No. 18-392

IN THE SUPREME COURT OF THE UNITED STATES

AARON M. RICHARDSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

In following *United States v. Davis*, 785 F.3d 498 (11th Cir.), cert. denied, 136 S. Ct. 479 (2015) ("*Davis*"), no court – from the magistrate judge who permitted the government to obtain Mr. Richardson's CSLI without a warrant, to the district court judge who refused to suppress the CLSI, to the Eleventh Circuit – ever engaged in the analysis that the United States has undertaken, and urges is unnecessary based on its own conclusion as to the result of that analysis. Mr. Richardson, unsurprisingly, concludes differently and asks only that this court grant the petition, vacate the decision of the Court of Appeals for the Eleventh Circuit, and remand for the court to reexamine the case and apply the legal standards pronounced in *Carpenter v. United States*, 585 U.S. ___, 138 S. Ct. 2206 (2018).

The three reasons the United States believes further review is unwarranted do not comport with procedural due process and are not supported by case law.

First, the United States contends that the good faith exception to the exclusionary rule applies, so further review is not warranted. Opp. Br. at 9-11. But the question of whether the good faith exception to the exclusionary rule can be applied in this case to permit the admission of the CSLI is one of the issues that the court would need to determine on remand. At the time the CSLI was obtained in 2013, *Davis* had not been decided in the Eleventh Circuit, and therefore clear legal precedent did not exist. *Cf. Davis v. United States*, 564 U.S. 229, 131 S.Ct. 2419, 2423–24 (2011) (affirming application of the good

faith exception where search followed then-binding, clear, bright-line circuit law). In the Eleventh Circuit's decision in this case, because of reliance on *Davis*, it did not undertake the good faith analysis. A court, not opposing counsel, needs to examine the case to determine whether the exclusionary rule applies under these facts where what has been held to be the wrong legal standard was applied.

Second, a court, not appellate attorneys, should have the opportunity to decide whether the error in the admission of CSLI evidence obtained by a warrantless search was harmless. Opp. Br. at 9, 11-13. The government's characterization of the narrow use of CSLI evidence presented via documentary exhibits and numerous witnesses, including an expert, and conclusion that "it did not play a significant role at trial" is mistaken. *Id.* at 12. The three weeks of CSLI the government obtained was introduced to tie Mr. Richardson to many aspects of the shooting, including planning and implementation. It was critical evidence for the government in establishing Mr. Richardson's location relating to several false statement counts for which he was found guilty and received non-concurrent sentences. The importance of the evidence is underscored by the government's multiple references in its closing arguments to what that CSLI proved. 3/17/16 Trial Tr. at 21-25.

Because of the standard in *Davis*, which the lower courts and both parties acknowledged applied at the time the issue of suppressing CSLI arose, neither of those first two legal issues have been presented to or considered by a judge. The government acknowledges as much. Opp. Br. at 6, 8.

Third, the United States makes unwarranted inferences from the Eleventh Circuit's denial of Mr. Richardson Petition for Rehearing. The government seeks to equate the denial of the en banc and rehearing request as a review on the merits in which *Carpenter* was applied in the analysis. Opp. Br. at 13-14. The United States posits that because the denial was issued five days after this Court's ruling in *Carpenter,* the Eleventh Circuit was not only aware of *Carpenter*, but "denied the rehearing petition only after determining that *Carpenter* did not change the outcome in [the] case." *Id.* at 14. There is no basis in the record for the assumption that "the court of appeals has thus already had the opportunity to consider petitioner's case in light of *Carpenter*." *Id.* Indeed, the exact opposite conclusion is equally, if not more, plausible. The very Eleventh Circuit Judge who wrote separately to dissent in *Davis* acknowledged in her separate opinion in this case that the decision in *Carpenter* "may mean that this issue [of the application of *Davis*] will need to be revisited." Pet. App. 19a. It defies logic that the Judge's rehearing denial reflects that an analysis was engaged in so quickly after *Carpenter* that changed her view about the need to revisit the case. Instead, the timeline suggests that the Eleventh Circuit may not have fully considered this case in light of the 114-page *Carpenter* opinion.

CONCLUSION

For the foregoing reasons, this Court should grant the petition, vacate the decision of the Court of Appeals for the Eleventh Circuit, and remand for the court to consider the case under *Carpenter*.

Respectfully submitted,

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