19-6737

ORIGINAL

No. TBA

IN THE
Supreme Court of the United States

Leonard L. Little, JR,
Petitioner,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, Mark S. Inch
and
ATTORNEY GENERAL OF FLORIDA, Ashley Moody,
Respondent(s).

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Second District Court of Appeal

PETITION FOR WRIT OF CERTIORARI

Leonard L. Little, JR
Petitioner, *pro se*
Desoto Correctional Institution
13617 South East Highway 70, Arcadia, Florida 34266

QUESTIONS PRESENTED

I. Petitioner asks did the Second District Court of Appeal apply federal law issued by the United States Supreme Court in a way that frustrates and undermines its holdings set forth in *Carpenter v. United States, 138 S. Ct. 2206, 201 L. Ed. 2d 507*?

II. Petitioner asks did the Second District Court of Appeal apply federal law issued by the United States Supreme Court in a way that frustrates and undermines its holdings set forth in *Padilla v. State, 189 So. 3d 986* (Fla. 2nd DCA 2016) *and Crawford v. Washington, 541 U.S. 36, 61, 124 S. Ct. 1354, 158 L. Ed. 2d 177* (2004)?

LIST OF PARTIES

THE LIST OF THE PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS THE SUBJECT OF THIS PETITION IS AS FOLLOWS:

1. Ashley Moody, Attorney General For The State Florida

2. Honorable Joseph A. Bulone, Circuit Court Judge, 6th Judicial Circuit, Pinellas County, Florida

3. Leonard L. Little, Petitioner

4. Carolyn Roy, Office of the Assistant Attorney General, 6th Judicial Circuit, Pinellas County, FL

5. Howard L. "Rex" Dimmig, II and J. L. "Ray" Le Grande, Appellate Attorney

TABLE OF CONTENTS

Opinions Below 1

Jurisdiction 2

Constitutional And Statutory Provisions Involved 3

Statement Of The Case 4

Reasons For Granting The Writ 4

Conclusion 12

INDEX TO APPENDIX

Appendix A Order Denying Judgment of Acquittal from Pinellas County, Florida

Appendix B Order of *per curiam* Affirmance Second District Court of Appeal State of Florida

Appendix C Mandate from the Second District Court of Appeal State of Florida

Table Of Authorities

Cases

Aguilar-Ayala v. Ruiz, 973 F.2d 411, 418 (5th Cir. 1992) 10

Allie, 978 F.2d at 1406, ... 11

Berger v. California, 393 U.S. 314, 315, 89 S. Ct. 540, 541, 21 L. Ed. 2d 508 (1969). 9

Boyd v. United States, 116 U.S. 616, 630, 6 S. Ct. 524, 29 L. Ed. 746 5

Bruton v. United States, 391 U.S. 123, 135-137, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). 9

Carpenter v. United States, 138 S. Ct. 2206, 201 L. Ed. 2d 507 ..... 1, 4

Carpenter, 138 S. Ct. at 2223 ..... 6, 7

Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) 8

Childers, 642 F.3d at 975; 8

Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) 9

Davis v. United States, 564 U.S. 229, 238, 131 S. Ct. 2419, 2427, 180 L. Ed. 2d 285 5

Dutton v. Evans, 400 U.S. 74, 89, 91 S. Ct. 210, 220, 27 L. Ed. 2d 213 (1970) 9

Leon, ... 5

Mattox v. United States, 156 U.S. 237, 242-43, 15 S. Ct. 337, 39 L. Ed. 409 (1895) 9

McClain v. State, 395 So. 2d 1164 (Fla. 2d DCA1981) 8

Padilla v. State, 189 So. 3d 986 (Fla. 2nd DCA 2016) 1

Pointer v. Texas, 380 U.S. 400, 405, 85 S. Ct. 1065, 1068, 13 L. Ed. 2d 923 (1965) 9

Riley, 134 S. Ct. at 2495 8

Roberts, 448 U.S. at 65-66 ..... 9, 10

Steinhorst v. Wainwright, 477 So. 2d 537 (Fla. 1985) 8

Tirado-Tirado, 563 F.3d at 123 10

Tracey, 152 So. 3d at 525 6

United States v. Di Re, 332 U.S. 581, 595, 68 S. Ct. 222, 92 L. Ed. 210 (1948)). 6

United States v. Ellis, 270 F. Supp. 3d 1134, 1145 (N.D. Cal. 2017). 7

United States v. Kinison, 710 F.3d 678, 685 (6th Cir. 2013) 5

United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984),....5

United States v. Owens, 484 U.S. 554, 559, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988); 8

United States v. Washington, 380 F.3d 236, 241 (6th Cir. 2004). 5

Statutes

Title 28 U.S.C. §1257 2

U.S. CONST. AMEND. VI. 9

Other Authorities

Fifth Amendment, United States Constitution 8

Fourteenth Amendment, United States Constitution 8

Section 9, Clause 2, United States Constitution 8

Sixth Amendment, United States Constitution 8

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **state courts**:

The opinion of the Circuit Court, Pinellas County, Florida appears at **Appendix A**.

