No. 18-9700

IN THE
SUPREME COURT OF THE UNITED STATES

DANIEL GATSON,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

BRIEF FOR PETITIONER

Daniel Gatson
Register No. 65962-050
Federal Correctional Institution
P.O. Box 900
Ray Brook, NY 12977

Petitioner, pro se

QUESTIONS PRESENTED

I. Whether the "target" of an electronic interception, whom voice was heard in intercepted conversations have "standing" as an "aggrieved person" under 18 U.S.C. § 2518.

II. Whether acquiring a person's past movements through his cell phone's historical cell tower records using the "Specific and Articulable" facts standard, instead of acquiring "Probable Cause" is a violation of the Fourth Amendment.

III. Whether an expert's testimony that has never been scientifically validated or the product of any scientific research and fails to give an empirical link between the research and the opinion, be admissible under Federal Rule of Evidence 702.

IV. Does a District Court have the authority to sentence the Petitioner to an egregious upward departure using factors already accounted for in the sentencing guidelines?

PARTIES TO THE PROCEEDINGS

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

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

CITATIONS OF OPINIONS AND ORDERS IN CASE 1

JURISDICTION 2

CONSTITUIONAL PROVISIONS INVOLVED 2

REASONS FOR GRANTING THE PETITION 3

STATEMENT OF THE FACTS 4

SUMMARY OF THE ARGUMENTS 12

ARGUMENT 14

I. WHETHER THE "TARGET OF AN ELECTRONIC INTERCEPTION, WHOM VOICE WAS HEARD IN INTERCEPTED CONVERSATIONS HAVE "STANDING" AS AN "AGGRIEVED PERSON" UNDER 18 U.S.C. § 2518. 14

II. WHETHER ACQURING A PERSON'S PAST MOVEMENTS THROUGH HIS CELL PHONE'S HISTORICAL CELL TOWER RECORDS USING THE "SPECIFIC AND ARTICULABLE" FACTS STANDARD, INSTEAD OF ACQUIRING "PROBABLE CAUSE" IS A VIOLATION OF THE FOURTH AMENDMENT. 19

III. WHETHER AN EXPERT'S TESTIMONY THAT HAS NEVER BEEN SCIENTIFCALLY VALIDATED OR THE PRODUCT OF ANY RESEARCH AND FAILS TO GIVE AN EMPIRICAL LINK BETWEEN THE RESEARCH AND THE OPINION, BE ADMISSIBLE UNDER FEDERAL RULE OF EVIDENCE 702. 25

IV. DOES THE DISTRICT COURT HAVE THE AUTHORITY TO SENTENCE THE PETITIONER TO AN EGREGIOUS UPWARD DEPARTURE USING FACTORS ALREADY ACCOUNTED FOR IN THE SENTENCING GUIDELINES? 31

CONCLUSION 35

TABLE OF AUTHORITIES

Cases:

Alderman vs. United States, 394 U.S. 165, 89 S. Ct. 961, 22 L.Ed.2d 176 (1969) 15

Arizona vs. Gant, 556 U.S. 332, 339 (2009) 20

Carpenter vs. United States, 138 S.Ct. 2206, 2219, 201 L.Ed.2d 507 (2018) 20

Carpenter vs. United States 2008 WL 3073916 (June 22, 2018) 10,11,20

Clay vs. United States, 537 U.S. 522, 525, 123 S. Ct. 1072, 155 L.Ed.2d 88 2003 24

Cutter vs. Wilkinson, 544 U.S. 709, 718 n. 7 (2005) 35

Daubert vs. Merrell Dow Pharms., 509 U.S. 579, 590, 125 L.Ed.2d 469, 113 S. Ct. 2786 (1993) 25,30

Griffith vs. Kentucky, 479 U.S. 314, 318, 107 S Ct. 708, 93 L. Ed.2d 649(1987) 24

Jones vs. United States, 362 U.S. 257, 261, 80 2. Ct. 725, 4 L.Ed.2d 697 [1960] 15,16

Katz vs. United States, 389 U.S. 347, 357 (1967) 20

Katz, 398 U.S. at 361 23

Kumho Tire, 526 U.S. at 150 27

Kyllo, 533 U.S. 31 23

Cases - Continued

Kyllo, 533 U.S. 34 21

Lopez vs. Gonzalez, 549 U.S. 47 (2006) 3

McCandles vs. Furland, 296 U.S. 140, 141-43 (1935) 3

McEroy vs. United States, 455 U.S. 642, 643 (1982) 3

Old Chief vs. United States, 519 U.S. 172, 186, 117 S. Ct. 644, 136, L.Ed.2d 574 (1997) 28

Riley vs. California, 573 U.S., _, 134 S.Ct. 2473, 2482, 189 L.Ed. 2d 430 (2014) 21

S.E.C. Otis & Company, 338 U.S. 843, 846-47 (1949) 3

Shapiro vs. United States, 335 U.S. 1, 4 (1948) 3

Smith vs. Maryland, 442 U.S. 735, 740-41 (1979) 23

United States vs. Kara, 468 U.S. 705, 714-15 (1984) 23

United States vs. Gatson 9,11

Watson vs. United States, 552 U.S. 74, 169 L.Ed.2d 472 (2007) 3

Rules:

Federal Rules of Evidence 702 ..... i, 25

Federal Rules of Criminal Procedure, Rule 41 16

Federal Rules of Criminal Procedure, Rule 41(e) 18

Statutes:

18 U.S.C. § 2518 ..... i, 14
18 U.S.C. § 2518 (10)(a) 18
18 U.S.C. §2314 ..... 5, 9, 16
18 U.S.C. §371 9
28 U.S.C. §1254(1) 1
N.J.S.A. § 2A:156A-1 ..... 4, 5, 12, 19
N.J.S.A. § 2C:18-2(a)(2) 4
N.J.S.A. § 2C:20-3A 5
N.J.S.A. § 2C:20-7 4
N.J.S.A. § 2C:34-1(b) 5
N.J.S.A. § 2C:5-2 5

Other Authorities:

2 James Carr & Patricia L. Bellia, "*The Law of Electronic Surveillance*" (2002) 15
Charles Alan Wright et al., 29 "*Federal Practice & Procedure*" – Evidence 6266 (1st ed.) 26
Matthew Tart et al., "*Historical Cell Site Analysis - Overview of Principles and Survey Methodologies*", 8 Digital Investigation 1, 193 (2012) 26

PETITION FOR A WRIT OF CERTIORARI

Petitioner Daniel Gatson, an inmate currently at Federal Correctional Institution Ray Brook NY, respectfully petitions the Supreme Court for a writ of certiorari to review the judgement of the United States Court of Appeals for the Third Circuit.

CITATIONS OF OPINIONS AND ORDERS IN CASE

The original conviction of Petitioner in the United States District Court for the Third Circuit, District of New Jersey on July 5, 2016 was not officially reported, but is set forth in the Appendix as *EXHIBIT N*.

The original conviction of Petitioner was appealed to the United States Court of Appeals for the Third Circuit, which affirmed the conviction in all respects on an opinion reported at United States vs. Daniel Gatson, 2018 U.S. App LEXIS 22170 (June 4, 2018).

The original conviction of Petitioner was appealed for a Rehearing to the United States Court of Appeals for the Third Circuit, which affirmed the conviction in all respects on October 30, 2018 set forth in the Appendix as *EXHIBIT M*.

JURISDICTION

Petitioner Daniel Gatson's petition for hearing to the United States Court of Appeals for the Third Circuit was denied on June 4, 2018. The Petitioner's request for rehearing was denied on October 1, 2018. Mr. Gatson invokes this Court's jurisdiction under 28 U.S.C. §1254(1), having timely filed this petition for writ of certiorari within ninety days of the United States Court of Appeals for the Third Circuit's judgement.

CONSTITUIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> **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.**

U.S. CONST. amend I.V.

REASONS FOR GRANTING THE PETITION

The United States Supreme Court has granted certiorari in numerous cases that presented conflicts among lower federal Court of Appeals. **See *Watson vs. United States*, 552 U.S. 74, 169 L.Ed.2d 472 (2007) (Certiorari granted to resolve conflict in lower Courts of Appeals); *Lopez vs. Gonzalez*, 549 U.S. 47 (2006) (same); *McEroy vs. United States*, 455 U.S. 642, 643 (1982); *Shapiro vs. United States*, 335 U.S. 1, 4 (1948) (same).**

Petitioner will argue herein that the United States Court of Appeals for the Third Circuit and the District Court for the Third Circuit's opinions is not only in conflict with other Federal Court of Appeals decisions, but also appears to be inconsistent with the United States Supreme Court's authority related to such questions of law. A conflict between a lower court's decision and the United States Supreme Court's decision is a powerful ground for issuance of a certiorari allowing parties to submit more fuller arguments on issues presented.
See *S.E.C. Otis & Company*, 338 U.S. 843, 846-47 (1949); *McCandles vs. Furland*, 296 U.S. 140, 141-43 (1935).

STATEMENT OF THE FACTS

The Petitioner was released from New Jersey state prison in November 2012 where he served twelve (12) years for Burglary N.J.S.A. § 2C:18-2(a)(2). A week after the Petitioner was released, members of the Bergen County Prosecutor's Office submitted the following Intercepted wire or oral communication affidavits, listing the Petitioner as the "Target" of the Investigation:

EAJ-BER-16-CDW-13; EAJ-BER-60-CDW-13; EAJ-BER-61-CDW-13; EAJ-BER-114-CDW-13; EAJ-BER-142-CDW-13; EAJ-BER-143-CDW-13; EAJ-BER-144-CDW-13; EAJ-BER-145-CDW-13; EAJ-BER-166-CDW-13; EAJ-BER-167-CDW-13; EAJ-BER-168-CDW-13; LSDS-BER-194-CDW-13; LSDS-BER-195-CDW-13; LSDS-BER-196-CDW-13; LSDS-BER-4-WT-13; LSDS-BER-215-CDW-13; LSDS-BER-5-WT-13; LSDS-BER-216-CDW-13; LSDS-BER-218-CDW-13; LSDS-BER-6-WT-13; LSDS-BER-220-CDW-13

All of the sworn affidavits are identical in three ways. **(1)** The Petitioner is identified as the person utilizing these particular headsets and facilities. **(2)** Each sworn affidavit was authorized pursuant to N.J.S.A. § 2A:156A-1, the "**Specific and Articulable**" facts standard. **(3)** All of the sworn affidavits state the Petitioner was in engaged in the following offense(s): **Burglary (N.J.S.A. § 2C:18-2); Receiving Stolen Property (N.J.S.A. § 2C:20-7); Theft of Movable**

Property (N.J.S.A. § 2C:20-3A); Promoting Prostitution (N.J.S.A. § 2C:34-1[b]), and Conspiracy to commit such crimes (N.J.S.A. § 2C:5-2).
See EXHIBIT A, Superior Court of New Jersey, County of Bergen, Authorization for Application and Affidavit Pursuant to the Wiretapping and Electronic Surveillance Control, Act N.J.S.A. § 2A:156A-1, LSDS-BER-8-WT-13, LSDS-BER-224-CDW-13.

