No. 17-6892

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD ANTHONY WILFORD, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's Fourth Amendment rights were violated by law enforcement's acquisition, pursuant to state-court orders, of real-time location information for petitioner's cell phone.

2. Whether the district court correctly determined, following a hearing under Franks v. Delaware, 438 U.S. 154 (1978), that inaccuracies in an application for an order authorizing the "pinging" of petitioner's cell phone were inadvertent and did not require suppression of evidence.

3. Whether evidence obtained from the warrantless installation and use of Global Positioning System (GPS) tracking devices attached to petitioner's cars was admissible under the good-faith exception to the exclusionary rule.

4. Whether the failure to arraign petitioner constituted reversible error under the Due Process Clause where petitioner declined the opportunity for an arraignment at his initial appearance and did not object to the lack of an arraignment before trial.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is unreported but is available at 689 Fed. Appx. 727. The opinion of the district court denying petitioner's motion to suppress (Pet. App. 17a-56a) is reported at 961 F.Supp. 2d 740. The opinion of the district court denying petitioner's motion to dismiss and motion for a new trial (Pet. App. 68a-79a) is unreported but is available at 2016 WL 759174.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 2017. A petition for rehearing was denied on June 20, 2017 (Pet.

App. 12a-13a). On September 5, 2017, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 17, 2017, and the petition was filed on November 15, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of conspiracy to distribute and possess with intent to distribute cocaine, in violation of 21 U.S.C. 846. Judgment 1. The district court sentenced him to 340 months of imprisonment, to be followed by ten years of supervised release. Id. at 2-3. The court of appeals affirmed. Pet. App. 1a-9a.

1. From 2010 until his arrest in 2011, petitioner belonged to a drug trafficking organization led by Lawrence Hayes. Pet. App. 25a-26a. The organization was based in Baltimore, Maryland, and operated in other States, including California. Id. at 25a-27a. During a joint investigation conducted by federal and state law-enforcement agencies, agents placed "slap on" Global Positioning System (GPS) tracking devices on 12 vehicles, including two used by petitioner. Id. at 27a-28a (citation omitted). The GPS devices were used in 2010 and 2011, and no warrant was obtained for their use. Id. at 28a. The agents also obtained orders from a Maryland court to obtain location data for

petitioner's cell phone by periodically "pinging" the phone. Id. at 28a-29a.

Evidence derived from the GPS devices and from pinging petitioner's cell phone enhanced the agents' ability to surveil petitioner as he and Hayes exchanged suspicious boxes and bags at various places. Pet. App. 29a-33a. From March to May 2011, agents executed six warrants at residences used by petitioner and other members of the Hayes organization. Id. at 34a. On May 20, 2011, the search of a residence frequented by petitioner at 1500 Cliftview Street in Baltimore resulted in the seizure of ten kilograms of cocaine. Ibid.

2. a. A federal grand jury in the District of Maryland returned a superseding indictment charging petitioner with conspiracy to distribute and possess with intent to distribute cocaine, in violation of 21 U.S.C. 846. Superseding Indictment 1-2. After indictment, petitioner filed a motion for a hearing under Franks v. Delaware, 438 U.S. 154 (1978), on the ground that, inter alia, the application for an order authorizing location data for petitioner's cell phone submitted to a Maryland court on November 18, 2010, contained false statements by a Drug Enforcement Administration agent. Pet. App. 50a.[1] Specifically, the

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[1] In Franks, the Court held that where a defendant makes a substantial preliminary showing that a reckless or intentional false statement was included by an affiant in a search warrant application and that false statement is necessary to a finding of probable cause, the Fourth Amendment requires a hearing at the

application stated that in August 2010, a confidential informant had named petitioner as a source of cocaine supply operating in Baltimore, but that informant had actually identified Hayes. Id. at 51a-52a. The application also incorrectly stated that another informant had provided petitioner's cell phone number and that the cell phone was used to contact Hayes, when in fact the cell phone number belonged to someone else. Id. at 52a. And the application stated that petitioner owned a dump truck business called B'MORES DUMPING, when in fact he owned a different dump truck business with the same address. Ibid.

The district court held a Franks hearing. Pet. App. 52a. After hearing testimony from the agents, the court concluded that although the application contained some incorrect information, "the inaccuracies were the result of negligence, and not a deliberate intent to mislead or a reckless disregard for the truth." Ibid. The court additionally explained that the agents had no incentive to mislead because at the time of the application, they had probable cause to believe that petitioner was a part of Hayes's drug trafficking organization. Id. at 52a-53a. The court accordingly concluded that suppression was not appropriate. Id. at 53a.

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defendant's request to determine whether the warrant establishes probable cause. 438 U.S. at 164-171.

b. Petitioner also moved to suppress location information obtained pursuant to the GPS tracking devices and the court orders authorizing the pinging of his cell phone. Pet. App. 36a-50a.

