

No. 17-6213

IN THE
SUPREME COURT OF THE UNITED STATES

GAREIC JERARD HANKSTON,
Petitioner

v.

THE STATE OF TEXAS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT

REPLY TO BRIEF FOR THE STATE OF TEXAS IN OPPOSITION

ALEXANDER BUNIN
Chief Public Defender
Harris County, Texas

ANGELA L. CAMERON
Assistant Public Defender
SARAH BETH LANDAU
Assistant Public Defender
Harris County, Texas
1201 Franklin St., 13th Floor
Houston, Texas 77002
Telephone: (713) 368-0016

ATTORNEYS FOR PETITIONER
GAREIC JERARD HANKSTON

QUESTION PRESENTED

Whether the warrantless acquisition of historical cell phone records revealing the location and movements of a cell phone user over the course of 206 days violates the Fourth Amendment to the United States Constitution.

The issue is currently pending before this Court in *Carpenter v. United States* (No. 16-402), *cert. granted*, ___ U.S. ___, 2017 WL 2407484 (U.S. June 5, 2017).

TABLE OF CONTENTS

QUESTION PRESENTED	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	iv
REPLY TO BRIEF FOR THE STATE OF TEXAS IN OPPOSITION.....	1
CONCLUSION	8

TABLE OF AUTHORITIES

Cases

<i>Abbott v. Veasey</i> , 137 S. Ct. 612 (2017).....	5
<i>American Ry. Express Co. v. Levee</i> , 263 U.S. 19 (1923).....	3
<i>Carpenter v. United States</i> (No. 16-402), <i>cert. granted</i> , ___ U.S. ___, 2017 WL 2407484 (U.S. June 5, 2017)	vi, 7, 8
<i>French v. Taylor</i> , 199 U.S. 274 (1905)	3
<i>Garrett v. State</i> , 749 S.W.2d 784 (Tex. Crim. App. 1986).....	4
<i>Hankston v. State</i> , 517 S.W.3d 112 (Tex. Crim. App. 2017).....	3
<i>Hankston v. State</i> , No. 14-13-00923-CR, 2015 WL 3751551 (Tex. App. – Houston [14th Dist.] 2016), <i>aff’d</i> 517 S.W.3d 112 (Tex. Crim. App. 2017), <i>petition for cert. filed</i> , (U.S. July 10, 2017) (No. 17-6213)	2
<i>Hankston v. State</i> , No. PD-0887-15 (Tex. Crim. App., Feb. 3, 2016)	2
<i>Hunter v. State</i> , 954 S.W2d 767 (Tex. Crim. App. 1995).....	7
<i>Malik v. State</i> , 953 S.W.2d 234 (Tex. Crim App. 1997).....	4
<i>Market St. R.R. v. Railroad Comm’n</i> , 324 U.S. 548 (1945)	4
<i>Mount Soledad Memorial Ass’n v. Trunk</i> , 567 U.S. 944 (2012)	6
<i>Salazar v. State</i> , 818 S.W.2d 405 (Tex. Crim. App. 1988).....	6
<i>Smith v. Phillips</i> , 455 U.S. 209 (1982).....	4
<i>Smith v. State</i> , 332 S.W.3d 425, 447 (Tex. Crim. App. 2011).....	7

Constitutional Provisions

U.S. CONST. AMEND. IV	i, 1
-----------------------------	------

Statutes

28 U.S.C. § 1257	3
Tex. Code Crim. P. art 44.45.....	4, 6
Tex. R. App. P. 66.1	4, 6

Rules

Sup. Ct. R. 13.1.....	3
Sup. Ct. R. 15.6.....	vi

Treatises

Stephen M. Shapiro, <i>et al.</i> , <i>Supreme Court Practice</i> (10th ed. 2013).....	4
--	---

REPLY TO BRIEF FOR THE STATE OF TEXAS IN OPPOSITION

Pursuant to Supreme Court Rule 15.6, petitioner Gareic Jerard Hankston submits this Reply to the Brief in Opposition (“BIO”) filed by the State of Texas.

