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Honorable Chief Justice and Associate Justices  
Supreme Court of New Jersey  
25 Market Street  
Trenton, New Jersey 08625

**Re: State v. Manning; Docket No. A-10-18 (080834)**  
**App. Div. Docket No. A-1033-14T2**

Honorable Chief Justice and Associate Justices:

Please accept this letter brief in lieu of a more formal submission from *amicus curiae* the American Civil Liberties Union of New Jersey Foundation (ACLU-NJ) in the above-captioned matter.

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## PRELIMINARY STATEMENT

In this garden variety murder investigation -- without any particularized fear of the destruction of evidence or threat to officer safety -- police bypassed the warrant requirement and obtained phone billing and location records on a claim of exigency. Although there may exist cases where those sorts of records may be obtained without a warrant, this was not such a case. The rule proposed by the trial court would effectively create a "murder-investigation" exception to the body of New Jersey search and seizure law that safeguards the privacy interests in cell phones and phone records. Such a rule cannot stand. The Appellate Division's analysis was also flawed: it ignored the fact that exigent circumstances can, sometimes, justify a failure to obtain a warrant. Had the Appellate Division used traditional exigency analysis, it would have concluded that the State did not and, indeed, could not, meet its burden of demonstrating that it could not obtain a warrant without jeopardizing the integrity of the evidence or the safety of officers.

## STATEMENT OF FACTS/PROCEDURAL HISTORY

*Amicus curiae* the American Civil Liberties Union of New Jersey Foundation (ACLU-NJ) shall rely upon the Statement of Facts and Procedural History submitted by the parties. The ACLU-NJ notes that the subject investigation dates back to August 2011.



## ARGUMENT

**I. THE COURT SHOULD AFFIRM THE SUPPRESSION OF MANNING'S CELL PHONE RECORDS OBTAINED WITHOUT ANY JUDICIAL PROCESS, BUT THE COURT SHOULD CLARIFY THE REQUIREMENTS FOR THE EXIGENCY EXECPTION.**

**A. The Appellate Division Correctly Noted the Significant Privacy Interests Involved In Both Cell Phone Toll Billing and Location Records.**

The Appellate Division correctly reversed the trial court's denial of Manning's motion to suppress the cell phone records and location data obtained without any judicial authorization. State v. Manning, No. A-1033-14T2 (App. Div. Feb. 7, 2018). In reversing the trial court, the Appellate Division reviewed State v. Earls, 214 N.J. 564 (2013), which held that, to obtain cell phone location data, law enforcement must obtain a search warrant based upon probable cause. Id. at 569. Earls, however, was applied prospectively. Id. at 591. Accordingly, the Court determined that "[f]or prior cases, the requirement in place at the time an investigation was conducted remains in effect. Starting January 12, 2010, law enforcement officials had to obtain a court order to get cell-site information under N.J.S.A. 2A:156A-29(e)." Id.

The Appellate Division discussed the long-standing constitutional privacy protections which required law enforcement to obtain warrants for telephone call records. State v. Hunt, 91 N.J. 338 (1982); State v. Mollica, 114 N.J. 329 (1989). Following



the decision in Hunt, as the Appellate Division noted, “the State took a cautious approach and consistently sought warrants to obtain telephone toll records.” Manning, No. A-1033-14T2 (slip. op. at 13), quoting State v. Lunsford, 226 N.J. 129, 140 (2016). In Lunsford, this Court reaffirmed that telephone call records are entitled to a constitutionally protected right to privacy. 226 N.J. at 136.

Because law enforcement failed to follow the State’s long-standing approach by not seeking a warrant or other Court Order for the call and location records, the Appellate Division held that suppression of Manning’s cell phone records was required.

**B. Suppression Is Warranted Because of the Constitutional Violations and Because the Exigency Exception to the Warrant Requirement Was Not Met.**

Law enforcement failure to utilize any judicial process was a constitutional violation which mandates suppression. However, the Appellate Division failed to address the trial court’s exigency analysis. This Court should nonetheless affirm the Appellate Division’s decision because the exigency exception to the warrant requirement was not met here.

There are a “few...carefully delineated” exceptions to the warrant requirement. United States v. United States Dist. Court, 407 U.S. 297, 318 (1972). One well-established exception “is the existence of exigent circumstances” State in the Interest of J.A., 233 N.J. 432, 448 (2018).



