No: 20-5262

In the
Supreme Court of the United States

STEPHEN HENDERSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Should this Court's decision in *United States v. Jones,* 132 S.Ct. 945 (2012), (placement of GPS monitoring on a vehicle and cells-site tracking without a warrant constitutes an improper search) and *Carpenter v. United States*, 138 S. CT. 2206 (2018) (individuals have a reasonable expectation of privacy in their cells-site location information and that obtaining such information constitutes a search requiring a warrant), be applied retroactively under Title 28 U.S.C. § 2253.

Should a writ of certiorari be granted in light of *Miller-El v. Cockrell,* 123 S. Ct. 1029 (2003).

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

In addition to the parties named in the caption of the case, the following individuals were parties to the case in the Unite States Court of Appeals for the Eight Circuit, the Honorable Shaw, C, District Judge, Eastern District of Missouri, Eastern Division.

None of the parties is a company, corporation, or subsidiary of any company or corporation.

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PETITION FOR WRIT OF CERTIORARI

Stephen Henderson, respectfully prays that a writ of certiorari is issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled cause.

OPINION BELOW

The opinion of the Court of Appeals for the Eighth Circuit, whose judgment is herein sought to be reviewed, is unpublished *Henderson v. United States, No.* 19-2806 (8th Cir. March 17, 2020) is reprinted in the separate Appendix A to this petition.

The denial of Henderson's Title 28 U.S.C. § 2255 in the Eastern District of Missouri - St. Louis under *Henderson v. United States*, No. 4:19-CV-1788 CAS, 2019 U.S. Dist. LEXIS 156645 (E.D. Mo. Sep. 13, 2019) and is reprinted as Appendix B to this petition.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on March 17, 2020.

The Jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1654(a) and 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No person shall be held to answer for a capital, or otherwise, infamous crime, unless on a presentment or indictment of a Grand Jury... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

Id. Fifth Amendment U.S. Constitution

The Fourth Amendment to the Constitution of the United States 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.

The Sixth Amendment to the Constitution of the United States provides:

> 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 witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Id. Sixth Amendment U.S. Constitution

Title 28 U.S.C. § 2255 provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> * * * * *
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

Id. Title 28 U.S.C. § 2255

STATEMENT OF THE CASE

Steven Henderson was convicted after a jury trial for conspiracy to distribute and possess with intent to distribute, in excess of five kilograms of cocaine, and distributing over five kilograms of cocaine, in violation of Title 18 U.S.C. § 841(a)(1), 846, and 851(a). The District Court sentenced Mr. Henderson to life incarceration. On April 24, 2012, Henderson filed a Title 28 U.S.C. § 2255 alleging several instances of ineffective assistance of counsel.[1] After a hearing, the

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[1] Ground One: Ineffective assistance during the plea negotiations.

Ground Two: Ineffective assistance during pre-trial in drafting and advising him to execute a "Verified Claim to Property in Forfeiture Complaint," wherein movant signed under penalty of perjury that he was in possession and the owner of currency and jewelry seized by the agents in the accompanying forfeiture case.

Ground Three: Ineffective assistance in failing to raise and litigate the meritorious issue that his statements should have been suppressed.

Ground Four: Ineffective assistance in failing to fully investigate his case by reviewing all applicable discovery and in failing to be prepared to litigate the case.

Ground Five: Ineffective assistance in failing to plead, litigate, and preserve movant's meritorious motions to suppress evidence, including issues related to his lack of consent to the search of the Sieloff residence, the improper use of GPS monitoring, and failure to present him to a neutral magistrate to determine if there was probable cause of his arrest.

Ground Six: Ineffective assistance in failing to adequately litigate the exclusion of improper character evidence at trial.

Ground Seven: Ineffective assistance - cumulatively.

court denied all the claims and subsequently, this court denied the request for a writ of certiorari.

Post denial, this Court entered a decision in *Carpenter v. United States*, 138 S. CT. 2206 (2018). *Carpenter* determined that individuals have a reasonable expectation of privacy in their cells-site location information and that obtaining such information constitutes a search requiring a warrant. *Id.* at 2220. Cells-site locations were critical for the government to be able to investigate and prosecute Henderson. As such, Henderson filed a second or successive 2255 in light of *Carpenter* and its retroactive application to his case. The District Court and the Appellate Court denied the requests to entertain the matter. The merits of the *Carpenter* claim have never been addressed in this case.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT AND THE DISTRICT COURT HAVE DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

Supreme Court Rule 10 provides in relevant part as follows:

Rule 10
CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

> (1) A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore. The following, while

neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

> (a)When a United States court of appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b)When a ... United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court.... *Id.*

Id. Supreme Court Rule 10.1(a), (c)

QUESTIONS PRESENTED

1. Should this Court's decision in *United States v. Jones*, 132 S.Ct. 945 (2012), (placement of GPS monitoring on a vehicle and cells-site tracking without a warrant constitutes an improper search) and *Carpenter v. United States*, 138 S. CT. 2206 (2018) (individuals have a reasonable expectation of privacy in their cells-site location information and that obtaining such information constitutes a search requiring a warrant), be applied retroactively under Title 28 U.S.C. § 2253.

