No. 19-5585

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

ALJULAH CUTTS—PETITIONER

VS.

THE STATE OF NEW YORK—RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

ALJULAH CUTTS
11739 STATE RTE. 22, P.O. BOX 51
COMSTOCK, NEW YORK, 12821-0051

QUESTIONS PRESENTED

1. Whether Congress intended for an order under the Stored Communications Act to be sufficient to authorize real time tracking of cell phone generated Cell Site Location Information?
2. Whether Petitioner's trial attorneys' failure to understand the Stored Communications Act, together with their failure to conduct basic legal research into the Warrant requirements pertaining to the collection of historical Cell Site Location Information, as well as the active tracking of real time Cell Site Location Information constituted deficient performance resulting in prejudice to Petitioner sufficient to deprive petitioner of a fair trial?
3. Whether this Court's decision in *Carpenter v United States,* 138 S.Ct. 2206, applies retroactively to the Petitioner, where the decision was foreshadowed by and predictable from the Court's decisions in *Jones v United States,* 565 US 400 [2012] and *Riley v California,* 573 US 373 [2014] and Petitioner's conviction went final in 2016?
4. Whether, in the alternative, Petitioner should be able to be heard as to his *Carpenter* claim under the Fundamental Miscarriage of Justice Exception to the procedural default rule where he was clearly aggrieved by ineffectiveness of his trial counsel and that ineffectiveness is the sole reason for the procedural default?
5. Whether the Trial Court's correctly interpreted the *Carpenter* holding when it held that the State complied with the *Carpenter* holding because they had established probable cause in their SCA affidavit?

STATEMENT OF THE PARTIES

The caption of the case in this Court contains the names of all of the parties to the proceedings in New York State Court.

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JURISDICTION

The Judgment sought to be reviewed was entered in the Supreme Court of the State of New York in and for New York County on January 11th, 2017 and discretionary review was subsequently denied. After this Court announced its decision in *Carpenter v United States*, 138 S.Ct. 2206, Petitioner renewed his previous motion under New York Civil Practice Law And Rules (CPLR) § 2221(e) .

Upon renewal, the Court took up the motion anew and held that the *Carpenter* decision was not retroactive, so the Petitioner could seek no redress under *Carpenter*, and held in the alternative that even if it did apply retroactively, the Stored Communications Act (SCA) order was supported by probable cause in that the order indicated that GPS/precision location was relevant to an ongoing criminal investigation so the result herein would remain unchanged, *see People v Cutts,* 62 Misc.3d 411 (Supreme Court, N.Y. County, November 7, 2018).

The Petitioner then exhausted his state remedies by filing a timely application for a certificate of appealability from the order to the Supreme Court of the State of New York, Appellate Division, First Judicial Department, which was denied. The Petitioner was served with a copy of the order denying a certificate of appealability on June 27th, 2019.[1] Under New York Law, a denial of a certificate of appealability is final, and there is no mechanism for appeal from such a denial making the Supreme Court, Appellate Division, First Judicial Department the highest court of New York State. As 90 days have not yet elapsed since Petitioner was served with the order denying a certificate of appealability, this petition is timely.

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[1] Although the decision denying permission to appeal was entered by the clerk on April 1st, 2019, Petitioner was not served with the order until June 27th, 2019. Under NY law, The clock does not begin to run on the time limitation to file an appeal until the Order is served, *see CPLR* §5513.

The Supreme Court has jurisdiction to review the case under 28 USC § 1257 as the questions presented involve the construction and application of the Fourth Amendment to the United States Constitution, the interpretation of The Stored Communications Act, codified as Chapter 121 of the United States Code, as well as the legislative intent behind definitions used by Congress in the Electronic Communications Privacy Act of 1986, and codified as Chapter 119 and Chapter 205 of Title 18 of the United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States:

> "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."

Electronic Communications Privacy Act of 1986--text included in appendix

New York Civil Practice Law and Rules §2221(e) "motion affecting prior order":

> "(e) A motion to renew:
> 1. Shall be identified specifically as such
> 2. Shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
> 3. Shall contain reasonable justification for the failure to present such facts on the prior motion."

