UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

COA #: 14-1572

UNITED STATES OF AMERICA

Plaintiff/Appellee,

v.

TIMOTHY IVORY CARPENTER

Defendant/Appellant

On Appeal from the United States District Court
for the Eastern District of Michigan
Southern Division

APPELLANT'S REPLY BRIEF

Harold Gurewitz (P14468)
Attorney for Appellant Carpenter
Gurewitz & Raben, PLC
333 W. Fort Street, Suite 1400
Detroit, MI 48226
(313) 628-4733

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I. GOVERNMENT ACQUISITION OF 127 DAYS OF CARPENTER'S HISTORIC CELL SITE LOCATION RECORDS WITHOUT A WARRANT OR PROBABLE CAUSE VIOLATED THE FOURTH AMENDMENT.

In the past three terms the Supreme Court has had two opportunities to address the application of the Fourth Amendment to emerging technologies and, each time, unanimously held that probable cause and a warrant are required. *United States v. Jones*, 132 S Ct 945 (2012); *Riley v. California*, 134 S Ct 2473 (2014). These cases demonstrate the court's view of the law in this area, as articulated by this Court in 2010, that "the Fourth Amendment must keep pace with the inexorable march of technological progress, or its guarantees will wither and perish." *United States v. Warshak*, 631 F3d 266, 285 (6th Cir. 2010), citing *Kyllo v. United States*, 533 US 27, 34 (2001)(noting that evolving technology must not be permitted to "erode the privacy guaranteed by the Fourth Amendment").

Because of the breadth of information that can be revealed about individuals from new technologies, like the five months of Carpenter's cell site location information ("CSLI") obtained here, both of these cases, albeit indirectly,[1] also call inexorably into question the viability of the doctrine substantially relied on by the

[1] The question was not directly before the Court in either case. *See Jones*, 132 S Ct at 957 ("Resolution of these difficult questions in this case is unnecessary, however, because the Government's physical intrusion on Jones' Jeep supplies a narrower basis for decision."); *Riley*, 134 S Ct at 2489, fn. 1.

Government in its Response, the so-called "third-party doctrine," as expressed in *United States v. Miller*, 425 US 435 (1976) and *Smith v. Maryland*, 442 US 735 (1979), when applied to modern technologies. *Jones*, 132 S Ct at 957 (Sotomayor, J., concurring)("[I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties."); *Id.* at 964 (Alito, J.); *Riley*, 134 S Ct at 2490 ("Historic location information is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building."); *see also, e.g., Florida v. Jardines*, 133 S Ct 1409, 1418-19 (2013) (Kagan, J., concurring) (odors detectable by a police dog that emanate from a home); *Ferguson v. City of Charleston*, 532 US 67, 78 (2001)(diagnostic-test results held by hospital staff). This Circuit, in *Warshak*, has already acknowledged the limitation of this doctrine in the modern era. 631 F3d at 283-88; *see also United States v. Skinner*, 690 F3d 772, 780-81 (6th Cir. 2012)(holding that a defendant had no reasonable expectation of privacy to three days of live tracking of a cell phone, but acknowledging that a defendant may have expectation of privacy in the context of long-term surveillance).

In order to ensure that the Fourth Amendment retains relevance in the quickly advancing era of modern technology, this Court must establish a bright line

rule here; one that requires probable cause and a warrant; that can withstand changes from emerging technologies; and, one that will protect the privacy rights of individuals.

A. Carpenter Has A Reasonable Expectation Of Privacy in CSLI

Both the Government and the Eleventh Circuit, in *United States v. Davis*, 2015 WL 2058977 (11th Cir. May 5, 2015)(en banc)[2], heavily rely on the Supreme Court's decisions in *United States v. Miller*, 425 US 435 (1976) and *Smith v. Maryland*, 442 US 735 (1979) to support their conclusion that an individual has no reasonable expectation of privacy in CSLI. (Appellee Brief (R41), Pg ID 30-41), *Davis*, 2015 WL 2058977 at *8-13. The Supreme Court, however, has never extended the "third party doctrine" to the breadth of information that can be revealed about an individual through CSLI and this Court should decline to make that extension here.