Sometimes, “‘the exigencies of the situation’ make the needs of law enforcement so compelling that a warrantless search is objectively reasonable”, Kentucky v. King, 563 U.S. 452, 460 (2011), quoting Mincey v. Arizona, 437 U.S. 385, 394 (1978). This “court has carefully delineated standards of police conduct that strikes a balance between individual privacy expectations and government interests.” State v. Hummel, 232 N.J. 196, 207 (2018). “To invoke [the exigent circumstances] exception, the State must show that the officers had probable cause and faced an objective exigency.” J.A., supra, 233 N.J. at 448.

“Although ‘exigent circumstances’ cannot be precisely defined or reduced to a neat formula”, courts have developed various factors “in determining whether law enforcement officials faced such circumstances”. State v. Johnson, 193 N.J. 528, 553 (2008). In J.A., those factors were said to include “the urgency of the situation, the time it will take to secure a warrant, the seriousness of the crime under investigation, and the threat that evidence will be destroyed or lost or that the physical well-being of people will be endangered unless immediate action is taken.” 233 N.J. at 448 (quoting Johnson). In J.A., quoting State v. Dunlap, 185 N.J. 543, 551 (2006), the Court reminded that “police safety and the preservation of evidence remain preeminent determinants of exigency.” Id.



Other factors to be considered are whether evidence could be "removed from the scene...the possibility that a suspect was armed or dangerous; and the strength or weakness of the underlying probable cause determination." State v. Walker, 213 N.J. 281, 292 (2013), quoting State v. DeLuca, 168 N.J. 626, 632-33 (2001). The quoted portion of DeLuca cited State v. Alvarez, 238 N.J. Super. 560, 568 (App.Div.1990), in which the court enumerated other factors which may be part of the "exigency" determination:

"the possibility of danger to the police officers guarding the site of contraband while a search warrant is sought;

information indicating the possessors of the contraband are aware that the police are on their trail;

the ready destructibility of the contraband and the knowledge that efforts to dispose of [the evidence]...are characteristic behavior of persons [suspected of the crime]."

238 N.J. Super. at 568.

Although Alvarez did not cite State v. Valencia, 93 N.J. 126 (1983), in that case, Justice Handler cited similar factors but also included,

"Information indicating the possessors of the contraband and are aware that the police are on their trail: and

the ready destructibility of the contraband."

93 N.J. at 137.



In Carpenter v. United States, 136 S.Ct. 2206 (2018), the United States Supreme Court recognized that “exigencies include the need to pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence.” Id. at 2223. Similar language was previously used in Riley v. California, 134 S.Ct. 2473, 2494 (2014).

Exigent circumstances generally arise when the circumstances giving rise to probable cause are unforeseeable and spontaneous. State v. Witt, 223 N.J. 409, 427 (2015), citing State v. Alston, 88 N.J. 211, 233 (1981), and Chambers v. Maroney, 399 U.S.42, 50-51 (1970). Thus, for example, “hot pursuit” “may in certain contexts constitute an exigent circumstance” because of “the possible destruction of evidence and the threat of violence by the suspect”. J.A., supra, 233 N.J. at 449 (citations omitted).

Every homicide meets the “seriousness of the crime” and the “possibility that the suspect is armed or dangerous” criteria. The failure to find a murder weapon at the scene, as occurred in this case, is hardly unusual. Theoretically, a murderer at-large places everyone at risk. However, the nature of the crime cannot swallow up the warrant requirement. Those factors alone cannot establish that exigent circumstances exist. To justify a search on this basis, it must “be supported by a genuine exigency”. Kentucky v. King, supra, 563 U.S. at 470. The two “preeminent” factors, “police safety and the preservation of evidence”, must always be





considered. Accordingly, the case-specific facts must be examined to determine whether those factors were present.

When considering the preservation of evidence, crucial factors are the type of evidence to be seized, who possesses it, its destructibility, and the existence of a genuine threat that it will be lost. The question to be asked is whether investigators were faced with a "now or never" situation with regard to the cell phone records. Riley v. California, supra, 134 S.Ct. at 2487.

Here, the evidence was safely in the possession of a publicly-regulated service provider. There was no realistic threat that it would be lost. As this Court's decision in State v. Reid, 194 N.J. 386, 406-7 (2008), recognized as to ISP records, these cell phone records continued to exist independent of the police investigation. They would have been available a day later. There was no legitimate concern that the evidence sought by the investigators would be destroyed.

The trial court accepted the State's argument that it was the potential destruction of other unknown evidence -- not the cell phone records -- which supported a finding of exigency. However, the exigency must be linked to the potential loss of the specific evidence seized, not some speculative, generalized notion that other evidence may be destroyed. Exigency may be met where there is particularized danger of destruction of specified evidence. Thus, in State v. DeLuca, 168 N.J. 626 (2001), this Court upheld



the exigent search of a seized pager with finite electronic memory which would be deleted as new messages exceeded its capacity.