The highest state court decision was rendered July 12, 2019 and appears at **Appendix B**.

The Mandate from the highest state court appears at **Appendix C**

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a) and Rule 13.[1]

[1] *Coy v. Iowa*, 108 S. Ct. 2798 (1988); "Under the Six Amendment a criminal defendant has the right 'to be confronted with the witness(es) against him.'"

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 9, Clause 2, United States Constitution, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

Amendment V, United States Constitution, "No person shall be deprived of Life, Liberty or property without due process of law..."

Amendment VI, United States Constitution, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Amendment XIV, Section 1, United States Constitution, "No State shall make or enforce any law which [...] shall 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

The facts of the case are undisputedly set forth covered in Petitioner's State Appeal Case Number *2D18-2377*, filed in the Second District Court of Appeal, State of Florida. In the essence of judicial resources, Petitioner will not re-state herein except to state the two (2) specific points in questions, enumerated in said factual presentation are:

First, this Honorable Court clearly established in *Carpenter v. United States, infra,* the necessity of a search warrant when police authorities are seeking to obtain a cell-site location data and secondly, the jury in the case at hand were not exposed to live testimony subject to cross examination establishing Petitioner's guilt, thereby depriving Petitioner of his Constitutional right to confrontation. *Crawford v. Washington ,infra.*

REASONS FOR GRANTING THE WRIT

I. The fact that defense counsel may not have properly preserved the warrantless search argument for state appeal does nothing to negate the fact that

government acquisition of cell phone location data is "a search within the meaning of the Fourth Amendment," subject to the general warrant requirement. *Carpenter v. United States, 138 S. Ct. 2206, 2220-21, 201 L. Ed. 2d 507 (2018).*

The underlying facts of the case regarding the police investigation clearly show that during the process of the investigation, Petitioner was somehow developed as a suspect via the cell-phone records of the victim. The summaries of the telephone activity between Petitioner and victim was admitted into evidence over the objection(s) of defense counsel, despite the fact that the State failed to file a notice of the summaries as required under Fla. Stat. §90.956.

The obvious fact is that if there were probable cause to obtain a warrant, the state would have done just that. The fact that they did not speaks volumes, though even when probable cause

is absent, suppression of evidence obtained is not automatically required. *See United States v. Washington, 380 F.3d 236, 241 (6th Cir. 2004).*

Therefore, Petitioner's defense counsel's did not necessarily need to preserve the issue *vis a vis*, a motion to suppress.

In *United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984)*, the Supreme Court held that "suppression of evidence obtained pursuant to a warrant [lacking probable cause] should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will, further the purposes of the exclusionary rule." *Id.* at *918, 104 S. Ct. at 3418.* The Court observed that because the exclusionary rule is designed to deter police misconduct, application of the rule does not further its purpose "when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope." *Id.* at *920, 104 S. Ct. at 3419.* Once again, no warrant was obtained in the case at hand.

Pursuant to *Leon*, "only police conduct that evidences a 'deliberate, reckless, or grossly negligent' disregard for Fourth Amendment rights" will warrant application of the exclusionary rule. *United States v. Kinison, 710 F.3d 678, 685 (6th Cir. 2013)* (quoting *Davis v. United States, 564 U.S. 229, 238, 131 S. Ct. 2419, 2427, 180 L. Ed. 2d 285 (2011)).*

In *Riley v. California, 134 S. Ct. 2473, 2493, 189 L. Ed. 2d 430 (2014)* the Court recognized that cell phones hold "the privacies of life," *id.* at 2495 (quoting *Boyd v. United States, 116 U.S. 616, 630, 6 S. Ct. 524, 29 L. Ed. 746 (1886))*, and noted that "[t]he 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." *Id.*

Following *Riley*, the Florida Supreme Court held that: a defendant had a subjective expectation of privacy in the location signals transmitted solely to enable the private and

personal use of his cell phone, even on public roads, and that he did not voluntarily convey that information to the service provider for any purpose other than for its intended purpose. *Tracey, 152 So. 3d at 525.*

