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TEXAS COURT OF CRIMINAL APPEALS

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No. PD-0941-17

***Christian Vernon Sims*, Appellant**

v.

***State of Texas*, Appellee**

On Discretionary Review from the Sixth Court of Appeals
No. 06-16-00198-CR

On Appeal from the 6th District Court, Lamar County
No. 26338

Petition for Discretionary Review

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If the Petition is granted, oral argument is requested

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Judge Bill Harris, presiding judge, 6th District Court, Lamar County

Chief Justice Josh Morriss III, Sixth Court of Appeals

Justice Bailey Mosely, Sixth Court of Appeals

Justice Ralph Burgess, Sixth Court of Appeals

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IV. Statement Regarding Oral Argument

Should the Court grant this petition, Appellant requests oral argument. *See* Tex. Rule App. Proc. 68.4(c) (2017). This case represents an opportunity for this Court to resolve the issue of the reach of Tex. Code Crim. Proc. Art. 38.23(a) (2016), and whether a person may invoke Art. 38.23(a) when seeking suppression of evidence obtained in violation of a statute even if the statute does **not** address whether suppression under Art. 38.23(a) or a broad state statue is available. Therefore, should this Court determine that its decisional process will be significantly aided by oral argument, Appellant will be honored to present oral argument.

To the Honorable Judges of the Texas Court of Criminal Appeals:

Appellant Christian Vernon Sims respectfully submits this petition for discretionary review:

V. Statement of the Case, Procedural History, and Statement of Jurisdiction

This petition requests that this Court review the Opinion and Judgment ("Opinion") of the Sixth Court of Appeals in *Sims v. State*, No. 06-16-00198-CR, 2017 Tex. App. LEXIS 6681 (Tex. App. Texarkana July 20, 2017) (designated for publication) (*see* Appendix), in which the Court of Appeals affirmed the *Judgment of Conviction by Court – Waiver of Jury Trial* ("Judgment") and sentence (CR.421-422)[1] rendered and imposed on October 18, 2016 in the 6th District Court of Lamar County for Murder, for which Appellant was sentenced to 35 years in TDCJ-ID. (RR4.17; CR.421-422); *see* Tex. Penal Code § 19.02 (2014).

On July 27, 2015, a grand jury indicted Appellant for Murder, alleging that on or about December 18, 2014, in Lamar County, Texas, Appellant "…intentionally and knowingly" caused the death of Annie Sims by shooting her with a firearm. (CR.182).

[1] The record on appeal consists of the Clerk's Record, cited by "CR" and the page number, and the Reporter's Record, cited as "RR" followed by the volume number and page or exhibit number (cited as "SX" for State's exhibits or "DX" for Appellant's exhibits).

Appellant filed a motion to suppress: (1) the warrantless seizure of the location-data evidence ("pinging") of a cell phone under the Fourth Amendment and Tex. Code Crim. Proc. Art. 38.23(a) (2016), (2) the warrantless arrest of Appellant under the Fourth Amendment and Tex. Code Crim. Proc. Art. 38.23(a) (2016), (3) statements made by Appellant in violation under *Miranda v. Arizona*, 384 U.S. 436 (1966) and Tex. Code Crim. Proc. Art. 38.22 (2016), and (4) the sufficiency of the probable cause affidavits under the Fourth Amendment and Tex. Code Crim. Proc. Art. 38.23(a) (2016). (CR.240-245.362-387).

On September 27, 2016 and October 13, 2016, hearings were held on Appellant's motion to suppress evidence. (RR2, RR3). After considering the evidence and arguments, the trial court denied the motion to suppress evidence. (CR.390-391). The trial court entered findings of fact and conclusions of law. (CR.423-428).

After the trial court denied the motion to suppress evidence, Appellant changed his plea to "guilty" to Murder in exchange for a 35-year prison sentence. (RR4.17; CR.421-422); *see* Tex. Penal Code § 19.02 (2014). However, as reflected *in the Trial Court's Certification of Defendant's Right to Appeal*, Appellant reserved his rights to appeal the issues raised and rejected on the motion to suppress evidence. (CR.407).

On June 20, 2017, the Court of Appeals affirmed the Judgment and sentence. *Sims*, 2017 Tex. App. LEXIS 6681 (*see* Appendix).

This petition for discretionary follows. Thus, this Court has jurisdiction over this case.

VI. Grounds for Review

Ground 1: The Court of Appeals erred by ruling that under Tex. Code Crim. Proc. Art. 38.23(a), violations of the Federal Stored Communication Act ("SCA") and Tex. Code Crim. Proc. Art. 18.21 do **not** require suppression of evidence pertaining to the warrantless pinging of a cellphone because: (1) the plain-language of Tex. Code Crim. Proc. Art. 38.23(a) states that **no** evidence obtained by an officer or other person in violation of any provisions of Texas or federal law shall be admitted in evidence against the accused; (2) Tex. Code Crim. Proc. Art. 38.23(a) is intended to provide greater protection than the Fourth Amendment; and (3) it is irrelevant that the SCA and Tex. Code Crim. Proc. Art. 18.21 do **not** provide that suppression is available since they are laws of Texas and the United States, and **neither** prohibits suppression of illegally obtained evidence under Art. 38.23(a).

Ground 2: The Court of Appeals erred by holding that Appellant was **not** entitled to a reasonable expectation of privacy in the real-time, tracking-data that was illegally seized because under the Fourth Amendment and Tex. Code Crim. Proc. Art. 38.23(a), a person has a legitimate expectation of privacy in real-time tracking-data regardless of whether he is in a private or public location.

Ground 3: The Court of Appeals erred by finding that the affidavits for the search warrants for Appellant's cellphone data and Facebook account support the trial court's findings of probable cause because material information included in the

affidavits was illegally obtained, and when that information is stricken, each affidavit lacks probable cause for a warrant.

Appellant directs this Court's attention to the following parts of the record on appeal:

- RR2: since the issues pertain to the motion to suppress, the entire volume.
- RR3: since the issues pertain to the motion to suppress, the entire volume.
- RR4: 17
- RR5: since the issues pertain to the motion to suppress, the entire volume.
- CR: 139, 155-158

See Tex. Rule App. Proc. 68.4(g) (2017).

VII. Argument

1. **Ground 1: The Court of Appeals erred by ruling that under Tex. Code Crim. Proc. Art. 38.23(a), violations of the Federal Stored Communication Act ("SCA") and Tex. Code Crim. Proc. Art. 18.21 do not require suppression of evidence pertaining to the warrantless pinging of a cellphone because: (1) the plain-language of Tex. Code Crim. Proc. Art. 38.23(a) states that no evidence obtained by an officer or other person in violation of any provisions of Texas or federal law shall be admitted in evidence against the accused; (2) Tex. Code Crim. Proc. Art. 38.23(a) is intended to provide greater protection than the Fourth Amendment; and (3) it is irrelevant that the SCA and Tex. Code Crim. Proc. Art. 18.21 do not provide that suppression is available since they are laws of Texas and the United States, and neither prohibits suppression of illegally obtained evidence under Art. 38.23(a).**

This Court should grant discretionary review and resolve the issue of the reach of Tex. Code Crim. Proc. Art. 38.23(a) (2016), and whether a person may invoke it when seeking suppression of evidence obtained in violation of a statute even if the statute does **not** address whether suppression under Art. 38.23(a) is available. Tex. Code Crim. Proc. Art. 38.23(a) (2016) is designed to reach where other provisions, statutory or constitutional, may **not**. The only "guidance" available is in federal appellate cases, but the broad protections of Art. 38.23(a) are **not** available to those charged with federal crimes. The Court of Appeals made numerous errors in its analysis and conclusions, and inserted nonexistent language into Art. 38.23(a) and the relevant statutes.

i. The plain-language of Tex. Code Crim. Proc. Art. 38.23(a) states that no evidence obtained by an officer or other person in violation of any provisions of Texas or federal law shall be admitted in evidence against the accused.

