No. 20-8418

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Bruce Harland Butler — PETITIONER
(Your Name)

vs.

State of Michigan — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

MICHIGAN COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Bruce Harland Butler
(Your Name)

G. Robert Cotton Correctional Facility
(Address)

3510 N. Elm Road
Jackson, Michigan 49201
(City, State, Zip Code)

906-387-5000
(Phone Number)

QUESTION(S) PRESENTED

1). WHETHER THE LOWER COURT'S DECISION WAS CONTARY TO CLEARLY ESTABLISHED UNITED STATES SUPREME COURT PRECEDENT? SEE CARPENTER v. UNITED STATES, 138 S. Ct. 2206 (2018) 2018 US LEXIS 3844; 201 L. Ed.2d 507.

2). SHOULD CARPENTER v. U.S, 138 S. Ct. 2206 (2018) BE GIVEN FULL RETROACTIVITY STATUS OF LAW IN MICHIGAN PURSUANT TO MCR 6.502 (G)(2)?

3). WAS MR. BUTLER DENIED DUE PROCESS AND A FAIR TRIAL BY THE INTRODUCTION AT TRIAL OF UNAUTHENICATED HISTORICAL CELL SITE LOCATION INFORMATION (CSLI) OBTAINED WITHOUT A VALID PROBABLE CAUSE WARRANT TO AT&T IN VIOLATION OF THE FOURTH AMENDMENT; ALTERNATIVELY, TRIAL AND APPELLATE COUNSEL WERE INEFFECTIVE FOR FAILING TO OBJECT AND INVESTIGATE THE UNAUTHENTICATED (CSLI) DOCUMENTS, DENYING MR. BUTLER HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS UNDER U.S. CONST. IV, VI, XIV; CONST. 1963, Art 1 §§ 11, 15, 17, 20.

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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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 **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the MICHIGAN COURT OF APPEALS court appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was Feb. 2, 2021
A copy of that decision appears at Appendix C.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

STATEMENT OF THE CASE

This is a post-conviction appeal from Petitioner, Bruce H. Butler, who after his 1st jury trial ended in a mistrial was subsequently convicted in the 6th Circuit/Oakland County Court before the Honorable Rae Lee Chabot of first-degree murder, MCL 750.316 and possession of a firearm during the commission of a felony, MCL 750.227b. Petitioner's judgment of conviction was 09-23-2013 in Case No. 2011-237958-FC, with a sentencing 11-05-2013 to life without parole. Petitioner's direct appeal from the judgment of conviction was to the Michigan Court of Appeals, Case No. 319548. The Michigan Court of Appeals denied appeal on 08-27-2015 with the citation to the case as 2015 Mich. App. LEXIS 1649.

Petitioner's further review to the Michigan Supreme Court for Leave to Appeal was denied on 05-02-2016 with the citation to the case as 2016 Mich. LEXIS 762. petitioner then filed MCR 6.500, Motion for Relief from Judgment on 04-12-2017 in the 6th Circuit/Oakland County Court, which was denied on 07-21-2017 with Case No. 2011-237958.

Petitioner filed Application for Leave to Appeal to the Court of Appeals on 01-18-2018. The Michigan Court of Appeals denied Leave to Appeal on 05-31-2018 with Case No. 342063. Petitioner then filed Application for Delayed Leave to Appeal to the Michigan Supreme Court on 07-20-2018 with the Case No. 156142.

While Petitioner's Delayed Application to Appeal was pending in the Michigan Supreme Court. The United States Supreme Court announced there ruling in Carpenter v. United States, 138 S. Ct., 201L. Ed. 2d 507 (2018), immediately following the the Petitioner filed a Motion to add a Fourth Amendment violation pursuant to MCR 7.316 A(3) and B, this new issue VIII in a question format was granted in part, and subsequently Petitioner's delayed application for leave to appeal was denied by the Michigan Supreme Court in Case No. 158142 & (25) on 02-04-2019.

Petitioner filed a Motion to Hold in Abeyance and Stay Proceedings in his Habeas Corpus Petition under 28 U.S.C. § 2254 to allow petitioner to exhaust the Fourth Amendment issue raised by Carpenter, by submitting a MCR 6. 502(G)(2) successive Motion for Relief from Judgment based on newly presented evidence and the retroactive change in law announced in Carpenter v. United States, 138 S. Ct. 2206, 201 L. Ed. 2d 507.

Petitioner's Motion to Hold in Abeyance and Stay Proceedings was Granted and the Writ of Habeas Corpus stayed pending completion of Petitioner's State Application for post-conviction review was on 04-08-2019 with the Case No. 19-10677 by the Honorable Avern Cohn, United States District Judge. (APPENDIX D)

Petitioner proceeded to file MCR 6. 502(G)(2) successive motion for relief from judgment on 06-18-2019 raising issues that were not raised in his first motion for relief from judgment on 04-12-2017. The Trial Court, Michigan Court of Appeals Case No. 353475 and the Michigan Supreme Court denied Application for Leave to Appeal in Case No. 161783 & 20 on 02-02-2021.

Now comes Petitioner, Bruce H. Butler prayfully asking this Honorable Court to grant Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

1. The lower court decisions conflicts with the US Supreme Court decision in Carpenter v. United States, 138 S. Ct. 2206 (2018)

2. The lower Court decision is contary to clearly established US Supreme Court precedent. See Carpenter v. United States, 138 S. Ct. 2206, 2018 US LEXIS 3844; 201 L. Ed.2d 507.

3. The lower Court decision is in conflict with the decision of Appeal Court United States v. Leyva, 2018 U.S. Dist. LEXIS 199327; 2018 WL 6167890.

4. Carpenter v. United States should be given full retroactivity Status of Law in Michigan pursuant to MCR 6.502(G)(2).

5. This case is not only important to many or millions of others similarily situated. See Katz v. United States 389 US 347,351.

6. The facts of my case is identical to Carpenter v. US.

7. Mr. Butler prays this Honorable Court grant relief based on his Constitutional issues.

I. DEFENDANT CAN SHOW HE IS ENTITLED TO FILE A SUCCESSIVE MOTION FOR RELIEF FROM JUDGEMENT BECAUSE CARPENTER V. UNITED STATES 138 S.CT. 2206 (2018) SHOULD BE GIVEN FULL RETROACTIVITY STATUS OF LAW IN MICHIGAN PURSUANT TO MCR 6.502(G)(2).

