

No. 21A-\_\_\_\_

# In the Supreme Court of the United States

---

REX HAMMOND,

*Applicant,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

---

## **APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

---

TO THE HONORABLE AMY CONEY BARRETT, ASSOCIATE JUSTICE AND CIRCUIT JUSTICE  
FOR THE SEVENTH CIRCUIT:

Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, applicant Rex Hammond respectfully requests a 58-day extension of time, to and including January 14, 2022, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit denied a timely request for rehearing on August 19, 2021. Unless extended, the time to file a petition for a writ of certiorari will expire on November 17, 2021. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1). Copies of the lower court's opinion and its order denying rehearing are attached.

1. This case arises from the government's use of real-time GPS tracking of a cell phone, without a warrant, to locate Hammond in connection with a series of robberies committed over a three week period in October 2017. Slip op. 1-2, 16-18. On

the day after one robbery—a Saturday—a task force comprising several state and federal law enforcement agents, including a Kalamazoo police detective Cory Ghiringhelli, concluded that Hammond was a suspect and obtained his cell phone number. Slip op. 2. Rather than locate and arrest Hammond, Ghiringhelli took the rest of the weekend off. C.A. Supp. App. 17-18. On Monday, Ghiringhelli finally looked up the phone number, traced it to AT&T, and made an “exigency request” to AT&T for real-time cell-phone location information and cell site location information (CSLI). C.A. Supp. App. 8. Using this real-time tracking information, officers pursued Hammond over the next six hours. Slip op. 4. The real-time ping located Hammond at various places, including several residences in Elkhart, Indiana; in a hotel room in South Bend, Indiana; and within his vehicle as he was traveling. Dkt. 39, at 5. In the early hours of Tuesday, officers located Hammond in Indiana, pulled him over for speeding, and arrested him. Dkt. 39, at 7, 9; Dkt. 93 at 6.

2. In pre-trial proceedings, Hammond moved to suppress the cell phone location information the government received from AT&T without a warrant, claiming, after *Carpenter v. United States*, 138 S. Ct. 2206 (2018), it “was obtained illegally, in violation of the Fourth Amendment to the United States Constitution,” and there was no exigency permitting a warrantless search. Dkt. 37, at 3. The district court denied Hammond’s motion. Slip op. 6. The court explained that “if Mr. Hammond’s phone data was collected in a good-faith reliance on the Stored Communications Act, the evidence needn’t be suppressed.” *Id.* A jury convicted Hammond.

3. The court of appeals affirmed. On the district court’s denial of the motion to suppress, the court concluded that the government’s intrusion into Hammond’s phone to obtain his real-time location to track him down and arrest him was not a “search” under the Fourth Amendment. In the court’s view, the government’s real-time GPS tracking of Hammond did not amount to a search, even after the Supreme Court’s recent decisions in *Carpenter*, *United States v. Jones*, 565 U.S. 400 (2021), and *Riley v. California*, 573 U.S. 373 (2014), because the government only tracked Hammond for “a matter of hours while the suspect travelled on public roadways.” Slip op. 27. The court also concluded that the good faith reliance on the exigency request section of the Stored Communications Act (SCA) when obtaining Hammond’s CSLI and real-time ping rendered the exclusionary rule inapplicable.

4. The petition for certiorari will demonstrate that certiorari is warranted on the question whether using real-time GPS tracking from a cell phone to locate a criminal suspect is a search under the Fourth Amendment.

This question divided courts before *Carpenter* and continues to do so after *Carpenter*. And it is a question expressly left unresolved by *Carpenter*. As the Florida Supreme Court cogently stated, people have “a subjective expectation of privacy in the location signals transmitted solely to enable the private and personal use of his cell phone, even on public roads, and that he did not voluntarily convey that information to the service provider for any purpose there than to enable use of his cell phone for its intended purpose.” *Tracey v. State*, 152 So. 3d 504, 525 (Fla. 2014). *See also State v. Earls*, 70 A.3d 630 (N.J. 2013) (warrant required for real-time cell

phone location tracking under state constitution); *Commonwealth v. Rushing*, 71 A.3d 939, 963 (Pa. Super. Ct. 2013) (same), *rev'd on other grounds*, 99 A.3d 416 (Pa. 2014); *United States v. Powell*, 943 F. Supp. 2d 759 (E.D. Mich. 2013) (same); *Maryland Real-Time Order*, 849 F. Supp. 2d 526 (D. Md. 2011) (same). And in the two years since the Court decided *Carpenter*, courts have expressed “no difficulty in extending the rationale of *Carpenter* as applied to historical CSLI to prospective orders.” *State v. Brown*, 202 A.3d 1003, 1014 n.9 (Conn. 2019); *State v. Muhammad*, 451 P.3d 1060, 1071 (Wash. 2019); see also *Reed v. Commonwealth*, 2020 WL 594084 (Ky. Ct. Slip op. Feb. 7, 2020), review granted (Sept. 16, 2020); *State v. Snowden*, 140 N.E.3d 1112, 1126 (Ohio Ct. Slip op. 2019).

5. Good cause exists for an extension of time to prepare a petition for a writ of certiorari in this case. Undersigned counsel has several other matters with proximate due dates and oral arguments, including argument before this Court on November 2, 2021 in *Houston Community College v. Wilson*, No. 20-804; a summary judgment brief due in the U.S. District Court for the District of Delaware on November 15, 2021 in *Jordan v. Mirra*, No. 1:14-cv-01485; a response brief due in the U.S. Court of Appeals for the Fourth Circuit on November 19, 2021, in *Wild Virginia v. Council on Environmental Quality*, No. 21-1839; and a response brief due in the U.S. Court of Appeals for the First Circuit on November 24, 2021, in *Medicaid and Medicare Advantage Products Association of Puerto Rico v. Hernandez*, No. 21-1297.

For the foregoing reasons, the application for a 58-day extension of time, to and including January 14, 2022, within which to file a petition for a writ of certiorari in this case should be granted.

October 21, 2021

Respectfully submitted.



MICHAEL B. KIMBERLY  
McDermott Will & Emery LLP  
500 North Capitol Street NW  
Washington, DC 20001  
(202) 756-8000  
mkimberly@mwe.com