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COURT OF CRIMINAL APPEALS
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In the Court of Criminal Appeals
Of Texas

Christopher James Holder,
Appellant

v.

The State of Texas,
Appellee

On Discretionary Review From
The Fifth Court of Appeals, Dallas, Texas
No. 05-15-00818-CR

and

The 416th Judicial District Court of Collin County, Texas
No. 416-80782-2013

STATE'S BRIEF

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Statement Regarding Oral Argument

Oral argument was granted and will be presented on September 27, 2017.

Statement of the Case

A jury convicted Appellant of capital murder. The State did not seek the death penalty, and the trial court imposed a mandatory sentence of life imprisonment without the possibility of parole. The Dallas Court of Appeals affirmed the conviction. *See Holder v. State*, No. 05-15-00818-CR, 2016 WL 4421362 (Tex. App.—Dallas Aug. 19, 2016) (not designated for publication).

Issues Presented

Appellant's Issue Granted

Did the Court of Appeals err in holding the State's petition to obtain the Appellant's cellphone records set forth the "specific and articulable facts" required by federal law under 18 U.S.C. § 2703(d)?

Threshold Issues Precluding Review of Appellant's Issue Granted

(1) Did Appellant lack standing to challenge the court order for the disclosure of his cellphone records?

(2) Do violations of 18 U.S.C. § 2703(d) warrant the remedy of exclusion under Article 38.23?

Statement of Facts

Sunday evening, November 11, 2012, the Plano Police Department responded to a possible burglary of a residence and found Billy Tanner dead in his home. His injuries included blunt force trauma and multiple stab wounds.

Leading up to this in the summer of 2012, Tanner's step-daughter, Casey James, her two children, and Appellant, Casey's then-boyfriend, moved in with Tanner.[1] 5 RR 108-09. When Casey and Appellant's relationship became troubled in October 2012, Tanner asked Appellant to move out, and Casey and Appellant broke up. 5 RR 123-24.

In early November, Casey called Appellant and told him that her daughter had said something odd about Tanner, and Appellant suggested that Tanner may have molested the daughter. After questioning the daughter, Casey called Appellant the next day and told him she was confident no abuse had occurred. 5 RR 127-33. Casey also mentioned that she and her children would be out of town that weekend, November 9 to 11, 2012. 5 RR 134-35.

When Casey left Tanner's home that Friday night, Tanner was home alone. 5 RR 136. When Casey arrived back at Tanner's house on Sunday evening, she knew something was wrong and called the police. 5 RR 141-47. The police found Tanner dead on the floor near the master bedroom. 5 RR 76-79, 85, 98; 8 RR 145-

[1] Tanner had been Casey's step-father since she was six years old. 5 RR 106-07. Although Tanner and Casey's mother eventually divorced, Tanner remained Casey's father figure.

48. The body appeared to have been there awhile; it had sustained a gash to the head and blood was coming out from the forehead. 5 RR 85-86. An "enormous amount of blood" surrounded the body. 5 RR 87, 100. Inside the bedroom, there were streaks of blood on the walls, and the bedsheets were bloody. 7 RR 87, 100; 8 RR 150-51. The condition of the crime scene led detectives to believe that this had been a crime of passion rather than a burglary "gone bad." 8 RR 5, 7, 9-10, 108. Tanner's red pickup truck was missing from the home, and a pair of black latex gloves was found on the kitchen table. 5 RR 102; 8 RR 103. The gloves did not contain blood, and Casey said the gloves were not there when she left on Friday. 5 RR 5 RR 144, 210-17; 8 RR 103-04, 108. Detectives knew that Appellant was a tattoo artist, and at some point a Facebook photo was found of Appellant tattooing while wearing a pair of black latex gloves similar to the ones found in the house. 8 RR 108. Appellant became a person of interest.

Early Monday morning, November 12, 2012, Jeff Rich, a detective with the Plano Police Department for 22 years, submitted a petition, pursuant to Article 18.21, § 5 of the Texas Code of Criminal Procedure, to a state district court, asking for a court order directing AT&T Wireless to provide account history and call detail records, including tower information, for calls made or received on the cellphone number belonging to Appellant between October 20 and November 12, 2012. 2 RR 112, 114-15, 133-35; SX 7a, 7b. The district court signed the petition,

but an AT&T representative asked that the petition's language be changed from "Petitioner has specific and articulable facts" to "Petitioner has probable cause." Detective Rich made the change, and the district court signed a revised court order, after which AT&T tendered the requested records. The State's petition provided in part:

> [P]ursuant to the authority of article 18.21, Section 5, Texas Code of Criminal Procedure, Petitioner hereby makes written application for a Court Order to obtain the below-listed records or information pertaining to a subscriber or customer of the below-listed electronic communication service.
>
> The following records or information are sought: *Any and all records regarding the identification of a* ***AT&T Wireless*** *user with the assigned telephone number of:* ***469-286-7425****, to include subscriber's name, address, date of birth, status of account, account history, call detail records,* ***including tower information*** *for calls made or received, for the period of October 20, 2012 through November 12, 2012, service address and billing address, ANI, method of payment and information on any and all other numbers assigned to this account or this user in the past or present. Affiant also requests that his order allow for the precision location/GPS location of the cellular handset to be provided for a period of 20 days beginning November 12, 2012.*
>
> The name of the company believed to be in possession of this information is:
>
> **AT&T Wireless**
> **POB 24679**
> **West Palm Beach, Florida 33416**
> **(888) 938-4715**
>
> Petitioner has probable cause that the above records or information are relevant to a current, on-going police investigation of the following offense or incident:

Death Investigation – Texas PC 19.03

> The cellular telephone was used by a possible suspect to communicate with unknown persons and obtaining the locations of the handset will allow investigators to identify if this suspect was in the area at the time of the offense and will provide investigators leads in this case.

2 RR 114-18; SX 7a, 7b. AT&T emailed the subscriber information and the historical cell site location information from October 20, 2012, to November 12, 2012.[2] 2 RR 133-34, 181; SX 31, 33.

That same day, detectives interviewed Appellant, who said that he had his cellphone with him over that weekend, and the cellphone number he provided matched the number on the phone records from AT&T. 7 RR 85-86, 89; 8 RR 105. Appellant denied being at Tanner's house over the weekend, and his timeline of activities did not match the phone records. Appellant eventually said he had been buying drugs in an area that was several miles from the crime scene. 7 RR 89-93. When questioned about concerns regarding Casey's daughter and Tanner, Appellant stated, "children shouldn't be molested." 7 RR 96-97; 8 RR 107.

The records showed the cellphone tower locations that Appellant's phone connected with or was "hitting off" of at various times on Saturday, November 10 and Sunday, November 11, 2012, in relation to areas of interest to the

[2] Although the petition asked for real-time location information, the record indicates that this data was never received, used in the investigation, or admitted at trial.

investigation.[3] Among other things, the records showed that from 3:28 to 4:16 p.m. on November 10, Appellant's phone was "hitting off" of a cell tower that "best served" Tanner's home, and it did so again between 12:41 and 12:44 a.m. on November 11, 2012.[4] 7 RR 35, 38, 46-47, 60-64, 105-09. Between 12:44 a.m. and 2:00 a.m., Appellant's cellphone had no activity. 7 RR 109. There was evidence from Tanner's own cellphone that he was alive at 2:35 p.m. on November 10, before Appellant's cellphone began hitting off the nearest cell tower, but there was no activity on Tanner's phone thereafter.[5]

In January 2013, Tarrant County law enforcement officers told Plano detectives that one of their inmates, Thomas Uselton, had information about Tanner's case. 8 RR 27-34, 113-14. Uselton told Plano detectives (and testified at trial) that he had known Appellant for a couple of years and that Appellant had

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[3] Two witnesses provided the State's evidence about Appellant's cell phone records—K.D. Burdette, AT&T engineer and custodian of records, 7 RR 6-7, and Detective Brian Pfahning, who interpreted and analyzed Appellant's cell cite data. 6 RR 147-50. The State also introduced SX 31 & 49 (Appellant's cell records), SX 50A–50C (Appellant's cell records annotated), SX 51 (map), and SX 57 (slides).

