No. 16-7314

IN THE SUPREME COURT OF THE UNITED STATES

ANTONIO RIOS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's Fourth Amendment rights were violated by law enforcement's warrant-authorized acquisition from petitioner's cellular-service provider of real-time precision location information for petitioner's cell phone during a two-day period when he traveled on public roadways.

2. Whether the district court correctly instructed the jury on the unanimity requirement with respect to conspiracy to engage in a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1962(d).

3. Whether the district court correctly instructed the jury on reasonable doubt.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A48) is reported at 830 F.3d 403.

JURISDICTION

The judgment of the court of appeals (Pet. App. A49) was entered on July 21, 2016. Petitions for rehearing were denied on September 27, 2016 (Pet. App. A56). The petition for a writ of certiorari was filed on December 21, 2016. 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 Western District of Michigan, petitioner was convicted of conspiracy to conduct the affairs of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(d) and 1963(a); and conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 841 and 846. Pet. App. A50. The district court sentenced petitioner to concurrent terms of 240 months of imprisonment on the RICO-conspiracy count, to be followed by three years of supervised release, and 300 months of imprisonment on the cocaine-conspiracy count, to be followed by five years of supervised release. Id. at A51-A52. The court of appeals affirmed. Id. at A1-A48.

1. a. Petitioner was a member of the Holland, Michigan, chapter of the Almighty Latin King Nation (known as the Latin Kings), a street gang with chapters in several States. See Pet. App. A2, A19; Gov't C.A. Br. 6. The Latin Kings established its Holland chapter (the Holland Latin Kings or HLK) in 1993. Gov't C.A. Br. 7. Over the next 20 years, the HLK added members and turf, using violence to dominate local rival gangs. Ibid. HLK members agreed to physically attack anyone perceived as a threat to another HLK member and to protect fellow members from criminal prosecution by refusing to cooperate with law enforcement,

threatening witnesses, and providing funds to members who were incarcerated. Id. at 8. HLK members obtained marijuana and powder cocaine from interstate sources, and members were expected to sell the marijuana and cocaine to support themselves and the gang. Ibid.

b. In January 2011, Holland Police Detective Kristopher Haglund learned from a confidential informant, who shared a house with petitioner's girlfriend, that petitioner was a ranking member of the HLK and routinely traveled to Chicago and Detroit to obtain cocaine to distribute in Holland. Pet. App. A25; 1/27/14 Tr. 5-9. Petitioner often brought along junior gang members or his girlfriend on those trips, so they could take responsibility if law enforcement found the drugs. Gov't C.A. Br. 27; 1/27/14 Tr. 6-8. At least four other individuals confirmed to Detective Haglund that petitioner was affiliated with the Latin Kings, trafficked in cocaine, and possessed firearms. Gov't C.A. Br. 27; 1/27/14 Tr. 9-10.

On January 25, 2011, the informant told Detective Haglund that, according to a conversation he had overheard, petitioner would pick up his girlfriend that evening in a dark Jeep or silver sedan to accompany him on a trip to Chicago to purchase cocaine and bring it back to Holland. Pet. App. A25; 1/27/14 Tr. 9-12. Officers immediately began surveilling the home of petitioner's girlfriend. Pet. App. A25; 1/27/14 Tr. 13-15. When petitioner

arrived and picked up his girlfriend in a dark sport utility vehicle, the officers began following him. Pet. App. A25-A26; 1/27/14 Tr. 13-14. They observed petitioner stop at a gas station and then head toward a highway that leads to Chicago in one direction and Detroit in the other. Gov't C.A. Br. 27; 1/27/14 Tr. 14-16. At that point, the officers suspected that petitioner had spotted them and broke off surveillance. Gov't C.A. Br. 27; 1/27/14 Tr. 14-15.

