IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

No._____

DOCKERY CLEVELAND,
Petitioner,

-vs-

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
SIXTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Because of the unique nature of a cell phone, the intrusion into the owner of the device will be ongoing as long as the device has the ability to be powered. Therefore, if a magistrate judge has placed a time limitation on the Government's ability to extract information from the device, does the failure of the extraction to be performed within the permissible framework of the warrant require the suppression of the tardily obtained information?

II. Because the right to serve on a jury is that of the prospective juror, once a defendant has challenged the Government's use of a peremptory challenge on a prospective juror who was African-American without providing an adequate race neutral basis for the challenge, does the defendant need to renew the objection after the basis is provided to preserve appellate review of that challenge?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW AND RULE 29.6 STATEMENT

All parties appear in the caption of the case on the cover page. None of the parties included thereon have a corporate interest in the outcome of this case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Dockery Cleveland, respectfully prays that a writ of certiorari issue to review the judgment below of the Federal Sixth Circuit Court of Appeals.

OPINIONS BELOW

The Order of the Sixth Circuit Court of Appeals, No. 17-3993, filed October 19, 2018, appears at Appendix A-1 to the Petition. Cleveland's Petition for Rehearing/Suggestion for en banc Review was denied on December 12, 2018 and is attached at Appendix A-2 to the Petition.

JURISDICTION

Jurisdiction of this Court is conferred pursuant to 28 U.S.C. §§ 1257 and 1651 as a judgment of the federal court of appeals was entered on December 12, 2018.

RELEVANT CONSTITUTIONAL PROVISIONS

FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION

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

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In October of 2015, the Drug Task Force in Youngstown, Ohio, was notified that a truck with a car carrier trailer destined for Warren, Ohio contained a vehicle that they believed contained illegal narcotics. A search warrant was obtained. An DEA agent obtained the keys from the driver. The vehicle was searched while it was still on carrier. From the rear section of car, ten kilo sized bricks with black tape, and two smaller green packages in a plastic wrap.

As the result of further investigation by law enforcement, a warrant was issued to seize the appellant's cellular telephone. The order granting the search specifically set a start-date and an end-date for the search to be conducted. Law enforcement officials obtained the cell phone within the permitted period for the search, but did not examine the contents of the device until well after the time period designated in the warrant.

Petitioner Cleveland's motion to suppress was denied by the district court. A jury convicted him of the charged offenses of conspiring to possess or distribute at least five kilograms or more of a mixture or substance containing a detectable amount of cocaine in violation of 21 U.S.C. §841(a)(1) and (b)(A) and 846.

On appeal, the Sixth Circuit Court of Appeals affirmed his convictions. Petitioner Cleveland challenged the denial of the suppression of search of his cell phone and the improper use of a peremptory challenge by the Government pursuant to Batson v. Kentucky, 476 U.S. 79 (1986).

Search of Cell Phone was Beyond the Scope of the Warrant Issued

The panel, in its opinion, cited the Sixth Circuit decision in United States v. Castro, 881 F.3d 961, 969 (6th Cir. 2018). Castro recognized that the "federal rules of criminal procedure

give law enforcement the authority to conduct searches of lawfully seized phones after they are seized," (citing, in part, Fed. R. Crim. P. 41(e)(2)(B). However, Castro did not address a warrant that had a specifically ordered expiration date for the search.

Cellular telephones have a unique application to the Fourth Amendment. An person's entire personal life and private information are contained in a cellular phone. Therefore, intrusions, including extractions, must be limited to the four corners of the warrant. Time limitations within an order granting a warrant must not be construed to be limited only to the date of seizure of the device. The Fourth Amendment should protect the contents contained in the device also. Therefore, if the Government fails to conduct an extraction within the designated period, it should follow that if forfeits its ability to use the tardily extracted information.

