IN THE SUPREME COURT OF FLORIDA

Case No. SC15-2125

CHRISTOPHER L. CARPENTER,
Petitioner,

v.

THE STATE OF FLORIDA,
Respondent.

On Petition for Discretionary Review from the First District Court of Appeal, Case No. 1D13-6199

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner, CHRISTOPHER L. CARPENTER, will be referred to as Petitioner or Carpenter. The Respondent, State of Florida, will be referred to as the Respondent or State. The Record on Appeal will be referred to as (R-volume number, page number).

STATEMENT OF THE CASE AND FACTS

A. Trial Court Proceedings.

On August 3, 2012, the Petitioner was charged by Amended Information with one count each of traveling to meet a minor to commit an unlawful sex act, pursuant to Section 847.0135(4), Fla. Stat.; solicitation of a minor to commit an unlawful sex act, pursuant to Section 847.0135(3), Fla. Stat.; and three counts of transmission of material harmful to minor pursuant to Section 847.0138(2), Fla. Stat. The Petitioner filed a motion to suppress evidence asserting, in part, that at the time of his arrest his cell phone was seized from his person and improperly searched by law enforcement without a warrant. In moving for suppression of the warrantless cell phone evidence the Petitioner relied upon this Court's opinion in *Smallwood v. State*, 113 So.3d 724 (Fla.2013) (hereinafter "*Smallwood II*") – the legal standard in effect at the time he filed his motion to suppress – for the proposition that the warrantless search of his cell phone violated the Fourth Amendment of the U.S. Constitution and that any

evidence obtained from the cell phone by warrantless search should be suppressed. In response, the State relied on *Smallwood v. State*, 61 So.3d 448, 459-60 (Fla. 1st DCA 2011) (hereinafter "*Smallwood I*"): the legal standard in effect at the time Petitioner's cell phone was searched.

At the trial court hearing on Petitioner's motion to suppress the cell phone evidence the State and counsel for Petitioner Carpenter stipulated that the cell phone was seized and searched without a warrant at the time of Petitioner's arrest. (R3, 195-96) As it relates to any legal authority under which he was operating during the search of Mr. Carpenter's cell phone, Deputy Josh Sconiers, the law enforcement officer who conducted the search and seizure of Petitioner Carpenter's cell phone, testified he was operating under the *Smallwood I* standard when he conducted the search. (R3, 234-236, 237-40) There was no additional testimony from Deputy Sconiers or other law enforcement regarding any applicable standard of law under which they were operating at the time Petitioner's cell phone was searched. (R2, 114-191; R3, 192-252)

On December 17, 2013, the trial court entered an Order Granting Defendant's Motion to Suppress Contents of the Defendant's Cell Phone, suppressing all cell phone evidence and citing as authority *Smallwood II*. (R1, 106)

B. Proceedings Before the First District.

After the State appealed the trial court's suppression order with the First District, the United States Supreme Court issued its decision in *Riley v. California*, — U.S. —, 134 S.Ct. 2473, 2493 (2014), establishing that a warrant is generally required before officers can conduct a warrantless search of a cell phone "even when a cell phone is seized incident to an arrest." *Id*. at 2493. *Riley v. California* clearly upholds the Florida Supreme Court's holding in *Smallwood II*, which remains the prevailing law in Florida regarding warrantless cell phone searches incident to arrest.

The First District reversed the trial court suppression order, holding that because *Smallwood I* was binding appellate precedent at the time Petitioner Carpenter's cell phone was searched it was objectively reasonable for law enforcement to rely on the authority of *Smallwood I. See State v. Carpenter*, 158 So.3d 693 (Fla. 1st DCA 2015). Because the search of Carpenter's cell phone was conducted in objectively reasonable reliance on binding appellate precedent, *Carpenter* held that it fell under the good-faith exception to the exclusionary rule. 158 So.3d at 697. *Carpenter* further provided:

> Although Carpenter correctly challenges the legality of the warrantless search of his cell phone based upon *Smallwood II,* determining the legality of the search does not address the question of whether he is entitled to the remedy of exclusion of evidence obtained from the search. In *Davis v. United States,* —— U.S. ——, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011), the United States Supreme

> Court held that "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." *Id.* at 2423–24. Under *Davis,* where a good-faith exception to the exclusionary rule applies, a defendant is not entitled to the remedy of exclusion of evidence simply because of retroactive applicability of a new law. In *Davis,* the Court emphasized that the exclusionary rule is not a personal constitutional right, but is instead a "judicially created sanction" to "deter future Fourth Amendment violations." *Davis,* 131 S.Ct. at 2433–34 (quoting *Stone v. Powell,* 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976)). The Court stated, "[W]hen binding appellate precedent specifically authorizes a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities." *Id.* Accordingly, the question presented in this case is not whether the evidence obtained from the warrantless search of Carpenter's cell phone should have been suppressed under the exclusionary rule, but whether the evidence was admissible based on the application of the good-faith exception to the exclusionary rule.