On October 13, 2013 the Petitioner was arrested by Government agents at the Marriott Hotel, 101 James Doolittle Boulevard in Uniondale, New York 11553. At this time, the Petitioner was handcuffed with NO incident and six armed agents then searched the Petitioner's hotel room. While searching the bathroom, agents found jewelry in the toilet and not only seized the jewelry, but the Petitioner's cell phone. All of the seizures were conducted without a search or seizures warrant.
See EXHIBIT B, Special Agent Azzata Joseph John 302 report.

Upon arrest, the Petitioner was charged with the following Federal Offenses:
(1) Count of Conspiracy (18 U.S.C. §371) and (12) Counts of Interstate Transportation of Stolen Property (18 U.S.C. §2314).
See EXHIBIT C, Second Superseding Indictment.

On August 19, 2014, the Petitioner's attorney Stephen Turano, Esq. submitted the following arguments:

REQUEST FOR A BILL OF PARTICULARS; MOTION TO SUPPRESS VARIOUS EVIDENCE; REQUEST FOR THE IMMEDIATE PRODUCTION OF EXPERT REPORTS; REQUEST FOR THE IMMEDIATE PRODUCTION OF BRADY AND GIGLO MATERIALS; REQUEST FOR AN ORDER REQUIRING THE GOVERNMENT TO PRESERVE ROUGH NOTES TAKEN DURING THE COURSE OF THE JOINT STATE AND FEDERAL INVESTIGATION; REQUEST FOR EARLY PRODUCTION OF JENCKS MATERIAL; REQUEST FOR THE IMMEDIATE PRODUCTION OF RULE 16(a)(1) EVIDENCE; REQUEST FOR EARLY PRODUCTION OF THE GOVERNMENT'S WITNESS LIST; REQUEST FOR A PRE-TRIAL JAMES HEARING TO DETERMINE ADMISSIBILITY OF CO-CONSPIRATOR STATEMENTS; REQUEST FOR A PRE-TRIAL HEARING TO DETERMINE ADMISSIBILITY AND AUDIBILITY OF RECORDED CONVERSATION; REQUEST FOR THE IMMEDIATE PRODUCTION OF THE IDENTITY OF ANY CONFIDENTIAL INFORMANTS; REQUEST FOR A 404(b) HEARING; REQUEST FOR PERMISSION, WHERE APPLICABLE, TO JOIN IN CO-DEFENDANT'S MOTIONS; REQUEST FOR PERMISSION FOR MR. GATSON TO FILE ANY NECESSARY, ADDITIONAL MOTIONS.

See EXHIBIT D, Stephen Turano's Omnibus Motions.

A month after Mr. Stephen Turano's submission of the omnibus brief on behalf of Petitioner, the Petitioner fired Mr. Turano and proceeded pro se. On October 21, 2014, The Petitioner submitted a pro se brief requesting to suppress: **THE WIRETAP APPLICATION IN THIS MATTER BECAUSE IT FAILED TO SATISFY THE NECESSITY REQUIREMENT; THE BERGEN COUNTY PROSECUTOR'S OFFICE FAILED TO PROVIDE PROBABLE CAUSE IN ORDER TO RETRIEVE HISTORICAL PHONE RECORDS; AGENTS FAILED TO ACQUIRE PROBABLE CAUSE TO SEARCH DEFENDANT'S HOME; AGENT'S FAILED TO ACQUIRE A SEARCH WARRANT PRIOR TO SEARCHING DEFENDANT'S HOTEL ROOM AND SEIZING HIS PROPERTY; AGENT'S FAILED TO SATISFY THE PARTICULARITY REQUIREMENT; THE GRAND JURY PRESENTATION, WHICH CONSISTED OF INFLAMMATORY AND PREJUDICIAL COMMENTS, MULTIPLE HEARSAY, IMPROPER SPECULATION AND MISLEADING AND DISTORTED FACTS, TAKEN IN IT'S TOTALITY, WARRANTS A DISMISSAL; THE INDICTMENT MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM; THE AFFIANT FAILED TO ACQUIRE JUDICIAL APPROVAL TO RECORD BACKGROUND CONVERSATION, THEREFORE THE BACKGROUND CONVERSATION RECORDED SHOULD BE SUPPRESSED; MOTION TO DISCLOSE ENTIRE CONTENTS OF WIRE SURVEILLANCE; BECAUSE THE UNITED STATES AND NEW JERSEY CONSTITUTIONS GUARANTEE THE RIGHT OF AN ACCUSED IN A CRIMINAL PROSECUTION TO BE CONFRONTED WITH THE WITNESS AGAINST HIM, THE EMPLOYMENT RECORDS OF THE MEMBERS OF**

THE BERGEN COUNTY PROSECUTOR'S OFFICE AND F.B.I. AGENTS WHO PARTICIPATED IN THIS INVESTIGATION OR HANDLING OF EVIDENCE IN THE MATTER MUST BE TURNED OVER TO THE COURT AND COUNSEL FOR AN IN-CAMERA INSPECTION.