This petition presents the issue of whether the warrantless acquisition of historical cell phone records revealing the location and movements of a cell phone user over the course of 206 days violates the Fourth Amendment to the United States Constitution. The issue is currently pending before the Court in *Carpenter v. United States* (No. 16-402), *cert. granted*, ___ U.S. ___, 2017 WL 2407484 (U.S. June 5, 2017). On appeal, Mr. Hankston challenged the denial of his motion to suppress the cell site data on state and federal constitutional grounds. The Fourteenth Court of Appeals of Texas affirmed the judgment of the district court, finding that a cell phone subscriber relinquishes his privacy interest in his location by disclosing that information to a third party. *Hankston v. State*, No. 14-13-00923-CR, 2015 WL 3751551, at *4-*6 (Tex. App. – Houston [14th Dist.] 2016) (Pet. App. B), *aff’d* 517 S.W.3d 112 (Tex. Crim. App. 2017), *petition for cert.*

filed, (U.S. July 10, 2017) (No. 17-6213). The court of appeals concluded that Article I, section 9 of the Texas Constitution did not substantively differ from the Fourth Amendment to the United States Constitution. *Id.* at *6. Although Mr. Hankston renewed his state and federal challenges with the Court of Criminal Appeals of Texas in his petition for discretionary review, that court granted review as to the state constitutional ground only. *See Order Granting Petition for Discretionary Review, Hankston v. State*, No. PD-0887-15 (Tex. Crim. App., Feb. 3, 2016) (Pet. App. C).

The State of Texas argues that the petition was “untimely, or it raises an issue that was not addressed by the court to which Mr. Hankston seeks a writ of certiorari.” BIO at 3. The State of Texas’s timeliness argument is unavailing, however, because the Court of Criminal Appeals of Texas did not issue an opinion in this case until April 12, 2017. *See Hankston v. State*, 517 S.W.3d 112 (Tex. Crim. App. 2017) (Pet. App. D). The petition in this case was timely filed on July 10, 2017, 89 days from the decision of the Court of Criminal Appeals of Texas. *See Sup. Ct. R. 13.1*. The State of Texas suggests that Mr. Hankston should have filed an interlocutory petition for writ of

certiorari on the federal issue in 2016 while the Court of Criminal Appeals of Texas considered the case on state grounds. This suggestion finds no support in the relevant statute, rules, or the cases cited.

When the Court of Criminal Appeals granted review as to the state court ground, but not the federal ground, the case was not resolved. First, pursuant to 28 U.S.C. § 1257(a), this Court exercises jurisdiction over final judgments rendered by the highest court of the state and lacks supervisory power over state courts.¹ *See Smith v. Phillips*, 455 U.S. 209, 221 (1982). “The literal terms of § 1257(a) appear to preclude review of interlocutory state court judgments[.]” Stephen M. Shapiro, *et al.*, *Supreme Court Practice* 157 (10th ed. 2013). The general rule is that to be reviewable, the state court judgment “must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not merely interlocutory or intermediate steps therein. It must be the final

¹ Neither case cited by the State of Texas stands for the proposition that a state petitioner is required to bring an interlocutory petition for writ of certiorari. *See* BIO at 4 (citing *American Ry. Express Co. v. Levee*, 263 U.S. 19, 20 (1923) (the highest court in Louisiana had refused review entirely) & 5 (citing *French v. Taylor*, 199 U.S. 274, 278-279 (1905) (a federal question raised in petition for rehearing was not in the record and came too late in the proceedings). Accordingly, these citations are not relevant here, where the highest state court granted review.

word of a final court.” *Market St. R.R. v. Railroad Comm’n*, 324 U.S. 548, 551 (1945).

Second, when the Court of Criminal Appeals of Texas grants review, that court has plenary power over the entire case. *See Garrett v. State*, 749 S.W.2d 784, 786 (Tex. Crim. App. 1986) (“[T]his Court has plenary power upon review to dispose of a cause ‘as the law and nature of the case may require’”), *overruled on other grounds by Malik v. State*, 953 S.W.2d 234 (Tex. Crim App. 1997). The Court of Criminal Appeals “may review decisions of the court of appeals on its own motion.” Tex. Code Crim. P. art 44.45; *see also* Tex. R. App. P. 66.1. The official notice of the grant of discretionary review here does not deny review of the remaining federal ground:

2/3/2016

HANKSTON, GAREIC JERARD Tr. Ct. No. 1326559

COA No. 14-13-00923-CR

PD-0887-15

On this day, the Appellant’s petition for discretionary review has been granted. The original and ten [copies](#) of the appellant’s brief must be filed with this Court within 30 days. The State’s brief is due 30 days after the timely filing of the appellant’s brief. ORAL ARGUMENT WILL BE PERMITTED; GRANTED ON GROUND NO. 1

Abel Acosta, Clerk

Pet. App. C. The whole case, including grounds not asserted by the parties nor granted review, was before the Court of Criminal Appeals.

