18-8166

Case No.

IN THE UNITED STATES SUPREME COURT

BRUCE DWAYNE WINSTON

Petitioner

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTTIORARI

FROM

U.S. COURT OF APPEALS FOR THE 4th CIRCUIT

CASE NO. 18-6424

BRUCE DWAYNE WINSTON, PRO SE

Inmate # 57522-037

Federal Prison Camp

P.O. Box 1000

Butner, NC 27509

QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court error in allowing evidence attained in an illegal Terry/Pretextural stop to be admitted into evidence in violation of the Petitioners 4th amendment rights.

2. Did the District Court error in allowing data gained from a cell phone site record as to the Petitioners whereabouts, placing him at various crime scenes, (drug transactions) admitted into evidence without a proper warrant in violation of the Petitioners 4th Amendment protection against unlawful search and seizure and his reasonable expectation of privacy.

3. In light of the Courts ruling in Carpenter v. United States, June 22, 2018, No. 16-402, did the Appeals court error in not applying the ruling concerning cell site data being obtained without a warrant, in violation of the Petitioners 4th Amendment rights in the instant case and remand it for further consideration in light of Carpenter in essence over ruling the District Courts admission of the cell site data into evidence.

4. Did the District Court error in allowing evidence of other acts leading to a Character conclusion under Rule 404 into evidence when those acts were unrelated to the facts of the case.

5. In light of the decision handed down by the 7th Circuit Court of Appeals in United States v. Fausto Lopez, No 17-2517 on October 18, 2018, did the Court of Appeals for the Fourth Circuit error in not applying the same reasoning to the instant case, remanding it for further proceedings, consistent with Lopez.

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JURISDICTION OF THE COURT

Petitioner filed a direct Appeal which was denied by the court after he was convicted by a jury. Subsequently and timely he filed d Motion at 28 U.S.C. § 2255 which was also denied by the court. Case no. 18-6424. Decided July 31, 2018. Subsequently and timely he filed a Motion for rehearing- enbanc which stayed the mandate of the Appeals court. The rehearing - enbanc was denied on October 23 , 2018 and thus the court has jurisdiction over the instant case. The Final Mandate followed and was issued on October, 30, 2018.

This filing is in accordance with Rule 13 and filed timely within the 90 days allowed under this rule.

The court finds jurisdiction under 28 U.S.C. § 2101 (c)

STATEMENT OF THE CASE AT BAR

QUESTION 1

Was the evidence attained in the illegal Terry/Pretextural stop properly admitted into the case.

Special Agent Fitzpatrick did not have reasonable suspicion to order the stop and search of the truck when the Petitioner and Payne left Baltimore and were driving down interstate 95. In four days of surveillance up to that point, he did not have evidence sufficient to create a reasonable suspicion, as his fialure to act indicates. DEA was unable to obtain any direct evidence linking the Petitioner and Payne to a drug conspiracy, despite the fact that an undercover agent kept company with both during a night of heavy drinking and loose talk at a bar and strip club. The agent did not hear a word spoken about drugs, observe as single drug transaction, witness an exchange of drug money, or even observe the secret compartment on the Petitioners truck. As to the petitioner and Payne, "there was absolutely no activity of any kind observed by the police... other than they went to the hotel, they were seen at the hotel, and they were seen leaving the

hotel. (J.A. 1952). Herevia had been the primary subject of the surveillance, and even he had not been observed selling drugs during the four days. Herevia met with "Tone" several days before the stop on June 3, but DEA did not witness any transaction.

Reasonable suspicion should not be imputed directly to the Petitioner and Payne based on the isolated actions of Herevia, given that "there is no reasonable suspicion merely by association. " See U.S. v. Black, 707 F.3d 531, 539 (4th Cir. 2013).

The government justifies the stop on the ground that DEA observed a criminal "pattern of conduct", **BUT IT DOES NOT SAY WHAT THAT PATTERN WAS.** Even if the Petitioners and Payne's behavior "fit a profile" of a drug couriers compiled by the DEA, the DEA lacked reasonable suspicion, because the only behavior the DEA observed was that of " a very large category of presumably innocent travelers." See Reid v. Georgia, 488 U.S. 438, 440-41 (1980). When the DEA ordered the stop as the Petitioner and Payne left Baltimore with their overnight bags (containing only clothes), Special Agent Fitzpatrick acted on a hunch which turned out to be a "lucky guess", and the DEA should not be rewarded for breaking the law to stop the truck. Whether or not they found drugs and cash after the stop, the stop itself was not done lawfully so everything after the stop " what was found in the truck" can not be entered into evidence. Absent that evidence there is nothing else presented by the government that by itself could have convicted the Petitioner of the charges against him.

THE ANSWER TO THE QUESTION THEN SEEMS QUITE CLEAR. THE STOP WAS ILLEGAL SO IT FOLLOWS THEN THAT THE EVIDENCE IT PRODUCED SHOULD NOT HAVE BEEN ADMITTED INTO EVIDENCE. THIS ALONE CALLS FOR THE COURT TO VACATE THE CHARGES AND SENTENCE.

