No. 21-5732

IN THE

SUPREME COURT OF THE UNITED STATES

In re ARTOSKA GILLISPIE, PETITIONER,

VS.

PAUL BLAIR, RESPONDENT.

ON PETITION FOR A WRIT OF HABEAS CORPUS TO THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF HABEAS CORPUS

Artoska Gillispie #512934
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Petitioner, pro se

QUESTIONS PRESENTED

1. Question: Has prejudice been shown where defense counsel (a) failed to file a motion to suppress (CSLI) (cell-site location information), and (b) failed to object to the admission of CSLI (cell-site location information)? Thus, regardless of whether such CSLI was obtained with or without a court order, police obtained a warrant not supported by probable cause before acquiring Petitioner's [personal location information] maintained by a third party, which required police to show "reasonable grounds" for believing that Petitioner's personal location information was relevant and material to an ongoing investigation. That showing falls well short of the probable cause required for a warrant, and such court order issued is not a permissible mechanism for accessing personal location information, because not all orders compelling access to personal location information will require a showing of probable cause.

2. Question: Has prejudice been shown where defense counsel (a) failed to file a motion to suppress identification, and (b) failed to object to the in-court (at preliminary hearing) identifications and to the in-court (at trial) identifications of Petitioner? Thus, such identifications were impermissibly suggestive and resulted in irreparable misidentification.

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF HABEAS CORPUS

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

OPINIONS BELOW

This case is from federal courts:

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States District Court appears at Appendix B to the petition and is unpublished.

The opinion of the United States Court of Appeals appears at Appendix C to the petition and is unpublished.

The opinion of the United States Court of Appeals appears at Appendix D to the petition and is unpublished.

INDEX TO APPENDICES

JURISDICTION

This case is from federal courts:

1. On February 12, 2014, Mr. Gillispie filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the U.S. District Court, seeking to challenge his convictions and sentences. Gillispie v. Griffith, No. 4:14-CV-00257-NAB (E.D. Mo. 2014). On March 29, 2017, the court denied the petition.

2. Mr. Gillispie filed a Notice of Appeal and request for COA, and on October 2, 2017, the U.S. Court of Appeals for the Eighth Circuit dismissed the appeal. Gillispie v. Griffith, No. 17-1992.

3. Mr. Gillispie filed a petition for rehearing, and on February 7, 2018, the U.S. Court of Appeals for the Eighth Circuit denied rehearing.

4. Mr. Gillispie filed a motion for leave to file a successive 2254 petition, and on April 2, 2021, the U.S. Court of Appeals for the Eighth Circuit denied the motion.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that "No State shall ... deprive any person of life, liberty, or property, without due process of law."

The Sixth Amendment to the United States Constitution provides, in relevant part, that no person shall be denied the right to legal counsel in any criminal proceeding, and the effective assistance of legal counsel.

COMPLIANCE WITH RULES 20.1 AND 20.4

In compliance with Rules 20.1 and 20.4 Petitioner states as follows:

1. The writ will be in aid of the Court's appellate jurisdiction, by establishing its precedence that will furnish a basis for determining an identical or similar case that may subsequently arise, or present a similar question of law.

2. Exceptional circumstances warrant the exercise of the Court's discretionary powers, in that, a constitutional violation has resulted. Thus, a manifest injustice or miscarriage of justice would result in the absence of habeas relief.

3. Adequate relief cannot be obtained in any other form or from any other court, as Petitioner has presented these issues before the U.S. Court of Appeals for the Eighth Circuit.