Carpenter, 158 So.3d at 697.

Carpenter also acknowledged that Petitioner had urged the First District to follow *Willis v. State*, 148 So.3d at 480 (Fla. 2d DCA 2014), where the court held that the good-faith exception to the exclusionary rule did not allow for admission of warrantless evidence seized from the defendant's cell phone; as in the present case, the search in *Willis* also occurred in 2012 after *Smallwood I* but before *Smallwood II*. 158 So.3d at 696. *Carpenter* rejected *Willis,* finding that "the majority in essence 'carves out an exception to *Pardo* for cases involving Fourth Amendment issues,'" and that *Smallwood I* was binding appellate precedent at the time of the search. 158

So.3d at 697.[1]

SUMMARY OF ARGUMENT

I. THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE FIRST DISTRICT'S OPINION IN *CARPENTER V. STATE* AND THE SECOND DISTRICT'S OPINION IN *WILLIS V.* STATE IN FAVOR OF THE SECOND DISTRICT GIVEN THAT APPLICABLE BINDING APPELLATE PRECEDENT WAS CHANGING ON A STATE AND NATIONAL LEVEL DURING THE PENDENCY OF TRIAL COURT AND DIRECT APPEAL PROCEEDINGS.

The First District's reliance on *Smallwood I* fails to take into consideration that the law regarding warrantless cell phone searches was completely reversed by the U.S. Supreme Court and this Court during the pendency of trial court and direct appeal proceedings in the present case. Adherence to well-established protections afforded criminal defendants in cases involving Fourth Amendment protections, again as recognized by the U.S. Supreme Court and this Court, is a fundamental principle that the Second District embraced in *Willis*. *Willis* properly recognized that a "pipeline" case, such as the present case, involving an area of quickly developing Fourth Amendment jurisprudence requires reconsideration of what constitutes "binding appellate precedent."

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[1] The First District denied Petitioner Carpenter's request for certification of conflict, pursuant to Fla. R. App. P. 9.330(a), with the Second DCA's opinion in *Willis v. State* and the Mandate was issued by the First District on March 30, 2015.

As established in *Coolidge v. New Hampshire*, 403 U.S. 443, 454–55, 91 S.Ct. 2022 (1971), exceptions to warrantless searches must be carefully drawn in order to protect Fourth Amendment rights. As the Second DCA noted in *Willis*, a "cautious use of the good-faith exception" needs to be applied under these circumstances." In the present case, to deprive Petitioner Carpenter of the *Smallwood II* standard – which came into existence while his case was pending and prior to the filing, hearing, and order on his motion to suppress – is inconsistent with the principle enunciated above in *Coolidge.* The reasoning in *Willis* should be applied to the instant case where the binding appellate law applicable to warrantless cell phone searches changed while Petitioner Carpenter's case was progressing through the courts.

ARGUMENT

I. THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE FIRST DISTRICT'S OPINION IN *CARPENTER V. STATE* AND THE SECOND DISTRICT'S OPINION IN *WILLIS V.* STATE IN FAVOR OF THE SECOND DISTRICT GIVEN THAT APPLICABLE BINDING APPELLATE PRECEDENT WAS CHANGING ON A STATE AND NATIONAL LEVEL DURING THE PENDENCY OF TRIAL COURT AND DIRECT APPEAL PROCEEDINGS.

The First District's reliance on *Smallwood I* fails to take into consideration that the law regarding warrantless cell phone searches was redefined by the U.S. Supreme Court and this Court during the pendency of trial court and direct appeal proceedings

in the present case. Adherence to well-established protections afforded criminal defendants in cases involving Fourth Amendment protections, again as recognized by the U.S. Supreme Court and this Court, is a fundamental principle that the Second District embraced in *Willis*. The decision in *Willis* was in no way rogue or upstart. Rather, *Willis* recognized that a "pipeline" case, such as the present case, involving an area quickly developing Fourth Amendment jurisprudence requires reconsideration of what constitutes "binding appellate precedent." Reversal of the First District's opinion in *Carpenter* is required.

