No. 23-5251

IN THE

SUPREME COURT OF THE UNITED STATES

MARK EDWIN GUIDA — PETITIONER
(Your Name)

vs.

BOBBY LUMPKIN, DIRECTOR — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

FIFTH CIRCUIT FEDERAL COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

MARK EDWIN GUIDA
(Your Name)

POLUNSKY UNIT, No. 1984879; 3872 FM 350 S.
(Address)

LIVINGSTON, TEXAS 77351
(City, State, Zip Code)

None
(Phone Number)

QUESTION(S) PRESENTED

I.

WAS EVIDENCE PRESENTED AT A TRIAL FOR MURDER SUBJECT TO THE EXCLUSIONARY RULE, WHERE SAID EVIDENCE WAS THE RESULT OF AN ILLEGAL SEARCH OF THE DEFENDANT'S CELL PHONE RESULTING IN "FRUITS OF THE POISONOUS TREE"?

II.

SHOULD CELL-SITE LOCATION INFORMATION (CSLI) BEEN EXCLUDED AT TRIAL UNDER CARPENTER V. UNITED STATES, 138 S.Ct. 2206 (2018), WHERE DATA WAS OBTAINED FROM A THIRD-PARTY CARRIER WITHOUT A WARRANT?

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:

RELATED CASES

- Guida v. State of Texas, No. 05-14-01626-CR, Court of Appeals of Texas, Fifth District. Judgement entered May 13, 2016

- Ex parte Guida, No. WR-88,538-01, Texas Court of Criminal Appeals, Judgement entered July 25, 2018

- Guida v. Director Lumpkin, No. 3:20-cv-390-B, United States District Court for the Northern District of Texas, Dallas Division. Judgement Entered July 26, 2022

- Guida v. Director Lumpkin, No. 22-10815, United States Fifth Circuit Court of Appeals. Judgement entered April 4, 2023.

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STATUTES AND RULES

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

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

The opinion of the United States court of appeals 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[X] is unpublished.

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

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[X] is unpublished.

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

The opinion of the highest state court to review the merits 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 _____ 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.

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was February 28, 2023.

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

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: April 4, 2023, and a copy of the order denying rehearing appears at Appendix D.

[ ] 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 _____. A copy of that decision appears at Appendix _____.

[ ] 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).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution states, "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Texas Code of Criminal Procedure, Article 38.23(a):

No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.

STATEMENT OF THE CASE

In two questions, Petitioner brings forth two issues of Fourth amendment significance; two separate instances of an illegal search and seizure. In the first a police detective violated Petitioner's expectation of privacy when the detective reached over the table during a non-custodial interview, snatched a cell phone from the petitioner's hands, manipulated the controls, copied down financial information of an ATM withdrawl, gave the information to other detectives who in turn tracked down a surviellance video of the transaction. The evidence led to an arrest, was used at trial, and led to a conviction for murder.

Petitioner brought this issue up for the first time on a 2254 Federal Habeas Application under Martinez v. Ryan, 132 S.Ct. 1309 (2012), a gateway for a state prisoner to bring up an ineffective assistance of trial counsel issue for the first time on a federal habeas corpus, without having brought up the issue previously on a state-writ application. After the Federal Magistrate Judge ordered the State to produce the interview tape showing the detective's illegal act, the State responded by supplying the Federal Court with only a portion of the taped interview, leaving out entirely the detective's illegal confiscation of the cell phone.

Without being able to view the taped interview in its entirety, the Magistrate Judge said that the petitioner could not show at least "some merit" in the issue and recommended that the issue was thus "procedurally barred" under the Martinez standard. Petitioner filed objections and the Federal District Judge agreed with the Magistrate Judge and dismissed the issue. It should be noted

that the Magistrate Judge stated "the law is unclear when applied to the facts of this case." (Rep. and Recomm. at page 24).

The issue was brought to the Fifth Circuit on appeal but the higher court determined that Petitioner "failed to make a substantial showing of the denial of a constitutional right." (See Order Fifth Circuit, Appendix A).

Petitioner brought this issue up under Ineffective Assistance of Trial Counsel because, during a pretrial Miranda Hearing, counsel illicited testimony from the detective regarding the illegal search of the cell phone, yet failed to broaden the scope of the hearing to include suppression of illegally obtained evidence under the Fruits of the Poisonous Tree Doctrine. Petitioner now timely files this issue with this United States Supreme Court.