Most recently, this United States Supreme Court recognized the "deeply revealing nature of Cell-Site Location Information [CSLI], its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection[.]" *Carpenter, 138 S. Ct. at 2223.* The Supreme Court stated: [T]he progress of science has afforded law enforcement a powerful new tool to carry out its important responsibilities. At the same time, this tool risks Government encroachment of the sort the Framers, "after consulting the lessons of history," drafted the Fourth Amendment to prevent. *Id.* (quoting *United States v. Di Re, 332 U.S. 581, 595, 68 S. Ct. 222, 92 L. Ed. 210 (1948)).* Thus, this Supreme Court applied Professor Kerr's equilibrium-adjustment theory and held that the government "must generally obtain a warrant supported by probable cause before acquiring such records." *Id.* at 2221.

Taken together these cases hold that, without a warrant, the government cannot: use technology to view information not visible to the naked eye, attach a device to property to monitor your location, search a cell phone in your possession without a warrant, or obtain real-time location information from the cell carrier.

And with a cell-site simulator, the government does more than obtain data held by a third party. The government surreptitiously intercepts a signal that the user intended to send to a carrier's cell-site tower or independently pings a cell phone to determine its location. Not only that, a cell-site simulator also intercepts the data of other cell phones in the area, including the phones of people not being investigated.

If a warrant is required for the government to obtain historical cell-site information voluntarily maintained and in the possession of a third party, *see Carpenter, 138 S. Ct. at 2221*, this Honorable court can discern no reason why a warrant would not be required for the more invasive use of a cell-site simulator. *See, e.g., United States v. Ellis, 270 F. Supp. 3d 1134, 1145 (N.D. Cal. 2017)*. This is especially true when the cell phone is in a private residence, *Karo*, 468 U.S. at 718, or other private locations "beyond public thoroughfares" including "doctor's offices, political headquarters, and other potentially revealing locales." *Carpenter, 138 S. Ct. at 2218.*

In closing, the requirements imposed by this United States Supreme Court are clear and they were not met by the police in Petitioner's case. All the authorities had to do was to seek/obtain a warrant through application to the appropriate government authorities.

The state's own witnesses testified to the fact that the evidence produced by this warrantless search was a critical factor in obtaining Petitioner's conviction.

The ultimate test of a constitutionally sound search is its "reasonableness." *Veronia School Dist. 47J v. Acton, 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995)*. Determining what is "reasonable" depends on a balancing of the nature of the privacy interest, the character of the government's intrusion, and the nature of the governmental concern at issue. *Id.*

This case begs the question of the reasonableness of the State's actions when it achieves near perfect surveillance of an individual, just as if they were wearing an ankle monitor.

In addition, in *Baskins v. State,* _____ So. 3d _____ (Fla. 2nd DCA 2018), in its reversal (on other grounds), the court specifically stated that in the vent this case is retried, any determination under the 4th Amendment concerning admissibility of evidence will be controlled with the U.S. Sup. Ct. decision in *Carpenter v. United States.*

Thus, absent a valid exception to the warrant requirement, the government must establish probable cause and receive court authorization before using a cell-site simulator. In other words, "get a warrant." *Riley, 134 S. Ct. at 2495.*

II. When the state's chief witness "could not remember anything" at trial, the state re-read the grand jury testimony in place of his testimony. This was an absolute judicial abuse of discretion and Petitioner's confrontational right was usurped.

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." U.S. Const. Amend. VI. The principle protection derived from this right is the right to effective cross-examination of the State's witnesses. *See Crawford v. Washington, 541 U.S. 36, 61, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)).*

The Confrontation Clause guarantees the *opportunity* for *effective* cross-examination. *See United States v. Owens, 484 U.S. 554, 559, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988); Childers v. Floyd, 642 F.3d 953, 972-73 (11th Cir. 2011).*

Reasons to limit cross-examination are the same in the Florida and Federal rules of evidence and include harassment, prejudice, confusion of the issues, and marginal relevance. *Childers, 642 F.3d at 975; see Steinhorst v. Wainwright, 477 So. 2d 537 (Fla. 1985)* (Florida law provides that cross-examination is properly limited to relevant matters within the scope of direct examination); *McClain v. State, 395 So. 2d 1164 (Fla. 2d DCA1981)* (inquiries into collateral matters should only be allowed when they affect the witness' credibility).