The plain-language of Tex. Code Crim. Proc. Art. 38.23(a) (2016) 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 States of America, shall be admitted in evidence against the accused on the trial of any criminal case." This language does **not** state that illegally obtained evidence must be suppressed only if the Texas or federal law violated specifically allows for suppression. **Nor** is the plain-language of Art. 38.23(a) qualified in any other way. **Nor** is there any indication in the language or in caselaw that Art. 38.23 is a "general" statute.

Appellant asserts violations of two statutes: 18 U.S.C. §§ 2701-2712 (2016), the SCA, and Tex. Code Crim. Proc. Art. 18.21 (2016), *Pen Registers and Trap and Trace Devices; Access to Stored Communications; Mobile Tracking Devices*. ***First***, under 18 U.S.C. § 2707 (2016), a person whose privacy rights are violated may bring a civil action against the offending party. Under 18 U.S.C. § 2708 (2016), "[T]he remedies and sanctions described in [18 USCS §§ 2701 *et seq.*] are the only judicial remedies and sanctions for nonconstitutional violations of [18 USCS §§ 2701 *et seq*.]. This language means that **under the SCA**, the civil action allowed under 18 U.S.C. § 2707 (2016) is the remedy or sanction available to an aggrieved party. The

language says **nothing** about another jurisdiction (such as Texas) being **prohibited** from allowing other remedies under its laws, like Tex. Code Crim. Proc. Art. 38.23(a) (2016). **Nor** does the language say anything about suppression under a broader state statute being **prohibited**.

Second, under Tex. Code Crim. Proc. Art. 18.21 §§ 12-13 (2016), a person whose privacy rights are violated may bring a civil suit, and "[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." Similar to the SCA, this language **neither** prohibits an aggrieved party from seeking relief for a violation under Tex. Code Crim. Proc. Art. 38.23(a) (2016), **nor** prohibits suppression under Art. 38.23(a). In fact, the language allows suppression under Tex. Const. Art. I, § 9 ("state constitution"). If protections under Tex. Const. Art. I, § 9 **equals** protections under the Fourth Amendment, *see* *Hulit v. State*, 982 S.W.2d 431, 436 (Tex. Crim. App. 1998), and Art. 38.23(a) offers greater protections than the Fourth Amendment (see [ii] below), then clearly Art. 38.23(a) applies to violations of Art. 18.21.

Rather than follow this simple formula, the Court of Appeals inserts nonexistent language into Tex. Code Crim. Proc. Art. 38.23(a) (2016) and the relevant statutes: "**Without providing any exclusionary rule**, the SCA provides for civil actions for violations of its terms and makes the remedies and sanctions

described in this chapter exclusive. See 18 U.S.C. §§ 2707 (civil actions), 2708 (exclusivity of remedies)." The Court of Appeals appears to believe that for Art. 38.23(a) or Tex. Const. Art. I, § 9 to apply, the SCA and Tex. Code Crim. Proc. Art. 18.21 (2016) must provide an "exclusionary rule." This is an erroneous conclusion based on nonexistent language.

Third, the issue is a violation of law found in statutes that do not prohibit suppression under Art. 38.23(a). A trial court "[n]ecessarily abuses its discretion if it refuses to suppress evidence that is obtained **in violation of the law** and that is, therefore, inadmissible under article 38.23." *Wilson v. State*, 311 S.W.3d 452, 458 (Tex. Crim. App. 2010) (emphasis supplied). The SCA and Art. 18.21 are statutes that constitute "the law," and Tex. Code Crim. Proc. Art. 38.23(a) (2016) covers situations where a person's constitutional and **statutory rights** are violated. *Johnson v. State*, 864 S.W.2d 708, 717-18 (Tex. App. Dallas 1993) (emphasis supplied), *affirmed*, *Johnson v. State*, 912 S.W.2d 227 (Tex. Crim. App. 1995); *see also Davidson v. State*, 25 S.W.3d 183, 186 fn.4 (Tex. Crim. App. 2000) (same).

ii. Tex. Code Crim. Proc. Art. 38.23(a) is intended to provide greater protection than the Fourth Amendment.

The Opinion perpetuates an anomaly that was **not** intended by the Legislature: "[T]herefore, 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 Tex. App. LEXIS 6681, *id*. at *5. Thus, per the

Opinion, if a defendant can show that his rights under the Fourth Amendment or Tex. Const. Art. I, § 9 are violated, the defendant would be entitled to suppression, but the defendant is **not** entitled to suppression under Art. 38.23(a).

However, Tex. Code Crim. Proc. Art. 38.23(a) (2016) is intended to provide greater protection than the Fourth Amendment. In *Miles v. State*, 241 S.W.3d 28, 35, 35 fn.25 (Tex. Crim. App. 2007) , this Court observed that the Texas Legislature "…[e]nacted an exclusionary rule broader than its federal counterpart," and further noted that [Tex. Code Crim. Proc. Art. 38.23(a) (2016)] "[l]ays down a rule far broader than that existing in any other state…while the federal rule (Fourth Amendment) excludes only evidence illegally obtained by federal officers, and those cooperating with them, [Tex. Code Crim. Proc. Art. 38.23(a) (2016)] makes a clean sweep and excludes evidence thus obtained by anyone." Thus, if a violation of the Fourth Amendment or Tex. Const. Art. I, § 9 entitle the defendant to suppression for a violation of the SCA or of Article 18.21, then the defendant must be entitled to suppression under the broad and powerful Tex. Code Crim. Proc. Art. 38.23(a) (2016). Any other conclusion leads to an irreconcilable anomaly and guts the effectiveness of Art. 38.23(a), which was never the intent of the Legislature.

iii. It is irrelevant that the Federal Stored Communication Act and Tex. Code Crim. Proc. Art. 18.21 do not provide that suppression is available since they are laws of Texas and the United States, and neither prohibits suppression of illegally obtained evidence under Art. 38.23(a).

The SCA is a "law of the United States." Tex. Code Crim. Proc. Art. 18.21 (2016) is Texas law. As explained above, Art. 38.23(a) is intended to be "broader than that existing in any other state" and thus has broad reach and power. In fact, as observed in *McClintock v. State*, No. PD-1641-15, 2017 Tex. Crim. App. LEXIS 291, at *19 (Tex. Crim. App. March 22, 2017) (designated for publication), "…[t]he language of the statutory exception (under Tex. Code Crim. Proc. Art. 38.23(a)) is broad enough to embrace the fruit-of-the-poisonous-tree doctrine."

Only if there was an "intervening circumstance" that "attenuates the taint" should evidence seized in violation of a law or statute **not** be suppressed under Art. 38.23(a). This issue, and by implication, the issue of the applicability of Art. 38.23(a) to violations of statutes like the SCA and Art. 18.21 was addressed in *State v. Jackson*, 464 S.W.3d 724 (Tex. Crim. App. 2015): officers placed a GPS tracking-device on the defendant's car to determine when and where he was obtaining drugs. *Id*. at 726. Using the GPS, the officers monitored his movement as he traveled at speeds exceeding the speed-limit, but also **independently verified** that he was speeding by pacing his car in their own unmarked vehicles. *Id*. An officer who was aware of the narcotics investigation verified by radar that the defendant was speeding

and stopped him. *Id*. Without issuing the defendant a speeding-citation, the officers obtained his consent to search his car and discovered methamphetamine in the trunk. *Id*. The defendant then confessed to possession of the drugs. *Id*.

