No. COA21-707 FIFTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA )

)

v. ) From New Hanover County

)

MARTY DOUGLAS ROGERS )

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**DEFENDANT-APPELLANT’S BRIEF**

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**INDEX**

TABLE OF CASES AND AUTHORITIES iii

ISSUES PRESENTED 1

STATEMENT OF THE CASE 2

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW 3

STATEMENT OF THE FACTS 3

STANDARD OF REVIEW 12

ARGUMENT 13

I. The trial court erred by denying Mr. Rogers’ motion to suppress when the order authorizing the search was facially invalid because it allowed a type and scope of search beyond the statutory authority of the issuing superior court judge 13

A. Superior court judges do not have the authority to authorize searches outside of the state 14

B. Chapter 15A, Article 12 of the General Statutes does not give superior court judges the authority to order law enforcement to obtain location data from a target phone 17

C. The motion to suppress should have been granted 19

II. The trial court erred when denying Mr. Rogers’ motion to suppress because the search order was not supported by probable cause 21

A. A search of location data, historical or “real time,” must be based on probable cause 22

B. The order giving police access to Mr. Rogers’ location information was not supported by probable cause 27

C. In the alternative, the trial court applied the wrong standard when ruling on the motion to suppress 34

CONCLUSION 34

CERTIFICATE OF COMPLIANCE WITH RULE

28(J)(2) 36

CERTIFICATE OF SERVICE 37

**TABLE OF CASES AND AUTHORITIES**

Cases

*Carpenter v. United States*,

138 S. Ct. 2206 (2018) *passim*

*Grady v. North Carolina*,

575 U.S. 306 (2015) 26

*Illinois v. Gates*,

462 U.S. 213 (1983) 30

*Mapp v. Ohio*,

367 U.S. 643 (1961) 20

*State v. Arrington*,

311 N.C. 633, 319 S.E.2d 254 (1984) 20, 28, 30

*State v. Benters*,

367 N.C. 660, 766 S.E.2d 593 (2014) 27, 29, 30

*State v. Brown*,

248 N.C. App. 72, 787 S.E.2d 81 (2016) 32

*State v. Bryant*,

237 N.C. 437, 75 S.E.2d 107 (1953) 19

*State v. Campbell*,

282 N.C. 125, 191 S.E.2d 752 (1972) 27

*State v. Carter*,

322 N.C. 709, 370 S.E.2d 553 (1988) 21, 23, 33

*State v. Clark*,

178 Wash. 2d 19, 308 P.3d 590 (2013) 19

*State v. Cook*,

273 N.C. 377, 160 S.E.2d 49 (1968) 19

*State v. Cooke*,

306 N.C. 132, 291 S.E.2d 618 (1982) 12

*State v. Farmer*,

333 N.C. 172, 424 S.E.2d 120 (1993) 20, 33

*State v. Forte,*

257 N.C. App. 505, 810 S.E.2d 339 (2018) 16, 17

*State v. Gore*,

272 N.C. App. 98, 846 S.E.2d 295 (2020) 27, 32

*State v. Green*,

103 N.C. App. 38, 404 S.E.2d 363 (1991) 20, 33

*State v. Hughes*,

353 N.C. 200, 539 S.E.2d 625 (2000) 13, 31

*State v. Jackson*,

249 N.C. App. 642, 791 S.E.2d 505 (2016) 30, 31

*State v. Johnson*,

204 N.C. App. 259, 693 S.E.2d 711 (2010) 30

*State v. Lewis*,

372 N.C. 576, 831 S.E.2d 37 (2019) 32

*State v. Logan*,

278 N.C. App. 319, 2021-NCCOA-311 20, 33

*State v. Perry*,

243 N.C. App. 156, 776 S.E.2d 528 (2015) 23, 24, 25

*State v. Smith*,

246 N.C. App. 170, 783 S.E.2d 504 (2016) 3

*State v. Thomas*,

268 N.C. App. 121, 834 S.E.2d 654 (2019) 17

*State v. Williams*,

195 N.C. App. 554, 673 S.E.2d 394 (2009) 34

*State v. Williams*,

362 N.C. 628, 669 S.E.2d 290 (2008) 13

*United States v. Leon*,

468 U.S. 897 (1984) 21, 33

*United States v. Webb*,

No. CR 19-121-BLG-SPW-1, 2021 U.S. Dist

LEXIS 1009 (D. Mont. Jan. 4, 2021) 14

*Wong Sun v. United States*,

371 U.S. 471 20, 33

Constitutional Provisions

N.C. Const. Art. I, § 20 20, 21, 22, 33

U.S. Const. Amend. IV 20

Statutes

18 U.S.C. § 2703 14

18 U.S.C. § 3123 19

N.C.G.S. § 7A-27(b) 3

N.C.G.S. § 15A-243 15

N.C.G.S. § 15A-245 27

N.C.G.S. § 15A-260 14, 17, 18, 24

N.C.G.S. § 15A-261 14, 17, 18

N.C.G.S. § 15A-262 14, 17, 18

N.C.G.S. § 15A-263 *passim*

N.C.G.S. § 15A-264 14, 17, 18

N.C.G.S. § 15A-811 15

N.C.G.S. § 15A-974 20, 33

N.C.G.S. § 15A-1444 3

Rules

N.C. R. App. P. 21 3

USCS Fed Rules Crim Proc R 41 (b)(1) 15

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# ISSUES PRESENTED

**I. Whether the trial court erred by denying Mr. Rogers’ motion to suppress when the order authorizing the search was facially invalid because it allowed a type and scope of search beyond the statutory authority of the issuing superior court judge.**

**II. Whether the trial court erred when denying Mr. Rogers’ motion to suppress because the search order was not supported by probable cause.**

# STATEMENT OF THE CASE

On 28 October 2019, the New Hanover County Grand Jury indicted Marty Rogers for trafficking in cocaine by possession, trafficking in cocaine by transportation, possession with the intent to sell or deliver a schedule II controlled substance, maintaining a vehicle for keeping and selling controlled substances, and additional charges. (Rpp 8-9).