Having lost track of petitioner, Detective Haglund obtained petitioner's cell phone number from the informant and confirmed it with petitioner's cellular-service provider. Gov't C.A. Br. 27-28; 1/27/14 Tr. 21. He then applied in state court for a warrant for "all subscriber information and real time precision location information for" petitioner's cell phone "for the next [two] days." D. Ct. Doc. 883-1, at 4 (Jan. 16, 2014) (capitalization omitted). The warrant also sought production of "GPS and[/]or tower information" and "incoming and outgoing calls * * * for the past [two] days." Ibid. (capitalization omitted). In the supporting affidavit, Detective Haglund recounted the information he had learned from the informant. Id. at 2-3. He also stated that the informant had previously provided credible information, including in two instances involving "wanted fugitives out of West Michigan." Id. at 2 (capitalization omitted). The magistrate judge signed the warrant. Id. at 4.

When investigators received the "first ping back," they learned that petitioner was in Detroit, not Chicago. Pet. App. A26 (citation omitted); see 1/27/14 Tr. 18-19, 21. They then monitored the phone's location as it began to move back toward Holland the following morning. Pet. App. A26; 1/27/14 Tr. 22. Investigators set up units ready to intercept petitioner along the way and prepared a K-9 unit. Pet. App. A26; 1/27/14 Tr. 23. One of the units stopped petitioner for driving at a speed of 106 miles per hour. Pet. App. A26; 1/27/14 Tr. 23-25; D. Ct. Doc. 852-1, at 8 (Dec. 30, 2013). The K-9 unit reported on the scene within minutes, and the police dog quickly alerted on the tailgate of the car. Pet. App. A26; 1/27/14 Tr. 54-55. Officers searched the car and found 103 grams of cocaine hidden in the center console. Ibid.; see Gov't C.A. Br. 26.

c. State, local, and federal authorities were also conducting a broader investigation into the HLK. Gov't C.A. Br. 9. Those efforts culminated in the simultaneous execution of 17 search warrants at HLK members' homes in July 2012. Id. at 9-10. The investigation revealed evidence of extensive criminal activities by the gang, including assault with a dangerous weapon, attempted murder, trafficking of at least five kilograms of cocaine and 100 kilograms of marijuana, unlawful possession of firearms, and obstruction of justice. Id. at 10-11.

2. a. In July 2013, a federal grand jury returned a fourth superseding indictment charging petitioner with conspiracy to conduct the affairs of an enterprise through a pattern of racketeering activity, in violation of RICO, 18 U.S.C. 1962(d) and 1963(a) (Count 1); conspiracy to possess five kilograms of cocaine or more with intent to distribute it, in violation of 21 U.S.C. 841 and 846 (Count 14); and conspiracy to possess 100 kilograms or more of marijuana with intent to distribute it, in violation of 21 U.S.C. 841 and 846 (Count 15). Fourth Superseding Indictment 3-32, 54-55, 56; Pet. App. A2.

b. Before trial, petitioner moved to suppress the cocaine seized in the January 2011 traffic stop. D. Ct. Doc. 852 (Dec. 30, 2013). The district court denied the motion. D. Ct. Doc. 910 (Jan. 31, 2014). The court reasoned that, under binding Sixth Circuit precedent, see United States v. Skinner, 690 F.3d 772 (2012), cert. denied, 133 S. Ct. 2851 (2013), petitioner did not have a reasonable expectation of privacy in the location of his cell phone as he drove on public roadways, and thus law enforcement's acquisition of precision location data did not constitute a Fourth Amendment search. D. Ct. Doc. 909, at 4-5 (Jan. 31, 2014).

In the alternative, the district court found that the information was obtained pursuant to a valid warrant. D. Ct. Doc. 909, at 5-10. Detective Haglund's affidavit stated that the

informant "ha[d] been a credible informant and ha[d] been in two separate cases involving wanted fugitives out of West Michigan." Id. at 6 (quoting warrant affidavit). Those statements, the court explained, were sufficient to establish the warrant's validity because the informant was known to Detective Haglund, and the detective "specif[ied] that the confidential informant ha[d] given accurate information in the past." Ibid. (quoting United States v. Brown, 732 F.3d 569, 574 (6th Cir. 2013), cert. denied, 134 S. Ct. 539 (2013), and United States v. Greene, 250 F.3d 471, 480 (6th Cir. 2001)). The affidavit also "include[d] substantial detail from the [informant] as to when [petitioner] would begin the trip, what he would be driving, his cell phone number, where he would go, who he would be traveling with, when he would return, the purpose of the trip, his history of previous trips for the same purpose, and his possession of a weapon," and much of that information was corroborated before the warrant was sought. Id. at 6-7. The court concluded that "the totality of the circumstances supported an independent judicial determination that the information was reliable." Id. at 7.

