No. 17-5943

IN THE SUPREME COURT OF THE UNITED STATES

MONTAI RILEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's Fourth Amendment rights were violated by law enforcement's acquisition from his cellular-service provider, pursuant to a court order, of real-time precision location information for his cell phone for a period of approximately seven hours, where the information traced him to a motel but did not reveal the room in which he was staying or his movements within that room.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 858 F.3d 1012. The order of the district court (Pet. App. B1-B8) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 2017. The petition for a writ of certiorari was filed on September 2, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Tennessee, petitioner was convicted of unlawful possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). The district court sentenced petitioner to 41 months of imprisonment, to be followed by three years of supervised release. Judgment 1-3. The court of appeals affirmed. Pet. App. A1-A17.

1. On June 22, 2015, petitioner entered a Check 'n Go store in Wyoming, Michigan, pointed a gun at the clerk, instructed her to open the safe, and fled on foot with "a money box and money bags." Pet. App. A2; Presentence Investigation Report (PSR) ¶ 30. The following day, a state court issued an arrest warrant for petitioner, finding probable cause that he had committed the armed robbery. Pet. App. A2; PSR ¶ 30; D. Ct. Doc. 39-1 (Feb. 19, 2016).

On June 25, 2015, petitioner purchased a cell phone serviced by AT&T. Pet. App. A2; PSR ¶ 4; D. Ct. Doc. 35-2, at 2 (Jan. 28, 2016). A member of petitioner's family gave that phone's number to petitioner's girlfriend "so she could contact him while he was 'on the run.'" Pet. App. A2 (quoting D. Ct. Doc. 35-2, at 2). Petitioner's girlfriend provided the number to Special Deputy Joel Bowman, the United States Marshal in charge of the fugitive investigation. Ibid.

On June 26, 2015, Special Deputy Bowman applied for an order from a Michigan state court requiring AT&T to provide telecommunications records and information for petitioner's cell phone pursuant to 18 U.S.C. 2703, 3123, and 3124. Pet. App. A2; D. Ct. Doc. 35-2, at 1-2. The application explained that petitioner was wanted on armed robbery charges, that Special Deputy Bowman had obtained petitioner's cell phone number from petitioner's girlfriend, and that this cell phone was "the only cellphone that [petitioner] [was] believed to be using at th[e] time." D. Ct. Doc. 35-2, at 2. The application requested disclosure of call-related information such as inbound and outbound phone numbers and cell-site location data, as well as real-time precision location information for petitioner's phone. Id. at 1.

The state court issued the requested order that same day. D. Ct. Doc. 35-2, at 3. The order stated, inter alia: "[T]he[] court finds based on probable cause, that there are reasonable grounds to believe that the requested records are relevant and material to an ongoing criminal investigation." Ibid. As relevant here, the order required AT&T to disclose:

> 16. Precision location of mobile device (GPS Location) such that service provider shall initiate a signal to determine the location of the subject's mobile device on the service provider's network or with such other reference points as may be reasonable [sic] available and a [sic] such intervals and times as directed by State Task Force Investigators and Deputy Marshals of the United States Marshal Service.

Id. at 1.

Within hours, the United States Marshals received longitude and latitude data revealing that petitioner's phone was located at the Airport Inn in Memphis, Tennessee. Pet. App. A4; D. Ct. Doc. 39-2, at 1-14 (Feb. 19, 2016). The location information, however, was not sufficiently accurate to pinpoint the room where defendant was staying. 2/26/16 Suppression Hr'g Tr. (Tr.) 12. A team from the Memphis office of the U.S. Marshals Service went to the motel, showed the front-desk clerk a picture of petitioner, and determined that petitioner had checked in under the name "Rico Shawn Lavender" and was in Room 314. Pet. App. A4; Tr. 11-12. The deputies went to petitioner's room and knocked. Pet. App. A4; Tr. 12-13. Petitioner opened the door and immediately attempted to shut it, but the deputies entered the room and arrested him. Pet. App. A4; Tr. 13. The arrest took place approximately seven hours after tracking commenced. Pet. App. A4-A5 & n.2; compare Doc. 39-2, at 1 (time of first "ping"), with Tr. 13 (arrest time). A Smith & Wesson .22-caliber pistol was in plain view on the bed in petitioner's room. Pet. App. A4; Tr. 13.

Following his arrest, petitioner pleaded guilty to armed robbery in Michigan state court. Pet. App. A5. The state court sentenced him to seven years and six months to twenty-five years of imprisonment. PSR ¶ 30.