STANDARD OF REVIEW

Appellate Courts will review a Trial Court's decision on a successive motion for Relief from Judgement that is made under MCR 6.502(G)(2): People v. Barnes, 502 Mich 265:

The issue whether a United States Supreme Court decision applies retroactively presents a question of law that is review De Novo. The Appellate Court reviews for an abuse of discretion in the Trial Court's ultimate ruling on a motion for Relief from Judgement, People v. Walker, 2019 Mich App. LEXIS 2531.

ARGUMENT

This Court should grant Defendant's successive motion for Relief from Judgement where Defendant established a retroactive change in law that applies to the instant case pursuant to the United States Supreme Court decision in Carpenter v. United States, 138 S.Ct. 2206 (2018) that a retroactivity be applied while on collateral review.

The Michigan Supreme Court recently stated that a person can raise a Fourth Amendment claim if that person can show under the totality of circumstances that he or she had a legitimate expectation of privacy in the area searched that society recognizes as reasonable. People v. Mead, 503 Mich 205 (2019).

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

Should be given full Retroactivity

In this case, the ruling announced in Carpenter should be given full retroactive effect, because a defendant is entitled to retroactive application of a new decision on collateral relief if it resulted from the application of settled law to new facts (i.e. the case did not announce a new rule of law). Teague v. Lane, 489 US 288, 301 (1989). Under any retroactivity analysis, (see, Teague, supra;Griffith v. Kentucky, 479 US 314 (1987);People v Hampton, 384 Mich 669 (1971);People v. Kamin, 405 Mich 482, 483 (1979).), the Carpenter decision did "not" announce a new rule.

Therefore, whether applying the Teague test, or the analysis of Griffith v. Kentucky, supra. Carpenter is fully retroactive because Carpenter is not a "new rule." When a decision of this Court merely applied settled precedents to new and different factual situations [the decision applies retrospectively]. Griffith, 479 US at 324 (citing U.S. v. Johnson, 457 US 537, 549 Hn.7 (1982).).

Teague announced the following for the Standard of what a new rule is. In general, a case announces a new rule when it "breaks new ground" or imposes a "new obligation" on the States or the Federal government. To put it differently, a case announces a new rule if the result was not dictated by "precedent" existing at the time the defendant's conviction became final. Teague, supra. In Carpenter v. United States, supra., the United States Supreme Court, did not announce a new rule nor impose a new obligation on the State or Federal government. The Courts have long recognized that the people have a right to a reasonable expectation of privacy, and that the Fourth Amendment protects that right. See Katz v. United States, 389 US 347 (1967), "the Fourth Amendment protects not only property interests but certain

expectations of privacy as well." Id. at 351. Thus, when an individual "seek to preserve something as private," and his expectation of privacy is "one that society is prepared to recognize as reasonable," official intrusion into that sphere generally qualifies as a search and requires a warrant supported by probable cause. Carpenter, 138 S. Ct. at 2213 (quoting Smith v. Maryland, 442 US 735, 740 (1979)). The language within Carpenter is clear and precise.

In their analysis they found that: The digital data at issue-personal location information maintained by a third party-did not fit 'neatly' under existing precedents but does lie between two lines of cases. One set addresses a person's expectation of privacy in his physical location movements. See, e.g., United States v. Jones, 565 US 400 (2012)(five justices concluding that privacy concerns would be raised by GPS tracking); also see United States v. Knotts, 460 US 276, 283-284 (1983)(the Court reserved the question whether "different constitutional principles may be applicable" if "twenty-four hour surveillance of any citizen of this country [were] possible."||. The other addresses a person's expectation of privacy in information voluntarily turned over to third parties. See United States v. Miller, 425 US 435 (1976)(no expectation of privacy in financial records held by a bank), and Smith v. Maryland, 442 US 735 (1979)(no expectation of privacy in records of dialed telephone numbers conveyed to telephone company). Carpenter, 138 S. Ct. at 2214-2216.

The Court went on to say: Tracking a person's past movements through CSLI partakes of many of the qualities of GPS monitoring considered in Jones-it is detailed, encyclopedic, and effortlessly compiled. At the same time, however, the fact that the individual continuously reveals his location to his wireless carrier implicates the third-party principles of Smith and Miller. Given the unique nature of cell-site records, the Court declined to extend Smith and

Miller to cover them.

A majority of the Court has already recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements. Jones, 565 US at 430. Allowing government access to cell-site records-which "hold for many Americans the 'privacies of life,'" Riley v. California, 573 US 373, 403 (2014)-contravenes that expectation. In fact, historical cell-site records present even greater privacy concerns than the GPS monitoring considered in Jones: They give the Government near perfect surveillance and allow it to travel back in time to retrace a person's whereabouts, subject only to the five-year retention policies of most wireless carriers. As technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes, this Court has sought to "assure[] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." Carpenter, 138 S. Ct. at 2217-2219. (citing Kyllo v. United States, 533 US 27, 34 (2001)).

The government's position in Carpenter's case was that the third-party doctrine governed Carpenter's case, because cell-site records, like the records in Smith and Miller, are "business records" created and maintained by wireless carriers.

The Courts rejected the governments position stating; "But there is a world of difference between the limited types of personal information addressed in Smith and Miller and the exhaustive chronicle of location information casually collected by wireless carriers". Carpenter, 138 S. Ct. at 2210. The third-party doctrine stems from the notion that an individual has a reduced expectation of privacy in information knowingly shared with another. Smith and Miller, however, did not rely solely on the fact of sharing. They also considered the "nature of the particular documents sought" and

limitations on any "legitimate 'expectation of privacy' concerning their contents". Miller, 425 US at 442. In mechanically applying the third-party doctrine to this case the Government fails to appreciate the lack of comparable limitations on the revealing nature of CSLI. Carpenter, 138 S. Ct. at 2210.

Nor does the second rationale for the third-party doctrine-voluntary exposure-hold up when it comes to CSLI. Cell phone location information is not truly "shared" as the term is normally understood. First, cell phones and the services they provide are "such a pervasive and insistent part of daily life" that carrying one is indispensable to participation in modern society. Riley, 573 US at 385. Second, a cell phone logs a cell-site record by dint of its operation, without any affirmative act on the user's part beyond powering up. Carpenter, 138 S. Ct. at 2218-2220.

The Court further concluded: This decision is narrow. It does not express a view on matters not before the Court; does not disturb the application of Smith and Miller (nor Knotts, Jones or Riley, in this matter), or call into question conventional surveillance techniques and tools, such as security cameras; does not address other business records that might incidentally reveal location information; does not consider other collection techniques involving foreign affairs or national security. Carpenter, 138 S. Ct. at 2220-2221.

The Government did not obtain a warrant supported by probable cause before acquiring Carpenter's cell-site records. It acquired those records pursuant to a court order under the Stored Communication Act, which required the Government to show "reasonable grounds" for believing the records were "relevant and material to an ongoing investigation." 18 U.S.C. §2703(d). That showing falls well short of the probable cause required for a warrant.