A motion to suppress was heard on 26 February 2021, the Honorable Phyllis M. Gorham presiding. (T1p 1)[[1]](#footnote-1). The matter came on for a guilty plea hearing at the 22 March 2021, Regular Criminal Session of the New Hanover County Superior Court, the Honorable G. Frank Jones presiding. (T2p 1). On 25 March 2021, Mr. Rogers entered a plea of guilty to trafficking in cocaine by transportation and possession with the intent to sell or deliver cocaine, and all remaining charges were dismissed. (Rpp 159-162; T2pp 1, 6). Mr. Rogers reserved his right to appeal the denial of his motion to suppress. (Rp 168; T1pp 50-51; T2p 13).

The trial court found Mr. Rogers to be a prior record level III and sentenced him to a term of 35 to 51 months of imprisonment for trafficking in cocaine followed by a consecutive term of 10 to 21 months of imprisonment for possession with the intent to sell or deliver cocaine. (Rpp 165-68). Mr. Rogers appealed. (Rpp169-171; T2p 13).

# STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Appeal of right lies to this Court from the final judgment of the New Hanover County Superior Court. N.C.G.S. §§ 7A-27(b) and 15A-1444(a). With this brief, Mr. Rogers filed a petition seeking review by writ of certiorari pursuant to N.C. R. App. P. 21(a)(1), as the right to appeal was possibly waived due to defective notice of appeal. *See* *State v. Smith*, 246 N.C. App. 170, 175, 783 S.E.2d 504, 508 (2016) (allowing the defendant’s petition for writ of certiorari and reviewing the denial of his suppression motion when the defendant failed to explicitly enter notice of appeal from the underlying judgment); N.C. R. App. P. 21(a)(1).

# STATEMENT OF THE FACTS

On 26 February 2021, a hearing on Mr. Rogers’ motion to suppress was held. (T1p 1). The State called one witness: Detective Donald Wenk with the New Hanover County sheriff’s office. (T1p 4). Wenk testified concerning an investigation he conducted regarding Mr. Rogers. (T1pp 4-30). Wenk testified that in July of 2019, a confidential source (CS), who Wenk knew, contacted him and provided “very specific information” about Mr. Rogers being responsible for trafficking cocaine in New Hanover County. (T1pp 5-6). The CS told Wenk that, on multiple occasions, the CS “was at Mr. Rogers’ residence and had seen large quantities of cocaine and also had conversations about purchasing large quantities of cocaine.” (T1p 5).

The CS also told Wenk that, on multiple occasions, Mr. Rogers would travel from North Carolina to Hayward California to receive large quantities of cocaine and traffic it back to New Hanover County. (T1p 6). The CS also told Wenk that Mr. Rogers had a brother from Chicago who came to Wilmington to help Mr. Rogers set up a ring in Wilmington. (T1p 6). Wenk testified “it was later learned” that Mr. Rogers’ brother had “just done approximately seven years for the same offense in Chicago.” (T1pp 7-8).

The CS gave Wenk a phone number for Mr. Rogers. (T1p 7). Wenk did a search on “a law enforcement database” for the number, and retrieved a picture of Mr. Rogers. (T1p 7). Wenk showed the picture to the CS, who identified the person shown as Marty Rogers. (T1p 7). Wenk testified “that phone number also . . . it was Mr. Rogers’ phone number.” (T1p 7).

The CS also told Wenk about a storage facility in located in Leland. (T1p 7). Wenk went to the storage facility and saw a unit on a lot surrounded by boats and recreational vehicles. (T1p 8). Wenk showed a photo of Mr. Rogers to the owners of the storage facility, who confirmed Mr. Rogers used a storage unit. (T1p 8).

The CS later informed Wenk that Mr. Rogers would be making a trip to Hayward California “in the next couple days[.]” (T1p 7). Afterwards, on 2 August 2019, Wenk applied for a “phone order” for Mr. Rogers’ phone. (T1pp 8, 10). Wenk attempted to surveil Mr. Rogers’ “listed address”, but it was “very hard” because Wenk had been told Mr. Rogers might have been staying somewhere else. Wenk chose to “just utilize electronic monitoring equipment at that time.” (T1pp 8-9). Wenk testified that a pen register device provides longitude and latitude coordinates that can be entered into any mapping system. (T1p 13).

While monitoring the device, at approximately 5:00am on 17 August 2019, Wenk saw “Mr. Rogers’ phone number starting to travel from Wilmington across the country.” (T1p 12). The device reported that Mr. Rogers’ phone number went “exactly to Hayward,” and stayed there for approximately 20-30 minutes. (T1p 12). Mr. Rogers’ phone number then started heading back to Wilmington. (T1pp 12-13). Wenk could not state exactly how long the trip took, but he testified “it was very concerning that they had left that morning and were able to drive it from here to California and back in just under – about two-and-a-half to three days.” (T1p 13). Wenk and his coworkers created a plan to detain Mr. Rogers. (T1p 14)

At approximately 9:31pm on 20 August 2019, a detective was on I-95 at South of the Border in South Carolina. (T1p 14). The detective saw Mr. Rogers at South of the Border and followed him back onto I-95. (T1p 15). Mr. Rogers’ car never stopped again, and the detective never lost sight of it. (T1p 15). After continuing to track Mr. Rogers’ progress using the GPS data, Wenk and other officers conducted an “investigative stop” of Mr. Rogers’ car on the Cape Fear Memorial Bridge at approximately 10:48pm. (T1pp 16-17). After the traffic stop, Wenk “later obtain[ed] a trafficking amount of cocaine in this investigation.” (T1p 17).

On cross examination, Wenk testified that, though the CS had been to Mr. Rogers’ residence multiple times, no address was listed in the affidavit accompanying the application for a “phone order.” (T1pp 17-18). Wenk testified the affidavit did not state whose house the CS was actually visiting when he saw Mr. Rogers. (T1p 18). The affidavit did not specify which dates the CS went to the house. (T1p 18). Wenk testified the affidavit did not state when the CS saw Mr. Rogers, where they saw him, or who was in the house. (T1p 18). Wenk further testified there was no information in the affidavit that the CS had ever actually bought any cocaine from Mr. Rogers. (T1pp 18-19). Likewise, Wenk testified the affidavit did not show that the CS ever saw Mr. Rogers selling drugs, only that they had conversations inquiring about purchasing cocaine. (T1p 19). Wenk also testified the affidavit provided no information to explain how the CS knew Mr. Rogers made trips to Hayward. (T1p 20). Wenk also testified that nothing in the affidavit shows anything was done to verify veracity of of the CS’s statements, other than verifying the phone number. (T1p 20).