Batson Violation

The second issue addressed in this petition is the double-objection requirement to preserve challenge made pursuant to Batson v. Kentucky, 476 U.S. 79 (1986). The panel here found that Cleveland's challenge on appeal must be viewed on a plain error standard because counsel failed to object to the district court's accepting of the race-neutral reasoning of the prosecutor. In other words, the objection to the prima facie evidence that a prospective juror was challenged for discriminatory reasons does not preserve a challenge if the district judge overrules the challenge. To preserve the claim, defense counsel must specifically object a second time, this time to the district courts accepting of the allegedly race neutral explanation.

The double-objection requirement is not from any Supreme Court ruling on the subject. It is akin to the old "exception" rule that is no longer required. If counsel objects to, say, a hearsay statement, and the prosecutor provides a reason that is accepted by the judge, counsel is

not required to re-object to preserve this issue. It is not clear why a second objection is required for Batson challenges.

A second objection requirement would seem to run against the goal of Batson, which is to protect the prospective juror as much as the defendant. A juror has an equal protection right to sit on a jury. That jury does not have counsel to protect his or her rights. A single objection should be enough to protect that right.

REASONS FOR GRANTING THE WRIT

I. Because of the unique nature of a cell phone, the intrusion into the owner of the device will be ongoing as long as the device has the ability to be powered. Therefore, where a magistrate judge has placed a time limitation on the Government's ability to extract information from the device, the failure of the extraction to be performed within the permissible framework of the warrant must result in the suppression of the tardily obtained information.

On November 6, 2015, a United States Magistrate signed a search warrant for a Samsung Galaxy Prevail cellular phone. The search warrant specifically stated the warrant was to be executed on or before November 27, 2015. Id. The Samsung Galaxy Prevail phone was eventually sent to a lab for a search of its contents. The Extraction Report from the phone lists the search of the phone's contents as having taken place on December 21, 2015, nearly a month after the expiration of the search warrant.

Law enforcement lacked authority to search the phone after the expiration of the search warrant. There is no exception to the warrant requirement that allowed for the search. As a result, the search was invalid and all evidence obtained through the search must be suppressed.

Under this Court's ruling of Riley v. California, 134 S.Ct. 2473 (2014) this Court found

that "modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life'... The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple — get a warrant.").

In the present case, the judge signed a search warrant authorizing a search of a cell phone already in the possession of law enforcement. The physical property had already been obtained and the warrant at issue is specific to the electronic information contained on the handheld device. In authorizing the warrant, the judge included a specific statement of the period of time for which the search can commence.

The parties agreed that there was no additional evidence but the four corners of the search warrant. The district court noted that the Magistrate Judge issued the warrant on November 6, 2015 and ordered law enforcement to execute the warrant on or before November 27, 2015. The parties agreed that the warrant was obtained in the time period in question, but the phone was not analyzed until December 21, 2017. The defense argued that this was outside of the permissible time span of the warrant authorizing the actual extraction or entry into the phone itself to obtain the data.

In its opinion, the panel upheld the district court's denial of Cleveland's motion to suppress. For authority, the panel relied upon this Court's holding in United States v. Castro, 881 F.3d 961, 969 (6th Cir. 2018), which relied upon, in part, Fed. R. Crim. P. 41(e)(2)(B)). Rule 41(e)(2)(B) states, in pertinent part, that "[t]he time for executing the warrant in Rule

41(e)(2)(A) and (f)(1)(A) refers to the seizure or on-site copying of the media or information, and not to any later off-site copying or review." Fed. R. Crim. P. 41(e)(2)(B).

The 2009 Advisory Committee's Note concerning Rule 41 recognized that practical considerations necessitate that a warrant's execution date govern only the date by when the seizure of the device, or, alternatively, on-site copying of the device, must occur, and not when off-site investigation and analysis of its contents must be completed. This aspect of the rule is not disputed.

What is disputed is the nature of the term "practical considerations." This is a rather vague term, which allows law enforcement to take whatever time it needs to examine the contents of the seized phone, thus extending the Fourth Amendment invasion of an unlimited period of time. This is particularly offensive, when, as here, the granting of the warrant included an end-date for the search. It was admittedly unclear if the wording of the order referred to the procurement of the phone or the actual extracting of the contents of that device.