[4] AT&T engineer Burdette determined from his maps that the crime scene address, 3121 Royal Oaks, was approximately 3300 feet (a little over half a mile) from the cell tower that best served that address. He also testified that the range of the relevant section or "sector" was, at its farthest point, approximately one mile. 7 RR 6, 35, 46-47, 52, 60-64; SX 51.

[5] Tanner's cellphone records showed that Tanner's phone called a friend's phone on Saturday, November 10, 2012, at 1:41 p.m. and that the call lasted nearly four minutes. SX 38. The friend confirmed that he spoke with Tanner that day. 11 RR 20-21, 34-35, 44; SX 41. Cellphone records also showed that Tanner's cellphone called the phone number of his parents in Louisiana on Saturday, November 10, 2012, at 1:46 p.m. 6 RR 230-31; SX 41. The call lasted until 2:35 p.m. SX 38. This was the last call from Tanner's phone to register with a cell tower that day or the next, when Tanner's body was found.

called him around 2:00 or 3:00 p.m. on Saturday, November 10, 2012, because he wanted drugs. 8 RR 47-50, 69. Appellant sounded "real hysterical." 8 RR 49-50. Later in the day, Appellant called him back when it was getting dark and asked if he would help him with something. 8 RR 50. After Uselton agreed, Appellant picked him up in Fort Worth. 8 RR 50-51. They first drove to the Irving tattoo parlor where Appellant worked, and Appellant got some gloves and bleach. 8 RR 51-52. Later, when Appellant put on a pair of black latex gloves, Uselton put on a pair too. 8 RR 50-52. Appellant's new girlfriend then dropped them off at Tanner's Plano home. 8 RR 52-53.

According to Uselton, when they walked in, Appellant hugged him and said, "He's dead. We ain't got to worry about it." 8 RR 53. When Uselton saw the dead body, Appellant stated, "[T]hink about our family, bro. You know what it is if you say anything." 8 RR 53. When Uselton asked, "What did he do," Appellant said, "He molested a little girl." 8 RR 53.

Uselton provided the detectives with very specific and key details regarding the crime scene and the victim that had not been made public. 8 RR 32, 34, 113-14. For instance, Uselton said that Appellant tried to clean up the scene by pouring ammonia on the garage floor, and officers noticed a bottle of ammonia in Tanner's kitchen. 5 RR 88-89; 8 RR 54, 58, 66. Uselton also said that, before they left the scene, Appellant leaned over and stabbed the body in the neck with the knife,

which was consistent with the medical examiner's testimony that Tanner had been stabbed in the neck postmortem. 5 RR 174, 180, 187; 8 RR 56-58. Uselton further recounted that Appellant wanted to burn the house down, that Uselton poured gasoline "everywhere," and that Appellant "lit the fire." 8 RR 57-59. First responders to Tanner's home noticed strong odors of gasoline and oil, and later, detectives found a large burned pile of clothes in Tanner's house, which indicated that someone had tried to start a fire. 5 RR 76-79, 85; 7 RR 86-87, 101; 8 RR 152-53.

Further, Usleton said they left the scene in Tanner's red pickup truck and left it in a parking garage in Las Colinas, where detectives had previously found it. 8 RR 26, 33-34, 60. Uselton also testified that he overheard Appellant's girlfriend ask Appellant why he did it, and Appellant stated, "I had to." 8 RR 8 RR 64.

DNA analysis could not exclude Appellant as a major contributor of the mixed DNA on the black latex gloves from Tanner's house. A forensic DNA analyst concluded it would be extremely unlikely anyone other than Appellant as a major contributor of the DNA from the glove. 5 RR 210-17; 9 RR 198, 212-17; SX 10.

Statement of Procedural History

Appellant filed two pretrial motions to suppress his cellphone records. CR 47-58, 113-26. In both motions, Appellant argued that the State's petition and

court order used to obtain his cellphone records failed to comply with state and federal law and the U.S. and Texas Constitutions. *See* Tex. Code Crim. Proc. art. 18.21, § 5; 18 U.S.C. § 2703(d). Detective Rich, the 22-year veteran who had presented the petition to the district court, testified that he had worked with the cellphone companies and attended trainings to determine a method for obtaining cellphone records. 2 RR 110-11. AT&T has a particular procedure that must be followed. 2 RR 112. At the time he filed the petition, he was aware that Appellant was a person of interest and that he had a cellphone number with AT&T. 2 RR 112-13.

Detective Rich presented the petition to the district judge at his home in the early morning hours of November 12, 2012. RR 119-20. He did not present any additional information. 2 RR 120, 126-27. The judge signed the order. After AT&T asked that the petition's language be changed from "Petitioner has specific and articulable facts" to "Petitioner has probable cause," the judge signed a revised order at 2:45 that morning. SX 7a, 7b. AT&T emailed Detective Rich Appellant's historical cellphone records from October 20, 2012, to November 12, 2012. 2 RR 133-34, 181; SX 8.

When asked for his understanding of what needed to be included in the petition, Detective Rich said that, "in this particular case, because it is just business records, I believe the standard is less than probable cause." 2 RR 124. When

asked if he could have put more information in the petition, like "when the date of the homicide probably was or could have been," Detective Rich stated, "If I had felt it was necessary, yes." 2 RR 130. Detective Rich explained that he "could have filled a page full of stuff if I chose to." 2 RR 131. He further explained that he felt that his petition complied with the relevant statutes. 2 RR 119.

The State made clear that the records at issue were phone numbers listed on cellphone call records and cellphone towers and that it "only deals with historical cell site information. There's no content, no text messages, no emails." 3 RR 12. The State noted that a court order to obtain historical cell site location records did not require probable cause and that Appellant did not have an expectation of privacy in the cellphone company's billing records. 2 RR 134-35. The State argued that it had complied with the State statute, under which it had sought the court order. 2 RR 135. Appellant made several arguments consistent with his written motions regarding why his cellphone records should be suppressed, including that the petition did not satisfy the requirements of the federal statute. 2 RR 140-53. The trial court took the issue under advisement and then denied the suppression motions. 2 RR 134-153; 3 RR 8-13; CR 399.

On direct appeal, Appellant argued that the trial court erred in denying his motion to suppress his cellphone records obtained by a court order in violation of

the relevant state and federal statutes and the Texas Constitution.[6] Ant. COA Br. at 29-36, 62-66. Regarding the federal statute, Appellant discussed an unpublished Dallas case that addressed a similar issue and a footnote from this Court's *Ford* opinion. *See Ford v. State*, 477 S.W.3d 321, 325 n.4 (Tex. Crim. App. 2015); *Anderson v. State*, No. 05-11-00259-CR, 2013 WL 1819979, at *10 (Tex. App.—Dallas Apr. 30, 2013, no pet.) (not designated for publication). In its response brief, the State argued in part that, even if the State failed to comply with the state or federal statute, suppression was not the appropriate remedy.[7] COA Br. at 25-27. The State argued that a violation of law does not always invoke the provision of Article 38.23 of the Code of Criminal Procedure and that specific language in both the state and federal statutes ruled out the suppression of evidence as an available remedy, unless the statutory violation also infringes on a state or federal constitutional right. At oral argument, the State argued that Appellant did not have standing to challenge the petition.[8] The court of appeals did not address either of these arguments, but concluded that the State's revised petition satisfied the federal

[6] Notably, Appellant raised thirteen issues on direct appeal. This influenced the depth with which the State was able to address all these many issues, due to time and word-count constraints.

[7] The State also raised this issue in the trial court. 2 RR 135-36.