2. In September 2015, a federal grand jury in the Western District of Tennessee charged petitioner with unlawful possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1), based on his possession of the .22 caliber pistol at the time of his arrest. Indictment 1.

Petitioner moved to suppress the firearm. D. Ct. Doc. 35 (Jan. 28, 2016). He argued that the government had violated his Fourth Amendment rights by acquiring real-time precision location information for his cell phone without a search warrant. Id. at 1-4. The government opposed the motion on three alternative grounds: (i) petitioner was a fugitive and therefore not entitled to an expectation of privacy as to his location under Payton v. New York, 445 U.S. 573 (1980); (ii) a search warrant is not required for short-term tracking that does not reveal movements within the home (or a motel room); and (iii) the good-faith exception to the exclusionary rule precluded suppression because the officers could reasonably presume that the AT&T Order was a valid and authorized acquisition of precision location information for petitioner's cell phone. D. Ct. Doc. 39, at 2-4 (Feb. 19, 2016).[1]

The district court denied petitioner's motion to suppress. Pet. App. B1-B8. The court reasoned that the court of appeals'

[1] The government did not argue that the order itself satisfied the Fourth Amendment's warrant requirement, if applicable. See D. Ct. Doc. 39, at 4; Pet. App. A5 n.3.

decision in United States v. Skinner, 690 F.3d 772 (6th Cir. 2012), cert. denied, 133 S. Ct. 2851 (2013), authorized the acquisition of precision location data where, as here, the tracking lasts only a few hours and the information does not track the suspect within his home or hotel room. Pet. App. B4-B6. In the alternative, the court found that, because petitioner was a fugitive subject to a valid arrest warrant, the officers could obtain real-time precision location information for petitioner's cell phone to effectuate his arrest, so long as they reasonably believed that petitioner was near his cell phone. Id. at B7 (citing Payton, 445 U.S. at 601).

Petitioner entered a conditional guilty plea, reserving the right to appeal the court's denial of his suppression motion. Plea Agreement 2-3. The district court sentenced petitioner to 41 months of imprisonment, to begin in February 2022 and run concurrently with his state court sentence for the armed robbery, and to be followed by three years of supervised release. Judgment 2-3.

3. a. The court of appeals affirmed. Pet. App. A1-A17. Like the district court, the court of appeals relied primarily on its prior decision in Skinner. In Skinner, the court had held that it would not "be a Fourth Amendment violation for law-enforcement officers to monitor * * * movements" that "'could have been observed by any member of the public'" "just because"

using cell-phone location data "was more efficient than relying on visual surveillance." Id. at A7 (quoting Skinner, 690 F.3d at 779). The court explained that an "important factor" in Skinner was that "the defendant's movements * * * were visible from public vantage points," and that "[e]ntering an individual's home to observe his movements, even if by technological device rather than physically, would much more likely raise Fourth Amendment concerns." Ibid.; see also id. at A7-A8 (comparing Kyllo v. United States, 533 U.S. 27, 35 (2001), and United States v. Karo, 468 U.S. 705, 708-709, 713-715 (1984), with United States v. Knotts, 460 U.S. 276, 279-280 (1983)). The court stated that the same concerns would arise if law enforcement tracked a suspect's movements within a hotel room. Id. at A8 (citing United States v. Allen, 106 F.3d 695, 698 (6th Cir.), cert. denied, 520 U.S. 1251 (1997)).

The court concluded that the tracking in this case did not constitute a search under the Fourth Amendment, observing that, as in Skinner, it "[did] not cross the sacred threshold of the home." Pet. App. A8. The Marshals used only "seven hours of GPS location data," ibid., and the tracking did "not reveal [petitioner's] movements within [his] home (or hotel room)." Ibid. The court found further support for its determination in this Court's decision in Knotts. Id. at A8-A9. The court stated that in Knotts, this Court had held that the tracking of a suspect's

vehicle through a surreptitiously installed beeper was not a Fourth Amendment search -- even though it "revealed the location of the cabin to which the criminal suspects had traveled" – when "it revealed no information about the interior of the cabin." Id. at A8. Similarly, here, "the tracking revealed only that [petitioner] had traveled to the Airport Inn, not which room (if any) the phone was in at the time of the tracking." Ibid.; see also id. at A9 ("That [petitioner] was arrested in a motel is of no moment, for the government learned no more about [his] whereabouts from tracking his cell-phone GPS data than what [petitioner] exposed to public view by traveling to the motel lobby 'along public thoroughfares.'") (citation omitted).

