No. 18-392

In the Supreme Court of the United States

AARON M. RICHARDSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in light of *Carpenter* v. *United States*, 138 S. Ct. 2206 (2018), the Court should vacate the judgment below and remand to the court of appeals to allow it to reconsider petitioner's claim that the district court should have suppressed certain historical cell-site location information, where the court of appeals denied a petition for panel rehearing and rehearing en banc five days after the Court issued its opinion in *Carpenter*.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is not published in the Federal Reporter but is reprinted at 732 Fed. Appx. 822. The order of the district court (Pet. App. 20a-21a) is unreported but is available at 2016 WL 437935. The report and recommendation of the magistrate judge (Pet. App. 22a-55a) is unreported but is available at 2015 WL 10002169.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2018. A petition for rehearing was denied on June 27, 2018 (Pet. App. 56a-59a). The petition for a writ of certiorari was filed on September 25, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of one count of attempted murder of a United States district judge, in violation of 18 U.S.C. 1113 and 1114; one count of using, carrying, and discharging a firearm during and in relation to a crime of violence and possessing and discharging a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c); one count of possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2); one count of possession of a stolen firearm and ammunition, in violation of 18 U.S.C. 922(j) and 924(a)(2); six counts of making false statements to the Federal Bureau of Investigation (FBI), in violation of 18 U.S.C. 1001; one count of stealing a firearm from a licensed firearms dealer, in violation of 18 U.S.C. 922(u) and 924(i)(1); two counts of failing to appear for a federal-court hearing, in violation of 18 U.S.C. 3146; ten counts of making false statements to the United States Probation Office while on supervised release, in violation of 18 U.S.C. 1001; and one count of impersonating an officer of the United States, in violation of 18 U.S.C. 912. Judgment 1. Petitioner committed most of these crimes while on release, in violation of 18 U.S.C. 3147(1). Indictment 1-15. Petitioner was sentenced to 4116 months of imprisonment, to be followed by five years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 1a-19a.

1. The charges in this case arise out of petitioner's attempted murder of United States District Court Judge Timothy J. Corrigan. Pet. App. 2a.

a. In 2011, Judge Corrigan sentenced petitioner to time served and three years of supervised release for an

unrelated federal offense. Pet. App. 2a. In March 2012, the university that petitioner attended suspended him after learning that he was on supervised release, which violated school policy. Presentence Investigation Report (PSR) ¶¶ 26-27. Petitioner sought early termination of supervised release, but Judge Corrigan denied the request. Pet. App. 2a; PSR ¶¶ 32-33.

Between October 2012 and April 2013, petitioner committed various burglaries and thefts, was repeatedly arrested for those and other state offenses, and made various false statements to his probation officer regarding his contacts with law enforcement. Pet. App. 2a; PSR ¶¶ 35-58. Petitioner's probation officer ultimately filed a petition for revocation of supervised release and, on May 23, 2013, served petitioner with a summons to appear in federal court on June 3, 2013, to answer the petition. Pet. App. 2a-3a; PSR ¶¶ 54-58. Petitioner failed to appear for that hearing or for a rescheduled hearing on June 11, 2013, claiming that he had missed the first because of a family funeral and the second because of a bus accident. PSR ¶¶ 61-63.

In fact, petitioner had begun working on a plan to murder Judge Corrigan, an effort petitioner termed "Mission Freedom." Pet. App. 3a. Petitioner found Judge Corrigan's home address and telephone number on the internet and stored the phone number as "Mission Freedom" in his phone's contact list. *Id.* at 3a & n.1; PSR ¶ 60. On June 11, 2013, petitioner sent his mother a series of text messages, telling her that he was "going to get freedom documents" and stating, "I gotta complete my mission then I can come home free." PSR ¶ 65. On June 15, 2013, petitioner visited a sporting-goods store and inspected two rifles. PSR ¶¶ 66-67. He returned to the store five days later, hid inside until it

closed, and then stole a rifle and ammunition in the early morning hours of June 21, 2013. Pet. App. 3a; PSR ¶¶ 69-71.

