No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

LAWRENCE DUSEAN ADKINSON,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

_____

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

_____

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LAWRENCE DUSEAN ADKINSON

QUESTIONS PRESENTED

QUESTION PRESENTED: Whether a defendant necessarily consents to disclosure of historical CSLI data tracking his physical location in excess of seven days simply by utilizing a cellular service with a "Privacy Policy" which purports to permit such use as part of its adhesion contract.

QUESTION PRESENTED: Whether the good-faith exception to the exclusionary rule should apply even where, as here, the order for historical CSLI data issued pursuant to the Secured Communications Act was served *after* the Department of Justice had, itself, acknowledged in an internal policy memorandum that a warrant based upon probable cause was necessary.

LIST OF PARTIES

A. Parties

1. Respondent: United States of America.
2. Petitioner: Lawrence Dusean Adkinson.

B. Attorneys For Respondent:

Attorney at Trial: and on Appeal	Attorney Bradley Paul Shepard Attorney Pamela S. Domash Assistant U.S. Attorneys 10 W. Market St., Ste 2100 Indianapolis, IN 46204

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below. The opinion of the United States Court of Appeals Appears at Appendix A to the petition and is reported at *USA v. Lawrence D. Adkinson,* 916 F.3d 605 (7th Cir. (Ind.) 2018).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The United States Court of Appeals decided the underlying case on February 14, 2019. No petition for rehearing was filed. This petition is timely if filed on or before May 15, 2019.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment IV

The Stored Communications Act

§ 2703. Required disclosure of customer communications or records

(c) Records concerning electronic communication service or remote computing service.--

> (1) A governmental entity may require a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications) only when the governmental entity--
>
> > (B) obtains a court order for such disclosure under subsection (d) of this section;
>
> (2) A provider of electronic communication service or remote computing service shall disclose to a governmental entity the--
>
> > (A) name;

(B) address;
(C) local and long distance telephone connection records, or records of session times and durations;
(D) length of service (including start date) and types of service utilized;
(E) telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and
(F) means and source of payment for such service (including any credit card or bank account number),

of a subscriber to or customer of such service when the governmental entity uses * * * any means available under paragraph (1).

(3) A governmental entity receiving records or information under this subsection is not required to provide notice to a subscriber or customer.

(d) Requirements for court order.--A court order for disclosure under subsection * * * (c) may be issued by any court that is a court of competent jurisdiction and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation. * * *

18 U.S.C. § 2703

STATEMENT OF THE CASE

A. Proceedings Below

A grand jury charged Defendant Lawrence Dusean Adkinson in a First Superseding Indictment with conspiracy to commit robbery (Count 1), conspiracy to brandish a firearm in furtherance of a crime of violence (Count 2), robbery (Count 3), and brandishing a firearm in furtherance of a crime of violence (Count 4). DCT DN 425. Adkinson plead not guilty to all counts.

The case proceeded to jury trial in the United States District Court for the Southern District of Indiana (New Albany Division). On August 10, 2017, the jury, convicted Adkinson on all four counts. DCT DN 576, Transcript p. 819, 887. On November 15, 2017, the District Court sentenced Adkinson to 240 months on Counts 1 and 3 to run concurrently, 22 months on Count 2 to run consecutively, and 84 months on Count 4, also to run consecutively plus a $400 special assessment and 3 years of supervised release. Sentencing p. 41-43; Appendix at 6 (DCT DN 671).

On February 14, 2019, the Seventh Circuit affirmed. *USA v. Lawrence D. Adkinson*, No. 17-3381, 916 F.3d 605 (7th Cir. (Ind.) 2019).

B. Statement of the Facts

Between July of 2015 and September of 2015, a string of robberies were executed at cell phone stores in Illinois, Kentucky, Indiana, and Iowa.[1] In accordance with its loss prevention policy, T-Mobile initiated several "tower dumps,"[2] then voluntarily informed investigating authorities that a T-Mobile cell phone using number (708) 543-7900 and affiliated with Adkinson was in the vicinity of at least four of the robberies. Thus, on September 3, 2015, authorities applied for and obtained an order, pursuant to The Stored Communications Act, 18 U.S.C. § 2703, to retrieve historical phone records for phone number (708) 543-7900, including call records and tower connection data for April 13, 2015, through September 17, 2015 – a period of 157 days. *See* DCT DN 320-1 (*In re Application*, 4:15-MJ-048 (S.D.