In light of Carpenter's precedent, Henderson filed his motion to vacate his sentence under Title 28 U.S.C. § 2255(f)(3) which the District Court denied without briefing under the theory that the filing was a second or successive 2255, however, the district court did not forward the petition to the Eight Circuit and that court did not consider the merits either. In light of *Carpenter's* precedent Title 28 U.S.C. § 2255(f)(3) should have been granted and if appropriate, relief granted.

In February 2008, the Drug Enforcement Agency "DEA" commenced an investigation into a drug trafficking operation in St. Louis County, Missouri. The investigation utilized numerous confidential informants, one of whom implicated Henderson as being a source of cocaine. Following information developed through a proffer with the confidential informant, the DEA agents began surveillance of Henderson by utilizing recording devices and other investigative techniques, including GPS tracking and cells-site tracking data from Henderson's cell phone. No warrant was ever sought before the placement of any GPS tracking device nor for the cells-site tracking information.

Specifically, in February 2008, federal agents planted a "homing device" or GPS monitor on Henderson's truck without a warrant or court authority. Informant Shelton testified that on February 20, 2008, agents had him take Henderson to a gas station while the agents planted a "homing device" in his car. (T1: 124, 128, 130). The agents extensively surveilled Henderson for nineteen days to learn where he was going and who his "source" was. They tracked all his movements, even the non-criminal related movements. After surveilling and tracking Henderson, the agents were able to obtain a warrant for his arrest. (T1: 146, T2: 112-113). This type of placement of GPS monitoring on a vehicle and cells-site tracking without a warrant constitutes an improper search and seizure under the Fourth Amendment. *United States v. Jones*, 132 S.Ct. 945 (2012). Even with a

blatant Fourth Amendment violation present, none of Henderson's prior counsel's addressed the issue. *Jones*, 132 S.Ct. 945 (2012) determined that the placement of a GPS monitor on a vehicle without a warrant constitutes an improper search and seizure under the Fourth Amendment. *id.* When the claim was preserved on the original Title 28 U.S.C. § 2255, it was denied since *Jones* had been decided after three years after the trial. *Carpenter* following *Jone's* precedent, has a retroactive effect. *Carpenter* strikes at the heart of Henderson's case.

Although *Carpenter* was decided after Henderson's case became final, the implications of the *Carpenter* affect the final determination of this case. The Fourth Amendment protects individuals against unjust Government invasions of a person's reasonable sphere of privacy. *Davis v. United States*, 564 U.S. 229, 229-30, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (2011). Before *Carpenter,* the Fourth Amendment was somewhat silent regarding the consequence of law enforcement seeking to use illegally obtained evidence at trial. *Id.* The creation of the exclusionary rule logically followed to enforce the Fourth Amendment. The exclusionary rule's "sole purpose ... is to deter future Fourth Amendment violations," not to punish or make amends for mistakes. *Davis*, 564 U.S. at 236-37; *Elkins v. United States*, 364 U.S. 206, 217, 80 S. Ct. 1437, 4 L. Ed. 2d 1669 (1960) ("calculated to prevent, not to repair"). There was no excuse for the lack of warrant in Henderson's case. Absent the violation, a conviction could not have

been secured. Since the facts in *Carpenter* are squarely on point with the matter before this Court, Henderson will not discuss the Court's reasoning in depth. Rather, for our purposes, what matters most is the Court's holding that individuals have a reasonable expectation of privacy in their cells-site location information and that obtaining such information constitutes a search requiring a warrant. *Id.* at 2220. Henderson argues that the officers' failure to obtain a warrant before acquiring his cell site location information constituted an illegal search that severely affected his Fourth Amendment Rights.

Under the principles outlined in *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), "the retroactivity of our criminal procedure decisions turn on whether they are novel." *Carpenter* is novel in nature. *Chaidez v. United States*, 568 U.S. 342, 347, 133 S. Ct. 1103, 185 L. Ed. 2d 149 (2013). "When we announce a 'new rule,' a person whose conviction is already final may not benefit from the decision in habeas or similar proceeding." *Id.* The Supreme Court recognizes two exceptions to the *Teague* formulation: "watershed" procedural rules and new rules that implicate the type of individual conduct the government may proscribe (i.e., a substantive, rather than procedural, rule). *Teague*, 489 U.S. at 311. The *Carpenter* decision carved out a new understanding of the Fourth Amendment, as it applies to wireless cells site data. This was not a new rule but an extension of the Fourth Amendment to a new set of facts, cells site

locations. The Court did not merely implement a new rule to change how warrants are secured. The Supreme Court merely extended constitutional protections to newer technology.

Under *Teague*, a case announces a "new rule" (1) when "it breaks new ground ***or imposes a new obligation" on the government***; or (2) "if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301 (emphasis added). Clearly, the new application explained in *Carpenter,* did not impose a new rule on the government. It merely extended the original intentions of the constitution. In essence, secure a warrant before tracking a cells-site, just as in any other constitutional protected search.