STATEMENT OF THE CASE

GROUND ONE

TRIAL COUNSEL WAS INEFFECTIVE FOR (a) FAILING TO FILE A MOTION TO SUPPRESS CSLI (cell-site location information), AND (b) FAILING TO OBJECT TO THE ADMISSION OF CSLI (cell-site location information), BECAUSE REGARDLESS OF WHETHER SUCH CSLI WAS OBTAINED WITH OR WITHOUT A COURT ORDER, POLICE OBTAINED A WARRANT NOT SUPPORTED BY PROBABLE CAUSE BEFORE ACQUIRING PETITIONER, ARTOSKA GILLISPIE'S [PERSONAL LOCATION INFORMATION] MAINTAINED BY A THIRD PARTY, WHICH REQUIRED POLICE TO SHOW "REASONABLE GROUNDS" FOR BELIEVING THAT MR. GILLISPIE'S PERSONAL LOCATION INFORMATION WAS RELEVANT AND MATERIAL TO AN ONGOING INVESTIGATION. THAT SHOWING FALLS WELL SHORT OF THE PROBABLE CAUSE REQUIRED FOR A WARRANT, AND SUCH COURT ORDER ISSUED IS NOT A PERMISSIBLE MECHANISM FOR ACCESSING PERSONAL LOCATION INFORMATION, BECAUSE NOT ALL ORDERS COMPELLING ACCESS TO PERSONAL LOCATION INFORMATION WILL REQUIRE A SHOWING OF PROBABLE CAUSE, AND THUS, MR. GILLISPIE WAS DENIED HIS RIGHTS TO A FAIR TRIAL, TO DUE PROCESS OF LAW, AND TO EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 10 AND 18(a) OF THE MISSOURI CONSTITUTION.

FACTS IN SUPPORT

In this case, on 12/30/2009, a robbery of US Cellular at 1457 Bass Pro Drive occurred at 19:56 hours. Sometime later on this same date, Detective Tom Rich of the Creve Coeur Police Department "allegedly" obtained a court order for Petitioner, Artoska Gillispie's (Gillispie) cell phone information, and Detective Rich requested assistance in locating Gillispie, as indicated in the Report of Officer Robert Gage DSN 250. However, the Record does not indicate that such court order was sought or obtained. There was no specific exception to the warrant requirement, in that, no exigent circumstances existed. Assuming a court order was sought and obtained, the police obtained a warrant not supported by probable cause before acquiring Gillispie's [personal location information] maintained by a third party. It acquired such personal location information pursuant to a court order, which required the police to show "reasonable grounds" for believing that Gillispie's personal location information was relevant and material to an ongoing investigation. That showing falls well short of the probable cause required for a warrant.

Consequently, a court order issued is not a permissible mechanism for accessing personal location information, because not all orders compelling access to personal location information will require a showing of probable cause. Tracking a person's movements through CSLI (cell-site location

information) partakes many of the qualities of GPS monitoring considered in United States v. Jones, 565 U.S. 400, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012).

The digital data at issue; personal location information maintained by a third party. Specifically, a person's expectation of privacy in his physical location and movements. This issue is addressed in United States v. Jones, supra (five Justices concluding that privacy concerns would be raised by GPS tracking).

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 v. United States, 389 U.S. 347, 351-52, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). A majority of the Supreme 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).

Generally, police need a warrant to access CSLI. However, case specific exceptions, e.g., exigent circumstances may support a warrantless search. Thus, "[i]n the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement." Riley v. California, 134 S.Ct. 2473, 2482, 189 L.Ed.2d 430, 439 (2014).

Here, however, there was no specific exception to the warrant requirement, in that, no exigent circumstances existed.

In Carpenter v. United States, 138 S.Ct. 2206 (2018), the Supreme Court reversed holding: [1]-The Government's acquisition from wireless carriers of defendant's historical cell-site location information (CSLI) was a search under the Fourth Amendment. When the Government accessed defendant's CSLI, it invaded his reasonable expectation of privacy in the whole of his physical movements, and the fact that the Government obtained the information from a third party did not overcome defendant's claim to Fourth Amendment protection; [2]-A court order obtained by the Government under the Stored Communications Act, 18 U.S.C.S. § 2703(d), was not a permissible mechanism for accessing historical CSLI because the showing required under the Act fell well short of probable cause. A warrant was necessary to obtain CSLI in the absence of an exception such as exigent circumstances.

Trial counsel was ineffective for (a) failing to file a motion to suppress CSLI (cell-site location information), and (b) failing to object to the admission of CSLI (cell-site location information). Thus, Petitioner was denied his rights to a fair trial, to due process of law, and to effective assistance of counsel, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 18(a) of the Missouri Constitution.