See EXHIBIT E, Petitioner's pro se Brief.

On September 28, 2015, Attorney Michael Pedicini submitted the following arguments on the Petitioner's behalf:

EVEN IF THE CELL PHONE RECORDS ARE ADMISSIBLE AS BUSINESS RECORDS, THEIR ADMISSIBILITY DOES NOT PRECLUDE A CHALLENGE TO SUCH EVIDENCE'S RELIABILITY; A DAUBERT HEARING IS NECESSARY TO DECIDE WHETHER THE GOVERNMENT'S EXPERT WITNESS, AGENT EICHER, SHOULD BE PERMITTED TO TESTIFY AT TRIAL ABOUT CELLULAR TELEPHONE SITE ANALYSIS; ASSUMING MR. GATSON TESTIFIES AT TRIAL, AT LEAST THREE OF HIS PRIOR CONVICTIONS SHOULD NOT BE ADMITTED FOR IMPEACHMENT PURPOSES UNDER FEDERAL RULES OF EVIDENCE 609.

See EXHIBIT F, Mr. Michael Pedicini's Brief.

In support of Attorney Pedicini's request for a Daubert hearing, he submitted cell tower expert Manfred Schenk's expert report which indicates the Government's "**Single Cell Theory**" method was unreliable and was not accepted in the scientific community and should not be accepted as evidence in the Petitioner's trial. ***See EXHIBIT G, Manfred Schenk's Cell Tower Expert Report***

On December 15, 2014, Honorable William J. Martini, U.S.D.J. denied all of the Petitioner's suppression request. The explanation for denying all of the Petitioner's suppression request created new law. ***See EXHIBIT H, 2014 U.S. Dist. LEXIS 173588, United States vs. Gatson.*** Regardless of the District Court's egregious decision, the Petitioner proceeded to trial.

The Petitioner was convicted of one count of Conspiracy to Transport Stolen Goods over state lines, in violation of (18 U.S.C. §371) and eleven counts of Transporting Stolen Property over state lines in violation of (18 U.S.C. §2314).

Prior to sentencing, the Petitioner submitted a pro se motion for a new trial. ***See EXHIBIT I, Petitioner's pro se Motion for a New Trial.*** Honorable William J. Martini denied the request for a new trial on July 5, 2016. The Petitioner was sentenced to 300 months in prison and 3 years of supervised release. ***See EXHIBIT J, The United States District Court for the Third Circuit, District of New Jersey, judgement of conviction.***

On November 9, 2017, Assistant Federal Public Defender K. Anthony Thomas, filed the following arguments with the United States Court of Appeals for the Third Circuit: **THE COMMUNICATION DATA WARRANTS USED TO OBTAIN HISTORICAL CELL SITE DATA WERE ISSUED UNDER A STANDARD THAT DID NOT REQUIRE A SHOWING OF PROBABLE CAUSE, AND WERE THEREFORE UNCONSTITUTIONAL AND ISSUED IN VIOLATION OF THE FOURTH AMENDMENT; THE WARRANTLESS SEARCH OF MR. GATSON'S HOTEL ROOM VIOLATED THE FOURTH AMENDMENT; THE DISTRICT COURT ERRED IN ADMITTING EVIDENCE OF PRIOR BAD ACTS WHERE THE EVIDENCE LACKED PROBATIVE VALUE AND WAS INCREDIBLY PREJUDICIAL; THE COURT ERRED IN DENYING THE DEFENSE'S REQUEST FOR A DAUBERT HEARING; THE SENTENCE WAS UNREASONABLE.**

See EXHIBIT K, K. Anthony Thomas' Appellate Brief.

On February 28, 2018, the Petitioner's appellate attorney submitted a reply brief.

See EXHIBIT L, K. Anthony Thomas' Reply Brief.

On June 22, 2018, The United States Supreme Court rendered a decision in ***Carpenter vs. United States*, 2008 WL 3073916 (June 22, 2018)** which was identical to the Petitioner's argument dealing with warrantless seizures of historical cell tower records.

On July 10, 2018, K. Anthony Thomas submitted a brief letter amending his complaint, by incorporating the United States Supreme Court's decision in *Carpenter vs. United States* 2008 WL 3073916 (June 22, 2018). Regardless of the United States Supreme Court decision in *Carpenter*, The United States Court of Appeals for the Third Circuit affirmed the District Court's denial of the Petitioner's suppression request.

See EXHIBIT M, United States vs. Gatson, 2018 U.S. APP. LEXIS 22170 (August 9, 2018).

On October 30, 2018, Petitioner submitted a SUR PETITION FOR PANEL REHEARING. The United States Court of Appeals for the Third Circuit denied the Petitioner's petition for a Panel Rehearing. ***See EXHIBIT N, The Order Denying the Petition for Rehearing.***

SUMMARY OF THE ARGUMENTS

I. The District Court erroneously denied Petitioner's request to suppress members of the New Jersey's Bergen County Prosecutors' Office and Government's acquisition of his cell phones' historical cell tower records. The District Court erroneously claimed Petitioner did not have "**standing**" to make such a request. Petitioner appealed the District Court's erroneous decision. The District Court's and the Appellate Court's decisions were erroneous for the following reasons:

1. Petitioner was a party to the intercepted wire, oral or electronic communications
2. All of the interceptions were directed at Petitioner, therefore, making him the "target" of the investigation
3. The Government played the jury portions of the intercepts and identified the voice on the intercepts as Petitioner's. Therefore, Petitioner had a reasonable expectation of privacy in the cell phones and was an "aggrieved person" which gives him "**standing**."