Consequently, an order issued under 2703(d) is not a permissible mechanism for accessing historical cell-site records. [emphasis added]. Not all orders compelling the production of documents will require a showing of probable cause. A warrant is required only in the rare case where the suspect has a legitimate privacy interest in the records held by a third-party. and even though the Government will generally need a warrant to access CSLI, case-specific exceptions- e.g., exigent circumstances-may support a warrantless search. Carpenter, 138 S. Ct. at 2221-2223.

The frame work detailed in Carpenter was clear "Before compelling a wireless carrier to turn over a subscriber's CSLI, the Government's obligation is a familiar one-get a warrant." Carpenter, 138 S. Ct. at 2221. The definition of the word familiar as defined by the Oxford dictionary is as follows: a) well known. b) often encountered or experienced. 2 well acquainted. 3 excessively informal; impertinent. 4 unceremonious; informal; close friend, customary, routine, aware, etc.

The Defendant asserts, that none of the language mentioned within the Carpenter decision is consistent within Teague's standard of a "clear break" from or a "new" obligation on the State or Federal Government.

The decision made in Carpenter defines what the Farmers[R4] thoughts were and their purpose for creating the Fourth Amendment, clarifies by existing Supreme Court precedent the difference between the types of documents in Smith and Miller verses the type of documents in Carpenter, make's very clear to the government's position, that the Supreme Court will 'not' extend Smith and Miller to Carpenter's case, nor to the Cell-Site Location Information (CSLI) documents, they defined the clear difference between the Stored Communication Act (SCA) and a probable cause warrant requirement.

The Court framed the Carpenter case following Katz, Knotts, Jones, and

Riley. These cases establish that individuals have a reasonable expectation of privacy in the whole of their physical movements contained within Cell-Site Location Information. Carpenter, 138 S. Ct. at 2214-2223. Defendant asserts, that the language in Carpenter is not anything new nor a breaking away from. Just simply applying settled law to a new set of facts. Even though some lower courts held, that the SCA was a permissible mechanism for accessing historical cell-site data, the United States Supreme Court made it very clear in their decision in Carpenter they stated: "But this Court has 'never' held that the Government may subpoena third-parties for records in which the suspect has a 'reasonable expectation of privacy'." Carpenter, 138 S. Ct. at 2221. Furthermore, though the practice of lower courts of compelling wireless carriers to turn over CSLI data through subpoenas under the SCA, this practice was not approved by the Supreme Court nor Congress who passed the Wireless Communication and Public Safety Act (WCPSA) in 1996, and then later amended this statute in 1999 to include "location information" for the purpose of privacy protection. See Wireless Communication and Public Safety Act 47 U.S.C. §222(f)(1).

In 1999, Congress passed the Wireless Communication and Public Safety Act (WCPSA), which amended the Telecommunication Act to place limits on the carrier's use or disclosure of cell-phone user's "location information." The existing statute obliged the telecommunication carrier to protect the confidentiality of "customer proprietary network information" (CPNI), that is, information about the customer's use of the service that was made available to the carrier by the customer solely by virtue of the carrier-customer relationship. 47 U.S.C. §222 (f)(1) (1996). in order to enhance privacy protection for wireless customer's, the 'new statute' amended the definition of (CPNI) to include "location," and added the following section:

(f) Authority to use wireless location information:

> For purposes of subsection (c)(1), without the expressed prior authorization of the customer, a customer shall not be considered to have approved the use or disclosure of or access to-
> (1) call location information concerning the user of a commercial mobile service..., or the user of an IP-enabled voice service..., other than in accordance with subsection (d)(4) of this section...

47 U.S.C. §222(f)(1999). The privacy concerns animating this legislation were well articulated by one of the bill's sponsors on the House floor:

> There is no question that information-rich location systems that do wonders to help save lives on our Nation's roadways also pose significant risks for compromising personal privacy. This is because the technology also avails wireless companies of the ability to locate and track individual's movements throughout society, where you go for lunch break; where you drive on the weekends; the places you visit during the coarse of a week is your business, it is your private business, not information that wireless companies ought to collect, monitor, disclosure, or use without one's approval...

Wherever your cell phone goes becomes a monitor of all your activities. 145 Cong. Rec. H9858-01, at H9860 (daily ed. Oct. 12, 1999)(statement by Rep. Edward Markey). Other members expressed similar privacy concerns:

> See, e.g., 145 Cong. Rec. H9858-01, at H9860 (daily ed. Oct. 12, 1999)(statement by Rep. Wilburt Tauzin)("[The privacy provision] protects us from the Government knowing where you are going and what you are doing in your life"); 145 Cong. Rec. H9858-01, at H9862 (daily ed. Oct. 12, 1999)(statement by Rep. Gene Green)("we do not want Big Brother looking over our shoulders"); 145 Cong. Rec. H9858-01, at H9863 (daily ed. Oct. 12, 1999)(statement by Rep. Thomas Bliley)("It is not appropriate to let government or commercial parties collect such information or keep tabs on the exact location of individual subscribers. S. 800 will ensure that such call location information is not disclosed without the authorization of the user, except in emergency situations, and only to specific personnel.").

It is crystal clear what the legislative intent was when Congress passed the (WCPSA) in 1999, supporting the crystal clear language in Carpenter, In Katz, 389 US at 351, we established that "the Fourth Amendment protects people, not places," and expanded our conception of the Amendment to protect certain expectations of privacy as well. when an individual "seeks to preserve something as private," and his expectation of privacy is "one that society is

prepared to recognize as reasonable," we have held that official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause." Carpenter, 138 S. Ct. at 2213, (citing Smith, 442 US at 740).

The enactment by Congress of the Wireless Communication and Public Safety Act (WCPSA) in 1999, is implementing Fourth Amendment protection's as Supreme Court president ruled prior to it enactment.

This Statute was interpreted by U.S Mag. Judge Stephen Wm Smith in In re United Stees ex rel. Historical Cell Site Data, 747 F. Supp. 2d 827. Judge Smith stated the following:

> Contrary to the Government's claim, the WCPSA does not "by its terms allow compelled disclosure pursuant to the SCA"..., The statute "does not mention the SCA." It merely recognizes an exception to its disclosure restrictions "as required by law." 47 U.S.C. §222(c)(1). This language is perfectly consistent with a Fourth Amendment warrant requirment. Id. 747 F. Supp. at 844 [emphasis added].

