COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-11482

COMMONWEALTH OF MASSACHUSETTS,
Appellant,

V.

SHABAZZ AUGUSTINE,
Defendant-Appellee

BRIEF FOR THE COMMONWEALTH ON APPEAL FROM JUDGEMENT OF THE SUFFOLK SUPERIOR COURT

SUFFOLK COUNTY

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I. JUDGE SANDERS INCORRECTLY TOOK JUDICIAL NOTICE OF FACTS RELATED TO THE LOCATION REVEALED BY CSLI AND THE DEFENDANT'S ARGUMENT THAT THIS COURT SHOULD TAKE JUDICIAL NOTICE OF NECESSARY FACTS IS SIMILARLY FLAWED.

The defendant consistently argues that CSLI reveals as precise of a location as GPS (D.Br. 22, 24, 43),[1] but cites to nothing except the Commonwealth's alleged concession and Judge Sanders' and other judicial opinions to support that contention. The problem with the fact finding in this case and all of the other cases is that there has yet to be an evidentiary hearing about the precision of location revealed by CSLI. A judge's factual findings need to be supported by evidence. *Cf. Commonwealth* v. *Hilton*, 450 Mass. 173, 178 (2007) ("A finding is clearly erroneous if it is not supported by the evidence . . . ."); *Commonwealth v. Antwan*, 450 Mass. 55, 61 (2007) (same). While there may be some scientific facts that may be "indisputably true," the precision of location

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[1] "(D.Br. _)" herein refers to the defendant's brief; "(C.Br. _)" refers to the Commonwealth's brief' "(Tr. _:_)" refers to the transcript; "(RA. _)" refers to the Commonwealth's Record Appendix; and "(SRA. _)" refers to the defendant's Supplemental Record Appendix.

revealed by CSLI, as shown through Congressional testimony cited in the Commonwealth's brief (C.Br. 19-23), is not one them. For that reason, the motion judge's ruling, as it relied entirely on the premise that CSLI revealed a location akin to GPS, was in error.

For that same reason, it would be inappropriate for this Court to take judicial "notice of pertinent facts reflected in court cases and other authoritative sources" as the defendant suggests (D.Br. 46). A critical examination of the sources used in some of the authoritative sources cited by the defendant illustrates why this would not be appropriate.

For example, the defendant cites *United States v. Powell*, 2013 U.S. Dist. LEXIS 64804 (E.D. Mich. May 3, 2013), on pages 26 and 30 of his brief. In *Powell*, the court did not hold an evidentiary hearing with regards to CSLI. *Id.* at *63.[2] Instead, the court relied upon a note written by a law student in the Brooklyn Law Review to make findings about the

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[2] Though the court did hold an evidentiary hearing, only one witness, a police officer, testified and he testified about using a GPS tracker to track one of the defendants, not about CSLI technology. *Powell*, 2013 U.S. Dist. LEXIS 64804 at *63.

location revealed by CSLI. *See id.* at *10 (citing Timothy Stapleton, Note, The Electronic Communications Privacy Act and Cell Location Data, 73 Brook. L. Rev. 383, 387 (2007)). A law student is hardly an expert on this type of technology.

Similarly in *State v. Earls*, 70 A.3d 630, 636 (2013), which is cited by the defendant on pages 2, 21, 22, 24, and 40 of his brief, the court specifically relied upon Professor Blaze's 2010 Congressional Testimony (not any evidence from an evidentiary hearing) to support its findings about CSLI. In this very same testimony, which the Commonwealth highlighted in its brief, Professor Blaze testified that while CSLI can reveal a precise location, such capabilities are not available in every network and not routinely tracked or recorded by every carrier (C.Br. 19). It cannot be said then that Blaze or the decision in *Earls* offer any support that CSLI reveals a precise location.

Neither do the other authorities cited by the court in *Earls*. The court also cites, *In re U.S. Historical Cell Site Data*, 747 F. Supp. 2d 827, 831 (S.D. Tex. 2010), *In re Pen Register & Trap/Trace*

Device with Cell Site Location Auth., 396 F. Supp. 2d 747, 750 (S.D. Tex. 2005), and Stephanie K. Pell & Christopher Soghoian, Can You See Me Now? Toward Reasonable Standards for Law Enforcement Access to Location Data That Congress Could Enact, 27 Berkeley Tech. L.J. 117, 129 (2012). Though these sources contain facts about CSLI, the facts are not supported by compelling or even ascertainable evidence.

