

No. 17-9235

**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term, 2017

SHAEED CALHOUN, Petitioner

v

UNITED STATES OF AMERICA, Respondent

**ON PETITION FOR WRIT OF CERTIORARI TO THE
SIXTH CIRCUIT COURT OF APPEALS**

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Issue I

Petitioner has asked this Court to grant certiorari to resolve the important question arising in the lower court decisions in his case and about which there is a split among the circuits, concerning the meaning of the good faith exception for binding appellate precedent and whether the deterrent purposes of Fourth Amendment (whether “the exclusionary rule applies when the law governing the constitutionality of a particular search is unsettled.”) *Davis v. United States*, 564 US 229, 254 (2011) (Sotomayor, concurring), is served by suppression where prosecutors who applied for seizure orders under the SCA knew or should have known that a warrant was required under the SCA. *United States v. Leon*, 468 US 897 (1984). This Issue is important because prosecutors regularly use long-term CSLI as a tool for retroactive tracking of defendants and because this issue will continue to arise in similar cases in the wake of *Carpenter v. United States*, __ US __; 138 S Ct 2208 (2018).

Contrary to the Response’s suggestion, Resp. Mem. 3, the *Krull* good-faith exception for a law enforcement officer’s reliance on a statute subsequently held unconstitutional, *Illinois v. Krull*, 480 US 340 (1987), neither resolves ambiguity in the meaning of the *Davis* judicial precedent exception or provides any reason to explain why a good-faith exception should apply where government officers have obtained long-term CSLI without a search warrant.

The lower courts in Petitioner’s case denied his motion to suppress 45 days

of Cell Site Location Information (CSLI) obtained by prosecutors without a search warrant before this Court's decision in *Carpenter*, _ US_, 138 S Ct 2208 (2018). The CSLI in Petitioner's case had been compelled in 2014 by orders obtained by Assistant United States Attorneys pursuant the reasonable grounds provision of the Stored Communications Act, 18 USC §2703(d), instead of the alternative section of the statute requiring probable cause and a warrant, §2703(c)(1)(A).

The lower courts in Petitioner's case denied his motion to suppress because in their view controlling precedent did not require a search warrant under §2703(d) for long term CSLI. ("there was no binding authority holding that obtaining the cell-site data, even cell-site data revealing an individual's whereabouts over an extended period or his presence in a private place, required a warrant supported by probable cause.") Pet. App. C 33, B 12-13; *Davis v. United States*, 564 US 229, 236 (2011). As discussed below, however, precedent distinguishing circumstances permitting a SCA reasonable grounds order from that requiring a search warrant was mixed prior to the lower court decisions in Petitioner's case and included at least 19 majority, dissenting and concurring circuit opinions explaining application of Fourth Amendment precedent discussing reasonable expectation of privacy and the third-party doctrine. There was no "bright line rule" dictating that a search warrant was not required.

1. This Court held in *Carpenter* that "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI", 138 S Ct at 2217; and, that "[t]he location information obtained from

Carpenter’s wireless carriers was the product of a search.” *Id.* While the holding is described as narrow, *Id.* at 2221, it squarely applies to long-term CSLI like the 45 days of CSLI in Petitioner’s case.

The opinion in *Carpenter* also explains that precedent, including the third-party doctrine, *Id.* at 2219-20, as applied in Petitioner’s case and others examining the use of the SCA to authorize seizure of historical cell site location records, is ambiguous in the context of new technologies including the creation of historical digital records of cell phone locations or CSLI. *Carpenter* applies Fourth Amendment jurisprudence to a “new phenomenon: the ability to chronicle a person’s past movements through a record of his cell phone signals.” *Id.* 2216. Decisions prior to *Carpenter* did not establish a bright line rule. Fourth Amendment precedent as applied to digital cell phone location records prior to *Carpenter* is ambiguous. (“Instead, requests for cell-site records lie at the intersection of two lines of cases, both of which inform our understanding of the privacy interests at stake.”) *Id.* 2214-15.