Under Tex. Code Crim. Proc. Art. 38.23(a) (2016), the trial court granted the defendant's motion to suppress the drugs and confession, holding that because the search was accomplished through the installation and monitoring of the GPS-tracker, a violation of the law occurred [here a violation of Tex. Code Crim. Proc. Art. 18.21 (2016)], and per Tex. Code Crim. Proc. Art. 38.23(a) (2016), evidence obtained in violation of the law must be suppressed. *Id*. The Eleventh Court of Appeals affirmed. *State v. Jackson*, 435 S.W.3d 819, 827-831 (Tex. App. Eastland 2014).

This Court reversed the court of appeals. ***First***, this Court observed that "…[n]either the Fourth Amendment…nor… our… statutory exclusionary rule [Tex. Code Crim. Proc. Art. 38.23(a) (2016)] requires the suppression of evidence that was not "obtained" as a result of some illegality. Appellant notes that this Court did **not** hold that suppression under Art. 38.23(a) is not allowed when a violation of the SCA or Tex. Code Crim. Proc. Art. 18.21 (2016) is alleged. This Court thus did **not** reverse based on the erroneous rationale of the Sixth Court of Appeals, that because the SCA and Tex. Code Crim. Proc. Art. 18.21 (2016) do **no** state, "suppression is available," or merely state that civil relief is available under the respective statutes, that relief under Art. 38.23(a) is precluded.

Second, this Court found that although the primary illegality was the on-going search via the GPS tracking-device that enabled the police to make the observations relied upon to justify the defendant's initial roadside detention, the independent verification of the defendant speeding was an "intervening circumstance," and thus since the "circumstance intervenes" between the primary illegality and the later discovery of evidence that is alleged to be "fruit of the poisonous tree," a reviewing court may regard it as an "intervening circumstance" factor and conclude that the illegal taint was attenuated. *Jackson*, 464 S.W.3d at 732-733. Thus, this Court ruled against the defendant because the officers independently verified that the defendant was committing a violation that warranted him being stopped, and then consented to the search and confessed to the crime.

There was **no** "intervening circumstance" in Appellant's case. Law enforcement was directed to Appellant solely due to the violations of the SCA and Tex. Code Crim. Proc. Art. 18.21 (2016). Appellant has explained in detail why he is entitled to relief under Tex. Code Crim. Proc. Art. 38.23(a) (2016) for violations of these statutes. And, as explained above, Art. 38.23(a) provides far greater protections than the Fourth Amendment, and thus more than what a federal court may deem appropriate under the Fourth Amendment.

To support its conclusions, the Court of Appeals erroneously cites several federal cases and ignores the broad reach of Art. 38.23(a). *See*

LEXIS 6681, *id*. at *4-5, citing *United States v. Wallace*, 857 F.3d 685, 689 (5th Cir. 2017), withdrawn and replaced by *United States v. Wallace*, 866 F.3d 605 (5th Cir. 2017); *United States v. Guerrero*, 768 F.3d 351, 358 (5th Cir. 2014); and *United States v. German*, 486 F.3d 849, 854 (5th Cir. 2007). None of these cases are availing to the conclusion that Tex. Code Crim. Proc. Art. 38.23(a) (2016) requires suppression here. For instance, in *Wallace*, based on the court's interpretation of the reach of the **Fourth Amendment**, the Fifth Circuit held that suppression is **not** a remedy for a violation of either the federal pen-trap statute or Tex. Code Crim. Proc. Art. 18.21 (2016). *Wallace*, 866 F.3d at 608. The Fifth Circuit compared the wire-tap statute, which specifically provides for an exclusionary remedy, and the pen-trap statute, which provides only for fines and imprisonment for knowing violations (but does not state that exclusion is unavailable). *Id*. at 608-609. The Fifth Circuit is free to reach this conclusion, but that court does **not** have the benefit of Tex. Code Crim. Proc. Art. 38.23(a) (2016) and its broad reach.

Next, although the Court of Appeals admits that "[W]hile Article 38.23 clearly requires exclusion in the general case of a statutory or constitutional violation," the Court mistakenly concludes "[t]he federal and state statutes specifically applicable to the pinging of (Appellant's) cell phone say that suppression is not available." *Sims*, 2017 Tex. App. LEXIS 6681, *id*. at *6. Based on this mistaken conclusion, the Court found that "the specific exclusivity of remedies in the two statutes control the

general terms of Article 38.23." *Id*. None of the cases cited, *Burke v. State*, 28 S.W.3d 545, 547 (Tex. Crim. App. 2000) (analysis of Evading Arrest); *Mills v. State*, 722 S.W.2d 411, 413-414 (Tex. Crim. App. 1986) (comparison of Tex. Penal Code § 31.03 versus a "more specific statute," Tex. Penal Code § 32.46); or *Davidson v. State*, 249 S.W.3d 709, 721 (Tex. App. Austin 2008, pet. ref.) (discussion that Art. 18.21 does not govern orders to place tracking devices by federal agents) hold that Art. 38.23(a) is a statute of "general terms" that may be trumped by the provision of a "specific" statute when the "specific" statute makes no mention of Art. 38.23(a) expressly or by implication.

Rather, the issue raised by the Court of Appeals pertains to Tex. Gov. Code § 311.026 (2017), which provides: (a) If a general provision conflicts with a special or local provision, the provisions shall be construed, if possible, so that effect is given to both; and (b) If the conflict between the general provision and the special or local provision is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest intent is that the general provision prevail."

Undersigned counsel was **not** able to find a case that held as the Court of Appeals, that Art. 38.23(a) is a statute of "general terms" that may be trumped by the specific provision of a "specific" statute, much less where the "specific" statute makes no mention of Art. 38.23(a) expressly or by implication. To affirm the Court

of Appeals effectively guts the power and reach of Tex. Code Crim. Proc. Art. 38.23(a) (2016) in contravention to the intent of the Legislature. Further, as discussed above, although the SCA and Art. 18.21 allow civil remedies for violations of the terms of each statute, nothing in either statute states a variation of "suppression under Art. 38.23(a) or under a state-suppression statute is unavailable." If the Legislature and Congress intended this result, it would have stated so, but it did **not**.

Finally, the Court of Appeals relies on a footnote in *Love v. State*, No. AP-77,024, 2016 Tex. Crim. App. LEXIS 1445 at *7 n.8 (Tex. Crim. App. Dec. 7, 2016), which provides in relevant part,

> "[W]e note that both the federal and state statutes upon which Appellant relies 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." Article 18.21, §§ 12 & 13. Before we may invoke the general exclusionary remedy embodied in Article 38.23, therefore, we must identify (as we have) a constitutional violation."

However, as discussed above, Tex. Code Crim. Proc. Art. 18.21 §§ 12-13 (2016) allows a person whose privacy rights are violated to bring a civil suit, but this language **neither** prohibits an aggrieved party from seeking relief for a violation under Tex. Code Crim. Proc. Art. 38.23(a) (2016) **nor** expressly prohibits suppression under Art. 38.23(a).

Appellant believes that these issues require clarification and thus asks this Court to grant discretionary review.