Having found that no Fourth Amendment search had occurred, the court of appeals did not consider the government's alternative arguments -- i.e., that a search warrant was not required because petitioner was a fugitive already subject to a valid arrest warrant, see Gov't C.A. Br. 11-13, and that the good-faith exception precluded suppression, id. at 13-15.

b. Judge Boggs concurred. Pet. App. A10-A17. He emphasized his view that petitioner's "Fourth Amendment claim fails, alternatively, because he was a fugitive subject to a valid arrest warrant, and because the officers * * * had reasonable suspicion that he was in possession of the phone that they were tracking." Id. at A10. He explained that in Payton, this Court held that

"the Fourth Amendment requires the government to obtain a warrant before entering the arrestee's home, but * * * in the case of a fugitive subject to a valid arrest warrant, the arrest warrant 'will suffice to interpose the magistrate's determination of probable cause between the zealous officer and the citizen.'" Id. at A12 (quoting Payton, 445 U.S. at 602-603). "Surely," Judge Boggs reasoned, "if the issuance of a valid arrest warrant may reasonably require an individual to open the doors of his home, * * * then it may reasonably require the same individual to open the doors of his phone -- at least so far as to disclose the longitude and latitude coordinates emitted by a phone that the individual chooses to carry and turn on." Ibid.

ARGUMENT

Petitioner contends (Pet. 2-16) that his Fourth Amendment rights were violated when law enforcement officers sought to determine his location as a fugitive by obtaining, from his cellular-service provider, real-time location information for a seven-hour period, even though the information did not reveal the motel room where petitioner was staying or petitioner's movements within that room. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is therefore unwarranted, particularly because the good-faith exception to the exclusionary rule would apply in any event. The

Court could, however, elect to hold the petition pending its decision in Carpenter v. United States, No. 16-402 (argued Nov. 29, 2017), which involves a challenge to the acquisition without a warrant of 127 days of historical cell-site location data from a cellular-service provider.[2]

1. a. The Fourth Amendment's prohibition on unreasonable searches was originally understood to be "tied to common-law trespass." United States v. Jones, 565 U.S. 400, 405 (2012). Accordingly, when the government obtains information by physically intruding on persons, houses, papers, or effects, it has conducted "a 'search' within the original meaning of the Fourth Amendment." Id. at 405, 406 n.3; see id. at 406. Later decisions of this Court concluded that a Fourth Amendment search also occurs "when government officers violate a person's 'reasonable expectation of privacy.'" Id. at 406 (quoting Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)); see Florida v. Jardines, 569 U.S. 1, 5-6 (2013). The reasonable-expectation-of-privacy standard requires "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" Katz, 389 U.S. at 361 (Harlan, J., concurring);

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[2] The question presented in this case is similar to the question presented in the petition for a writ of certiorari in Rios v. United States, No. 16-7314, which the Court appears to be holding for Carpenter.

see Smith v. Maryland, 442 U.S. 735, 740 (1979) (adopting Justice Harlan's formulation).

Petitioner does not contend that the government obtained his cell phone's location information through a common-law trespass upon his person, house, papers, or effects.[3] He claims (Pet. 8-16), instead, that the government's acquisition of that information violated his reasonable expectation of privacy and was therefore a Fourth Amendment search. In support of that claim, petitioner points (Pet. 16) to Justice Sotomayor's concurring opinion in Jones, which posited that "[i]n cases involving even short-term monitoring, some unique attributes of GPS surveillance relevant to the Katz analysis will require particular attention." 565 U.S. at 415. The Court in Jones, however, reaffirmed that "mere visual observation does not constitute a search," and it expressly abstained from addressing whether "achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy." Id. at 412. And the

[3] In the court of appeals, petitioner sought to make a trespass claim for the first time during oral argument. Pet. App. A6 n.5. The panel properly deemed that claim forfeited and declined to address it. Ibid. Petitioner has not attempted to assert that forfeited claim in the petition for a writ of certiorari. In any event, the record in this case does not reveal the exact technology employed by petitioner's cellular-service provider, Pet. App. A4 n.2; Tr. 20-25, which also makes this case an inappropriate vehicle for review of any trespass claim. See Gov't Br. in Opp. 12 n.1, Rios v. United States, No. 16-7314 (Sept. 25, 2017) (describing technologies used by cellular-service providers to obtain real-time precision location information).

principal concurrence in Jones took the view that, although "the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy," "relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable." Id. at 430 (Alito, J., concurring in the judgment).