GROUND TWO

TRIAL COUNSEL WAS INEFFECTIVE FOR (a) FAILING TO FILE A MOTION TO SUPPRESS IDENTIFICATION, AND (b) FAILING TO OBJECT TO THE IN-COURT (at preliminary hearing) IDENTIFICATIONS AND TO THE IN-COURT (at trial) IDENTIFICATIONS OF PETITIONER, ARTOSKA GILLISPIE. THE IN-COURT (preliminary hearing) IDENTIFICATIONS WERE IMPERMISSIBLY SUGGESTIVE, IN THAT, ALTHOUGH A PHYSICAL LINEUP WAS CONDUCTED AND PHOTOGRAPHED ON 12/31/2009, THE VICTIMS STEVEN SHAW AND THOMAS CASALI WERE NOT SHOWN SAID LINEUPS IN THEIR PHYSICAL OR PHOTOGRAPHIC FORMS. FURTHERMORE, THERE WAS NO POSITIVE IDENTIFICATION OF MR. GILLISPIE AS THE PERPETRATOR OF THE ROBBERY OF US CELLULAR AT 1457 BASS PRO DRIVE THAT OCCURRED ON 12/30/2009. THUS, THE FIRST POSITIVE IDENTIFICATION OF MR. GILLISPIE WAS AT THE PRELIMINARY HEARING AND WAS NOT BASED ON THE VICTIM'S RECALL OF FIRST-HAND OBSERVATIONS OF THE ROBBERY, BUT RATHER FROM THE SUGGESTIVE PROCEDURES OR ACTIONS THAT OCCURRED AT THE PRELIMINARY HEARING, AND MR. GILLISPIE WAS DENIED HIS RIGHTS TO A FAIR TRIAL, TO DUE PROCESS OF LAW, AND TO EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 10 AND 18(a) OF THE MISSOURI CONSTITUTION.

FACTS IN SUPPORT

The Constitution, our decisions indicate, protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit. Constitutional safeguards available to defendants to counter the State's evidence include the Sixth Amendment rights to counsel, Gideon v. Wainwright, 372 U.S. 335, 343-345 (1963); compulsory process, Taylor v. Illinois, 484 U.S. 400, 408-409 (1988); and confrontation plus cross-examination of witnesses, Delaware v. Fensterer, 474 U.S. 15, 18-20 (1985).

On 12/30/2009, a robbery of US Cellular at 1457 Bass Pro Drive occurred at 19:56 hours (REPORT pg. 1 of 42).[2] On 12/31/2009, a physical lineup was conducted and photographed at 13:15 hours (REPORT pg. 18 of 42). The victims of this robbery, Steven Shaw and Thomas Casali were not shown said lineups in their physical or photographic forms. Furthermore,

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[2] The Offense/Incident Report by Officer Robert Gage DSN 250 will be referenced ("REPORT").

there was no positive identification of Petitioner, Artoska Gillispie (Gillispie) as the perpetrator of said robbery. However, on 12/31/2009, a warrant was issued, without probable cause having been presented on the charge of Robbery In The First Degree (MO Charge Code 1201099.0), in violation of Section 569.020 RSMo.

Steven Shaw, victim indicated that he was not ever shown a photo lineup or anything like that. Steven Shaw's first identification of Gillispie was during the suggestive actions that occurred at the preliminary hearing. Prior to the preliminary hearing, Steven Shaw had not identified Gillispie as the person who committed the robbery of US Cellular on 12/30/2009. Additionally, the record does not indicate that Steven Shaw positively identified Gillispie as the suspected robber at any point prior to the preliminary hearing. The following colloquy occurred between defense counsel, Rebecca Winka and Steven Shaw:

> Q. Is it fair to say that when you came to the preliminary hearing and you identified Mr. Gillispie in court that was the first time you had seen either him or a picture of him since the robbery?
>
> A. Yes.
>
> Q. And you were sure that was the person who robbed you?
>
> A. The minute he walked in the room. Yes.