In *In re Pen Register & Trap/Trace Device with Cell Site Location Auth.*, the court relied upon two law journal notes written by law students to support its findings. *See id.* (citing Darren Handler, Note, An Island of Chaos Surrounded by a Sea of Confusion: The E911 Wireless Device Location Initiative, 10 VA. J.L. & TECH. 1, at *8, *17-*21 (Winter 2005) and Note, Who Knows Where You've Been? Privacy Concerns Regarding the Use of Cellular Phones as Personal Locators, 18 HARV. J.L. & TECH. 307, 308-16 (Fall 2004)). Looking at the sources cited by these law students also does not inspire confidence. Mr. Handler, for example, wrote about how CSLI reveals a location, which is supported by a citation to an FCC website that no longer works. While the other law

journal note also contains information about how CSLI reveals a location, however, it too contains citations to websites that no longer exist. It is therefore impossible for this Court to verify the accuracy of this information.

Coming full circle, the other sources relied upon by the court in *Earls -- In re U.S. Historical Cell Site Data*, and the Berkeley Technology Law Journal article -- rely upon the 2010 testimony of Professor Blaze. *See* 747 F.Supp. 2d at 831; Pell & Soghoian, *supra*, at 126 n.28, 127 n.30, 128 n.34, 137 n.69, 168 n.211. As noted in the Commonwealth's brief, Professor Blaze testified that this type of record is not kept by every cell service provider and that some CSLI "may only collect information about the nearest tower" (C.Br. 19 (citing 111th Cong. at 135 (Testimony of Blaze)).

To the extent that the precision of location or the type of location or the accuracy of location is necessary to the resolution of this case, an evidentiary hearing must be held. This is an important issue involving technical and scientific facts. Evidence should be taken about those facts.

The defendant's argument relies entirely upon the premise that CSLI can and does routinely reveal a great deal of information about individuals. A court should take evidence to decide whether or not that assertion is true. For all of those reasons, it was error for the motion judge to take judicial notice of certain facts related to CSLI and it would be error for this Court to do so too.

II. THE COMMONWEALTH HAS NEVER "CONCEDED" THAT CSLI CAN REVEAL AS PRECISE OF LOCATION AS GPS.

On page 3, the defendant asserts: "The Commonwealth has conceded that CSLI can reveal precise locations." To support that assertion he cites to page 22 and 23 of the Commonwealth's brief. That section of the Commonwealth's brief contains a discussion about why it was erroneous for Judge Stephen Wm Smith to take judicial notice of facts in *In re Application of the United States of America for Historical Cell Site Data*, 747 F.Supp. 2d at 827. Specifically, Judge Smith relied upon the testimony of Professor Matt Blaze; on pages 22 and 23, the Commonwealth was discussing what that testimony was. While Mr. Blaze certainly testified that CSLI may

reveal a precise location, the Commonwealth has not adopted his testimony. To the contrary, the Commonwealth's position is that it is inappropriate to adopt that testimony as fact in this case. Simply discussing Mr. Blaze's testimony is not a concession that CSLI can or did reveal any location in this case. If the defendant wanted to show that CSLI was as discerning as GPS it was his burden during the motion to suppress hearing to present evidence that it was.

On pages 9, 14, 15, 22, 25, 43, 44, the defendant asserts: "The Commonwealth also agreed that CSLI 'can be' as discerning as GPS data." To support that he cited to (Tr. 2:23). While true that the prosecutor did say at one point that CSLI can be as discerning as GPS during the second motion hearing, it is important to put that statement into context. When the prosecutor mentioned that he was specifically speaking about a federal case and he stated

> I think that's partially accurate which is to say that CSLI can be. It is not in every instance, and it is definitionally limited to where those cell towers are.
>
> That Judge talked about mini cells and that mini cells can be put in buildings and can

> be put in specific offices. We did some -- some research on this and spoke to some RF engineers who said well that's not -- at least as far as Erickson is concerned, and Erickson does work with Sprint, mini cells are done as a matter of course. They're done when people call up and say I have absolutely no cell service in this building, so they put a mini cell up.
>
> At a minimum, it would be Mr. Sack's and Mr. Augustine's burden to show that there were mini cells that were discerning enough to show internal location in this particular case

(Tr. 2:23). There was absolutely no evidence that microcells were involved in this case. For that reason, it cannot be said that the Commonwealth conceded that CSLI generally reveals as precise of a location as GPS.

III. THE DEFENDANT FAILED TO MEET HIS BURDEN AND DEMONSTRATE THAT A SEARCH IN THE CONSTITUTIONAL SENSE OCCURRED.

The defendant also asserts that the Commonwealth is asking the court to look at what the search actually revealed and to determine whether a warrant is required (D.Br. 25-28). That is not the Commonwealth's argument. The defendant's own hypothetical is instructive on that point. The defendant argues that "[j]ust as an officer's right to open someone's bag does not depend on whether the bag

turns out to be empty, the constitutionality of acquiring CSLI cannot depend on what the CSLI ends up revealing" (D.Br. 25). What the defendant misses in that hypothetical is that an individual's right to challenge the search of that bag depends on whether there was governmental action in the search, whether he has standing to search, and whether he has a reasonable expectation of privacy that the bag would not be searched. *See Commonwealth v. Mubdi*, 456 Mass. 385, 390, 392 (2010). The right of that individual to challenge the search depends on large part where the bag is. If the individual's bag was lying on a public street, he would have no reasonable expectation of privacy in it.