2. Before *Carpenter*, five courts of appeals to consider the Fourth Amendment status of historical CSLI, produced 19 separate majority, concurring and dissenting opinions. *In re Application of U.S. for an Order Directing a Provider of Elec. Commc’n Serv. To Disclose Records to Gov’t*, 620 F3d 304, 305 (3rd Cir. 2010); *United States v. Stimler*, 864 F3d 253 (3rd Cir. 2017); *United States v. Graham*, 824 F3d 421, 424 (4th Cir. 2016)(en banc); *United States v. Graham*, 796

F3d 332, 338 (4th Cir. 2015), vacated, reh’g en banc granted, 624 Fed App’x 75 (4th Cir. 2015); *In Re Application of the U.S. for Historical Cell Site Data*, 724 F3d 600, 602 (5th Cir. 2013) *United States v. Carpenter*, 819 F3d 880 (6th Cir. 2016), cert granted, 137 S Ct 2211; *United States v. Davis*, 785 F3d 498, 500 (11th Cir. 2015)(en banc); *United States v. Davis*, 754 F3d 1205, 1208 (11th Cir. 2014), vacated reh’g en banc granted, 573 Fed App’x 925 (11th Cir. 2014).

3. The SCA is also unclear on its face because it identifies two conflicting, contradictory means for the government to obtain CSLI: (1) a warrant requiring probable cause, or (2) a court order requiring reasonable suspicion under § 2703(d). Although § 2703(c)(1)(A) unambiguously requires the government to comply with Fed. R. Crim. P. 41, demonstrating probable cause based on facts established by sworn testimony before it can obtain the data, § 2703(d) includes no such requirements. The Stored Communications Act, 18 USC §2703, permits law enforcement officers to seek Cell Site Location Information (CSLI) by either of two means: a search warrant requiring a showing of probable cause, §2703(c)(A), or an order for disclosure based on a showing of “specific and articulable facts showing that there are reasonable grounds . . .” §2703(c)(B) and (d). The SCA leaves it to law enforcement to choose which option to utilize. The judge’s role in this statutory scheme is to determine the adequacy of a factual showing made to support an application – reasonable grounds or probable cause – not necessarily to vet the particular choice of the officer under the “reasonable grounds” section of the SCA,

the officer need only show the records sought will be “relevant and material to an ongoing investigation.” 18 USC §2703(d)(“ a ggantic departure from the probable cause rule). *Carpenter*, 138 S Ct 2221. In Petitioner’s case, Assistant United States Attorneys obtained 45 days of his CSLI in 2014 using the order provision of the statute and its reasonable grounds standard, §2703(c)(A), instead of a search warrant requiring probable cause. Pet. Br. 6-9.

The Government’s Response, on the other hand, Resp. Mem. 2-4, which suggests consideration of *Illinois v. Krull* good-faith exception for an officers reliance on a statute that is subsequently held to be unconstitutional, only adds to this ambiguity. See, *Krull*, 480 US 340, 349 (1987)(“The present case presents the question whether a similar exception to the exclusionary rule should be recognized when officers act in objectively reasonable reliance upon a *statute* authorizing warrantless administrative searches, but where the statue is ultimately found to violate the Fourth Amendment.”) *Id* 342. Moreover, the *Krull* good-faith exception as presented by the Response, Resp. 3, does not apply here for multiple reasons: it was not raised or discussed in the lower courts opinions in Petitioner’s case; and, the opinion in *Krull* is based on a statute that permitted warrantless administrative inspections, unlike the SCA that permits applications for judicial orders or search warrants and requires of necessity reliance by prosecutors who apply for the order on judicial precedent to choose between those alternatives.