Thus, as to Teague's second requirement of "a case announces a new rule" if the result was not dictated by precedents existing at the time the Defendant's conviction became final. Defendant's conviction became final in 2016. The Wireless Communication and Public Safety Act was created by Congress in 1996 and subsequently, amended in 1999 to add protection for "location information." In addition to the fact that Carpenter's decision was based on existing precedents that the Court was Careful not to disturb. Id. at 2220. Considering these facts the second exception in Teague must fail, because Carpenter's decision resulted from the application of "settled law," (i.e. Katz, Knotts, Jones, Riley, Smith & Miller) to new facts, it did not announce a "new" rule, but simply clarified under existing precedents, that a individual in-fact "maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI." Id. at 2217. Therefore, Carpenter's decision did not "break away" from the past nor does it

place a "new" obligation on the State and Federal Government.

Next, we turn to the test for retroactivity in Griffith v. Kentucky, supra. Griffith held the following for determining if "retroactivity" applies:

> A new constitutional rule established by the United Staes Supreme Court for the conduct of criminal prosecution is to be applied retroactively to all cases, State or Federal, which were pending on direct review or not yet final at the time the new rule was announced, with no exception for cases in which the new rule represents a "clear break" with the past, that is, where the new rule explicitly overrules past precedent of the supreme court, disapproves a practice which the Supreme Court has arguably sanctioned in prior cases, or overturns a longstanding practice that lower courts have uniformly approved; "final" means a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied...Id. at L. Ed. HN 2A.
>
> See also United States v. Johnson, 457 US 537, 549-551 (1982)(New Rule "explicitly overrules a past precedent of this Court....,or disapproves a practice this Court arguably has sanctioned in prior cases...., or overturns a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved.").

The first prong, "the new rule represents a 'clear break' with the past, that is, where the new rule explicitly overrules past precedent of the Supreme Court. When applying the first prong in Griffith to Carpenter, as argued above, this prong also fails, the decision in Carpenter resulted from the application of "settled law," to new facts. Carpenter in-fact did not "break away" from the past nor does it place a "new" obligation on the State and Federal Government. Simply put, Carpenter clarified under existing precedents, (without disturbing them) that a individual in-fact "maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI." Carpenter, 138 S. Ct. at 2217. See also (WCSPA|| 47 U.S.C. ||222(f)(1). of 1999.

As for the second prong in Griffith which states: "disapproves a practice which the Supreme Court has arguably sanctioned in prior cases." The second prong also fails, Carpenter's decision held, "But this Court has 'never' held

that the government may subpoena third parties for records in which the suspect has a reasonable expectation of privacy." Carpenter, 138 S. Ct. at 2221.

The third and final prong in Griffith is: "overturns a longstanding practice that lower courts have uniformly approved." The defendant, asserts that the practice of compelling wireless carriers to turn over CSLI via a subpoena under the Stored Communication Act (SCA), was not uniformly practiced but in-fact was split going in both directions. Some lower courts required the government to obtain a probable cause warrant before compelling a wireless carrier to turn over CSLI documents and agreed that a customer has not voluntarily shared his CSLI with a wireless carrier simply because he turned on a cell phone. See In re United States ex rel. Historical Cell Site Data, 747 F. Supp. 2d 827, 839 (S.D. Tex. 2010); In re U.S. order Auth. the Rel. of Hist. Cell-site info., 736 F. Supp. 2d 578, 580 (E.D.N.Y. 2010); In re U.S. order Directing Prov. to Disclose Records, 620 F.3d 304, 308-309 (3rd Cir. 2010); Com. v. Augustine, 467 Mass. 230, 4 N.E. 3d 846 (2014)(recognizing a reasonable expectation of privacy in cell-site location information); U.S. v. Powell, 943 F. Supp. 2d 759, 770(E.D. Mich. 2013)(surveillance by means of cellular tracking data constituted a search that must be justified by probable cause and a warrant); U.S. v. Davis, 754 F3d 1205, 1217 (11th Cir. 2014)("Cell-site location information is within subscriber's reasonable expectation of privacy. The obtaining of that information without a warrant is a Fourth Amendment violation."). And some lower courts held that a subpoena under the SCA was sufficient to compel a wireless carrier to turn over a subscriber's CSLI. See U.S. v. Graham, 824 F.3d 421, 424 (4th Cir. 2016); U.S. v. Caira, 833 F.3d 803, 807 (7th Cir. 2016); U.S. v. Thompson, 866 F.3d 1149, 1153-1154 (10th Cir. 2017).

Thus it is clear that the lower courts were split in the question of whether the Government needed a warrant supported by probable cause; or was a subpoena under SCA 2703(d) sufficient to compel a wireless carrier to turn over CSLI.

There in-fact was no "uniformity" within the lower courts, thus the final prong of Griffith also fails. For the reasons argued above Carpenter's decision does "not" meet the standard set forth in Teague v. Lane nor Griffith v. Kentucky to be considered a "new" legal constitutional procedure. Instead, Carpenter's decision clarifies through the application of "settled law" to new facts, and as enacted by Congress in 1996 and amended in 1999 to specifically include privacy protections dealing with "location information" implicating a Fourth Amendment protection. See (WCSPA) 47 U.S.C. §222(f)(1).

Accordingly, because Carpenter is a clarification of exiting law, full retroactivity applies. See People v. Jahner, 433 Mich. 490. The Courts further held that its decision was entitled to retroactive application because it constituted a clarification of existing law. People v. Kamin, 405 Mich. 482 (1979); Due process requires that a State Supreme Court decision which is issued after petitioner's conviction became final and which did not articulate a new rule but merely interpreted the elements of the statute under which petitioner was convicted, must be applied on collateral review of petitioner's claim. Fiore v. White, 531 US 225 (2001).

The decision of the Michigan Supreme Court that the "lifer law," which allows for parole consideration after ten years [now fifteen years], applies to sentences for convictions on conspiracy to commit first-degree murder, is to be given retroactive effect. The decision clarifies the existing law, rather than announces new law. People v. Dudgeon, 433 Mich. 490 (1989) See also People v. Rosengren, 159 Mich. App. 492 (1987); People v. Berwardorf, 438

Mich 55 (1991); People v. Doyle, 451 Mich 93 (1996); People v. Newson, 173 Mich App. 160 (1988) (decision clarifying existing law is to be given full retroactive effect).

Defendant/Appellant submits his case is analogous to People v. Walker, 2019 Mich App. LEXIS 2531 in that a constitutional Fourth Amendment violation should be applied retroactively on collateral appeal. Defendant/Appellant had a right to have CSLI obtained by valid search warrant. Defendant's conviction became final in 2016 and like Lafler v. Cooper, 566 U.S. 5156, Carpenter does not create a new rule and therefore applies retroactively.

