NO. 18-7811

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

RONALD BISHOP THOMPSON -- PETITIONER

vs.

NOAH NAGY -- RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE SIXTH CIRCUIT FEDERAL COURT OF APPEALS

RONALD BISHOP THOMPSON
MDOC No. 810396
Lakeland Correctional Facility
141 First Street
Coldwater, MI 49036

QUESTIONS PRESENTED

1

Did trial counsel perform ineffectively at Petitioner's second trial,when Petitioner's first trial,in which there was no mention of cell phone testimony, ended in a hung jury, by failing to object on Fourth Amendment grounds when the prosecution in the second trial made cell-site location information the literal bookends of its case?

2

Is the Stored Communications Act, 18 USC §§ 2701-2712 Unconstitutional because it allows cell site location information to be divulged to law enforcement without a warrant?

3

Was trial counsel ineffective for failing to examine the Detroit Police Department's request for the §2703(d) Order to determine whether or not it complied with the mandatory language of the SCA and subsequently to examine the magistrate's granting of the request?

4

Was trial counsel ineffective for failing to object to the cellular telephone evidence on Fourth Amendment grounds and to request a pretrial suppression hearing reqarding the same.

5

Was appellate counsel ineffective for failing to raise ineffective assistance of trial counsel?

6

Was the Detroit Police Department's acquisition of Petitioner's cell-site records a search under the Fourth Amendment?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. The sole party is Lakeland Correctional Facility's Warden Noah Nagy.

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These Court Opinions are supplemented by the Rule 5 Material which was served upon the Clerk of the United States District Court for the Eastern District of Michigan, Southern Division, as set forth as follows in the Index of Record:

Index of Record 2:16-cv-13998

1. Wayne County Register of Actions 10-008679-01-FC

2. 08-17-2010 Preliminary Examination Transcript I

3. 08-18-2010 Preliminary Examination Transcript II

4. 11-19-2010 Decision on Motion to Quash Bindover Transcript

5. 02-17-2011 Jury Trial Transcript (Excerpt -79 pages)

6. 02-17-2011 Jury Trial Transcript (Excerpt -96 pages)

7. 02-23-2011 Jury Trial Transcript (Excerpt -123 pages)

8. 02-23-2011 Jury Trial Transcript (Excerpt - 145 pages)

9. 02-24-2011 Jury Trial Transcript (Excerpt - 18 pages)

10. 02-24-2011 Jury Trial Transcript (Excerpt - 48 pages)

11. 06-29-2011 Jury Trial Transcript I

12. 06-30-2011 Jury Trial Transcript II

13. 07-05-2011 Jury Trial Transcript III

14. 07-06-2011 Jury Trial Transcript IV

15. 07-21-2011 Sentence Transcript

16. Michigan Court of Appeals 305760

17. Michigan Supreme Court 146842

18. 10-15-2014 Motion for Relief from Judgment

19. 03-11-2015 Opinion and Order denying MRJ

20. Michigan Court of Appeals 328944

21. Michigan Supreme Court 152921

TABLE OF AUTHORITIES CITED

CASES continued **PAGE NUMBER**

STATUTES

COURT RULES

AMENDMENTS U.S. CONST.

MICHIGAN CONST.

OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgments below

OPINIONS BELOW

Appendix I,

pages 1 through 10 is the ORDER of the United States Court of Appeals for the Sixth Circuit, Ronald Bishop Thompson, Petitioner-Appellant v. Noah Nagy, Warden, filed November 20, 2018, No. 18-1747, denying Petitioner's appeal of the district court's judgment;

pages 11 through 30 is the OPINION AND ORDER of the United States District Court, Eastern District of Michigan, Southern Division, Ronald B. Thompson, Petitioner v. Bonita Hoffner, Respondent, filed May 15, 2018, Case No. 2:16-cv-13998, denying Petitioner's Habeas Corpus with prejudice, denying a certificate of appealability, **AND GRANTING PERMISSION TO APPEAL IN FORMA PAUPERIS**;

pages 31 through 39 is the Opinion of the State of Michigan Third Circuit Court, Criminal Division, The People of the State of Michigan, Plaintiff, v. Ronald Bishop Thompson, Defendant, Case No. 10-008679-01, denying Petitioner's motion for relief from judgment;

page 40 is the Order of the Michigan Court of Appeals, dated November 19, 2015, Docket No. 328944, denying application for leave to appeal the denial of the Motion for Relief from Judgment;

page 41 is Order of the Michigan Supreme Court, Docket No. 152921, dated October 26, 2016, denying leave to appeal the Michigan Court of Appeals' Order of November 19th.;

page 42 if the Order of the Michigan Supreme Court, dated July 30, 2013, Docket No. 146842, denying leave to appeal the January 24, 2013 judgment of the Michigan Court of Appeals on Petitioner's Appeal of Right.

JURISDICTION

The date on which the United States Court of Appeals for the Sixth Circuit decided my case was **November 20, 2018.**

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

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment -- Encompassing the 4th Circuit's Federal Court of Appeals ruling in its August 5th, 2015 Opinion in **United States v. Graham,** 2015 U.S. App. LEXIS 136534, that a warrant was required to obtain historical cell site location information from a cell phone provider, which on June 26, 2018 the United States Supreme Court Validated in **Carpenter v. United States, No. 16-402.**

Sixth Amendment -- Encompassing the failure of Petitioner's trial counsel to examine the Detroit Police Department's request for the §2703(d) Order to determine whether or not it complied with the mandatory language of the SCA and subsequently to examine the magistrate's granting of the request.

Sixth Amendment -- Encompassing the failure of Petitioner's trial counsel to object to the cellular telephone evidence on Fourth Amendment grounds and to request a pretrial suppression hearing regarding the same.

Sixth Amendment -- Encompassing the failure of Petitioner's appellate counel to raise the ineffective assistance of trial counsel claim.

STATEMENT OF THE CASE

The primary issue in this case is the unconstitutional access to Petitioner's historical cell-cite location data, by the Detroit police, via an 18 U.S.C. §2701 (d) Court Order, to place him at the scene of the crime, which the United States Supreme Court in *Carpenter v. United States*, No. 16-102, has now ruled "is not a permissible mechanism for accessing historical cell-site records," which is exactly what was done in Petitioner's case.