New York Civil Practice Law and Rules §5513(b) "Time to take an appeal, cross appeal, or move for permission to appeal":

> "(b) Time to move for permission to appeal. The time within which a motion for permission to appeal must be made shall be computed from the date of service by a party upon the party seeking permission a copy of the judgment or order to be appealed from and written notice of its entry, or, where permission has already been denied by order of the court whose determination is sought to be reviewed, of a copy of such order and written notice of its entry, except that when such party seeking permission to appeal has been served a copy of such judgment or order and written notice of its entry, the time shall be computed from the date of such

service. A motion for permission to appeal must be made within thirty days."

United States Code Title 18 §2510-Text included in appendix

United States Code Title 18 §2701 *et seq* -Text included in appendix

United States Code Title 18 §3117(b) "Mobile tracking devices":

> "(b) Definition.--As used in this section, the term "tracking device" means an electronic or mechanical device which permits the tracking of the movement of a person or object"

United States Code Title 28 §1257(a) "State courts; certiorari":

> "(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn into question or where the validity of a statute of any state is drawn into question on the ground of it being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specifically set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

STATEMENT OF THE CASE

This case began on July 29th, 2009, when Felix Brinkmann, aged 81 years, was murdered in his Manhattan, New York, apartment. Very quickly, the police learned that a woman, accompanied by a dark skinned male who was much taller than she, were the last people to enter the apartment. The doorman recounted that he had called Mr. Brinkmann to announce the visitors and the call had been made from the woman's cellular phone. A phone dump of Mr. Brinkmann's home phone revealed that the phone was registered to Angela Murray and she was quickly arrested. Ms. Murray refused to name her accomplice.

The police quickly learned that someone had used Mr. Brinkmann's credit card at a local business and they were able to pull surveillance tape from the counter. A police informant then identified the man using the card as Hasib Cutts, and the man accompanying him as the

Petitioner Aljulah Cutts. Both men match the general description of the man accompanying Ms. Murray into the apartment, and the police really had no information as to which of them, if it were either one, might be the killer. Importantly, the possession and use of a stolen credit card is a crime and the police had sufficient probable cause to obtain an arrest warrant, but chose not to.[2]

Hasib Cutts was quickly located and detained for questioning, but the police could not locate the Petitioner. Although they had probable cause to obtain an arrest warrant for the stolen property charge, the District Attorney assigned to the case chose instead to obtain a judicial subpoena under the Stored Communications Act compelling Sprint/Nextel to grant the NYPD access to the Cell Site Location Information (CSLI) generated by the petitioner's cell phone for the purpose of tracking him down so he could be questioned regarding the homicide. The order also granted the State access to the historical CSLI records of the Petitioner.

At pretrial suppression hearings, defense counsel challenged several statements made by the Petitioner during his apprehension as well as the voluntariness of his statements made upon

[2] It shouldn't escape notice that under New York precedent law the right to counsel attaches when an arrest warrant is issued, *see People v Samuels,* 49 NY2d 218, 221 (1980). Clearly the District Attorney would know that any chance of questioning the Petitioner would evaporate the moment they obtained a warrant, *see US v Stokes,* 733 F.3d 438, 441 (2nd Cir 2013)[recognizing that "Under New York law, once an arrest warrant issues, law enforcement officers are not permitted to question suspects outside of the presence of counsel"], because no competent attorney would permit a suspect in a stolen property case to answer questions about a related homicide. The Petitioner asserts that the District Attorney made a concerted, tactical maneuver in order to bypass the warrant requirement with the intention of getting him into an interrogation room absent an attorney.

the interrogation, but counsel never bothered to challenge the warrantless collection of CSLI in the case, which in the case of real time tracking is clearly contrary to federal law.[3]

After trial, and petitioner's conviction, an appeal was taken and the judgment affirmed. Petitioner then moved pursuant to Criminal Procedure Law (CPL) Article 440.10 to vacate the judgment on the ground that the warrantless tracking and collection of CSLI violated federal law and the Fourth Amendment, and that he had been deprived of effective assistance of counsel because his lawyers were not aware of the limitations of the SCA and had not researched the federal law to make sure they knew what they were arguing, which caused them to miss the illegality of the warrantless tracking.[4]

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[3] Any competent attorney would argue that the law was plainly violated if they knew that to be the case, which reveals that counsel, two generally competent attorneys, simply did not know and did not bother to check, which is deficient performance under the *Strickland* test, *see Hinton v Alabama, supra,* 571 US at 274.