On the evening of June 22, 2013, petitioner bought a movie ticket from a theater near Judge Corrigan's home. Pet. App. 3a; PSR ¶ 73. Several hours later, Judge Corrigan and his wife were watching television in their home when a gunshot shattered the window near where the judge was sitting. Pet. App. 3a. Although the bullet did not strike Judge Corrigan or his wife, shards of metal from the window frame lacerated Judge Corrigan's head and forearm. *Ibid.*; see PSR ¶ 73. Less than two hours later, petitioner entered a bar near Judge Corrigan's home with an apparent "scope bite," an eye injury that occurs when a rifle's recoil causes the scope to strike the shooter. Pet. App. 3a.

Two days later, on June 25, 2013, the police went to arrest petitioner at his apartment for failing to appear at his revocation hearings. Pet. App. 4a. During a search of the apartment, the police found the rifle that petitioner had stolen from the sporting-goods store. *Ibid.* The rifle's trigger guard was covered with electrical tape that matched tape found in the bushes outside Judge Corrigan's home. *Ibid.* In addition, the gun's size and rifling were consistent with the bullet recovered from Judge Corrigan's home, and petitioner's DNA was on the rifle's scope. *Ibid.* The police also recovered ammunition, petitioner's cell phone, and a sham order bearing Judge Corrigan's forged signature that purported to pardon petitioner's entire criminal history. *Ibid.* During a later interview with the FBI, petitioner claimed that he had been home on the night of the shooting and had no knowledge of the rifle in his apartment. *Id.* at 4a-5a.

b. In the early stages of the investigation into Judge Corrigan's attempted murder, the FBI applied for and received court orders pursuant to the Stored Communications Act (SCA), 18 U.S.C. 2701 *et seq.*, to obtain specified cell-site location information (which indicates cellphone connections to cell towers) to narrow the pool of potential suspects in the case. 3/14/16 Trial Tr. (Trial Tr.) 24-26; see Pet. App. 10a; 18 U.S.C. 2703(c)(1). That cell-site location information allowed the FBI to "eliminate[] quite a few" names from its list of potential suspects. Trial Tr. 26; see *id.* at 24-26.

The FBI added petitioner to its suspect list on June 25, 2013, the day of petitioner's arrest. Trial Tr. 165. Thereafter, in response to a court order issued under Section 2703(d) of the SCA, Verizon Wireless provided the government with cell-site location records for petitioner's phone for the period from June 5 to 25, 2013. Trial Tr. 26-29, 53. The records showed that at 4:13 p.m., 4:14 p.m., and 4:29 p.m. on June 11, 2013, approximately 11 days before the shooting, petitioner's phone had connected to a cell tower located about a mile away from Judge Corrigan's house. Trial Tr. 61-65. Verizon's records for petitioner's phone included no cell-site location information for the night of the shooting or for the night when petitioner stole the rifle from the sporting-goods store. *Id.* at 65-66.

2. In September 2013, a grand jury returned an indictment charging petitioner with one count of attempted murder of a United States district judge, in violation of 18 U.S.C. 1113 and 1114; one count of using, carrying, and discharging a firearm during and in relation to a crime of violence and possessing and discharging a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c); one count of possession of

a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2); one count of possession of a stolen firearm and ammunition, in violation of 18 U.S.C. 922(j) and 924(a)(2); six counts of making false statements to the FBI, in violation of 18 U.S.C. 1001; one count of stealing a firearm from a licensed firearms dealer, in violation of 18 U.S.C. 922(u) and 924(i)(1); two counts of failing to appear for a federal-court hearing, in violation of 18 U.S.C. 3146; 11 counts of making false statements to the United States Probation Office while on supervised release, in violation of 18 U.S.C. 1001; and one count of impersonating an officer of the United States, in violation of 18 U.S.C. 912. Indictment 1-15. The indictment specified that petitioner committed most of these crimes while on release, in violation of 18 U.S.C. 3147(1). Indictment 1-15.