In its response, the Government relies upon *Smith* to argue that Carpenter has no reasonable expectation of privacy in CSLI, (Appellee Brief (R41), Pg ID 30-48), and that individuals are presumed to have knowledge of how modern

[2] The Government Response cites to the recent decision in *Davis*, *supra,* for the narrow view derived from the operations of older forms of communications technology, that focused only the creation of discrete items of dialing information. *See*, Appellee Brief (R41), Pg ID 36-38.

cellular technology functions. (Id, Pg ID 36-41). The Government's expansive reading of *Smith* is unsupported. In *Smith*, the court held that the use of a pen register to capture the telephone numbers an individual dials was not a search under the Fourth Amendment. 442 US at 739, 742. This holding was premised upon two factors; one which the Government overstates and another it completely ignores. First, the court reasoned that "[w]hen he used his phone, petitioner voluntarily conveyed numerical information to the telephone company and 'exposed' that information to its equipment in the ordinary course of business." *Id*. at 744. In reaching this conclusion, the court reminisced that "[t]he switching equipment that processed those numbers is merely the modern counterpart of the operator who, in an earlier day, personally completed calls for the subscriber." *Id*. Smith, therefore, could not claim that this change in technology gave rise to an expectation of privacy in the limited information that individuals used to verbally convey to phone operators.

Second, and of particular significance here, the Court emphasized the "pen register's limited capabilities," *Id.* at 742, explaining that "a law enforcement official could not even determine from the use of a pen register whether a communication existed." *Id.* at 741. The Government's argument that "*Smith*'s reasoning applies equally to cellphone technology," (Appellee Brief (R41), Pg ID

36), completely ignores this part of the Court's analysis. The phone numbers a person dials are readily distinguishable from CSLI. CSLI reveals far more about an individual. (Amicus Brief (R29), Pg ID 20-24; Appellant's Brief (R25), Pg ID 37).

Miller is similarly distinguishable. Nearly 40 years ago, in *Miller*, the court held that a bank depositor had no expectation of privacy in records about his transactions that were held by the bank. Although the court explained that the records were the bank's business records, 425 US at 440, it proceeded to inquire whether Miller could nonetheless maintain a reasonable expectation of privacy in the records: "We must examine the nature of the particular documents sought to be protected in order to determine whether there is a legitimate 'expectation of privacy' concerning their contents." *Id.* at 442. The Court's ultimate conclusion – that Miller had no such expectation – turned not on the fact that the records were owned or possessed by the bank, as the Government asserts, but on the fact that Miller "voluntarily conveyed" the information contained in them to the bank and its employees. *Id.*

For the same reasons, the recent decision of the Eleventh Circuit in *United States v. Davis*, 2015 WL 2058977 (11th Cir. May 5, 2015)(en banc), which, relying on *Miller* and *Smith*, held that a defendant did not have a reasonable expectation of privacy in 67 days of CSLI, is simply untenable in light of

advancements in modern technology. Technology has advanced and will only continue to improve and become more precise. So, this Court should not be bound by anachronistic rules limited to practices that have been by-passed by emerging technologies.

Davis is also distinguishable because, here, the Government obtained 127 days of Carpenter's CSLI; nearly twice as much as it recovered from Davis. The acquisition of Carpenter's CSLI is, therefore, far more intrusive. *United States v. Maynard*, 615 F3d 544, 561-63 (DC Cir. 2010)(discussion breadth of information revealed from prolonged surveillance).

As the Third Circuit has explained, cell phone users retain a reasonable expectation of privacy in their location information:

> A cell phone customer has not 'voluntarily' shared his location information with a cellular provider in any meaningful way. . . . [I]t is unlikely that cell phone customers are aware that their cell phone providers *collect* and store historical location information. Therefore, "[w]hen a cell phone user makes a call, the only information that is voluntarily and knowingly conveyed to the phone company is the number that is dialed and there is no indication to the user that making that call will also locate the caller; when a cell phone user receives a call, he hasn't voluntarily exposed anything at all.

In re Application of the U.S. for an Order Directing a Provider of Elec. Commc'n Serv. to Disclose Records to the Gov't (*Third Circuit Opinion*), 620 F3d 304, 318-

19 (3rd Cir. 2010); *see also Tracey v. State*, 152 So 3d 504, 523 (Fla. 2014)("[t]he fiction that the vast majority of the American population consents to warrantless government access to the records of a significant share of their movements by 'choosing' to carry a cell phone must be rejected.").

