No. 16-6308

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2016

Aaron Graham,
Petitioner,

v.

United States of America,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

Petition for Rehearing

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Petition for Rehearing

Petitioner Aaron Graham respectfully moves this Court for an order (1) vacating its denial of the petition for a writ of certiorari, entered on June 28, 2018, (2) granting the petition, (3) vacating the convictions, and (4) remanding to the Fourth Circuit for further proceedings. As grounds for this motion, petitioner states the following:

Jurisdiction

This Court entered an order denying the petition for a writ of certiorari on June 28, 2018. As stated in petitioner's certification pursuant to Rule 44.2 attached to the end of this petition, this petition is restricted to addressing intervening circumstances of a controlling effect, specifically the impact of this Court's decision in *Carpenter v. United States,* No. 16-402, 585 U.S. __, 138 S. Ct. 2206 (2018). This petition is timely filed pursuant to Rule 44.

Reasons for Granting the Petition

Because this Court's decision in *Carpenter v. United States* overruled the en banc decision that had affirmed petitioner's conviction, this Court should vacate its order denying the petition for a writ of certiorari, grant the petition, vacate the convictions, and remand to the Fourth Circuit for further proceedings.

In *Carpenter v. United States*, this Court decided that the government must obtain a warrant based on probable cause before it could obtain historical cell site location information (CSLI) from a cellular service provider. Using a court order under 18 U.S.C. § 2703(d), which requires a standard lower than probable cause, rather than a warrant, violates the Fourth Amendment. This is the precise issue that

Mr. Graham raised in his petition for certiorari, and the Fourth Circuit's decision to the contrary was the basis for the en banc court affirming his convictions.

The central issues in *Carpenter* and in this case are identical. The issue presented and decided in *Carpenter* (and in Mr. Graham's petition for a writ of certiorari as well) was whether and to what extent the third-party doctrine of *Smith v. Maryland*, 442 U.S. 735 (1979), and *United States v. Miller*, 425 U.S. 435 (1976), governed the government's warrantless acquisition of historical CSLI and rendered the Fourth Amendment's warrant requirement inapplicable.

Carpenter holds that the third-party doctrine does not eliminate the privacy interest and the warrant requirement does apply: "We therefore decline to extend *Smith* and *Miller* to the collection of CSLI. Given the unique nature of cell phone location information, the fact that the Government obtained the information from a third party does not overcome Carpenter's claim to Fourth Amendment protection." *Carpenter*, 138 S. Ct. at 2220; *see also id.* at 2217 ("We decline to extend *Smith* and *Miller* to these novel circumstances."). In explaining the difference between the holding in *Carpenter*, *Smith*, and *Miller*, the Court stated that the nature of the record was inherently private and individuals do not voluntarily and intentionally share the information in a traditional third-party doctrine sense. *Id.* at 2219-20. "In no meaningful sense does the [cell phone] user 'assume [] the risk' of turning over a comprehensive dossier of his physical movements." *Id.* at 2220. Finally, the Court "conclude[d] that the Government must generally obtain a warrant supported by probable cause before acquiring such records." *Id.* at 2221.

The en banc Fourth Circuit held in Mr. Graham's case, based entirely on *Smith* and *Miller*, that the Fourth Amendment provides no protection for CSLI, rendering the warrant requirement inapplicable. "The Government's acquisition of historical CSLI from Defendants' cell phone provider did not violate the Fourth Amendment." *United States v. Graham*, 824 F.3d 421, 424 (4th Cir. 2016). The court explained, "For the Court has long held that an individual enjoys no Fourth Amendment protection 'in information he voluntarily turns over to [a] third part[y].'" *Id.* at 425 (quoting *Smith*, 442 U.S. at 743-44). Relying on the third-party doctrine, the en banc court stated, "All of our sister circuits to have considered the question have held, as we do today, that the government does not violate the Fourth Amendment when it obtains historical CSLI from a service provider without a warrant." *Id.*

The Fourth Circuit's en banc decision did not rely on any grounds other than the third-party doctrine. The court explained "Applying the third-party doctrine to the facts of this case, we hold that Defendants' did not have a reasonable expectation of privacy in the historical CSLI. The Supreme Court's reasoning in *Smith* controls." *Id.* at 427. The court held that Mr. Graham exposed his information to the service provider and therefore assumed the risk that the government would in turn disclose the information to the government. *Id.* at 427-28. "For these reasons, the Government's acquisition of that information (historical CSLI) pursuant to §2703(d) orders, rather than warrants, did not violate the Fourth Amendment." *Id.* at 428.

The Fourth Circuit indicated an awareness that its holding might not survive review by this Court: "The Supreme Court may in the future limit, or even eliminate

the third-party doctrine. Congress may act to require a warrant for CSLI. But without a change in controlling law, we cannot conclude that the Government violated the Fourth Amendment in this case." *Id.*

Carpenter provided the precise change in the law that the en banc Fourth Circuit envisioned. That decision in fact overruled the en banc *Graham* decision. *Carpenter* acts a change in circumstances of a controlling effect.

Conclusion

This Court's decision in *Carpenter v. United States* overruled the en banc decision that had affirmed the petitioner's conviction. The legal arguments presented in the petition for a writ of certiorari in this case and those decided in *Carpenter* are identical. The petitioner therefore respectfully asks this Court to reconsider its order denying his petition and instead, grant the petition, vacate his conviction, and remand his case to the Fourth Circuit for further proceedings in light of *Carpenter*.

Respectfully submitted,

__/s/_____
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Certificate of Counsel

As Counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

____/s/_____
Counsel for Petitioner