Before trial, petitioner moved to suppress various categories of evidence, including the cell-site location information for his phone. D. Ct. Doc. 63, at 4-9 (Aug. 13, 2015). In the motion, petitioner acknowledged that the court of appeals' decision in *United States* v. *Davis*, 785 F.3d 498 (11th Cir.) (en banc), cert. denied, 136 S. Ct. 479 (2015), was "adverse to [his cell-site] claim." D. Ct. Doc. 63, at 7. In *Davis*, the en banc court of appeals had held that the government's acquisition of cell-site records pursuant to a court order issued under 18 U.S.C. 2703(d) did not violate the Fourth Amendment rights of the individual customer to whom the records pertain. 785 F.3d at 511-513, 516-518. *Davis* had alternatively held that that the good-faith exception to the exclusionary rule applied because the prosecutors and officers in that case acted in good faith. *Id.* at 518 n.20. A magistrate judge recommended that the district court deny petitioner's motion to suppress the cell-site

location information, Pet. App. 22a, 54a, and the court accepted the recommendation and denied the motion, *id.* at 20a-21a.

Petitioner proceeded to trial, where the government presented evidence of the facts described above. See Pet. App. 2a-5a; Gov't C.A. Br. 4-21. In addition, an FBI agent testified about the cell-site location information for petitioner's phone and explained that the information showed that petitioner was within a mile of Judge Corrigan's house on June 11, 2013, between 4:13 p.m. and 4:29 p.m. Trial Tr. 62. The agent further testified that the cell-site records for petitioner's phone included no cell-site location information for the time of the shooting, which meant that the agent could neither "rul[e] [petitioner] in" nor "rul[e] [him] out" based on the cell-site records. *Id.* at 66. The agent stated that, based on the cell-site records, he "couldn't tell [the jury] one way or the other" where petitioner was on the night of the shooting "because there was no phone activity that night." *Id.* at 68.

The jury found petitioner guilty on all counts, except for one count of making a false statement to the United States Probation Office. Judgment 1.

3. Petitioner appealed, claiming in part that the government violated his Fourth Amendment rights when it acquired his cell-site location information without a search warrant. Pet. C.A. Br. 21-23. After the parties filed their briefs in the court of appeals, this Court granted the petition for a writ of certiorari in *Carpenter* v. *United States*, No. 16-402 (June 5, 2017), to consider whether the government's acquisition, pursuant to a court order issued under 18 U.S.C. 2703(d), of historical cell-site records created and maintained by a cell-

service provider violates the Fourth Amendment rights of the individual customer to whom the records pertain.

On May 1, 2018, the court of appeals affirmed. Pet. App. 1a-19a. As relevant here, the court rejected petitioner's contention that the district court should have granted his motion to suppress his cell-site location information. *Id.* at 10a-11a. The court of appeals explained that petitioner's suppression argument "fail[ed]" because the court was "bound by" its earlier decision in *Davis*. *Id.* at 11a. The court did not address the government's alternative argument that any error in admitting the cell-site location information was harmless. *Id.* at 10a-11a; see Gov't C.A. Br. 36-37.

In a separate opinion, Judge Martin acknowledged that *Davis* remained binding circuit precedent but noted that she had previously explained her disagreement with that opinion. Pet. App. 19a (Martin, J., concurring in part and dissenting in part). Judge Martin stated, "The parties to this proceeding are aware, of course, that the Supreme Court has recently heard arguments on a similar Fourth Amendment challenge, which may mean that this issue will need to be revisited." *Ibid.* (citing *Carpenter*, *supra*).

4. Petitioner filed a petition for panel rehearing and rehearing en banc. Pet. for Reh'g i & n.1. In the petition, petitioner contended that the panel's decision in his case "may be contrary to" the Court's forthcoming decision in *Carpenter*, which petitioner predicted that the Court would issue by June 25, 2018. *Id.* at i. Petitioner further contended that the cell-site location information for his phone was "important to the government's case against [him]." *Id.* at 3 (capitalization altered).