c. At trial, petitioner objected to the district court's instruction to the jury on reasonable doubt. The instruction read in relevant part: "[P]roof beyond a reasonable doubt means proof which is so convincing that you would not hesitate to rely and act on it in making an important decision in your own life." 6/12/14

Tr. 2089. Petitioner objected to the instruction's reference to "an important decision" in a person's life. Id. at 1994; see id. at 1992-1993. He asked the court to use the Sixth Circuit's model jury instruction, id. at 1992, which references "the most important decisions" in one's life, see 6th Cir. Pattern Crim. Jury Instruction 1.03 (2017). The district court overruled petitioner's objection. 6/12/14 Tr. 1993-1994. Petitioner also requested an instruction that, to find petitioner guilty of RICO conspiracy, the jury must be unanimous as to the "specific [racketeering] acts or categories" of racketeering acts that petitioner conspired to commit. Id. at 1992-1993. The court denied petitioner's request. Id. at 1993.

The jury found petitioner guilty on the RICO-conspiracy and cocaine-conspiracy counts and acquitted him on the marijuana-conspiracy count. D. Ct. Doc. 1197, at 1-3 (June 13, 2014). In a special verdict, the jury unanimously found the racketeering conspiracy responsible for trafficking at least five kilograms of cocaine. Id. at 2. The district court sentenced petitioner to concurrent terms of 240 months of imprisonment on the RICO-conspiracy count and 300 months of imprisonment on the cocaine-conspiracy count. Pet. App. A51-A52. The court reduced the term of imprisonment by 61 months to account for time petitioner had already served in state prison for related conduct. Id. at A51.

d. The court of appeals affirmed. Pet. App. A1—A48. Three of petitioner's claims are at issue here. First, the court found petitioner's Fourth Amendment challenge to the validity of the warrant authorizing acquisition of his precision location information to be foreclosed by circuit precedent holding that "individuals do not have a reasonable expectation of privacy in the real-time location data that their cellular telephones transmit." Id. at A26-A27 (citing Skinner, 690 F.3d at 777-780).

Second, the court of appeals rejected petitioner's challenge to the reasonable-doubt instruction. Pet. App. A30-A33. The court explained that "the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course." Id. at A32 (quoting Victor v. Nebraska, 511 U.S. 1, 5 (1994)). The court observed that this Court has previously "approved of the use of language similar to that selected by the district court." Id. at A32-A33 (citing Holland v. United States, 348 U.S. 121, 140 (1954); Wilson v. United States, 232 U.S. 563, 570 (1914); Hopt v. Utah, 120 U.S. 430, 439, 441 (1887)).

Finally, the court of appeals rejected petitioner's challenge to the district court's failure to give a unanimity instruction. Pet. App. A34-A35. The court of appeals explained that, under its precedent, "a jury need not agree on which overt act, among several, was the means by which a crime was committed," id. at A34

(citation omitted), and that "the RICO conspiracy statute contains 'no requirement of some overt act or specific act' at all," ibid. (quoting Salinas v. United States, 522 U.S. 52, 63 (1997)). Thus, the court concluded, "to convict a defendant of RICO conspiracy, the jury need not be unanimous as to the specific predicate acts that the defendant agreed someone would commit." Ibid. (citation omitted). The court further rejected petitioner's argument that unanimity was required as to "specific categories of acts the RICO conspiracy involved." Ibid. The court perceived some "disagreement" among the courts of appeals on the question, but saw "[no] need * * * [to] resolve" that dispute because petitioner's jury "unanimously found the racketeering conspiracy responsible for at least five kilograms of cocaine." Ibid. Thus, the jury "necessarily was unanimous as to a type of racketeering act that the conspirators had agreed would be committed in furtherance of the conspiracy, making any instructional error harmless." Id. at A35.

