams's testimony was an act of free will. Ms. Williams testified that the police "forced" her to go with them for questioning. She asserted her Fifth Amendment right against incrimination, and only testified when compelled to do so by court order. Finally, she reiterated at trial that she did not want to testify.[26] *See* 10/24/14 at 22-26; 11/4/14 at 421-29, 432. The government's suggestion that the illegally obtained evidence did not "play a great role in obtaining Ms. Williams's testimony" because the police also had the ATM video is similarly unavailing. As discussed above at note 18, the government presented no evidence regarding the police's ability to link the ATM video to Ms. Williams in the absence of the illegal stop. But even if they could have, the stolen phones which were found in Ms. Williams's purse as a result of the cell site

[26] The fact that Ms. Williams was "represented by an attorney [and] the government obtained court-ordered immunity," Gov't Br. at 46, does not change the attenuation analysis. The critical point is that as in *United States v. Scios*, Ms. Williams repeatedly refused to cooperate and *only* testified when compelled to do so by court order. 590 F.2d 956 (D.C. Cir. 1978) (en banc).

simulator were highly incriminating evidence and were used in "the initial questioning of [Ms. Williams]." *Ceccolini*, 435 U.S. at 277.

The government's other arguments—that there were "significant lapses of time" between the initial police conversation and Ms. Williams's testimony and that there is "no evidence suggesting that MPD's use of the simulator was motivated by a desire to find Ms. Williams," Gov't Br. at 46—are red herrings. There is virtually always a "significant lapse" between police investigation and trial. What is relevant is that Ms. Williams was identified as a witness and questioned at the police station immediately after the cell site simulator search. The government cites no authority for its suggestion that Ms. Williams's testimony should not be excluded because the police did not use the cell site simulator to find her *specifically*. Indeed, in all of the cases cited by Mr. Jones (at 45-46) where the courts excluded the witness's testimony, the police learned about the existence of the particular witness incidentally during the illegal search; the witness was not the target of the search. Here, the police used the cell site simulator to track Mr. Jones's phone, which was located in Ms. Williams's purse. Thus, Ms. Williams's testimony is "almost inextricably[] linked" with the illegal cell site simulator search. *United States v. Rubalcava-Montoya*, 597 F.2d 140, 144 (9th Cir. 1979).[27]

[27] The government floats the idea that it "would have inevitably discovered Ms. Williams through independent sources," Gov't Br. at 44, but it did not make this argument below or elicit evidence to support it. *See supra* n.18. Moreover, because the government does not develop this argument on appeal, it is waived. "[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *Comford v. United States*, 947 A.2d 1181, 1188 (D.C. 2008).

## F. THE TRIAL COURT'S ERROR WAS NOT HARMLESS.

The government's harm argument is limited. It concedes, as it must, that if all of the evidence that Mr. Jones identified as fruits should have been suppressed, it cannot show that the error was harmless beyond a reasonable doubt. Gov't Br. at 47. Thus, if this Court agrees with Mr. Jones's fruits analysis, it must reverse. The government further concedes that it cannot show that the error is harmless if the Court finds that Mr. Jones's DNA profile should have been suppressed. *Id.* Because the DNA profile was a fruit of the illegal simulator search and the good faith doctrine does not apply, *see* discussion pp. 15-18, this Court must reverse.

The government maintains that the error was harmless *only if* the exclusionary rule does not apply to the appellant's DNA profile *and* the exclusionary rule does not apply to the phones recovered from the vehicle, the phones recovered from Ms. Williams's purse, or Ms. Williams's testimony. *Id.* Even if this Court were to find that the DNA profile and some fraction of evidence were admissible, the government cannot show that the trial court's error in admitting the other fruits was harmless. Here, the sheer quantity of evidence likely influenced the verdict. The government cannot meet its heavy burden to show that there is no "reasonable possibility that the evidence complained of might have contributed to the conviction." *Ellis*, 941 A.2d at 1049 (citation omitted).

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief has been served, electronically, using the Court's e-filing system, upon Lauren Bates, AUSA, Office of the United States Attorney, and Arthur Spitzer, American Civil Liberties Union of the Nation's Capital, this 31st day of March, 2017.

s/ Stefanie Schneider
Stefanie Schneider