On July 6, 2011, following a 4-day trial in the Wayne County Circuit Court, Petitioner Ronald Bishop Thompson was found guilty of first degree (premeditated) murder, MCL §750.316(1)(a), and felony firearm, MCL §750.227(b), for the shooting death of his best friend Dennis VanHulle. [TT, July 6, 2011, p. 84.]

On July 21, 2011, the Honorable Timothy M. Kenny, trial judge, imposed the respective mandatory sentences, life in prison without parole and two (2) years for the felony firearm. [ST, July 21, 2011, p 7.]

This was the second trial on those charges. Appellant's first trial ended in a mistrial. (See Michigan Court of Appeals Appendix I, Exhibit pages 1-4, Jury Notes from first trial.)

Petitioner was tried twice. His first trial ended in a hung jury. He was represented in the second trial by Attorney Susan F. Reed (P16897). He was represented in the first trial by Attorneys Jeffrey G. Schwartz (P32976) and John Andrews (P48054). [See Habeas Petition, COA Appendix 1 to Application, Exhibit pages 1-4, Jury Notes from first trial.

On Petitioner's Appeal of Right of the second trial, he was represented by Attorney Gerald Lorence (P16801), who raised only what now form Petitioner's first four habeas claims. The Michigan Court of Appeals [COA] affirmed the convictions on those four claims. *People v. Ronald Bishop Thompson*, unpublished PER CURIUM Opinion, Docket #305760, January 24, 2013, [Habeas Petition, Court of Appeals Application Appendix 3, Exhibit pages 1-6.] Petitioner subsequently filed an Application for Leave to Appeal in the Michigan Supreme Court, raising the same claim that he had raised in the Michigan Court of Appeals. The Michigan Supreme

Court denied leave to appeal, *People v. Ronald Bishop Thompson*, MSC Order, Docket #146842, July 30, 201, thus concluding the appeal of right. [Habeas [COA] Application, Appendix 3, Exhibit page 6-B.]

Petitioner's then attorney, Laura Kathleen Sutton [P40775], returned to the trial court and filed a Motion for Relief from Judgment raising what became the fifth through twelfth habeas claims. The trial court issued an Opinion ruling that Petitioner had not shown good cause under MCR 6.508(D)(3), nor had he proved actual prejudice. See 2:16-cv-13998, Dkt. 6-19, at 8.

Petitioner filed an application for leave to appeal in the Michigan Court of Appeals, raising the same claims. The Michigan Court of Appeals denied the application because " the defendant alleges grounds for relief that could have been raised previously and he has failed to establish good cause for failing to previously raise the issues, and has not establish that good cause should be waived. MCR 6.508(D)(3)(a)." *People v. Thompson*, No. 328944 (Mich. Ct. App. Nov. 19, 2015). Petitioner applied for leave to appeal this decision in the Michigan Supreme Court, but it was denied with citation to Rule 6.508(D). *People v. Thompson*, 886 N.W.2d 421 (Mich. Oct. 26,2016.)

DEFAULTED CLAIMS

In ruling that Petitioner's appellate counsel was not ineffective, the Michigan Court of Appeals found defendant alleged grounds for relief that could have been raised previously and had failed to establish good cause for failing to previously raise the issues, and had not established that good cause should be waived. MCR 6.508(D)(3)(a)." *People v. Thompson*, No. 328944 (Mich. Ct. App. Nov. 19, 2015). Petitioner applied for leave to appeal this decision in the Michigan Supreme Court, but it was denied with citation to Rule 6.508(D). *People v. Thompson*, 886 N.W.2d 421 (Mich. Oct. 26, 2016.)

STATEMENT OF FACTS

The following summary and noted exhibits represent the facts of this case as presented at pretrial preliminary examination and during Petitioner's second trial.

The victim VanHulle was a member of the Highwaymen Motorcycle Club and was alone at his home on March 26, 2010, when shortly after midnight he opened his front door and was shot once in the mid-throat area. He died on April 10, 2010. The cause of death was a "single gunshot wound to the neck complicated by adult respiratory distress syndrome and sepsis." [TT, July 5, 2011, p 48.] However, though not mentioned in the trial transcript, the death certificate adds "renal failure" to the cause of death. [See Michigan Court of Appeals Application, Appendix 1, Exhibit pages 12-1, 12-2.]

In the tape of VanHulle's 9-minute 911 call, the Operator asked VanHulle on five separate occasions "who shot you?," "what was his name?," and not once did VanHulle name Petitioner. [TT, June 30, 2011, p 20.]

Detroit Police Officer Jeffrey Elgert testified that on March 26, 2010, he responded to a shooting at 20511 Danbury in the City of Detroit. When asked "where exactly is that located?," Officer Elgert responded: "Danbury Street it's going to be approximately three to four streets west of John R, and that house is located just south of Eight Mile." [Id., p 25.]

Officer Elgert testified he and his partner were met at the door of the residence by the victim, who had been shot in the middle of the throat, around the Adam's apple. [Id., p 26.] Officer Elgert stated he asked the victim if he knew who the shooter was, and the victim picked up a piece of paper and wrote the name of the person who had shot him. [Id., p 27.] On cross-examination, Officer Elgert admitted that the victim never attempted to point to a picture in the house, or a number on his cell phone or any other act of identification of the shooter. [Id. p, 31.] Moreover, Office Elgert admitted that when he first came into contact with the victim, he could not see that the victim had been short, but rather that fact had to be pointed out to him by the victim. [TT, June 30, 2011, p 32.]

Officer Elgert's partner, Detroit Police Officer Detrick Mott, testified that on March 26,

2010, he responded to a police run of a person being shot at 20511 Danbury, in the City of Detroit. [TT, July 5, 2011, p 19.] Officer Mott's testimony was that when the victim opened the front door of his home, Officer Mott immediately noticed that the victim had a bullet hole right in the middle of his neck. [Id., p 20.] Officer Mott testified his first thought at the time was to see if the perpetrator was still there, because of that he shouted at the victim, "Is the person that shot you still here?" [Id., p 21.] Officer Mott testified further that he repeatedly asked the victim if he knew who had shot him, and the victim shook his head up and down, in an effort to answer "yes." [Id., p 22.] Officer Mott further stated that when he asked the victim if he could write down the name of the shooter, the victim grabbed a piece of paper and wrote down the name of the shooter. [Id., pp 22-24.]