Additionally, the pretextural stop by the Maryland State Police, not the DEA who ordered the stop, rises and falls on the "Collective Knowledge Doctrine". The District court Judge states in ST lines 14, 15, 21, 22 " That stop is constitutionally invalid" and " I've found that absent the matter of the Collective Knowledge Doctrien" the stop was unconstitutional. Even the judge realizes that the stop was unlawful and states that the Appeals court would want to take a look at it, but then refuses to withdraw his ruling allowing the evidence found in the stop into the case.

The stopping of a vehicle by a police officer constitutes seizure under the Fourth Amendment, which mandates that any seizure must be reasonable. In the context of a supression motion, (filed by the Petitioner) the reasonable suspicion standard required the court to view the "totality of the circumstances" to determine whether the officer had reasonable suspicion ond/or particularized and objective basis for suspecting the particular person stopped of criminal activity. In the context of an investigatory stop, under the collective knowledge doctrine, when an officer acts on an instruction from another officer, the act is justified if the instructing officer had sufficient information to justify taking such action himself; in this very limited sense, the instructing officer's knowledge is imputed to the acting officer. Special agent Fitzpatrick clearly as afore mentioned had no reasonable suspicion to have the vechicle stopped even after four days of survallance. Wherefore it follows that the State trooper who made the stop had no reasonable suspicion either. There was no collective knowledge. Officer Neeley of the Maryland State Police clearly stated in testimony that the so called knowledge he was given to do the stop was in fact false and not reasonably trustworthy. It is a black scare on law enforcement and the court which brings into question the integrity of both and the integrity of the judicial proceedings.

QUESTIONS 2 & 3

Did the court error in allowing cell site phone record data obtained without without a warrant to be introduced into evidence? How does Carpenter effect the courts decision?

The panel decision conflicts with a decision of the United States Supreme Court rendered on June 22, 2018 some 30 days after the Petitioner filed his Petitioner with this court. The case (Carpenter v. United States, No 16-402) therefore, makes consideration by the full court necessary to secure and maintain uniformity of the court's decisions.

Additionally, in the Petitioners judgment as a Pros Se litigant, and his understanding of the law and procedure, several material fact and legal matters were overlooked and the instant case involves several matters of exceptional importance, as well as the fact that that the Petitioners Constitutional rights were violated.

Clearly the government's acquisition of the Petitioners cell site records constituted a fourth Amendment search just as it did in the Carpenter Case. The Court held;
The Fourth Amendment protects not only property interest but certain expectations of privacy as well. Katz v. United States, 389, U.S. 347, 351. Thus, when an individual "seeks to preserve something as private," and his expectation of privacy is " one that society is prepared to recognize as reasonable," official intrusion into that sphere qualifies as a search and requires a warrant supported by probable cause. See Smith v. Maryland, 442, U.S. 735, 740 (internal quotation marks and alterations omitted). The analysis regarding which expectations of privacy are entitled to protection is informed by historical understandings" of what was deemed an unreasonable search and seizure when the Fourth Amendment was adopted." Carroll v. United States, 267 U.S. 132, 149. These founding era understandings continue to inform this Court when applying the Fourth Amendment to innovations in surveillance tools. See Kyllo v. United States, 533, U.S. 27.Pp. 4 7.
Further the court held;

The digital data at issue, personal location information mainatained by

a third party does not fit neatly under existing precedents but lies at the intersection of two lines of cases. One set addresses a person's expectation of privacy in his physical location and movements. See United States v. Jones, 565 U.S. 400 (five Justices concluding that privacy concerns would be raised by GPS tracking). The other addresses a person's expectation of privacy in financial records held by the bank, and Smith 442, U.S. 735, (no expectation of privacy in records of dialed telephone numbers conveyed to telephone comany.) Pp 7 10.

Lastly the court held;

Tracking a person's past movements through CSLI partakes of many of the qualities of GPS monitoring considered in Jones, it is detailed, encyclopedic, and effortlessly complied. At the time, however, the fact that the individual continuously reveals his location to his wireless carrier implicated the third party principle of Smith and Miller. Given the unique nature of cell site records, this Court declines to extend Smith and Miller to cover them. Pp 10 18

The court adopted a new rule which "must take account of more sophisticated systems that are already in use or in development, "Kyllo, 533 U.S. at 36 and the accuracy of CSLI is rapidly approaching GPS level precision, Pp 12 15.