The district court denied petitioner's motion to suppress evidence obtained through the GPS devices. Id. at 37a-46a. The court acknowledged that in United States v. Jones, 565 U.S. 400 (2012), this Court held that the government's installation and use of a GPS tracking device on a target's vehicle constitutes a Fourth Amendment search that requires a warrant. Pet. App. 37a. The district court determined, however, that because the government's warrantless installation and use of GPS tracking devices to monitor petitioner's vehicles preceded this Court's decision in Jones, the GPS evidence was admissible under the good-faith exception to the exclusionary rule. Id. at 38a-44a.

The district court also denied petitioner's motion to suppress evidence obtained pursuant to the state-court orders that authorized the pinging of petitioner's cell phone. Pet. App. 46a-50a. Petitioner contended that cell-phone pinging was not authorized by the Maryland pen register statute under which the orders were sought. Id. at 46a. The court determined, however, that even if pinging fell outside the scope of the Maryland statute, a federal-court suppression remedy would not be warranted absent violation of the Fourth Amendment. Id. at 46a-48a. Although petitioner had not invoked the Fourth Amendment in his brief, the court assumed arguendo that the pinging of petitioner's cell phone to determine its location was a Fourth Amendment search. Id. at 49a. But it found no constitutional violation, because "the orders authorizing the pinging satisfied the Fourth Amendment's warrant requirement." Ibid. The court also found no impropriety in the government's reliance in a federal prosecution on a warrant issued by a state judge. Ibid.

c. Following a trial, a jury found petitioner guilty of conspiracy to distribute and possess with intent to distribute cocaine, in violation of 21 U.S.C. 846. Judgment 1. The district court sentenced him to 340 months of imprisonment, to be followed by ten years of supervised release. Judgment 2-3.

d. After his conviction and while an appeal was pending, petitioner filed a pro se motion to dismiss the district court's order on the ground that he was never arraigned after the indictment, and a motion for a new trial based on the government's alleged use of a cell-site simulator during the investigation. Pet. App. 68a-69a, 77a.[2] The court denied the motions. Id. at 68a-79a.

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[2] Cell-site simulators are devices that transmit signals to cell phones within the simulator's coverage area as if they were a cell tower. See generally Department of Justice Policy Guidance: Use of Cell-Site Simulator Technology, at 2 (Sept. 3, 2015), https://www.justice.gov/opa/file/767321/download. In response, cellular devices transmit signals that identify the device in the same way as they would with a networked cell phone tower. Ibid. Upon identifying the target device, the simulator obtains signaling information for the device (i.e., the relative signal

With respect to the arraignment issue, the district court observed that during an initial appearance before a magistrate judge, defense counsel had advised the court that petitioner had received a copy of the indictment, the magistrate judge had explained the charges and the maximum and minimum penalties to petitioner, and petitioner had stated that he understood. Pet. App. 69a. The magistrate judge had then asked, "[D]o you want to do an arraignment while you are here?" Ibid. (citation omitted; brackets in original). Defense counsel had declined, and no arraignment was ever held. Ibid. Reviewing the record, the court found no prejudice to petitioner from the lack of an arraignment. Id. at 71a. From the beginning, the court explained, petitioner had vigorously contested the charge and "never voiced any complaints as to the lack of opportunity to enter a formal plea of guilty or not guilty." Ibid. The court further explained that "[t]he record amply demonstrates that [petitioner] was aware of the charge against him," the range of possible penalties, and his rights. Id. at 73a.

The district court also determined that petitioner was not entitled to a new trial based on the government's use of a cell-site simulator. Pet. App. 77a-78a. The court explained that petitioner lacked a personal Fourth Amendment right to challenge

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strength and general direction), which can be used to triangulate the position of the device. Ibid.

the use of that device because it was used only to obtain information about Hayes. Id. at 78a. Furthermore, the court explained, the only information derived from using the cell-site simulator was confirmation of Hayes' cell phone number, which had already been provided to the government by AT&T. Ibid. The court thus found that the device had no effect on the outcome of petitioner's trial. Ibid.

3. The court of appeals affirmed. Pet. App. 1a-9a. The court rejected petitioner's argument that the district court lacked jurisdiction because petitioner was not arraigned. Id. at 3a-4a. The court explained that technical noncompliance with Federal Rule of Criminal Procedure 10, which requires that a defendant be advised in open court of the substance of the charge against him before being called upon to plead, "does not warrant reversal of a conviction if not raised before trial." Pet. App. 3a (citing United States v. Reynolds, 781 F.2d 135, 136 n.2 (8th Cir. 1986)). Rather, the court explained, failure to arraign "only warrants a reversal if it causes prejudice or impairs a substantial right." Ibid. (quoting United States v. Williams, 152 F.3d 294, 299 (4th Cir. 1998)). The court noted that petitioner did not raise this issue before or during trial, and it determined that petitioner had not established prejudice or impairment of a substantial right, because he was properly advised of the charges against him at the initial appearance before a magistrate judge

and his attorney received a copy of the superseding indictment and later filed numerous motions. Ibid.