The third party doctrine is not even an absolute rule in the context of older decisions, of the kind the Government attempts to argue should still apply here. *See Warshak*, 631 F3d at 283-88; *see also Oregon Prescription Drug Monitoring Program v. US Drug Enforcement Administration*, 988 F Supp 2d 957, 967 (D. Or. 2014)(holding that prescription drug records, despite being held by a third party, are due full Fourth Amendment protection). In *Warshak*, this Court held that there is a reasonable expectation of privacy in the contents of emails. The court explained that the fact that email is sent through an internet service provider's servers does not vitiate the legitimate interest in email privacy: both phone calls and letters are sent via third parties, but people retain a reasonable expectation of privacy in those forms of communication. *Id.* at 285 (citing *Katz*, 389 US at 353; *United States v. Jacobsen*, 466 US 109, 114 (1984)). *Warshak* further held that even if a company has a right to access information in certain circumstances under the terms of service, that does not necessarily eliminate the customer's reasonable

expectation of privacy vis-à-vis the government. *Id.* at 286-88.[3]

The sensitive and private information that was disclosed by CSLI deserves no less protection. Like the contents of emails, cell phone location information is not a simple business record voluntarily conveyed by the customer. In this case the Government obtained a transcript of Carpenter's locations and movements for over 4 months. (Appellant's Brief (R25), Pg ID 37; Amicus Brief (R29), Pg ID 20-24). This information, unlike mere call detail reports, *Smith*, *supra*, invades "the

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[3] The Government also argues that this Court should not "draw an ephemeral and arbitrary line between cell-site and all other forms of third-party business records" and leave such "line-drawing" to the legislature. Appellee Brief (R41), Pg ID 47-48) The Second Circuit, in *ACLU v. Clapper*, 2015 WL 2097814 (2nd Cir. May 7, 2015)(Sack, J., concurring), recently rejected this approach:

> In that connection, Judge Lynch's opinion refers to "the primary role that should be played by [Congress] in deciding, explicitly and after full debate, whether such programs [as those pursuant to which the NSA has collected telephone metadata] are appropriate and necessary."Ante at 92. I agree. I think it nonetheless appropriate to pause to ensure that that statement is not read to devalue or minimize the role of the courts in determining the meaning of any such legislation, its future application to particular acts or practices of the federal government and others, or its propriety under the Constitution. The courts are charged with the responsibility of making those judgments. They are, as an institution, tasked with the duty, in the context of cases or controversies properly brought before them, to seek to reconcile the never completely reconcilable tension between the individual's interest in privacy and right to civil liberties and the government's duty to protect American lives and property.

Id at *33.

privacies of life." *Riley*, 134 S Ct at 2494. In the modern era, virtually all forms of communication are facilitated through third parties. To adopt the Government's proposed vast expansion of the third party doctrine would eviscerate the protection provided by the Fourth Amendment. *Smith*, 442 US at 750 (Marshall, J., dissenting)("unless a person is prepared to forgo use of what for many has become a personal or professional necessity, he cannot help but accept the risk of surveillance."). The Fourth Amendment demands more. *See Coolidge v. New Hampshire*, 403 US 443, 455 (1971)("If times have changed, reducing everyman's scope to do as he pleases in an urban industrial world, . . . the values served by the Fourth Amendment [are] more, not less important.").

B. The Reasonableness Doctrine Only Applies to Non-Criminal Investigations.

In its Response, the Government erroneously argues that even if this Court determines that obtaining cell-site records constitutes a search that "[g]iven the diminished expectations of privacy (at best) and compelling governmental interests in securing cell-site location information to advance early-stage criminal investigations, any 'search' occurring here was reasonable under the Fourth Amendment." (Appellee Brief, (R41), Pg ID 51), *citing Davis*, 2015 WL 2058977, at *16-18 (en banc). The Government's argument and the Eleventh Circuit's reasoning in *Davis*, that the reasonableness doctrine should apply in the context of

a classic criminal investigation, is at odds with the *per se* rule established by the Supreme Court in *Katz*.