Wenk further testified that, while the CS him “in a couple of days [Mr. Rogers’ is] going to Hayward” at some point in July, the trip didn’t happen until 17 August 2019. (T1p 22). Wenk also testified that, while his application, signed on 1 August 2019, he stated there was “probable cause to believe a felony had been committed,” but that a felony had not actually been committed on 1 August 2019. (T1pp 23-24).

After hearing Detective Wenk’s testimony, the trial court heard argument. In his written motion to suppress and at the hearing, Mr. Rogers requested the trial court suppress any information resulting from unlawful GPS tracking of Mr. Rogers’ cell phone, pen register data, the results of any search conducted at the storage facility, and an unlawful stop and search. (Rpp 28-32; T1pp 38-43). Specifically, Mr. Rogers argued the order for GPS tracking was not supported by probable cause and the issuing judge did not have authority issue a warrant across state lines. (Rp 28; T1pp 39-43) Mr. Rogers argued the resulting searches of the vehicle he was in and the storage facility were unlawful. (Rp 29; T1pp 39-43). Mr. Rogers argued the searches were unlawful under both the State and Federal constitutions. (Rpp 28-29).

Regarding jurisdiction, the State acknowledged that “there’s not really a Supreme Court case that particularly addresses this issue,” but cited instead several North Carolina cases in which similar orders crossing state lines had been upheld under the Fourth Amendment. (T1pp 34-35). The State also argued that the burden on law enforcement in these situations would be impractical if superior court judges could not issue extrajudicial warrants. (T1p 36). Finally, the State also argued that, because the order was authorized under N.C.G.S. § 15A-263, the applicable standard was “reasonable suspicion.” (T1p 31). The State argued there was reasonable suspicion to support the issuance of the order and the resulting searches. (T1pp 31-34).

The trial court did not issue a written order, but it announced its findings of fact and conclusions of law from the bench. The trial court made the following orally announced findings of fact:

In July 2019, Officer Donald Wenk of the New Hanover County sheriff’s department did an investigation into a trafficking cocaine case. Officer Wenk was with the vice and narcotics department for six years and with the New Hanover County sheriff’s department for nine years, and during that investigation, Detective Wenk received information from a confidential source about a black male subject by the name of Marty Rogers who was responsible for trafficking and distributing large quantities of cocaine in New Hanover County.

The confidential source was a nonconfidential source to Detective Wenk. The confidential source provided specific information that he observed large quantities of cocaine in the presence of Marty Rogers in his residence on multiple occasions, and he or she had numerous conversations inquiring about purchasing cocaine from Marty Rogers. The confidential source also explained that Marty Rogers would make trips to Hayward, California, which was very specific and explicit, to make purchases and transport trafficking amounts of cocaine back to Wilmington, North Carolina on multiple occasions.

Detective Wenk, utilizing the law enforcement database, retrieved a photograph of Marty Rogers. Detective Wenk showed this photograph to the confidential source. The confidential source identified the person in the photograph as being Marty Rogers, who Wenk knew to possess and transport and make numerous trips to Hayward, California to traffic cocaine, that within 72 hours of Detective Wenk receiving this information from the confidential source the confidential source -- received information from the confidential source that Marty Rogers would be making another trip to Hayward, California to purchase trafficking amounts of cocaine and transport it back to Wilmington, North Carolina.

The confidential source provided Detective Wenk with the phone number of Marty Rogers. The confidential source stated the telephone number is the number that they always used to contact Marty Rogers. Detective Wenk researched the telephone number utilizing the law enforcement database. The phone number listed for Marty Rogers is the same phone number provided to Detective Wenk by the confidential source. Detective Wenk applied for a pen register to track the telephone number for Marty Rogers.

Detective Wenk received information that Marty Rogers was living somewhere on Marstellar Street or the Creekwood area. They were not able to locate Marty Rogers in Marstellar Street. On August 2nd, 2019 -- on August 1, 2019, Detective Wenk made an application for the pen register to track the phone number of Marty Rogers. That application was presented to a superior court judge who ordered that, the pen register.

The New Hanover County sheriff’s vice and narcotics began surveillance from the phone number, noted that on August 17, 2019, at approximately 5:00 a.m., the monitored electronic device tracked the phone number as it began to leave Wilmington, North Carolina heading across the country. The phone number arrived in Hayward, California at 9:30 p.m. on August 20, 2019; that the phone number stayed in that area approximately 20 to 30 minutes and then began its trip back to Wilmington, North Carolina, taking approximately three days.

Once the phone number arrived back on the East Coast on Interstate 95, the car was identified as a gray Ford Explorer with an Enterprise tag. The occupants of the vehicle were able to be identified as Marty Rogers. There was a black female and another black male later identified as Ray Rogers.

When the vehicle came on 74/76 towards Wilmington, they began to follow the vehicle. The vehicle made no further stops at that time. The vehicle followed into Wilmington, and vice never changed. The tracking never diverted, and once the vehicle was on the Memorial Bridge in New Hanover County, an investigative stop was made, and that’s approximately 10:48. Upon a search of the vehicle, trafficking amounts of cocaine were found in the vehicle.

(T1pp 45-48).

The trial court then made the following conclusions of law:

As for the reasonable suspicion of the pen register, 15A-263 states that a superior court judge may enter an ex parte order authorizing the installation and use of a pen register or a trap and trace device within the state if the judge finds there is a reasonable suspicion to believe that a felony offense has been committed, that there’s reasonable grounds to suspect that the person named or described in the affidavit committed the offense, that that person is known and can be named or described, and that the results of the procedures involving the pen registered or trap and trace devices will be of material aid in determining whether the person named in the affidavit committed the offense.

The Court finds there was reasonable suspicion to believe that a felony had been committed, that Marty Rogers was trafficking large amounts of cocaine based upon the information provided by the confidential source, that the confidential source’s information was explicit and quite detailed regarding the activities of the defendant, Marty Rogers, regarding trafficking in cocaine; that the confidential source positively identified Marty Rogers from a photograph provided by Detective Wenk; that the phone number the confidential source provided to Detective Wenk as being the phone number of Marty Rogers was verified by Detective Wenk through the law enforcement database system as belonging to Marty Rogers; that Detective Wenk discovered during his investigation that there was a storage facility in Leland, North Carolina belonging to Marty Rogers; and that there was a -- and that Marty Rogers’ unit was described as being on the back end of the storage facility; that the storage facility was locked; that they spoke with the owner of the facility.