II. Members of the New Jersey's Bergen County Prosecutor's Office used N.J.S.A. § 2A:156A-1 to acquire Petitioner's cell phone's Historical Cell Tower Records using the "**Specific and Articulable**" facts standard. A far less standard than probable cause. Members of the New Jersey's Bergen

County Prosecutor's Office and members of the Government violated Petitioner's reasonable expectation of privacy when they coaxed information from his cell phone to track his locations, which had previously been unknown. This was a warrantless search without probable cause, which violated Petitioner's Fourth Amendment rights.

III. The District Court committed plain error by allowing the Government's witness F.B.I. Agent Scott D. Eicher to testify as a cell tower expert. The Government's cell tower expert's "**Single Cell Tower**" theory remains wholly untested by the scientific community. The Government's cell tower expert also failed to offer any evidence to substantiate the alleged expert's successful use of the "**Single Cell Tower**" theory or its rate of error in the field.

IV. The District Court committed plain error when it violated Petitioner's Sixth Amendment rights by increasing his sentence beyond the maximum authorized by the jury verdict. The District Court used factors already accounted for in the sentencing guidelines to justify such an egregious sentence.

ARGUMENT

I. WHETHER THE "TARGET OF AN ELECTRONIC INTERCEPTION, WHOM VOICE WAS HEARD IN INTERCEPTED CONVERSATIONS HAVE "STANDING" AS AN "AGGRIEVED PERSON" UNDER 18 U.S.C. § 2518.

The District Court and the United States Court of Appeals for the Third Circuit's decision to deny and affirm the Petitioner's request to suppress all intercepted conversations and the acquisition of his historical cell tower records, was due to the erroneous belief that the Petitioner allegedly failed to make a claim that he ever owned, possessed, used, or had any privacy interest what so ever in these cell phones or the cell phones historical cell tower records. The District Court and the United States Court of Appeals for the Third Circuit's reason for denying and affirming the Petitioner's appeal was erroneous and resulted in a decision that was contrary to clear established Federal Law.

Under Federal Law Electronic wiretap applications are governed by 18 U.S.C. § 2518, which provides that "any aggrieved person" may move to suppress any "unlawfully

intercepted" communication in a hearing before a court of law. Id. 2518(10) (The statute further defines "aggrieved person" means a person "who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed." §2510(11); see *Alderman vs. United States*, 394 U.S. 165, 89 S. Ct. 961, 22 L.Ed.2d 176 (1969) (in order to qualify as a person aggrieved by an unlawful search and seizure one must [be]... one against whom the search was directed." (quoting *Jones vs. United States*, 362 U.S. 257, 261, 80 2. Ct. 725, 4 L.Ed.2d 697 [1960])

A person named in a surveillance thus has "**Standing**" to challenge the warrant's sufficiency. **See 2 James Carr & Patricia L. Bellia, "*The Law of Electronic Surveillance: 6:16*" (2002) ("As a general rule, Courts limit "Standing" to those individuals whose personal privacy has been breached. No "Standing" exists unless the individual shows either a possessory interest in the site, if he was overheard or named in the order, or had a reasonable expectation of privacy that was breached.**" The Petitioner was the individual against whom the interceptions was directed and whom voice was identified to the jury as the Petitioner's.

See EXHIBIT A, Superior Court of New Jersey, County of Bergen, Authorization for Application and Affidavit, pursuant to the Wiretapping and Electronic Surveillance Control Act, N.J.S.A. § 2A:156A-1, LSDS-BER-8-WT-13, LSDS-BER-224-CDW-13.

The Affidavits in support of the surveillance orders included descriptions of Petitioner as the "Target" and investigators' statements certifying their beliefs that the Petitioner was the individual using the cellular phones at issue. Therefore, the Petitioner had standing as an "aggrieved person" under 18 U.S.C § 2518.

a. The Petitioner Should Have Been Given "Standing" Because Historical Cell Tower Records Were Used as Evidence to Satisfy Elements of The Federal Offense 18 U.S.C. §2314, Therefore Giving the Petitioner "Standing" As An "Aggrieved Person" Under Rule 41.

The District Court and the United States Court of Appeals for the Third Circuit failed to also take into consideration the circumstances of this particular prosecution confer "**standing**" to invoke Rule 41 under the clear expressions of the Supreme Court in ***Jones vs. United States*, 362 U.S. 257, 80 S. Ct. 725, 4 L.Ed.2d 697.**

In *Jones*, the accused was unlawfully in possession of narcotics. In the case at bar, the Petitioner was alleged to be in possession of the cellular phone in question and stolen property. Possession was the basis of the conviction in the instant case.

The Petitioner's property interest in the cell phones, cell phones historical cell tower records was established for the purpose of the suppression motion by the indictment, and this interest was protected from illegal searches and seizures by the Fourth Amendment. The District Court and the United States Court of Appeals for the Third Circuit decisions to deny and affirm the Petitioner's motion to suppress and prevented his attack upon the search and seizure, gave the Government the advantage of contradictory positions as a basis for conviction. Petitioner's conviction flows from his possession of the cell phones, the cell phones historical cell tower records. Yet, the fruits of the search, upon which the conviction depends, were admitted into evidence on the ground that the Petitioner did not have possession of the cell phone, historical cell tower records and stolen property at that time.