2. **Ground 2: The Court of Appeals erred by holding that Appellant was not entitled to a reasonable expectation of privacy in the real-time, tracking-data that was illegally seized because under the Fourth Amendment and Tex. Code Crim. Proc. Art. 38.23(a), a person has a legitimate expectation of privacy in real-time tracking-data regardless of whether he is in a private or public location.**

Appellant argued that the State's warrantless use of real-time, tracking-data obtained from cellphone companies and pertaining to the location of his cellphone was an unreasonable search in violation of the Fourth Amendment and Tex. Const. Art. I, § 9. *Sims*, 2017 Tex. App. LEXIS 6681, *id*. at *6-9; *see* U.S. Const. Amend IV. The Court of Appeals concluded, "…[w]hile there may be a legitimate expectation of privacy in real-time tracking data in private locations, the same tracking, when following a subject in public places, does not invade legitimate expectations of privacy. Where such surveillance took place on public highways, there was no legitimate expectation of privacy." *Id*. at *8. In other words, the Court of Appeals believes that once a person leaves a private location, any data relating to the location of his cellphone is open-game to warrantless searches. This reasoning **cannot** be reconciled with a person's right to privacy under the Fourth Amendment and Tex. Const. Art. I, § 9.

As the Court of Appeals acknowledges, there is considerable debate among state and federal courts regarding whether warrantless searches are allowed in this situation. *Id*. In citing *Ford v. State*, 477 S.W.3d 321, 335 fn.18 (Tex. Crim. App. 2015), the Court notes that Florida, New Jersey, Illinois, Indiana, Maryland, and

Virginia require warrants for such information. *Sims*, 2017 Tex. App. LEXIS 6681, *id*. at *8; And, the Southern District of Texas has ruled that "real-time" location information may be obtained only under warrant supported by probable cause. *In re Application for Pen Register and Trap/Trace Device with Cell Site Location Authority*, 396 F.Supp.2d 747 (S.D. Tex. 2005).

When a person uses her cellphone in her home, that person has a right to privacy to the contents of the phone and, as the Court of Appeals acknowledges, "[a] legitimate expectation of privacy in real-time tracking data in private locations" (such as her home). These principles have been established by *Riley v. California*, 134 S. Ct. 2473, 2489 (2014) and *State v. Granville*, 423 S.W.3d 399, 417 (Tex. Crim. App. 2014) (Officers **cannot** activate and search the contents of a cellphone that is stored in a jail property room without a search warrant.).

Under *Riley* and *Granville*, when the person leaves her home, she does **not** lose her right of privacy in her cellphone. Thus, it makes **no** sense for the person to lose "the legitimate expectation of privacy in real-time tracking data" merely because the person leaves her home.

When a person picks up a phone that is a "landline" and makes a call, that person "voluntarily conveys" information (phone-number dialed) through the phone company. The "landline" phone is connected to copper wires that runs through a jack to a box outside, the "entrance bridge." This entrance bridge is connected to cable

that runs along the road that either goes to the phone company's switch or a digital concentrator, which is a device that digitizes the person's voice and combines it with other voices that are sent along a coax cable to the phone company's office. There, the line is connected to a line card at a switch, which is the source of the "dial tone" when one picks up a landline. This process is "reversed" back to the destination of the call. There is **no** "tracking" of where the caller or recipient are because the source-and-destination-points are fixed. And, when a person makes a call on a landline, numbers dialed are turned over to the phone company. *Smith v. Maryland*, 442 U.S. 735, 742-743 (1979) (No legitimate expectation of privacy regarding numbers dialed on a landline because these numbers are volunteered to the phone company.).

This is **not** how cellphone technology works. As the Sixth Circuit observed in *United States v. Forest*, 355 F.3d 942, 951-952 (6th Cir. 2004), unlike dialed phone-numbers, cell-site data is not "voluntarily conveyed" by the user to the phone company, but instead is transmitted automatically during the registration process, entirely independent of the cellphone user's input, control, or knowledge. Thus, comparing what a cellphone conveys to a cell-site to "a person travelling in an automobile on public thoroughfares" as held in *Knotts*, a case handed down in 1983, long before cellphones were used, is **not** a correct analysis. *Sims*, 2017 Tex. App. LEXIS 6681, *id*. at *9, citing *United States v. Knotts*, 460 U.S. 276, 281 (1983).

In *Ford*, 477 S.W.3d at 329, this Court held that "the Fourth Amendment does **not** prohibit the obtaining of information **revealed** to a third-party, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third-party will not be betrayed." (emphasis supplied). This Court agreed with the court of appeals that it is **not** relevant that the incriminating evidence was determined from records of **passive activity** on the cellphone since the defendant "…voluntarily availed himself of AT&T's cellular service, which includes the ability to receive data sent to a subscriber's phone, when he chose it as his provider." *Id*. at 331. Referring to this as "…a distinction without a functional difference" **ignores** the reality that a person who wants to use a cellphone has **no** choice but to subscribe to one of the few remaining providers, all of whom keep real-time, tracking-data pertaining to the location of his cellphone.

And, to conclude that a person loses his expectation of privacy in real-time, tracking-data merely because he leaves his house using the rationale of "a person travelling in an automobile on public thoroughfares" (as though the public or police can "see" the invisible waves automatically generated by a cellphone) ignores the reality of cellphone technology. Appellant asks this Court to grant discretionary review.

3. **<u>Ground 3</u>: The Court of Appeals erred by finding that the affidavits for the search warrants for Appellant's cellphone data and Facebook account support the trial court's findings of probable cause because material information included in the affidavits was illegally obtained, and when that information is stricken, each affidavit lacks probable cause for a warrant.**

Appellant incorporates here the arguments in Grounds 1 and 2. The search warrants that were signed after the initial illegalities were based on information in the affidavits derived from the illegally obtained evidence.

In (RR5.SX-1, ¶¶ 3 and 10), the affidavit provides, "[H]omicide Investigators in Texas had developed information that the suspects had used the victim's credit card several times in Oklahoma and had started using cellular telephone data to determine their location. Information was developed that a cell phone of interest was located in the local area" and "Cellular Telephones are known to have been carried by the suspects just prior to their arrest but were not on them when they were taken into custody. As the phones were used to determine their location, said phone(s) are likely in the motel room or in the vehicle."

In (RR5.SX-2, page 3, ¶4), the affidavit provides, "While engaged in the electronic surveillance of Christian Sims cell phone it was tracked to a location at 6105 New Sapulpa, Tulsa Oklahoma."

In (RR5.SX-3, page 3), the affidavit provides, "While engaged in the electronic surveillance of Christian Sims cell phone it was tracked to a location at 6105 New Sapulpa, Tulsa Oklahoma."

The evidence obtained would **not** have been possible but-for the illegalities described in Grounds 1 and 2. When considering whether a warrant is supported by probable cause, the test is whether the magistrate had a substantial basis for concluding that a search would uncover evidence of wrongdoing. *Illinois v. Gates*, 462 U.S. 213, 236 (1983). When considering the sufficiency of an affidavit, courts look at the facts within the four corners of the affidavit and evaluate those facts in their totality. *Gates*, 462 U.S. at 234; *Crider v. State*, 352 S.W.3d 704, 707 (Tex. Crim. App. 2011).

If a probable-cause affidavit contains illegally obtained information, a Court must disregard that evidence and evaluate the affidavit for probable cause using the remaining evidence. *Castillo v. State*, 818 S.W.2d 803, 805 (Tex. Crim. App. 1991), *overruled on other grounds* by *Torres v. State*, 182 S.W.3d 899, 901-902 (Tex. Crim. App. 2005). The deference afforded a magistrate in making a probable cause determination disappears if parts of the affidavit are stricken of tainted information. *McClintock v. State*, 444 S.W.3d 15, 19 (Tex. Crim. App. 2014) ("When part of a warrant affidavit must be excluded, then it is up to the reviewing courts to determine whether 'the independently acquired and lawful information stated in the affidavit nevertheless clearly established probable cause") *affirmed after remand*, *McClintock*, 2017 Tex. Crim. App. LEXIS 291. When the illegally

obtained information is stricken from the affidavits, each affidavit lacks probable cause for a warrant. Appellant asks this Court to grant discretionary review.