[1] More specifically, the first robbery occurred at an unidentified mobile phone store on the west side of Chicago. This was followed by robberies of a Clarksville, IN, T-Mobile store on July 27, 2015 (Transcript p. 187-202); a Lexington, KY, Verizon store on July 28, 2015 (Transcript p. 231-238); an Aurora, IL, AT&T store on August 14, 2015 (Transcript p. 238-244); a Bradley, IL, Spring Mobile store on August 18, 2015 (Transcript p. 244-255); a St. Louis, MO, T-Mobile store on August 23, 2015 (Transcript p. 255-266); a Bloomington, IL, Midwest Cellular store on August 23, 2015 (Transcript p. 340-356); an unidentified Orland Park, IL, cellular store also on August 23, 2015 (Transcript p. 300-303); a Batavia, IL, Spring Mobile store on August 24, 2015 (Transcript p. 356-365); a Dekalb, IL, T-Mobile store on August 26, 2015 (Transcript p. 95-109, 152-187); an Orland Park, IL, T-Mobile store on September 13, 2015 (Transcript p. 365-374); and finally a Waterloo, IA, i-Wireless store in September 15, 2015 (Transcript p. 303-313, 383).

[2] A "tower dump" is a download of information on all the devices that connected to a particular cell site during a particular interval.

Ind. (New Albany Division)).[3] Thereafter, on September 11, 2015, authorities also sought a precision location warrant for phone number (708) 543-7900. *See* DCT DN 320-2 at 1-13. While drafting the application for the precision warrant, T-Mobile informed authorities that (708) 543-7900 was no longer active, but the equipment previously associated with that number was now utilizing the number (708) 262-6900. Based on this information, United States Magistrate Judge Van T. Willis issued a precision location warrant for the phone number (708) 262-6900, which was served upon T-Mobile. *See* DCT DN 320-2 at 14. Information obtained pursuant to the precision location warrant was utilized to locate and arrest Adkinson and others at the Pines Motel in Pottsville, Iowa.

On February 1, 2017, Trial Counsel for Adkinson, filed a pre-trial Motion to Suppress *inter alia* "any and all evidence obtained through cell phone records and/or triangulation of cell phone records." DCT DN 291 at 1. The Government filed a Response to the Motion to Suppress together with eight Exhibits. DCT DN 320 and 320-1 through 320-8. Adkinson then filed a reply. DCT DN 333. Neither party requested a hearing on the Motion and the District Court did not conduct one. On

[3] Subsequent warrants for the Pines Motel and related vehicles appear to have been obtained without reference to any CSLI obtained as a result of the § 2703 order because the affidavit for warrant was filed on September 11, 2015, see DCT DN 320-2 (*In re Search*, 4:15-MJ-51 (S.D. Ind. (New Albany Division)), whereas the comprehensive CSLI data covered by the § 2703 order does not appear to have been disclosed by T-Mobile until sometime after that date. *See* Gov't Trial Exhibits 1, 2, 3, and 4.

April 7, 2017, the District Court issued lengthy Findings of Fact and Conclusions of Law on the questions presented and denied the Motion to Suppress. DCT DN 362.

At trial, the Government utilized the complained-of data to place Adkinson at the physical location of multiple robberies, Gov't Trial Exhibit 5 (AT&T Mobility Usage (with cell location)), Transcript p. 55, and to prove that Adkinson and his co-defendants were in possession of stolen property.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's decision that Adkinson "consented" to T-Mobile sharing his cell-site information with authorities based upon its Privacy Policy conflicts with this Court's collected decisions in *Carpenter v. United States*, 585 U.S. ___, 138 S.Ct. 2206, 2220-2223 (2018) (finding Fourth Amendment violation despite similar Privacy Policy provision), and *Riley v. California*, 573 U.S. 373, 134 S.Ct. 2473, 2485 (2014) (interest in protecting officers' safety does not dispense with warrant requirement for searches of cell phone data) , and *Smith v. Maryland*, 422 U.S. 735, 99 S.Ct. 2577 (1979) (Fourth Amendment protection should not depend on how a telephone company chooses to connect its customer's calls). Furthermore, there is an open question whether the good-faith exception to the exclusionary rule should apply even where, as here, the order for historical cell-site data issued pursuant to the Secured Communications Act was served *after* the Department of Justice had, itself, acknowledged in an internal policy memorandum that a warrant based upon probable cause was necessary.