Accordingly, Defendant/Appellant contends that the ruling of Carpenter should be given full retroactive effect and applied to the instant case. The Southfield Police Department violated Defendant/Appellant's Fourth Amendment right where they obtained via the internet, Defendant/Appellant's Cell-Site Location Information (CSLI).

This information was material and the use of it prejudiced Defendant/Appellant in violation of his Fourth Amendment right, and also his right to a fair trial and due process protected by the Sixth and Fourteenth Amendments.

II. MR. BUTLER WAS DENIED DUE PROCESS AND A FAIR TRIAL BY THE INTRODUCTION AT TRIAL OF UNAUTHENTICATED HISTORICAL CELL-SITE LOCATION INFORMATION OBTAINED WITHOUT A VALID PROBABLE CAUSE WARRANT IN VIOLATION OF THE FOURTH AMENDMENT. ALTERNATIVELY, TRIAL AND APPELLATE COUNSEL WERE INEFFECTIVE FOR FAILING TO OBJECT AND INVESTIGATE THE UNAUTHENTICATED CSLI DOCUMENTS, DENYING DEFENDANT/APPELLANT HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS UNDER U.S. CONST. IV,VI,XIV, CONST, 1963, ART 1 §§11, 15, 17, 20.

STANDARD OF REVIEW

Where a question arises on the matter of a Fourth Amendment violation, the court shall review for clear error if the defendant had a reasonable expectation to privacy when there was no valid probable cause warrant issued, then any and all evidence obtained from an illegal search, be it a physical search of a person or electronic or tracking, said evidence is inadmissible. Carpenter v. United States, 2018 US LEXIS 3844; 201 LED 2d 507 (2018).

The Michigan Supreme Court recently stated that a person may raise a Fourth Amendment claim if that person can show under the totality of circumstances, that he or she had a legitimate expectation of privacy in the area searched that society recognizes as reasonable. People v. Mead, 503 Mich 205 (2019).

ARGUMENT

Defendant/Appellant was denied due process and a fair trial by the introduction of unauthenticated historical (CSLI) Cell-Site Location Information, which was obtained without a valid probable cause warrant to AT&T, in violation of the Fourth Amendment.

Mr. Butler asserts that the AT&T cell-phone records that contained historical cell-site location information was obntained without a valid search warrant. They were not supported by probable cause and must be suppressed and Mr. Butler's conviction reversed, vacated, or remanded for a new trial without the use of the illegally obtained documents. **(See Carpenter v. United States, 138 S.CT. 2206 (2018)).**

Det. David Clevenger of the Southfield Police Dept. was conscientiously aware of the need for a search warrant supported by probable cause in order to obtain the documents. In fact, he obtained a warrant to get Defendant's/Appellants (CSLI) only to realize upon serving the warrant that he made a grave error, the warrant Det. Clevenger obtained was for Verizon, (Cell Partnership BDA Verizon Wireless) **(See Attachment T).**

Mr. Butler was not a Verizon customer and they did not hold the documents that Det. Clevenger sought to obtain, nor was Verizon Defendant/Appellant's cell-phone provider before or after the crime in question was committed.

Southfield Police proceeded to go beyond the specific 3-day period expressly stated in the warrant request. The police violated the scope of what was required to particularly described by the Fourth Amendment. The Southfield Police acquired Mr. Butler's cell-phone and house phone records for a period of one year well-beyond the 3-day specified in the invalid warrant **(See Attachment U)** and well past the 7-day retention period outlined in **Carpenter, supra.** Det. Clevenger never resubmitted a new warrant to AT&T Wireless.

The Southfield Police did not contact AT&T representatives by any formal written request. The documents used during the trial were obtained via the internet from the police Department's Computer Network without a subpoena pursuant to the Stored Communication Act, 18 U.S.C. § 2703(d)(2). The police accessed the Cell-Tower records and data including wave propagation maps for Cell-Towers in violation of 18 U.S.C. §2701 et seq.

These AT&T cell-phone records were admitted by the prosecution as evidence without first verifying and authenticating the documents and properly introducing pursuant to **MRE 902(11).**

The documents used yet not authenicated, alleged to be Mr. Butler's cell-phone records that were used to show historical (CSLI) cell-site location information, which purported to show defendants physical movements and used them to create a time line theory which the prosecutor used throughout trial and repeatedly in opening and closing arguments, showing a factual basic that this was outcome determinative.

When Det. Clevenger circumvented the warrant process he did so with willful disregard of Mr. Butler's Fourth Amendment right. **(See Carpenter, supra).** The Fourth Amendment protects not only property interests, but certain expectation of privacy as well. **Katz v United States** 389 US 347, 351 (1997).

Even under the Store Communication Act 18 U.S.C.A. § 2703(d), the United States Supreme Court has already ruled that S.C.A does not go around Fourth Amendment protection, nor is the S.C.A. a permissible mechanism for assessing historical Cell-Site Location Information. **(See Carpenter, supra.)**

In the case against Defendant/Appellant there was neither a subpoena under the S.C.A. nor a valid search warrant supported by probable cause. Wong v. U.S., 371 U.S. 471 (1963), which is needed for the state to access and use (CSLI) data in Mr. Butler's trial against him. See Carpenter, supra. Therefore, the States actions violated Defendant/Appellant's right to be free from unreasonable search and/or seizure guaranteed by both the United States Constitution and Michigan Constitution 1963 Art 1 §§11, 15, 17, 20.

Mr. Butler contends that Det. Clevenger needed a valid warrant as outlined in Carpenter and Defendant/Appellant/s cellphone records containing his (CSLI) were the fruits of an illegal search and therefore must be suppressed.

The Fourth Amendment of the United States Constitution provides as follows:

> The right of people is to be secure in their persons houses, papers, and effects against unreasonable searches and seizures, shall not be supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. [Emphasis added]

Article 1, section II of the Michigan Constitution of 1963 provides as follows:

> The persons houses, papers, and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation...[Emphasis added]

Mr. Butler's case is similar to Carpenter's with one exception that sets Defendant/Appellant's case apart as more prejudicial than Carpenter's. The fact that Det. Clevenger did not have a subpoena pursuant to the Stored Communications Act 18 U.S.C. §2703d, "before compelling a wireless carrier to turn over a subscriber's CSLI the government's obligation is a familiar one - get a warrant." Carpenter, 138 S.Ct. at 2221.

Accordingly, as stated herein, the holding announced in Carpenter, supra should be given full retroactive effect. Furthermore, Mr. Butler asserts that the "good faith" exception cannot suffice to save Det. Clevenger.