The District Court and the United States Court of Appeals for the Third Circuit's erroneous decision to deny and affirm the Petitioner's request to suppress all intercepted conversations and the acquisition of his historical cell tower records thus subjected the Petitioner to the penalty meted out to one in lawless possession, while refusing the Petitioner the remedy designed for one in his situation. It is consonant with the amenities to put it mildly, it is simply unacceptable for the Administration of Criminal Justice to sanction such squarely contradictory assertions of power by the Government.

The District Court and the United States Court of Appeals for the Third Circuit decision to deny and affirm the Petitioner's request to suppress the search and seizure of the cell phones and the cell phones historical cell tower records, due to his alleged lack of "**Standing**" was clearly contrary to, or involved an unreasonable application of, clearly established Federal Law. **See Rule 41(e)**.

Therefore, the Petitioner humbly request that he be Granted "Standing" to challenge the warrantless, unconstitutional search and seizure conducted by the Bergen County Prosecutor's Office and the Government. Therefore, pursuant to 18 U.S.C. § 2518 (10)(a) and Rule 41(e).

II. WHETHER ACQURING A PERSON'S PAST MOVEMENTS THROUGH HIS CELL PHONE'S HISTORICAL CELL TOWER RECORDS USING THE "SPECIFIC AND ARTICULABLE" FACTS STANDARD, INSTEAD OF ACQUIRING "PROBABLE CAUSE" IS A VIOLATION OF THE FOURTH AMENDMENT.

The District Court and the United States Court of Appeals for the Third Circuit denied and affirmed the Petitioner's request to suppress his cell phones historical cell tower records. The Petitioner's argument during the suppression hearing was that members of the Bergen County Prosecutor's office search and seizure of his cell phones historical cell tower records violated his Fourth Amendment right to unreasonable searches and seizures, because, members of the Bergen County Prosecutor's office seized these records using the **"Specific and Articulable"** facts standard rule. **See N.J.S.A. § 2A:156A-1.**

The District Court and the United States Court of Appeals for the Third Circuit both erroneously failed to address if members of the Bergen County Prosecutor's Office and the Government conducted an unconstitutional search and seizure of the Petitioner's cell phones historical cell tower records, which requires probable cause.

See *Carpenter vs. United States*, 138 S.Ct. 2206, 2219, 201 L.Ed.2d 507 (2018).

The Supreme Court has made clear that when the Government engages in prolonged location tracking, or when tracking reveals information about a private space that could not otherwise be observed, that tracking violates a reasonable expectation of privacy and therefore constitutes a search within the meaning of the Fourth Amendment.

The acquisition of the Petitioner's cell phones historical cell tower records information was an unconstitutional search and seizure for the following reasons **(1)** Warrantless searches are "**per se unreasonable**" **(2)** the acquisition of the Petitioner's cell phones historical cell tower records without probable cause violated his Fourth Amendment rights. **See *Carpenter vs. United States*, 138 S.Ct. 2206, 201 L.Ed.2d 507 (2018); *Arizona vs. Gant*, 556 U.S. 332, 339 (2009); *Katz vs. United States*, 389 U.S. 347, 357 (1967).**

A majority of courts have already recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements. Allowing access to cell-site records-which "**hold for many Americans the "privacies of**

life," See *Riley vs. California*, 573 U.S., _, 134 S.Ct. 2473, 2482, 189 L.Ed. 2d 430 (2014)-contravenes that expectation.

In fact, Historical cell site records present even greater privacy concerns than the GPS monitoring considered in ***Jones*, they give the government near perfect surveillance and allow it to travel back in time to retrace a person's whereabouts.**

Cell site location tracking has become a favored tool of law enforcement and is already used far more frequently than GPS tracking technology in *Jones*. The highly intrusive warrantless search and seizure conducted in this matter cries out for clear judicial regulation. An aggregation of surveillance records infringes a Fourth Amendment legitimate expectation of privacy.

The Supreme Court has cautioned that such new technology should not be allowed to "**erode the privacy guaranteed by the Fourth Amendment." See *Kyllo*, 533 U.S. at 34; see also** decisions in ***Jones*** and ***Carpenter*** will have little practical effect in safeguarding Americans from the pervasive monitoring of their movements that so troubled a

majority of the Justices. See *Jones*, 132 S. Ct at 955 (Sotomayor, J.) id. at 963-64 (Alito, J.). For the District Court and the United States Court of Appeals for the Third Circuit to turn a blind eye to such a novel question of law whose resolution is necessary to guide future action by law enforcement officers and sister circuit magistrates, is sufficient reason for this Court to decide the violation issue before it. This is just such a case.

a. Petitioner Had a Reasonable Expectation of Privacy

Petitioner had a reasonable expectation of privacy that was violated by the Bergen County Prosecutor's Office and the Government's warrantless search of his cell phones historical tower records.