Prejudice under *Strickland* is often in the eye of the beholder, yet here, prejudice stems from the fact that federal law actually prohibits the tracking of a cell phone using CSLI unless a warrant is obtained. There is a 'reasonable probability' of a different outcome in that the Petitioner would have won, without doubt, had his attorneys done the basic research into federal law and the error here has deprived the Petitioner of a fair trial as damaging evidence, statements made at the time of the arrest, should have been suppressed due to the illegal arrest.

[4] The federal questions brought before the Supreme Court in this petition were squarely put to the Motion Court, see Order denying CPL §440.10 motion, Appendix 1 "Defendant moves, pursuant to criminal procedure law §440.10, to vacate his judgment of conviction on two grounds. First he claims that . . . installation of a pen register and trap and trace device on his cell phone . . . the police used that to determine his real time geographic location in order to arrest him, thus violating his right against unreasonable searches and seizures under the Fourth Amendment . . . Second he claims that his trial counsel failed to assert the Fourth Amendment claim and, consequently, failed to provide Defendant with effective assistance of counsel in violation of the Sixth Amendment.

The motion was denied without a hearing and an appeal was requested, where the federal questions were once again asked of the higher court. The appellate court denied leave to proceed on appeal. Subsequent to the denial of post conviction relief, this Court issued the decision in *Carpenter v US,* 138 US 2206, which completely vindicated Petitioner's arguments that the warrantless collection of CSLI was unconstitutional and that he had been prejudiced by his attorneys failure to argue the point.

Petitioner then moved to renew his prior argument under CPLR §2221(e) and CPL 440.10. The people responded asserting that *Carpenter* did not apply retroactively and the Petitioner filed a reply memorandum, discussing retroactivity, asserting the fundamental miscarriage of justice exception, *see Murray v Carrier,* 477 US 478, 495-496 (1986), to the procedural bar rule and explaining that he would not be barred had his attorney simply conducted basic legal research into the critical point of law, so he should be heard even if the trial court determined that *Carpenter* did not apply retroactively. The court took up the federal questions anew by reaching the merits, discussed *Carpenter,* assessed whether it applied retroactively, decided it did not, but never assessed the ineffective counsel argument and whether the fundamental miscarriage of justice exception should allow the Petitioner to bypass the bar of non retroactivity. The court ultimately adhered to its prior determination and denied the motion, *People v Cutts,* 62 Misc.3d 411 (Sup. Ct. NY County 2018). Petitioner made a request for a discretionary appeal and again put the federal questions before the higher court. The appellate court denied leave to appeal. This petition ensues.

REASONS FOR GRANTING THE WRIT

This case is much larger than one man. This is about privacy; the right to move without being tracked; and the interplay of technology and the Fourth Amendment. It's about the will of Congress; the importance of the definitions that Congress chooses to incorporate into the law; and the binding nature of those words. This is much larger than one man; it's about who we are, who we choose to be, and how we want to live our lives.

Cell site location technology is an incredibly useful and absolutely wonderful thing. This technology works to save lives everyday. It allows first responders to locate us if we have an emergency and can't give our location; it allows us to know where our children are, and who they are with, when they aren't with us; and allows us to keep in touch through the world of social media. CSLI is amazing and we're a better society for having invented it. Unfortunately, however amazing a technology is, it usually has a dark side.

The ability to electronically track people raises several personal privacy and civil liberty questions, as Justice Sotomayor so eloquently noted in her concurrence of *United States v Jones,* 565 US 400, 413-419 (2012)"[T]he government usurped [Petitioner's] property for the purpose of conducting surveillance on him, thereby invading privacy interests long afforded, and undoubtedly entitled to Fourth Amendment protections"], *id,* 412-414, and is ripe for abuse ["Because GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices . . ."], *id,* 415-416.

Turning to this case, the State chose to obtain both historical and real time CSLI data by means of an order under the Stored Communications Act, 18 USC §2703(d), [5] even though they had sufficient cause to obtain a warrant if they wanted to. The reason for the choice is simple, they needed to find *and question* the Petitioner about a homicide and the moment they obtained a warrant, his right to counsel would attach and he wouldn't even be able to waive the presence of an attorney unless the attorney was present, *see People v Samuels,* 49 NY2d 218, 221 (1980); *US v Stokes,* 733 F.3d 438. It's exceedingly unlikely that any attorney, assigned to a stolen property case, would permit his client to answer questions about a homicide.

