

No. _____

In the Supreme Court of the United States

MICHAEL D. NIXON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for Writ of Certiorari
from the Sixth Circuit Court of Appeals
to the United States Supreme Court**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether Michael D. Nixon's constitutional rights were violated when the District Court failed to grant him, an indigent defendant, funding for a geo-location cellular phone expert witness pursuant to 18 U.S.C. § 3006A(e).

PARTIES TO THE PROCEEDING

The parties appearing here and below are: (1) Michael D. Nixon, the Petitioner named in the caption; and (2) the United States, the Respondent named in the caption.

No corporations are involved in this proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Michael D. Nixon, respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The decision of the Sixth Circuit Court of Appeals is contained within the Appendix and was not recommended for publication.

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on February 2, 2020. A timely petition for rehearing en banc was denied by the Court of Appeals on March 24, 2020. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The District Court's denial of expert witness funding to an indigent defendant to address a specific issue that was crucial to the Defendant's Motion to Suppress violated 18 U.S.C. § 3006A(e) and further denied the Defendant adequate legal representation, penalizing him as a result of his indigence.

An indigent defendant's right to expert assistance rests primarily on the due process guarantee of fundamental fairness.

STATEMENT OF THE CASE

Michael D. Nixon requested funding from the United States District Court for the Northern District of Ohio pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A(e), to retain the services of an expert witness in cellular geo-location data after arguing that the ability to narrow cellular geo-location data to one specific house, as was done in this case, was false.

The Sixth Circuit Court of Appeals indicated that "without more specificity to the cell-site and location data challenges and the necessity for an expert, we are unable to conclude that the district court's decision to deny Nixon funds for an expert rose to an abuse of discretion." (Opinion, p. 5).

How is an indigent Defendant supposed to provide the specificity required by the Sixth Circuit's Opinion to his request for Criminal Justice Act "CJA" funding to consult with an expert on a complicated technical issue that is extremely crucial to his defense, without being provided CJA funds to consult with that expert?

Defendants must not be required to make a "prima facie" showing of what he or she intends to prove with the assistance of an expert. Here, the Defendant made a detailed showing of his need for an expert on a specific, complicated and technical issue of geo-location cellular phone data that was crucial to his defense and Motion to Suppress. The denial of expert witness funding prejudiced Mr. Nixon's constitutional rights and denied him adequate legal representation as a result of his indigence.

A. PROCEDURAL BACKGROUND.

Michael D. Nixon was the sole Defendant named in a seven (7) count Indictment in the United States District Court for the Northern District of Ohio on April 11, 2018. (Indictment, R. 1, PAGE ID 1-5). Mr. Nixon was charged with five (5) counts of sexual exploitation of children in violation of 18 USC §2251(a), one (1) count of receipt and distribution of visual depictions of minors engaged in sexually explicit conduct in violation of 18 USC §2252(a)(2), and one (1) count of possession of child pornography in violation of 18 USC §2252A(a)(5)(B). *Id.*

At his arraignment, the Court found Mr. Nixon to be indigent pursuant to his Financial Affidavit and appointed Mr. Nixon counsel pursuant to the Criminal Justice Act. (Financial Affidavit, R. 7, PAGE ID 37).

On October 31, 2018, Mr. Nixon filed a Motion to Suppress the search of his person and residence located at 929 Township Road 2375 Perrysville, Ohio 44864, as well as, all evidence and statements derived from the illegal search. (Motion to Suppress, R.16, PAGE ID 60-71). Mr. Nixon's Motion to Suppress focused on the apparent geo-location data that the government used though their expert witness to narrow down the geo-location data to only two residences in a multiple mile radius area. The search warrant affidavit was twelve (12) pages long and contained thirty (30) paragraphs.

Mr. Nixon requested an oral evidentiary hearing and *Franks* hearing pursuant to *Franks v. Delaware*. 438 U.S. 154 (U.S. 1978). (Motion to Suppress, R.16, PAGE ID 60-71). Mr. Nixon also requested leave from the District Court to obtain the services of an expert witness in support of his Motion to Suppress. *Id.* at PAGE ID 60. The request for an expert was made for a specific purpose, to have an expert in geo-location cellular phone data review the scientific

accuracy of the allegations made in the search warrant affidavit.