[8] Without saying the word "standing," the State raised the issue in the trial court, when it argued that, once an individual voluntarily exposes his information to a third-party cellphone provider, he has no reasonable expectation of privacy in the cellphone records and that obtaining the records was not a search or seizure under the Fourth Amendment. 2 RR 135-36.

statute. Appellant filed a motion for rehearing and motion for reconsideration en banc on this issue. The court of appeals denied the motions.

Summary of the State's Arguments

Threshold issues preclude review of Appellant's issue granted. First, Appellant lacks standing to challenge the court order used to obtain AT&T's records of his cellphone usage. Existing law is clear that he lacks an expectation of privacy and has no property interest in these records. Further, both the relevant federal and state statutes make it clear that Appellant has no justiciable right in AT&T's records that he can raise in a criminal case. This Court has held that Article 38.23 does not apply when a suspect lacks an individual, justiciable right.

Moreover, Appellant lacks any remedy if the court order was incorrect. Both the federal and state statutes dictate that suppression is not a remedy if they are violated, barring a constitutional violation that is not in play because it has neither been asserted nor preserved. The specific remedy provisions in these statutes control over the general suppression remedy in Article 38.23.

In any event, the court order met the requirements of the federal statute, which requires the order to be based on facts that meet a reasonableness standard less than probable cause. Here, when the petition is read in a common-sense manner as a whole, it shows that the detective was investigating a murder, had a suspect, had the suspect's cellphone number, and had a window of days relevant to the investigation; and in addition, the detective averred that the records would

show whether the suspect's phone was in the vicinity of the murder at the time of the murder, which would generate leads in the investigation.

Arguments

Appellant asserts that the court of appeals erred in holding that the State's petition to obtain his cellphone records set forth the "specific and articulable facts" required by federal law under 18 U.S.C. § 2703(d). Threshold issues, however, preclude review of Appellant's issue granted. First, he lacks standing to challenge the court order used to obtain AT&T's records of his cellphone usage. Moreover, the relevant state and federal statutes dictate that suppression is not a remedy if they are violated, barring a constitutional violation that is not in play. In any event, the court order met the requirements of the federal statute.

Relevant Statutes and Background

The Federal Statute

The federal statute at issue is the Stored Communications Act (SCA), which is Title II of the Electronic Communications Privacy Act (ECPA) of 1986, as amended in 1994.[9] *See* 18 U.S.C. §§ 2701-12; *In re Application of the U.S. for Historical Cell Site Data* (hereinafter *Historical Cell Site*), 724 F.3d 600, 606 (5th Cir. 2013); *Sims v. State*, No. 06-16-00198-CR, 2017 WL 3081399, at *2 (Tex. App.—Texarkana June 30, 2017, no pet.) (not yet reported). The SCA regulates

[9] The term SCA has become a popular shorthand term for this portion of the ECPA. *See* Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208, 1208 & n.1 (2004).

Also, Title I of the ECPA is the Wiretap Act, and Title III is the Pen Registry Act. *See generally In re Application for Pen Register and Trap/Trace Device With Cell Site Location Authority*, 396 F.Supp.2d 747, 751-53 (S.D. Tex. Oct. 14, 2005) (discussing ECPA's three titles).

disclosure of stored electronic communications by service providers. *See Historical Cell Site*, 724 F.3d at 606. The SCA sets out terms under which government entities, including law enforcement agencies, may obtain disclosure of information from a third-party provider of electronic communications services, including mobile telephone carriers. *See* 18 U.S.C. § 2703(a)-(c); *Sims*, 2017 WL 3081399, at *2. As relevant here, section 2703(c)(1) provides in part:

> A government entity may require a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications) only when the governmental entity . . . . obtains a court order for such disclosure under subsection (d) of this section.

18 U.S.C. § 2703(c)(1)(B). Section 2703(d) provides in part that a court of competent jurisdiction may issue a court order for disclosure under subsection (c) but that it shall issue only if the governmental entity offers *specific and articulable facts* showing that there are *reasonable grounds* to believe that the contents of a wire or electronic communication, or the records or other information sought are *relevant and material to an ongoing criminal investigation*. *Id.* § 2703(d).

For violations of its terms, the SCA specifically provides for civil actions, money damages, and administrative discipline. *See*, *e.g.*, 18 U.S.C. §§ 2707, 2712. The SCA further provides that "[t]he remedies and sanctions described in this chapter are the only judicial remedies and sanctions for nonconstitutional violations of this chapter." 18 U.S.C. § 2708. Thus, "suppression is not a remedy

for a violation of the Stored Communications Act." *United States v. Guerrero*, 768 F.3d 351, 358 (5th Cir. 2014); *see United States v. Wallace*, 866 F.3d 605, 605 & n.2 (5th Cir. Aug. 3, 2017) (not yet reported).[10]

The Texas Statute

Article 18.21 of the Code of Criminal Procedure has been described as the "parallel state statute" or the "state law analog" to § 2703. *See Wallace*, 866 F.3d at 605; *Love v. State*, No. AP-77,024, 2016 WL 7131259, at *7 n.8 (Tex. Crim. App. Dec. 7, 2016) (not yet reported). Article 18.21, §5(a) provides:

> A court shall issue an order authorizing disclosure of contents, records, or other information of a wire or electronic communication held in electronic storage if the court determines that there is a reasonable belief that the information sought is relevant to a legitimate law enforcement inquiry.

Tex. Code Crim. Proc. art. 18.21, § 5(a).[11] This statute provides civil causes of action *by the provider* as remedies. *See* Tex. Code Crim. Proc. art. 18.21, §§ 10,

[10] As of the filing of the State's brief, the *Wallace* opinion is not fully paginated. The State relies on the language found in headnotes four and five in section III of the opinion.

[11] The cellphone records at issue in this case were obtained by the State using a court order issued under a prior version of Article 18.21 of the Code of Criminal Procedure. *See* Act of May 27, 2013, 83rd Leg., R.S., ch. 1289, §§ 5-13, 2013 Tex. Sess. Law Serv. 3263, 3264-3270 (H.B. 2268); *see also Hankston v. State*, 517 S.W.3d 112, 113 n.3 (Tex. Crim. App. 2017) (discussing court order under prior version of 18.21); *Olivas v. State*, 507 S.W.3d 446, 475 (Tex. App.—Fort Worth 2016, pet. filed) (same). The legislature did not amend the language in § 5(a), but instead added § 5A. The effective date of the current statute was June 14, 2013, and the new statute applied to all proceedings as of that date. *Id.* Here, the court order was sought on November 12, 2012.

The statutory language in Article 18.21, § 5 mirrors the language in § 2703, as originally enacted in 1986, which allowed a federal judge to issue a court order so long as the government

12. And it provides that "[t]he remedies and sanctions described in this article are the exclusive judicial remedies and sanctions for a violation of this article other than a violation that infringes on a right of a party guaranteed by a state or federal constitution." *Id.* §13. Thus, suppression is not an available recourse. *See Wallace*, 866 F.3d at 605.

Appellant Lacked Standing to Challenge the Court Order[12]

Appellant cannot complain about the order because he lacks standing. He has no expectation of privacy in the AT&T records, and he has no property interest in the records because they belong to AT&T. The Court's traditional application of Article 38.23 requires that a defendant show that a personal, justiciable right was violated before they can invoke the remedy of suppression. Moreover, Congress and the Texas Legislature have each rejected suppression as a remedy for violations of the SCA and Article 18.21, further undermining any notion that Appellant had a right to complain. *See* 18 U.S.C. §§ 2707, 2708, 2712; Tex. Code Crim. Proc. art. 18.21, §§ 10, 12, 13.