VIII. Conclusion and Prayer

The Court of Appeals erred by affirming the denial of the motion to suppress evidence, and: (1) decided an important question of state and federal law that has not been, but should be, settled by this Court; and (2) decided an important question of state or federal law in a way that conflicts with the applicable decisions of this Court and the Supreme Court. *See* Tex. Rule App. Proc. 66.3 (2017). Appellant prays that this Court grant discretionary review, reverse the Opinion of the Court of Appeals, reverse the Judgment and sentence, reverse the denial of the motion to suppress, and remand this case back to the trial court for a new trial.

Respectfully submitted,

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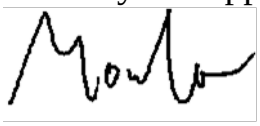
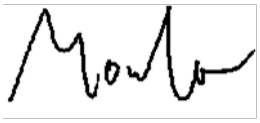


/s/ Michael Mowla
Michael Mowla

IX. Certificate of Service

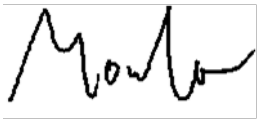
I certify that on October 29, 2017, this document was served on Gary Young and Jill Drake of the Lamar County District Attorney's Office by efile to gyoung@co.lamar.tx.us and jdrake@co.lamar.tx.us; and on Stacey Soule, State Prosecuting Attorney, and John Messinger, Assistant State Prosecuting Attorney, by efile to stacey.soule@spa.texas.gov, john.messinger@spa.state.tx.us, and information@spa.texas.gov. *See* Tex. Rule App. Proc. 9.5 (2017) and Tex. Rule App. Proc. 68.11 (2017).



/s/ Michael Mowla
Michael Mowla

X. Certificate of Compliance with Tex. Rule App. Proc. 9.4

I certify that this document complies with: (1) the type-volume limitations because it is computer-generated and does **not** exceed 4,500 words. Using the word-count feature of Microsoft Word 2016, this document contains **4,472** words except in the following sections: caption, identity of parties and counsel, table of contents, table of authorities, statement regarding oral argument, statement of the case, procedural history, and statement of jurisdiction, statement of issues presented (grounds for review section), signature, certificate of service, certificate of compliance, and appendix; and (2) the typeface requirements because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font. *See* Tex. Rule App. Proc. 9.4 (2017).



/s/ Michael Mowla
Michael Mowla

Appendix

Sims v. State

Court of Appeals of Texas, Sixth District, Texarkana

June 30, 2017, Submitted; July 20, 2017, Decided

No. 06-16-00198-CR

Reporter
2017 Tex. App. LEXIS 6681 *; 2017 WL 3081399

CHRISTIAN VERNON SIMS, Appellant v. THE STATE OF TEXAS, Appellee

Notice: PUBLISH

Prior History: [*1] On Appeal from the 6th District Court, Lamar County, Texas. Trial Court No. 26338.

Core Terms

cell phone, suppression, tracking, probable cause, pinging, cellular telephone, search warrant, remedies, legitimate expectation of privacy, real-time, highway, recites, suppress evidence, credit card, provides, missing, murder, terms, constitutional violation, sanctions, searches, argues, arrest, motel, pet

Case Summary

Overview

HOLDINGS: [1]-Defendant's claim that evidence discovered as a result of the warrantless pinging of his cellular telephone as he disappeared after his grandmother was murdered and her car, keys, and purse were missing, should have been suppressed because it violated the Stored Communications Act and *Tex. Code Crim. Proc. Ann. art. 18.21* was rejected because those statutes provided that their remedies were exclusive, and the remedies did not include suppression of evidence; [2]-The specific exclusivity of remedies in the two statutes controlled the general terms of *Tex. Code Crim. Proc. Ann. art. 38.23*; [3]-The real-time tracking data appeared to have been used to track defendant to exclusively public places—a public highway and a public truck stop parking lot; therefore, defendant did not have a legitimate expectation of privacy of the location of his cell phone.

Outcome
Conviction affirmed.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Stored Communications Act

Civil Rights Law > Protection of Rights > Privacy Rights > Electronic Communications

Criminal Law & Procedure > Search & Seizure > Eavesdropping, Electronic Surveillance & Wiretapping > Electronic Beepers, Pagers & Tracking Devices

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Suppression of Evidence

HN1[] **Federal Acts, Stored Communications Act**

Violations of the Federal Stored Communication Act (SCA) and of *Tex. Code Crim. Proc. Ann. art. 18.21* do not require suppression of the evidence discovered thereby.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Motions to Suppress

HN2[] **De Novo Review, Motions to Suppress**

An appellate court reviews the trial court's legal rulings on motions to suppress de novo.

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Stored Communications Act

Civil Rights Law > Protection of Rights > Privacy Rights > Electronic Communications

Criminal Law & Procedure > Search & Seizure > Eavesdropping, Electronic Surveillance & Wiretapping > Electronic Beepers, Pagers & Tracking Devices

HN3[] **Federal Acts, Stored Communications Act**

The Stored Communications Act (SCA) sets out terms under which government entities, including law enforcement agencies, may obtain disclosure of information from providers of electronic communications services, including mobile telephone carriers. *18 U.S.C.S. § 2703*. Without providing any exclusionary rule, the SCA provides for civil actions for violations of its terms and makes the remedies and sanctions described in this chapter exclusive. *18 U.S.C.S. §§ 2707* (civil actions), 2708 (exclusivity of remedies).

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Stored Communications Act

Criminal Law & Procedure > Search & Seizure > Eavesdropping, Electronic Surveillance & Wiretapping > Electronic Beepers, Pagers & Tracking Devices

Civil Rights Law > Protection of Rights > Privacy Rights > Electronic Communications

HN4[] Federal Acts, Stored Communications Act

The plain language of 18 U.S.C.S. § 2703(c) of the Stored Communications Act states that the government may obtain a court order requiring a cellular telephone company to turn over records or other information related to its customers.

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Stored Communications Act

Civil Rights Law > Protection of Rights > Privacy Rights > Electronic Communications

Governments > Legislation > Statutory Remedies & Rights

HN5[] Federal Acts, Stored Communications Act

18 U.S.C.S. § 2708 of the Stored Communications Act provides that the remedies and sanctions described in the Act are the only judicial remedies and sanctions for nonconstitutional violations of the Act.

Civil Rights Law > Protection of Rights > Privacy Rights > Electronic Communications

Governments > Legislation > Statutory Remedies & Rights

HN6[] Privacy Rights, Electronic Communications

Parallel to the Federal Stored Communications Act (SCA) is *Tex. Code Crim. Proc. Ann. art. 18.21* of the Texas Code of Criminal Procedure, which sets out its terms for disclosure, provides for civil actions, but no exclusion of evidence, for its violation, and states that the remedies and sanctions described in the article are the exclusive judicial remedies and sanctions for a violation of the article other than a violation that infringes on a right of a party guaranteed by a state or federal constitution. *Tex. Code Crim. Proc. Ann. art. 18.21, §§ 4-5B* (terms for disclosure), *§ 12* (cause of action), § 13 (exclusivity of remedies).