(SS.Dep.15:23-25; 16:18-20).[3]

This pretrial identification was not reliable because Gillispie was the only prisoner in the courtroom dressed in an orange jumpsuit, coupled with the fact that Gillispie was sitting next to the only defense lawyer in the courtroom. Thus, the first positive identification of Gillispie was at the preliminary hearing and was not based on the victim's recall of first-hand observations of the robbery, but rather from the suggestive procedures or actions that occurred at the preliminary hearing.

During the Deposition, Thomas Casali testified that he first learned the name of who was arrested in this case when he Googled it, and he also viewed a picture that accompanied the article. The following colloquy occurred between defense counsel, Rebecca Winka and Thomas Casali:

> Q. When did you first learn the name of who was arrested in this case?
>
> A. I think I Googled it.
>
> Q. Okay?
>
> A. On, you know, Google I said US Cellular robbery and then it pulled up like on KSDK and that's when I saw his name.

(TC.Dep.18:12-18).[3]

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[3]The Deposition of Steven Shaw will be referenced (SS.Dep") and Thomas Casali referenced ("TC.Dep.").

Q. Okay. do you recall, did the article you viewed on line, did that have a picture accompanying it?

A. Yes.

(TC.Dep.18:25; 19:1-2).

During the Deposition, Thomas Casali testified that a police officer showed him one (1) individual picture of the suspected robber, and further testified that he was not shown a photo lineup at all in this case. The following colloquy occurred between defense counsel, Rebecca Winka and Thomas Casali:

Q. Okay. At any point after that night did the police ever show you an individual picture of--

A. They showed me a picture like after it happened, after we had written our statements, or police reports, sorry, they-- I can't remember which police officer did, but one of them pulled it out and said is this the guy and I said yeah, that's him.

Q. Okay?

A. You know, you can recognize his face.

Q. Okay. So he just showed you one picture?

A. Yes.

Q. Okay. And you said you never viewed a photo lineup at all in this case?

A. No. We didn't have a lineup.

(TC.Dep.19:4-22).

This pretrial identification was not reliable because the one (1) individual picture of Gillispie was the only photo shown to Thomas Casali, coupled with the fact that police failed to show Thomas Casali a photo lineup or physical lineup, where Mr. Casali would have the opportunity to view multiple photos and/or view Gillispie live in 3D. Thus, the first positive identification of Gillispie was after being shown one (1) individual photo and was not based on the victim's recall of first-hand observations of the robbery, but rather from the suggestive procedures or actions that occurred when the officer showed Mr. Casali a single picture of Gillispie, which limited Mr. Casali's options to consider all of the relevant factors involved in identification.

In this case, first, this Court must decide whether the police used an unnecessarily suggestive identification procedure. Second, if they did, the Court must next consider whether the improper identification procedure so tainted the resulting identification as to render it unreliable, and therefore, inadmissible. See Neil v. Biggers, 409 U.S. 188 (1972); and Manson v. Brathwaite, 432 U.S. 98 (1977). Here, with respect to the first step, a pretrial identification procedure is unduly suggestive if the identification results not from the witness's recall of first-hand observations, but rather from the procedures or actions employed by the police.

Contending that the Due Process Clause is implicated here, Petitioner, Gillispie relies on a series of decisions involving police-arranged identification procedures. See Stovall v. Denno, 388 U.S. 293 (1967); Simmons v. United States, 390 U.S. 377 (1968); Foster v. California, 394 U.S. 440 (1969); Neil v. Biggers, 409 U.S. 188 (1972); and Manson v. Brathwaite, 432 U.S. 98 (1977). These cases detail the approach appropriately used to determine whether due process requires suppression of an eyewitness identification tainted by police arrangement. First, due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary. Id. at 107, 109; Biggers, 409 U.S. at 198. Second, even when the police use such a procedure, however, suppression of the resulting identification is not the inevitable consequence. Brathwaite, 432 U.S. at 112-113; Biggers, 409 U.S. at 198-199. Instead, due process requires courts to assess, on a case-by-case basis, whether improper police conduct created a "substantial likelihood of misidentification." Id. at 201. "[R]eliability [of the eyewitness identification] is the linchpin" of that evaluation. Brathwaite, 432 U.S. at 114. Where the "indicators of [a witness'] ability to make an accurate identification" are outweighed by the corrupting effect of law enforcement suggestion, the identification should be suppressed.