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showed "reason to believe that … the records or other information sought, are relevant to a legitimate law enforcement inquiry." *See In re Application of the U.S. for an Order Directing a Provider of Elec. Commuc'n Serv. to Disclose Records to Gov't,* 620 F.3d 304, 313 (3d Cir. 2010) (hereinafter *In re Third Circuit Application*); *United States v. Kennedy*, 81 F.Supp.2d 1103, 1109 n.8 (D. Kan. 2000). In 1994, Congress amended the statute to its current language. *Id.*

[12] Whether an appellant has standing to contest a search and seizure is a question of law the court reviews de novo. *See Matthews v. State*, 431 S.W.3d 596, 607 (Tex. Crim. App. 2014).

In *Fuller v. State*, this Court addressed the interplay of Article 38.23 and a violation of a statute that did not confer a right on the litigant complaining about the violation. 829 S.W.2d 191 (Tex. Crim. App. 1992). During Fuller's trial, the trial court admitted into evidence an audio recording that Fuller had made and sent to fellow inmate Brenda Hall. Another inmate stole the recording from Hall and gave it to the police. *Id.* at 201-02. Fuller objected to admission of the evidence under Article 38.23 because it was obtained by theft in violation of the law. This Court held that Fuller could not complain about admission of the tape on this basis because he lacked standing. *Id.* at 202. The Court noted that, as a general matter "courts lack the authority . . . to entertain litigation by persons who have not suffered actionable injury" and the "fundamental rule of law that only the person whose primary legal right has been breached may seek redress for an injury." *Id.* at 201 (citation omitted). Because the tape belonged to, and was stolen from, Hall, she, not Fuller, had the right to complain about it. The State could prosecute the person who stole the tape for theft. But no one could sue or prosecute anyone for an injury to Fuller. Thus, Fuller could not invoke Article 38.23 to exclude the audio tape. *Id.* at 202.

This Court reached a comparable result in *Rocha v. State*, 16 S.W.3d 1, 16-19 (Tex. Crim. App. 2000), when it noted that Rocha had no individual rights under the Vienna Convention on Consular Relations, and thus, it was not "law" for

the purposes of Article 38.23. In *Rocha*, the Court relied on decisions from other states, as well as official positions of the United States Department of State, that the Vienna Convention conferred no individual rights. *Id.* at 16, 17-18. Another factor in the Court's decision was the State Department's opinion, as well as federal court decisions, that suppression was not an appropriate remedy for Vienna Convention. *Id.* at 16-17.

Appellant, like Fuller and Rocha, attempts to invoke the rights of others rather than his own rights. The records in question belong to AT&T. This Court has held that individuals do not have an expectation of privacy in cellphone records generated and maintained by a provider. *See Ford*, 477 S.W.3d at 328-34. Appellant concedes as much. Ant. Br. at 11, 13-14. Appellant does not contend that he owns the records, nor could he credibly do so because it is well accepted that these records belong to third parties, which is part of the reason why individuals lack an expectation of privacy in such records. *See Ford*, 477 S.W.3d at 330 (noting that historical cell-site-location information ("CSLI") records are created by the provider for the provider).

Moreover, § 2703 and its parallel state statute, Article 18.21, demonstrate that Appellant has no right to complain of the order at issue in this case. Title 18 U.S.C. § 2703(e) provides that subscribers have no cause of action against providers for violations under that statute. Otherwise, those aggrieved under the

federal SCA are limited to civil actions. *See* 18 U.S.C. § 2707(a)-(b). Moreover, only the specified relief is available for violations of § 2703. *See* 18 U.S.C. § 2708. Regarding the intent of the Texas Legislature, Article 18.21 by its terms confers no rights on subscribers. Rather, only providers have a right to complain of violations of the statute. *See* Tex. Code Crim. Proc. art. 18.21, § 10 (providing that subscribers have no cause of action for violations of the statute); *id.* § 12(a) (providing providers the ability to seek injunctive relief, attorney's fees, and actual damages in the event of violation); *id.* § 13 (providing that the remedies within the statute are the exclusive remedies for violations of the statute that do not infringe on constitutional rights).

Accordingly, because Appellant lacks an expectation of privacy or property interest in AT&T's records, because any right he has under 18 U.S.C. § 2703 is limited to that statute, and because Article 18.21 confers him no rights, Appellant has no general right to relief that he can assert in Texas courts to challenge the court order in this case.

Appellant's Reliance on Wilson is Misplaced.

Acknowledging that he lacks standing to contest the search of his cellphone records under the Fourth Amendment to the United States Constitution or Article I, § 9 of the Texas Constitution, Appellant contends that his right to object "must exist under some law other than a right to privacy grounded in the Constitution."

Ant. Br. at 11, 13-14. Appellant claims he has standing under Article 38.23 to seek suppression of evidence obtained in violation of the SCA because the SCA was enacted to regulate the governmental gathering of evidence for a criminal prosecution. Ant. Br. at 16-17, 19. Appellant relies primarily on this Court's *Wilson* opinion. *See Wilson v. State*, 311 S.W.3d 452, 545-65 (Tex. Crim. App. 2010).

In *Wilson*, a detective fabricated a lab report and then used it to obtain a suspect's confession to a murder. The issue was whether Article 38.23 barred the admission of a confession if the interrogating officer fabricated documentary evidence in violation of § 37.09 of the Texas Penal Code (tampering with evidence). The Court held that the detective violated § 37.09 and that, therefore, Wilson's confession was inadmissible under Article 38.23. The Court stated that:

> The primary purpose of article 38.23(a) is to deter unlawful actions which violate the rights of criminal suspects in the acquisition of evidence for prosecution. Article 38.23(a) may not be invoked for statutory violations unrelated to the purpose of the exclusionary rule or to the prevention of the illegal procurement of evidence of crime.

Id. at 459. The Court held that "[a] police officer's violation of section 37.09 (or section 37.10) to obtain a confession or other evidence is at the core of conduct proscribed by the Texas exclusionary statute." *Id.* at 461.

First, Texas and federal legislators clearly did not believe that a violation of these respective statutes—Article 18.21 of the Code of Criminal Procedure and 18

U.S.C. § 2703(d)—were related to the purpose of the exclusionary rule; otherwise, they would not have excluded suppression as a remedy, as discussed further below. The basis for this lies in the fact that the evidence in question is the property of a third party, the cellphone service providers. In § 37.09, by contrast, the Texas Legislature did not choose a different remedy when violations of that statute impacted police evidence gathering.

Moreover, the two types of evidence gathering in § 37.09 and § 2703(d) are different, as are any "violations." Section 37.09 prohibits tampering with evidence, and a violation of the statute constitutes an offense and suppression of any evidence. Section 2703(d) involves a process (overseen by a "court of competent jurisdiction") that requires an electronic service provider to disclose the provider's non-content records. The cellphone companies create those records, and in the case of historical cell site information, "'the Government merely comes in after the fact and asks a provider to turn over records the provider has already created.'" *Ford*, 477 S.W.3d at 330 (quoting *Historical Cell Site*, 724 F.3d at 612). And, as noted above, any "violation" of the federal statute is remedied primarily by a civil cause of action, not suppression.

In the instant case, Detective Rich did not commit a crime. Far from it. At worst, he attempted—but failed—to fully comply with the procedural requisites for obtaining a court order. *See* 18 U.S.C. § 2703(d). Detective Rich testified at the

motion to suppress hearing that he believed that the court order complied with the relevant statutes. 2 RR 119. A state district court agreed, and so did the Dallas Court of Appeals.

Appellant does not explain how his rights were violated in this substantially different type of evidence gathering, especially where this Court has held that a defendant has no legitimate expectation of privacy in records held by a third party cellphone company identifying which cellphone towers communicated with his cellphone at particular points in the past. *Ford*, 477 S.W.3d at 330. The *Wilson* case does not dictate that Article 38.23 applies in the instant case. *See Wilson*, 311 S.W.3d at 458-59 (holding that the purpose of Article 38.23 is "to protect a suspect's privacy, property, and liberty rights against overzealous law enforcement . . . [and] to deter unlawful actions which violate the rights of criminal suspects in the acquisition of evidence for prosecution").