ARGUMENT

> QUESTION PRESENTED: Whether a defendant necessarily consents to disclosure of historical CSLI data tracking his physical location in excess of seven days simply by utilizing a cellular service with a "Privacy Policy" which purports to permit such use as part of its adhesion contract.

In its order denying Adkinson's motion to suppress the historical CSLI, the District Court reasoned that Adkinson presented no authority to support his contention of a reasonable expectation of privacy in historical CSLI, and that any expectation of privacy in historical cell tower data in this case was vitiated by T-Mobile's published Privacy Policy. *United States v. Kemp et al.*, 2017 WL 2719328 (June 23, 2017 order). However, as this Court's opinion in *Carpenter v. United States*, 585 U.S. __, 138 S.Ct. 2206 (2018), opinion now makes clear, Adkinson did indeed have a reasonable expectation of privacy in historical CSLI.

The facts in *Carpenter* are striking similar to the instant case. There, the defendant, along with a rotating group of accomplices, robbed at least six RadioShack and T-Mobile[4] stores at gunpoint over a 2-year period. The government sought and obtained the historical cell phone location data of a private individual pursuant to a

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[4] This Court parenthetically noted that the robbery of the T-Mobile stores was "ironic," *Carpenter*, 585 U.S. ___, 138 S.Ct. at 2212. However, based on the transcript and opinions, it does not appear that T-Mobile was both a victim of the alleged offense and supplier of its cell-site location information (CSLI) linking Carpenter to the alleged offenses. The CSLI appears to have been obtained from MetroPCS and Sprint as "third-party" witnesses.

disclosure order under The Stored Communications Act, 18 U.S.C. § 2703, rather than by securing a warrant.[5] As a result, the District Court never made a probable cause finding before ordering Petitioner's service provider to disclose months' worth of Petitioner's cell phone location records. This Court concluded, *inter alia*, that the digital data at issue – the record of Carpenter's physical movements as captured through CSLI maintained by a cell phone service provider – was protected by the warrant requirement of the Fourth Amendment. In a footnote, this Court added that "It is sufficient for our purposes today to hold that accessing seven days of CSLI constitutes a Fourth Amendment Search." *Carpenter*, 485 U.S. ___, 138 S.Ct. at 2217 n.3. Because the Government had not obtained a warrant, the Supreme Court reversed Carpenter's conviction and remanded his case to the lower court.

Here, as in *Carpenter*, authorities applied for and obtained an order, pursuant to The Stored Communications Act, 18 U.S.C. § 2703, to retrieve historical phone records for phone number (708) 543-7900, including call records and tower connection data for a period of 157 days. *See* DCT DN 320-1 (*In re Application*, 4:15-MJ-048 (S.D. Ind. (New Albany Division)). Accordingly, the record of

[5] Under the Stored Communications Act, a disclosure order does not require a finding of probable cause. Instead, the SCA authorizes the issuance of a disclosure order whenever the government "offers specific and articulable facts showing that there are reasonable grounds to believe" that the records sought "are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d).

Adkinson's physical movements as captured through CSLI maintained by T-Mobile was protected by the warrant requirement of the Fourth Amendment and the § 2703 order is not the equivalent of a warrant. *Carpenter*, __ U.S. ___, 138 S.Ct. at 221-222 ("reasonable grounds" under § 2703 not equivalent to "probable cause" required by the Fourth Amendment).

