No. 18-8038

IN THE

SUPREME COURT OF THE UNITED STATES

James P. Burke — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Fifth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

SUPPLEMENTAL BRIEF FOR PETITION FOR A WRIT OF CERTIORARI TO SUPREME COURT OF THE UNITED STATES

James P. Burke, Reg.#93973-379, (Incarcerated **pro-se** litigant)
(Your Name)

FSL Elkton, PO Box 10
(Address)

Lisbon, OH 44432
(City, State, Zip Code)

(330)420-6200
(Phone Number)

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

NEW MATTER(S)

Pursuant to Rule 15.8 of the Rules of the Supreme Court, James P. Burke (incarcerated pro-se litigant) files this **supplemental** brief to bring to the Court's attention the following new matter:

1. Since the time of James P. Burke's (petitioner) petition for a writ of certiorari, the Supreme Court of the United States reversed and remanded the decision by the United States Court of Appeals for the Sixth Circuit in **Carpenter vs. United States**, 138 S. Ct. 2206, 201 L. Ed. 2d 507, decided on June 22, 2018. In **Carpenter** the Supreme Court found that the government's acquisition from wireless carriers of defendant's historical cell-site location information (CSLI) was a search under the Fourth Amendment. When the government accessed defendant's CSLI, it invaded his reasonable expectation of privacy in the whole of his physical movements, and the fact that the government obtained the information from a third party (third party doctrine - the reduced expectation of privacy in information knowingly shared) did not overcome defendant's claim to Fourth Amendment protection. Additionally a court order obtained by the government under the Stored Communications Act, 18 U.S.C.S. §2703(d), was not a permissible mechanism for accessing historical CSLI because the showing required under the ACT fell well short of probable cause. A warrant was necessary to obtain CSLI in the absence of an exception such as exigent circumstances.

The petitioner would argue that the **Carpenter** decision directly relates to Fourth Amendment violations in his own case, specifically the acquisition of information through the NIT installation in violation of **Rule 41(b)** of the Federal Rules of Criminal Procedure. As in the **Carpenter** case, the government's use of innovations in surveillance (NIT maleware in "Playpen" sting) technology to pinpoint and/or identify suspects using digital data meets the criteria of the **Katz** test, as well as the property based theory of Fourth Amendment rights ("physically occupying private property for the purpose of obtaining information" is a search). When the government installed the NIT maleware, acquiring seven specific categories of data, it arguably did so without a warrant as the Rule 41(b) violations rendered any warrants "void ab initio" (petitioner argued as such in original petition). This court has established that warrantless searches are typically unreasonable where "a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing" (Vernonia School Dist. 47J vs. Aeton (1995)). In addition to aforementioned accessing of information in violation of reasonable expectation of privacy the **Carpenter**

case highlighted the founding-era understandings this court uses when applying Fourth Amendment questions to innovations in surveillance tools such as CSLI and NIT maleware installation. When the government uses such tools to access information or records-which "hold for many Americans the 'privacies of life, '" (**Riley vs California**, 2014)-it contravenes that expectation.

In the petitioner's case the government not only arguably violated his Fourth Amendment rights by conducting a "warrantless" search, due to Rule 41(b) violation rendering NIT warrant "void ab initio, it then acquired the Internet Protocol (IP) address of his computer, utilizing the NIT maleware, to contact the third-party associated with the IP address and identify the petitioner's computer location. This is in addition to the NIT maleware physically searching the petitioner's computer to acquire six other key pieces of information/data, to include the computer's MAC address, in violation of the property based theory of the Fourth Amendment. As this court found in **Carpenter** the petitioner argues that the third-party doctrine should not apply in his case as his computer location wasn't truly "shared". In **Riley** cell phones were considered to store so much personal information, essentially the same as personal computers, and had become "such a pervasive and insistent part of daily life" that carrying one is indispensable to participation in modern society. The court compared cell phones to computers in the amount of data they store, data that individuals have a reasonable expectation of privacy to, and as such if the third-party doctrine does not apply to **Carpenter** then it should not apply in the petitioner's case where the government violation was arguably two-fold (41(b) violation, warrantless search, etc.). The petitioner already addressed case specific exceptions (good-faith, exigent circumstances, etc.) in his initial petition, specifically the government's knowledge of Rule 41(b) issues before initiating NIT maleware installation and lack of acting in an exigent manner once users of Playpen were identified (built cases first-took months/years to confront and/or search suspects who may have continued to harm innocent victims during the period). In addition to the aforementioned violations stated by petitioner in this supplemental brief, as well as his original petition for certiorari, the amount of data seized by the NIT maleware installation and uneccessary allowance of Playpen users to post/download child pornography (government needed only for users to create user-name and log-on to Playpen to acquire probable cause) exhibited deliberate and reckless government behavior.

2. (Second new matter) Since the time of James P. Burke's petition for a writ of certiorari, the Supreme Court of the United States reversed and remanded the decision in **McCoy vs. Louisiana**, U.S., 16-8255, reversed and remanded, 05/14/2018.

Petitioner found through BOP legal library (LexisNexus) update that... SPB 3/4/2019

As in **McCoy**, the petitioner's individual liberty was at stake in this case and it should have been his perogative to decide objective of defense. As stated in initial petition, as well as in motions/responses to lower courts, the petitioner objected to CJA counsel's strategy throughout case and maintained his intent towards "violent predators", wishing to state as such in open court, which counsel ignored. Appellant repeatedly requested CJA counsel to acquire outside computer/internet expert assistance to challenge government utilization of terminology that placed petitioner in egrecious light, challenge calculation of images/videos, challenge factual basis and PSI/PSR, and to determine method to install NIT maleware. Petitioner provided CJA counsel with all military records, as well as Veteran Affairs (VA) records and authorization to contact VA mental health care providers as needed, to confirm extensive contribution to society and truthfullness of stated intent. None of these requests (or minimal) was presented to court or objected to despite petitioner's adamant request for CJA counsel to do so.

In addition the petitioner was reliant upon CJA counsel to inform him of developments during case (repeatedly attempted to contact for updates) in order to decide his objective(s). CJA counsel neglected to inform petitioner, or make effort to investigate, previous mentioned grounds of contention included in petitions/motions presented by petitioner in post-sentencing (Fourth Amendment, Rule 41(b), Due Process violations, etc.). Additionally CJA counsel never informed petitioner of his right to petition for certiorari to Supreme Court, as required by **Rule 44(a)**. CJA counsel never contested additional "special assessment" against petitioner, in the amount of $5,000.00, under **Title 18 U.S.C. §3014 "Justice for Victims of Trafficking Act,"** despite petitioner not being convicted or accused of commiting an offense under chapter(s) **77, 109A, 110, 117,** or **274** of said ACT. Understandably many of these points are for **28 U.S.C. §2255** motion(s) but petitioner wanted to highlight them as knowledge of such would have influenced his decisions and objectives of defense during trial phase (**McCoy**), which although readily available at the time, petitioner was not aware of until already incarcerated and had access to the legal library through the Bureau of Prisons (BOP).

CONCLUSION

On the basis of this new material, as well as the material previously submitted, the petitioner James P. Burke requests that this honorable Court **grant** the petition for writ of certiorari.

Respectfully submitted,

James P. Burke

Date: March 4, 2019