This Court has not yet directly decided this issue. In addition, there is a surprising dearth of circuit law on this matter. The panel here relied upon United States v. Carrington, 700 F.App'x 224 (4th Cir. 2017). The FBI obtained a fourteen-day warrant authorizing the search of numerous electronic devices that had been lawfully seized during an investigation, including two cellular phones. The warrant expired on April 18, 2014, but it was not until October 2014 that the FBI completed its forensic analysis of the phones and discovered a series of text messages referencing drug smuggling activity. The Fourth Circuit rejected the defendant's argument that the "phone was not 'searched' for Fourth Amendment purposes until the FBI completed its forensic analysis of the phone in October of 2014," because the court found this argument

inconsistent with Rule 41.

The problem with this precedent, is that in Carrington, there was no end date set forth on the warrant. The expiration date issue was not addressed. Because of the unique privacy issues involved with hand held phones, the district court would be correct to limit the time frame in which an extraction may be conducted after a legal seizure of that device.

While the handheld 'cell phone' device is physical property, the contents of the phone are electronic communications. Unless the services to the phone were cut off immediately at the time law enforcement took possession, the intrusion continues while the phone is in possession of law enforcement. A modern smart phone contains electronic communications in the form of voice mails, text messages, emails, social media content and messaging, access to cloud content for which uploads from other sources may be automatic, banking information, GPS tracking, location history, and many other types of information which are electronically communicated and delivered wirelessly to the device.

What is unique about cell phones and must be considered here is that the invasion of privacy continues for the entire possession of the phone. Calls, texts and emails are continually being received, or are able to be received, as long as the phone is powered. Data stored on the device may have been received after the obtaining of the instrument. In other words, the electronic communication to the device persists even when the device is no longer in possession of the owner.

To permit the search of a phone after the expiration of the time period determined necessary by the authorizing judge amounts to an unconstitutional intrusion in violation of the Fourth Amendment to the United States Constitution. To permit a search of electronic

communications obtained outside the scope of the warrant is not distinguishable from permitting a never-ending warrantless intrusion of the phone owners privacy.

The issue of expiration dates in warrants are addressed in several different areas of the law. For instance, in the area of wiretaps, Congress choice to limit the length of the privacy invasions. The United States Code requires that an order authorizing a 'wiretap warrant' for electronic communications must expressly state the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained." 18 U.S.C. § 2518 (4)(e). The United States Code requires that "No order entered under this section may authorize or approve the interception of any wire, oral, or electronic communication for any period longer than is necessary to achieve the objective of the authorization." 18 U.S.C. §2518(5).

The panel in Cleveland seemed to imply that because the phone was disabled, there was no danger of any further privacy violations as Cleveland would be unable to receive any further communications. Opinion, footnote 3. This is true, but ignores the concept that not being able to receive communications is also an unwarranted invasion of one's privacy. In today's society, as addressed above, the cell phone is the source of all matters personal and unique to the cell phone owner.

II. Because the right to serve on a jury is that of the prospective juror, once a defendant has challenged the Government's use of a peremptory challenge on a prospective juror who was African-American without providing an adequate race neutral basis for the challenge, the defendant need not renew the objection after the basis is provided to preserve appellate review of that challenge.

In the case of a a violation of Batson v. Kentucky, 476 U.S. 79 (1986), need defense counsel specifically object a second time to the district courts accepting of the Government's race neutral basis for exercising a peremptory challenge to preserve the issue?

Batson protects the individual jurors right to sit as opposed to a defendant's right to a representative cross-section of the community. This Court held that the Equal Protection Clause of the Fourteenth Amendment governs the exercise of peremptory challenges by a prosecutor in a criminal trial. The Court explained that although a defendant has "no right to a 'petit jury composed in whole or in part of persons of his own race,'" Id., at 85, quoting Strauder v. West Virginia, 100 U.S. 303, 305, (1880), the "defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria," 476 U.S. at 85-86.