The District Court denied Mr. Nixon's Motion to Suppress, request for a *Franks* hearing, and Motion for the Appointment of a geo-location data expert witness on November 20, 2018. (Order, R. 20, PAGE ID 158-160).

After the Court denied the Defendant's Motion to Suppress, Mr. Nixon entered into a conditional plea agreement which permitted him to appeal the Court's Order denying his Motion to Suppress and Motion for the Appointment of an Expert Witness on December 3, 2018. (Plea Trans., R. 47, PAGE ID 427, 436).

On March 19, 2019, fifty-six (56) year old Michael D. Nixon was sentenced to three hundred and sixty (360) months imprisonment as to Counts 1 through 5 and two hundred and forty (240) months as to Counts 6 and 7, all to be served concurrently. (Judgment, R. 34, PAGE ID 365). Mr. Nixon timely filed a Notice of Appeal to the Sixth Circuit Court of Appeals on March 26, 2019. (Notice, R. 36, PAGE ID 382).

On February 6, 2020, the Sixth Circuit Court of Appeals issued an unpublished opinion affirming the decision of the trial court. Mr. Nixon timely filed a petition for rehearing en banc which was denied on March 24, 2020.

B. FACTUAL BACKGROUND.

On November 16, 2017, the parents of a 10-year-old female victim informed the Metropolitan Police Department for the District of Columbia that an unknown person was texting their daughter, requesting she send nude

images of herself to the phone number 360-214-1406, and that the victim complied. Law enforcement issued an administrative subpoena to Verizon Wireless for that number, to no avail, as Verizon identified that the number was assigned to a prepaid cellular phone and thus was unable to identify a subscriber. That number, however, was associated with a complaint filed with the Bellingham, Washington Police Department on November 10, 2017 by the father of a 17-year-old female victim who had received similar text messages and sent nude images of herself.

Based on that information, on November 20, 2017, Magistrate Judge G. Michael Harvey authorized a sealed search warrant directing Verizon Wireless to provide the historical cell-site and location data for the phone number 360-214-1406.

The following day, Verizon informed law enforcement that the phone number of the target device had been changed to 360-210-2360 and contained the following mobile equipment identifier (MEID): A00000477F7856. Judge Harvey then issued a pen register order to Verizon for the 360-210-2360 number, authorizing the gathering of the number's dialing, routing, addressing, and signaling information.

On November 27, 2017, Special Agent Jacob Kunkle, a member of the FBI's Cellular Analysis Survey Team, apparently analyzed the data provided by Verizon Wireless that were obtained from the pen register for the dates of November 21st through November 27th. (Affidavit, R. 17-1, PAGE ID 103). Special Agent Kunkle has over four hundred (400) hours of training in relation to the analysis of cellular technology. *Id* Based on Agent Kunkle's experience and analysis, he stated that he was able to limit the geographic area of the location of the device to

within a 3-mile radius of the cell towers located at State Route 95 and Country Road 2704 in the Perrysville, Ohio area. *Id.*

Investigative personnel conducted a review of the pen register court order and the geo-location search warrant and determined 360-210-2360 is an active telephone number that was consistently using cell towers in the vicinity of latitude 40.6721, longitude -82.3042, which is approximately 1.7 miles north east of Perryville, Ohio. *Id.*

On November 27, 2017, SA Kunkle conducted further analysis of the phone records obtained and focused on the top twenty-five (25) frequent numbers in contact with 360-210-2360. *Id.* SA Kunkle identified only one number 419-496-9799 that was within the geographical area of where the device is located. *Id.* A records search revealed phone number 419-496-9799 had been used by Courtney Alexis Perry. *Id.* A Facebook search indicated that Ms. Perry was in a photograph with a person identified as Michael Gregory Nixon. *Id.*