The court when on to say;

Third party doctrine does not govern the case. "there is a world of difference between the limited types of personal information addressed in Smith and Miller and the exhaustive chronicle of location information casually collected by wireless carriers. Second that the rationale for third party doctrine voluntary exposure hold up when it comes to CSLI. Cell phone location information is not truly "shared" as the term in normally understood. Fist, cell phones and the services they provide are " such a pervasive and insistent part of daily life" that carrying one is indispensable to participation in modern society. Riley, 573 U.S.. Second a cell phone logs a cell site record by dint of its operation, without any affirmative act on the user's part beyond powering up. Pp 15 17

A cell phone seized in the illegal search and sizure was used and introduced into evidence concerning where the Petitioner was or was not, and provided data which was used to convict the Petitioner and upon which the jury relied heavily to determine there verdict. But for this data the government could not have proved that the Petitions was present at other drug related transaction locations killing the prosecutors theory that there were multiple times and places that the Petitioner acted as a Mule for the drug drops. The problem arose when they used a phone that did not even belong to the Petitioner and failed to use the records from the phone that actually did belong to the Petitioner which would have given the jury a whole other view of his movements and activities and showing he was not at the drug drop locations at the time of any other drug drop but was about lawful business and family affairs during the time the other phone data showed that the owner of the phone used to convict the Petitoner was present and not the Petitioner.

In a recent ruling of the United States Supreme Court on June 22, 2018, Justice John Roberts speaking fro the majority wrote "Unlike the nosy neighbor who keeps an eye on comings and goings, the signal towers and processing centers that track cellphone users "are ever alert, and their memory is nearly infallible, making anaalog-era precedents prosecutors cited to justify such warrantless searches all but obsolete. " The court rejected the government arguments that that police should have the same access to digital data as investigators do under 20th century precedents, to examine business records held by banks or to conduct shoe leather surveillance. "There is a world of difference between the limited types of personal information addressed by 1970's decisions allowing warrantless examination of business records and the exhaustive chronicle of location information casually collected by wireless carriers today."

The court went onto say that that "authorities need a warrant to search the contents of a cellphone found in a suspects' pocket, despite precedents allowing them to examine address books, matchboxes and other items found on an arrestee without demonstrating probable cause. "

So the Supreme Court has set new law concerning the search and seizure of cell phone data which was primary evidence in the instance case. That new Fourth Amendment Doctrine gives protection against police searches and they hinge on the public's reasonable expectation of privacy."

In the instant case not only was a cell phne that did not belong to the Petitioner taken and it's data used to convict the Petitioner of being at locations he never was at the time of drug deals and drops, but the phone was not even found on his person but in the truck where there were other passengers and one that had been driven by other people making it highly probable that the cell phone belonged to someone else as the Petitioner had his own cellphone. The data was not obtained through the use of a warrant as is the requirement after this Supreme Court Ruling. It follows therefore that the data from the cell phone was not admissable as evidence under the Federal Rules of evidence. The police in the Carpenter Case....relied on information provided by the cell carrier that showed Mr. Carpenter's whereabouts over several months which put him at or near several crime scenes at the time of the crimes. This Supreme Court Case is identical to the instant case in that matter and was ruled as none admissable evidence by the U.S. Supreme Court on appeal, as will the instant case be if it must go to the higher Court for Justice. Clearly this cell phone data breech violated the Petitioners Fourth Amendment Right to protection against unlawful search and seizure and his reasonable expectation of privacy.

It should be abundantly clear to the court that multiple protections afforded the Petitioner by the U.S. Constitution, aforesaid have been violated.

As in Carpenter the Government did not obtain a warrant supported by probable cause before acquiring the Petitioners cell site records. It acquired the records from a cell phone found in the truck counsel which the Petitioner was only a passenger in. The cell phone did not belong to the Petitioner but was left in the truck by the former driver believed to be George Herevia, a government witness. Petitioner had his own cell phone with him and any data retrived from it was contrary to the data received from the phone in question. So either the Petitioner was majicly able to be in two places at one time, which he was not, or the cell data obtained from the phone that was not his and used against him was a false record of the petitioners whereabouts. Using the cell records from his phone he was never where the supposed drug **trafficking** crimes took place at the time they took place. Absent this cell hone data the government would be hard pressed to prove any case against the petitioner.

IT IS ONCE AGAIN CLEAR THAT IN LIGHT OF CARPENTER THE CELL SITE DATA FROM THE PHONE USED CANNOT BE ADMITTED SINCE IT WAS OBTAINED WITHOUT A PROPER WARRANT. IN THE ALTERNATIVE THE COURT SHOULD FIND THAT THE CELL PHONE USED TO OBTAIN THE DATA HAD NO NEXUS TO THE PETITIONER AND THEREFORE WAS NOT ADMISSIBLE.

Absent this data the government looses all credibility in it's attempt to tie the Petitioner to the drug crime conspiracy.

Question # 4

Did the District Court error in allowing evidence of other acts under Rule 404 into evidence when those acts have no nexus to the case at bar?

It was error to admit the evidence because it failed to satisfy two threshold tests for admissibility under Rule 404 (b). First, the government failed to show that the Petitioner committed the prior act - i.e. that he was the "actor" as required by Huddleston v. U.S.. Petitioner did nottransport the drugs and was not at the scene in NC. His supposed connection with the incident was his ownership of the horse trailer, but the problem enters when you see that the

undisputed evidence was that he had sold it two years earlier. *Second*, the Government failed to show that the North Carolina incident was sufficiently similar to the charged conduct. That incident occurred at a substantially different time and involved a different destination, different actors, different narcotics, a very different amount of cash, different vehicles, and a different compartment both in size and configuration.