Furthermore, to the extent Appellant's argument that he can challenge the court order in this case is based on *Wilson*, that decision is out of step with the Court's other Article 38.23 jurisprudence and should be limited to its facts. The Court in *Wilson* was deeply divided, and the majority opinion did not mention *Fuller* or respond to a well-reasoned dissent based on *Fuller*. *See Wilson*, 311 S.W.3d at 466-71 (Hervey, J., dissenting). In the past, the Court has always limited Article 38.23 such that it only applied to violations of the defendant's

rights. *See Miles v. State*, 241 S.W.3d 28, 38-39 (Tex. Crim. App. 2007) (defendant could not complain of violations of traffic laws by citizens who arrested him for DWI); *Chavez v. State*, 9 S.W.3d 817, 819 (Tex. Crim. App. 2000) (defendant could not complain of violation of task force agreement by officer who purchased cocaine from defendant outside the boundaries of the task force); *Fuller*, 829 S.W.2d at 202 (defendant could not complain about a theft committed against a third party); *Cf. Jenschke v. State*, 147 S.W.3d 398, 399 (Tex. Crim. App. 2004) (Article 38.23 applied to theft of incriminating evidence from the defendant's truck by the victim's parents even though they eventually turned the evidence over to police); *State v. Johnson*, 939 S.W.2d 586, 587 (Tex. Crim. App. 1996) (Article 38.23 operated to exclude evidence obtained in a burglary of the defendant's business by the victim's son). While the *Wilson* Court was concerned about officers using falsified documents in criminal investigations, the analogies to officer misconduct cases were unsound. Thus, *Wilson* should be limited to its facts. It does not provide Appellant a remedy.

Harrison Is Also Distinguishable

Appellant also relies on the Fort Worth Court of Appeals' case, *State v. Harrison*, No. 02-13-00255-CR, 2014 WL 2466369 (Tex. App.—Fort Worth May 30, 2014, no pet.) (not designated for publication). In *Harrison*, police officers obtained the defendant's cellphone location by "pinging" his phone in order to find

and arrest him. Officers did not obtain a warrant or court order to "ping" the cell phone numbers that led to his arrest and subsequent incriminating statements. Instead, the cellphone provider voluntarily gave them the information. The State argued that law enforcement obtained the records under an exigent circumstance exception in the SCA because officers were investigating a homicide, and they were afraid Harrison could kill someone else. *Id*. The trial court suppressed the defendant's statements, and the State appealed. The court of appeals affirmed the trial court, noting that the State had not proved exigent circumstances and that, therefore, the State had violated the SCA. While the appellate court recognized that the SCA does not require exclusion of evidence as a remedy for its violation, it held that Article 38.23 of the Code of Criminal Procedure applied to exclude evidence obtained in violation of any federal or state law.

Harrison is distinguishable for a few reasons. In addition to being unpublished without any subsequent history, the State did not raise the arguments in that proceeding that are before this Court. The *Harrison* court did not address whether Harrison had standing to challenge the absence of a court order in that case, and it does not appear that the State raised such a challenge. Moreover, as the court of appeals recognized, the State—as the appealing party—did not argue that Article 38.23 did not apply to exclude the evidence if § 2702 was violated; rather, it only argued that the investigators had exigent circumstances and

attempted to distinguish *Wilson* because the investigators' conduct did not rise to the same level as that in *Wilson*. The court of appeals held that Article 38.23 applied to Harrison. The *Harrison* Court did not address the issue now before this Court; that is, whether Article 38.23 applies when the language in both the federal and state statutes excludes suppression as a remedy.

In sum, Appellant has not identified any of his rights that have been violated such that Article 38.23 applies in this case. Appellant has failed to establish that he has standing to challenge the introduction of his cellphone records.

The CSLI Records Were Properly Admitted Because Suppression is Not an Available Remedy under the SCA or Article 18.21.

As Appellant acknowledges, the SCA provides primarily civil remedies for violations of its terms, stating that "[t]he remedies and sanctions described in this chapter are the only judicial remedies and sanctions for nonconstitutional violations of this chapter." *See* 18 U.S.C. §§ 2707 (civil actions), 2708 (exclusivity of remedies). Citing this statutory language, the Fifth Circuit has held that suppression is not available to criminal defendants based on a violation of the SCA, so long as the violation does not violate a constitutional right. *See Wallace*, 866 F.3d at 605 n.2 ("[W]e have held that suppression is not a remedy for violations of the SCA."); *Guerrero*, 768 F.3d at 358 ("[S]uppression is not a remedy for a violation of the Stored Communications Act."). Many other federal courts have similarly held, including the cases Appellant relies on in his merits

argument. *See United States v. Perrine*, 518 F.3d 1196, 1202 (10th Cir. 2008) ("[V]iolations of the ECPA do not warrant exclusion of evidence.") (citing cases); *Kennedy*, 81 F.Supp.2d at 1110 ("[S]uppression is not a remedy contemplated under the ECPA.").

Even though Appellant asserts that the State violated a federal statute, and he relies on federal case law in support, he nonetheless argues that federal laws cannot prevent states from choosing the remedy of suppression to deter statutory violations of federal law. Ant. Br. at 15-16 (discussing Article 38.23 of the Code of Criminal Procedure).[13] Appellant fails to acknowledge, however, that the Texas Legislature has chosen to exclude suppression as a remedy with regard to our state statute, which closely mirrors the federal statute at issue. *See* Tex. Code Crim. Proc. art. 18.21, §§ 12, 13. Moreover, this Court has previously considered federal court remedies when determining whether Article 38.23 applies to violations of federal law. *See Rocha*, 16 S.W.3d at 16-17.

Like its federal counterpart, Article 18.21 specifically provides that the "remedies and sanctions described" therein—namely "injunctive relief," and "actual damages"—"are the exclusive judicial remedies and sanctions for a

[13] Article 38.23 provides: "No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United State of America, shall be admitted in evidence against the accused on the trial of any criminal case." Tex. Code Crim. Proc. art. 38.23.

violation of this article." *See* Tex. Code Crim. Proc. art. 18.21, §§ 12-13; *Wallace*, 866 F.3d at 605; *Love*, 2016 WL 7131259, at *7 n.8. In fact, the remedy in Article 18.21 is even narrower than its federal counterpart because only the cellphone provider can seek the remedy.

"In some situations, a statutory requirement is arguably intended by the legislature to trigger remedies other than exclusion of evidence obtained as a result of that violation and *only* such remedies. In such cases, of course, Article 38.23 does not require exclusion." George E. Dix and John M. Schmolesky, 40 Tex. Prac., Criminal Practice and Procedure, *Evidence Obtained in Violation of "Laws" of Texas—Legislative Intention to Preclude Exclusionary Remedy*, § 7:26 (3d ed.); *cf. Wilson*, 311 S.W.3d at 463 ("The Texas Legislature could, should it so decide, exempt police officers from liability for the offense of tampering with evidence or fabricating government documents, but it has not yet done so.").

The Texas Legislature's intent to apply remedies other than exclusion of evidence in Article 18.21 is demonstrated by the fact that, by comparison, Article 18.20 of the Code of Criminal Procedure—governing the detection, interception, and use of wire, oral, or electronic communications—contains a provision which specifically allows an aggrieved person charged with an offense to move to suppress the contents of an intercepted wire, oral, or electronic communication or

evidence derived from the communication. *See* Tex. Code Crim. Proc. art. 18.20, § 14(b).