The court of appeals also rejected petitioner's argument that the Fourth Amendment required exclusion of evidence obtained from the warrantless placement of GPS devices on his vehicles. Pet. App. 4a-5a. Relying on circuit precedent, the court explained that "[t]he good faith exception to the exclusionary rule applies where warrantless GPS evidence was obtained" before this Court's decision in United States v. Jones, 565 U.S. 400 (2012). Pet. App. 5a (citing United States v. Stephens, 764 F.3d 327 (4th Cir. 2014), cert. denied, 136 S. Ct. 43 (2015)).

The court of appeals further rejected petitioner's challenge to the government's use of cell phone location data obtained pursuant to the state court orders. The court stated that, "[h]aving reviewed the record," it "discern[ed] no error," adding that "[s]earch warrants obtained during a joint federal-state investigation may be authorized by Federal Rule 41(b) or by state law and may serve to uncover violations of federal law as well as state law." Pet. App. 5a (quoting United States v. Claridy, 601 F.3d 276, 281-282 (4th Cir. 2010)).

The court of appeals additionally determined that petitioner lacked a Fourth Amendment right that would allow him to challenge the government's use of a cell-site simulator during the investigation. Pet. App. 5a-6a. The court explained that, according to the record, the government used the device to confirm information about a co-conspirator's phone number, not petitioner's phone number. Id. at 5a. The court noted that petitioner had presented "only supposition and conjecture" to support his assertion that a cell-site simulator was used to obtain information about him. Ibid. The court further explained that petitioner had failed to show that any evidence introduced at trial was tainted by the use of a cell-site simulator. Id. at 5a-6a.

ARGUMENT

Petitioner contends (i) that this Court should grant certiorari to decide whether the government's acquisition of real-time location information for a cell phone constitutes a Fourth Amendment search (Pet. 10-24); (ii) that he was improperly denied a hearing under Franks v. Delaware, 438 U.S. 154 (1978), with respect to the government's application for an order authorizing location data for his cell phone submitted to a Maryland court on November 18, 2010 (Pet. 25-27); (iii) that the court of appeals improperly determined that evidence obtained through the warrantless use of a GPS device to track his vehicle in 2010 and 2011 was admissible under the good-faith exception to the exclusionary rule (Pet. 28-34); and (iv) that the district court lacked jurisdiction because he was never arraigned (Pet. 35-39). The court of appeals correctly rejected each of those contentions, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is therefore unwarranted. Based on the first question presented, however, the Court could elect to hold the petition pending its decision in Carpenter v. United States, No. 15-402 (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 cell service provider.

1. The government has previously addressed the argument that the government's acquisition of real-time location information for a cell phone constitutes a Fourth Amendment search in its brief in opposition to the pending petition for a writ of certiorari in Rios v. United States, No. 16-7314 (filed Dec. 21, 2016). See U.S. Br. in Opp. at 11-18, Rios, supra (No. 16-7314). The court orders authorizing the pining of petitioner's phone permitted officer to obtain location data for the cell phone for a longer time period than the court order obtained in Rios. Nevertheless, for the reasons explained in that brief, a copy of which is being served on petitioner, review of petitioner's claim is not warranted.

In the alternative to plenary review, petitioner requests (Pet. 10) that this Court hold his petition pending disposition of Carpenter, No. 16-402 (argued Nov. 29, 2017), which involves the question whether the government's acquisition of historical cell-site records from a cell service provider, created and maintained for the 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). The government's brief in opposition in Rios explains why the government's acquisition of real-time location information for a cell phone is different from the government's acquisition of historical cell-site records from a cell service provider. See U.S. Br. in Opp. at 18-20, Rios, supra (No. 16-7314). For the reasons explained in that brief, it is unlikely that this Court's decision in Carpenter will affect the proper disposition of this petition. 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.[3]

With respect to the state-court pinging orders, petitioner also repeats (Pet. 13-14) his argument that collection of location information about his cell phone was invalid based on the government's use of a cell-site simulator. The court of appeals correctly determined, however, that the record shows that officers

[3] The Court appears to be holding Rios and at least two other cases raising petitioner's first question presented for Carpenter. See Rios, supra (No. 16-7314); Riley v. United States, petition for cert. pending, No. 17-5943 (filed Sept. 2, 2017); Patrick v. United States, petition for cert. pending, No. 17-6256 (filed Oct. 2, 2017).

only used that device to ping Hayes's phone, and petitioner therefore lacks a personal Fourth Amendment right that would enable him to challenge the officers' investigative actions. Pet. App. 5a-6a; see United States v. Payner, 447 U.S. 727, 731 (1980); Rakas v. Illinois, 439 U.S. 128, 133-134 (1978).