ARGUMENT

I. THE RULE 404(b) EVIDENCE EXPLAINS WINSTON'S CONVICTION

The jury convicted Winston, and acquitted Payne. The divergence is not arbitrary; it reflects the impact of the erroneous admission of the prior "bad acts" evidence concerning the North Carolina incident.

The Government contends now that "much of the evidence . . . applied only to Winston and not to Payne." Gov't Br. ("GB") 17. But that is not what the Government told the jury in closing argument. At trial, the Government argued that Winston and Payne were joined at the hip, acting together at every point and offering the same cover story when stopped and questioned by law enforcement. In summarizing the evidence, the Government referred to "Winston and Payne" or "Payne and Winston" or "they" more than 100 times. Typical are these passages:

> The truck that *they* were driving, as you're familiar with by now, had a logo on the side that said Shaleentergy.com. . . .
>
> *Both*, as you can see in the images in front of you, were wearing shirts that matched the Shaleentergy.com logo on the side. The shirt said Shale on it.

(J.A. 1272-73) (emphasis added).

> These defendants drove together, drove 17,000 miles, as you heard. . . . I'll remind you now, that is three-quarters of the way around the earth. That's a lot of time to spend with someone in a car. That's four roundtrips from the East Coast to West Coast.

(J.A. 1279-80).

> Here's what I submit to you. That whole truck was disguised. The whole thing is disguised. The whole thing is a cover story. *Mr. Winston and Mr. Payne drove in that truck with a fake energy company on the side, wearing shirts for a company that doesn't exist, and gave a false cover story about New Holland, Pennsylvania and natural gas.* That's the disguise that *they* played a direct role in.

(J.A. 1291) (emphases added).

Even now, the Government's "Statement of Facts" recites that:

- Before they arrived in Baltimore, Winston and Payne transported "multiple shipments" of drugs;
- They traveled more than 17,000 miles together on these trips;
- They traveled together "to Baltimore in a white truck, which bore the logo of a company called 'Shale Entergy' on the side," "check[ed] into the Holiday Inn" together, and "left the hotel" together the next day;

- They were both wearing "Shale Entergy" work shirts on the date of their arrest;

- They "were never in New Holland, Pennsylvania," "never visited an actual job site for 'Shale Entergy,'" and "never performed any kind of energy-related work;" and

- They both received a $10,000 check for bond money from an attorney unknown to them.[1]

The Government now sees "[d]istinctions in the [e]vidence [a]gainst Winston and Payne" that it did not see at trial. GB 17.

- It says that Winston created a fictional company called "Shale Entergy." But, at trial, the Government argued that both Winston and Payne claimed to be employees of Shale Entergy. (J.A. 1291, 1398). And the Government pointed out that Payne, like Winston, was also wearing a Shale Entergy work shirt when the two were arrested. (J.A. 1291, 1596-96).

- The Government says that Winston "told a group of officers that during the weekend leading up to his arrest he had been working in New Holland, Pennsylvania at a job site for 'Shale Entergy.'" GB 10. But the Government argued in closing that "they both made up the story about New Holland, Pennsylvania" and, again, "when they got pulled over, within minutes or an hour or two of each other, they both provided the same story . . . despite the fact they both knew there was no real job site or real work to be done in New Holland, Pennsylvania." (J.A. 1297).

- The Government argues in its brief that Winston alone testified "that the purpose of the trip to Memphis was to pick up an air compressor from a former employee of 'Shale Entergy'" and that this statement was "contradicted by the evidence." GB 12. But, in fact, Mr. Payne

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1 GB 10-11, 11, 6-7, 14, 8-9 & 17, respectively.

corroborated this testimony, testifying that, upon arriving in Memphis, Herevia "drove to a house and retrieved a compressor." (J.A. 1091).

- The Government also argues that the evidence was unique as to Winston because he denied receiving $30,000 from Herevia at the Baltimore Holiday Inn when there was evidence of a $16,000 deposit in Winston's bank account. GB 14, 15. But Payne was also present, denied receiving any money from Herevia, and admitted that Winston paid him on each trip. (J.A. 1074-75, 1090, 1684).

In the end, the evidence regarding Winston was different in two respects: that he was allegedly involved in the North Carolina incident and that he was allegedly present when the secret compartment was installed in the truck. What the Government's brief ignores is exactly what Winston and Herevia actually said about the installation of the compartment.[2] The evidence was undisputed that Winston did not fabricate or install the compartment and that Herevia did. (J.A. 1663). Winston hoisted the truck bed onto the truck. (J.A. 937). Herevia did not testify that Winston saw him fabricate and install the compartment; he only insinuated that Winston must have seen his handiwork when Winston hoisted the bed onto the truck. (J.A. 1664-65). Winston testified that he did not see or recognize any compartment because of the compartment's small size, his poor eyesight, or both. (J.A. 933-95). The point is not that the jury was obligated to credit Winston's account, but

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2 *See* GB 8-9, 25 (citing J.A. 1661-65 (Herevia), 933-35 (Winston)).

that admission of the evidence about the North Carolina incident skewed the jury's evaluation of Herevia and Winston's competing accounts. The prior "bad acts" evidence allowed the Government to argue to the jury, as it argues now, that Winston must have observed the secret compartment the second time around because it's "a once in a lifetime occurrence" to discover a secret compartment in one's vehicle. GB 26.