Third, to require Mr. Hankston to petition for certiorari before the Court of Criminal Appeals has resolved the case would be premature,

leaving the case poorly suited for review. The Court denied certiorari in a case in an interlocutory posture for this very reason. *See Abbott v. Veasey*, 137 S. Ct. 612, 613 (2017) (statement of Roberts, C.J., respecting the denial of certiorari). In a suit over a Texas voter identification statute the court of appeals had remanded to the district court for further proceedings as to remedy after vacating the district court's finding of discriminatory intent. *Id.* Defendants, Texas officials, asked this Court to determine whether the legislature acted with a discriminatory purpose and whether the statute violated the Voting Rights Act. *Id.* Chief Justice Roberts reasoned that the petitioners could raise either or both of the issues again after entry of final judgment by the district court because they “will be better suited for certiorari review at that time.” *Id.*; *see also Mount Soledad Memorial Ass’n v. Trunk*, 567 U.S. 944, 132 S. Ct. 2535, 2536 (2012) (statement of Alito, J., respecting the denial of the petitions for writs of certiorari) (noting that because the petitions came to the Court in an interlocutory posture, no final judgment had been rendered, making it unclear precisely what action the government would be required to take under

the Establishment Clause after acquiring property from the city of San Diego to preserve a memorial consisting of a large white cross).

Similarly here, the entire case remained pending before the Court of Criminal Appeals, which could have resolved the issue on state constitutional grounds, potentially obviating the need for a petition for writ of certiorari. The Court of Criminal Appeals could have discovered an issue not raised by the parties and resolved it on its own motion,² or decided to review the federal constitutional ground,³ or remanded it to the Court of Appeals, which would have affected the need for any petition for writ of certiorari.

As the Court of Criminal Appeals of Texas has explained, the petition for discretionary review is “functus officio” once it is granted. *Hunter v. State*, 954 S.W2d 767, 769 (Tex. Crim. App. 1995). The purpose of the state petition for discretionary review is to cross the threshold of the court in its role as “caretaker of Texas Law,” not as “arbiter of individual applications [of the law].” *Id.* (citation omitted). The court could have done anything it chose after accepting the case for

² See Tex. Code Crim. P. art 44.45; see also Tex. R. App. P. 66.1.

³ See, e.g., *Salazar v. State*, 818 S.W.2d 405, 408 n.7 (Tex. Crim. App. 1988) (noting the court’s decision to review appellant’s tenth ground on the court’s own motion).

review. *See, e.g., Smith v. State*, 332 S.W.3d 425, 447 (Tex. Crim. App. 2011) (granting a ground for review on the court's own motion then dismissing it as improvidently granted). In short, filing a writ for certiorari after the Court of Criminal Appeals granted review only on one ground before that court resolved the case would have left Mr. Hankston in the untenable position of filing an unripe, interlocutory petition requesting an advisory opinion from this Court. As presented now, the case is ripe to be resolved based on this Court's decision in *Carpenter v. United States* (No. 16-402), *cert. granted*, ___ U.S. ___, 2017 WL 2407484 (U.S. June 5, 2017).

CONCLUSION

For the foregoing reasons, as well as for those set forth in the petition for writ of certiorari, this case should be held pending this Court's disposition of *Carpenter*. Should this Court determine the Fourth Amendment is violated by the warrantless acquisition of historical cell phone records, this Court should grant certiorari, vacate the decision of the Texas Fourteenth Court of Appeals and remand this case for further consideration in light of its decision.

Respectfully submitted,

ALEXANDER BUNIN
Chief Public Defender
Harris County Texas

ANGELA L. CAMERON
Assistant Public Defender
SARAH BETH LANDAU
Assistant Public Defender
Harris County, Texas
1201 Franklin Street, 13th Floor
Houston Texas 77002
Telephone: (713) 368-0016