On June 22, 2018, this Court held in *Carpenter* v. *United States*, 138 S. Ct. 2206 (2018), that the government's acquisition of seven or more days of historical cell-site location records created and maintained by a cell-service provider is a Fourth Amendment search generally subject to the warrant requirement. *Id.* at 2216-2223. Five days later, the court of appeals denied the petition for rehearing in this case, with no judge in regular active service on the court requesting that the court be polled on rehearing en banc. C.A. Order Denying Reh'g 1-2. Judge Martin signed the orders denying the petition. *Ibid.*

ARGUMENT

Petitioner contends (Pet. i) that this Court should grant the petition for a writ of certiorari, vacate the court of appeals' decision, and remand the case to allow that court to reconsider his Fourth Amendment challenge to the government's acquisition of his cell-site location information in light of this Court's decision in *Carpenter* v. *United States*, 138 S. Ct. 2206 (2018). As petitioner acknowledges (Pet. i), however, he previously asked the court of appeals to rehear his case in light of *Carpenter*, and the court denied that rehearing petition shortly after *Carpenter* issued. That denial indicates that the court of appeals has already determined that *Carpenter* does not change the outcome of petitioner's case. That determination is correct because the good-faith exception to the exclusionary rule applies and because any error in admitting the cell-site data was harmless. Further review is not warranted.

1. Under this Court's decision in *Carpenter*, the government's acquisition of 20 days of cell-site records for petitioner's phone was a Fourth Amendment search that required a warrant. See 138 S. Ct. at 2216-2223.

But "[t]he fact that a Fourth Amendment violation occurred * * * does not necessarily mean that the exclusionary rule applies." *Herring* v. *United States*, 555 U.S. 135, 140 (2009). As this Court has explained, the exclusionary rule is a "judicially created remedy" that is "designed to deter police misconduct rather than to punish the errors of judges and magistrates." *United States* v. *Leon*, 468 U.S. 897, 906, 916 (1984) (citation omitted). "As with any remedial device, application of the exclusionary rule properly has been restricted to those situations in which its remedial purpose is effectively advanced." *Illinois* v. *Krull*, 480 U.S. 340, 347 (1987).

The exclusionary rule therefore does not apply "where [an] officer's conduct is objectively reasonable" because suppression "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." *Leon*, 468 U.S. at 919. For that reason, "evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Ibid.* (citation omitted).

That good-faith exception to the exclusionary rule applies here because the officers reasonably relied on a court order issued under the SCA to acquire petitioner's cell-site records. This Court has held that the good-faith exception applies to "officer[s] acting in objectively reasonable reliance on a statute," later deemed unconstitutional, that authorizes warrantless administrative searches. *Krull*, 480 U.S. at 349; see *id.* at 342. It follows *a fortiori* that officers act reasonably in rely-

ing on a statute that authorizes the acquisition of records only pursuant to an order issued by a neutral magistrate.

At the time the records were acquired in petitioner's case, moreover, no binding appellate decision (or holding of any circuit) had suggested, much less held, that the SCA was unconstitutional as applied to historical cell-site records. See *United States* v. *Davis*, 785 F.3d 498, 509-510 & n.10 (11th Cir.) (en banc) (recognizing that, at that time, the Fifth Circuit was the only other court of appeals that had addressed the Fourth Amendment's application to historical cell-site records), cert. denied, 136 S. Ct. 479 (2015); *In re Application of the U.S. for Historical Cell Site Data*, 724 F.3d 600, 615 (5th Cir. 2013) (holding that the Fourth Amendment permits the government to use court orders issued under 18 U.S.C. 2703(d) to obtain historical cell-site location information). Cf. *Davis* v. *United States*, 564 U.S. 229, 241 (2011) ("Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule."). Accordingly, suppressing the historical cell-site data here would not have the requisite deterrent effect on future unlawful conduct, and application of the exclusionary rule would therefore be inappropriate. See *Davis*, 785 F.3d at 518 n.20 (holding that, even if the Fourth Amendment required a search warrant for historical cell-site location records, the good-faith exception applied in that case because "the prosecutors and officers here acted in good faith").