The reasonableness doctrine has only been held to apply when the search involved had some kind of purpose that was non-criminal. The Government's argument, that it should apply in a criminal investigation, effectively would do away with the warrant requirement completely, and replace it with just a generalized reasonableness inquiry. In *Arizona v. Hicks*, 480 US 321 (1987), the Supreme Court, addressing Justice O'Connor's dissent, which argued that limited intrusions should be subject to reasonableness analysis, soundly rejected this argument:

> Justice O'CONNOR's dissent suggests that we uphold the action here on the ground that it was a "cursory inspection" rather than a "full-blown search," and could therefore be justified by reasonable suspicion instead of probable cause. As already noted, a truly cursory inspection—one that involves merely looking at what is already exposed to view, without disturbing it – is not a "search" for Fourth Amendment purposes, and therefore does not even require reasonable suspicion. We are unwilling to send police and judges into a new thicket of Fourth Amendment law, to seek a creature of uncertain description that is neither a "plain view" inspection nor yet a "full-blown search." Nothing in the prior opinions of this Court supports such a distinction, not even the dictum from Justice Stewart's concurrence in *Stanley v. Georgia*, 394 US 557, 571, 89 S Ct 1243, 1251, 22 LEd 2d 542 (1969), whose reference to a "mere inspection" describes, in our view, close observation of what lies in plain sight.

Id at 328-29.

C. The Good Faith Exception Does Not Apply.

Relying on this Court's decision in *Warshak,* 631 F3d at 283-88, the United States has argued in its Response that the good faith exception to the exclusionary rule should apply to the conduct of the "government officers", Response Brief, Doc. 41 at p. 52 ("This Court has already found the good-faith exception applicable to very similar circumstances.")(Appellee Brief (R41), Pg ID 52).

In this case, the responsible officer is Assistant United States Attorney John N. O'Brien, who was the applicant for each of the two Orders obtained pursuant to the SCA,[4] not a police officer or other law enforcement investigator. The orders obtained by AUSA O'Brien produced over four months of cell site location information ("CSLI")(R221-2, R221-3, Applications and Orders). It includes approximately 7,500 calls. The CSLI was ultimately used by the prosecution at trial as important evidence against Carpenter. *Supra.*

In *Warshak*, this Court held unconstitutional the use of SCA orders pursuant

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[4] AUSA O'Brien applied for and obtained Carpenter's CSLI on May 2, 2011 (R221-3: Exhibit B: Application and Order-Carpenter Metro PCS, Pg ID 1153-63) and June 7, 2011 (R221-4: Exhibit C: Application and Order-Carpenter Sprint, Pg ID 1164-74). AUSA O'Brien also applied for and obtained co-defendant Sanders CSLI on June 7, 2011. (R221-2: Exhibit A: Application and Order-Sanders, Pg ID 1141-52) Applications by an AUSA, at least in this case, were the norm.

to the same section of the statute at issue here, 18 USC §2703(d), 631 F3d at 285-88, but ultimately decided that the good faith exception should apply, where the issue had not been decided before. *Id* at 289. O'Brien's applications in this case were filed in May and June 2011, several months after this Court's opinion in *Warshak;* and, O'Brien, as the applicant and as an experienced government lawyer, was then obviously on notice, at the least based on *Warshak*,[5] that the same statute he had relied upon, had been found to be unconstitutional as applied in what the Government acknowledges in their Response here as "similar circumstances." (Appellee Brief (R41), Pg ID 52).

However, unlike *Warshak*, this Court should now conclude that the prosecutor's SCA applications here were not used in"good-faith," for at least the following reasons: (1) because the case law interpreting the constitutionality of the SCA is not finally settled, and was unsettled at the time of the applications,

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[5] In *Third Circuit Opinion*, 620 F3d 302 (3rd Cir. 2010), the court also found that §2703(d) provides a magistrate judge with discretion whether to require a warrant showing of probable cause. *Id* at 319; *see also United States v. Maynard*, 615 F3d 544, 562 (DC Cir. 2010). Also, but subsequent to the applications in this case, the Supreme Court issued its opinion in *United States v. Jones,* 132 S Ct 945 (2012), holding that attaching a GPS tracking device to a vehicle is a search within the meaning of the Fourth Amendment. According to Justice Sotomayor's concurring opinion, long term GPS tracking by the Government , which, it is asserted, is much the same as it gathering long term CSLI, "violates a long term expectation of privacy that society recognizes as reasonable." *Id* at 954 (Sotomayor, J., concurring); *see also Id.* at 964 (Alito, J., concurring).