The name the victim wrote on the piece of paper was "Ron Higendorf." [TT, June 30, 2011, p 17], the birth name of Petitioner. [TT, July 5, 2011, p 70.]

Defense Attorney Susan Reed objected to the slip of paper with the name Ron Higendorf being admitted as a "dying declaration," carrying on the same objection from the first trial. [TT, June 30, 2011, pp 75-76.] While the first trial discussion on this ruling is not available due to the fact that the court reporter averred significant parts of that trial's testimony were not available for transcription [see COA Application Appendix 1, Exhibit page 11-4, entry No. 21,2-08-2-12], the preliminary examination makes it clear that while the prosecution raised two theories, that of "excited utterance" and "dying declaration," the magistrate judge ruled the evidence not admissible under the excited utterance theory [PT, 26-27], but ruled it admissible under the theory of dying declaration. [PT, 28-29, 46.] Defense Attorney Swartz objected strenuously to the Court's Preliminary Examination ruling on this matter. [PT, 30-31, 33-34.]

Kevin VanHulle, the victim's brother, testified that the victim was a member of the "Highwaymen Motorcycle Club," but had not been an active member at the time of the death. [TT, June 30, 2011, p 36.] VanHulle indicated that Petitioner and the victim were best friends and had been for ten years, were very, very close, and hung out with each other all the time. [Id., pp 36, 38.]

VanHulle further testified that Petitioner joined him and the victim for a casual, hour-long lunch about a month before the incident, and it appeared at that time they were still good friends. [Id., p 39.]

VanHulle testified that at the time his brother was shot, Petition resided with someone named Wayne Cup on George Street in Hazel Park, **not even a quater mile from his brother's house.** [Id., p 46.] [Note see COA Application Appendix 1, Exhibit page 6-3, Trial Exhibit 40, cell Tower Map showing location of scene of crime (and added for the appeal, residence location of Wayne Cup.)]

Tara Miller, the victim's daughter, testified that she knew Petitioner because her father had been friends with him for at least 10 years. [TT, June 30, 2011, pp 49-50.] She described the relationship between Petitioner and her father as a normal friendship that anybody else would have. [Id., p 50.] She testified she knew that her father and Petitioner spent a lot of time together. [Id., p 59.]

Sara Nall, the victim's live-in girlfriend, testified that she had been living with the victim for the five months prior to his death, at the victim's home located at 20511 Danbury in the city of Detroit. [Id., p 60.] Nall indicated the victim and Petitioner were very close, and when she was first introduced to Petitioner, the victim referred to him as his brother. [Id., p 71.]

Nall further testified that two weeks before the victim was shot, she had gotten a late night visit from Petitioner's wife, who appeared at the house in mud-covered clothing, acting distraught, as a result of a fight she said he had had with her husband who accused her of having sex with the victim. [Id., p 80.]

Nall identified the name of the shooter written on the piece of paper as having been written in the victim's handwriting. [Id., p 83.]

On cross-examination, Nall admitted she had previous testified that on the night Petitioner's wife showed up at the victim's house, she was severely intoxicated. Nall further admitted she had also previously testified that Petitioner's wife had a tendency to lie when she was drunk. [Id., p 86.]

Petitioner chose not to testify in his own defense. [TT, July 5, 2011, pp 67-69.]

Aaron Higendorf, an attorney, was the defense's sole witness who testified he was the full brother of Petitioner. [Id., p 70.]

Aaron testified he had know the victim since Aaron was in law school in 2003 or 2004. He described the relationship between the victim and his brother as close, that they lived together for awhile, were coworkers, and hung out together. [TT, July 5, 2011, pp 72-73.] Aaron believed when he met the victim, the victim, his brother, and another coworker were renting a home in Hazel Park. [Id. p. 74.]

Aaron further testified at the time of the incident, his brother was living in the residence of Wayne Cup, Sr., whom he described as "our friend's father, who recently passed away." According to Aaron's testimony, **while the victim was living in Detroit, there was only a distance of about a quarter of a mile between his residence and where his brother was living in Hazel Park, and there were at least two bars and a motorcycle club bar, all within the same quarter mile area.** [Id., pp 75-76.] Aaron estimated his brother had been living at the Wayne Cup residence for two months before the victim was shot, maybe from the beginning of the year. [Id., p 77.]

The defense published to the jury Defense Exhibit A, the following handwritten note by the victim authenticated by his girlfriend Sara Nall.

Paragraph one:

"Brzinski called April 20th and informed me of a hit on my life by both Outlaws and Highwaymen." [Id., p 81.]

Paragraph two:

"Bobby Burton and Gerald Peters on wire tapped called discussing how I wouldn't obey order to harm Liberty Rider (Tank). Also the (smoke) incident. Bird threatened to kill me for standing up." [See COA Application Appendix 1, Exhibit pages 13-1 and 13-2 for police reports referring to note, and Exhibit page 13-3 for copy of note.]

In rebuttal, the prosecution recalled the victim's daughter Tara Miller who testified that

she had a conversation with her father regarding an FBI Agent by the name of Brzinski. She remembered the conversations to have been between 2004 and 2005 [Id., p 83]; however, under cross-examination she admitted that he had no idea whether her father continued talking to the FBI Agent after that. She stated she had had only the one conversation with her father about it. [Id., p 84.]

On May 13th, 2010, Detroit Police Sergeant Kevin Hanus applied for a court order, pursuant to Title 18, United States Code, Section 3123 and 3124, directing Sprint/Nextel to provide the Detroit Police Homicide Section with what amounted to a laundry list of telecommunication record(s) . . . pertaining to cellular/wireless phone number 1-313-424-5726, for the period of March 10, 2010, and extending through the date of this order, which was May 13th, 2010, a period of 64 days.