The second issue of Fourth Amendment significance has to do with the State's use of Cell-Site Location Information (CSLI). Again without a warrant, the State obtained the CSLI data through a third-party wireless carrier. This Supreme Court has determined that a warrant is the necessary means for which to obtain CSLI data rather than through the use of a subpoena to the wireless carrier under the Business Records Exemption.

This Fourth Amendment issue was first brought up in a pretrial hearing where the Motion to Suppress CSLI data was overruled. Petitioner then brought the issue up on his direct appeal. The Appellate Court based their denial on a case from the Texas Court of Criminal Appeals that was overruled by a United States Supreme Court decision in Carpenter v. U.S., 138 S.Ct. 2206.

Petitioner brought the issue up again on his 2254 Federal Habeas Application; the court denying relief on the issue.

After going to the Fifth Circuit with this Fourth Amendment issue, Petitioner now asks this Supreme Court to determine whether, in light of the Carpenter decision, the CSLI data was obtained illegally when the State obtained the CSLI data without a warrant.

Petitioner contends that these two Fourth Amendment issues are ripe for consideration in this court and are important issues to those who are similiarly situated.

REASONS FOR GRANTING THE PETITION

The United States Court of Appeals for the Fifth Circuit has decided an important question of constitutional magnitude that has not, but should be, settled by this Court and has decided an important federal question in a way that conflicts with relevant decisions of this court.

As the Magistrate Judge wrote in his Report and Recommendation, "the law is unclear when applied to the facts of this case," evidenced by the Fifth Circuit Court reaching to the Eighth Circuit for guidance. (See Report and Recommendation at page 24).

It is therefore important that this Supreme Court provide legal guidance for this and others who are similarly situated on this Fourth Amendment issue.

QUESTION ONE

WAS EVIDENCE PRESENTED AT A TRIAL FOR MURDER SUBJECT TO THE EXCLUSIONARY RULE, WHERE SAID EVIDENCE WAS THE RESULT OF AN ILLEGAL SEARCH OF DEFENDANT'S CELL PHONE RESULTING IN "FRUITS OF THE POISONOUS TREE"?

ISSUE PRESENTED

Petitioner first presented this issue on a federal 2254 habeas corpus petition under Martinez v. Ryan, 132 S.Ct. 1309 (2012), made applicable to Texas habeas petitioners in Trevino v. Thaler, 133 S.Ct. 1911 (2013), that counsel for the defendant failed to motion to suppress illegally seized evidence of a surveillance video showing the petitioner purchasing gasoline canisters. The video in question was obtained from information gathered during a non-custodial interview where a police detective snatched a cell phone out of the hands of the petitioner and searched the phone, without a

warrant, and obtained cell phone data of an ATM withdrawn at a gas station. This illegally obtained information led to the surveillance video, leading to an arrest and subsequent conviction for murder.

Petitioner relies on Riley v. California, 134 S.Ct. 2473 (2014), that cell-phone data is protected under the Fourth Amendment right against search and seizure, and obtaining a warrant is generally required before a search of data can begin. As this Honorable Court has concluded, "Modern cell phones are not just another technological convenience. With all they contain and all they may reveal they hold for many Americans 'the privacies of life'...Our answer to the question of what the police must do before searching a cell phone seized incident to an arrest is accordingly simple - get a warrant." Riley at page 2495.

Petitioner has argued on a 2254 habeas application that the police detective investigating a murder violated Petitioner's expectation of privacy to the cell phone data held within his cell phone and the police detective breached that expectation of privacy when he reached over the table and snatched petitioner's cell phone from his hands, manipulated the controls and copied down financial information leading police to an ATM machine and consequently a video surveillance showing petitioner purchasing gasoline canisters and gasoline. Gasoline canisters similar to the ones he purchased were found at the scene of a murder/arson three hours after the video taped purchase.

Although the violation of privacy occurred in a non-custodial interview rather than "subsequent to arrest", Petitioner believes that the standard still applies. Even more so because as the

subject of a non-custodial interview, petitioner was a free citizen with all legal and constitutional rights available to him. Petitioner does not believe that just because he was not yet under arrest at the time of the intrusion, Riley wouldn't apply to the illegal seizure and search of his cell phone and data stored within it.