exclusion of the CSLI evidence obtained based on the statute, but in violation of the Fourth Amendment, will deter future violations and is a constitutionally valid reason to require its suppression here, *Davis v. United States,* 131 S Ct 2419, 2434 (2011)(Sotomayor, J., concurring); (2) the applications were submitted and intentionally relied on less than probable cause after this court decided in *Warshak* that the SCA, as applied there, was unconstitutional; (3) based on decisions from other courts, the AUSA applicant should have known that the statute was unconstitutional, if used to avoid a search warrant and a finding of probable cause, *Warshak*, 631 F3d at 287.

As Justice Sotomayor observed in *Davis,* when police decide to conduct a search or seizure in the absence of case law (or other authority) specifically sanctioning such action, exclusion of the evidence obtained may deter Fourth Amendment violations:

> If, as the Government argues, all rulings resolving unsettled Fourth Amendment questions should be nonretroactive, in close cases, law enforcement officials would have little incentive to err on the side of constitutional behavior. Official awareness of the dubious constitutionality of a practice would be counterbalanced by official certainty that, so long as the Fourth Amendment law in the area remained unsettled, evidence obtained through the questionable practice would be excluded only in the one case definitively resolving the unsettled question.

Id at 2435, citing *United States v. Johnson*, 457 US 537, 561 (1982).[6]

According to precedent this Court follows, the primary purpose of the exclusionary rule "is to deter future Fourth Amendment violations." *Davis,* 131 S Ct at 2426; *Illinois v. Krull*, 480 US 340, 347 (1987)("The Court has stressed that the 'prime purpose' of the exclusionary rule 'is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures."). To that end, the Supreme Court has held on several occasions, in differing contexts, that any deterrent effect on police officers is absent if they have acted in "objective good faith." *Krull,* 480 US at 349; *see Krull,* 480 US at 343-46 (police officers conducted an administrative search of an auto parts dealer in reliance on a state statute permitting inspections even though the statute was later found to violate the Fourth Amendment on challenge by the defendant); *Davis*, 131 S Ct at 2433-34 (officers who conducted a vehicle search and seized a gun after a routine traffic stop and arrest of the occupant, acted in objective reasonable reliance on binding appellate precedent, although the precedent was subsequently changed by a new rule).

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[6] "The doctrine of good-faith reliance should not be a perpetual shield against the consequences of constitutional violations. In other words, if the exclusionary rule is to have any bite, courts must, from time to time, decide whether statutorily sanctioned conduct oversteps constitutional boundaries." *Warshak,* 631 F3d at 282, fn13.

It is also clear from these decisions that the good-faith exception cannot apply when a law enforcement officer had reason to know that the statute on which he relied for authority to conduct a search and seizure on less than probable cause, was unconstitutional. In those cases, he does not act in good faith. *Krull*, 480 US at 355. (An officer cannot "be said to have acted in good-faith reliance upon a statute if its provisions are such that a reasonable officer should have known that the statute was unconstitutional"). Similarly, when an officer decides to act without controlling legal precedent, he cannot be said to have acted in good faith. *Davis*, 131 S Ct at 2435 ("[I]n the absence of case law (or other authority) specifically sanctioning such action, exclusion of the evidence may deter Fourth Amendment violations."). These rules should be all the more clear where issues of good faith involve the application of a statute which has been found unconstitutional in another related application and where the law enforcement officer applicant is an experienced government attorney, charged with knowledge of the changes and development of the law.

It is submitted then that using the good faith exception is not supported here, where: (1) the CSLI applications were prepared and submitted to the court for orders issued on less than probable cause by an experienced prosecutor; (2) the statute explicitly provides for use of a probable cause warrant, a course apparently

intentionally by-passed in each of the three applications before the court in this case, suggesting a practice to do so by the United States Attorney for the Eastern District of Michigan; and, (3) case law counseled against the practice. In this circumstance, this court should conclude that the "remedial purposes of the exclusionary rule "[are] effectively advanced, " *Illinois v. Krull,* 480 US at 347, by suppression of the CSLI evidence obtained by the Government on a showing of less than probable cause.