This case does not approach the "long-term monitoring" over the course of four weeks that occurred in Jones. 565 U.S. at 429 (Alito, J., concurring in the judgment). In Jones, the GPS device placed on the suspect's car "relayed more than 2,000 pages of data over the 4-week period" directly to a government computer, id. at 403, thus leading to the view that the police had "secretly monitor[ed] and catalogue[d] every single movement of [petitioner's] car for a very long period," id. at 430 (Alito, J., concurring in the judgment). Here, the Marshals monitored petitioner's cell phone location for approximately seven hours. Pet. App. A5-A6, A8; p. 5, supra. And during that short period, the location data provided by the service provider alerted the officers only to the fact that petitioner was staying at the Airport Inn in Memphis. Pet. App. A4 n.2, A8-A9. It did not reveal "a precise, comprehensive record of [petitioner's] public movements that reflect[ed] a wealth of detail about h[is] familial, political, professional, religious, and sexual associations," Jones, 565 U.S. at 415 (Sotomayor, J., concurring). In particular,

it did not reveal petitioner's specific location within the public accommodation (a motel) to which he had fled. Pet. App. A4 n.2, A8-A9.

Kyllo v. United States, 533 U.S. 27 (2001), which petitioner cites in passing (Pet. 3), is inapposite for similar reasons. In Kyllo, the Court held that the use of a thermal imaging device "that is not in general public use[] to explore details of the home that would previously have been unknowable without physical intrusion" is a Fourth Amendment search. 533 U.S. at 40. Kyllo's holding hinged on the fact that the device in question permitted officers to obtain information from inside a house that had not already been exposed to the public. See id. at 34-40. Here, the geographic coordinates obtained from petitioner's cellular-service provider did not "reveal which room, if any, the phone was in at the time of each ping." Pet. App. A4 n.2; see id. at A7 (distinguishing location tracking that "[e]nter[s] an individual's home to observe his movements, even if by technological device rather than physically").

Finally, petitioner contends (Pet. 12-14) that the widespread use of GPS-enabled cell phones and the relative precision of the location data that can be derived from such phones warrant this Court's consideration. Concerns about evolving technological standards, however, are more appropriately considered by legislatures than by courts addressing Fourth Amendment doctrine.

See Jones, 565 U.S. at 429-430 (Alito, J., concurring in the judgment). Congress itself has addressed these issues in the Stored Communications Act, 18 U.S.C. 2701 et seq., which prohibits communications providers from disclosing certain information pertaining to subscribers to the government, but permits the government to acquire such information in particular circumstances.

b. Petitioner has not identified any conflict among the federal courts of appeals on the question presented, and none exists. As noted, the Sixth Circuit has held that no Fourth Amendment search occurs when law enforcement officers acquire from a cellular-service provider real-time precision location data from a phone during travel on public roads. See United States v. Skinner, 690 F.3d 772 (2012), cert. denied, 133 S. Ct. 2851 (2013); United States v. Rios, 830 F.3d 403 (2016), petition for cert. pending, No. 14-2495 (filed Dec. 21, 2016). The Fifth, Eighth, and Tenth Circuits have reserved judgment on that question. See United States v. Wallace, 866 F.3d 605, 609 (5th Cir. 2017) (rejecting the defendant's suppression claim under the good-faith exception without deciding the "open question" whether obtaining precision location data constitutes a search); United States v. Turner, 781 F.3d 374, 384 & n.10 (8th Cir.) (same), cert. denied, 136 S. Ct. 208, and 136 S. Ct. at 493 (2015); United States v. Barajas, 710 F.3d 1102, 1108-1109 (10th Cir.) (same), cert. denied,

134 S. Ct. 230 (2013). No court of appeals has held that acquisition of precision location data constitutes a Fourth Amendment search.

2. Even if the question identified in the petition warranted this Court's review, this case would be an unsuitable vehicle for addressing it because the good-faith exception to the exclusionary rule would foreclose suppression.

The exclusionary rule is a "'judicially created remedy'" that is "designed to deter police misconduct rather than to punish the errors of judges and magistrates." United States v. Leon, 468 U.S. 897, 906, 916 (1984) (citation omitted). "As with any remedial device, application of the exclusionary rule properly has been restricted to those situations in which its remedial purpose is effectively advanced." Illinois v. Krull, 480 U.S. 340, 347 (1987). The rule therefore does not apply "where [an] officer's conduct is objectively reasonable," because suppression "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." Leon, 468 U.S. at 919. For that reason, "evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." Ibid. (citation omitted).