Special Agent Kunkle had previously conducted a search of the residences located within the target area and recognized the name Michael Gregory Nixon as previously residing at 929 Township Road 2375, Perrysville, Ohio 44864. *Id.* at PAGE ID 103-4. An OHLEG database search revealed that Michael Gregory Nixon SSN XXX-XX-4287 had a last known address on King Road in Ashland, Ohio. *Id.* at PAGE ID 104. Special Agent Kunkle further identified Michael D. Nixon SSN XXX-XX-3207 as currently residing at 929 Township Road 2375, Perrysville, Ohio 44864. *Id.* In conclusion, the Affiant stated:

Based on the aforementioned factual information, your affiant respectfully

submits that there is probable cause to believe that an individual who resides at the residence described above is involved in the sexual exploitation of children. Your affiant respectfully submits that there is probable cause to believe that an individual residing in the residence described above has violated 18 USC §2251(a). Additionally there is probable cause to believe that evidence of the commission of criminal offenses, namely, violations of 18 USC §22151(a), is located in the residence described above, and the evidence listed in Attachment B of this affidavit, which is incorporated herein by reference, is contraband, the fruits of crime, or things otherwise criminally possessed, or property which is or has been used as the means of committing the foregoing offenses. Your affiant, therefore, respectfully request that the attached warrant be issued authorizing the search and seizure of the items listed in Attachment B.

Id. at PAGE ID 104-5.

Mr. Nixon's Motion to Suppress argued that the Affidavit did not establish, allege, or even suggest any basis for a finding of probable cause to believe that Michael D. Nixon had ever been involved in child pornography in any manner. (Motion to Suppress, R. 16, PAGE ID 66). Most importantly, Mr. Nixon requested the Court grant funding to retain the services of an expert witness in cellular phone geo-location tracking to review the accuracy of this specific allegation in the affidavit stating:

"The affidavit alleges a three (3) mile radius and states there was only one other residence located in the area identified as a result of the five days of collected geo-location data from the cellular phone. The Defendant is in need of an expert witness to review this information to determine if the allegations in paragraph twenty-eight (28) of the affidavit are scientifically accurate. "

Id. at PAGE ID 68.

The District Court denied Mr. Nixon's Motion to Suppress and Motion for the Appointment of a geo-location data expert stating that Mr. Nixon had not shown that an expert was necessary. (Order, R. 20, PAGE ID 158-160). The Court specifically relied upon the geo-location data to deny Mr. Nixon's Motion to Suppress in its finding of probable cause, stating:

"However, as detailed in the facts above, there was ample evidence that the target phone would be located at the residence to be searched. The geolocation data from the device limited the possible location to two residential addresses. Moreover, only one of those addressees had any relation to the target device –calls to Ms. Perry who had ties to a former resident of the property, Michael G. Nixon. Accordingly, there was more than sufficient probable cause to search the property. "

Id. at p. 157.

Nixon requested funds under the Criminal Justice Act, 18 U.S.C. § 3006A(e)(1), which provides that a defendant may obtain a court-appointed expert if: (1) the services are necessary to mount a plausible defense; and (2) without such authorization, the defendant's case would be prejudiced. *United States v. Gilmore*, 282 F.3d 398, 406 (6th Cir. 2002). In its opinion, the Sixth Circuit Court of Appeals found:

"Nevertheless, Nixon fails to demonstrate a need for such an expert to mount his defense. He relies on the complexity of analyzing the historical cell-site and location data, but does not show how his ultimate points of contention would require an expert. For example, he takes issue with the factual allegation that only one other residence was located within the three-mile radius that contained Nixon's home. The affidavit provided an explanation of the area, including the longitudinal and latitudinal points from which Nixon could ascertain the number of residences in the area. Moreover, Nixon does not contest the reliability or veracity of the Verizon records handed over to law enforcement or the use of historical cell-site and location data for ascertaining the target device's location. Nixon primarily focuses on the need for an expert to respond because the Government presented an expert. But without more specificity to the cell-site and location data challenges and the necessity for an expert, we are unable to conclude that the district court's decision to deny Nixon funds for an expert rose to an abuse of discretion."