Among the data requested were the cell tower and/or cell-site location, and activations at said locations, numbers dialed; incoming calls; and call durations. [COA Application Appendix 1, Exhibit 5-1.]

In support of this application Sgt. Hanus attested only to the facts of the crime without listing any nexus between those fact and how they related to the data requested, i.e., how that data was "relevant and material to an ongoing criminal investigation." [Id. Exhibit pages 5-2, 5-3.

The examining magistrate, listing investigator Roger C. Clemons (not Sgt. Kevin Hanus) as the applicant for the order, without having been presented with any "Specific and articulable facts that were reasonable grounds to believe the requested records were relevant and material to an ongoing criminal investigation," perfunctorily issued the order by reciting the bare bones language of the act. [Id., Exhibit pages 6-1, 6-2.]

Consequently, Sprint complied with the Order. [Id., Exhibit pages 6-A through 6-D.]

Detroit Police Officer Michael McGinnis testified that he reviewed the cell phone records of Petitioner and the victim, and from those records was able to create a map showing where Petitioner was when he made calls to the victim in the days prior to the victim's death.

[TT, June 30th, 2011, pp 102-108.]

When the prosecution moved to tender McGinnis as an expert in cell phone technology, defense counsel Reed objected, renewing the objections that had been made in the first trial. The Trial Court noted and overruled the objection. [Id, p 93.] Defense counsel Reed made no objections to the exhibits of the maps created from the Call Detail Record, other than those already made concerning McGinnis' testimony. [TT, June 30, 2011, 93.] **At no time did Defense Counsel Reed object to or challenge the historical cell-site information on Fourth Amendment grounds.**

Specifically, significant testimony of Officer McGinnis included:

1. that Trial Exhibit 40, showing a red flag right off of Eight Mile and near John R was the scene location of the homicide [Id. p 102]:

2. that while a person in the vicinity of the scene of the homicide making or receiving calls, those calls could be coming from either one of the two towers [Id., p 103];

3. it was significant that the call placed at 12:42 a.m. on March 25th, 2010 was at Sector Two as opposed to Sector One or Sector Three because Sector two faces the southeast direction [Id., p 104];

4. and especially in relationship to the flag representing the victim's residence, **because it is consistent with the phone being at the scene of the homicide using Sector Two** [p 105]; [Compare with COA Application Appendix 1, Exhibit page 6-E, to which Petitioner has added a red box indicating his residence at the time.] [Emphasis added.]

5. Petitioner's residence is within a quarter mile of the victim's residence [TT, June 30, 2011, pp 108, 109;

6. Because the Georgia (sic) (should be George) residence is near Eight Mile and John R, that would be even closer to the victim's residence [Id., p 109];

7. that because the 12:42 a.m. call from Petitioner to the victim lasting one minute and 41 seconds came from Tower 611-3107 in Sector two, **that is consistent with that person being in the area near the victim's residence.** [Id., p 115.] [Emphasis added.]

The assistant prosecutor focused on the cell-site location testimony of McGinnis throughout the second trial from opening argument [Id., pp 15, 18], significantly during the trial [Id., pp 90-115], to closing argument [TT, July 6, 2011, pp 15-17] and rebuttal. [Id., p 54.]

During deliberations, the jury requested Petitioner's cell phone records and the cell phone map prepared by Officer McGinnis. [COA Application Appendix 1, Exhibit page 7.] This

request came just two hours and 50 minutes before the jury reached its guilty verdict. The request was made at 12:50 p.m., and the jury return with its verdict at 3:30 p.m. [TT, July 5, 2011, p 83.]

REASONS FOR GRANTING THE WRIT

The primary issue in this case is the unconstitutional access to Petitioner's historical cell- cite location data by the Detroit Police via an 18 U.S.C. § 2701 (d) Court Order to place him at the scene of the crime, which the United States Supreme Court in ***Carpenter v. United States*, No. 16-402**, has now ruled "is not a permissible mechanism for accessing historical cell-cite records," which is exactly what was done in Appellant's case.

The Trial Court, District Court and the Sixth Circuit Court of Appeals have decided an important federal question that conflicts with the relevant decision of this Court in *Carpenter v. United States*, No. 16-402, which held in rendering its Opinion that "it was sufficient for their purposes today to hold that **accessing seven days of CSLI constitutes a Fourth Amendment search.**"

In Petitioner's case, Detroit Police Sergeant Kevin Hanus in his Application to the 3rd Circuit Court of Michigan for an Order Requesting Telecommunications Records for the period beginning **March 10, 2010 (sixteen days before the homicide) and extending through the date of the Order (May 13, 2010 – 48 days after the homicide) a period of sixty-four days**, requesting the following communications records(s) and assistance pertaining to cellular/wireless 1-313-424-5786:

1: Cell tower and/or Cell-site Location, and activations at said locations;

2: Numbers dialed.

3. Incoming numbers, if identified;

4. Call durations;

5. Subscriber, ESN and billing information; SMS text MMS (i.e.) text messages (etc.) all;

6. Subscriber, ESN, and billing information. Tower locations for any other cellular/ wireless telephone on this account or that may be identified from these records;
7. An engineering map showing all cell-site tower locations/addresses, sectors and orientations;
8. The physical address/location of all cellular towers in the specified marker;
9 That upon request the telecommunications provider for these cellular/wireless numbers provide 24 hour a day switch based engineering and technical assistance;
10. Records and assistance requested in this order;
11. **That this order shall cover, and be applied, to any cellular/wireless telephone MIN/ESN that the subscribers of the phone covered by this order, may change service to, for the duration of this order;**
12. That the call detail records be provided in electronic format;
13. Provide a list of channels/radio channels and their corresponding cell sites;
14. That the provider, at the request of the Affiant, switch either cellular towers by Geographic area of coverage or specified cellular'wireless telephone from digital or GMS to analog service;
15. The provider for this cellular numbers, and resellers, not terminate or restrict service.
16. **Precision location of mobile device (GPS) Location).** [Emphasis added.] It is further requested pursuant to Title 18, United States Code Service 2703(d), Sprint/Nextel, and any and all other telecommunications providers and/or other wireless or hard-line telecommunications company, provide the Detroit Police Homicide Section, subscriber information, including names, addresses, credit and billing information of the subscribers, published and non-published, for the telephone numbers being dialing or being dialed from the cellular/wireless phone number of 1-313-424-5786, and any other Sprint/Nextel, cellular telephones identified from the requested records, for the period of **March 10, 2010, and extending through the date of this order.**