An unreasonable, warrantless search occurred when the Bergen County Prosecutor's and the Government breaches a person's "reasonable expectation of privacy". ***Katz*, 398 U.S. at 351**. Courts use the **Katz** analysis to determine whether there was a reasonable expectation of privacy. A reasonable expectation of privacy requires **(1)** the individual's subjective expectation of privacy, and **(2)** the objective expectation of privacy with **(3)** the consideration of the nature of the activity in question. ***Smith vs. Maryland*, 442 U.S. 735, 740-41**

(1979); *Katz*, 398 U.S. at 361 (Harlan, J., concurring). Because the case at hand meets the above criteria, Petitioner had reasonable expectation of privacy.

b. Petitioner Had a Subjective Expectation of Privacy

Petitioner had a reasonable, subjective exception of privacy that was violated by the agents and officers of the Bergen County Prosecutor's Office search and seizure of his cell phone and Historical cell tower records. A Fourth Amendment violation requires that there was a subjective expectation of privacy. ***Katz*, 398 U.S. at 361**. While it is clear that the search and seizure of an individual's home without a warrant is violation of privacy, it is unclear how this expectation is maintained when law enforcement uses technology to aid their surveillance. ***United States vs. Kara*, 468 U.S. 705, 714-15 (1984); *Kyllo*, 533 U.S. 31.**

c. Petitioner Had an Objective Expectation of Privacy

Petitioner had an objective expectation of privacy supported by society. Part-two of the **Katz** analysis looks to the objective. The court must determine whether the subjective expectation of privacy is "one that society is prepared to recognize as reasonable." ***Katz*, 398 U.S. at 361.**

d. *Carpenter vs. United States* Applies Retroactively to The Petitioner's Case

[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases – state or federal; pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past. **See *Griffith vs. Kentucky*, 479 U.S. 314, 318, 107 S Ct. 708, 93 L. Ed.2d 649(1987)**

A conviction is final "when the time expires for filing a petition for certiorari contesting the appellate court's affirmation of the conviction." ***Clay vs. United States*, 537 U.S. 522, 525, 123 S. Ct. 1072, 155 L.Ed.2d 88 2003.**

III. WHETHER AN EXPERT'S TESTIMONY THAT HAS NEVER BEEN SCIENTIFCALLY VALIDATED OR THE PRODUCT OF ANY RESEARCH AND FAILS TO GIVE AN EMPIRICAL LINK BETWEEN THE RESEARCH AND THE OPINION, BE ADMISSIBLE UNDER FEDERAL RULE OF EVIDENCE 702.

The District Court and the United States Court of Appeals for the Third Circuit decision to deny and affirm the Petitioner's request for a **Daubert** hearing was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States. **See Federal Rules of Evidence 702; and *Daubert vs. Merrell Dow Pharms.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L. Ed 2d 469 (1993)**

The District Court erroneously abused its discretion by allowing the Government witness FBI Special Agent Scott D. Eicher to testify as an expert witness regarding specific cell tower distances and the exact location of the Petitioner's cell phone using a "Single Cell Tower" theory. The Government's witness FBI Agent Special Agent Scott D. Eicher "**Single Cell Tower**" theory has never been subjected to peer review or publication or accepted by the scientific community and fails to give a rate of error. The Government's witness FBI Special Agent Scott D. Eicher "**Single Cell Tower**" theory remains

wholly untested by the scientific community, while other methods of historical cell site analysis can and have been tested by scientists. **See, e.g., Matthew Tart et al., "*Historical Cell Site Analysis - Overview of Principles and Survey Methodologies*", 8 Digital Investigation 1, 193 (2012) (reviewing techniques for collecting radio frequency data for historic cell site analysis and concluding that "[a]rea [s]urveys around the location of interest... provide the most accurate and consistent method for detecting servicing [c]ells at a location").**

The Seventh Circuit has stated that **"[a] very significant Daubert factor is whether the proffered scientific theory has been subjected to the scientific method."** This is because the **"scrutiny of the scientific community... increases the likelihood that the substantive flaws in methodology will detected." *Daubert*, 509 U.S. at 593: see also Charles Alan Wright et al., 29 "*Federal Practice & Procedure*" – Evidence 6266 (1st ed.) ([J]udicial interference with the jury's power to weigh [expert] evidence may be warranted where expert testimony is based on emerging scientific theories that have not gained wide spread acceptance within the scientific community").**

The Government's witness FBI Special Agent Scott D. Eicher's "**Single Cell Tower**" theory has not been subject to scientific testing or formal peer review and has not been generally accepted in the scientific community.

These factors weigh against a finding of reliability. The District Court and the United States Court of Appeals for the Third Circuit erroneously tries to fill these gaps by relying on descriptions of cell-site methodology in other cases and assumes the Government's witness FBI Special Agent Scott D. Eicher's "**Single Cell Tower**" theory would be the same in the Petitioner's case. The District Court's "**gatekeeping inquiry must be tied to the facts of a particular case.**" ***Kumho Tire*, 526 U.S. at 150**. Indeed, judicial acceptance is not relevant; what matters is general acceptance in the relevant expert (scientific or otherwise) community.

The District Court and the Court of Appeals for the Third Circuit erroneously seems to have relied on rulings in other cases to satisfy the reliability requirement. These past cases fail to reveal the scope of the Government's expert testimony in the Petitioner's case.

The District Court and the Court of Appeals for the Third Circuit have simply dropped its "**Gatekeeping**" obligation under Federal Rules of Evidence 702 and Daubert. What happened with regards to the admission of the Government's Expert Witness FBI Special Agent Scott D. Eicher's opinion testimony was alarming.