Here, the defendant simply failed to make the necessary showing. His affidavit and argument is entirely void of any asserted fact about his relationship to the locations that were revealed. His argument on appeal relies upon the "potential" for CSLI to reveal detailed information (D.Br. 26-28). However, he has failed to back up that assertion with any real evidence. The defendant simply failed to show that a search in the constitutional sense

occurred and his motion should have been denied for that reason.

While this analysis may have changed after this Court's decision in *Commonwealth v. Rousseau*, 465 Mass. 372 (2013), the holding of *Rousseau* demonstrates why the defendant's argument still must fail. In *Rousseau* this Court held "under art. 14, a person may reasonably expect not to be subjected to extended GPS electronic surveillance *by the government*, targeted at his movements, without judicial oversight and a showing of probable cause." 465 Mass. at 832. Applying that holding to these facts the defendant cannot show: (1) that there was extended electronic surveillance; (2) that this surveillance was conducted by the government, as some cell service providers collect this information regularly; (3) that this surveillance was targeted at his movements because cell service providers collect this type of data for business purposes regardless of a later criminal investigation; and (4) that there was a lack of judicial oversight as the police are required to apply for and obtain a § 2703(d) order before they gain access to this data.

While the defendant attempts to distinguish this case from *Rousseau* by arguing that CSLI is more discerning than GPS because CSLI may reveal that someone is inside a home (D.Br. 29-31), the defendant has never provided any evidence that CSLI reveals that sort of precise location or that CSLI revealed that type of location in this instance. Further, while the defendant makes much of the fact that the home is sacred under Fourth Amendment jurisprudence (D.Br. 29), he ignores that in order to challenge a search of a home an individual must demonstrate his relationship to that home. The determination of whether a search in the constitutional sense has occurred "'turns on whether the police conduct has intruded on a constitutionally protected reasonable expectation of privacy.'" *Commonwealth v. Magri*, 462 Mass. 360, 366 (2012) (quoting *Commonwealth v. Porter P.*, 456 Mass. 254, 259 (2010)). A defendant cannot meet his burden at the motion to suppress stage by just asserting that a search occurred without any other information. That is all the defendant has done here.

Finally, the defendant's reliance on *Commonwealth v. Cote*, 407 Mass. 827 (1990) and on *Commonwealth v.*

Blood, 400 Mass. 61 (1987) (D.Br. 33-35, 38-39), is misplaced. Both of those cases involve surveillance that revealed the content of communications. *See Cote*, 407 Mass. at 835; *Blood*, 400 Mass. at 68-69. Indeed, at the very core of the holding of *Blood* was recognition that an individual's thoughts, emotions, and sensations should be protected from unwarranted governmental intrusion. 400 Mass. at 69. Here, those same concerns are absent because CSLI does not reveal any content. Instead, CSLI, according to the defendant, potentially reveals an individual's movements, which historically have never been protected by the Fourth Amendment, *see United States v. Karo*, 468 U.S. 705, 714-715 (1984), *United States v. Knotts*, 460 U.S. 276, 282 (1983), or until very recently art. 14. *See Rousseau*, 465 Mass. at 832. For that reason too, the defendant's argument fails.

IV. THE COMMMONWEALTH HAS CONSISTENTLY ARGUED THAT THE § 2703(d) ORDER WAS SUPPORTED BY PROBABLE CAUSE AND FOR THAT REASON THE EXCLUSIONARY RULE SHOULD NOT APPLY.

On page 9 the defendant also asserts: "the Commonwealth declined to argue that the § 2703(d) order was supported by probable cause." He then

speaks of inevitable discovery and how the Commonwealth did not argue that the evidence should not be suppressed because it would have been inevitably discovered. He again brings up "that the Commonwealth expressly abandoned its probable cause argument" on page 48. First, the Commonwealth did argue that the § 2703(d) order was supported by probable cause (see R.A. 56-57, 139-143; SRA. 193-195, 252-256). Second, the defendant misunderstands the Commonwealth's argument. The Commonwealth did not argue that this evidence would have been inevitably discovered because there was probable cause to support a warrant. Instead, the Commonwealth argued something entirely different, that the exclusionary rule should not apply as it is only meant to apply when officers act unlawfully which they did not do here because they applied for a court order which laid out probable cause pursuant to a statute (C.Br. 53-58).

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Honorable Court reverse the allowance of the defendant's motion to suppress or in the alternative, remand the case for an evidentiary hearing.

Respectfully submitted
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CERTIFICATION

I hereby certify that, to the best of my knowledge, this brief complies with the rules of court that pertain to the filing of briefs, including those rules specified in Mass. R. App. P. 16(k).

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