The Court Order signed by a judge of the 3rd Circuit Court of Wayne County Michigan, states:

> This matter having come before the court pursuant to an application under Title 18, USC, Section 3123 and 3124 by investigator Roger C. Clemons, I-298, A Law Enforcement Officer, requesting the production of certain telecommunications records: The Court finds **based on specific and articulable facts, that there are reasonable grounds to believe that the requested records are relevant and material to an ongoing criminal investigation.**

ARGUMENT 1

CONTRARY TO THE COLLATERAL STANDARD ORDER ISSUED IN THIS CASE BY THE MICHIGAN COURT OF APPEALS, PETITIONER DID ESTABLISH ENTITLEMENT TO RELIEF UNDER MICHIGAN MCR 6.508(D)(3) THROUGH HIS INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIM.

The language of MCR 6.508 (D)(3) is specific:

(D) **Entitlement to Relief.** The defendant has the burden of establishing entitlement to the relief requested. The Court may not grant relief to the defendant if the motion

(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, **unless the defendant demonstrates**

(a) good cause for failure to raise such grounds on appeal or in a prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,

(i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;

(iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case. [Emphasis added.]

Petitioner was denied his Sixth Amendment right to effective assistance of trial counsel by:

1. Trial counsel's failure to examine the Detroit police request for the §2703(d) Order to determine whether or not it complied with the mandatory language of the Stored Communications Ace and subsequently to examine the magistrate's granting of the request.

2. Trial counsel's failure to object to the cellular telephone evidence on Fourth Amendment grounds and to request a pretrial suppression hearing regarding the same.

Petition was denied his Sixth Amendment right to effective assistance of Appellate Counsel by Appellate Counsel's failure to raise the ineffective assistance of Trial Counsel.

See both ineffective assistance claims infra.

ARGUMENT 2

THE STORED COMMUNICATION ACT, 18 USC §§ 2701-2712, IS UNCONSTITUTIONAL. CELL-SITE LOCATION INFORMATION BY ITS VERY NATURE MUST REQUIRE A WARRANT.

The Constitutional position is clear in this matter. The Fourth Amendment provides that "no Warrants shall issue, but upon probably cause supported by Oath or Affirmation...." U.S. Const. Amend. IV. It is also a "basic principle of Fourth Amendment law" that searches and seizures without a warrant are "presumptively unreasonable." See e.g. *Groh v. Ramirez*, 540 U.S. 551, 559, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004).

Disagreeing with the 11th Circuit's *en banc* majority Opinion in *Quartavious Davis*, (2015 U.S. App. LEXIS 7385, (785 F.3d 498), on August 13, 2015, the 4th Circuit Court of Appeals ruled that the government conducts a search under the Fourth Amendment when it obtains and inspects a cell phone user's historical cell-site location information (CSLI) for an extended period of time. *U.S. v. Graham*, 2015 U.S. App. LEXIS 13653, LEXIS HN4↓ (*19-*20).

The 4th Circuit Opinion observed that "there is an objectively reasonable cell phone user's expectation of privacy in the long-term cell-site location information," reasoning that "historical location information is among the heightened privacy concerns presented in government inspection of cell phones." Id., LEXIS HN14↓ (*49-*50).

From the onset of his Fourth Amendment claim, Petitioner raised *U.S. v. Graham*

As noted above, in Petitioner's case, the obtained cell phone evidentiary exhibits were not obtained pursuant to a warrant supported by probable cause, but only by a court order that perfunctorily recited the language of the statute to determine that there were "reasonable grounds to believe" that the requested records were relevant and material to an ongoing criminal investigation."

Anytime one considers a Fourth Amendment claim, two preliminary questions must be addressed: (1) Was there a search? and (2) Was there a seizure? In this case, there is no question that there was a seizure by way of a court ordered subpoena. The real issue is

whether there was a search such that a warrant supported by probable cause was required.

The 4th Circuit opined there was, and now in Carpenter, the United States Supreme Court has agreed. *Carpenter v. United States*, No. 16-402, decided June 22, 2018.

Petitioner presents to this Court that it is axiomatic that the Stored Communications Act is ambiguous as to when a magistrate should or should not require a warrant. Under the ambiguity of this act, a police officer is left with the freedom to disregard a warrant and request stored cell-site location data with less than probable cause, **even to the extent of precise GPS location data**, which is exactly what Sgt. Hanus did in Petitioner's case. [See Habeas [COA] Appendix 1, Exhibit page 5-1, item 16.] And what the magistrate judge in this case allowed. Id., Exhibit page 6-2, item 16.]

It makes no difference here that Petitioner's phone did not contain precise GPS location data, the SCA by allowing the police to obtain precise GPS location data on less than probable cause, is per se unconstitutional. See *United States v. Jones, (infra).*

In Petitioner's case, the cell-site location data obtained through a § 2703(d) order provided the basis for DPO Michael McGinnis, testifying at Petitioner's second trial to tell the jury that "a call at 12:42 a.m. (on the morning of the homicide) placed from Petitioner's phone to the victim's phone . . . **is consistent with the phone being at the scene of a homicide** . . ." [TT, June 30, 2011, pp 104-105.]

McGinnis testified further that the cell tower information was "consistent with Petitioner being . . . near . . .the victim's home" at 12:42 a.m., just eight minutes before the victim was on the phone calling 911 for help after having been shot. [TT, June 30, 1011, p 115.]

In *United States v. Jones*, 565 U.S. ___, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012), this Court strongly suggested a "privacy right" in electronic monitoring of People's movements. In *Jones* the Court affirmed a lower court ruling that the placement of a GPS device was a "trespass" and Fourth Amendment violation.

In so doing, Justice Sotomayer noted that

> electronic monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth or detail about familial, political, professional, religious, and sexual associations. 132 S.Ct. at 955.