ARGUMENT

Petitioner contends (Pet. 9-24) that his Fourth Amendment rights were violated in this case when law enforcement officers obtained, from petitioner's cellular-service provider, real-time location information for a two-day period of time as petitioner traveled on public roadways. That claim lacks merit and warrants no further review, particularly because the information about the

location of petitioner's cell phone was obtained pursuant to a valid warrant and thus would be constitutionally valid regardless of whether the police had engaged in a Fourth Amendment search. The Court could, however, elect to hold the petition pending its decision in Carpenter v. United States, cert. granted, No. 15-402 (June 5, 2017), which involves a challenge to the acquisition without a warrant of 127 days of historical cell-site location data from a cellular-service provider.

Petitioner further contends (Pet 24-32) that the district court erred in rejecting his proposed jury instructions on unanimity as to the specific racketeering acts or categories of racketeering acts that petitioner conspired to commit and on reasonable doubt. The court of appeals correctly rejected those contentions as well, and those portions of its decision likewise do not conflict with any decision of this Court or another court of appeals. Further review of these additional claims is therefore not warranted.

1. a. The Fourth Amendment's prohibition on unreasonable searches was originally understood to be "tied to common-law trespass." United States v. Jones, 565 U.S. 400, 405 (2012). Accordingly, when "the Government obtains information by physically intruding" on persons, houses, papers, or effects, it has conducted "a 'search' within the original meaning of the Fourth Amendment." Id. at 406-407 n.3; see id. at 406. Later decisions

of this Court concluded that a Fourth Amendment search also occurs "when government officers violate a person's 'reasonable expectation of privacy.'" Id. at 406 (quoting Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)); see Florida v. Jardines, 569 U.S. 1, 5-6 (2013). The reasonable-expectation-of-privacy standard requires "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" Katz, 389 U.S. at 361 (Harlan, J., concurring); see Smith v. Maryland, 442 U.S. 735, 740 (1979) (adopting Justice Harlan's formulation).

Relying in large part on the concurring opinions in Jones, petitioner contends (Pet. 9-24) that the government's use of precision location data to obtain the location of his cell phone violated his reasonable expectation of privacy and was therefore a Fourth Amendment search.[1] Those opinions do not assist him. The

[1] The record in this case does not reveal the exact technology employed by petitioner's cellular-service provider or the exact information obtained from that provider, which alone makes it an inappropriate vehicle for further review. "Precision location information," however, usually refers to the latitude-and-longitude data that service providers must be able to provide under Federal Communications Commission rules in connection with emergency calls placed by a cell phone. See 47 C.F.R. 20.18(e)-(h). Cellular-service providers obtain that information in one of two ways, depending in part on the provider's technology: (i) through a "handset-based" solution (i.e., by having the cell phone transmit the information generated by its built-in GPS system), 47 C.F.R. 20.18(g); or (ii) through a "network-based" solution (i.e., by triangulating the phone's position based on

Court in Jones reaffirmed that "mere visual observation does not constitute a search," and it expressly abstained from addressing whether "achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy." 565 U.S. at 412. And the principal concurrence in Jones took the view that, although "the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy," "relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable." Id. at 430 (Alito, J., concurring in the judgment); see id. at 415 (Sotomayor, J., concurring) (agreeing with Justice Alito about "'longer term GPS monitoring'" and suggesting that "some unique attributes of GPS surveillance" will require further analysis "[i]n cases involving even short-term monitoring") (citation omitted).

This case does not approach the "long-term monitoring" over the course of four weeks that occurred in Jones. 565 U.S. at 429 (Alito, J., concurring in the judgment). In Jones, the GPS device placed on the suspect's car "relayed more than 2,000 pages of data over the 4-week period" directly to a government computer, id. at 403, thus leading to the view that the police had "secretly

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signal characteristics relative to one or more towers), 47 C.F.R. 20.18(f).

monitor[ed] and catalogue[d] every single movement of [petitioner's] car for a very long period," id. at 430 (Alito, J., concurring in the judgment). Here, the warrant authorized the officers to monitor petitioner's cell phone location for two days, and the actual monitoring lasted less than 24 hours. Pet. App. A26; Gov't C.A. Br. 31-32. And even for that shorter period, the record does not show that the police obtained "a precise, comprehensive record of [petitioner's] public movements that reflect[ed] a wealth of detail about h[is] familial, political, professional, religious, and sexual associations," 565 U.S. at 415 (Sotomayor, J., concurring). Indeed, the record does not reveal the frequency, format, or volume of the information the officers obtained at all.