Business & Corporate Compliance > ... > Communications Law > Federal Acts > Stored Communications Act

Civil Rights Law > Protection of Rights > Privacy Rights > Electronic Communications

Criminal Law & Procedure > Search & Seizure > Eavesdropping, Electronic Surveillance & Wiretapping > Electronic Beepers, Pagers & Tracking Devices

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Suppression of Evidence

HN7[] Federal Acts, Stored Communications Act

Suppression of evidence is not available to criminal defendants based on a violation of the Stored Communications Act or of *Tex. Code Crim. Proc. Ann. art. 18.21*, so long as the violation is not also a violation of a constitutional right.

Governments > Legislation > Interpretation

HN8 **Legislation, Interpretation**

It is a rule of statutory construction that the specific should control the general in case of an irreconcilable conflict.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > Eavesdropping, Electronic Surveillance & Wiretapping > Electronic Beepers, Pagers & Tracking Devices

HN9 **Search & Seizure, Scope of Protection**

The Texas Constitution does not reach further than the *Fourth Amendment to the United States Constitution* in situations in which the State is attempting to acquire an appellant's cell phone records from a third party.

Criminal Law & Procedure > Search & Seizure > Eavesdropping, Electronic Surveillance & Wiretapping > Electronic Beepers, Pagers & Tracking Devices

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

HN10 **Eavesdropping, Electronic Surveillance & Wiretapping, Electronic Beepers, Pagers & Tracking Devices**

Only in certain circumstances might an individual have a legitimate expectation of privacy in third-party information concerning the location of that individual's cell phone. Courts have considered that location information can be of three basic types, (a) real-time tracking information, (b) intermediate-term information, and (c) long-term location information. The safest, least controversial type of data is the intermediate-term information. In Texas, there is no legitimate expectation of privacy in four days' cell phone location information obtained from the carrier. Longer term, pattern data showing places an individual visits over an extended period of time is suspect, in that individuals may very well have legitimate expectations of privacy in such data, which maps out the patterns of their daily lives. Real-time, tracking data has been debated among the courts.

Criminal Law & Procedure > Search & Seizure > Eavesdropping, Electronic Surveillance & Wiretapping > Electronic Beepers, Pagers & Tracking Devices

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

HN11 **Eavesdropping, Electronic Surveillance & Wiretapping, Electronic Beepers, Pagers & Tracking Devices**

While there may be a legitimate expectation of privacy in real-time tracking data regarding the location of an individual's cell phone in private locations, the same tracking, when following a subject in public places, does not invade legitimate expectations of privacy. Where such surveillance takes place on public highways, there is no legitimate expectation of privacy.

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

HN12 **Search & Seizure, Expectation of Privacy**

A person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.

Criminal Law & Procedure > ... > Search Warrants > Probable Cause > Totality of Circumstances Test

HN13 **Probable Cause, Totality of Circumstances Test**

When reviewing whether a warrant affidavit supports a finding of probable cause, an appellate court does not consider facts in isolation, but examines the affidavit(s) from the totality of the circumstances. In determining whether an affidavit provides probable cause to support a search warrant, an issuing court and a reviewing court are constrained to the four corners of the affidavit. The appellate court must examine the supporting affidavit to if it recited facts sufficient to support conclusions (1) that a specific offense was committed, (2) that the property or items to be searched for or seized constitute evidence of the offense or evidence that a particular person committed it, and (3) that the evidence sought is located at or within the thing to be searched. Tex. Code Crim. Proc. Ann. art. 18.01(c) (Supp. 2016). The appellate court examines the affidavits for recited facts sufficient to justify a conclusion that the object of the search is probably within the scope of the requested search at the time the warrant is issued. The appellate court reviews the combined logical force of facts that are in the affidavit.

Criminal Law & Procedure > Search & Seizure > Search Warrants > Probable Cause

HN14 **Search Warrants, Probable Cause**

Affidavits for arrest or search warrants should be interpreted in a common sense and realistic manner, and once a magistrate has found probable cause, warrants should not thereafter be invalidated through a hypertechnical interpretation of Taunton v. State.

Criminal Law & Procedure > Search & Seizure > Search Warrants > Probable Cause

HN15[] **Search Warrants, Probable Cause**

The task of the issuing magistrate is simply to make a practical, common-sense decision whether, giving all of the circumstances set forth in the affidavit there is a fair probability that evidence of a crime will be found in a particular place.

Judges: Before Morriss, C.J., Moseley and Burgess, JJ. Opinion by Chief Justice Morriss.

Opinion by: Josh R. Morriss, III

Opinion

Early in the afternoon of December 18, 2014, the body of Annie Sims was discovered on the back porch of her Powderly, Texas, home with a bullet in her head. Missing were Annie's live-in grandson, Christian Vernon Sims (Sims), his girlfriend, Ashley Morrison, Annie's vehicle, and Annie's purse, its contents including credit cards and at least one handgun. Officers suspected that the missing couple caused Annie's death and had taken the missing items from Annie's house. The officers' investigation was assisted by Sims' grandfather and Annie's husband, Mike Sims, as well as Sims' father, Matt.

Sims and Morrison were identified as having charged on Annie's credit card in McAlester, Oklahoma, shortly before the discovery of Annie's body. Starting around 5:00 p.m. that evening and without a warrant, officers had Sims' mobile carrier "ping" or track Sims' cellular telephone[1] by using information from cell towers along a highway in Oklahoma, Sims' northerly path of travel. Using the tracking data, officers learned, **[*2]** first, that Sims' cell phone was somewhere on that northbound highway, north of McAlester, and, later, at a Sapulpa, Oklahoma, truck stop located further north along the same highway. Oklahoma officers soon located Annie's vehicle in the parking lot of a motel across the highway from the truck stop. Armed with the license number from the vehicle, officers learned from the motel desk clerk that Sims and Morrison had rented room 275 in that motel. From that room, both suspects were arrested peacefully at approximately 8:25 p.m. At the motel, without being questioned, Sims told officers, among other things, "[Morrison] had nothing to do with it. It was all me."

After the denial of Sims' various motions to suppress evidence, he and the State entered into a plea agreement, under which Sims pled guilty to Annie's murder and was sentenced to thirty-five years' imprisonment. Having retained the right to appeal the denial of his motions to suppress and urging that at least one of his motions was erroneously denied, making Sims' plea of guilty allegedly involuntary, Sims appeals in three points of error. In the first two points, Sims claims that evidence discovered as a result of the warrantless **[*3]** "pinging" of his cellular telephone should have been suppressed because it both constituted a constitutionally unreasonable search and violated state and federal statutes. In his third point, Sims argues that the trial court should have also suppressed evidence discovered from the later, warrant-based, searches of his cellular telephone and Facebook account because the warrant affidavits were insufficient. Sims posits that, because he pled guilty only after his various motions to suppress had been

[1] Although Sims' cellular telephone used an account in the name of Mike Sims, the phone itself was purchased, possessed, and used only by Sims. The limited information Mike had the authority or ability to obtain, regarding Sims' cell phone use, did not include any content of communications or "substantive text messages, photos, or any other electronic — detailed electronic information from the provider." There is no claim that this special arrangement compromised any rights of Sims in the information concerning the phone's use or location.

denied, his conviction and sentence should be reversed and the case remanded to the trial court for further proceedings.

We affirm the trial court's judgment because (1) ***HN1***[⬆] violations of the *Federal Stored Communication Act (SCA)* and of *Article 18.21 of the Texas Code of Criminal Procedure* do not require suppression of the evidence discovered thereby, (2) there was no constitutional violation from this reasonable search in pinging Sims' cell phone, and (3) the affidavits for the search warrants for Sims' cellular telephone data and his Facebook account data support the trial court's findings of probable cause.

