No. 18-7129

IN THE
SUPREME COURT OF THE UNITED STATES

BRENNAN CHRISTIAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ Of Certiorari
To The Fourth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

BRENNAN CHRISTIAN,
Petitioner pro se,
33318-057
Federal Medical Center
Post Office Box 14500
Lexington, Kentucky 40512

QUESTIONS PRESENTED

1. Has the Fourth Circuit Court of Appeals misapplied this Court's ruling in Carpenter v. United States (138 S.Ct. 2206, 2217, 2220 (2018)) regarding cell phone records being Constitutionally protected under the Fourth Amendment, and instead deferring to the District Court's discretion and "decision not to suppress evidence seized after a search of historical cell cite records" over Petitioner's Constitutional rights defined in Carpenter that are not subject to the District Court's discretion?

2. Has the Fourth Circuit Court of Appeals begun to establish a precedential stare decisis beginning with United States v. Chavez, (No. 16-4499), 894 F.3d 593 (4th Cir. 2018), and continuing through Petitioner's case that splits the Fourth Circuit from the other Circuits respective to the correct application of Carpenter?

3. Should Chavez be granted Certiorari, is Petitioner's case similarly situated enough so as to warrant Certiorari, despite Petitioner's pro se instant Petition shortcomings?

4. Should Chavez not be granted Certiorari, is Petitioner's case sufficiently attenuated or unique enough to warrant Certiorari, despite Petitioner's pro se instant Petition shortcomings?

LIST OF PARTIES

1. BRENNAN CHRISTIAN, Petitioner.

2. UNITED STATES OF AMERICA, Respondent.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Cases:

Constitutional Provisions:

Statutes:

Rules:

OPINIONS BELOW

The per curiam Opinion in Appeal No. 17-4715, issued on September 10, 2018 is Unpublished.

The Judgment in Case No. 1:16-cr-00207-LMB-1, issued on November 3, 2017 is Unpublished.

JURISDICTION

In Appeal No. 17-4715, the United States Court of Appeals for the Fourth Circuit affirmed the conviction in Criminal Case No. 1:16-cr-00207-LMB-1 originating from the United States District Court for the Eastern District of Virginia, Alexandria Division.

The Judgment Order was issued on September 10, 2018, in an unpublished Per Curiam opinion. The Order appears at Appendix A.

The Mandate was issued on October 2, 2018. There was no Petition for Rehearing filed in Appeal No. 17-4715.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution - Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unresonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution - Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution - Amendment VI

In all criminal prosecutions, the accused shall emjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be

informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Title 21 United States Code — §841(a)(1)

§ 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or....

Title 21 United States Code — §846

§ 846. Attempt and conspiracy

Any person who attempts or conspires to committ any offense defined in this title shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

1. Petitioner appears pro se and respectfully prays this Court observe the standards of liberal construction, to accept all facts asserted herein as true, and to treat the instant Motion/Petition with special solicitude in consideration of Petitioner's pro se status and lack of legal training. Haines v. Kerner, 404 U.S. 519 (1972); Erickson v. Pardus, 551 U.S. 89 (2007).

2. Aside from additional points raised below, Petitioner elects to adopt and submit the "Statement of the Case" originally submitted in his Direct Appeal - Brief of Appellant. (Appeal: 17-4715 Doc: 27 Filed: 04/09/2018 Pgs: 9-23 of 46) [internal numbers: 3-17]. These pages appear herein at Appendix C.

3. In a case originating from the Eastern District of Virginia (the same district of Petitioner's case), the Court of Appeals decided the Direct Appeal in United States v. Chavez, (No. 16-4499, July 2, 2018). There are similarities between that case and Petitioner's case. Chavez is currently before the Supreme Court on a Petition for Writ of Certiorari. The instant Petition seeks similar review to that of Chavez, on similar grounds.

REASONS THE WRIT SHOULD BE GRANTED

This Court has held that cell phone records are within the protections of the Fourth Amendment, and for law enforcement to be in compliance with same, a particularized search warrant is required. Carpenter v. United States, 138 S.Ct. 2206, 2217, 2220 (2018). Within this context, the good faith exception standard established in United States v. Leon, 468 U.S. 897 (1984), is less perfunctory vis-a-vis historical or geographical cell phone data, and requires a clear distinction for probable cause by the affiant seeking the search warrant, accompanied by a more nuanced scrutiny by the Magistrate or Judge, to determine if the warrant application is attenuated and detailed enough to transcend from 'general warrant' to particularized 'Carpenter and Leon-compliant warrant'. Furthermore, "[i]n determining whether a search warrant is supported by probable cause, the crucial element is not whether the target of the search is suspected of a crime, but whether it is reasonable to believe that the items to be seized will be found at the place to be searched." United States v. Lalor, 996 F.2d 1578, 1582 (4th Cir. 1993) (citations omitted). In Petitioner's case, the cell phone and its data were employed to be a de facto surveillance device. The warrant was deftly worded to rely on Leon (should the warrant, search, or evidence be challenged) and to capitalize on the low number of cell phone/GPS tracking warrant cases, to then rely on Leon by an anticipated default.