In his Findings and Conclusions, Magistrate Judge David L. Horan tries to liken Petitioner's case to an Eighth Circuit case in U.S. v. Morgan, 842 F.3d 1070 (8th Cir. 2016), where a police officer wrote down information from a defendant's cell phone while the defendant himself scrolled down the information from his cell phone while the officer wrote down pertinent information, the defendant essentially publishing the information for the officer to see. (See Report and Recommendation at page 23).

The Eighth Circuit determined that there was no "search" of the cell phone because "Morgan had no reasonable expectation of privacy when he voluntarily displayed his cell phone screen in the presence of officers[.]" Petitioner contends that his case is more akin to Riley where officers "looked on their own through the contents of a cell phone." (Report and Recommendation at page 24).

An opinion from the United States Supreme Court is therefore needed to provide guidance to the application of Constitutional law to the facts in this case to provide clarity to those who are similarly situated.

LEGAL BASIS FOR ARGUMENT

The Fourth Amendment to the United States Constitution guarantees the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. U.S. Const.Amend. IV. To establish standing to challenge governmental intrusions under the Fourth Amendment, an individual must demonstrate their reasonable expectation of privacy in a place searched, or meaningful interference with their possessory interest in property seized.

Ratified in 1791 and made applicable to the states in 1868, the Fourth Amendment protects the "rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." As the constitutional text establishes, the"ultimate touchstone of the Fourth Amendment is reasonableness." Caniglia v. Strom, 141 S.Ct. 1596, 1603 (2021). Reasonableness generally requires the obtaining of a judicial warrant. In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement.

"The warrant requirement is not a mere formality; it ensures that necessary judgement calls are made 'by a neutral and detached magistrate,' not 'by the officer engaged in the often competitive enterprise of ferreting out crime.'" Schmerber v. California, 86 S.Ct. 1826 (1966). A warrant thus serves as a check against searches that violate the Fourth Amendment by ensuring that a police officer is not made the sole interpreter of the Constitutional protections. Accordingly, a search conducted without a warrant is "per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions."

Katz v. U.S., 99 S.Ct. 507 (1967).

The Fruit of the Poisonous Tree Doctrine requires the exclusion of tangible evidence seized during an unlawful search, and derivative evidence, both tangible and testimonial, acquired as a result of the unlawful search. See Wong Sun v. U.S., 83 S.Ct. 407 (1963).

The Exclusion Rule prohibits introduction into evidence of tangible materials seized during an unlawful search. It also prohibits the introduction of fruit of the poisonous tree, or derivative evidence that is the product of the primary evidence, or that is otherwise acquired as an indirect result of an unlawful search.

The first step in a "fruit of the poisonous tree" analysis is to ask whether any piece of evidence is "derivative" of illegally seized evidence. Derivative evidence includes tangible or testimonial evidence that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search, up to the point at which the connection to the illegality becomes sufficiently attenuated. Murray v. U.S., 108 S.Ct. 2529 (1988).

As the name suggests, this doctrine holds that if the evidential "tree" is tainted by illegality, then so is its "fruit." This doctrine has been part of the canon of criminal law in the United States for over 100 years. Silverthorne Lumber Co. v. U.S., 40 S.Ct. 182 (1920).

APPLICATION OF LAW TO FACTS OF THIS CASE

A pre-trial hearing was held based on defense counsel's Motion to Suppress Petitioner's police interview. Oral arguments focused solely on the issue of whether the State failed to provide Petitioner with his Miranda rights while in custody. The trial judge ultimately determined that Petitioner was not deserving of Miranda until he was actually arrested in the course of what began as a non-custodial interview. (Report and Recommendation at page 22).

At that hearing, however, these facts came to light through testimony of the detective. But, ineffectively, trial counsel did not follow through to an obvious conclusion, that is, suppression of illegally seized evidence obtained during the interview.

Q: You asked him a couple of questions and he pulls out his cell phone and he is looking through it, is that correct?

A: Seems like it is regarding financial probably.

Q: Do you recall saying let me see that and taking it out of his hand?

A: Yeah, because he couldn't read it to me.