(1) Violations of the Federal Stored Communication Act and of Article 18.21 of the Texas Code of Criminal Procedure Do Not Require Suppression of the Evidence Discovered Thereby

Sims argues that **[*4]** the warrantless pinging of his cellular telephone to locate him, as he and Morrison travelled north through Oklahoma, violated both the Federal SCA and its counterpart Texas statute, requiring suppression of all evidence discovered as a result of the pinging. *See* *18 U.S.C. § 2702 (2015)*, *§ 2703 (2009)*; *TEX. CODE CRIM. PROC. ANN. art. 18.21* (West Supp. 2016).

HN2[⬆] We "review the trial court's legal rulings [on motions to suppress] de novo." *State v. Kelly, 204 S.W.3d 808, 818 (Tex. Crim. App. 2006)*; *see* *Wiede v. State, 214 S.W.3d 17, 24 (Tex. Crim. App. 2007)*. The State argues that suppression of evidence is not a remedy available to Sims under either the state or the federal statute and directs us to the very recent case *United States v. Wallace, 857 F.3d 685 (5th Cir. 2017)*. We agree that suppression is not a remedy for a non-constitutional violation of either statute.

The federal statute at issue here is the SCA, which is Title II of the Electronic Communications Privacy Act of 1986, as amended. *See* *18 U.S.C. §§ 2701-12 (SCA)*; *see also* *Pub. L. No. 99-508, 100 Stat. 1848 (1986)* (ECPA).[2] ***HN3***[⬆] The SCA sets out terms under which government entities, including law enforcement agencies, may obtain disclosure of information from providers of electronic communications services, including mobile telephone carriers. *See* *18 U.S.C. § 2703*.[3] Without providing any exclusionary rule, the SCA provides for civil actions for violations of its terms and makes the "remedies **[*5]** and sanctions described in this chapter" exclusive. *See* *18 U.S.C. §§ 2707* (civil actions), *2708* (exclusivity of remedies).[4]

HN6[⬆] Parallel to the SCA is *Article 18.21 of the Texas Code of Criminal Procedure*, which sets out its terms for disclosure, provides for civil actions, but no exclusion of evidence, for its violation, and states 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." *See TEX. CODE CRIM. PROC. art. 18.21, §§ 4-5B* (terms for disclosure), *§ 12* (cause of action), *§ 13* (exclusivity of remedies).

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[2] For a helpful explanation of the components of the federal statutory scheme, *see* *United States v. McGuire, No. 2:16-CR-00046-GMN-PAL, 2017 WL 1855737, at *5 (D. Nev. Feb. 9, 2017)*.

[3] ***HN4***[⬆] "The plain language of *18 U.S.C. § 2703(c)* states that the government may obtain 'a court order' requiring a cellular telephone company to turn over 'record[s] or other information' related to its 'customer[s].'" *Wallace, 857 F.3d at 691*.

[4] ***HN5***[⬆] *Section 2708* provides, "The 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*.

Therefore, ***HN7***[↑] 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. *Wallace, 857 F.3d at 689*; *United States v. Guerrero, 768 F.3d 351, 358 (5th Cir. 2014)*, *cert. denied, 135 S. Ct. 1548, 191 L. Ed. 2d 643 (2015)*; *United States v. German, 486 F.3d 849, 854 (5th Cir. 2007)*; *see Love v. State, No. AP-77,024, 2016 Tex. Crim. App. LEXIS 1445, 2016 WL 7131259, at *7 n.8 (Tex. Crim. App. Dec. 7, 2016)* (to suppress evidence for violation of SCA or *Article 18.21*, court must find constitutional violation).

Sims argues that, by its explicit terms, Article 38.23 of the Texas Code of Criminal Procedure requires suppression in this case:

> 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 States of America, shall be admitted in evidence **[*6]** against the accused on the trial of any criminal case.

TEX. CRIM. PROC. CODE ANN. art. 38.23(a) (West 2005). Understandably, Sims reasons that a violation of either the federal or the state statute requires, under Article 38.23(a), exclusion of the evidence. We disagree, because of ***HN8***[↑] the rule of statutory construction that the specific should control the general in case of an irreconcilable conflict. While 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' cell phone say that suppression is not available. Here, the specific exclusivity of remedies in the two statutes control the general terms of Article 38.23. *See Burke v. State, 28 S.W.3d 545, 547 (Tex. Crim. App. 2000)*; *Mills v. State, 722 S.W.2d 411, 413-14 (Tex. Crim. App. 1986)*; *Davidson v. State, 249 S.W.3d 709, 721 (Tex. App.—Austin 2008, pet. ref'd)*; *see also Love, 2016 Tex. Crim. App. LEXIS 1445, 2016 WL 7131259, at *7 n.8*.

We therefore overrule this point of error. Only if there was a constitutional violation should the trial court have suppressed the evidence found from pinging Sims' cell phone.

(2) There Was No Constitutional Violation from this Reasonable Search in Pinging Sims' Cell Phone

Sims also asserts that the State's warrantless use of the third-party data pertaining to the location of his cellphone was an unreasonable search in violation of the federal and state Constitutions. *See U.S. CONST. amend IV*; *Tex. Const. art. 1, § 9*. We disagree.[5]

HN10[↑] Only in certain circumstances **[*7]** might an individual have a legitimate expectation of privacy in third-party information concerning the location of that individual's cell phone. In discussing the subject, courts have considered that location information can be of three basic types, (a) real-time tracking information, (b) intermediate-term information, and (c) long-term location information. They suggest that the safest, least controversial type of data is the intermediate-term information. For example, Texas

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[5] ***HN9***[↑] The Texas Constitution does not reach further than the ***Fourth Amendment to the United States Constitution*** in situations in which the State is attempting to acquire an appellant's cell phone records from a third party. *Holder v. State, No. 05-15-00818-CR, 2016 Tex. App. LEXIS 9107, 2016 WL 4421362, at *13* (Tex. App.—Dallas Aug. 19, 2016, pet. granted); *see Hankston v. State, 517 S.W.3d 112, 121-22 (Tex. Crim. App. 2017)*.

precedent is that there is no legitimate expectation of privacy in four days' cell phone location information obtained from the carrier. *Ford v. State, 477 S.W.3d 321, 334-35 (Tex. Crim. App. 2015)*.

Longer term, pattern data showing places an individual visits over an extended period of time is suspect, in that individuals may very well have legitimate expectations of privacy in such data, which maps out the patterns of their daily lives. Five Justices of the United States Supreme Court have agreed that "longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy." *See United States v. Jones, 565 U.S. 400, 414, 132 S. Ct. 945, 181 L. Ed. 2d 911* (Sotomayor, J., concurring), 431 (Alito, J., concurring in the judgment) (2012); *see Ford, 477 S.W.3d at 332*.

The third type of data, real-time, tracking data, such as is the data used here, **[*8]** has been debated among the courts.

> [M]any federal courts that have considered the issue have concluded that "real-time" location information may be obtained only pursuant to a warrant supported by probable cause. *See In re Application for Pen Register and Trap/Trace Device with Cell Site Location Authority, 396 F. Supp. 2d 747 (S.D. Tex. 2005)*. Some states, too, require a warrant for real-time cell-site-location data[—]either under the *Fourth Amendment*, a state constitution, or a state statute. *See, e.g., In Tracey v. State, 152 So.3d 504, 526 (Fla. 2014)* (*Fourth Amendment*); *State v. Earls, 214 N.J. 564, 70 A.3d 630, 644 (N.J. 2013)* (New Jersey Constitution); *725 ILL. Comp. Stat. 168/10*; *Ind. Code 35-33-5-12*; *Md. Code Ann. Crim. Proc. § 1-203.1(b)*; *Va. Code Ann. § 19.2-70.3(C)*. their supporting affidavits. *Illinois v. Gates, 462 U.S. 213, 236, 103 S. Ct. 2317, 76 L. Ed. 2d 527 . . . (1983)*; *Crider v. State, 352 S.W.3d 704, 707 (Tex. Crim. App. 2011)*. We will sustain the issuance of the warrant if "the magistrate had a 'substantial basis for . . . conclud[ing]' that a search would uncover evidence of wrongdoing." *Gates, 462 U.S. at 236* . . . (quoting *Jones v. United States, 362 U.S. 257, 271, 80 S. Ct. 725, 4 L. Ed. 2d 697 . . . (1960)*); *see Swearingen, 143 S.W.3d at 811*.