Expert witness, Dr. James Lampinen is a distinguished professor of psychology at the University of Arkansas. Dr. Lampinen has conducted an expert review of the eyewitness identification factors in many cases. Dr. Lampinen has testified that his specialty is cogni-psychiatry, which is the branch of psychology that deals with memory, reasoning, thinking, and language. Dr. Lampinen has testified about his extensive experience working with various law enforcement agencies promoting good eyewitness practices, and courses he taught in Arkansas to teach the best practices for eyewitness identification. Dr. Lampinen published a book in 2012 about the psychology of eyewitness identification.

Dr. Lampinen has testified that there have been significant developments in the scientific world of eyewitness identifications since 1998. Some of these developments include new insight regarding variables which can make eyewitness identifications more or less reliable. These new developments have furthered the general understanding of eyewitness identifications as a whole, causes of misidentifications, and the weight that such evidence should be given in a setting such as the case at bar.

Dr. Lampinen has testified that an in-court identification of this nature, as in the case at bar, is suspect for two reasons. First, when a witness is asked to identify someone who is sitting in a room, it is highly suspect because it is pretty clear who is supposed to be the suspect and who should

be identified. The witness is then under a great deal of pressure to make an identification of that person. Second, is an issue called "photo biasing." This phenomenom results when a person has seen a picture of a suspect and is then later asked to make an identification. That witness is more likely to identify the suspect in the photo whether or not the person is guilty. That same logic applies to Steven Shaw's and Thomas Casali's in-court identification of Petitioner.

Dr. Lampinen has testified that memory gets worse over time. Therefore, as in the case at bar, there was no identification made by Steven Shaw or Thomas Casali a short period after the crime occurred, but could be made months later. Thus, the likely explanation is that the identification was based on suggestive outside factors rather than memory.

It is within the sound discretion of this Court to permit expert testimony if it will assist the finder of fact and not divert the finder of fact's attention from the relevant facts or relate to the credibility of witnesses. See Perry v. New Hampshire, 565 U.S. 228, 247 (2012). Here, the Court should find that Dr. Lampinen's scientific study is helpful to discerning relevant facts regarding the reliability of eyewitness identification factors in the case at bar.

Trial counsel was ineffective for (a) failing to file a motion to suppress identification, and (b) failing to object to the in-court (at preliminary hearing) identifications and

to the in-court (at trial) identifications of Petitioner, Gillispie. Thus, Petitioner was denied his rights to a fair trial, to due process of law, and to effective assistance of counsel, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 10 and 18(a0 of the Missouri Constitution.

REASONS FOR GRANTING THE PETITION

The writ should issue because: (1) the record does not indicate that a court order was sought or obtained to retrieve Petitioner's personal location information; (2) Petitioner's personal location information was not relevant and material to an ongoing investigation, and there was no specific exception to the warrant requirement, in that, no exigent circumstances existed; (3) assuming a court order was sought and obtained, the police obtained a warrant not supported by probable cause before acquiring Petitioner's personal location information. Police acquired such personal location information pursuant to a court order, which required the police to show "reasonable grounds" for believing that Petitioner's personal location information was relevant and material to an ongoing investigation. That showing falls well short of the probable cause required for a warrant.

The writ should issue because: (1) trial counsel was ineffective for failing to file a motion to suppress identification; (2) trial counsel was ineffective for failing to object to in-court identifications of Petitioner; (3) such identifications of Petitioner was not based on the victims' recall of first-hand observations of the robbery, but rather from the suggestive procedures or actions that occurred at the preliminary hearing, and the victim researching Google and obtaining Petitioner's name and photo.

CONCLUSION

WHEREFORE, based on the foregoing reasons and facts presented herein, Petitioner, Artoska Gillispie respectfully moves this Honorable Court to issue a writ of habeas corpus, and for such other and further relief as this Court may deem just and proper under the circumstances.

Respectfully submitted,

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DATE: 08/10/2021