Contrary to petitioner's contention (Pet. 20-21), Riley v. California, 134 S. Ct. 2473 (2014), does not aid his argument. In Riley, the Court held that a law enforcement officer generally must obtain a warrant to search the contents of a cell phone found on an arrestee. Id. at 2485. No question existed in Riley that reviewing the contents of a cell phone constituted a Fourth Amendment search; the question was whether that search fell within the traditional search-incident-to-arrest exception to the warrant requirement. See id. at 2482 ("The two cases before us concern the reasonableness of a warrantless search incident to a lawful arrest."). In deciding the search-incident-to-arrest question in

Riley, the Court stated that that "[m]odern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse." 134 S. Ct. at 2488-2489. But those concerns stemmed primarily from cell phones' capability, which is not at issue here, to "collect[] in one place many distinct types of information," such "an address, a note, a prescription, a bank statement, a video," "[a]n Internet search[,] and browsing history." Id. at 2489-2490; see also id. at 2485 ("Cell phones * * * place vast quantities of personal information literally in the hands of individuals."). Riley also viewed the overall privacy concerns with cell phone searches to include the possibility that "[h]istoric location information" might be used to "reconstruct," after the fact, "someone's specific movements" even "within a particular building." Id. at 2490 (emphasis added). But Riley did not consider the sort of targeted acquisition of location information for a specific two-day period at issue here.

Petitioner's reliance (Pet. 21) on Kyllo v. United States, 533 U.S. 27 (2001), is misplaced for similar reasons. In Kyllo, the Court held that the use of a thermal imaging device "that is not in general public use[] to explore details of the home that would previously have been unknowable without physical intrusion" is a Fourth Amendment search. Id. at 40. Kyllo's holding hinged on the fact that the device in question permitted officers to

obtain information from inside a house that had not already been exposed to the public. See id. at 34-40. It did not address the use of a device to obtain location information about travel on public roadways.

Finally, petitioner argues (Pet. 18-19) that the public's "sense of concern regarding cellular phones, tracking technology, and privacy concerns * * * warrants consideration." Changing public attitudes about technology, however, are more appropriately considered by legislatures than by courts addressing Fourth Amendment doctrine. See Jones, 565 U.S. at 429-430 (Alito, J., concurring in the judgment). Congress itself has addressed these issues in the Stored Communications Act, 18 U.S.C. 2701 et seq., which prohibits communications providers from disclosing certain records pertaining to subscribers to the government, but permits the government to acquire such records in particular circumstances.

b. As petitioner acknowledges (Pet. 9), no conflict exists among the federal courts of appeals on the question presented. As noted, the Sixth Circuit has held that no Fourth Amendment search occurs when law enforcement officers acquire from a cellular-service provider real-time precision location data from a phone during travel on public roads. See Pet. App. A26-A27; see also United States v. Skinner, 690 F.3d 772, 774, 777-781 (6th Cir. 2012), cert. denied, 133 S. Ct. 2851 (2013). The Fifth, Eighth,

and Tenth Circuits have reserved judgment on that question. See United States v. Wallace, 866 F.3d 605, 609 (5th Cir. 2017) (rejecting the defendant's suppression claim under the good-faith exception without deciding the "open question" whether obtaining precision location data constitutes a search); United States v. Turner, 781 F.3d 374, 384 & n.10 (8th Cir.) (same), cert. denied, 136 S. Ct. 208, and 136 S. Ct. at 493 (2015); United States v. Barajas, 710 F.3d 1102, 1108-1109 (10th Cir.) (same), cert. denied, 134 S. Ct. 230 (2013). No court of appeals has held that acquisition of precision location data constitutes a Fourth Amendment search.[2]