II. IT WAS ERROR TO ADMIT EVIDENCE OF THE NORTH CAROLINA INCIDENT

A. The Government Failed To Establish that Mr. Winston Was an "Actor" in Connection with the North Carolina Incident

The Supreme Court in *Huddleston* established the threshold test of admissibility for prior "bad acts" evidence: The evidence is relevant "*only if* the jury can reasonably conclude that the act occurred and that *the defendant was the actor.*" *Huddleston v. U.S.*, 485 U.S. 681, 689 (1988) (emphasis added); *U.S. v. McLamb*, 985 F.2d 1284, 1290 (4th Cir. 1993). By any fair reckoning, it cannot be said that Winston was "the actor" in the 2010 delivery of illegal drugs and cash to North Carolina. There was no evidence that he placed the drugs and cash in the horse trailer, handled the drugs or cash at any time, or even knew about them. He most certainly did not drive the

truck and trailer to North Carolina, and there was no evidence that he had ever traveled there before or had business dealings of any kind in the state.

Not surprisingly, then, the Government seeks to step away from the *Huddleston* test, arguing that the prior "bad acts" evidence must only be "'sufficiently related' to the charged offense" or "must establish a linkage between the prior act and the defendant." GB 23, 24. *Huddleston* teaches, however, that a sufficient relationship, or linkage, begins with evidence from which a jury "could reasonably conclude . . . both that the act actually happened and that the defendant committed the act." *U.S. v. Young*, 65 F. Supp. 2d 370, 373 (E.D. Va. 1999); *see U.S. v. Cooks*, 589 F.3d 173, 183 (5th Cir. 2009) (requiring that the defendant must, at minimum, be "knowingly involved" in the prior act); *U.S. v. Gonzalez-Lira*, 936 F.2d 184, 190 (5th Cir. 1991) (excluding Rule 404(b) evidence regarding smuggling attempt when Government presented no evidence that the defendant committed the prior act).

The Government cites six cases in its discussion of the *Huddleston* requirement. What the Government does not say about those cases is that, in *all* of them, it was apparent and undisputed that the defendant was the "actor" who committed the prior bad act. *See Cooks*, 589 F.3d at 183 (the de-

fendant was "the mastermind" and "himself created many of the forged documents" pertaining to the prior act); *U.S. v. Flores-Blanco*, 623 F.3d 912, 919-20 (9th Cir. 2010) (border patrol agents had "apprehended Flores-Blanco on the prior occasions" smuggling illegal aliens); *U.S. v. Thomas*, 189 Fed. App'x 219, 223-24 (4th Cir. 2006) (unpublished) (Thomas had sold drugs before); *U.S. v. Van Metre*, 150 F.3d 339, 350-51 (4th Cir. 1998) (Van Metre had committed rape before); *U.S. v. Aramony*, 88 F.3d 1369, 1376-77 (4th Cir. 1996) (Aramony had made prior sexual advances); *U.S. v. Powers*, 59 F.3d 1460, 1465-65 (4th Cir. 1995) (Powers had assaulted women before). Indeed, in *all* the Rule 404(b) cases cited by the Government, the defendant was unquestionably "the actor" in the prior bad act.

The Government's evidence at the pretrial hearing did not show that Winston was the actor who in 2010 transported drugs and drug money to North Carolina. He was not stopped and apprehended in North Carolina. He did not drive the truck and trailer, and he did he meet the trailer in North Carolina. Nor was there evidence that he had anything to do with handling the drugs and money at any point, that he even knew about the drugs and money, or that he stood to benefit from the transportation of the drugs. Rule 404(b) evidence need not be evidence of a conviction, or course, nor even

crime. Nevertheless, it is notable that Winston traveled voluntarily to North Carolina to recover his truck, and the authorities were apparently so little convinced that he was an actor that they questioned him only briefly and allowed him to return home. In none of the cases cited by the Government is the *Huddleston* test met by such an attenuated showing.

If Winston was not an actor—and the Government does not really contend that he was[3]—the Government argues that there was "*some* evidence"[4] of a linkage between the prior incident and the charged conduct, because the horse trailer allegedly "belonged to" Winston (a claim that the Government makes a dozen times or more).[5] But the undisputed evidence at trial was the horse trailer did not belong to him, because he had sold it (and a horse) to Jose Alfredo Flores in 2008 for $25,000. (J.A. 708-09, 710-11, 714, 896, 954-55).[6]

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3 Indeed, the Government's primary explanation for why the North Carolina incident is probative of Mr. Winston's knowledge assumes that he was *not* an actor. The Government posits that, if "Winston was not involved, *ex ante*, in the scheme that resulted in the North Carolina seizure . . . , he was nonetheless informed, *ex post*, of the drug-related use to which his vehicle had been put." GB 25.