Notably, this Court in *Love* recognized, albeit in a footnote, that both § 2703 and Article 18.21 "expressly rule out the suppression of evidence as an available remedy—unless that statutory violation also 'infringes on a right of a party guaranteed by a state or federal constitution.'" *Love*, 2016 WL 7131259, at *7 n.8. The Court explained that, before the general exclusionary remedy embodied in Article 38.23 can be invoked regarding these two statutes, a constitutional violation must be identified. *Id.* This Court held that Love had a reasonable expectation of privacy in the content of his text messages and that the State violated Love's Fourth Amendment rights by compelling Metro PCS to turn over the contents of his communications without first obtaining a warrant. *Id.* at *3-6. The Court held that the exclusionary rule applied in that circumstance because there was a constitutional violation. The Court noted, however, that "[b]efore we may invoke the general exclusionary remedy embodied in Article 38.23 . . . we must identify (as we have) a constitutional violation." *Id.* at *7 n.8. In contrast, here, Appellant cannot identify a constitutional violation, and therefore, Article 38.23 does not apply.

This suppression issue has been addressed most recently in *Sims v. State. Sims*, 2017 WL 3081399, at *3. In *Sims*, the court found no constitutional

violation in the warrantless use of real-time tracking data used to track Sims. *Id.* The defendant nonetheless argued that, by its explicit terms, Article 38.23 required suppression. The court rejected this argument, explaining that, "[w]hile Article 38.23 clearly requires exclusion in the general case of a statutory or constitutional violation, the federal and state statutes specifically applicable to the pinging of Sims' cellphone say that suppression is not available." *Id*. The court explained that "the rule of statutory construction that the specific should control the general in [the] case of an irreconcilable conflict" and that "the specific exclusivity of remedies in the two statutes control the general terms of Article 38.23." *Id*. Thus, the *Sims* Court reiterated that "suppression is not available to criminal defendants based on a violation of the SCA or of Article 18.21, so long as the violation is not also a violation of a constitutional right." *Sims*, 2017 WL 3081399, at *3 (citing cases). And as this Court has held, the State's warrantless acquisition of CSLI records, such as the court order used in the instant case, does not infringe on a right guaranteed by the Texas or federal constitutions.[14] *See Ford*, 477 S.W.3d at 330-

[14] The United States Supreme Court has recently granted review in *Carpenter v. United States*, 819 F.3d 880 (6th Cir. 2015), *cert. granted*, 2017 WL 2407484 (June 5, 2017). The question for review is: Whether the warrantless seizure and search of historical cell phone records revealing the location and movements of a cellphone user over the course of 127 days is permitted by the Fourth Amendment. Appellant, however, forfeited any Fourth Amendment claim by not raising it in his brief to the court of appeals. Thus, even if the Supreme Court's decision in *Carpenter* were to undermine this Court's *Ford* decision, that would not aid Appellant in this case. Further, *Carpenter*, may turn out to be distinguishable from this case since the timespan of records sought was much shorter (only about 20 days, compared to Carpenter's 127 days).

35 (the State's warrantless acquisition of cell site location information did not violate the Fourth Amendment); *Hankston*, 517 S.W.3d at 121-22 (determining that the State's acquisition of CSLI records did not violate the Texas Constitution). Thus, even if the court order issued in this case violated the federal statute, Appellant was not entitled to the suppression of his cellphone records under Article 38.23.

The Court Order Complied With § 2703

In any event, the State's petition and corresponding court order met the requirements of the federal statute.

The Statutory Language & Federal Case Law

The State's petition provided in part that, pursuant to the authority of Article 18.21, § 5 of the Code of Criminal Procedure, it was seeking records from AT&T for a certain phone number, including call detail records and tower information for calls made or received for the period of October 20, 2012 through November 12, 2012, and that:

> Petitioner has probable cause that the above records or information are relevant to a current, on-going police investigation of the following offense or incident:
>
> **Death Investigation – Texas PC 19.03**
>
> The cellular telephone was used by a possible suspect to communicate with unknown persons and obtaining the locations of the handset will allow investigators to identify if this suspect was in the area at the time of the offense and will provide investigators leads in this case.

2 RR 114-15; SX 7a, 7b.

The federal statute at issue here provides that a court shall issue a court order only if the governmental entity offers "specific and articulable facts showing that there are reasonable grounds to believe" that "the records or other information sought, are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). As one commentator has noted, the statute is "dense and confusing, and few cases exist explaining how the statute works." Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208, 1208 (August 2004) (footnote omitted). Professor Kerr explains that "the absence of a statutory suppression remedy has resulted in few judicial decisions on these topics. For most of the key issues, our guidance is the text, a few snippets of legislative history, and perhaps one or two judicial opinions." *Id.* at 1224 (footnotes omitted).

In any event, the Fifth Circuit has held that "the 'specific and articulable facts' standard is a lesser showing than the probable cause standard that is required by the Fourth Amendment to obtain a warrant." *Historical Cell Site Data*, 724 F.3d at 606. The Sixth Circuit opined that § 2703(d) "stakes out a middle ground between full Fourth Amendment protection and no protection at all, requiring that the government show 'reasonable grounds' but not 'probable cause' to obtain the cell-site data." *See United States v. Carpenter*, 819 F.3d 880, 889 (6th Cir. 2016),

cert. granted on other grounds, 2017 WL 2407484 (U.S. June 5, 2017). The Eleventh Circuit has held that "a § 2703(d) court order functions as a judicial subpoena, but one which incorporates additional privacy protections that keep an intrusion minimal." *United States v. Davis*, 785 F.3d 498, 517 (11th Cir. 2015).

Appellant asserts that § 2703(d) imposes a "reasonable suspicion" standard, noting that the Tenth Circuit has "suggested" that § 2703(d)'s reference to "specific and articulable facts" is akin to the "reasonable suspicion" standard set out in *Terry v. Ohio*, 392 U.S. 1 (1968). Ant. Br. at 20 (citing *Perrine*, 518 F.3d at 1202). Notably, the Tenth Circuit did not provide analysis on this issue; instead, it simply stated: "As Perrine notes, the 'specific and articulable facts' standard derives from the Supreme Court's decision in *Terry*. Thus, we are familiar with the standard imposed."[15] *Perrine*, 518 F.3d at 1202. The Fourth Circuit has also held without explanation that "§ 2703(d) is essentially a reasonable suspicion standard."[16] *See In re U.S. Application for an Order Pursuant to 18 U.S.C. section 2703(d)*, 707 F.3d 283, 287 (4th Cir. 2013). In contrast, one federal district court has specifically rejected this notion, explaining that:

> While clever, this argument ignores the actual language of the statute, which does not use the phrase "reasonable suspicion," but requires

[15] The court likely did not fully address this issue because the court found that the government's affidavit offered in support of its application easily satisfied § 2703. *Id.* at 1202-03.

[16] The dissent in a Fifth Circuit case repeated this same language in the Fourth Circuit case, without further analysis. *See Historical Cell Site Data*, 724 F.3d at 618 (Dennis, J., dissenting).

> only "specific and articulable facts showing that there are reasonable grounds to believe that the … records … sought[ ] are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). Thus there is no indication in the text (or in the legislative history) that Congress intended to import the standards guiding *Terry* stops into the SCA. Nor is it likely that the courts using this shorthand intended to graft onto the statutory language the doctrine arising out of the limited investigation stop cases. A better interpretation is that, when used in connection with the SCA, the phrase merely indicates that the standard "is a lesser one than probable cause."

In re Application of the U.S.A. for an Order Pursuant to 18 U.S.C. 2703(c), 2703(d) Directing AT&T, Sprint/Nextel, T-Mobile, Metro PCS, Verizon Wireless, 42 F.Supp.3d 511, 514 (S.D.N.Y. 2014) (citing *In re Third Circuit Application*, 620 F.3d. at 313).