Similarly, Justice Alito reasoned that while a car owner can reasonably expect that although his individual movements may be observed, there will not be a "tiny constable" hiding in his vehicle to maintain a log of his movements. 132 S.Ct. at 958 n. 3.

Applying the "privacy right" theory of Fourth Amendment protections, in light of *United States v. Jones*, the 11th Circuit Court of Appeals held:

> While committing a crime is certainly not within a legitimate expectation of privacy, if the cell phone location data could place him near those scenes, it could place him near any other scene. There is a reasonable privacy expectation in being near the home of a lover, or a dispensary of medication, or a place of worship, or a house of ill repute. *** we hold that cell-site location is within the subscriber's reasonable expectation of privacy.
>
> . . . .
>
> In short, we hold that cell-site location information is within the subscriber's reasonable expectation of privacy.
> *United States v. Quartavious Davis*, 754 F3d 1205, 1216-1217 (June 11, 2014)

The holding in the Eleventh Circuit recognized the immense implications of allowing cell site location data to be obtained on an entire nation on less than probable cause.

The 4th Circuit weighed in, agreeing with the original 11th Circuit holding and more particularly applying the Constitutional reasoning of this Court in *Jones*.

> The privacy interests affected by long-term Global Positioning System (GPS) monitoring ~~apply with equal or greater force to historical cell-site location information for an extended time period~~. . . .Much like long-term GPS monitoring, long-term location information disclosed in cell phone records can reveal both a comprehensive view and specific detail of the individual's daily life. . . . *U.S. v. Graham*, 2015 U.S. App. LEXIS 13652. LEXIS HN11↓(*28)

> Unlike Global Positioning System monitoring of a vehicle, examination of historical cell-site information can permit the government to track a person's movements between public and private spaces, impacting at once his interests in both the privacy of his movements and privacy of his home. Id., LEXIS HN12↓(*31-33).

Petitioner has argued throughout his pleadings that the SCA is per se

unconstitutional. The release of cell-site location information to the police requires a warrant. *U.S. v. Graham, supra.*

Petitioner asked the District Court three times within his "Reply to Answer in Opposition To Petition For Writ Of Habeas Corpus," mailed for filing May 15, 2017, to hold his Petition in abeyance until U.S. v. Graham was settled in the United States Supreme Court.

On page 32, Petitioner informed the District Court that on the same issues Petitioner has raised regarding historical cell cite information, United States v. Graham, 4th Circuit, Docket No. 16-6308, has joined three other cases, *Carpenter v. United States*, 6th Circuit, No. 15-402, *Caira v. United States*, 7th Circuit, No. 6761, and *Rios v. United States*, 6th Circuit, No. 16-714.

On page 35, Petitioner repeated his request for his Petition to be held in abeyance until this Court rendered its Opinion in the cases cited.

And on page 51, within his "Relief Requested," Petitioner asked the District Court to either GRANT his petition, or to stay its decision pending the United States Supreme Court's ruling in *Graham v. United States*, Docket No. 16-402.

ARGUMENT 3

PETITIONER WAS DENIED HIS SIXTH AMENDMENT GUARANTEE OF EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL

The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), including the right to effective assistance of counsel on direct appeal. *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); *Joshua v. DeWitt*, 341 F.3d 43 (6th Cir. 2003).

Regarding the duties of appellate counsel on direct appeal, Petitioner turns to *McCoy v. Court of Appeals of Wisconsin, District 1*, 486 U.S. 429, 108 S.Ct. 1895, 100 L.Ed.2d 440, 1988 U.S. LEXIS 2487, June 6, 1988.

". . . The appellate lawyer must master the trial record, thoroughly

> research the law, and exercise judgment in identifying the arguments that may be advanced on appeal. In preparing and evaluating the case, and in advising the client as to the prospects for success, counsel must consistently serve the client's interest to the best of his or her ability." LEDHR9A [ELL page 17.]
>
> " . . . In searching for the strongest arguments available, the attorney must be zealous and must resolve doubts and ambiguous legal questions in favor of his or her client LEdHR1A [Ell page 20.]

Regarding this issue, the trial court pointed out, appellate counsel's failure to raise every conceivable issue does not constitute ineffective assistance of counsel. The trial court went on to hold Petitioner's contention that his appellate counsel was ineffective for failing to raise on direct appeal the issues raised collaterally is without merit "because appellate counsel's decision to winnow out weaker arguments and focus on those more likely to prevail is not evidence of ineffective assistant." [See MRJ Opinion, pp 7-8, Appendix 3, Exhibit pages 37-38.]

The trial court's reasoning, while sound in the general sense, is misapplied in this case for the simple reason that the arguments appellate counsel herein winnowed out **were not** the weaker arguments. It does not follow that the appellate attorney had carte blanche to discard obvious issues that deprived Petitioner of a defense. The line of law as to this reasoning is long and consistent. The critical failure of an attorney to object or raise an issue can be ineffective assistance of counsel if it deprive the defendant of an opportunity for dismissal or the case or for success on appeal. *Gravely v. Mills*, 87 F.3d 779 (6th Cir. 1996); *Kowalak v. United States*, 645 F.2d 534, 537-538 (6th Cir. 1981); *Corsa v. Anderson*, 443 F. Supp. 176 (E.D. Mich. 1977).

In the instant cause, it is reasonable probably that Petitioner could have gotten a reversal on his appeal of right but for the inaction of appellate counsel. See *Mapes v. Coyle*, 171 F.3d 408 (6th Cir. 1999), finding ineffective assistance of appellate counsel where counsel omitted issues that were "significant and obvious."