Q: Well, he's holding his cell phone looking at his financial records as a witness in this case and you say let me see that and take it out of his hand, correct?

A: Yes, but I think he's trying --

Q: So, the answer is yes?

A: It's not yes or no, no, sir.

Q: Well, it is actually. Did you take his cell phone out of his hands as he was looking at his financial records?

A: At one point, yes, sir.

-(Dkt. No. 16-2; Rep. and Reccom. at 22)

Ineffectively, trial counsel did not broaden the scope of this Miranda Hearing to include this illegal seizure and search of the cell phone and ask the court to rule on this Fourth Amendment violation. But these adduced facts led to an ORDER by the Federal Magistrate Judge for the State to produce Trial Exhibit 53, labeled "Mark Guida Interview," which was the video tape of the entire police interview showing the detective snatching the cell phone out of Petitioner's hands, manipulating the controls, copying down illegally seized data, and leaving the room. During the interview other detectives used the data to track down the surviellance video depicting Petitioner purchasing gasoline canisters and gas at a Race Track gas/convenience store. This single piece of evidence led to Petitioner's arrest during the interview.

But the State did not fully adhere to the ORDER. Instead of producing the entirety of the video taped interview, labeled as Trial Exhibit 53, the Texas Attorney General cut the exhibit into two parts and labeled them "Volume One" and "Volume Two," and then forwarded to the court only Volume Two, which begins at the point that the Petitioner is arrested, leaving out entirely the detective's illegal search and seizure of the cell-phone data.

After production of only the second half of the video, the Magistrate Judge writes in his Report and Recommendations, "It is not clear why the State only submitted Volume 2 of Exhibit 53." (Rep. and Rec. at page 22). But Exhibit 53 was never in two volumes. It is labeled "Mark Guida Interview," and nothing more. The Attorney General's Office chose to cut the interview into two parts to hide the illegal search and seizure from the court.

Then the Magistrate Judge concludes that the petitioner "fails

to show that the trial judge would have believed petitioner's version of events." (Report and Recommendation at page 25). How convenient to conclude this after the Attorney General has manipuliated the evidence! Petitioner argued in response that this act was an obstruction of justice and contempt of court, but to no avail.

Petitioner contends that had the Federal Magistrate Judge viewed the entirety of the interview video, he would have come to an entirely different conclusion as to whether or not Petitioner's Fourth Amendment rights were violated during the non-costodial interview, and the court was remiss in allowing the State to manipulate the evidence without question.

Consequently, the Magistrate Judge concludes that the Petitioner has failed to show that the trial judge would have granted a motion to suppress the fruits of the illegal search and seizure, therefore trial counsel was not ineffective in failing to motion to suppress and the Martinez claim ultimately is without merit. (Report and Reccomendation at page 27).

"It is settled law that [a] seizure of property occurs when there is some meaningful interference with an individual's possessory interest in that property." U.S. v. Jackson, 104 S.Ct. 1652 (1984). The 'general rule' is that absent an "extraordinary situation" a party cannot invoke the power of the state to seize a person's property without a prior judicial determination that the seizure is justified. ID

"The Supreme Court has made it abundantly clear that in order to search for digital data contained in a cellular telephone, which in essence is deemed to be a computer, a search warrant is required

other than in exigent circumstances." U.S. v. McCutcheon, 2016 U.S. Dist. LEXIS 162183 (W.D.N.Y.). "Such a search would be like finding a key in a suspect's pocket and arguing that it allowed law enforcement to unlock and search a house." Riley at 2491.

In U.S. v. Gorden, 346 F.Supp.3d 999 (E.D.Mich. 2018), the defendant's motion to suppress was granted in part because the victim's cell phone seized at a hotel was not discovered from an independant source, but was seized during the course of an illegal search; the phone would not have been inevitably discovered, as there was no other line of investigation occurring at that time, except for the illegal search.

In Collins v. Virginia, 138 S.Ct. 1663 (2013), an officer approached the eavesment of a suspect's home and garnered evidence of a stolen motorcycle without a warrant. The Supreme Court overturned Collins' conviction due to this Fourth Amendment violation, an intrusion of Collins' reasonable expectation to privacy which resulted in the arrest of Collins.