2. Petitioner contends (Pet. 25-27) that he was improperly denied a Franks hearing with respect to the government's application for an order authorizing collection of cell-phone location data that was submitted to a Maryland court on November 18, 2010. Petitioner failed to raise that contention in the court of appeals, and the court did not address it. The Court's usual practice is to "refrain from addressing issues not raised in the [c]ourt of [a]ppeals," EEOC v. Federal Labor Relations Auth., 476 U.S. 19, 24 (1986) (per curiam), and no reason exists to depart from that practice here. See United States v. Williams, 504 U.S. 36, 41 (1992) ("Our traditional rule * * * precludes a grant of certiorari * * * when the question presented was not pressed or passed upon below.") (citation and internal quotation marks omitted).

In any event, contrary to petitioner's contention (Pet. 25), the district court did in fact hold a Franks hearing on his claim that the application submitted on November 18, 2010, contained false statements. Pet. App. 52a. Following that hearing, it concluded that inaccuracies in the application "were the result of negligence, and not a deliberate intent to mislead or a reckless disregard for the truth." Ibid. The court's fact-bound conclusion on that issue would not warrant this Court's review. United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts."); see Sup. Ct. R. 10.

3. Petitioner further contends (Pet. 28-34) that the good-faith exception to the exclusionary rule does not permit the government to introduce evidence obtained through the warrantless use of a GPS tracking device on a vehicle, which the Court held to be a Fourth Amendment search in United States v. Jones, 565 U.S. 400 (2012), even though the warrantless use of GPS devices to track petitioner's vehicles occurred in 2010 and 2011 -- before this Court's decision in Jones. Pet. App. 28a. The government has previously addressed petitioner's argument that the good-faith exception to the exclusionary rule does not authorize the admission of evidence obtained from the pre-Jones warrantless installation and use of a GPS tracking device in its brief in opposition to the petition for a writ of certiorari in Stephens v. United States, cert. denied, 136 S. Ct. 43 (2015). See U.S. Br. in Opp. at 6-9, Stephens, supra (No. 14-1313). For the reasons explained in that brief, a copy of which is being served on petitioner, review of petitioner's claim is not warranted. This Court has denied several petitions for writs of certiorari presenting similar good-faith

questions in the context of GPS tracking devices.[4] The same result is warranted here.

4. Petitioner further contends (Pet. 35-39) that his due process rights were violated because he was never formally arraigned. Because petitioner forfeited that claim by failing to raise it before trial, as required by Federal Rule of Criminal Procedure 12(b)(3) (2013), the claim is reviewable only for plain error. See, e.g., United States v. Catone, 769 F.3d 866, 871 (4th Cir. 2014). Petitioner must therefore show: (1) an error (2) that is plain or obvious and (3) that has affected his substantial rights; and if the first three prongs are satisfied, this Court may exercise discretion to correct the error if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. See, e.g., United States v. Marcus, 560 U.S. 258, 262 (2010).

This Court has held that a defendant who is not arraigned must show that he was prejudiced by the lack of an arraignment in order to obtain relief under the Due Process Clause. Garland v. Washington, 232 U.S. 642, 644-647 (1914); see United States v. Rogers, 469 F.2d 1317, 1317-1318 (5th Cir. 1972). The court of

[4] See, e.g., Katzin v. United States, 135 S. Ct. 1448 (2015) (No. 14-7818); Brown v. United States, 135 S. Ct. 1031 (2015) (No. 14-237); Fisher v. United States, 135 S. Ct. 676 (2014) (No. 14-5207); Smith v. United States, 135 S. Ct. 704 (2014) (No. 13-10424); Aguiar v. United States, 135 S. Ct. 400 (2014) (No. 13-10076); Sparks v. United States, 134 S. Ct. 204 (2013) (No. 12-10957).

appeals' determination that petitioner was not prejudiced by the lack of an arraignment is a fact-bound ruling that does not warrant this Court's review, particularly in a plain-error posture. The record shows that petitioner declined the magistrate judge's offer of an arraignment at his initial appearance, and the lack of an arraignment thereafter was an oversight that did not affect the proceedings. Pet. App. 69a. The record "amply demonstrates that [petitioner] was aware of the charge against him," the maximum and minimum penalty, and his rights, id. at 73a.[5]

CONCLUSION

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

Respectfully submitted.

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[5] Petitioner's assertion (Pet. 35) that he was also denied a bail hearing is incorrect. He was detained by agreement after a hearing. See No. 1:11-cr-00258 Docket No. 88 (Sept. 19, 2011).