Nor has petitioner identified a conflict between the decision below and any decision of a state court of last resort. The single state court decision petitioner cites (Pet. 10) required a warrant to obtain location information, but that decision relied expressly on state law, not the federal Constitution. State v. Lunsford, 141 A.3d 270, 274-285 (N.J. 2016) (discussing State v. Earls, 70

[2] Petitioner also discusses cases involving cell-site (as opposed to precision location) information, claiming that those cases likewise fail to keep pace with changing technology. See Pet. 11-16 (discussing United States v. Graham, 824 F.3d 421 (4th Cir.) (en banc), petition for cert. pending, No. 16-6308 (filed Sept. 26, 2016), and petition for cert. pending, No. 16-6694 (filed Oct. 27, 2016); United States v. Davis, 785 F.3d 498 (11th Cir.) (en banc), cert. denied, 136 S. Ct. 479 (2015); In re Application of United States for Historical Cell Site Data, 724 F.3d 600 (5th Cir. 2013); see also pp. 18-21, infra. But petitioner does not claim any conflict with those decisions.

A.3d 630, 644 (N.J. 2013) (New Jersey Constitution)), clarification denied, 161 A.3d 761, 229 N.J. 252 (N.J. 2017) (Tbl.). Petitioner's amicus cites (Elec. Frontier Found. Et al. Amicus Br. 4-7) the Supreme Court of Florida's decision in Tracey v. State, 152 So. 3d 504 (2014), but Tracey involved the use of cell-site data, not precision location data. Id. at 515. Accordingly, Tracey does not directly address the particular circumstances here. See note 1, supra; pp. 19-20, infra.

c. In the alternative to plenary review, petitioner suggests (Pet. 11) that the Court should hold his petition pending disposition of the petition in Graham v. United States, No. 16-6308, which presents the same issue currently before this Court in Carpenter. Carpenter involves the question whether the government's acquisition of historical cell-site records from a cellular-service provider, created and maintained for the cell provider's business purposes, violates the Fourth Amendment rights of the individual customer to whom the records pertain. Br. in Opp. at 11-22, Carpenter, supra (No. 16-402). Cell-site data is created and recorded by service providers in the ordinary course of business "to find weak spots in their network and to determine whether roaming charges apply, among other purposes." United States v. Carpenter, 819 F.3d 880, 887 (6th Cir. 2016), cert. granted, 137 S. Ct. 2211 (2017); Br. in Opp. at 14-16, Carpenter, supra (No. 16-402).

This case does not concern historical cell-site data. Rather, it concerns the acquisition of precision real-time cell phone location information from a cellular-service provider pursuant to a warrant. It thus implicates different technology, doctrine, and procedures. Indeed, the precedent on which the court of appeals relied in this case, United States v. Skinner, supra, was not even cited in the majority opinion in Carpenter. See Carpenter, 819 F.3d at 883-893. In addition, in Carpenter, one of the orders obtained by the police covered 127 days of location data, and the question presented by the petitioner is limited to location records for that period. Pet. at i, Carpenter, supra (No. 16-402); Pet. Br. at i, 6-7, Carpenter, supra (No. 16-402).[3] The petitioner in Carpenter has conceded that the government's acquisition of historical cell-site data covering a short period of time (including, presumably, the two-day period involved in this case) would not implicate the Fourth Amendment. Pet. Br. at 29-30, Carpenter, supra (No. 16-402).

This case is also unlike Carpenter -- and would be particularly unsuitable for addressing the question presented by petitioner -- because officers obtained the data in question pursuant to a valid warrant. As the district court correctly

[3] The other order covered a period of seven days and, according to the petitioner in Carpenter, resulted in disclosure of two days of historical cell-site data. Pet. Br. at 7, Carpenter, supra (No. 16-402).

determined, the tip from an informant who had been reliable in the past, and who provided substantial information about petitioner's activities that officers corroborated before seeking the warrant, supported the magistrate's finding of probable cause. See D. Ct. Doc. 883-1, at 2-3; see, e.g., Illinois v. Gates, 462 U.S. 213, 241-246 (1983) (anonymous letter stating that defendants were engaged in drug dealing and describing their activities bore sufficient indicia of reliability to establish probable cause for a search warrant, where the information in the letter was specific and a number of details had been corroborated by independent police work).[4] Thus, even if the police engaged in a Fourth Amendment search by acquiring short-term real-time precision location data, the search was reasonable under the Fourth Amendment, and the judgment below could be affirmed on that alternate ground even though it was not addressed by the court of appeals. See Jones v. United States, 527 U.S. 373, 396 (1999) (plurality opinion); see also United States v. Tinklenberg, 563 U.S. 647, 661 (2011).