Although the "**prosecution is entitled to prove its case by evidence of its own choice**," *Old Chief vs. United States*, 519 U.S. 172, 186, 117 S. Ct. 644, 136, L.Ed.2d 574 (1997) (**one-sided enforcement of the evidentiary and procedural rules is troubling, especially in criminal cases where liberty is at stake**.)

Absent an independent evaluation of the Government's expert's "**Single Cell Tower**" theory, the District Court and the Court of Appeals for the Third Circuit decision to deny and affirm the Petitioner's request to have a Daubert Hearing is clearly contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. **See *Daubert vs. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct 2786, 125 L.Ed.2d 469 (1993); and Federal Rule of Evidence 702 which governs the admissibility of expert testimony**

and provides: if scientific, technical, or other specialized knowledge will assist the tier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. Pursuant to Rule 702, there are three distinct substantive restrictions on the admission of expert testimony: qualifications, reliability, and fit.

For a court to qualify a witness to testify as an expert, Rule 702 requires the witness to have "specialized knowledge" regarding the area of testimony. Though This specialized knowledge may arise from "practical experience as well as academic training and credentials" it is clear that the proffered witness "must possess skill or knowledge greater than the average layman." Despite the generally liberal standard for qualifying an expert witness, the Third

Circuit has "not pursued a policy of qualifying [every] proffered witness as an expert."

Reliability requires that the expert's opinion be "grounded in the methods and procedures of science" and not "subjective belief or unsupported speculation." Therefore, the Petitioner humbly request this court to grant him a **Daubert** hearing.

***Daubert vs. Merrell Dow Pharms.*, 509 U.S. 579, 590, 125 L.Ed.2d 469, 113 S. Ct. 2786 (1993).**

IV. DOES THE DISTRICT COURT HAVE THE AUTHORITY TO SENTENCE THE PETITIONER TO AN EGREGIOUS UPWARD DEPARTURE USING FACTORS ALREADY ACCOUNTED FOR IN THE SENTENCING GUIDELINES?

On November 2, 2015, Petitioner was found guilty on (1) Count of Conspiracy to Transport Stolen Property in Interstate Commerce (18 U.S.C. § 2314) and (10) Counts of Stolen Property in Interstate Commerce (18 U.S.C.§2314), by a jury verdict. On July 5, 2016, The District Court sentenced the Petitioner to a seventeen- year term of imprisonment and erroneously applied an eight-year upward variance, taking the Petitioner's sentence from his initial guideline range 210-262 to 262-327 months.

The District Court's claim for giving such an extreme upward variance was due to the Petitioner's criminal history of committing unarmed burglaries and these unarmed burglaries endangered the public. On July 6, 2016, the United States Court of Appeals for the Third Circuit agreed with the District Courts erroneous decision and affirmed the Petitioner's egregious increase in the Petitioner's sentence.

The District Court's egregious eight-year increase in the Petitioner's sentence reflects an exercise of judicial discretion

the Sentencing Commission, acting under the authority of Congress designed to avoid; Especially, when the District Court relied on factors for which are already accounted for in the guidelines. When a factor is already included in the calculation of the [g]uidelines sentencing range, a judge who wishes to rely on that same factor to impose a sentence above or below the guideline range must articulate specifically the reasons that this particular Defendant's situation is different from the ordinary situation covered by the [g]uidelines calculation.

The first fundamental element of the guidelines calculation is the assignment of a base offense level, which is calculated by accounting for "all acts and omissions committed... by the defendant... that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense."

See U.S. Sentencing Guidelines Manual 1B1.3 (a)(1) (2004).

Where the guidelines have taken matters into account, the District Court is not then at liberty to depart. The District Court used as one of its reasons for the upward departure, the Petitioner's likelihood of committing crimes in the future. The

District Court's reason is erroneous because the likelihood of recidivism is already built into the calculation of criminal history points. The District Court's upward departure is egregious by the Court's failure to specify why it concluded that the Petitioner's criminal history points "significantly" underrepresented the likelihood of recidivism. Such a statement without more is insufficient: A recital of past convictions followed by the statement that the guidelines do not adequately reflect this history or deter recidivism, as here, amounts to little more than an expression of personal disagreement with the guidelines.

The District Court erroneously failed to take the additional step of identifying those specific aspects of the Petitioner's criminal history not adequately considered by the Guidelines.

In passing a sentence under existing law, the District Court can no longer write on a blank page, circumscribed only by the statutory limits appertaining directly to the offense of conviction. "The guidelines were formulated pursuant to a constitutional delegation of power by Congress, and the sentencing Court is required to impose a sentence through

application of the guidelines, unless there exist a valid basis for departure."

Such a departure is contrary to Congress and the United States Sentencing Commission Sentencing Reform Act. To allow such an egregious upward departure would promote regional disparity in sentencing. The Petitioner hopes and prays that this Court does not permit so parochial an approach to prevail and remand this matter back to the District Court for clarity.

CONCLUSION

For the above and foregoing reasons, the Petitioner humbly request this Court to vacate the judgement of the United States Court of Appeals for the Third Circuit and District Court and remand with directions to conduct an evidentiary hearing to address the questions presented. That approach is in keeping with the principle that this Court is "a court of review, not of first view," *Cutter vs. Wilkinson*, 544 U.S. 709, 718 n. 7 (2005).

Respectfully submitted,

Mr. Daniel Gatson
Register No. 65962-050
F.C.I. Ray Brook
P.O. Box 900
Ray Brook, NY 12977

Petitioner, pro se

Date: June 12, 2019