4 GB 28.

5 GB 1, 15, 16, 18, 21, 25, 26, 28, 29, 31, 40, 46.

6 The Government acknowledges that Mr. Winston produced "Coggins papers" confirming the sale of the horse. GB 16 n.4.

Winston still held the title to the trailer only because Flores had not yet paid the $25,000 in full. (J.A. 708, 896-97).[7] For purposes of showing that Winston was an actor in connection with the North Carolina incident, however, the critical fact is not title to the trailer, but *possession*, for only if he had control of the trailer at the time of the North Carolina incident could the jury reasonably conclude that he knew of the secret compartment and the use of the trailer to transport drugs. But, again, the evidence was that the trailer had been out of Winston's possession for almost two years by then.[8]

The Government also points to evidence that: (1) Vanover and Flores were Winston's employees; (2) Vanover told authorities at the time of the traffic stop that Winston had told him to go to North Carolina to pick up mules from a man named "Don;" and (3) the marijuana and currency seized from the horse trailer belonged to the same Juan Carlos Flores who owned the cocaine and currency seized from Winston and Payne in 2013. GB 28.

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7 It would have made no sense for Mr. Winston to transfer the title until he had been paid, particularly when the trailer was collateral for an outstanding loan. (J.A. 708-09). Thus, that he retained title does not contradict his testimony that he had sold the trailer two years earlier, as the Government asserts. GB 16.

8 *See Young*, 65 F. Supp.2d at 374 (excluding Rule 404(b) evidence of a prior arson involving the defendant's car, because, despite his control of both cars immediately before their reported theft and destruction, control alone "does not implicate the custodian in fraud and arson").

First, however, this was evidence presented at the pretrial hearing, not the trial. Admissibility under *Huddleston* turns on whether the Rule 404(b) evidence is such that "*the jury* can reasonably conclude that the act occurred and that the defendant was the actor," and the jury never heard this evidence. *Huddleston*, 485 U.S. at 689; *id.* at 690-91 ("the trial court must consider all evidence presented to the *jury*" in making its final assessment of admissibility) (emphases added).

Second, none of this additional evidence establishes that Winston was "knowingly involved" in the North Carolina incident. That Vanover and Flores had been part-time employees on Winston's farm in Arkansas did not connect him to their apprehension in North Carolina, particularly when Winston's testimony was undisputed that the he had not see them for a month before their arrest. (J.A. 895). That Vanover told North Carolina authorities that Winston had instructed him to pick up "mules from Don" hardly implicates Winston in the drug trade. If Vanover was telling the truth, then his statement exonerated Winston, and if, as was to be expected, he was offering a "cover story" for his presence in North Carolina, it was not one that impli-

cated Winston and not one that Winston corroborated.[9] As for the evidence that Juan Carlos Flores owned the drugs seized in both the 2010 and 2013 incident—four lines of testimony in the 199-page transcript of the *pretrial* hearing—the Government never made reference to it in the Rule 404(b) briefing and argument in the trial court, nor did Judge Bennett. (J.A. 403-07 & 414-16 (argument); 47-61, 71-79 (briefing); 438-49 (DCT opinion)).

Third, this additional evidence almost certainly was not offered at the trial because it was triple hearsay and unreliable. Vanover did not testify at the hearing; rather, Vanover spoke to North Carolina authorities, who talked to Special Agent Fitzpatrick, who testified. (J.A. 109-112). Likewise, Flores talked to the DEA informant, who reported to Fitzpatrick, who testified about that twice-removed conversation. (J.A. 105).

B. The North Carolina Incident Is Not Sufficiently Similar to the Charged Conduct

Sufficient similarity between the charged conduct and the prior "bad act" is the *sine qua non* of admissibility. This Court has repeatedly said that,

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9 The Government has the logic of the situation backwards. What would have been suspicious is Vanover and Winston both giving the same implausible story about picking up mules. In fact, Mr. Winston did not offer any explanation; he merely told authorities that Vanover had borrowed his truck. (J.A. 111-12).

to be relevant, Rule 404(b) evidence "*must be* sufficiently related to the charged offense." *U.S. v. Rawle*, 845 F.2d 1244, 1247 n.3 (4th Cir. 1988) (emphasis added); *U.S. v. McBride*, 676 F.3d 385, 397 (4th Cir. 2012); *U.S. v. Johnson*, 617 F.3d 286, 297 (4th Cir. 2010). The Government does not disagree in principle, but, in practice, it resists a frank comparison of the charged conduct with the North Carolina incident along the several dimensions recognized as significant in the case law. GB 23.

The differences are significant. The North Carolina incident occurred three years earlier, in 2010, in a different part of the country. It involved very different vehicles (a horse trailer rather than a flat-bed truck) driven by different individuals (Vanover and Flores rather than Payne and Winston). The drugs were different in type and amount (1,100 pounds of marijuana versus 21 kilograms of cocaine), as was the amount of cash seized ($1.1 million versus $30,000). Also different were the cover stories (picking up two mules versus checking oil-field valves). *See* Winston Br. ("WB") 18-19; GB 29-30. And absent from the scene of the North Carolina incident are Herevia, the drug handler in this case, and Winston.