Even assuming that the government's acquisition of precision location data for petitioner's phone was an impermissible search under the Fourth Amendment, the resulting evidence was admissible pursuant to the good-faith exception. The Marshals sought and obtained the tracking information pursuant to a court order issued under the Stored Communications Act. Pet. App. A2; D. Ct. Doc. 35-2. Nothing in the record suggests that the information contained in the Marshals' application was false, or that the Marshals otherwise engaged in any intentional misconduct. Gov't C.A. Br. 14. Nor does the case present any evidence or allegation that the magistrate judge failed to act in a neutral or detached fashion. Ibid. The application, moreover, established -- and the state court's order found, D. Ct. Doc. 35-2, at 3 -- probable cause that petitioner had committed an armed robbery, was a fugitive, and was using the AT&T cell phone. Gov't C.A. Br. 14. Finally, the order clearly identified the location of petitioner's phone as the item to be disclosed.

This Court has held that the good-faith exception applies to "officer[s] acting in objectively reasonable reliance on a statute," later deemed unconstitutional, that authorizes warrantless administrative searches. Krull, 480 U.S. at 349; see id. at 342. It follows a fortiori that officers act reasonably in relying on a statute, such as the Stored Communications Act, that authorizes the acquisition of records pursuant to an order issued

by a neutral magistrate. See 18 U.S.C. 2703(c)-(d). Suppression of the firearm derived from the tracking of petitioner's cell phone could not be expected to deter future unlawful conduct, and application of the exclusionary rule would therefore be inappropriate. For that reason as well, this case is an unsuitable vehicle to consider the question identified in the petition.

3. Petitioner discusses at length (Pet. 2, 4-7, 16) Carpenter v. United States, No. 16-402 (argued Nov. 29, 2017), which involves the question whether the government's acquisition of historical cell-site records from a cellular-service provider, created and maintained for the cell provider's business purposes, violates the Fourth Amendment rights of the individual customer to whom the records pertain. U.S. Br. at 14-41, Carpenter, supra (No. 16-402). Petitioner does not, however, request that this Court hold his petition pending a decision in Carpenter. To the contrary, he acknowledges (Pet. 7) that Carpenter "implicates an entirely distinct constitutional analysis" from this case.

The historical cell-site data at issue in Carpenter is created and recorded by service providers in the ordinary course of business "to find weak spots in their network and to determine whether roaming charges apply, among other purposes." United States v. Carpenter, 819 F.3d 880, 887 (6th Cir. 2016), cert. granted, 137 S. Ct. 2211 (2017); U.S. Br. at 9, Carpenter, supra (No. 16-402). This case does not concern historical cell-site

data. Rather, it concerns the collection and acquisition of precision real-time cell phone location information from a cellular-service provider, pursuant to a court order and probable cause. It thus implicates different technology, doctrine, and procedures. Indeed, the precedent on which the court of appeals relied in this case, United States v. Skinner, supra, was not even cited in the majority opinion in Carpenter. See Carpenter, 819 F.3d at 883-893.

In addition, in Carpenter, one of the orders obtained by the police covered 127 days of location data, and the question presented by the petitioner in that case is limited to location records for that period. Pet. at i, Carpenter, supra (No. 16-402); Pet. Br. at i, 6-7, Carpenter, supra (No. 16-402).[4] The petitioner in Carpenter has conceded that the government's acquisition of historical cell-site data covering a short period of time (including, presumably, the seven-hour period involved in this case) would not implicate the Fourth Amendment. Pet. Br. at 29-30, Carpenter, supra (No. 16-402); Pet. Reply Br. at 12, Carpenter, supra (No. 16-402).

It is therefore unlikely that this Court's decision in Carpenter will affect the proper disposition of this petition,

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[4] The other order covered a period of seven days and, according to the petitioner in Carpenter, resulted in disclosure of two days of historical cell-site data. Pet. Br. at 7, Carpenter, supra (No. 16-402).

particularly given the alternate grounds for affirmance in this case. See pp. 15-17, supra. Nevertheless, if the Court believes that its forthcoming decision in Carpenter may bear on the proper analysis in this case, it may wish to hold this petition pending its decision in Carpenter and then dispose of the petition as appropriate in light of its decision in that case.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, it should be held for Carpenter v. United States, No. 16-402 (argued Nov. 29, 2017), and disposed of as appropriate in light of the Court's decision in that case.

Respectfully submitted.

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