This reliance on "benefit-of-the-doubt" Leon and its good faith exception applies, or should apply, only in those cases where actual 'good faith' of the search warrant applicant can be shown. In Petitioner's case, it was not good faith, but rather a tool of expediency to gather unparticularized data - namely, a series of locations where the possessor of the cell phone (not necessarily BRENNAN CHRISTIAN, and not known to law enforcement) had travelled, providing law enforcement with a plethora of physical locations for which they could apply for additional search warrants.

A key difference between this form of tracking and that done by law enforcement using 'eyes-on' literal surveillance is that in the former, a computer system passively identifies the general location of a cell phone regardless of who is in possession of the cell phone and without and detail as to the activity (legal or illegal) of the possessor of the cell phone. In the latter, trained law enforcement personnel can and do continually identify the individual being surveilled as well as the conduct of the individual at each location.

As a surveillance warrant comes very close to the proscribed general warrant forbidden by the Fourth Amendment, and requires adetailed and particularized search warrant affidavit generally well beyond any Leon reliance, the cell phone/GOS warrant requires as much, if not more — to ensure that the automated surveillance via cell phone is not a general warrant violative of Petitioner's Fourth Amendment protections.

The Carpenter decision established that, to paraphrase, as a subsequent result of the increased computing and data power of cell phones and cell phone 'ping' data becoming increasingly accurate, the standard data produced by the cell phones has become so revealing and informative, that the access to such a wealth of data (and its subsequent use) requires law enforcement to provide true probable cause to the Magistrate or Judge to acquire such a powerful tool's use in a criminal investigation and not run afoul of the Fourth Amendment. The papers and effects protected by the Fourth Amendment have been equated to the personal computing device or cell phone storage capabilities available today. Chief Justice Roberts wrote of this technological development and its Fourth Amendment implications.* The warrant requirement established in Katz v. United States, 389 U.S. 357 (1967) allows for "a specific exception to the warrant requirement"; warrantless tracking in real time (or soon thereafter) of a cell phone via GPS data is not a "specific exception", it is investigatory short cutting (or electronic surveillance) that was not and could not be addressed in Katz, nor Berger v. New York, 388 U.S. 41, 63 (1967), nor even the Omnibus Crime Control and Safe Streets Act of 1968, because the technology of today was not the technology of the late 1960's. (Id. at 347).

Katz instructs, "[w]hat a person knowingly exposes to the public, even in...own home or office, is not a subject of [4th]

* Exact citation unknown (not located) by pro se Petitioner. Known only to memory of reading case summaries of Supreme Court.

Amendment protection." (Id.). In Petitioner's case, it was not only cell phone call data of telephone calls placed, but also the passive transportation of the cell phone (on Petitioner's person) that was recorded. The cell phone, nor the use of the cell phone for its primary purpose by Petitioner was not "knowingly expose[d] to the public" neither at home nor on any public street or way. Unless the cell phone was actively used by Petitioner for making a call or text message, there was no knowing exposure to the public, it was simply an electronic device not in use at the moment, whose location was tracked by the cell phone service provider for purposes of network connectivity. Warrant requirement, cell phone data capabilities, and related elements have been addressed by this Court in Riley v. California, 134 S.Ct. 2473, 2482 (2014) and its partner case United States v. Wurie, 134 S.Ct. 2473 (2014). These cases have set forth that if law enforcement desires cell phone data or the cell phone itself then the data, "get a warrant". Id. The Carpenter decision reaffirmed the 4th Amendment implications of gathering cell phone data, and that being Constitutional in nature, the protections afforded by the 4th Amendment should rightfully take precedence over any judicial discretion either in warrant approval or at trial where the Katz "specific exception" is unclear (or non-existent), and where blanket application of Leon is wholly inappropriate, given the circumstances, and the investigative conduct of law enforcement.

The attenuation of the warrant requirement of probable cause to a higher standard under Carpenter, although rigorous for law enforcement, is more than resonable given the greater breadth and depth (and sheer volume) of data that comes into the possession of law enforcement, unimaginable in scope merely ten years ago, let alone 1967-68 when Katz and Berger were decided and the Omnibus Act was passed.