A Court Order Under 18 U.S.C. § 2703 May Not Serve As A Substitute For A Search Warrant To Permit The State To Actively Track A Person's Cell Phone Because A Cell Phone Qualifies As A Tracking Device And CSLI Qualifies As Communication From A Tracking Device, Which Is Exempt By Law From Disclosure Under The Stored Communications Act.

The Courts that have had occasion to examine the Stored Communications Act (SCA)(18 USC §2701 *et. seq.*) have required the Government to obtain a warrant based upon probable cause before obtaining 'real time' Cell Site Location Information (CSLI) data, *see, Sims v State,* 569 S.W.3d 634, 645 (Tex. Crim. App. 2019)

> "[W]e see no difference between [prospective and historical CSLI] for the purposes of applying the third party doctrine and determining whether a person has a legitimate expectation of privacy in his physical movements and location . . . the nature of real time CSLI records are not meaningfully different than in *Carpenter*" *also see, Commonwealth v Pacheco,* 2019 WL 2847239 (Sup. Ct. Penn, 2019) [same]

[5] This Court has already addressed the impropriety of obtaining *historical* CSLI data under such an order and categorically outlawed it, *Carpenter v United States,* 138 US 2206 (2018), but has not addressed real time tracking of a cell phone, even expressly stating that "our decision today is a narrow one. We do not express a view on matter not before us: real time CSLI or "tower dumps" . . .", *Carpenter, supra,* 2220.

Federal District Courts, in disposition of applications for orders under the SCA where the government sought access to real time CSLI, have consistently rejected the requests, *see, In Re Application of US For An Order Authorizing Use Of A Pen Register With Caller Identification Device Cell Site Location Authority On A Cellular Telephone,* 2009 WL 159187 (SDNY 2009)[holding that CSLI does not qualify as a record under the Stored Communications Act; the term "electronic communication" does not include any communication from a tracking device; cell phone falls squarely within the definition of a tracking device]; *In Re U.S. For an Order Directing A Provider Of Electronic Communication Service To Disclose Records To the Government,* 534 F.Supp.2d 585 (WD Pennsylvania 2008)[holding that access to customer's CSLI cannot be authorized under the SCA]; *In Re Application For A Pen Register And Trap And Trace Device With Cell Site Location Authority,* 396 F.Supp.2d 747 (SD Texas 2005) [Holding that real time CSLI qualifies as tracking device under Electronic Communications Privacy Act (ECPA); cannot be compelled under SCA; requires a warrant to be obtained].

The decisions of these courts rest on the definitions that Congress incorporated into the Electronic Communications Privacy act of 1986. In enacting the act, Congress decided that 18 U.S.C. §2703(c) should provide access to "records concerning *electronic communications service* or remote computing service," [emphasis added]. They then defined an electronic communications service as "any service which provides to users thereof the ability to send or receive wire or *electronic communications*," *see,* 18 U.S.C. §2510(15) [emphasis added]. They further decided that "electronic communication" means "any transfer of signs, signals, etc. . . . but does not include any communication from a *tracking device* (as defined in 18 U.S.C. §3117)," *see,* 18 USC §2510(12)(C) [emphasis added]. Congress then chose to define a "tracking

device" as "an electronic of mechanical device which *permits* the tracking of the movement of a person or object," *see,* 18 U.S.C. §3117(b) [emphasis added].

Because a cell phone qualifies as a tracking device, prospective CSLI is a "communication from a tracking device," which is categorically exempted from being an "electronic communication" under the definitions of the ECPA, and is therefore exempt from disclosure under the SCA, *see In Re App., supra, at* 3 (SDNY), *In Re App., supra* (SD Texas).

Because the SCA cannot permit the warrantless disclosure of real time CSLI, the State was required to obtain a warrant prior to accessing it and a constitutional error has occurred, *see In Re App., 396 F.Supp2d at 764*

> "This type of surveillance is unquestionably available upon a traditional probable cause showing . . . On the other hand, permitting surreptitious conversion of a cell phone into a tracking device without probable cause raises serious Fourth Amendment concerns."

Nor Was The Error Harmless

The warrantless tracking led directly to collection of metadata documenting the Petitioner's movements, as well as very incriminating statements that were used against Petitioner to great effect at his trial and no doubt contributed to his conviction. These statements could not have been made had a warrant been issued in the case, as an attorney would have entered the case at the point of a warrant being issued, *People v Samuels,* 49 NY2d 218, 221 (1980), Petitioner could not have spoken to police until he spoke to the attorney, *US v Stokes,* 733 F.3d 438, 441 (2nd Cir 2013), and any reasonable attorney undoubtedly would advise his client not to speak with police about a murder.