Admittedly, this case is distinguishable from *Carpenter* on certain facts. In *Carpenter*, authorities obtained the historical CSLI from MetroPCS and/or Sprint – neither of whom appeared to be victims of any of Carpenter's alleged crimes. MetroPCS and Sprint were classic "third party" witnesses. Thus, any Privacy Policy provision permitting either company to use historical CSLI to protect themselves would not have applied. Here, authorities obtained the historical CSLI from T-Mobile – who was not merely a third-party witness, but itself a victim of Adkinson's alleged crimes – so that the Privacy Policy permitting T-Mobile to use historical CSLI to protect itself did purport to apply.[6] However, this is necessarily

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[6] T-Mobile's Privacy Policy states:

> For Legal Process and Protection. We will provide customer information where necessary to comply with the law, such as disclosure of your information to a law enforcement agency for your safety or the safety of others, or when compelled by subpoena or other legal process. (See DN 320-7 Page 3 of 16).
>
> HOW WE USE INFORMATION WE COLLECT ABOUT YOU
> We use the information we collect for a variety of business purposes, such as:
> • To protect our rights, interests, safety and property and that of our customers, service

a distinction without a difference. The majority's opinion in *Carpenter* admits of no qualification or limitation of the Fourth Amendment protection based upon the terms of a company's Privacy Policy. Nor should this Court entertain arguments in favor of any.

In modern society, a cell phone service carrier's Privacy Policy is a standardized contract form offered to cell service consumers on essentially a "take it or leave it" basis without affording the consumer realistic opportunity to bargain. Moreover, a would-be cell service consumer cannot obtain the desired product and services except by acquiescing in said form contract. *See Riley v. California*, 573 U.S. 373, 134 S.Ct. 2473 (2014) (emphasizing that customers really don't have a choice if they want to have a cell phone). This is the very definition of an "adhesion contract." *See* Black's Law Dictionary 40 (6th ed.) (West 1990). Because such contracts are not the result of traditionally "bargained" contracts, courts tend to relieve parties from the onerous conditions imposed by them. Additionally, this Court has previously made clear that it is "not inclined to make a 'crazy quilt' of the Fourth Amendment" based solely upon the "practices of a private corporation." *See*

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providers and other third parties; and
• To comply with law or as required for legal purposes. (See DN 320-7 Page 8 of 16)

Smith v. Maryland, 422 U.S. 735, 99 S.Ct. 2577 (1979) (Fourth Amendment protection should not depend on how a telephone company chooses to connect its customer's calls). *See also*, *United States v. Jones*, 565 U.S. 400, 132 S.Ct. 945, 957 (2012) (Sotomayor, J., concurring) ("[I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill-suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks…I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection."). Reading these legal tenets in tandem, the tension between the rights of the accused to full Fourth Amendment protections of historical CSLI data, and the rights of T-Mobile to enjoy the benefits of its Privacy Policy to disclose that data to protect itself, must be resolved in favor of the accused. *Accord Riley*, 573 U.S. 373, 134 S.Ct. at 2485 (interest in protecting officers' safety does not dispense with warrant requirement for searches of cell phone data).

That full Fourth Amendment protection should be the outcome, regardless of any purportedly applicable Privacy Policy provision, is supported by *Carpenter* itself. Although the impact of a Privacy Policy on the scope of the Fourth Amendment

protection was discussed at oral argument, *see Carpenter* Transcript at 16-17[7], the majority was willing to acknowledge the possibility of a case specific warrant exception only for exigent circumstances – not for a Privacy Policy. *Carpenter*, 585 U.S. ___, 138 S.Ct. at 2220-2223. This Court's opinion acknowledging the one exception, but not the other – despite discussion on the very subject at oral argument and the dissenting opinions of Justices Alito and Thomas, *see Carpenter*, 585 U.S. ___, 138 S.Ct. at 2261 (Alito, J., and Thomas, J., dissenting) – indicates the omission was not unintentional. Applying the familiar legal tenet of *expressio unius est exclusio alterius* (express mention of one is implied exclusion of another), the Seventh Circuit's opinion that Adkinson "consented" to disclosure of his private data

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[7] JUSTICE ALITO: The contract, the standard MetroPCS contract seems to say -- and I guess we don't have the actual contract in the record here does seem to say that -- advise the customer that we can disclose this information to the -to the government *if we get a court order*.

MR. WESSLER: I agree that the MetroPCS contract in -- in effect in 2010 and the other company's privacy policies today do disclose that location information can be obtained, but I actually think *the disclosures more broadly in those documents accrue to our favor. * * * [T]hose contractual documents to a company restate and contractualize the protections of the Telecommunications Act and quite strongly promise people that their information will remain private without consent.*

I think I should caution the Court that -- that *relying too heavily on those contractual documents in either direction here would, to paraphrase the Court in Smith, threaten to make a crazy quilt of the Fourth Amendment* because we may end up with a, you know, hinging constitutional protections on the happenstance of companies' policies.