During trial the prosecution called Det. Wakefield also of the Southfield Police Department. He testified as an expert and during cross-examination by defense attorney Niskar, the following was clarified:

Cross-Examination

By Mr. Niskar

Q. Is it true that he provided those records to you prior to you subpoening - were you - strike that. Southfield Police Department will subpoena cell-phone records from the carriers, correct?

A. But we would -- we would request by a search warrant.

Q. Or by search warrant. Right?

A. Right.

Q. There is a -- Stored Communications Protection Act, which requires you to do that, right?

A. It doesn't require us to request them, but if we need to request them through the carriers -- whether it's a subpoena, search warrant, some sort of court order, yes. [Emphasis added] (TT-V, 40) (Attachment X).

Mr. Butler asserts that the Southfield Police Department had an established procedure identified in Det. Wakefield's testimony. The evidence shows that Det. Clevenger did not follow this procedure, he disregarded the law and constitution and did it his way clearly in bad faith.

In fact, Det. Wakefield, who claimed to be an expert in historical cellular data based on a brief training seminar he attended on a computer forensics which may have included a unit on cellular data (TT V, 10-26). Det. Wakefield never attended any courses, training, or programs with the various cell-phone providers (AT&T for Mr. Butler, Sprint for Roberts (TT V, 42) Attachment W and G)).

Southfield Police Det. Clevenger supplied phone records via the internet from the police department's computer network from providers of electronic communication service or remote computing service to Det. Wakefield, who stated he did this work two or three times a week, sometimes all week (TT V, 8).

Det. Clevenger submitted CellCo DBA Verizon cellular phone record language under (1) of warrant. The following constitutes evidence of criminal conduct: That stated the full (scope) and (2) The property to be searched for and seized is specifically described as: CellCo partnership DBA Verizon Wireless (Attachment T).

Verizon is a totally different phone carrier from AT&T. The Southfield Police proceeded to obtain Defendant/Appellant's cell-phone number/records for the time period of this crime by illegally acquiring Defendant/Appellant's cell-phone number/records from his daughter, Jennifer Lynn Culbreath and her husband Curtis Culbreath's home phone records from Vonage, their phone company provider in South Carolina.

These records were obtained (Exhibit E) without their written approval/request or a search warrant/subpoena, furthermore the records were obtained via the internet website vonage.com, through the police department's computer network by remote computing in violation of 18 U.S.C. §2701 et. seq.

When a trial court determines that a defendant has established a "substantial preliminary showing of a deliberate falsehood or reckless disregard for the truth by the affiant" in the search warrant affidavit, and the allegedly false statement was to a finding of probable cause, the trial court holds an evidentiary hearing pursuant to Franks v. Delaware, 438 U.S. 154; 98 S.Ct. 2674; 57 LED 2d 667 (1978), Franklin, 500 Mich 92 at 94-95.

The same standard is used so defendant may then be entitled to have the warrant voided (when reckless disregard for the truth is established by a preponderance of the evidence and the affidavit's remaining content is insufficient to establish probable cause. ID. at 104, citation omitted). Generally, unconstitutionally seized evidence must be excluded from trial; People v. Dillon, 296 Mich App. 506, 508; 822 N.W. 2d 611 (2012) "Exclusion of improperly obtained evidence serves as a deterrant to police misconduct, protects the rights to privacy, and preserves judicial integrity." People v. Hyde, 285 Mich App. 428, 439; 775 N.W. 2d 644 (2008).

The "good faith" exception to the exclusionary rule announced in United States v. Leon, 468 US 897 (1954) cannot be applied to Mr. Butler's circumstances.

In Leon, the court stated when the "good faith" exception would not apply:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent conduct which has deprived the defendant of some right by refusing to admit evidence gained as a result of such conduct. The Court's hope to instill in those particular investigating officers, or their future counterparts, a greater degree of care toward the rights of an accused." Leon, 468 US at 919, citing U.S. v. Peltier, 422 US 531, 542 (1975) 95 S.Ct. 2313.

Det.Clevenger's actions were willful and negligent and a gross violation of Southfield Police Department procedure and ultimately violated Defendant/Appellant's rights under both United States and Michigan Constitutions.

The AT&T cell-phone records were illegally obtained and used in Mr. Butler's trial from the beginning, all throughout and included in closing arguments, in violation of Defendant/Appellant's constitutional rights to a fair trial. (Exhibit D).

A search warrant which authorizes electronic surveillance must limit any search to precise and discriminate circumstances; People v. Dezek, 107 Mich App. 78. This act by the Southfield Police was not a technical violation of Michigan's statutory warrant requirements.

The Fourth Amendment protects people, not just places.

MCL 780.654(1) states that each warrant shall designate and describe the house or building or other location or place to be searched and the property or thing to be seized does not override a Fourth Amendment violation.

Recently passed Constitution Amendent, Michigan proposal 2 requires a search warrant for all Electronic Communications service or remote computing service pertaining to a subscriber or customer that are obtained in violation of the provisions of this Amendment are subject to the rules governing exclusion as if the records were obtained in violation of Amendment IV of the constitution of the United States and section 11 of Article I of the State Constitution of 1963.

The trial court Plaintiff/Appellee fails to address that the AT&T cell-phone records were admitted by the prosecution as evidence. They failed to verify and authenticate these documents and properly introducing them pursuant to MRE 902(11).

Rule 902 Self-Authentication: Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: (11) certified records of regularly conducted activity. The original or a duplicate of a record, whether domestic or foreign of regularly conducted business activity that would be admissible by written rule 803(6) if accompanied by written declaration under oath by its custodian or other qualified person certifying that:

> (A) The record was made at or near the time of the occurrence of the matters set forth by or from information by a person with knowledge of these materials;
>
> (B) The record was kept in the course of regularly conducted business activity and;
>
> (C) It was the regular practice of the business activity to make the record.

A.party intending to offer into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record of a declaration available for inspection sufficiently in advance of their offer into evidence, to provide an adverse party with a fair opportunity to challenge them.

The prosecution violated Mr. Butler's constitutional rights by not following its own procedure. (See People v. Hale, 2018 Mich App. LEXIS 1302, April 10, 2018. Exhibit F).

Mr. Butler argues that CSLI data obtained by the invalid search warrant and lack of authentication were used in his trial in violation of his constitutional rights to a fair trial.

B. ALTERNATIVELY, TRIAL AND APPELLATE COUNSEL WERE INEFFECTIVE FOR FAILING TO OBJECT AND INVESTIGATE THE UNAUTHENTICATED CSLI DOCUMENT IN VIOLATION OF THE SIXTH AMENDMENT AND STRICKLAND V. WASHINGTON.