(Opinion, p. 5).

REASONS FOR GRANTING THE PETITION

The Court denied Mr. Nixon access to CJA expert funds that were crucial to his defense in this case. This data analyzed, summarized, and used by the government in their Affidavit and went far beyond the knowledge of a lay person. The denial of an expert witness in this case to analyze the complex and scientific geo-location data that was somehow able to narrow the cellular phone usage data down to only two (2) residences in a large area is extremely improbable.

Defendants and legal counsel are not experts in DNA, handwriting, pathology, cell phone towers analysis or any scientific area that involves specific knowledge, skill, education, experience, or training in a specialized field. As a result, Courts are permitted to admit the testimony of expert witnesses both on behalf of the government and defendants to address these specialized issues. If a client is indigent, it is up to the District Court to grant the appropriate CJA funding for the appointment of an expert witness upon the request and proper showing by the Defendant in order to ensure that every individual, whether rich or poor, has the same right to a fair trial under the law.

Mr. Nixon clearly demonstrated a need to consult with an expert witness in this case. His request was not a fishing expedition, as alleged by the government, it was a legitimate request to be on the same playing field as the government. This request was not a delay tactic. The government had exclusive access to their expert witness, FBI Special Agent Kunkle. Agent Kunkle has over 400

hours of training regarding the analysis of cellular technology. (Appellee Brief, p. 13). The Defendant should have been entitled to the same resources the government had in investigating and prosecuting this case.

The Defendant's indigence prejudiced him in not being able to consult with an expert regarding geo-location data that was the entire basis for the search warrant affidavit. Some courts compel indigent criminal defendants to prove only that reasonably competent paid counsel would have retained the expert's services and that the defendant was clearly prejudiced by the lack of those services. *See United States v. Labansat*, 94 F.3d 527, 530 (9th Cir. 1996). If Mr. Nixon had the funding, he clearly would have consulted a geo-location expert regarding this crucial allegation in the Affidavit that was his defense to the allegations against him.

The Defendant is unsure how the government has placed the burden on the defendant to demonstrate the information SA Kunkle provided in the affidavit was not accurate without having a court-funded expert to consult and contest SA Kunkle's expert analysis and opinion. Without an expert witness with the same or similar extensive training and expertise to reanalyze the raw data, the Defendant was prejudiced from putting on a defense.

Mr. Nixon's discovery and Motion to Suppress involved complex jargon regarding cellular phone analysis and cell phone tower data, including scientific analysis, that went far beyond the ability of a lay person to evaluate. Michael D. Nixon completed a CJA 23 financial affidavit stating that he was indigent and unable to afford legal counsel to represent him for the very serious allegations he was facing. (Financial Affidavit, R. 7, PAGE ID 37). At his arraignment, the Court found Mr. Nixon to be indigent

and appointed Attorney Cafferkey to represent him pursuant to the Criminal Justice Act. (Arraignment Trans., R. 45, PAGE ID 394).

Based upon Special Agent Kunkle's analysis, he alleges that he was able to limit the geographical area location of the cellular device in question, that could not be linked to a specific person, to a 3-mile radius within the cell towers located at State Route 95 and County Road 2704 in Perrysville, Ohio area. *Id.* Special Agent Kunkle was able to use the raw data provided from the pen register of cellular phone number 360-210-2360 to determine that in his expert opinion, there were only two (2) possible residences located within the target geographical area as a result of his analysis of the cellular towers. *Id.* at PAGE ID 102-104.

Mr. Nixon established a significant need for an expert as this geo-location information and cellular raw data was the sole piece of evidence that pointed the government towards the search of Mr. Nixon's person and residence. The Court relied specifically on the geo-location data to deny Mr. Nixon's Motion to Suppress, stating:

"However, as detailed in the facts above, there was ample evidence that the target phone would be located at the residence to be searched. The geolocation data from the device limited the possible location to two residential addresses. Moreover, only one of those addressees had any relation to the target device –calls to Ms. Perry who had ties to a former resident of the property, Michael G. Nixon. Accordingly, there was more than sufficient probable cause to search the property."