The owner of the facility identified Marty Rogers as having ownership of the unit in the facility and that the phone number identified as Marty Rogers’ phone number was the same phone number that the owner of the facility provided to law enforcement.

Therefore, the Court does find there was a reasonable suspicion for the order of the pen register, and based upon the information provided by the confidential source and the information provided through the tracking of the pen register, the Court finds that the stop of the vehicle on the Memorial Bridge in New Hanover County was a reasonable stop based upon the information provided and that they were able to track the phone number from Wilmington, North Carolina to Hayward, California back to Wilmington, North Carolina; that they were identified while coming back into Wilmington, North Carolina; that Marty Rogers was the driver of that vehicle; and when that vehicle was stopped that there were trafficking amounts of cocaine in the vehicle.

As to the jurisdictional issue, the case law supports that a person can be tracked from the state of North Carolina to any other state in the nation and back to the state of North Carolina; therefore that motion is denied. So the motion to suppress the State -- motion to suppress the affidavit for the pen registry is denied on all issues.

(T1pp 48-50). Mr. Rogers gave notice of appeal from the denial of the motion to suppress. (T1p 50).

On 25 March 2021, Mr. Rogers entered an *Alford* plea of guilty to trafficking in cocaine and possession with the intent to sell or deliver cocaine. (Rpp 159-162; T2pp 1, 6). Mr. Rogers reserved his right to appeal the denial of his motion to suppress when entering his guilty plea. (Rp 168; T2p 13).

# STANDARD OF REVIEW

Appellate review of a suppression order is “limited to determining whether the trial judge’s underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge’s ultimate conclusions of law.” *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). The conclusions of law are fully reviewable on appeal and are reviewed de novo. *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000). Under de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the lower court. *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008).

# ARGUMENT

## The trial court erred by denying Mr. Rogers’ motion to suppress when the order authorizing the search was facially invalid because it allowed a type and scope of search beyond the statutory authority of the issuing superior court judge.

Federal law allows state courts limited authority to issue search orders pursuant to the Stored Communications Act (SCA). However, that authority is strictly limited by state law. Here, the SCA order authorizing the search of Mr. Rogers’ cell phone data exceeded the authority given superior court judges by the North Carolina General Statutes. The order was facially invalid, and the trial court erred by denying Mr. Rogers’ motion to suppress.

In his amended motion to suppress and at the suppression hearing, Mr. Rogers argued that the search order was invalid because the issuing judge did not have authority to issue a search warrant across State lines. (T1p 43; Rp 28). The State acknowledged that “there’s not really a Supreme Court case that particularly addresses this issue,” but cited instead several North Carolina cases in which similar orders crossing state lines had been upheld under the Fourth Amendment. (T1pp 34-35). The State also argued that the burden on law enforcement in these situations would be impractical if superior court judges could not issue extraterritorial warrants. (T1p 36).

The trial court’s ruling on the jurisdictional issue was cursory: “As to the jurisdictional issue, the case law supports that a person can be tracked from the state of North Carolina to any other state in the nation and back to the state of North Carolina; therefore that motion is denied.” (T1p 50). The trial court’s ruling was error.

### Superior court judges do not have the authority to authorize searches outside of the state.

The search order in this case was purportedly authorized under N.C.G.S. §§ 15A-260-264 and 18 U.S.C. § 2703(d). (Rp 36). Under the SCA, an order “may be issued by any court that is a court of competent jurisdiction” but, “[i]n the case of a State governmental authority, such a court order shall not issue if prohibited by the law of such State.” 18 U.S.C. § 2703(d). Thus, the validity of an order under 18 U.S.C. § 2703 depends on the state laws governing the issuance of orders and warrants. *See, e.g.,* *United States v. Webb*, No. CR 19-121-BLG-SPW-1, 2021 U.S. Dist. LEXIS 1009, at \*9 (D. Mont. Jan. 4, 2021) (“CSLI warrants authorized by the Stored Communications Act must comply with state warrant procedures. However, Montana does not authorize such extraterritorial search warrants.”).

However, the authority of superior court judges in North Carolina is limited to the territorial jurisdiction of the state. For example, under North Carolina law, a search warrant issued by a superior court judge is valid only “*throughout the State*.” N.C.G.S. § 15A-243(a)(3) (emphasis added). Likewise, Article 12 states that “a superior court judge may enter an ex parte order authorizing the installation and use of a pen register or a trap and trace device *within the State*[.]” N.C.G.S. § 15A-263(a)(emphasis added). Similarly, a subpoena issued by a North Carolina court has no authority to command a person in another state to appear and testify. In that situation, a North Carolina judge must certify to a judge of another state that an out-of-state witness is needed and the out-of-state judge has the authority to order its resident to travel to North Carolina and testify. *See, e.g.* N.C.G.S. § 15A-811, et seq.

Even Federal law recognizes the limited territorial jurisdiction of state court judges: It is worth noting that Rule 41(b) of the Federal Rules of Criminal Procedure gives a federal magistrate judge the authority to issue a warrant for persons or property within the court’s district or outside its district within the United States. The Federal rule also authorizes a state judge to issue a federal warrant, but only if a federal judge is unavailable *and only* for a search or seizure within that district. *See* USCS Fed Rules Crim Proc R 41 (b)(1). Federal law does not authorize a state judge to issue a warrant or order to allow police to conduct searches in other districts or states.

In this case, the order in question authorized tracking in any jurisdiction in the United States. Specifically, the order authorized the officers to “install and monitor a pen register and/or trap and trace device(s) **without geographical limits** on theTARGET TELEPHONE service[.]” (Rp 39, emphasis in the original). The order also ordered cell service providers to supply “**all of the following information** . . . **without geographical limits**[:]. . . historical and prospective Global Positioning System (GPS) . . . data[.]” (Rpp 39-40, emphasis in the original). This authorization is in direct contradiction to North Carolina law. It violates N.C.G.S. § 15A-263, the claimed source of the superior court judge’s purported authority here. It also violates North Carolina law on the issuance of search warrants generally. By a plain reading of the text, warrants and orders such as the one in this case, which are issued by a North Carolina superior court judge, are only valid within the boundaries of the state. It stretches credulity to argue that any North Carolina state court can approve warrants for police action outside of this state. Thus, the search order is facially invalid because it plainly exceeds the territorial jurisdiction of the issuing official.