STANDARD OF REVIEW

Whether the defendant was denied the effective assistance of counsel is a constitutional question which this court reviews De Novo. People v. LeBlanc, 465 Mich App. 575, 579; People v. Henry, 239 Mich App 140, 146.

In the alternate, for the reasons stated above, Defendant/Appellant was denied his Sixth Amendment right to effective assistance of trial counsel by his failure to object to the introduction of the unauthenticated AT&T cell-phone records containing his CSLI documenting his historical physical movements. Counsel was also ineffective for failing to investigate this information and move the trial court to suppress the illegally obtained documents. Both the Michigan and the United States Constitution guarantees that a criminal defendant enjoy the assistance of counsel for his or her defense (U.S. Const. Amend. VI; Mich Const. 1963 Art. 1 §20.

A claim of ineffective assistance of counsel is governed by the familiar two-prong test set forth in Strickland v. Washington, 466 US 668 (1984); People v. Pickens, 466 Mich 298 (1994). First the defendant must show that his attorney's performance was deficient. Deficient performance is not merely below average performance, rather, "the defendant must show that counsel's

representation fell below an objective standard of reasonableness." Strickland at 668. Second, the defendant must show that he was prejudiced by the substandard performance; "prejudice" is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694 (See Attachment H, L, M, N, and Z).

It has been consistently held that defense counsel's failure to take the proper and evident steps to protect his clients constitutional rights during criminal prosecution constitutes ineffective assistance and/or denies the defendant a fair trial. (See e.g. Kimmelman v. Morrison, 477 US 365 (1986) and its progeny). A claim of ineffectiveness is not necessarily a referendum on an attorney's performance at trial overall. A "single serious error" may support a claim of ineffective assistance of counsel. Id. at 383.

Trial counsel's first failure to object to inadmissible evidence can be constitutionally ineffective assistance warranting a new trial where the deficient performance deprived the defendant of a fair trial. (See generally, Northrop v. Trippett, 265 F3d 372 (CA 6 2001), cert den 535 US 955 (2002) (Fourth Amendment violation); People v. Ullah, 216 Mich App. 669, 550 N.W. 2d 568 (1996) (Improper other acts evidence).

Mr. Butler, was denied effective assistance when trial counsel failed to investigate the AT&T cell-phone records that contained Cell-Site Location Information, had counsel done even a small amount of investigation into this evidence it would have been discovered how Det. Clevenger obtained the crucial evidence even pre-Carpenter, the process used was in violation of Mr. Butler's due process rights, in addition to the fact that these documents were never authenticated, to insure they were accurate, and unmolested. "A failure to investigate can certainly constitute ineffective assistance." Washington v Smith, 219 F3d 620, 630 (CA 7, 2000). Now post-Carpenter there is no question to counsel's performance being deficient. Trial counsel owed defendant "a duty to make a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 US at 691.; People v Caballero, 184 Mich App 636, 640-642 (1990). Effective assistance requires that defense counsel adequately prepare for trial. Workman v Tate, 957 F2d 1339, 1345 (CA 6, 1992); People v Storch, 176 Mich App 414, 423-426 (1989).

Furthermore, as a result of counsel's deficient performance for failing to investigate and challenge the AT&T records containing CSLI, prejudice is apparent. The prosecutions entire theory was based upon the CSLI records. The prosecution relied almost completely in laying the foundation to which their whole case was built upon these non-authentic documents, without them their whole case was a sham, nothing but a hollow theory, and a different outcome was almost guaranteed to say the least. Counsel's failure to challenge these documents was ineffective and resulted in Mr. Butler being denied a fair trial, the prejudice has been met. Strickland, 466 US at 694. Accordingly, as held in Carpenter the AT&T cell-phone records containing Mr. Butler's CSLI was a search under the Fourth Amendment, thus the exclusionary rule must be applied to these records obtained in bad faith without a search warrant.

C. DEFENDANT/APPELLANT WAS DENIED HIS DUE PROCESS RIGHT TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

A criminal defendant is entitled to effective assistance of counsel on appeal as well as at trial, counsel who acts as an advocate rather than merely as a friend or the court. Evitts v. Lucey, 469 US 387 (1985); Mahdi v. Bagley, 552 F3d 631, 636 (CA 6 2008). The Strickland test applies as well to appellate counsel. Burger v. Kemp, 483 US 776 (1987). Courts rarely characterize advocacy as effective by the presentation of every possible non-frivolous argument that can be made. See Smith v. Murray, 477 US 527 (1986); Joshua v. DeWitt, 341 F3d 430, 441 (CA 6 2003). Nevertheless, an appellate attorney's failure to raise an issue can amount to ineffective assistance. Smith v. Robbins, 528 US 259, 288 (2000) ("Notwithstanding Barnes, it is still possible to bring a Strickland claim based on counsel's failure to raise a particular claim."); McFarland v. Yukins, 356 F3d 688 (CA 6 2004). "Counsel's performance is strongly presumed to be effective." Id. at 710, quoting Scott v. Mitchell, 209 F3d 854, 880 (CA 6 2000), and "only when ignored issues are clearly stronger than those presented will the presumption of effective assistance of [appellate] counsel be overcome." Joshua, 341 F3d at 441 (alterations in original), quoting Monzo v. Edwards, 281 F3d 568, 579 (CA 6 2002).

As stated herein, counsel failed completely to investigate and move to suppress the AT&T cell-phone record due to the fact that Det. Clevenger failed to get a warrant or subpoena when he obtained the CSLI records. Counsel failed further by not objecting to the prosecutions failure to authenticate or properly introduce this evidence. Appellate counsel's failure to challenge this evidence "amount[ed] to constitutionally ineffective assistance on appeal." McFarland,

supra. This argument logically depends on the merits of the underlying ineffective assistance of counsel claim. Ivory v. Jackson, 509 F3d 284, 294 (CA6, 2007) ("whether raising the issue might have changed the result on appeal, in turn, goes to the merit of the claim itself."). As presented herein, Mr. Butler has shown that trial counsel's ineffectiveness was meritorious and would have resulted in a grant of relief, there is no question but that appellate counsel's error was prejudicial. Dando v. Yukins, 461 F3d 791, 802 (CA6, 2006). The critical failure of an attorney to object or raise an issue can be ineffective assistance of counsel if it deprived the defendant of an opportunity for dismissal of the case or for success on appeal. Gravely v. Mills, 67 F3d 779 (CA6, 1996); Kowlak v. United States, 645 F2d 534, 537-538 (CA6, 1981); Corsa v. Anderson, 443 F. Supp. 176 (E.D. Mich. 1977).