A Batson challenge is an equal protection violation. It is designed to protect the rights of the prospective juror in addition to those of the defendant. Therefore, requiring a second objection to protect the rights of the juror seems to be an anathema to the goal of that legal principle.

Here, during the selection of the jury, defense counsel objected to the Government's exercising a peremptory challenge in regard to an African-American male. The Government responded that it believed the prospective juror had left a job, with a public security agency, in a suspicious manner. This was based upon the Government's belief that the prospective juror

failed to provide an adequate reason for leaving that job and was now holding a temporary job with the Cleveland Clinic.

The Sixth Circuit found that although Petitioner Cleveland objected to the exclusion at the time of the Government's exercising of the peremptory, the failure to object a second time, after the district court's overruling of the challenge, did not properly preserve the issue on appeal. Therefore, the panel reviewed the issue on a plain error standard.

To support this decision, the panel relied upon unreported opinions from the circuit which were decided before Miller-El v. Cockrell, 537 U.S. 322, 328, (2003), Miller-El v. Dretke, 545 U.S. 231 (2005) or Foster v. Chatman, 136 S. Ct. 1737, 1747 (2016) (quoting Snyder v. Louisiana, 552 U.S. 472, 478 (2008). The panel opinion relied upon the decision in United States v. Jackson, 347 F.3d 598 (6th Cir. 2003) which limited the scope of the district court's requirements in assessing race neutral reasons. "It is inappropriate for a district court to perfunctorily accept a race-neutral explanation without engaging in further investigation." Id. (citing McCurdy v. Montgomery Cty, 240 F.3d 512, 520–21, (6th Cir. 2001)). "However, 'it is the defendant's burden to rebut, to whatever extent possible, the prosecutor's reasons for exercising his or her peremptory strikes on the record at the time such reasons are proffered.'" Id. (quoting United States v. Harris, 15 F. App'x 317, 321 (6th Cir. 2001)). "If a defendant fails to rebut a race-neutral explanation at the time it was made, the district court's ruling on the objection is reviewed for plain error, and the movant in this setting is in no position to register a procedural complaint that the district court failed to give a specific reason on the record for accepting the government's race-neutral explanation." Id. (citing United States v. Wilson, 11 F. App'x 474, 476–77 (6th Cir. 2001)). Opinion, p.10-11.

The double objection requirement seems to be a circuit creation. In their recent cases this Court has not required a second objection when addressing Batson related issues. Rather, the court focused on whether the record supported the race neutral reason provided. In particular, "side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve" were viewed as powerful evidence of an improper striking of a prospective juror. Miller-El, 545 U.S at 241. If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step. Id. *See also* Foster v. Chatman, supra.

Challenged Juror Here

The challenged jury here was dismissed based on the same answers that non-minority jurors had provided during questioning. Juror Reed informed the jury that he had worked in a public utilities police department for 27 years in security. When asked by the judge if his background in law enforcement would make it impossible for him to be fair in evaluating officers' testimony, he responded "no, sir." He stated he could fairly listen to the testimony and follow the law. He could think of no reason why he could not be fair and impartial.

Nothing in the above inquiry supports a race-neutral reason for exercising a peremptory challenge against prospective Juror Reed. Because the inquiry was so limited, it is next to impossible to conduct a comparative analysis of Reed with the other jurors. But like the other jurors, Reed was respectful in answering his questions, as were the other jurors. The district court refused to heed the request of the Government to conduct further inquiry of the juror. Based on the record, the Government did not meet its burden of establishing the basis for a

permissible exercising of the challenge.

Because a Batson challenge is an equal protection violation and designed to protect the rights of the prospective juror in addition to those of the defendant, requiring a second objection to protect the rights of the juror seems to be an anathema to the goal of that legal principle.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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