The District Court erred by not applying the Carpenter analysis to Petitioner's case. The District Court further erred by deciding a matter of Constitutional protections under the Fourth Amendment as within the Court's discretionary power rather than deferring to its Constitutional mandate as explained in Carpenter. Furthermore, as Petitioner's case chronologically overlapped Carpenter under Certiorari, the matter was ripe for application, and the failure of the District Court to do so was a Due Process violation, per the Equal Protection clause. As Petitioner's case was at trial, and not by plea agreement, Petitioner's innocence was always maintained and the inclusion of the evidence directly violated Petitioner's Fair Trial guarantee under the Sixth Amendment. As to each of these matters above, the Court of Appeals further erred in each instance by and through affirming the District Court's decisions.

Known to Petitioner is the current application (or non-application) of Carpenter by the Fourth Circuit Court of Appeals. There is a developing pattern with the instant Petitioner's Direct Appeal being decided in the wake of United States v. Chavez,.(No. 16-4499), 894 F.3d 593 (4th Cir. 2018). Petitioner posits that the Fourth Circuit is in error. Petitioner further states that Courts of Appeal in the other Circuits are likely to have applied Carpenter as this Court had intended. Such a split between Circuits is an issue ripe for review by this Court under Rules of the Supreme Court, Rule 10(a).

Due to the nature of doing legal research in a prison, Petitioner has had no access to published cases from the other Circuits wherein Carpenter is applied in accordance with the Court's ruling.

The general outline and limited details of the Chavez case (894 F.3d 593 (4th Cir. 2018)) are known to Petitioner through reading a case summary. To Petitioner's best understanding, the portions of Chavez's case pertaining to: (1) cell phone/GPS data usage by law enforcement; (2) Leon 'good faith' exception; and (3) non-alignment of the Fourth Circuit Court of Appeals with this Court's Carpenter decision; are all similar enough that should Certiorari be granted to Chavez, Petitioner is similarly situated to such a degree, within the same Circuit, as to also warrant Writ of Certiorari examination and remand back to the Fourth Circuit.*

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* Note: Pro se Petitioner has no access to the documents in Chavez's Direct Appeal nor his documents submitted to this Court. As such, pro se Petitioner is unable to further develop the above.

It is Petitioner's current understanding that there are marked differences between his case and that of Chavez. As stated on the previous page and its footnote, Petitioner is at a disadvantage to argue this point fully, but does so below to raise the issue(s) and place them into the record.

Should Chavez not be granted the Writ of Certiorari, Petitioner prays the Honorable Supreme Court take notice of the following differences between the two cases.

Chavez:

1- Recorded by confidential informant admitting to murders;

2- The witnesses against Chavez were his codefendants, who were also friends and associates;

3- There was no mistrial in Chavez's proceedings.

Petitioner:

1- No recording by confidential informant admitting to crime;

2- There were three codefendants;
   2(a) They did not know Petitioner, and vice versa;
   2(b) They were illegal aliens with a vested interest in cooperating with Government to avoid deportation;
   2(c) They have a record of lying (perjury) in the case, under oath and on the witness stand - they all changed testimony;

3- There were two mistrials in Petitonre's proceedings;
   3(a) Mistrial One - hung jury (no telephone in evidence)
   3(b) Mistrial Two - jury brought into courtroom before Petitioner.

Another difference between the first and second trials of Petitioner has no comparable equivalent to Chavez, nevertheless, its relevence is apparent, and premiates Petitioner's objections at trial, issues on appeal, and continues through the instant Petition.

The introduction of the cell phone and its accompanying data occurred during the **second trial**, not the first. Petitioner posits that the Government knew of the illegal or unlawful cell phone data (or the method by which the data was gathered), or even its usage being prejudicial or unlawful - thereby damaging to their case before a jury.

When the first trial resulted in a mistrial, and with time and resources having been heavily invested in the case (law enforcement and prosecution), the Government chose to introduce the cell phone data, hoping for a conviction in the second trial and taking the gamble that the cell phone and data evidence would not be suppressed.

Petitioner asserts that the Government had the cell phone and its data available for the first trial, but knowingly elected to not use it. The District Court erred by not suppressing the evidence at the second trial, effectively giving the Government a "second bite at the apple", despite the "new" evidence not being by any means actually new chronologically, predating the commencement of the first trial. On these terms the Court of Appeals failed to correct the District Court, and on additional or related terms also failed to correct the District Court on the cell phone/GPS and data issue per Carpenter.

CONCLUSION

WHEREFORE, in consideration of the facts, authorities, and argument set forth above, pro se Petitioner BRENNAN CHRISTIAN humbly prays the Honorable Justices of the Supreme Court GRANT the instant PETITION FOR WRIT OF CERTIORARI.

Submitted under penalty of perjury and in accordance with 28 U.S.C. §1746.

Respectfully Submitted,

Brennan Christian — 12-7-2018

BRENNAN CHRISTIAN — DATE