Mr. Butler was denied his substantial rights to due process, fair trial, and effective assistance of both trial and appellate counsel.

Due process requires that a defendant be convicted only on the basis of legally admissible evidence. US Const. Am XIV. "A defendant's due process right to a fair trial is violated when there is a reasonable possibility that inadmissible evidence might have contributed to the conviction." Fahy v. Connecticut, 375 US 85, 87-88 (1963).

Mr. Butler respectfully asserts that these newly presented issues raised within his motion were first discovered following the United States Supreme Court decision announced in Carpenter v. United States, which as stated herewithin, applies retroactively to this case. Immediately following the Carpenter decision, Mr. Butler filed in the Michigan Supreme Court a motion pursuant to MCR 7.316A(3)&B to add this new issue announced in Carpenter. Mr. Butler's application for

leave to appeal from the denial of his Motion for Relief from Judgement under MCR 6.500 at seq. was pending and not yet final. Subsequently, on Feb. 4, 2019, the Michigan Supreme Court did in fact grant this new issue to be added to the pending leave to appeal. Within the same order granting the motion to add this issue, the Court denied his leave to appeal. (order attached Exhibit C).

D. DEFENDANT HAS DEMONSTRATED ACTUAL INNOCENCE AND A RETROACTIVE CHANGE IN LAW BASED ON CARPENTER V UNITED STATES, 138 S.CT. 2206 (2018) AND HAS SHOWN ACTUAL PREJUDICE.

As demonstrated herewithin, Carpenter does apply to Mr. Butler's conviction pursuant to MCR 6.502(G)(2). Additionally, in March 2019, MCR 6.502(G)(2) was amended to include "The court may waive the provision of this rule if it concludes that there is a significant possibility that the defendant is innocent of the crime." Mr. Butler has made a significant showing that "it is more likely than not that no reasonable juror would have found [defendant] guilty beyond a reasonable doubt." People v Swain, 288 Mich App 609 (2010). Turning to §6.508(D)(3)(i)(iii), as shown, Mr. Butler suffered "actual prejudice" and asserts that but for the errors stated above, Mr. Butler would have had a reasonable chance of acquittal, and that the irregularities were so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of this case.

Furthermore, to the extent that it requires "but for" causation, the "actual prejudice" requirement under MCR 6.508(D)(3)(b) appears to be equivalent to the prejudice test adopted in Strickland supra, to establish ineffective assistance of counsel, in

that this test the defendant must show that "but for" the error complained of, a "reasonable probability" exist that the results might have been different. The "probability" requirement requires less than a preponderance of evidence. Strickland, 466 US at 678-694. As shown above, Mr. Butler was denied several substantial rights, resulting in his denial of due process and a fair trial.

Miscarriage of justice "as the courts have explained the principle of comity and finality that inform the concepts of cause and prejudice must yield to be imperative of correcting a fundamental injustice and incarceration."

The courts have made clear "the miscarriage of justice" exception extends at least, to cases of "actual innocence" which the court has defined as situations in which the constitutional violation "has probably resulted in the conviction of one who is actually innocent of the offense of which he is convicted." See Murray v Carrier, 477 US 473; Schlup v Delo, 513 US 298.

Plaintiff/Appellee misstates the record and is totally without merit in stating Defendant/Appellant's Carpenter Fourth Amendment search warrant violation was previously presented in his original Motion for Relief from Judgement. Where Defendant/Appellant states Det. Wakefield claimed to be an expert in historical cellular data, based on a brief training seminar he attended on a computer forensic course which may have included a unit on cellular data (TT. V, 10-26). Det. Wakefield never attended any courses, training or programs with the various cell-phone providers (AT&T for Mr. Butler, Sprint for Roberts) (TT. V, 42, Attachment W).

Det. Wakefield did not have the scientific knowledge or know the scientific method on which relevant evidence was based.

Mr. Butler presented: celltower affidavit from an expert disputing the State's celltower expert's analysis and lack of training on the various cell-phone providers; that the State's expert allowed the State's witness to direct the investigation away from him as the State's witness failed to inform the State's expert that his cell-phone was registered to the celltower that provides cellular service to the crime scene (Attachment G).

Mr. Butler asserted he did not receive a fair hearing on the celltower data/analysis. Mr. Butler could not address the flaws in this field of scientific knowledge, including shifts in scientific consensus, as a scientific method on which relevant scientific evidence at trial was based.

Mr. Butler asserted that substantial defense was lost by counsel's failure to secure an expert at trial where proof was offered. People v Ackerman, 257 Mich App 434, 455 (2003). Mr. Butler provided proof that an expert would have testified favorably to establish the factual predicate for his claim of ineffective assistance for not obtaining a celltower expert at trial and not filing a Daubert challenge to this evidence.

Pursuant to the "Carpenter" ruling, Mr. Butler applied due diligence in notifying the Michigan Supreme Court in his delayed Leave to Appeal. Mr. Butler requested pursuant to MCR 7.316(A)(3) and MCR 7.316(B) that review, consider, and apply to his case the Carpenter decision. (Exhibit C), (Exhibit G).

Mr. Butler's Motion that Carpenter should be given full retrtoactivity change in Michigan law does not raise issues that were previously decided against him in his first Motion for Relief from Judgement. Contrary to the findings of the Trial Court and Plaintiff/Appellee, the Courts rationale for finding that Mr. Butler did not establish actual prejudice under MCR 6.508(D)(2) was outside the range of reasonable and principled outcome; and therefore, an abuse of discretion.

This was not a case in which Mr. Butler was convicted by an overwhelming amount of evidence--rather it was quite the opposite. The record reflects that Mr. Butler's first trial resulted in a hung jury. If not for the illegally obtained evidence, the second trial may have seen the same result.

The Michigan Supreme Court in People v Mead, 503 Mich 205 (2019) clarified Michigan law by "dispensing with the rubric of standing" in the Fourth Amendment context. The aspect of Mead will need to be integrated into all Fourth Amendment challenges going forward. The issue whether Mr. Butler has a legitimate expectation of privacy that society recognizes as reasonable not standing. Verizon is a totally different phone carrier from AT&T.

Mr. Butler prays this Honorable Court finds an expectation of privacy in the personal cell records.

The Fourth Amendment has suffered serious erosions and Mr. Butler respectfully asks this Honorable Court to stop the emasculation of this amendment by the good faith exception.

Mr. Butler has made a substantial showing of merits this claim holds and asserts in order for this Court to truly adjudicate on the full merits an evidentiary hearing should be held. (See Motion for Evidentiary Hearing).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Bruce H. Butler

Date: Jan 29, 2021