The 7th Circuit discussed this issue at length in *Mason v. Hanks*, 97 F.3d 887, 7th Cir. 1996, holding:

> Effective advocacy does not require the appellate attorney to raise every non-frivolous issue under the sun, of course. *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). After all, "[o]ne of the principal functions of appellate counsel is winnowing the potential claims so that the court may focus on those with the best prospects." *Page v. United States*, 884 F.2d 300, 302 (7th Cir. 1989). **This is not to say that counsel's selection of the issues to pursue on appeal is beyond scrutiny. "Were it legitimate to dismiss a claim of ineffective assistance of counsel on appeal solely because we found it improper to review appellate counsel's choice of issues, the right to effective assistance of counsel on appeal would be worthless."** *Gray*, 800 F.2d at 646, (citing *United States v. Harris*, 558 F.2d 366,371 (7th Cir. 1977)). [*Gray v. Greer*, 800 F.2d 644 (7th Cir. 1985)]. [Emphasis added.]
>
> But **when appellate counsel omits (without legitimate strategic purpose) "a significant and obvious issue," we will deem his performance deficient** (*Gray*, 800 F.2d at 646; *Hollenback*, 987 F.2d at 1275 [*Hollenback* v. United States, 987 F.2d 1272 (7th Cir. 1983)], and **when that omitted issue "may have resulted in a reversal of the conviction, or an order for a new trial," we will deem the lack of effective assistance prejudicial** *Gray*, 800 F.2d at 646. [Emphasis supplied.
>
> The ultimate question we ask is "whether, but for counsel's errors, there is a **reasonable probability** that the outcome of the proceeding [here Mason's direct appeal] would have been different. [Emphasis added.]

The Eastern District of Michigan has reiterated the legal principle that "**ineffective assistance of counsel constitutes cause and prejudice standard of reviewing claims first presented in post-conviction proceedings.** " See *Matthews v. Abramajtys*, 92 F. Supp. 615, 630 (E.D. Mich. 2000). In addition, that same month, the United States Supreme Court stated succinctly that "ineffective assistance adequate to establish cause for procedural default of some other constitutional claim is itself an adequate constitutional claim." *Edwards v. Carpenter*, 529 U.S. 446, 120 S.Ct. 1587, 1591, 146 L.Ed.2d 518 (April 2000). [Emphasis added.]

When weaker claims are raised while omitting "significant and obvious issues . . .," "[n]o tactical reason -- no reason other than oversight or incompetence -- has been or can be assigned for the lawyer's failure to raise the only substantial claims that [defendant] had." *Mayo v. Henderson*, 13 F.3d 528 (6th Cir. 1994); *Fagan v. Washington*, 942 F.2d 1155, (7th Cir. 1991).

Petitioner's appellate attorney failed to recognize the following act/omissions of Petitioner's trial attorney as argued in Petitioner's Ineffective Assistance of Trial Counsel Claim.

1. The failure of trial counsel to examine the Detroit Police request for the § 2703(d) Order to determine whether or not it complied with the mandatory language of the SCA and subsequently to examine the magistrate's granting of the request.

2. The failure of trial counsel to object to the cellular telephone evidence on Fourth Amendment grounds and to request a pretrial suppression hearing regarding the same.

Petitioner believes he has presented a viable ineffective assistance of appellate counsel claim.

ARGUMENT 4

PETITIONER WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

The trial court opined regarding this issue that "the record does not demonstrate defense counsel's performance was unreasonable and his trial strategy and determinations will not be substituted with the judgment of this Court." [See MRJ Opinion, p. 7, paragraph 2, COA Appendix 3, Exhibit page 37, (copy included with this Application per Court Rule -- See Index to Appendices, Index of Record 2:16-cv-13998, 19. 03-11-2015, Opinion and Order denying MRJ.)

Petitioner's interpretation of the record, as presented in the previous issues in this Petition, is diametrically opposed and divergent to the trial court's insofar as the arguments more likely to prevail.

The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); U.S. Const. Amends. VI, XIV; Michigan Const. 1963, art 1 §§ 17,20.

Under *Strickland* a claim of ineffective assistance of counsel is comprised of two elements, to wit: that the representation afforded by counsel was deficient, and that the deficient representation prejudiced the defense: 466 U.S. at 687. A defendant need not show that it was "more likely than not that the outcome would have been different," ineffectiveness may be established "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *People v. Grant*, 470 Mich 477. 684 N.W.2d 686 (2004)

To make a claim of ineffective assistance of counsel, the defendant must overcome the presumption that counsel's actions were based on reasonable strategy. *Strickland, supra.* However, labeling counsel's error "strategic" does not shield the performance from Sixth Amendment scrutiny. *Henry v. Scully*, 918 F.Supp 693, 715 (SDNY 1995); see also *Cave v. Singletary*, 971 F.2d 1513 (11th Cir. 1992).

The performance of counsel at trial may be assessed not only for specific errors or omissions but also as a whole. *United States v. Cronic*, 466 U.S. 548, 104 S.Ct. 2032, 80 L.Ed.2d 657 (1984); *Blackburn v. Foltz*, 828 F.2d 1177 (6th Cir. 1987). As this Court in *Strickland* stated: "The ultimate focus must be the fundamental fairness of the proceeding whose result is being challenged. 466 U.S. at 696.

The performance of Petitioner's trial counsel brings the fundamental fairness of his trial glaringly into question.

A criminal prosecution does not occur in stuttering steps, it is a process that must be planned to and result in a fundamentally fair proceeding. Petitioner asks the United States Supreme Court to consider the following acts/omissions of his trial counsel:

1. The failure of trial counsel to examine the Detroit Police request for the § 2703(d) Order to determine whether or not it complied with the mandatory language of the SCA and subsequently to examine the magistrate's granting of the request.

2. The failure of trial counsel to object to the cellular telephone evidence on Fourth Amendment grounds and to request a pretrial suppression hearing regarding same.

3. The failure of trial counsel to request a private investigator to investigate theories of third party guilt, or even to present evidence readily available.

Defense in his second trial did absolutely no investigation whatsoever regarding the SCA in regards to the 4th Amendment claim herein presented, instead relying again and again on defense counsel's objections from the first trial. [TT, June 30, 2011, p. 93.]

As stated previously, this was a second trial brought about because the first trial ended in a mistrial when the jury could not decide beyond a reasonable doubt that Petitioner was guilty. [See Michigan COA Application Appendix 1, Exhibit pages 1 through 4.]