D. The Erroneous Admission of Cell-Site Records was not Harmless.

Where the court has determined that evidence has been admitted at trial as the result of constitutional error, here, CSLI evidence through the testimony of Agent Hess pertaining to Counts 1, 3, 4, 7, 8, 9 and 10, it is the Government's burden to convince this court that the constitutional error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 US 18, 23-24 (1986). "If there is a reasonable probability that the evidence complained of contributed to the conviction, then the error cannot be considered harmless." *Id; United States v. Carnes*, 309 F3d 950, 963 (6th Cir. 2002). The question the court must ask is whether, given the improperly admitted evidence, "is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty." *Carnes*, 309 F3d at 963.

Here, the use of the CSLI by the Government and the detailed testimony of Agent Hess, as an FBI agent and expert, to support it, was not harmless beyond a reasonable doubt. That is so because the Government's evidence offered to establish Carpenter's guilt for the charged robberies, was largely dependent on witnesses who had plea bargained down from lengthy potential sentences in return for their testimony, if the Government determined it to be helpful.[7] There was no witness who placed Carpenter inside any store that was robbed. He was not identified by any store employee witness as someone seen in the vicinity of a robbery at about the time it occurred. While there were two videos from stores nearby the Warren, Ohio, robbery, viewed by trial witnesses who testified they believed Carpenter was seen in the video at a nearby store, all other evidence placing him near the scene of any robbery came from former defendants whose testimony was challenged because of plea bargains offering them the possibilities of very favorable sentence treatment in return for their trial testimony.

For those reasons, the prosecutor emphasized the importance of the CSLI as an "overlay or corroboration," to the jury in his closing argument (R333, TR

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[7] USSG §5K1.1 requires a motion by the prosecutor based on its determination that the government witness has provided substantial assistance in order to authorize the court to depart on those grounds. The witnesses who had entered guilty pleas and agreed to testify in return for potential §5K1.1 departures included: Michael Green; Adrian Foster; and Jesse Dismukes.

12/16/13, Gov't Closing, Pg ID 3214). As he argued, it was an integral part of his theory that the CSLI could be used by the jury to resolve their doubts about the witnesses credibility. He told the jury, for example, that Carpenter's phone put him "right where the first robbery was at the exact time of the robbery, the exact sector." Id. And, that the same was true for the robberies on December 18, 2010, March 4, 2011 and April 5, 2011.

CONCLUSION

The Government's acquisition of 127 days of Carpenter's CSLI without a warrant or probable cause was a violation of the Fourth Amendment. This Court should determine that the good-faith doctrine does not apply. It should also conclude that in the context of evidence presented at trial, substantially dependent on the testimony of co-operating defendants who testified in return for sentence concessions, the over-arching corroboration of the CSLI testimony and evidence described in the testimony of FBI Special Agent Hess, was not harmless error.

For these and all the reasons argued in Carpenter's opening brief, it is respectfully requested that this court reverse Carpenter's convictions.

Respectfully Submitted,

GUREWITZ & RABEN, PLC

By: s/Harold Gurewitz
Harold Gurewitz (P14468)
Attorney for Appellant Carpenter
333W. Fort Street, Suite 1400
Detroit, MI 48226
(313) 628-4733

DATE: May 26, 2015

CERTIFICATE OF COMPLIANCE

Appellant Carpenter certifies that his Reply Brief contains 4,401 words and complies with FRAP 32(7)(B)(I). The type face is 14 point Times New Roman.

s/Harold Gurewitz

CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2015, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to all parties of record.

s/Harold Gurewitz (P14468)
Gurewitz & Raben, PLC
333 W. Fort Street, Suite 1400
Detroit, MI 48226
(313) 628-4733
Email: hgurewitz@grplc.com

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APPELLANT 'S ADDENDUM

Appellant Carpenter, pursuant to Sixth Circuit Rule 11(b), hereby designates the following findings in the district court's record as items to be included in the joint appendix.

DESCRIPTION OF ENTRY	RECORD ENTRY NUMBER	PAGE ID - RANGE
No additional documents		

WITNESS TESTIMONY

DESCRIPTION OF PROCEEDING OR TESTIMONY	DATE	RECORD NUMBER & PAGE ID #
No additional transcript		

TRANSCRIPTS: OTHER PLEADINGS

DESCRIPTION OF ENTRY	DATE	RECORD NUMBER & PAGE ID #
No additional transcript		