In *Smallwood II,* 61 So.3d at 448, 459-60, this Court held that "the search of appellant's cell phone incident to his arrest was not a violation of the Fourth Amendment." *Smallwood II* further held that a cell phone search incident to arrest did not require officers to have any reason to believe that the cell phone contained evidence of the crime. Id. at 459-60. *Smallwood I* was the precedent in the First District at the time of the warrantless search of Petitioner Carpenter's cell phone on June 12, 2012. On May 2, 2013 – after the search of Mr. Carpenter's cell phone but before the filing of his motion to suppress, suppression hearing, and trial court order suppressing evidence – this Court issued *Smallwood II*, quashing *Smallwood I* and holding that the good-faith exception to the exclusionary rule did not apply to images obtained in a warrantless search incident to arrest. 61 So.3d at 459-60. Since the

instant appeal was filed, the United States Supreme Court issued its decision in *Riley v. California*, —— U.S. ——, 134 S.Ct. 2473, 2493 (2014), where the Supreme Court held that a warrant is generally required before officers can search a cell phone "even when a cell phone is seized incident to an arrest." Id. at 2493. *Riley* upholds the Florida Supreme Court's decision in *Smallwood II*, which remains the current legal standard in Florida regarding warrantless cell phone searches incident to arrest.

In *Willis*, 148 So.3d at 480, a post-*Riley* and *Smallwood II* opinion, the Second District held that the good-faith exception to the exclusionary rule did not allow for the admission of warrantless evidence seized from the defendant's cell phone. The defendant in *Willis* appealed his judgment and sentence for 24 counts of possession of child pornography; the images were found on his cell phone in February, 2012 when, as in the present case with Petitioner Carpenter, a warrantless search for these photographs was still permissible under *Smallwood I*. Recognizing that *Smallwood I* was later overruled by *Smallwood II*, and recognizing the U.S. Supreme Court's ruling in *Riley*, 134 S.Ct. at 2473, the *Willis* court found:

> In light of the holdings in *Smallwood II* and *Riley*, we conclude that the evidence obtained prior to the search warrant must be suppressed. In *Smallwood II*, the Florida Supreme Court held that law enforcement is required to obtain a search warrant before searching the data and content of a cell phone that has been seized incident to a lawful arrest.

Willis, 13 So. 3d at 727, 735.

In the present case, *Carpenter* relied on *Davis v. United States*, — U.S. —, 131 S.Ct. 2419, 2434 (2011), for the proposition that binding appellate precedent in effect at the time of the search in Petitioner Carpenter's case should prevail.[2] The court in *Willis* specifically addressed *Davis* in relation to the application of binding precedent and why *Smallwood II* and *Riley* should apply even though *Smallwood I* was the law at the time of the cell phone search. The *Willis* court reasoned:

> We recognize that at the time it occurred, the warrantless search of the cell phone here was permitted by the First District's recent decision in *Smallwood I*, which was a decision then binding on all Florida trial courts. *See Pardo v. State*, 596 So.2d 665, 666 (Fla.1992). As discussed in *Smallwood II*, the Supreme Court held in *Davis v. United States*, ——U.S. ——, 131 S.Ct. 2419, 2434 (2011), that "when the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply." ***The case law is still developing on the type of precedent that qualifies as "binding appellate precedent" that is sufficient to permit "objectively reasonable reliance."*** (emphasis added)

Id. at 483.

As noted by the *Willis* court, "there was no decision on this issue from either the Florida Supreme Court or the United States Supreme Court at the time of the search, and the issue of cell phone searches was clearly an open and unresolved legal issue

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[2] In *Davis,* the U.S. Supreme Court held that "searches conducted in *objectively reasonable reliance on binding appellate precedent* are not subject to the exclusionary rule." 564 U.S. at 232 (emphasis added). The Court emphasized that the exclusionary rule is not a constitutional requirement, but rather a judicial creation intended to deter future Fourth Amendment violations. *Id.* at 236.

in 2012," and: "Thus, without faulting the officers involved, we conclude that the State cannot rely upon the good-faith exception to prevent the exclusion of this evidence." *Id*. at 483 (emphasis added) *Willis* further held:

> It should be noted that *Smallwood I* was pending on review in the Florida Supreme Court when this cell phone was searched. *See Smallwood v. State*, 68 So.3d 235 (Fla.2011) (table decision). There is nothing in the record to establish that the officers in this case actually knew about the holding in the First District and that they were relying on that holding. The exclusionary rule does serve, at least in substantial part, as a deterrent. **However, when a Fourth Amendment issue is rapidly evolving, it is hard to justify an approach to the good-faith exception that allows the first defendant to reach the United States Supreme Court to receive the benefit of the exclusionary rule while other defendants in the legal pipeline do not. The equal application of the rule of law would seem to be a principle of our legal system calling for a cautious use of the good-faith exception in situations like the one we face today.** (emphasis added)

Id. at 483.[3]

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[3] And specifically on the issue of reliance on *Smallwood II* and *Riley*, the *Willis* court stated:

> Distinct from the *Davis* argument, the State briefly suggests that *Smallwood II* and *Riley* should have prospective application only. It relies on the First District's decision in *State v. O'Steen*, 238 So.2d 434, 437 (Fla. 1st DCA 1970). *Osteen* involved a search incident to arrest that occurred prior to the decision in *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034 (1969). *Chimel* was a case in which the United States Supreme Court confronted at least two of its own prior decisions and attempted to create a more predictable rule. **We conclude that the circumstances that warranted a prospective approach to the holding in *Chimel* simply do not exist in this case.**

Id. at 3 (emphasis added); *accord*, *Saint-Hilaire v. State*, 143 So.3d 1147, 1148 (Fla. 3d DCA 2014).

A longstanding tenet of United States Supreme Court precedent with regard to the Fourth Amendment provides:

> [T]he most basic constitutional rule in this area is that "*searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.*" The exceptions are "jealously and carefully drawn," and there must be "a showing by those who seek exemption ... that the exigencies of the situation made that course imperative." "*[T]he burden is on those seeking the exemption to show the need for it.*"

Coolidge v. New Hampshire, 403 U.S. 443, 454–55, 91 S.Ct. 2022 (1971) (emphasis supplied).

And as the Second DCA noted in *Willis*, a "cautious use of the good-faith exception" needs to be applied under these circumstances." To deprive Mr. Carpenter of the *Smallwood II* standard – which came into existence while his case was pending and prior to the filing, hearing, and order on his motion to suppress – is inconsistent with the principle enunciated above in *Coolidge.* 403 U.S. at 454.

In *Griffith v. Kentucky,* 479 U.S. 314, 107 S.Ct. 708 (1987), the United States Supreme Court held that decisions of the United States Supreme Court that announce constitutional principles applicable to state prosecutions are to be applied retroactively to all nonfinal – *i.e.,* "pipeline" cases where the time for direct appeals or for a petition for certiorari to review the denial of such appeals had not expired, *see*

Brown v. State, 634 So. 2d 735 (Fla. 1st DCA 1994) – criminal cases, state or federal, pending on direct review or not yet final. There is no exception for cases in which the new rule constitutes a "clear break" with the past. *Id*. at 323. The *Griffith* Court explained that once it has announced a new rule of criminal law applicable to state prosecutions, "the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review." *Id.* at 323. Recognizing that it could not hear each case pending on direct review, the Court observed that it would fulfill its judicial responsibility by instructing lower courts to apply the new rule to cases not yet final. *Id.* There is no dispute in the present case that Petitioner Carpenter's case was not final when both *Smallwood II* and *Riley* became the Florida and national legal standards regarding warrantless cell phone searches.

Following the decision in *Griffith*, the Florida Supreme Court has consistently expressed its intention to apply the *Griffith* rule broadly to its own decisions. *Smith v. State,* 598 So.2d 1063, 1066 (Fla.1992); *State v. Fleming*, 61 So.3d 399 (Fla.2011). In *Smith v. State*, 598 So.2d at 1063, this Court wrote:

> We are persuaded that the principles of fairness and equal treatment underlying *Griffith*, which are embodied in the due process and equal protection provisions of Article I, Sections 9 and 16 of the Florida Constitution, compel us to adopt a similar evenhanded approach to the retrospective application of the decisions of this court with respect to all nonfinal cases. Any rule of law that substantially affects the life, liberty, or property of criminal defendants must be applied in a fair and evenhanded manner. Art. I, §§ 9, 16, Fla. Const.