This Court's decision in *Teague* provides an exception to non-retroactivity for "those procedures that are implicit in the concept of ordered liberty." *Id.* 489 U.S. at 311 (internal citations omitted). As the Supreme Court has explained, such rules vindicate two discrete concerns: the "fundamental fairness" of the underlying criminal proceeding; and the "accuracy" of that proceeding. *Saffle v. Parks,* 494 U.S. 484, 110 S. Ct. 1257 (1990). In *Schriro v. Summerlin*, 124 S.Ct. 2519, 2524-2525 (2004), the Court did not dispute that its decision in *Ring v. Arizona*, 536 U.S. 610 (2002), which applied *Apprendi* to Arizona's capital sentencing scheme, was "fundamental," *Summerlin*, 124 S.Ct at 2523, or that it satisfied the first part of the *Teague* exception for "'watershed rules ... implicating fundamental

fairness." Id. However, the Court declined to apply *Ring* retroactively because it found that given the at the Arizona statute required a judge to make the relevant findings beyond a reasonable doubt -- the second part of the *Teague* exception, which calls for the enhancement of accuracy, was not satisfied. *Summerlin*, 124 S.Ct. at 2525 (rejecting conclusion that "judicial fact-finding [alone] so 'seriously diminishes accuracy'" as to meet the second prong of the Teague exception); id. at 2522 n.1. In this case, the facts are not judicial fact-finding, but constitutional protections. The "enhancement of accuracy" by requiring judicial oversight before the search, satisfies *Teague's* exception.

As this court decided in *Carpenter:*

> A person does not surrender all Fourth Amendment protection by venturing into the public sphere. To the contrary, "what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz*, 389 U. S., at 351-352, 88 S. Ct. 507, 19 L. Ed. 2d 576. A majority of this Court has already recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements. *Jones*, 565 U. S., at 430, 132 S. Ct. 945, 181 L. Ed. 2d 911 (Alito, J., concurring in judgment); id., at 415, 132 S. Ct. 945, 181 L. Ed. 2d 911 (Sotomayor, J., concurring). Prior to the digital age, law enforcement might have pursued a suspect for a brief stretch, but doing so "for any extended period of time was difficult and costly and therefore rarely undertaken." Id., at 429, 132 S. Ct. 945, 181 L. Ed. 2d 911 (opinion of Alito, J.). For that reason, "society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period." Id., at 430, 132 S. Ct. 945, 181 L. Ed. 2d 911.

Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018).

This protection, the Fourth Amendment right, strikes at the heart of the *Teague* exception. Cases after *Carpenter* have either assumed or explicitly found that *Carpenter* is retroactive. *United States v. Leyva*, 2018 U.S. Dist. LEXIS 199327, 2018 WL 6167890 (E.D. Mich. Nov. 26, 2018) (stating that Carpenter is retroactive); *United States v. Curtis*, 901 F.3d 846 (7th Cir. 2018).

2. Should a writ of certiorari be granted in light of *Miller-El v. Cockrell*, 123 S. Ct. 1029 (2003).

This court's opinion in *Miller-El* made clear that whether to grant a COA is intended to be a *preliminary* inquiry, undertaken before full consideration of the petitioner's claims. *Id.* at 1039 (noting that the "threshold [COA] inquiry does not require full consideration of the factual or legal bases adduced in support of the claims"); *Id.* at 1040 (noting that "a claim can be debatable even though every jurist of reason might agree after the COA has been granted and the case has received full consideration, that petitioner will not prevail") (emphasis added); *Id.* at 1042 (noting that "a COA determination is a separate proceeding, one distinct from the underlying merits"); *Id.* at 1046-47 (Scalia, J., concurring) (noting that it is erroneous for a court of appeals to deny a COA only after consideration of the applicant's entitlement to habeas relief on the merits). Indeed, such as "full consideration" in the course of the COA inquiry is forbidden by § 2253(c). *Id.* at 1039 ("When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its

adjudication of the actual merits, it is, in essence, deciding an appeal without jurisdiction.") *Swisher v. True*, 325 F.3d 225, 229-30 (4th Cir. 2003).

Here the Eight Circuit needed only agree that based on the record, Henderson was entitled to have the case proceed further, not that he will be victorious on the merits of his claims. Even if the District Court denied all the claims without an evidentiary, (which was an error in this case) the Eight Circuit had the authority to grant the relief and expand upon it. V*alerio v Dir. of the Dep't of Prisons,* 306 F3d 742 (9th Cir. 2002), cert den (2003) 538 US 994, 155 L Ed 2d 695, 123 S Ct 1788) (court of appeals not only has the power to grant COA where the district court has denied it as to all issues but also to expand COA to include additional issues when the district court has granted COA as to some but not all issues.) This is especially beneficial to Henderson since the records create more doubts than it addressed.

As such, this court must agree that a writ of certiorari should be granted to the Eight, remanding for a Certificate of Appealability to allow this specific argument of Carpenter to proceed further.

CONCLUSION

Based on the foregoing, this Court should grant this request for a Writ of Certiorari and order the Court of Appeals for the Eight Circuit and the District Court to address the matters of the issues filed herein.

Done this 3, day of June 2020.

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