Finally, contrary to the trial court’s holding that caselaw supports extra-jurisdictional orders, the cases cited by the State below do no such thing. In its argument, the State relied upon *State v. Forte,* 257 N.C. App. 505, 810 S.E.2d 339 (2018), and *State v. Thomas*, 268 N.C. App. 121, 834 S.E.2d 654 (2019). The State argued that, in those cases, “courts have allowed and found valid similar orders where individuals were on a pen register or trap and trace device, traveled out of state, and came back[.]” (T1pp 34-35). However, in neither of those cases was a jurisdictional argument raised or addressed. *See Forte*, 257 N.C. App. 505, 810 S.E.2d 339; *Thomas*, 268 N.C. App. 121, 834 S.E.2d 654. This Court has yet to rule on the jurisdictional argument made in this case, and thus, there is no support in the caselaw for the trial court’s ruling.

### Chapter 15A, Article 12 of the General Statutes does not give superior court judges the authority to order law enforcement to obtain location data from a target phone.

The search order here also exceeded scope of the superior court judge’s authority under N.C.G.S. §§ 15A-260-264. Simply put, nothing in Article 12 of Chapter 15A authorizes a superior court judge to order cell service providers to turn over location information, or to allow police officers to install any devices that monitor cell phones for that data. As Article 12 is the purported source of the superior court judge’s authority to act under federal law in this order, (Rpp 36-43), the superior court judge vastly exceeded its authority by ordering the search of location information.

Article 12 is titled “Pen Registers; Trap and Trace Devices[,]” and, it authorizes law enforcement officers to make an application to a superior court judge for an order to install or use a pen register or a trap and trace device in conjunction with certain investigations. N.C.G.S. §§ 15A-262, 15A-263. However, pen registers and trap and trace devices have a specific, clearly limited definition under Article 12. These definitions do not include the retrieval of location data.

Article 12 defines “pen register” as: “a device which records or decodes electronic or other impulses which identify numbers dialed or otherwise transmitted on the telephone line to which such device is attached[.]” N.C.G.S. § 15A-260 (2). Similarly, Article 12 defines a “trap and trace device” as a device with identifies any number making calls *to* a particular phone number. N.C.G.S. § 15A-260 (3). Thus, “pen registers” and “trap and trace devices” as authorized under North Carolina law, are devices capable of only identifying numbers called from or placing calls to a target phone. Neither of these devices, as allowed under Article 12, track location data. There is similarly nothing else in Article 12 which authorizes any device capable of tracking location data. *See* N.C.G.S. §§ 15A-260-264. Any device capable of tracking location data, even if the device is called a “pen register,” is simply not authorized by the limited permissions provided in Article 12. *See also* *Carpenter v. United States*, 138 S. Ct. 2206, 2216 (2018) (noting that “the Government’s use of a pen register—a device that recorded the outgoing phone numbers dialed on a landline telephone—was not a search [because of] . . . the pen register’s “limited capabilities[.]”) (cleaned up).

The order here authorizes law enforcement to “install or use a pen register and trap and trace device/cell site simulator device pursuant to 18 U.S.C. 3123 and N.C.G.S. § 15A-263 *to determine the location* of the aforementioned target cellular number/device.” (Rp 39). This order plainly exceeds the limited authority granted a superior court judge under N.C.G.S. § 15A-260 and N.C.G.S. § 15A-263 to authorize the use of devices which record and identify phone numbers.

### The motion to suppress should have been granted.

A warrant issued without the authority of the issuing official is void *ab initio*, and cannot support a search. *See, e.g*. [*State v. Bryant*, 237 N.C. 437, 438, 75 S.E.2d 107, 108 (1953)](https://advance.lexis.com/api/document/collection/cases/id/3RRR-2BT0-000G-K027-00000-00?page=438&reporter=3330&cite=237%20N.C.%20437&context=1000516) (recognizing that a search warrant unauthorized by statute would be void); *State v. Cook*, 273 N.C. 377, 380, 160 S.E.2d 49, 51 (1968) (overruling challenge to validity of warrant after concluding the person who issued it had authority to do so); *also see* *State v. Clark*, 178 Wash. 2d 19, 24, 308 P.3d 590, 593 (2013) (“A warrant issued without authority is inherently void and cannot authorize a search.”).

The Fourth Amendment to the United States Constitution protects the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,” prohibits the issuance of warrants except upon probable cause, and is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. IV; *see* *Mapp v. Ohio,* 367 U.S. 643, 656 (1961). The same protections are guaranteed by Article I, Section 20 of the North Carolina Constitution. *State v. Arrington*, 311 N.C. 633, 643, 319 S.E.2d 254, 261 (1984) (stating Article I, Section 20 prohibits unreasonable searches and seizures). Because the search order here was issued by a judge who lacked authority to issue it, it is void and “any evidence obtained as a result of the search” order should have been suppressed. *State v. Logan*, 278 N.C. App. 319, 2021-NCCOA-311, ¶37; s*ee* *also* N.C.G.S. § 15A-974(a)(1).

The appropriate remedy for an unlawful search is application of the exclusionary rule which requires that fruits of an unlawful search be excluded at trial. *Wong Sun v. United States*, 371 U.S. 471, 485-487 (1963); *State v. Farmer*, 333 N.C. 172, 188-89, 424 S.E.2d 120, 130 (1993) (evidence obtained by unreasonable search and seizure must be excluded under the North Carolina Constitution). Here, this includes any evidence relating to the location data illegally retrieved from Mr. Rogers’ phone as well as the “investigatory stop” and search of the storage facility conducted based on that location data.