In this second trial, a primary focus of defense strategy was third party guilt. In that regard, the defense placed two pieces of evidence before the jury: (1) Petitioner's brother who testified as to Petitioner's birth name; and (2) a note from VanHulle claiming that an FBI agent informed him that a member of another motorcycle club wanted VanHulle dead. [Id., Exhibit page 1-3; see also police reports regarding finding note at scene, Exhibit pages 13-1, 13-2.]

In closing argument, defense counsel told the jury:

> You also have Exhibit Number, Defense Exhibit A, and you know that Brzinski is an FBI agent, because I think his daughter said that he was talking to the FBI, Mr. VanHulle, a motorcycle club member talking to the FBI. And because of that two motorcycle gangs put a hit out on him. Possibly that someone from one of those motorcycle gangs hit him probably consider where he was shot in the throat. How does that coincide with somebody who is talking to the FBI? Use your common sense there. What kind of sign is that? You talk too much. Shot in the throat. [TT, July 6, 2011, p 43.]

That third part guilt was a significant part of the defense strategy cannot be contested, yet defense counsel failed to offer any evidence of third party guilt other than argument, which is not evidence as the trial court instructed "the lawyers' statements and arguments to you are not evidence." [TT, July 6, 2011, p 59.]

Defense counsel knew or should have known that evidence of third-party guilt is admissible, else why bring it up? See *People v. Kent*, 157 Mich App 780, 793, 404 N.W.2d 668 (1987); *Holmes v. South Carolina*, 547 U.S. 319, 327, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). Yet, defense counsel made no attempt to investigate evidence of that third party guilt.

In the first place, any reasonably competent attorney should have know that a private investigator could be requested at state expense for an indigent defendant. See *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

In *Ake*, an indigent criminal defendant was held entitled to assistance of a psychiatrist when sanity at the time of the offense is seriously in question. As pertains to Petitioner's issue here, the following language of *Ake* is instructive:

> This Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle grounded in significant part on the Fourteenth Amendment's due process guarantee

> of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake. 470 U.S. 76, 84 L.Ed.2d 61 (III).

See also 74 ALR4th 330 (Right of indigent defendant in state criminal case to assistance of expert in social attitudes). 34 ALR3rd 1256 (Right of indigent defendant in criminal case to aid of state by appointment of investigator or expert.)

Not only did defense counsel not request a private investigator at public expense for Appellant to garner evidence of the very real possibility of third party guilt, she did not even so much as utilize evidence available to her on the public record.

During the trial, the prosecutor opened the door for inquiry into those threats, even if they had been previously excluded. Attempting to minimize the danger to VanHulle from gang violence, the prosecutor asked the victim's daughter when VanHulle spoke to her about an FBI agent telling him of threats against his person, and she replied that it had been back in 2004. giving the jury the impression that any threats by gang members against FBI informants ended in 2004. This exchange opened the door for an alert defense counsel to counter that impression with readily available evidence that the threat to informants such as VanHulle did not end in 2004, but continued right up to the date VanHulle was shot.

According to public documents, the two men mentioned in VanHulle's writing (Burton and Peters) [See COA Application Appendix 1, Exhibit page 13-3] were FBI informants. According to those public documents, Burton and Peters received threats against their persons during the time-frame of this incident (the shooting of VanHulle); and at the urging of the U.S. Attorney, the Court moved Burton and Peters to a secret location because of threats that had been made and the danger of continuing threats just prior to the shooting of VanHulle, another FBI informant.

At the time of the shooting, VanHulle, along with a large number of his Highwaymen confederate, were under indictment for multiple crimes of violence and racketeering. See *United States v. Nagi, et al*, Sixth Circuit cases 11-1170,11-1208, 11-1221, 11-1223, 11-1349, and 11-1354.

Even a casual review of these cases show that the United States Attorney General's Office opposed pre-trail release, and at times had bond revoked, for these gang members because of threats of violence against witnesses. Without a doubt, VanHulle, a codefendant and confederate of these defendants, was on speaking terms with the FBI, and quite possibly a current informant.

Since the prosecutor opened the door as to when the threats against VanHulle were made and gave the jury the impression that such threats against informants ended in 2004, defense counsel could have and should have walked through that door and called witnesses to show that the threats against informant motorcycle club members did not end in 2004, but continued up to the time of VanHulle's shooting. Who knows what other evidence the defense could have unearthed with the aid of a private investigator?

While decisions of what evidence to present and what witnesses to be called are generally presumed to be matter of trial strategy, the failure to call witnesses can constitute ineffective assistance of counsel when the failure deprives a defendant of a substantial defense. *Hutchinson v. Bell*, 303 F.3d 720, 749 (6th Cir. 2002). "This duty includes the obligation to investigate all witnesses who may have information concerning his or her client's guilt or innocence." *Stewart v. Wolfenbarger*, 468 F.3d 338,356 (6th Cir. 2006).

Regarding third-party guilt, defense counsel totally abandoned any adversarial testing whatsoever; in short, she abandoned the issue. As the United States Supreme Court has ruled

> [I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment right that makes the adversary process itself presumptively unreliable. *United States v. Cronic*, 104 S.Ct. 2039, 2047, 466 U.S. 648, 659; 80 L.Ed.2d 657 (1984).

CONCLUSION

In regards to District Court Judge Roberts' denial of a certificate of appealability on pages 18-19 of her Opinion, Pg. IDs 2255 and 2256, and the U.S. Court of Appeals for the Sixth Circuit upholding her Opinion, for all the reasons presented heretofore in this Petition, Petitioner believes he has made a substantial showing of the denial of a Constitutional Right and has shown "that reasonable jurists could debate whether (or for that matter agree) that his Petition should have been resolved in a different manner by the District Court or that his issues were adequate to deserve encouragement to proceed further." **The United States Supreme Court in *Carpenter v. United States* has now ruled that "the Government's acquisition of cell-site records is a search within the meaning of the Fourth Amendment," and "[c]onsequently, an order under Section 2703(d) of the Act is not a permissible mechanism for accessing historical cell-site records. Before compelling a wireless carrier to turn over a subscriber's CSLI, the Government's obligation is a familiar one – get a warrant.**

For all of the reasons given in this Petition, a writ of certiorari should be granted.

Respectfully submitted,

Ronald B Thompson

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Petitioner Pro Se
January 18, 2019