There is no doubt that evidence was admitted in this trial, which should have been suppressed because it was obtained as the product of an unlawful arrest that appears to have been calculated to sidestep Petitioner's right to counsel, or that such evidence had an impact in this

highly circumstantial case. Petitioner's Fourth Amendment right to be free from unreasonable searches and seizures, as well as his Fourteenth Amendment right to Due Process was violated and the error was not harmless.

The Performance Of Petitioner's Defense Attorney Was So Deficient That He Was Deprived Of Effective Assistance Of Counsel.

Petitioner's trial attorneys failed to perform their most basic function, which is to understand the legal principles and assess the facts crucial to his case. Without a doubt, most of the incriminating evidence being introduced was in the form of metadata and statements made by Petitioner during and immediately after his arrest, which were obtained when the State tracked him down by surreptitiously accessing the GPS capability of his cell phone. This action, which should have peaked the interest of any defense attorney, was authorized not by a judicial warrant, but rather by an order granted under the purported authority of a federal statute.

A reasonable defense attorney would have questioned the order, because it just seems wrong, and would have learned, quite quickly, that the SCA cannot be used to track a cell phone's GPS. Counsel would need to look no further than Westlaw or Lexis, as a review of general case law shows Court after Court denying the government's SCA applications to access prospective CSLI. Counsel failed to understand the legal principles crucial to defending his client, and also failed to simply read the law, which is a glaring example of deficient performance, *see, Hinton v Alabama,* 571 US 263, 274 (2014), citing *Strickland v Washington,* 466 US 668 (1984).

The error was prejudical because Petitioner would have won the suppression argument, had it been timely made, *Strickland, supra,* 694 [requiring a 'reasonable probability of a different result' had the error not occurred],

The Court's Carpenter Decision Should Apply Retroactively To The Petitioner's Case

Writing for the Majority in *Teague v Lane,* 489 US 288, 301 (1989), Justice O'Connor was candid in admitting that it is often difficult to determine when a case announces a new rule, but noted that a rule is new if the result was not dictated by precedent at the time of the Petitioner's conviction. Precedent dictates the result in a subsequent case where the result would be apparent to reasonable jurists, *see Guzman v US,* 404 F.3d. 139 (2nd Cir. 2005) *citing Beard v Banks,* 542 US 406 *at* 124 S.Ct. 2511 (2004).

When the Court decided *Carpenter* they considered whether there was a reasonable expectation of privacy in one's physical location, by analyzing *Katz v United States,* 389 US 347 (1967)[person enjoys a reasonable expectation of privacy, 360-361, Harlan, J, concurring]; *Kyllo v United States,* 533 US 27 (2001)[use of technology to do what otherwise could not be done conventionally violates reasonable expectation of privacy]; and *United States v Jones,* 565 US 400 (2012) [GPS tracking requires a warrant].

They then began their inquiry by noting that *Carpenter:*

> "[D]oes 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 US 400 (2012), and the other addresses a person's expectation of privacy in information voluntarily turned over to a third party *see, United States v Miller,* 425 US 443 (1976) and *Smith* [*v Maryland,* 442 US 735 (1979)]", *id, at* S.Ct. 2209.
>
> "[CSLI] tracking partakes of many of the qualities of the GPS monitoring we considered in *Jones* . . . at the same time, the fact that the individual continuously reveals his location to his wireless carrier implicates the third party principle of *Smith and Miller*," 138 S.Ct. 2217.

The Court also relied on its decision in *Riley v California,* 573 US 373, (2014), noting that there were privacy issues involved because of the vast amount of sensitive information contained on modern cell phones:

> "[A] majority of the court has already recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements. Allowing government access to cell-site records--which hold for many Americans the privacies of life contravenes that expectation" *Carpenter, supra; Riley,* 573 US at 403.