Ford, 477 S.W.3d at 335 n.18. But, ***HN11***[⬆] while there may be a legitimate expectation of privacy in real-time tracking data in *private* locations, the same tracking, when following a subject in *public* places, does not invade legitimate expectations of privacy. Where such surveillance took place on public highways, there was no legitimate expectation of privacy. *United States v. Forest, 355 F.3d 942, 951-52 (6th Cir. 2004)*, *vacated on other grounds, Garner v. United States, 543 U.S. 1100, 125 S. Ct. 1050, 160 L. Ed. 2d 1001 (2005)* (reasoning that federal agents' action in calling defendant's cell phone and hanging up before it rang in order to "ping" defendant's physical location was **[*9]** not search under *Fourth Amendment*, as it was possible for any member of public to view defendant's car) (citing *United States v. Knotts, 460 U.S. 276, 281, 103 S. Ct. 1081, 75 L. Ed. 2d 55 (1983)* ***HN12***[⬆] ("A person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another."). "*Fourth Amendment* concerns might be raised . . . if real-time location information were used to track the present movements of individuals in *private* locations . . . . *Ford, 477 S.W.3d at 334* (emphasis added).

Here, the real-time tracking data appears to have been used to track Sims to exclusively public places—a public highway between McAlester and Sapulpa, Oklahoma, and a public parking lot of a Sapulpa truck stop, across the highway from the motel in which Sims and Morrison were ultimately found. We conclude that Sims did not have a legitimate expectation of privacy of the location of his cell phone in those locations. Therefore, there was no *Fourth Amendment* violation in that regard. *Id.* We overrule this point of error.

(3) The Affidavits for the Search Warrants for Sims' Cellular Telephone Data and His Facebook Account Data Support the Trial Court's Findings of Probable Cause

Sims argues that evidence from the later searches of his cell phone and of his Facebook account should have been suppressed **[*10]** because the supporting affidavits are insufficient to establish probable cause. We disagree.

HN13[⬆] When reviewing whether a warrant affidavit supports a finding of probable cause, we do not consider facts in isolation, but examine the affidavit(s) from the totality of the circumstances. *Illinois v. Gates, 462 U.S. 213, 238-39, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)*; *Rodriguez v. State, 232 S.W.3d 55, 59-60 (Tex. Crim. App. 2007)*. In determining whether an affidavit provides probable cause to support a search warrant, an issuing court and a reviewing court are constrained to the four corners of the affidavit. *Taunton v. State, 465 S.W.3d 816, 822 (Tex. App.—Texarkana 2015, pet. ref'd)*. We must examine the supporting affidavit to see if it recited facts sufficient to support conclusions (1) that a specific offense was committed, (2) that the property or items to be searched for or seized constitute evidence of the offense or evidence that a particular person committed it, and (3) that the evidence sought is located at or within the thing to be searched. *Tex. Code Crim. Proc. Ann. art. 18.01(c)* (West Supp. 2016); *Taunton, 465 S.W.3d at 822*. We examine the affidavits for recited facts "sufficient to justify a conclusion that the object of the search is probably [within the scope of the requested search] at the time the warrant is issued." *State v. Delagarza, 158 S.W.3d 25, 26 (Tex. App.—Austin 2005, no pet.)*. We review "the combined logical force of facts that are in the affidavit." *Taunton, 465 S.W.3d at 822*; *Rodriguez, 232 S.W.3d at 62*.

> ***HN14***[⬆] Affidavits for arrest or search warrants should be interpreted **[*11]** in a "common sense and realistic manner," and once a magistrate has found probable cause, warrants should not thereafter be invalidated through a "hypertechnical" interpretation of
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> *Taunton, 465 S.W.3d at 821-22*.

Sims urges us to follow our opinion in *Taunton* and find that the affidavits here were insufficient. But there are significant differences between the *Taunton* affidavits and those related to the searches of Sims' cell phone and Facebook data. The *Taunton* affidavits failed to disclose any evidence that tied Taunton to the crimes that those affidavits described, any relationship between Taunton and the victims, or any information on how Taunton may have committed the crimes or was involved in their commission. *See id. at 823-24*.

The affidavit seeking a warrant to search Sims' cell phone recites that cell phones are commonly used in the commission of crimes, that the cell phone in question is controlled by Sims, and that the affiant believes that Sims' cell phone contains evidence of criminal activity, such as subscriber information, text messages, voice calls, and cell-tower and GPS site coordinates. The affidavit describes Annie's death by gunshot at her residence, Annie's missing vehicle, the suspicion of the neighbor **[*12]** and relative that Sims may be responsible for Annie's death, specific facts from the relative leading to her suspecting Sims' involvement, a specific search of the residence uncovering the absence of Annie's vehicle, purse, and purse contents, including credit cards and guns, the use of at least one stolen credit card by Sims and Morrison in Oklahoma within hours after the murder, the tracking of Sims' cell phone location leading to authorities' location of Annie's vehicle and, ultimately, to Sims and Morrison, themselves. The affidavit

also notes Sims' arrest in connection with the course of events. The affidavit concludes that there is "reason to believe that information gained from" Sims' cell phone "will be useful in the investigation."

These recitations within the four corners of the above affidavit include information missing from the *Taunton* affidavits: evidence suggesting a link between Sims and Annie's murder, setting out the relationship between Sims and Annie, and information suggesting that Sims may have shot Annie. The cell phone affidavit supports the trial court's finding of probable cause for the issuance of a search warrant for the contents of Sims' cell phone.

The affidavit **[*13]** seeking a warrant to search Sims' Facebook data, likewise, recites various facts, though its recitations were thinner than the facts set out in the cell phone affidavit. It asserts that Sims had a particular Facebook account and that the affiant believes that Sims' account "contains private messages, private messages with photographs, photographs, wall updates, and wall posts and other information" related to Annie's murder. It recites basic facts of Annie's murder, including the fatal gunshot wound, the missing vehicle, Sims being a suspect along with Morrison, basic facts on why Sims was a suspect in the murder, the missing purse, credit cards, and guns, Sims' and Morrison's use of the stolen credit card in Oklahoma, the use of Sims' cell phone tracking data to find and arrest Sims and Morrison. It, too, notes Sims' arrest in connection with these events.

As stated by our sister court, ***HN15***[] "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, giving all of the circumstances set forth in the affidavit . . . there is a fair probability that . . . evidence of a crime will be found in a particular place." *Wise v. State, 223 S.W.3d 548, 556 (Tex. App.—Amarillo 2007, pet. ref'd)*. It is reasonable to conclude, from the **[*14]** four corners of the affidavit that there is a fair probability that evidence of the crime would be found on Sims' Facebook account. This supports the trial court's finding of probable cause for the issuance of the search warrant for Sims' Facebook data. We overrule this point of error.

We affirm the judgment of the trial court.

Josh R. Morriss, III

Chief Justice

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Date Decided: July 20, 2017

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