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.

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[4] The district court also correctly rejected an attack on the warrant based on Franks v. Delaware, 438 U.S. 154 (1978). D. Ct. Doc. 909, at 7-10.

2. Petitioner separately contends (Pet. 24-28) that this Court should decide whether juries must be unanimous as to the "specific categories of acts involved in a RICO conspiracy." Pet. 25. Review of that question is not warranted.

a. The RICO-conspiracy statute makes it a crime "for any person to conspire to violate any" substantive RICO provision. 18 U.S.C. 1962(d). The underlying substantive RICO provision relevant here prohibits any member of an enterprise affecting interstate commerce "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. 1962(c). "[P]attern of racketeering activity" means any two (or more) acts of "racketeering activity." 18 U.S.C. 1961(5). "[R]acketeering activity," in turn, includes any drug trafficking offense under federal law. 18 U.S.C. 1961(1)(D).

b. Petitioner contends (Pet. 24-28) that the district court erred in denying his request for a jury instruction requiring the jury to be unanimous as to the "specific categories of [racketeering] acts involved in a RICO conspiracy." Pet. 25. That question is not presented here. The court of appeals properly declined to decide that question, Pet. App. A34-A35, because the jury unanimously found that the conspiracy "involve[d] 5 kilograms or more of cocaine," D. Ct. Doc. 1197, at 1. By making that unanimous finding, the court explained, the jury "necessarily was

unanimous as to the type of racketeering act that the conspirators had agreed would be committed" and any error from omitting the instruction petitioner requested was harmless. Pet. App. A35.

Petitioner resists (Pet. 26) that conclusion on the ground that it "fails to account of the requirement of at least two acts of racketeering activity to constitute a 'pattern' of racketeering activity." At trial, however, the government introduced evidence of numerous acts of drug trafficking committed by the enterprise, see, e.g., 6/11/14 Tr. 1956-1960 (stipulation as to various drug quantities), but no single act involved five or more kilograms of cocaine. The jury thus could not have found that the RICO conspiracy involved more than five kilograms of cocaine without finding at least two predicate drug trafficking acts under the cocaine-trafficking category in the indictment. Pet. 26.

Petitioner further contends (Pet. 27-28) that unanimity is required not only as to the "categories" of racketeering activities, but also as to the discrete acts themselves. That contention has been rejected by every court of appeals to have considered the question. See Pet. App. A34; United States v. Applins, 637 F.3d 59, 80–82 (2d Cir.), cert. denied, 565 U.S. 960, and 565 U.S. 1087 (2011); United States v. Cornell, 780 F.3d 616, 624-625 (4th Cir.), cert. denied, 136 S. Ct. 127 (2015); United States v. Glecier, 923 F.2d 496, 500-501 (7th Cir.), cert. denied, 502 U.S. 810 (1991); United States v. Randall, 661 F.3d 1291, 1299

(10th Cir. 2011); United States v. Hein, 395 Fed. Appx. 652, 656 (11th Cir.) (per curiam) (unpublished), cert. denied, 562 U.S. 1095 (2010), and 568 U.S. 1110 (2013). That unanimous view follows from Salinas v. United States, 522 U.S. 52 (1997), in which the Court held that a defendant can be convicted of RICO conspiracy for "adopt[ing] the goal of furthering or facilitating the criminal endeavor" without himself committing or agreeing to commit two or more of the predicate acts. Id. at 65.