The Government does not deny these differences; it simply declares by *ipse dixit* that "these alleged differences are inconsequential for purposes of

the Rule 404(b) analysis." GB 30. Differences of this kind, however, are the differences found significant by the three Fourth Circuit cases cited in our opening brief, *McBride*, *Johnson*, and *Hernandez*, each of which excluded Rule 404(b) evidence in drug cases because the differences between the Rule 404(b) evidence and the charged conduct rendered the acts too dissimilar. WB 29-35. Here, the differences between the Rule 404(b) evidence and the charged conduct are *greater* than in *McBride*, *Johnson*, or *Hernandez*.

Most notably, in all three cases, the defendants (unlike Winston) were directly involved in the prior incidents—they were the drug dealers or "cookers." In evaluating the similarity of the Rule 404(b) evidence in *McBride*, this Court considered differences in time, location, and the drugs involved, and, along each dimension, the differences in this case are greater. The North Carolina incident is three years distant in time versus one and a half years in *McBride*. The drugs are different here (marijuana/cocaine), not essentially the same as in *McBride* (cocaine/crack cocaine). And the lack of connection between the locations is even greater (North Carolina/Maryland versus the defendant's residence and a nightclub in the same town). 676 F.3d at 397. The same comparisons apply to this case and *Hernandez*. The prior incident is further removed in time here (three years versus six months) and

the drugs are different, not essentially the same (marijuana/cocaine versus cocaine/crack cocaine). 975 F.2d at 1036-37. In *Johnson*, too, the Court considered differences in time and location, as well as the difference between the cast of supporting actors in the two incidents. It counted against the admissibility of the prior-acts evidence that the first drug deals had occurred five years earlier, that they occurred in different locations (albeit in the same town), and that they did not involve the same co-defendants—just as here. *See Johnson*, 617 F.3d at 288, 290, 291, 298.

About these differences in time, place, drugs, and actors that the Court deemed dispositive, the Government says almost nothing.[10] It dismisses *McBride* and *Johnson* as inapposite because they involved "street-level" rather than "generic" drug activity—a distinction unsupported by any logic or authority or, for that matter, the facts of this case. What, after all, does the Government contend Payne and Winston were doing, but delivering drugs to Herevia for his "street-level" dealing to Tone? Whether the evidence in *McBride* and *Johnson* "lacked the sophistication" of the evidence here (presumably, the Government means a hidden compartment) is beside the point.

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10 The Government argues, for example, that a difference in the drugs involved in the two incidents is irrelevant, but ignores the holding in *McBride* and cites the dissenting opinion. GB 32.

The cases are consistent in requiring that the Rule 404(b) evidence be sufficiently similar to the charged conduct. The North Carolina incident does not meet that test, for it involved different drivers in a different vehicle transporting different drugs (and a dramatically different amount of cash) to a different state on a different pretext—and over three years removed in time from the charged conduct.

The Government once again urges this Court to follow its decision in *Rawle*. But to follow *Rawle* is to find that the district court erred in admitting the North Carolina incident. *First*, it was undisputed in *Rawle* that the defendant committed a "prior act," for he had driven the tractor trailers carrying drugs in the past. *Second*, there was a clear similarity between the charged conduct and the 404(b) evidence, for both involved tractor-trailers loaded with marijuana and paper products that were driven from southern states to northeastern states using false bills of lading. *Rawle*, 845 F.2d at 1246, 1247-48. Here, by contrast, Winston was not a driver in 2010, nor even present in North Carolina, and the vehicles, drivers, drugs, amounts of money, destinations, and location and nature of the secret compartments were all different. *Third*, the Government overlooks that the district court in *Rawle* instructed the jury "to disregard the 'prior bad act evidence' with regard to

Counts Two and Four." 845 F.2d at 1246. Those counts - for conspiracy to possess marijuana with intent to deliver and for possession - are the counterparts to the charges on which the Petitioner was tried and convicted. That is, the court in Rawle only admitted the Rule 404 (b) evidence as to a charge (violation of the Travel Act, 18 U.S.C. § 1952) not at issue here.
See Rawle, 845 F.2d at 1248 "The prior bad acts" testimony was admissible and relevant for the purposes of showing a business enterprise, i.e a c continuous course of conduct, an essential element of the Travel Act.".

QUESTION # 5

In light of United States v. Fausto Lopez, No 17-2517 decided October 18, 2018 in the 7th Circuit Court of Appeals should the court apply the same reasoning to the case at bar, consistent with Lopez.