The *Carpenter* Court called the circumstances of the case 'novel' and they are that, but the circumstances are all that's novel, the ruling was predictable from *Jones and Riley.* The concurring opinions of 5 Justices in the *Jones* decision[6] spoke at length in concurring opinions

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[6] "Recent years have seen the emergence of many new devices that permit the monitoring of a person's movements . . . Perhaps most significant, cell phones and other wireless devices now permit wireless carriers to track and record the location of users and as of June 2011, it has been reported, there were more than 322 million wireless devices in use in the United States . . . new 'smart phones' which are equipped with a GPS device permit more precise tracking . . . a provider is able to monitor the phone's location and speed of movement . . . the availability and use of these and other new devices will continue to shape the average person's expectations about privacy of his or her daily movements," id, at 428-429 (Alito, J joined by Ginsburg, J Breyer, J and Kagan, J concurring);

"With increasing regularity, the Government will be capable of duplicating the monitoring undertaken in this case by enlisting factory--or owner--installed vehicle tracking devices or GPS enabled smartphones . . . I agree with Justice Alito that, at the very least, longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy. In cases involving even short term monitoring, some unique attributes of GPS surveillance . . . will require particular attention. GPS monitoring generates a precise, comprehensive record of a person's movements that reflects a wealth of detail about her familiar, political, professional, religious, and sexual associations. The Government can store such records and efficiently mine them for information years into the future. And because GPS monitoring is cheap . . . and by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: limited police resources and community hostility.

that revealed their deeply held concerns over the ability of the government to track GPS enabled smartphones and they make their feelings well known on the issue; A majority of The Supreme Court was fearful of GPS tracking as it relates to cell phones.

This Court's decisions in *Jones* [2012], *and Riley* [2014] occurred well *before* the Petitioner's decision went final in 2016 and makes plain that GPS monitoring requires a warrant. Why would a cell phone be any different? Based largely upon *Jones,* reasonable jurists all over the country were finding that a warrant is required to track a cell phone by its GPS capability, *see, Commonwealth v Augustine,* 467 Mass. 230, 254 (2014); *State v Earls,* 214 N.J. 564 (2013)[7]; *Tracey v State,* 152 So.3d 504 (Fla. 2014):

As it pertains to the Petitioner, whose conviction went final in 2016, *Carpenter v United States* did not break any new ground nor did it impose any new obligations not already discernable in *Jones*, and the result of *Carpenter* was readily discernable by reasonable jurists all over the country, from the very liberal northeast and ultra conservative deep-south. Because this is so, *Carpenter* should be retroactive in its application to the Petitioner's case as *Carpenter* was "merely an application of the principle [GPS tracking requires a warrant] that governed a prior decision [*Jones*] to a new set of facts [cell phones and CSLI]", *Chaidez v US,* 568 US 342, 347 (2013) "[W]hen all we do is apply a general standard to the kind of factual circumstances it was meant to address, we will rarely state a new rule for *Teague* purposes"] *ibid.*

The net result is that GPS monitoring by making available at a relatively low cost a substantial quantum of intimate information about any person whom the Government, in it's unfettered discretion, chooses to track may alter the relationship between citizen and government in a way that is inimical to democratic society . . . ", id at 415-416 (Sotomayor, J concurring)

[7] This case analyzed *Jones* extensively, yet rested ultimately on state constitutional grounds.

In The Alternative, Petitioner Should Be Availed Of The Fundamental Miscarriage Of Justice Exception To The Procedural Default Rule

The Fundamental Miscarriage of Justice exception to the procedural bar rule exists to 'balance the societal interests in finality, comity, and conservation of judicial resources with the individual interest in justice that arises in the extraordinary case', *House v Bell,* 547 US 518, 531 (2006). Under the exception, a claim forfeited under state law may be brought in federal court only if the prisoner demonstrates cause for the default and actual prejudice from the asserted error, *Engle v Isaac,* 456 US 107, 129 (1982). The Petitioner avers that he can demonstrate his eligibility for the exception.

This court recognized long ago that ineffective assistance of counsel could be asserted as cause for the default, *see Murray v Carrier,* 477 US 478, 488-489 (1986)[8], but added the caveat that the claim of ineffective assistance should be presented to the state courts before being brought into federal litigation, *id, at 489.* The standard for judging ineffective assistance is, of course, the established cause and prejudice test of *Strickland v Washington.*

It's clear from the facts that the asserted error was squarely presented to the State courts on two separate occasions.[9] The second presentation even asserted the fundamental miscarriage of justice exception to the procedural bar rule should the Trial Court hold that *Carpenter* did not apply retroactively to the Petitioner. In sum, the State had a fair opportunity to correct the error and chose not to.