Richardson v. United States, 526 U.S. 813 (1999), does not support petitioner's position. Richardson held that a jury must be unanimous as to the specific "violations" comprising the "continuing series of violations" required for conviction under the continuing criminal enterprise statute, 21 U.S.C. 848. 526 U.S. at 815 (quoting 21 U.S.C. 848(c)). Section 848, however, defines a substantive offense. Conspiracy, in contrast, requires in relevant part a showing that the defendant "intend[ed] to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense." Salinas, 522 U.S. at 65. That showing is made whenever the defendant has agreed that a member of the enterprise will commit a pattern (i.e., two or more) of qualifying statutory violations, whether or not the defendant knows the details of any particular violation. Ibid. In the context of the inchoate offense of conspiracy, therefore, jury unanimity as to those details is not required.

3. Petitioner further contends (Pet. 28-32) that the district court erred in defining the term "reasonable doubt" for the jury. Further review of that contention is not warranted.

Petitioner asked the district court to give the Sixth Circuit pattern jury instruction on reasonable doubt, see p. 8, supra, which provides in relevant part that "[p]roof beyond a reasonable doubt means proof which is so convincing that you would not hesitate to rely and act on it in making the most important decisions in your own lives." 6th Cir. Pattern Crim. Jury Instruction 1.03 (2017). The "sole difference" (Pet. App. A32) between the instruction given by the district court and the pattern instruction was that the court referred to "an important decision" in the jurors lives, rather than "the most important decisions" in their lives. Compare 6/12/14 Tr. 2089, with 6th Cir. Pattern Crim. Jury Instruction 1.03 (2017).

Due process requires a trial court to instruct the jury that the government must prove its case beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 320 n.14 (1979); In re Winship, 397 U.S. 358, 362 (1970). The Constitution, however, "neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course." Victor v. Nebraska, 511 U.S. 1, 5 (1994). As this Court has explained, "the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof." Ibid.

A reasonable-doubt instruction is defective only if "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet" the reasonable-doubt standard. Id. at 6.

Petitioner cannot make that showing. As the court of appeals correctly explained, this Court has approved the use of language that is effectively identical to the language petitioner challenges. Pet. App. A32-A33; see Holland v. United States, 348 U.S. 121, 140 (1954) (citing with approval instruction framing the standard in terms of "the kind of doubt that would make a person hesitate to act"); Wilson v. United States, 232 U.S. 563, 570 (1914) (approving instruction that, "if you are in the frame of mind where if it was a matter of importance to you in your own affairs, away from here, you would pause and hesitate, before acting, then you have a reasonable doubt"); Hopt v. Utah, 120 U.S. 430, 439, 441 (1887) (approving language referring to "the more weighty and important matters relating to your own affairs" and calling such language "as just a guide to practical men as can well be given"). Nor does petitioner point to a conflict in the courts of appeals.[5] To the contrary, several courts of appeals

[5] Petitioner claims (Pet. 30) that, in Baker v. Corcoran, 220 F.3d 276 (2000), cert. denied, 531 U.S. 1193 (2001), the Fourth Circuit "d[id] not simply condone reasonable-doubt instructions like the one given in [this] case." But petitioner correctly acknowledges (Pet. 30) that the issue in Baker -- the use of instructions referring to a jury's willingness to act, rather than

have approved instructions materially identical to the one given here. See Pet. App. A32-A33 (citing cases).

To the extent petitioner suggests (Pet. 29-32) that district courts should not be permitted to depart from pattern jury instructions, this Court has already stated that the Constitution does not require trial courts to use "any particular form of words" to define reasonable doubt. Victor, 511 U.S. at 5. Nor does petitioner identify any need for this Court to exercise its supervisory authority over the federal courts to mandate the specific wording of a reasonable-doubt instruction that district courts would invariably be required to use. In particular, petitioner has not demonstrated that variations among jury instructions have resulted in violations of due process or misapplications of the reasonable-doubt standard by juries. There is therefore no need for this Court to formulate a specific reasonable-doubt instruction. Certainly, petitioner has shown no such error in the instruction given here, and thus any modification that might be proposed to its particular formulation would not entitle him to relief.

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the absence of hesitation to act -- "stands distinct" from the error alleged here.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, it should be held for Carpenter v. United States, cert. granted, No. 16-402 (June 5, 2017), and disposed of as appropriate in light of the Court's decision in that case.

Respectfully submitted.

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SEPTEMBER 2017