Lopez was reversed due to the district courts denial to suppress evidence seized in a Terry/Preteutural Stop. In the instant case the motion filed to supress the evidence from the Terry/Pretextural Stop was also denied by the District Court and should be reversed for the very same reasons as Lopez. Lopez was decided after the Petitioner had filed his appeal and therefore creates new law applicable to the petitioners case. Petitioner relaizes that Lopez is a 7th Circuit case and is not binding on the fourth Circuit, but what it does is create a split in the circuits decsions on this matter with the 4th Circuit Court of Appeals upholding the District court decision to allow the evidence to be brought forward in the instant case, while the Lopez decision in the 7th Circuit overturned the District Courts decision. Creating this circuit split requires the Supreme Court to settle the split in the circuits on this issue. Petitioner seeks a ruling on this matter applicable to the instant case at bar.

In Lopez the denial of the motion to supress was reversed for two independent

reasons. First,when the officers seized and searched Lopez, they did not have reasonable suspicion that he was engaged in a crime. In the instant case after 4 days of close servelance there was nothing suggesting to the officer that the Petitioner nor the driver were involved in or about to become involved in a crime. They did not have any reasonable suspicion, to warrant the stop. They had no warrant for the stop because no judge would have issued such a warrant based on the facts they presented for the stop. It was clearly illegal, warantless, and a violation of the fourth amendment rights of the Petitioner. Second in Lopez, even if the original stop had been justified, which is was not, the officers continued detaining Lopez beyond the original justification for the stop. Since there was no justification for the stop in the instant case any detention of the Petitioner violated his rights to be secure in his person. In Lopez they received a tip from an informantas they did in the instant case from Herevia (the government informant and witness) , but as in Lopez the officers failed to validate the information from any other source, putting it suspect at best and false at worst. As in Lopez the district cout found fist that the officers had reasonable suspicion that authorized their investigative stop but the circuit court disagreed. In the instant case both the District and Circuit court agree but they are in conflict with the Lopez ruling creating the Circuit split. In the instant case the petitioner did not voluntarily consent to the search so without reasonable suspicion the stop should have ended immediately when nothing was apparent and out in the open to allow it to proceed.

The Fourth Amendment to the Constitution prohibits unreasonable searches and seizures. The Petitioner was seized without a warrant or probable cause, but he could have been seized briefly but lawfully.... Terry v. Ohio, 392 U.S.

1, 27 (1968), **if the officers had a reasonable suspicion that he was engaged in criminal activity. (which they clearly did not).**

Terry stops are made without warrants, but they are subject to limits. First they must have a "reasonable suspicion, grounded in specific and articulable facts", that an individual has committed a felony or is about to commit a crime. United States v. Hensley, 469 U.S. 221, 229 (1985). The reasonable suspicion standard necessary for an arrest is a lower bar than the probable cause standard necessary for an arrest, see United States v. Arvizu, 534 u.S. 266, 273-74 (2002), but the police are not enttitled to detain a person for questioning based on only a hunch. Petitioner was handcufffed and put in the back of a police car before reasonable suspicion or probable cause was apparent. It was a lucky hunch which is not sufficient to detain a person, see Terry, 392, U.S. at 22; United States v. Wimbush, 337 F.3d, 947, 949-50 (7th Circuit 2003).

The fourth amendmnet proceeds as much by limitation upon the scope of governmental action as by imposing preconditions upon its linitiation. A Terry stop violates the constitution when an officer "prolongs the stop, absent the reasonable suspicion ordinarily demanded". by the 4th amendment. See Rodriguez v. UNited States, 135 S. ct. 1609, 1615 (2015). **WHEN THE REASONABLE SUSPICION JUSTIFYING THE STOP EVAPORATES THE STOP MUST END.** The terry stop deprives a person of liberty and then involves a frisk for weapons performed in public while the citizen stands helpless.

In the instant case the stop was made based on information from an informant just as it was in Lopez. Terry stops based on tips must consider the identity of the informant. See Florida v. J.L., 529 U.S. 266, 271 (2000). The tip in the instant case like in Lopez was not predictive information, it lacked :indicia of reliability" without means to test the informant's knowledge or credibility. See Adams v. Williams 407 U.S. 143, 146-47 (1972).

The Supreme court has long recgonized decisions " have consistently recognized the value of corroboration of details of an informant's tip by independent police

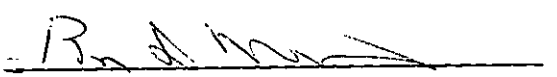
work. See Gates, 462 u.S. at 241. Not only was the tip unreliable but it came from government witness with a lot to gain through his deal with the government. Shifting blame for his actions to the Petitioner was an easy out for the informant. Lopez and its standards must be applied to the instant case, the stop declared illegal and and any evidence seized stopped from being presented. THe only was to accomplish this now is to vacate and remand for a new trial.

CONCLUSION

Any one of the five questions presented stand on their own merit and all of them should be considered worthy of the courts grant of Certiorari. Taken as a whole the totality of the circumstance demands that the case at bar be vacated and remanded for a new trial consistent with the findings of the court on the presented issues.

WHEREFORE THE ABOVE CONSIDERED the Petitioner ask this honorable court to grant him his Petition for Writ of Certiorari.

Respectfully submitted,



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Dated this 19 day of February, 2019.