In *Illinois v. Krull*, *supra*, this Court examined the question “whether a

good-faith exception to the Fourth Amendment exclusionary rule applies when an officer's reliance on the constitutionality of a statute is objectively reasonable, but the statute is subsequently declared unconstitutional." *Id.* 346. In *Krull*, a Chicago police officer conducted a warrantless administrative inspection of an auto wrecking yard and arrested Krull, the license holder, after identifying several suspect stolen vehicles. Krull moved to suppress evidence seized in the inspection after the administrative inspection statute was found unconstitutional. State courts rejected the good-faith exception. This Court reversed. It concluded that the officer's reliance on the state inspection statute to conduct his warrantless search was objectively reasonable. *Id.* at 357. ("this defect in the statute was not sufficiently obvious so as to render a police officer's reliance upon the statute objectively unreasonable.") *Id.* at 360.

Unlike the statute in *Krull* which facially authorized warrantless inspections of certain businesses by police officers, the SCA "permits the Government to compel the disclosure of certain telecommunications records," *Carpenter v. United States*, 138 S Ct 2206, 2212 (2018), by means either of judicial orders based on reasonable grounds or a probable cause. The reasoning of *Krull* narrowly focuses on a question that does not arise in the SCA context, whether the exclusionary rule is aimed at legislators.

Neither *Krull* nor the *Davis* binding appellate precedent exception to Fourth Amendment exclusions apply to Petitioner's case or to the question presented by

Petitioner concerning the meaning of the good-faith exception for binding precedent. (“There is no evidence suggesting that Congress or state legislatures have enacted a significant number of statutes permitting warrantless administrative searches violative of the Fourth Amendment.”) *Id* 351.

Issue II

1. In its Response to Petitioner’s Issue II, the Government attempts to misdirect this Court’s attention from the second question presented by Petitioner: whether the §924(c)(3)(B) residual clause is unconstitutionally vague. Petitioner argues in his Petition at Issue II, as he did on appeal to the Sixth Circuit, that because the residual clause is unconstitutionally vague, his conviction for Hobbs Act conspiracy is not a crime of violence within the meaning of the statute.

2. In its Response, the Government effectively concedes the residual clause is unconstitutional, Resp. Mem. 4-6, but argues that Petitioner’s separate substantive offense of Hobbs Act robbery, for which he was also convicted but which is not specifically discussed in his appeal or in his Petition to this Court, is a crime of violence. In support of this Hobbs Act robbery argument, the Response refers this Court to the Government’s brief in opposition to the petition for a writ of certiorari it filed in *Garcia v. United States*, cert. den., No. 17-5704 (Jan. 8, 2018) *Garcia*, and to the cases cited there, all of which involve discussions of Hobbs Act robbery, not Hobbs Act conspiracy.

3. To the extent that the Response does discuss Hobbs Act conspiracy, it

cites only to *United States v. Eshetu*, 863 F3d 946, 955-956 (DC Cir. 2017), Resp. Mem. 6, an opinion that was withdrawn on August 3, 2018. *United States v. Eshetu*, __ F3d __, 2018 WL 3673907 (DC Cir. 8/3/18).

The defendants in *Eshetu* were charged with conspiring to commit Hobbs Act robbery (not Hobbs Act robbery), 18 USC §1951, and using and carrying or possessing a firearm during a crime of violence, 18 USC §924(c). In the August 3, 2018 *Eshetu* decision vacating the opinion on which the Response principally relies, the Court follows *Sessions v. Dimaya*, __ U.S. __, 138 S Ct 1204, 1210 (2018), decided after the first *Eshetu* opinion was issued, to conclude that “section 924(c)(3)(B) is void for vagueness.” *Id.* at *1. It is on this basis that the court in *Eshetu* concludes that “*Dimaya* requires us to abjure our earlier analysis to the contrary”, *Id.*; and, “grant[s] rehearing for the limited purpose of vacating Lovo’s and Scorto’s section 924(c) convictions in light of *Dimaya*.” *Id.*

Other courts have similarly decided that Hobbs Act conspiracy is not a crime of violence within the meaning of §924(c). See, *United States v. Pullia*, 2017 WL 5171218, at *4 (N.D. Ill. 2017)(collecting cases).

The same outcome as in *Eshetu* should follow here in Petitioner’s case. This Court should grant certiorari to find that §924(c) is unconstitutional and vacate Petitioner’s conviction for Hobbs Act conspiracy.

Respectfully submitted,

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