In *Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)*, this Supreme Court outlined the important purposes of the due process right of cross-examination of adverse witnesses: The right of cross-examination is more than a desirable rule of trial

procedure. It is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process.' *Dutton v. Evans, 400 U.S. 74, 89, 91 S. Ct. 210, 220, 27 L. Ed. 2d 213 (1970); Bruton v. United States, 391 U.S. 123, 135-137, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).*

It is, indeed, 'an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.' *Pointer v. Texas, 380 U.S. 400, 405, 85 S. Ct. 1065, 1068, 13 L. Ed. 2d 923 (1965).*

Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. But its denial or significant diminution calls into question the ultimate "integrity of the fact-finding process" and requires that the competing interest be closely examined. *Berger v. California, 393 U.S. 314, 315, 89 S. Ct. 540, 541, 21 L. Ed. 2d 508 (1969).*

The Confrontation Clause affords criminal defendants the right "to be confronted with the witnesses against him." U.S. CONST. AMEND. VI.

This Supreme Court has explained that the Confrontation Clause contemplates a personal examination and cross examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. *Ohio v. Roberts, 448 U.S. 56, 63-64, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980) (overruled on other grounds by Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004 (quoting Mattox v. United States, 156 U.S. 237, 242-43, 15 S. Ct. 337, 39 L. Ed. 409 (1895)).*

Petitioner acknowledges and understands that there are circumstances which warrant an easing of the Confrontational Clause, i.e., when, if the government can demonstrate the unavailability of the declarant whose statements it wishes to use. *Id.* (quoting *Roberts, 448 U.S. at 65-66*).

At Petitioner's trial, the State's witness Freeman, claimed a "lack of memory." This prompted the court to question the prosecutor's case, to wit;

> The Court: "State, let me ask you this, do you have a case if he (Freeman) has amnesia?"
> The Court: "..you had two witnesses. One is hiding and the other has amnesia."

The seminal question in this case revolves not around whether state's witness was available, rather the fact that said witness, told the court, that "he could not remember," consequently the state introduced prior grand jury testimony to fill the void of his "ability to remember."

"A witness is only 'unavailable' for Confrontation Clause purposes if the 'prosecutorial authorities have made a *good-faith effort* to obtain his presence at trial.'" *Id.* (quoting *Roberts*, 448 U.S. at 74).

The lengths to which the prosecution must go to produce a witness is a question of reasonableness. *Tirado-Tirado, 563 F.3d at 123*; *see also Aguilar-Ayala v. Ruiz, 973 F.2d 411, 418 (5th Cir. 1992)* ("[D]eposition testimony is admissible only if the government has exhausted reasonable efforts to assure that the witness will attend trial."). Although "[t]he inevitable question of precisely how much effort is required on the part of the government to reach the level of a 'good faith' and 'reasonable' effort eludes absolute resolution applicable to all cases," it is well established that, "[b]ecause of the importance our constitutional tradition attaches to a

defendant's right to confrontation, the 'good faith effort' requirement demands much more than a merely perfunctory effort by the government." *Allie, 978 F.2d at 1406, 1408.*

The facts of this reasonableness inquiry in this specific case place it downstream from a spectrum bounded on one end by precedent in *Allie* (where it was held that the government did make a good faith effort to obtain the presence of deported witnesses) and on the other end by precedent in *Tirado-Tirado* (where it was held that the government did not make a good faith effort to obtain the presence of deported witnesses).

In *Tirado-Tirado*, the government's efforts did not meet the good-faith effort standard and in this case, under the totality of circumstances presented on the record before this court, the government's efforts to present the live testimony of their witness fall towards *Tirado-Tirado*, ergo the government therefore did not meet the good-faith standard to establish the unavailability of the witnesses.

Finally, the ultimate test of a constitutionally sound search is its "reasonableness." *Veronia School Dist. 47J, v. Acton, 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995)*; "(d)etermining what is 'reasonable' depends on a balancing of the nature of the privacy interest, the character of the government's intrusion, and the nature of the governmental concern at issue.'"

A Petitioner convicted on the basis of constitutionally inadmissible Confrontation Clause evidence is entitled to a new trial and the government bears the burden of establishing the error is harmless beyond a reasonable doubt. *Id.*

CONCLUSION

In view of the foregoing facts, arguments, and authorities, Petitioner respectfully submits that a writ of certiorari should be granted.

Respectfully submitted,

/s/ Leonard Little Jr.

Leonard L. Little Jr., Petitioner

Date: 11-[redacted]11, 2019