MR. WESSLER: There's a provision to disclose, *as required by law*, those four words need to be read in -- in context and in compliance with the Constitution. So if -- if there is a reasonable expectation of privacy in these records, then a warrant is required.

to authorities is directly contrary to this Court's precedent.

> QUESTION PRESENTED: Whether the good-faith exception to the exclusionary rule should apply even where, as here, the order for historical CSLI data issued pursuant to the Secured Communications Act was served *after* the Department of Justice had, itself, acknowledged in an internal policy memorandum that a warrant based upon probable cause was necessary.

On September 3, 2015, the Department of Justice issued a policy memorandum regarding the use of cell-site simulator technology. Department of Justice Policy Guidance: Use of Cell-Site Simulator Technology (Sept. 3, 2015), http://www.justice.gov/opa/file/767321/download. According to the memorandum, cell-site simulators function in the same manner as cell "tower dumps." As the memorandum explains:

> A cell site simulator receives and uses an industry standard unique identifying number assigned by a device manufacturer or cellular network provider. When used to locate a known cellular device, *a cell-site simulator initially receives the unique identifying number from multiple devices in the vicinity of the simulator*. Once the cell-site simulator identifies the specific cellular device for which it is looking, it will obtain the signaling information relating only to that particular phone. *When used to identify an unknown device, the cell-site simulator obtains signaling information from non-target devices in the target's vicinity for the limited purpose of distinguishing the target device.*

Id. at 2 (emphasis added). Likewise, a "tower dump" is a download of information on all the devices that connected to a particular cell site during a particular interval which is then also used to identify an unknown device and determine its location.

Done repeatedly, either process results in the collection of historical CSLI.

The memorandum continues:

> While the Department has, in the past, appropriately obtained authorization to use a cell-site simulator by seeking an order pursuant to the Pen Register Statute, as a matter of policy, *law enforcement agencies must now obtain a search warrant supported by probable cause* and issued pursuant to Rule 41 of the Federal Rules of Criminal Procedure (or the applicable state equivalent), except [in exigent or exceptional circumstances].

Id. at 4 (emphasis added).

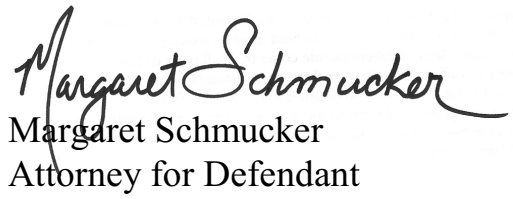
The same day the DOJ issued its policy statement requiring law enforcement agencies to obtain a search warrant supported by probable cause, Assistant United States Attorney Bradley P. Shepherd applied for and obtained an order for historical CSLI pursuant only to The Stored Communications Act, 18 U.S.C. § 2703 for 7900 including call records and tower connection data for April 13, 2015 through September 17, 2015 (157 days) (per DN 320-1 *In re Application*, 4:15 MJ 048 (S.D. Ind. (New Albany Division)). AUSA Shepherd *did not* seek a warrant based on probable cause. Moreover, because the SCA order was not served on T-Mobile until September 8, 2015 (*see* Appendix D (GX 3-2 at 2 cover sheet for eMailed response to order)) – five days *after* the Department of Justice had issued its Policy Guidance – AUSA Shepherd had sufficient time to be informed of the policy and take the necessary action to obtain an actual warrant.

Furthermore, lower courts have previously held that the DOJ shows its good faith when it notifies the court and relevant parties that it has made a mistake and attempts to correct the error. *See generally*, *Fischer v. United States Department of Justice*, 723 F.Supp.2d 104, 108-109 (D.C. 2010). Because the DOJ made no such effort in this case; instead proceeding upon the clearly deficient SCA order to obtain Adkinson's sell phone records from T-Mobile, this Court should grant certiorari to consider whether the good faith exception to the exclusionary rule should be applied under this, or similar, circumstances.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,



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