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[8] "If the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State, which may not conduct trials at which persons who face incarceration must defend themselves without adequate legal assistance", *Carrier, at 488,* quoting *Cuyler v Sullivan,* 466 US 335, 344 (1980)[internal quotations removed].

[9] In the CPL 440 motion and again in the renewal of that motion post *Carpenter.*

The thrust of the ineffectiveness claim is that counsel didn't understand the scope of 18 USC §2703 and failed to conduct basic legal research into the law, which caused him to fail in his effort to have damaging evidence suppressed at a pre-trial hearing.Counsel had the SCA order and heard the detectives say they tracked his client's cell phone, so he must have believed it was legal for the State to do such a thing.

This case is actually quite similar to *Hinton v Alabama,* 571 US 263 (2014) where the attorney needed to hire an expert witness and was under the mistaken belief that he could only spend $1,000. That attorney's failure to understand that state law no longer imposed a specific limit and instead allowed reimbursement for reasonable expenses, together with his failure to conduct basic legal research on the topic was judged to be deficient performance.

Petitioner's attorney was similarly deficient. Petitioner was seeking suppression of statements made at the time of his arrest and during interrogation. A reasonable attorney would wonder whether it was legal to intercept a cell phone signal and track it down without a warrant, and would also wonder why the people chose not to obtain a warrant even though they could have charged Petitioner with a felony level crime[10] and simply asked for an arrest warrant.

The error here is, in principle, no different from *Hinton.* An attorney thought he knew the law, never checked, and prejudiced his client at an important stage of the proceedings, *see Strickland, supra,* 695-696 [Some errors will have a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture].

[10] Petitioner was on camera standing at the checkout counter while his suspected accomplice was using the victim's stolen credit card. Under New York Law this fact pattern constitutes at least criminal possession of stolen property in the third degree, a class D felony

The error here allowed metadata documenting Petitioner's movements and proximity to the crime scene, as well as emotionally charged statements, which could be interpreted as admissions of guilt, uttered to his girlfriend at the time of his arrest, to remain in evidence and be used to great effect during his trial. This was the most damning evidence against Petitioner as his movements and words were the only actual evidence tending to prove his guilt.

Moreover, the state imposed the procedural bar of non-retroactivity to Petitioner's collateral review petition, which would not have been necessary had counsel simply done his job in 2009. Under the fundamental miscarriage of justice doctrine, this appears to be the rare case where Federal Court relief for Petitioner's *Carpenter* claim is warranted even if he is technically barred by the *Teague* rule.

The State Court Erred In Holding That The State May Obtain CSLI Under The SCA If They Demonstrate Probable Cause In Their Affirmation

The Trial Court's order denying collateral review on the renewal of the motion, *People v Cutts,* 62 Misc.3d 411, 415 (2018), held that, in the event that *Carpenter* applies retroactively:

> "[T]he result would remain unchanged, as the court order in this case was indeed supported by probable cause (unlike the court order in *Carpenter*) and authorized the wireless company to provide the police with historical as well as real-time cell site information. The order. . . indicated that probable cause has been established to show that the GPS/precision location is relevant to an ongoing criminal investigation. See order of Hon. Kevin B. McGrath, Jr., J, dated August 5, 2009. Thus the order obtained to locate and arrest defendant fully complied with the requirement under *Carpenter."*

This is a misstatement of the law on several points. First off--In *Carpenter,* the Court took issue with the *mechanism* under which the CSLI was obtained, and did not seem to concern itself with whether or not the government had actually established probable cause. Presumably, it shouldn't matter if they did or did not establish probable cause, it only matters that they did not

need to under §2703(d), as the standard of review under that section is "a gigantic departure from the probable cause rule," *Carpenter,* 138 S.Ct. at 2221.

Secondly, *Carpenter* took no position on 'real time' CSLI or 'tower dumps', *Carpenter, supra,* 2220; and lastly, the order does not support the preposition that the State established 'probable cause' at all, but only parrots the SCA standard while purporting to say that. [The order . . . indicated that probable cause has been established to show that the GPS/precision location is relevant to an ongoing criminal investigation]. This certainly isn't the standard for a warrant to issue, *see Maryland v Pringle,* 540 US 366, 371 (2003) *quoting Brinigar v United States,* 338 US 160, 175 (1949) ["The substance of all the definitions' of probable cause is a reasonable ground for belief of guilt"](internal quotes omitted); *cf. United States v Thompson,* 2019 WL 1075886 *3 (D. Minn. March 7, 2019) As the Court noted in *Carpenter* there is a huge gap between 'reasonable suspicion' under the SCA and 'probable cause' under the Fourth Amendment, yet the Trial Court here simply swaps out 'reasonable suspicion' for 'probable cause' in an effort to justify it's position.