Any argument that the State might make that the exclusionary rule does not apply because Wenk purportedly acted in good faith should be rejected. First, the State made no argument about the good faith exception in the court below and is therefore waived on appeal. *State v. Green*, 103 N.C. App. 38, 41-42, 404 S.E.2d 363, 365-366 (1991). Second, the search order did not merely allow police to do something improper - police deliberately sought permission under Article 12 to do something not allowed by Article 12, and planned to exercise that invalid authority, even though North Carolina law does not, and cannot, authorize such searches beyond its borders. Therefore, the order should be invalidated and any claim of good faith by law enforcement should be rejected as law enforcement should have been aware of the North Carolina statutes regarding the territorial jurisdiction of search warrants and which devices are authorized under N.C.G.S. § 15A-263. *See United States v. Leon*, 468 U.S. 897, 923 (1984) (“[A] warrant may be so facially deficient . . . that the executing officers cannot reasonably presume it to be valid.”). Third, Mr. Rogers sought suppression under both the Federal and State Constitutions, and our Supreme Court has refused to apply the good faith exception to the exclusionary rule under the Article I, Section 20 of the North Carolina Constitution. *State v. Carter*, 322 N.C. 709, 724, 370 S.E.2d 553, 562 (1988).

## The trial court erred when denying Mr. Rogers’ motion to suppress because the search order was not supported by probable cause.

The trial court also erred by denying Mr. Rogers’ motion to dismiss because the application for the SCA order in this case did not provide probable cause to support the order. The order was therefore not sufficient to serve as a valid equivalent of a search warrant, and any evidence obtained as a result of the search should have been suppressed under the State and Federal constitutions. *See* N.C. Const. Art. I, § 20, U.S. Const. Amend. IV.

### A search of location data, historical or “real time,” must be based on probable cause.

Regardless of whether Wenk employed an unlawful pen register, or performed some other search of cell-site location information (CSLI) data, the case law is clear: a search of location data from a cell phone must be supported by probable cause and either a warrant or its functional equivalent.

In *Carpenter*, the United States Supreme Court held that a person has a legitimate expectation of privacy in the record of his physical movements as captured through historical CSLI. The Court observed that CSLI “provides an intimate window into a person’s life, revealing not only his particular movements, but through them his familial, political, professional, religious and sexual associations.” *Carpenter*, 138 S. Ct. at 2217 (cleaned up). When the government tracks the location of a cell phone, “it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone’s user.” *Carpenter*, 138 S. Ct. at 2218.

In so holding, the Court rejected the application of the “third party doctrine,” which states that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties. *Carpenter*, 138 S. Ct. at 2220. Having found that the acquisition of historical CSLI was a search, the Court held that the government must generally obtain a warrant supported by probable cause to conduct that search. *Carpenter*, 138 S. Ct. at 2221.

*Carpenter’s* holding not only sets a minimum standard for CSLI searches under the Fourth Amendment, it also sets the minimum standard under North Carolina’s state constitutional prohibition against unreasonable searches and seizures. *See* *Carter*, 322 N.C. at 714, 370 S.E.2d at 556 (“[A]n individual’s constitutional rights under the Constitution of North Carolina must receive at least the same protections such rights are accorded under the Federal Constitution”).

The State below recognized that *Carpenter’s* analysis on historic CSLI was relevant, arguing that because the data here was “real-time,” it was not subject to *Carpenter’s* analysis. (T1p 44). By arguing that *Carpenter* would apply to this data if it were historic data, the State recognized that this was not mere “pen register” data but was in fact location data potentially subject to the probable cause standard. However, the State’s argument was still both factually and legally incorrect.

First, under this Court’s pre-*Carpenter* decision, *State v. Perry*, the data at issue here would almost certainly be described as historic CSLI. In *Perry*, this Court held that CSLI data was “historical” despite being ordered prospectively and being used to track a person’s current location, because, in part, the officers received the data from the service provider “every fifteen minutes,” and that delay was sufficient to render the data “historical.” *State v. Perry*, 243 N.C. App. 156, 165, 776 S.E.2d 528, 535 (2015). Similarly, in this case, the “provider time” connected with the GPS coordinates shows Wenk was given the GPS coordinates approximately every fifteen minutes, and updates continued after Mr. Rogers’ arrest when his phone was presumably in police custody and no new location data was provided. (Rpp 52-115). Likewise, as in *Perry*, the officers copied the coordinates given by the provider into a “google maps search engine” to track the cell phone’s location. *Compare* *id.* at 166 with T1p 13. Thus, the data at question here is likely historical cell-site data under the framework established by *Perry* and, under *Carpenter*, a warrant supported by probable cause is required to support the search.

However, even if the data were “real-time” data, as the State argued below, probable cause would still be required. There is no support for the State’s position that real-time data monitoring is subject to only a reasonable suspicion standard. First, the State’s argument at the hearing was that “reasonable suspicion” applied because this was a pen register, and under 15A-263 a pen register needs only reasonable suspicion. (T1p 44). However, as discussed above, N.C.G.S. § 15A-263 authorizes a pen register only to track the numbers of phones called by the target. N.C.G.S. § 15A-260. A pen register which tracks GPS location data, as Wenk said was the case here, is simply not authorized under N.C.G.S. § 15A-260.

Second, there is no meaningful argument that the privacy interests described in *Carpenter* do not apply equally, if not more forcefully, to real-time location searches. As *Carpenter* noted, a cell phone is “almost a ‘feature of human anatomy,’ . . . [which] faithfully follows its owner beyond public thoroughfares and into private residences, doctor’s offices, political headquarters, and other potentially revealing locales.” *Carpenter*, 138 S. Ct. at 2218 (cleaned up). “Accordingly, when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone’s user.” *Id.* The *Carpenter* Court was explicit that, “when the Government accessed CSLI from the wireless carriers, it invaded Carpenter’s reasonable expectation of privacy in the whole of his physical movements.” *Id.* at 2219. While the Court explicitly addressed only *historical* data, *id.* at 2220, it would be disingenuous to argue that, while a person has a clear privacy interest in data showing where they were last week, they do not have a similar privacy interest in data showing where they are today, or will be next week. Moreover, in *Perry,* this Court already recognized that: “The majority of federal courts which have considered the issue have concluded that ‘real-time’ location information may only be obtained pursuant to a warrant supported by probable cause.” *Perry*, 243 N.C. App. at 164, 776 S.E.2d at 534.