Based on the statutory language, the standard is less than probable cause; and, because the State must show "reasonable grounds," the standard is one of "reasonableness." *Cf. Davis*, 785 F.3d at 516-17 ("As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness.'").[17] In this regard, the requirement that there be "specific and articulable" facts has been construed simply as requiring a factual basis. *See*, *e.g.*, *Davis*, 785 F.3d at 506 (noting that, under § 2703 (d), "the telephone records are made available *only* if a judicial officer (or the government

[17] In discussing the constitutionality of a court order under § 2703(d), the *Davis* Court stated: "Even if this Court were to hold that obtaining MetroPCS's historical cell tower locations for a user's calls was a search and the Fourth Amendment applies, that would begin, rather than end, our analysis. [citation omitted.] The Fourth Amendment prohibits unreasonable searches, not warrantless searches." *Davis*, 785 F.3d at 516.

shows) a *factual basis* for why the records are material to an ongoing criminal investigation") (emphasis added).[18] Simple subpoenas, by contrast, do not require that the requestor specify anything in support. *See*, *e.g.*, Tex. Code Crim. Proc. arts. 24.01 & 24.02.

A court order should contain enough information "'to prevent arbitrary invasions of privacy.'" *Davis*, 785 F.3d at 517 (noting that the protections in § 2703 are "sufficient to satisfy 'the primary purpose of the Fourth Amendment,' which is 'to prevent arbitrary invasions of privacy.'"). Investigative authorities may not request customer-related records pursuant to a § 2703(d) court order "merely to satisfy prurient or otherwise insubstantial governmental interests." *Id.* The legislative history of the 1994 amendments to § 2703 stated in part that the intent to raise the standard for access to transactional data was "to guard against 'fishing expeditions' by law enforcement." *See In re Third Circuit Application,* 620 F.3d at 314; *Kennedy*, 81 F.Supp.2d at 1109 n.8.

Here, the State's factual basis for the cellphone records established more than a "prurient or otherwise insubstantial governmental interest"; it was not arbitrary, and it did not constitute a "fishing expedition." Instead of casting a wide

[18] In comparison, the provisions for authorizing a pen register and/or a trap and trace device under Title III of the ECPA of 1986 (the "pen register statute"), codified at 18 U.S.C. §§ 3121-3127, require a government attorney merely to "certify" the relevance of the information likely to be obtained, without requiring a factual basis for the certification. *Id.* §§ 3122, 3123.

net and hoping to discover some relevant information, the State cast one line, assuring the court that it "*will* provide investigators with leads in this case." SX 7b (emphasis added). Indeed, the State identified that it was investigating a murder and that it had a suspect and the suspect's cellphone number. The State requested cell tower information for a limited amount of time to determine if Appellant had been in area of the murder during that time. Thus, this petition satisfied what was most essential to a § 2703(c) court order, i.e., "help[ing] to build probable cause against the guilty, deflect suspicion from the innocent, aid in the search for truth, and judiciously allocate scarce investigative resources." *Davis*, 785 F.3d at 517. Appellant asserts that "[t]he requirement of a threshold showing of 'specific and articulable facts' assures the inquiry will be legitimate." Ant. Br. at 30. The court order in this case is obviously "legitimate."

The State also complied with the remaining statutory requirements. For one, the statute requires that the information sought will be "relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). One treatise has surmised that the 1994 "addition of the word 'material' requires that the information is likely to have some greater importance than mere abstract or remote relevance." *See* Clifford S. Fishman and Anne T. McKenna, *Wiretapping and Eavesdropping* § 7:51:40 (Dec. 2016). At least one district court has held that the government need not show actual relevance, but rather only reasonable grounds to believe that

the relevant information will be obtained as a result. *See In re Application of the U.S. for an Order Pursuant to 18 U.S.C. § 2703*, 830 F.Supp.2d 114, 130 (E.D. Va. 2011). Here, the State's petition specifically stated that knowing the locations of the suspect's phone would provide investigators with leads in this case, thereby establishing that relevant and material information would be obtained as a result of the acquisition of the cellphone records.

Moreover, "[t]he phrase 'ongoing criminal investigation' is probably read most often as referring to information-gathering prior to arrest and indictments." *See Wiretapping and Eavesdropping* § 7:51:40. As the Eleventh Circuit explained: "Historical cell tower location records are routinely used to investigate the full gamut of state and federal crimes" and that "[s]uch evidence is particularly valuable during the early stages of an investigation, when the police lack probable cause and are confronted with multiple suspects."[19] *Davis*, 785 F.3d at 517. Here, the State's petition clearly indicated that the requested records were relevant and material to an ongoing capital murder investigation because they would either place Appellant near the scene and help to build probable cause against him or clear him from suspicion.

[19] In contrast, a district court in the District of Columbia has stated: "Because of the intermediate evidentiary burden it imposes on the government, an application seeking records pursuant to section 2703(d) is unlikely to be the first step in a criminal investigation." *In re Applications of the U.S. for an order Pursuant to 18 U.S.C. § 2703(d)*, 206 F.Supp.3d 454, 457 (D.D.C. 2016) (hereinafter *In re Applications D.D.C.2016*).

Appellant asserts that the State's petition failed to satisfy § 2703(d) because it lacked certain information.[20] In reviewing the petition in this case, however, the rules for reading warrant affidavits should serve as a guide. *See generally* 72 Geo. Wash. L. Rev. at 1219 ("The court order found in § 2703(d) . . . is something like a mix between a subpoena and a search warrant."). Similar to reviewing a warrant affidavit, the focus in reviewing the State's petition should be on "the combined logical force of facts" that are included rather than those that are omitted. *Cf. Rodriguez v. State*, 232 S.W.3d 55, 62 (Tex. Crim. App. 2007) (applying the principle in the warrant context). The State's petition, like a warrant affidavit, should be read in a common sense and realistic manner rather than in a hyper-technical manner. *Cf. McLain v. State*, 337 S.W.3d 268, 271 (Tex. Crim. App. 2011). In the same way that a magistrate may draw reasonable inferences from the facts stated in the affidavit, the district court in this case could make reasonable inferences from the facts in the petition. *Cf. Flores v. State*, 319 S.W.3d 697, 702 (Tex. Crim. App. 2010). Here, the facts in the petition were sufficient alone to satisfy § 2703; but, alternatively, the facts in combination with all reasonable inferences that might flow from those facts, were sufficient to satisfy § 2703(d). *See Rodriguez*, 232 S.W.3d at 64.

[20] In suggesting all the information he believes should have been included, he seems to advocate for facts that would satisfy a probable cause standard. Ant. Br. at 24.

Key facts showing that this court order was not arbitrary included: a murder, a suspect, and the suspect's phone number, which would show with whom he had been communicating and if he was in the area of the crime at the time it occurred; bottom line, it would provide leads in an ongoing police investigation.

Appellant complains that the State's petition did not include a timeframe for the murder and that it omitted facts justifying the request for tower information for the period of Oct. 20, 2012 – Nov. 12, 2012. In turn, he accuses the Dallas Court of "supplying missing facts and making assumptions from those facts" when the court stated that "the petition's request for historical cell data was limited to twenty days, suggesting the offense was committed within that time span." Ant. Br. at 27-28 (citing *Holder*, 2016 WL 4421362, at *11). In fact, the court simply recognized that the district court could have reasonably inferred that the murder under investigation occurred within the requested time period because the petition stated that the records would allow investigators to "identify if this suspect was in the area at the time of the offense."

