

No. 17-8608

IN THE
SUPREME COURT OF THE UNITED STATES

NATHANIEL PEMBROOK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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The two points raised in the government's response to Nathaniel Pembroke's petition for a writ of certiorari warrant brief reply.

1. Pembroke concurs with the government's request that this Court grant the petition in regard to whether his Hobbs Act conspiracy conviction constitutes a predicate offense for purposes of 18 U.S.C. § 924(c) in light of *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). (Resp. 3–5.) Notably, the Sixth Circuit itself signaled this week

that, in light of *Dimaya*, it might revisit *United States v. Taylor*, 814 F.3d 340, 376–79 (6th Cir. 2016), on which the court relied to deny Pembroke’s arguments about § 924(c). See *Harper v. United States*, No. 18-1202, Order, ECF No. 10-2 (6th Cir. Jun. 18, 2018) (granting certificate of appealability on whether “*Dimaya* casts doubt on this court’s decision in *Taylor*”). Thus, Pembroke agrees with the government that this Court should grant his petition, vacate the Sixth Circuit’s judgment and remand for further consideration in light of *Dimaya*.

2. As to *Carpenter v. United States*, No. 16-402, the government notes, as did Pembroke, that the Sixth Circuit purported not to rely on *Carpenter* in resolving his case. (Resp. 3.) The government suggests two alternative approaches: this Court could deny the petition, or it could wait for *Carpenter* and then “dispose of the petition as appropriate in light of the decision in that case.” (*Id.*)

Now that this Court has decided *Carpenter* in favor of the petitioner, it is clear that the government’s second suggested approach is the better one. The possible application of the good-faith exception was specifically mentioned at oral argument before this Court in *Carpenter*. Tr., Oral Argument, *Carpenter v. United States*, at 90–91 (No. 16-402 Nov. 29, 2017). Yet this Court’s decision does not resolve this question; instead, it reverses the judgment of the Sixth Circuit and remands for further proceedings in light of the Court’s recognition that Fourth Amendment protections

apply to historic cell-site location records. *Carpenter v. United States*, No. 16-402, 585 U.S. ___, Slip Op. at 22–23 (June 22, 2018).

This Court should follow the same approach here as it did in *Carpenter*. The facts of the two cases are not persuasively distinguishable. As it did with Mr. Carpenter, the government obtained cell-site information without a warrant and used it against Pembroke and his co-defendants at trial. The prosecution even presented testimony from the same exact FBI agent, Christopher Hess, as it used in *Carpenter*. Compare *id.* at 3–4, with Pet. Appendix at 6a.

Moreover, *Carpenter* gives Pembroke cause to ask the Sixth Circuit to revisit its good-faith ruling. *Carpenter* explains, for example, that “historical cell-site records present even greater privacy concerns than the GPS monitoring of a vehicle we considered in [*United States v. Jones*, 565 U.S. 400 (2012)].” *Carpenter*, Slip Op. at 13. This analysis undermines the Sixth Circuit’s conclusion that the absence of binding authority specifically addressing historic cellphone location information meant that law enforcement acted in good faith in obtaining this data without a warrant in this case. Thus, especially if this Court decides, in line with the agreement of both parties here, that it should grant Pembroke’s petition and remand in light of *Dimaya*, it should also vacate the Sixth Circuit’s ruling regarding Pembroke’s Fourth Amendment challenge and remand for further consideration in light of *Carpenter*.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

FEDERAL PUBLIC DEFENDER

By:

A handwritten signature in dark ink, appearing to read "Benton C. Martin", written over a light blue horizontal line.

Benton C. Martin
Deputy Defender

Counsel for Petitioner Nathaniel Pembroke

Detroit, Michigan
June 22, 2018