Lastly, the courts in New York are now citing this order as authority, *see People v Clark,* 171 AD3d 942 (2nd Dep't 2019) [SCA] court order authorizing the acquisition of the records made an express finding of probable cause . . . accordingly the order 'was effectively a warrant' which complied with the requirements of *Carpenter*; *People v Edwards,* 63 Misc.3d 827, 834 (Sup. Ct. Bronx County 2019):

> "The People's application for the CSLI order correctly pointed out that the victim had identified defendant as the robber . . . thus there was ample probable cause to support a search warrant. Accordingly, Justice Michaels' Order should be treated as the equivalent of a properly issued search Warrant based on probable cause . . ."

Plainly, *Carpenter* does not turn on any *post hoc* analysis that there was 'probable cause' established in a proceeding that didn't require it. The Court should step in and correct New York before this 'bad law' holding spins out of control.

CONCLUSION

Petitioner has attempted to assert a ruling of this Court in the courts of New York State and he has been systematically disallowed. The courts have seemingly rewritten the *Carpenter* decision in order to make an SCA order 'effectively a warrant' so long as some court determines, *post hoc,* that the application made a showing of probable cause that would have been sufficient to obtain a warrant, even though the proceeding didn't require it. The only question that never seems to come up is --If they had probable cause then why didn't they get a warrant?

Real time CSLI has yet to be taken up by this Court and really should be. It would expand the *Carpenter* decision to cover all CSLI as it rightly should. Real time tracking of a cell phone just feels wrong, sort of like a cold war era KGB spy game. Many of us grew up fearing this type of thing, and now it's a reality.

This court has an opportunity now to clarify it's *Carpenter* decision and speak to whether this is a new rule or a new application of the old rule. Retroactivity claims are already beginning to come and the time to speak on this is at hand. The longer we wait, the more claims are being litigated and more judicial resources are allocated to those claims, this is an issue of importance and should be heard.

Finally, the New York Courts are twisting this whole deal so that they can continue doing as they wish. A warrant is a warrant and an order is an order, so when is an order 'effectively' a warrant, well NEVER. A warrant is based upon a finding of probable cause, sworn to under oath for the purpose of obtaining a warrant, and issued by a judge after hearing the facts at hand. The

State doesn't get to take the easy road, showing only 'reasonable suspicion' then, if they are challenged, say that they 'effectively' got a warrant based upon a higher standard because their proof at the lesser hearing measured up in some judges opinion. Respectfully, that's a bunch of hooey.

Privacy is the number one public policy concern in the digital age. CSLI; tracking; *Carpenter*; this is all about privacy. So how can we live in the modern age and not be subject to unreasonable surveillance? We ask the Supreme Court to stand up for us and limit governmental surveillance power. That's what's going on here.

You see, Aljulah Cutts is but one man, but this is much bigger than he. Sure, it's true that Mr. Cutts will remain in prison if this Petition is denied, but make no mistake, the cherished concept of liberty itself will also suffer.

The fears expressed by the 5 concurring Justices in *United States v Jones* were valid. Justice Alito's sound opinion was that the best solution to privacy concerns is legislative, but even though Congress prohibited use of the SCA to electronically track people when they enacted the Electronic Communications Privacy act in 1986, New York chooses to ignore them and do it anyway. Justice Sotomayor's thoughts about "trips to the psychiatrist, the plastic surgeon, the abortion clinic . . ." expressed valid concerns about things that New York is doing as we speak, and twisting the *Carpenter* ruling to justify it, to boot.

How can we let that stand? It makes a mockery out of this Court's ruling. Millions of American citizens live in New York and millions more travel to it each year. Is willful ignorance of a federal privacy law, and a ruling of our nation's highest court by a State in the Union going to be accepted? Or will this Court rebuke New York and enforce it's own will over the politics of

a troubling time? This Court should hear this case and Petitioner Cutts respectfully begs for just such a hearing.

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Executed on July 25 2019, in Washington County N.Y.