> "[T]he integrity of judicial review requires that we apply [rule changes] to all similar cases pending on direct review." *Griffith*, 479 U.S. at 323, 107 S. Ct. at 713. Moreover, "selective application of new rules violates the principle of treating similarly situated defendants the same," because selective application causes "'*actual inequity*'" when the Court "'chooses which of many similarly situated defendants should be the chance beneficiary' of a new rule." Id. (citation omitted). Thus, we hold that any decision of this Court announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case pending on direct review or not yet final.

598 So.2d at 1066.

In *Tracey v. State*, 152 So.3d 504 (Fla.2014), also a cell phone technology case addressing whether a defendant had a subjective and objectively reasonable expectation of privacy falling under Fourth Amendment purview in real time cell site location information (CSLI) regarding the location of defendant's cell telephone, this Court began its analysis by recognizing the significance of Fourth Amendment jurisprudence: "We begin with one of the bedrock principles of our federal constitution, the Fourth Amendment to the United States Constitution, which states:

> 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."

152 So.3d at 512.

Tracey continued:

"Over four decades ago, the Supreme Court emphasized the importance of fidelity to the foundational premise of the Fourth Amendment in *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022 (1971), stating:

> [T]he most basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." The exceptions are "jealously and carefully drawn," and there must be "a showing by those who seek exemption ... that the exigencies of the situation made that course imperative." "[T]he burden is on those seeking the exemption to show the need for it." In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or "extravagant" to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won—by legal and constitutional means in England, and by revolution on this continent—a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important. Id. at 454–55, 91 S.Ct. 2022 (plurality opinion) (footnotes omitted).

Although these words were penned long ago, they have proved prescient now that technology has advanced to the point that our whereabouts can be ascertained easily and at low cost by the government. As the Supreme Court wisely cautioned in Coolidge, "[i]f times have changed," such as they have now that technology has provided the government with technological capabilities scarcely imagined four decades ago, the protections of the Fourth Amendment are "more, not less, important." Id. at 455, 91 S.Ct. 2022. Keeping this paramount constitutional right in mind, we turn first to a discussion of pertinent United States Supreme Court precedent."

152 So.3d at 512.

And in *Smallwood II*, 113 So.3d at 730, this Court stated:

> We commence our review by noting a longstanding tenet of United States Supreme Court precedent with regard to the Fourth Amendment: [T]he most basic constitutional rule in this area is that *"searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions*." The exceptions are "jealously and carefully drawn," and there must be "a showing by those who seek exemption ... that the exigencies of the situation made that course imperative."

Id. at 730, citing *Coolidge v. New Hampshire*, 403 U.S. 443, 454–55, 91 S.Ct. 2022 (1971) (emphasis supplied)

This Court's rulings in *Smith, Fleming, Tracey,* and *Smallwood II* all recognize the critical importance of protecting a criminal defendant's Fourth Amendment rights. The Petitioner recognizes that *Davis v. United States* does not stand for the proposition that exclusion of evidence is required because of retroactive applicability of a new law. 131 S.Ct. at 2433-34. In the present case, however, the reasoning in *Willis* should be applied to the instant case where the binding appellate law applicable to warrantless cell phone searches changed while Petitioner Carpenter's case was progressing through the courts.

CONCLUSION

Based on the foregoing, the Petitioner respectfully requests that this Court 1) resolve the conflict between *State v. Carpenter*, 158 So.3d 693 (Fla. 1st DCA 2015), and *Willis v. State*, 148 So.3d at 480 (Fla. 2d DCA 2014), in favor of the Second District's reasoning in *Willis* that the good faith exception to the exclusionary rule

should not apply where the law forming the basis of applicable binding appellate precedent changes – on a state and national level – during nonfinal trial court and direct appeal proceedings; and 2) remand to the trial court to reinstate the trial court's order suppressing evidence; or 3) enter any relief the Court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail to Matthew Pavese, Assistant Attorney General, at Matthew.Pavese@myfloridalegal.com and crimapptlh@myfloridalegal.com, on June 22, 2016.

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Pursuant to Fla. R. App. P. 9.210(a), undersigned counsel hereby certifies that this brief complies with the font requirements the Rule, and is formatted in Times New Roman 14-point font.

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