The Riley Court has clearly stated that searching a citizen's cell phone is akin to intruding onto the eavesment of a citizen's home. Even though the search of Petitioner's cell phone was not 'incident to arrest', the evidence garnered from the illegal search of Petitioner's cell phone caused the arrest and should have been suppressed at trial under the fruits-of-the-poisonous-tree doctrine. Trial counsel for the defense was ineffective in failing to motion the court to suppress the surveillance video when he uncovered testimonial pre-trial evidence of the illegal seizure and search at the Suppression-Miranda Hearing that a Fourth Amendment violation had occurred during Petitioner's non-custodial interview.

The Exclusionary Rule prohibits the introduction at trial of all evidence that is derivative of an illegal search, or evidence known as the fruit of the poisonous tree. Because Riley v. California, 134 S.Ct. 2473 (2014) was decided previous to the Miranda Hearing when evidence of a Fourth Amendment violation was referrenced, and trial counsel should have known the outcome of the Riley opinion, counsel was ineffective for failing to seek suppression of the video surviellance evidence which was obtained as a result of the illegal seizure and search of Petitioner's cell phone data during a non-custodial interview.

A suppression of the evidence would have led to a completely different result as no other evidence even remotely links Petitioner to the murder, and, although circumstantial, it is the single most compelling piece of evidence in the case. As the detective indicated at the Miranda Hearing:

"When I saw the videotape of him buying gas and gas cans within three hours before she's burnt up, that changes the whole scenario." (RR:2/64/9-13). It is at this point in the interview that Petitioner "is not free to leave," (RR:2/63/7-9) and is arrested.

But this evidence was obtained through an illegal seizure and search of the cell phone; a search without a warrant.

As the Magistrate Judge has written in his Report and Recommendation, "the law is unclear when applied to the facts of the case." (Rep. and Rec. at page 24). Therefore, Petitioner seeks an opinion from this Supreme Court of the United States, to give clarity to the issue of illegal search of a citizen's cell phone which leads to an arrest for this case and others that are similiarly situated.

QUESTION TWO

DOES CARPENTER V. U.S., 138 S.Ct. 2206 APPLY TO PETITIONER'S CASE WHERE THE STATE USED CELL SITE TOWER LOCATION DATA WITHOUT OBTAINING A WARRANT?

The Supreme Court's decision in Carpenter v U.S. recognizes that individuals have a reasonable expectation of privacy in cell-site data, and holds that the acquisition of that data from wireless carriers who maintain it constitutes a search that, under the Fourth Amendment, requires "a warrant supported by probable cause." Carpenter, at 2220-21."An SCA order, issued on a showing of "reasonable grounds" for believing that the records were 'relevant and material to an ongoing investigation' falls short of this requirement." ID at 2221. Accordingly, when the government accesses CSLI from a wireless carrier, the government invades a citizen's reasonable expectation in the whole of his physical movement. ID.

In this petitioner's case, the detective obtained the CSLI records from AT&T Wireless with a subpoena on December 21, 2012. (RR:7/20/21). On July 24, 2013 the State "attempted to correct any error" by showing probable cause." (RR:7/20/23). "In an abundance of caution, [the state] attempted both methods." (RR:7/21/5).

Petitioner filed a motion to suppress, and questioned which method of obtaining the CSLI was actually used. The court "sustained the defendant's objection to the materials obtained through use of the search warrant" and denied the objection to documents obtained through the use of the petition process, which the court "believes is in compliance with 28 U.S.C. 27.03." (RR:7/37). The court ruled that the CSLI was obtained only through subpoena rather than through the warrant process.

Even though the CSLI data did not directly implicate petitioner as being the perpetrator of this crime, the CSLI data was circumstantial by not ruling him out either. But the evidence did not rule out millions of people in the Dallas area and was thus harmful and had an adverse impact on the jury's determination of guilt.

Because this petitioner motioned the trial court to suppress the CSLI data and the court overruled that motion and the state used this evidence at trial, and because petitioner brought the issue to the appellate court on direct review, and the appellate court relied on a case which was overruled by the United States Supreme Court, this petitioner askes this court to apply the Carpenter decision to his case. The CSLI data used at his trial should have been excluded from trial when the state did not obtain a warrant for the data and Petitioner had a reasonable expectation of privacy to third-party business records that recorded his physical movement.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Mark Edwin Linda

Date: June 5th, 2023