2. In addition, even if the good-faith exception to the exclusionary rule did not apply, any error in admitting petitioner's historical cell-site information at trial was harmless. See *Neder* v. *United States*, 527 U.S. 1, 18

(1999) (observing that constitutional error is harmless when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error"). Although cell-site location information was valuable in the early stages of the investigation into Judge Corrigan's attempted murder because it allowed the FBI to narrow the pool of potential suspects in the case, see Trial Tr. 24-26; U.S. Br. at 52, *Carpenter*, *supra,* petitioner's own cell-site location information did not play a significant role at trial.

First, the cell-site location information was limited in scope and included no data for either the night of the shooting or for the night when petitioner stole the rifle that he used in that crime. See Trial Tr. 65-66. Because the cell-site records thus did not reveal where petitioner was when the shooting occurred, the cell-site location information did not allow the FBI to either "rul[e] him in" or "rul[e] [him] out" as a suspect in that crime. *Id.* at 66; see *id.* at 68.

Second, to the extent that the cell-site location information placed petitioner within a mile of Judge Corrigan's house on June 11, 2013, between 4:13 p.m. and 4:29 p.m., see Trial Tr. 61-65, that evidence (which was irrelevant to many counts of conviction) was cumulative of other evidence showing petitioner's location at that time. As the government explained in closing argument, petitioner sent a text message on June 11, 2013, at 4:17 p.m., in which he described his location with specificity. 3/17/16 Trial Tr. 24-25 (prosecutor quotes text message during closing argument); see 3/12/16 Trial Tr. 229, 252-253 (text messages from petitioner's phone received in evidence). The location petitioner described in the text message was less than a mile from Judge Corrigan's house. 3/17/16 Trial Tr. 25.

Finally, the other evidence of petitioner's guilt was overwhelming. That evidence included petitioner's internet searches for Judge Corrigan's home address and telephone number; surveillance video and other evidence showing that, two days before the shooting, petitioner stole a rifle with the characteristics of the gun used in the crime; petitioner's purchase of a movie ticket near Judge Corrigan's home on the evening of the shooting; petitioner's presence at a bar near the judge's house two hours after the shooting; the apparent "scope bite" injury petitioner exhibited at the bar; petitioner's false statements about being home on the night of the shooting and having no knowledge of the rifle in his apartment; and the sham order bearing Judge Corrigan's forged signature in petitioner's apartment. See Gov't C.A. Br. 4-21. In light of the other trial evidence, it is clear that the jury would have returned guilty verdicts on all counts of conviction even if the historical cell-site data had not been admitted at trial.

3. Petitioner contends (Pet. 6) that the court of appeals "was likely still relying on its decision in *Davis*" when it denied his rehearing petition. The circumstances surrounding that denial do not support petitioner's contention. When the panel issued its opinion in petitioner's case on May 1, 2018, Judge Martin noted in a separate opinion that petitioner's cell-site claim might "need to be revisited" because this Court had recently heard arguments in *Carpenter*. Pet. App. 19a. In his subsequent rehearing petition, petitioner likewise argued that the court of appeals' decision in his case might conflict with this Court's forthcoming decision in *Carpenter*, which petitioner predicted the Court would issue by June 25, 2018. Pet. for Reh'g i. The Court issued *Carpenter* on June 22, 2018, and five days later,

the court of appeals denied petitioner's rehearing petition. C.A. Order Denying Reh'g 1-2.

That sequence of events indicates that the court of appeals was aware of *Carpenter* and denied the rehearing petition only after determining that *Carpenter* did not change the outcome in petitioner's case. Because the court of appeals has thus already had the opportunity to consider petitioner's case in light of *Carpenter*, no basis exists for vacating that court's decision and remanding the case for the court to revisit that question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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