This rationale comports with the Supreme Court’s conclusion that Satellite Based Monitoring of a person’s GPS coordinates by an ankle monitor is a search requiring probable cause. In *Grady v. North Carolina*, the Supreme Court held that “a State also conducts a search when it attaches a device to a person’s body, without consent, for the purpose of tracking that individual’s movements.” *Grady v. North Carolina*, 575 U.S. 306, 309 (2015). While *Grady* was based on the physical act of attaching a device to a person’s body without consent, there is little practical difference between the State forcing a person to wear an ankle monitor and the State secretly forcing a person’s cell phone to betray their location data, unbeknownst to the holder of the phone. Indeed, *Carpenter* itself alluded to the type of monitoring discussed in *Grady* when holding that a search of historical CSLI must be supported by probable cause: *“*Accordingly, when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone’s user.” *Carpenter*, 138 S. Ct. at 2218. As above, there can be no serious argument that a non-consensual search of real-time location data is any less a trespass and intrusion upon the privacy interests of a person than a search of historical location data.

Thus, whether the search of location data connected to Mr. Rogers’ cell phone was “historical” CSLI under *Perry*, or retrieved by true, real-time monitoring through some other means, the applicable standard is the same: the monitoring of GPS data through a defendant’s cell phone is a search requiring probable cause. *See Carpenter*, 138 S. Ct. at 2217 (“Whether the Government employs its own surveillance technology as in *Jones* or leverages the technology of a wireless carrier, . . . an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI.”).

### The order giving police access to Mr. Rogers’ location information was not supported by probable cause.

This Court has previously held that, while the search of historical location data requires a search warrant supported by probable cause, an SCA order and its application may serve as the functional equivalent of a warrant if they suffice to establish probable cause. *State v. Gore*, 272 N.C. App. 98, 108-09, 846 S.E.2d 295, 301-02 (2020). Facts in a search warrant application show probable cause if they provide “reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense will reveal the presence *upon the described premises* of the objects sought and that they will aid in the apprehension or conviction of the offender.” *State v. Campbell*, 282 N.C. 125, 132, 191 S.E.2d 752, 757 (1972) (cleaned up).

Whether probable cause exists must be based only on the information before the issuing official, either in the four corners of the application or memorialized on the record at the time. *See* *State v. Benters*, 367 N.C. 660, 673-74, 766 S.E.2d 593, 603 (2014); N.C.G.S. § 15A-245(a). It is the duty of the reviewing court to ensure that there is a substantial basis for the issuing official’s finding of probable cause based on the totality of circumstances as set forth in the warrant application. *Arrington*, 311 N.C. at 638, 319 S.E.2d at 257-258. Here, to the extent any of the trial court’s findings concern matters outside of the application for the search order, they were irrelevant in determining whether the SCA order was the functional equivalent of a search warrant.

The factual allegations relevant to the probable cause question contained in Detective Wenk’s affidavit in support of the SCA order are as follows:

During the month of July 2019 Detective D. Wenk received information from a Confidential Source that a black male subject by the name of Marty Douglas Rogers is responsible for Trafficking/Distributing large quantities of Cocaine in New Hanover County. The Confidential Source herein referred to as CS, stated that he/she has been to Marty Douglas Rogers residence on multiple occasion and has seen large quantities of Cocaine and has had numerous conversations inquiring about purchasing Cocaine. The CS further explained that Marty Douglas Rogers would make trips to Hayward, California to purchase and transport trafficking amounts of Cocaine back to Wilmington, NC on multiple occasions. Det. Wenk, utilizing a law enforcement database, retrieved a photograph of Marty Douglas Rogers. Det. Wenk showed the CS the photograph of Marty Douglas Rogers. The CS identified the photograph of Marty Douglas Rogers as the individual who he/she knew to possess, transport, and make trips to Hayward, California for trafficking in Cocaine. Within the last (72) hours Det. Wenk received further information from the CS who stated Marty Douglas Rogers was about to make another trip to Hayward, California to purchase a trafficking amount of Cocaine and transport it back to Wilmington NC. The CS provided a phone number of (910) 233-3006 for Marty Douglas Rogers. The CS stated that this telephone number is the number that he/she has always contacted Marty Douglas Rogers on. Det. Wenk researched the phone number utilizing a law enforcement database provided by the CS. The phone number listed for Marty Douglas Rogers is the same number provided by the CS.

(Rp 45).

There is insufficient information in the foregoing to support probable cause because the CS was not shown to be reliable, and there was no information showing how the CS knew a trip was imminent. Furthermore, the information concerning the CS seeing drugs was stale. Considering the totality of the circumstances, the foregoing information does not provide probable cause to believe evidence of a crime would be found in Mr. Rogers’ cell phone records or location information.

First, the affidavit is based entirely on information from a confidential source, but it is lacking in any information traditionally relevant to a showing of reliability. Our Supreme Court has held that, when information in a warrant application comes from a confidential informant, the reliability of that information must be tested. *Benters*, 367 N.C. at 666, 766 S.E.2d at 598-99. “When sufficient indicia of reliability are wanting, however, we evaluate the information based on the anonymous tip standard.” *Id.* “An anonymous tip, standing alone, is rarely sufficient, but “the tip combined with corroboration by the police *could* show indicia of reliability that would be sufficient to pass constitutional muster.” *Id.* (cleaned up, emphasis added). Here, there was insufficient information to show the reliability of the information provided by the CS, and therefore it was insufficient to provide probable cause.

For example, the informant’s veracity or reliability and basis of knowledge are “highly relevant in determining the value of his report.” *Illinois v. Gates*, 462 U.S. 213, 230 (1983). Here, Wenk did not state that the CS had previously given correct information. *Contrast with Arrington*, 311 N.C. at 642, 319 S.E.2d at 260 (“The fact that statements from the informants in the past had led to arrests is sufficient to show the reliability of the informants.”). Instead, the sole information concerning the CS was that Wenk “knew” them.

Moreover, Wenk did not corroborate any relevant information provided by the CS. *See State v. Jackson*, 249 N.C. App. 642, 654, 791 S.E.2d 505, 514 (2016) (“Another factor in assessing the reliability or unreliability of an informant is whether information provided by the informant could be and was independently corroborated by the police.”) (cleaned up).Officers must conduct a follow-up investigation which must do more than corroborate easily observable facts and conditions. *State v. Johnson*, 204 N.C. App. 259, 264, 693 S.E.2d 711, 715 (2010) (“Where the detail contained in the tip merely concerns identifying characteristics, an officer’s confirmation of these details will not legitimize the tip.”). According to the SCA application, officers failed to corroborate any of the CS’ information beyond identifying characteristics such as confirming Mr. Rogers’ photograph and phone number, which is simply not enough under *Johnson*. Further, the application did not contain the address at which the CS purported to have met with Mr. Rogers, nor did the application show that any address was ever confirmed. *Contrast with Jackson*, 249 N.C. App. at 654, 791 S.E.2d at 514.