(Order Denying Motion to Appoint Expert, R. 20, PAGE ID 157). The District Court's reliance on this data and SA Kunkle's analysis establishes that an expert witness was needed to contradict the government's conclusion and that an expert witness was necessary to mount a plausible defense for Mr. Nixon. Mr. Nixon was clearly prejudiced without access to a geo-location expert witness.

In denying the Defendant's Motion for the Appointment of an expert witness, the District Court stated:

"First, Nixon requests an expert to review the geolocation data gathered by authorities. However, Nixon's counsel has not shown that an expert is necessary. The current motion shows an understanding of the data and fails to raise any argument as to why an expert is necessary."

(Order Denying Motion to Appoint Expert, R. 20, PAGE ID 158). The District Court's statement that there was a general understanding of the data is not the same as having the knowledge, experience and training to conduct an independent analysis of the raw data to provide an opinion that contradicts the expert analysis SA Kunkle performed, an individual who has over four hundred (400) hours of training in this subject.

The Criminal Justice Act and the CJA Guidelines state that Court appointed defense counsel can obtain funding for the fees and expenses associated with hiring an expert, investigator, or other professional to assist defense counsel. In order to provide adequate representation to Defendants, each United States District Court creates a plan to furnish a Defendant investigative, expert, and other

services necessary for adequate representation. *See* 18 U.S.C. §3006A(a). Within that code, it further states:

(1)Upon Request.— Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate judge if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.

18 U.S.C. §3006A(e). Pursuant to 18 U.S.C. § 3006A(e), counsel for an indigent criminal defendant may request the district court to authorize the expenditure of funds for investigative, expert, or other services. *See, e.g., United States v. Clark*, 385 F.3d 609, 617 (6th Cir.2004); *United States v. Osoba*, 213 F.3d 913, 915-16 (6th Cir.2000).

When expert services are requested under 18 U.S.C. § 3006A(e) in the context of a criminal prosecution, they are deemed "necessary" if a defendant can demonstrate (1) such services are necessary to mount a plausible defense, and (2) without them, the defendant's case would be prejudiced. *United States v. Gilmore*, 282 F.3d 398, 406 (6th Cir.2002). The Defendant does not have to prove a plausible defense, only establish that he may have a plausible defense. *United States v. Alden*, 767 F.2d 314, 318 (7th Cir.1984).

Mr. Nixon met both of those elements. The appointment of a geo-location expert was extremely necessary to contradict the expert analysis performed by SA Kunkle. Mr. Nixon needed a qualified expert to review the raw data and the conclusions that SA Kunkle made that limited the geographic area in this case to only two (2) residences. Mr. Nixon needed an expert to mount a plausible defense in his Motion to Suppress. Clearly, Mr. Nixon's case was prejudiced without this expert and SA Kunkle's analysis was specifically relied upon in the Court's denial of his Motion to Suppress. Mr. Nixon was ultimately sentenced to thirty (30) years imprisonment.

An indigent defendant's right to expert assistance rests primarily on the due process guarantee of fundamental fairness. This Honorable Court has previously held that the failure to provide an expert to an indigent defendant deprived him of a fair opportunity to present his defense and violated due process. *Ake v. Oklahoma*, 470 U.S. 68, 76, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985). Mr. Nixon made the proper showing of a particulate need for the expert he requested and the Court's decision precluded him from defending his case.

This issue regarding geo-location data is a matter of high importance for all citizens and their reasonable expectation of privacy. Mr. Nixon should have been granted the funds to consult with an expert witness pursuant to the Criminal Justice Act and 18 U.S.C. §3006A(a) to ensure that his right to be free of unlawful search and seizure was based on accurate scientific evidence, analysis and conclusions.

CONCLUSION

The denial of funds in this case for an expert witness to analyze the complex and scientific geo-location data prejudiced Mr. Nixon's constitutional rights, warranting reversal. For the foregoing reasons, Mr. Nixon respectfully requests that this Court issue a writ of certiorari to review the judgment of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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