While Appellant supports his arguments with two opinions authored by federal magistrate judges out of the District of Columbia, these authorities seem far afield in the hierarchy of persuasive authorities for this Court and the state district court that issued the court order. For instance, Appellant compares the instant case to *In re Applications D.D.C. 2016*, 206 F.Supp.3d 454, which is distinguishable

from the instant case both procedurally and factually. Procedurally, a United States Magistrate Judge issued this opinion, in which he denied without prejudice the government's applications to obtain several § 2703(d) court orders for cellphone records and allowed the government to re-submit amended applications. 206 F.Supp.3d at 459. This type of review in which revisions are suggested and entertained involves an arguably different process and perspective than assessing the propriety of an existing order that is being reviewed post-conviction, as in the instant case.[21]

Factually, the federal case is distinguishable because it involved "such a broad disclosure of electronic information." *Id.* at 458. Indeed, the United States government was investigating nine people suspected of killing a U.S. national in a foreign country. *Id.* at 455. The government presented several related applications for several § 2703(d) orders and identified 21 electronic accounts it believed may have been associated with nine suspected perpetrators, including accounts provided through Gmail, Yahoo, Facebook, Hotmail, and WhatsApp. *Id.* The government's applications included *no date restrictions* for the requested records. *Id*. The government's first set of applications provided a two-sentence description of the murder and alleged that "'[i]nvestigators have learned that individuals who

[21] The other two federal district court opinions cited by Appellant are similarly procedurally distinguishable. *See In re Application of U.S. for an Order Authorizing Disclosure of Historical Cell Site Information for Telephone Number [redacted]*, *et. al*., 20 F.Supp.3d 67, 72 (D.D.C. 2013); *Kennedy*, 81 F.Supp.2d at 1109 n.8.

perpetrated the attack used or purported to use a variety of the 21 electronic accounts, and that the records and information sought in the applications were 'relevant and material' to the investigation because they 'will help investigators learn whether and how the perpetrators of that attack communicated with each other and other conspirators.'" *Id*. at 455. The magistrate denied the applications as too conclusory. *Id.* In amended applications, the government represented that "several individuals who perpetrated the attack" were arrested by the foreign government authorities and confessed to committing the crime and that the perpetrators had access to a variety of e-mail address and electronic communication accounts, including the electronic accounts at issue. *Id.* at 456-57. In again denying the government's petitions, the magistrate determined that "[t]he government's showing in the applications really boils down to two assertions, that (1) a group of persons are suspected of committing a crime and (2) those persons (may) have email or other electronic accounts." *Id.* at 458. The magistrate concluded that section 2703(d) required something more than what the government offered to justify such a broad disclosure of electronic information. *Id.* at 458.

In contrast, the State's petition in the instant case was limited to a request for 23 days' worth of cell tower records for one suspect, who was identified as an AT&T Wireless user with the assigned cellphone number identified in the petition. The petition identified a phone number that was alleged to have been used by the

suspect to "communicate with unknown persons," and the petition specified that "obtaining the locations of the handset [would] allow investigators to identify if this suspect was in the area at the time of the offense and [would] provide investigators leads in this case." SX 7b. The State's straightforward and limited request for records in a local murder is justifiable.

For similar reasons, the other case Appellant discusses is distinguishable. *See In re Applications D.D.C. 2013*, 20 F.Supp.3d 67. While Appellant plucks out language that seems to support his argument, this case, similar to the case above, is factually complex, and in a procedurally different posture than the instant case. Notably, the federal magistrate that issued this opinion issued a subsequent opinion in the same case after the government amended and resubmitted its applications. *See In re Application of the U.S. for an Order Authorizing Disclosure of Historical Cell Site Info. For Telephone Number [Redacted]*, 40 F.Supp.3d 89, 90 (D.D.C. 2014). In this opinion, the magistrate judge reveals that he was grappling with a bigger issue in reviewing the government's applications:

> After careful consideration and a review of the relevant case law, this Court is convinced that the request for CSLI raises serious statutory and constitutional questions. As a result, this Court can only determine whether this application should be granted in its current form—and without a showing of probable cause—if it takes evidence on the underlying technology and receives briefing from both the government and court-appointed amicus curiae.

Id. This language suggests that, in previously reviewing the government's applications, the magistrate judge likely was holding the government to a higher standard than that required under § 2703(d). Or there may have been other reasons for denying the application that had little to do with what § 2703 requires. The cases cited by Appellant do not demonstrate that the State's petition and the corresponding court order were insufficient under § 2703(d).

Texas Case Law

There is little case law in our State courts discussing the requisites of a § 2703(d) court order. In this case, the Dallas Court of Appeals discussed one of its own prior cases that addressed a similar claim. *See Holder*, 2016 WL 4421362, at *12 (citing *Anderson*, 2013 WL 1819979, at *10). While *Anderson* has limited precedential value, it is instructive. *See* Tex. R. App. P. 47.7(a). In *Anderson*, court orders for cellphone records satisfied § 2703, where the petitions stated that petitioner had reason to believe that the records and information sought were relevant in a current, on-going police investigation of a capital murder that occurred on January 10, 2009, and was reported on Dallas Police Department offense number 9747-W. *Id.* at *10. Appellant does not address *Anderson*, but instead relies on dicta in the *Ford* footnote to argue that the court order in this case was insufficient.

In *Ford*, this Court held that cellphone records obtained by a court order under a prior version of Article 18.21, § 5 of the Code of Criminal Procedure did not violate Ford's Fourth Amendment rights. This Court stated in a footnote that the information in the State's application (an issue that was not before the Court) established the "reasonable belief that the information sought is relevant to a legitimate law enforcement inquiry" that is necessary for the state court order, as well as the "specific and articulable facts" showing required for an order under 18 U.S.C. § 2703(d). *See Ford*, 477 S.W.3d at 325 n.4. Notably, however, as acknowledged by the *Ford* Court in the footnote: "The State makes the observation that its Article 18.21 application—though it was not required to do so—*established probable cause* for a search for the specific records being sought." *Id.* (emphasis added). Because the court order in *Ford* established probable cause and because probable cause is not required under either Article 18.21, § 5 or 18 U.S.C. § 2703, the State's application in the *Ford* case does not set a floor for these court orders. As the Fifth Court noted in its *Holder* opinion, the question of whether the information contained in the State's application in *Ford* satisfied the federal statutes was not before the *Ford* Court, and therefore, "the [*Ford*] case is distinguishable and offers no guidance regarding how the federal statute should be applied in a situation such as this." *Holder*, 2016 WL 4421362, at *12.

The State's petition in *Hankston* more closely resembles the petition here. In *Hankston*, the State obtained the defendant's cellphone records by court order pursuant to a prior version of Article 18.21, § 5.[22] *See Hankston*, 517 S.W.3d at 113-14 & n.3. As in *Ford*, the sufficiency of the information contained in the State's petition was not before the *Hankston* Court. Nonetheless, the language in *Hankston* is instructive in providing an example of a state petition presented to a state district court that is consistent with the challenged petition in the instant case. As described in the *Hankston* opinion:

> The application stated that the records were being requested because law enforcement believed the records would "assist [the] investigation by providing information as to who [Hankston] was in contact with on the date of the Complainant's murder . . . [and] will also aid in proving/disproving the defendant's whereabouts before and after the murder."

Id. at 113.[23] While the court order in *Hankston* was issued under Article 18.21, § 5, so was the court order in the instant case.

Viewed in an appropriate light, the application in the instant case showed that the detective was investigating a murder, had a suspect, had the suspect's number, and averred that the limited request for historical cell site location information would show whether the suspect was in the vicinity of the offense

[22] This Court held in *Hankston* that Article I, § 9 of the Texas Constitution "does not restrict law enforcement from obtaining cellphone records revealed to a third party." *Hankston*, 517 S.W.3d at 122.

[23] The court order in *Hankston* allowed the State to obtain cellphone records for the twelve months preceding the issuance of the order. *Id.* at 114.

around the time of the offense. These are sufficiently specific facts to comply with § 2703(d) and Article 18.21, § 5.

Prayer

The State prays that this Court affirm both the court of appeals' decision and the trial court's judgment.

Respectfully submitted,

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Certificate of Service

On this 7th day of September, 2017, the State has e-served Appellant's counsel, Steven R. Miears, at SteveMiears@msn.com, and State Prosecuting Attorney, Stacey M. Soule, at stacey.soule@spa.state.tx.us, through the eFileTexas.gov filing system and by e-mail.

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Certificate of Compliance

This brief complies with the word limitations in Texas Rule of Appellate Procedure 9.4(i)(2). In reliance on the word count of the computer program used to prepare this brief, the undersigned attorney certifies that this brief contains 11,479 words, exclusive of the sections of the brief exempted by Rule 9.4(i)(1).

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