Likewise, the application does not show that the informant made any statements against penal interest – seeing large quantities of cocaine and having discussions about buying or selling drugs is not illegal. *Contrast with id.* at652, 791 S.E.2d at 512(“Statements against penal interest carry their own indicia of credibility sufficient to support a finding of probable cause to search.”) (cleaned up).

Finally, the information was vague, providing no specific dates, times, or locations for any of the events it described. *See, e.g.,* *Hughes*, 353 N.C. at 209, 539 S.E.2d at 631 (holding motion to suppress should have been granted because “[e]ven more important for purposes of its reliability, the information provided did not contain the “range of details” required[.]”). The application was devoid of any information required to address the staleness of the information the CS related. The application stated only that the CS contacted Wenk “in the month of July 2019” and later “within the last 72 hours” to inform him of an upcoming trip. The application did not state when or how the CS learned of the trip, nor when the CS made any of the supposed visits to Mr. Rogers’ purported house, nor when the CS saw drugs or discussed drugs with Mr. Rogers. When an affidavit in support of a warrant includes information only as to the time the confidential source spoke to an officer, but none concerning the time the source made the observations themselves, there is insufficient information support a finding of probable cause. *See, e.g., State v. Brown*, 248 N.C. App. 72, 80, 787 S.E.2d 81, 87 (2016) (reversing order denying motion to suppress where officer “failed to state . . . the time the informant’s observations were made. . . . [And instead] only provided information regarding the time when the informant spoke to the officer.”) (cleaned up).

Based on the foregoing, the SCA application lacks sufficient information showing that any evidence of criminal conduct would be found in Mr. Rogers’ phone data, and it was entirely based on a CS whose reliability was unsupported by the affidavit. These deficiencies prevent the affidavit from establishing probable cause for the search. *See, e.g., State v. Lewis*, 372 N.C. 576, 588, 831 S.E.2d 37, 45 (2019) (holding that a search warrant was unsupported by probable cause and stating “critical” to the analysis is the information that was not contained in the affidavit).

For all of the above reasons, the SCA order was unsupported by probable cause, and it was not the equivalent of a search warrant. *Contrast with Gore*, 272 N.C. App. at 108-09, 846 S.E.2d at 301-02. Because the SCA application failed to show probable cause, the order “was invalid; thus, any evidence obtained as a result of the search” order should have been suppressed. *Logan*, 2021-NCCOA-311, ¶37; *see* *also* N.C.G.S. § 15A-974(a)(1) (“Upon timely motion, evidence must be suppressed if: [i]ts exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina . . . .”). The appropriate remedy for the unlawful search is application of the exclusionary rule which requires that fruits of an unlawful search be excluded at trial. *Wong Sun*, 371 U.S. at 485-487; *Farmer*, 333 N.C. at 188-189.

As with argument I, any argument that the State might make that the exclusionary rule does not apply because Wenk purportedly acted in good faith should be rejected. First, that argument was not made in the court below and is therefore waived on appeal. *Green*, 103 N.C. App. at 41-42, 404 S.E.2d at 365-366. Second, the good faith exception does not apply here, because the “affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.” *Leon*, 468 U.S. at 923 (cleaned up). And third, Mr. Rogers sought suppression under both the Federal and State Constitutions, and our Supreme Court has refused to apply the good faith exception to the exclusionary rule for violations of Article I, Section 20 of the North Carolina Constitution. *Carter*, 322 N.C. at 718-719, 379 S.E.2d at 558-559.

### In the alternative, the trial court applied the wrong standard when ruling on the motion to suppress.

In the alternative, if this Court declines to hold that the motion to suppress should have been granted for the foregoing reasons, the matter must nevertheless be remanded to the trial court. As described above, the search of Mr. Rogers’ location data was required to be supported by probable cause. However, the trial court erroneously applied the “reasonable suspicion” standard when making its ruling on Mr. Rogers’ motion to suppress: “Therefore, the Court does find there was a reasonable suspicion for the order of the pen register.” (T1p 49). Thus, this case must be remanded “to the trial court for a ‘redetermination’ under the proper standard.” *State v. Williams*, 195 N.C. App. 554, 561, 673 S.E.2d 394, 398-99 (2009) (remanding case where “trial court’s statement suggests the court improperly applied the reasonable articulable suspicion standard rather than probable cause in determining whether the seizure . . . was justified under the Fourth Amendment”).

# CONCLUSION

For the foregoing reasons and authorities, Mr. Rogers respectfully requests this Court to reverse the trial court’s order denying his motion to suppress.

Respectfully submitted this, the 2nd day of March, 2022.

Electronically Submitted

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# CERTIFICATE OF COMPLIANCE WITH RULE 28(J)(2)

I hereby certify that Defendant-Appellant’s Brief is in compliance with Rule 28(j)(2) of the North Carolina Rules of Appellate Procedure in that it is printed in thirteen-point Century Schoolbook font and the body of the brief, including footnotes and citations, contains no more than 8,750 words as indicated by Microsoft Word, the program used to prepare the brief.

This, the 2nd day of March 2022.

Electronically Submitted

Sterling Rozear

Assistant Appellate Defender

# CERTIFICATE OF SERVICE

I hereby certify that the original Defendant-Appellant’s Brief has been duly filed, pursuant to Rule 26, by electronic means with the Clerk of the North Carolina Court of Appeals.

I further certify that a copy of the foregoing Brief has been served upon Caden Hayes, Assistant Attorney General, by sending it electronically to the following current email address, cwhayes@ncdoj.gov.

This, the 2nd day of March 2022.

Electronically Submitted

Sterling Rozear

Assistant Appellate Defender

1. The transcript of the 26 February 2021 hearing on the motion to suppress shall be referred to herein as (T1p #); the transcript of the 25 March 2021 guilty plea hearing shall be referred to herein as (T2p #). [↑](#footnote-ref-1)