The length of time required to obtain a warrant is a relevant consideration. Here, it was not exceptional. In about three hours on August 16, 2011, the Bergen County Prosecutor's Office was able to make a written application and obtain a search warrant for the decedent's car. The following day, based upon the information obtained from AT&T the previous evening, a Communications Data Warrant was obtained at 9:15 p.m. This followed an extensive, written application detailing the course of the investigation to that point. Also on August 17, law enforcement prepared a 28-page wiretap application to intercept communications associated with Manning's cell phone and another number in communication with that phone. On August 19, another warrant was signed for the search of a home. It is thus clear that warrants were both obtainable and obtained in short order. There was plainly time to prepare a written or oral application to a Judge.

The claim that law enforcement personnel were in danger, the other "preeminent" determinant, appears to be unsubstantiated. Although the exigency application to AT&T stated that "suspect is armed and dangerous. Poses a threat to law enforcement", there is no evidence to suggest that the delay necessary to obtain a warrant would have endangered any investigating officer. To the contrary, as to Manning, the police acted with a notable lack of urgency.



Between 4:30 and 5:00 p.m. on August 16, investigators determined that the decedent had been with Randy Manning the night before his body was discovered. At that time, they also obtained Manning's cell phone number. Then, at 7:39 p.m., an exigent request was made to AT&T for Manning's cell phone records and location data. The records were received in about twenty minutes.

On August 18, the defendant contacted investigators asking if they wanted to talk with him. As a result, it was arranged that the defendant would take public transportation from Brooklyn to Hackensack to be interviewed following day. Defendant voluntarily appeared at the Prosecutor's Office for questioning at 11:31 a.m. on August 19. This arrangement belies the State's asserted concern about the fact that there was "a murderous gunman still on the loose." Sba40. If that were a real concern, Manning would have been brought in for questioning much earlier. He would have been picked up by the police in Brooklyn and brought to New Jersey; he would not have arrived in Hackensack by public transportation three days after the decedent's body was found.

While the desire of the investigators to solve the crime quickly is understandable, their actions were hardly characterized by a sense of urgency once they obtained the defendant's cell phone data. Rather, they appear to have simply sought to work around the warrant requirement for the cell phone data. As the Supreme Court explained in Riley v. California, supra, 134 S.Ct. at 2493, "[T]he



warrant requirement is 'an important working part of our machinery of government,' not merely 'an inconvenience to be somehow 'weighed' against the claims of police efficiency'," quoting Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971). No "objective exigency" existed, and a warrant should have been obtained.

A determination as to whether exigent circumstances exist is necessarily fact-sensitive. State v. DeLuca, supra, 168 N.J. at 632. One can imagine situations involving a mass murderer, serial killer or terrorist where there is an exigent need for phone data justifying bypassing the warrant requirement. In Carpenter, the United States Supreme Court noted that the warrantless collection of cell phone data had been approved by lower courts in cases "related to bomb threats, active shootings, and child abductions". Carpenter, supra, 138 S.Ct. at 2223. "[M]ore extreme hypotheticals" were suggested in Riley: "a suspect texting an accomplice who, it is feared, is preparing to detonate a bomb, or a child abductor who may have information about the child's location on his cell phone....[S]uch fact-specific threats may justify a warrantless search of cell phone data." 134 S.Ct. at 2494. Discussing such extreme examples suggests that, only in rare cases, will the warrantless search of cell phone records be justified. This is hardly such a case.

The decision of the trial court bespeaks a need for guidance and clarification regarding the analysis required to find exigent



circumstances. The factors which led the trial court to find such circumstances in this case are hardly extraordinary. The early stages of many investigations are "extremely tense and dangerous", particularly when the perpetrator is armed. An armed perpetrator always poses "potential harm to the well-being of the public". Evidence is frequently susceptible to destruction. An armed perpetrator is likely to discard or destroy the incriminating weapon. However, the evidence in this case was not "in the hands of" the perpetrator.

The Court should take this opportunity to make clear that the need for a warrant is important and paramount. It can be bypassed only in narrow circumstances, not in circumstances that regularly arise in countless criminal investigations.



CONCLUSION

*Amicus curiae* the American Civil Liberties Union of New Jersey Foundation respectfully submits that the Court should affirm the suppression of the cell phone records, but for different reasons than those decided by the Appellate Division.

Respectfully submitted,

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