RECEIVED by MSC 1/16/2025 3:50:33 PM

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Hood, P.J., Redford and Maldonado, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MICHAEL GEORGIE CARSON,

Defendant-Appellee.
_____/

Supreme Court No. 166923

Court of Appeals No. 355925

Emmet County Circuit Court No.: 20-005054-FC

REPLY BRIEF OF PEOPLE OF THE STATE OF MICHIGAN

Dana Nessel
Attorney General

Ann M. Sherman (P67762)
Solicitor General
Counsel of Record

Michael H. Schuitema (P72718)
Emmet County Prosecutor

Christopher M. Allen (P75329)
Assistant Solicitor General
PO Box 30212, Lansing, MI 48909
(517) 335-7628

Brent E. Morton (P58526)
Assistant Attorney General
Criminal Appellate and
Parole Appeals Division

Attorneys for Plaintiff-Appellant

Dated: January 16, 2024

RECEIVED by MSC 1/16/2025 3:50:33 PM

TABLE OF CONTENTS

Page

Index of Authorities ii

Introduction 1

Argument 2

I. The search warrant met the requirements of the particularity doctrine. 2

A. Throughout his brief, Carson focuses on an issue that is not before this Court. 2

B. *Carpenter v United States* requires the State to get a warrant but says nothing about particularity. 4

C. Carson's reference to other authority is largely distinguishable and consistent with the People's position. 5

D. The Court of Appeals' erroneous decision has generated confusion that requires a remedy. 7

II. If there had been a particularity problem, courts must apply the severance doctrine to excise only the invalid portion of the warrant. 8

III. The officer submitting the warrant request acted in line with longstanding and binding authority 11

IV. Counsel was not ineffective. 12

Conclusion and Relief Requested 13

Word Count Statement 13

RECEIVED by MSC 1/16/2025 3:50:33 PM

INDEX OF AUTHORITIES

Page

Cases

Andresen v Maryland,
427 US 463 (1976) 3

Carpenter v United States,
585 US 296 (2018) 4, 5

Commonwealth v Young,
287 A3d 907 (Pa Super Ct 2022) 5

Groh v Ramirez,
540 US 551 (2004) 2

Herring v United States,
555 US 135 (2009) 11

People v Covlin,
58 Misc. 3d 996 (NY Sup Ct 2018) 6

People v Hughes,
506 Mich 512 (2020) 3, 7, 8

People v Keller,
479 Mich 467 (2007) 9, 10, 11

People v Riley,
468 Mich 135 (2003) 12

Richardson v State,
481 Md 423 (2022) 6

Strickland v Washington,
466 US 668 (1984) 12

Terreros v State,
312 A3d 651 (Del 2024) 6, 7

United States v Chaney,
921 F3d 572 (CA 6, 2019) 2

United States v Salas,
106 F4th 1050 (CA 10, 2024) 4

United States v Tompkins,
118 F4th 280 (CA 2, 2024) 8

United States v Ventresca,
380 US 102 (1965) 3

Utah v Strieff,
579 US 232 (2016) 9

Warden v Hayden,
387 US 294 (1967) 3

RECEIVED by MSC 1/16/2025 3:50:33 PM

RECEIVED by MSC 1/16/2025 3:50:33 PM

INTRODUCTION

This Court directed briefing on four issues. The primary issue is whether the Court of Appeals erred in "holding that the warrant to search the defendant's cell phone violated the Fourth Amendment's particularity requirement." Unfortunately, throughout his briefing, Carson persistently argues about a distinct Fourth Amendment issue—whether the affidavit in support of the warrant met the probable cause standard. This is not the claim that the Court of Appeals decided in its erroneous opinion, and it is not an issue that this Court granted leave to appeal to consider. Carson repeatedly misses the mark.

When attempting to address particularity, Carson's analysis suffers from a flaw similar to that of the Court of Appeals'—he tethers his argument to U.S. Supreme Court precedent that has nothing to say about the particularity doctrine. Both *Riley v California* and *Carpenter v United States* are pertinent in that they discuss the Fourth Amendment and evolving technology. But they stand for the proposition that, with the privacy interests in a modern cellphone and GPS location data, the state must get a warrant to search and seize them. The State did that.

The search warrant here was sufficiently particular. It identified the location of the search (Carson's cell phone), the crime to which the evidence must relate (safe breaking and larceny in a building), and the evidence to be search and seized (documents and records from the phone). Even if there was a malady in the warrant, it should be excised through severance, which would not affect the quantum of evidence at Carson's trial. And the officer acted in good faith under binding law, so the exclusionary rule does not apply. This Court should affirm.

RECEIVED by MSC 1/16/2025 3:50:33 PM

ARGUMENT

I. The search warrant met the requirements of the particularity doctrine.

Carson's briefing focuses intently on an issue not before this Court—whether there was sufficient probable cause in the affidavit to support the search warrant. And he focuses on a case, *Carpenter v United States*, that does not speak to particularity. His references to other States' authority largely miss the mark, and the one outlier he identifies is in tension with this Court's decision in *People v Hughes*. This Court's resolution is needed to resolve ongoing confusion about the state of the law.

A. Throughout his brief, Carson focuses on an issue that is not before this Court.

Throughout the briefing, Carson dwells on the alleged lack of probable cause in the affidavit. (See Def Br at 10–15, 20, 22, 26–29, 32.) But the Court of Appeals' majority did not evaluate the existence of probable cause or whether there was an adequate nexus between the affidavit and the warrant. That issue is simply not before the Court. (9/25/24 Mich Sup Ct Order; People's Br at 30–31 n 7.)

What is more, as Carson correctly recognizes, the warrant itself does not explicitly incorporate the supporting affidavit, so the constitutionality of the warrant depends on what appears within its four corners. (Carson Br at 4, citing *Groh v Ramirez*, 540 US 551, 557–558 (2004).) See also *United States v Chaney*, 921 F3d 572, 581 (CA 6, 2019) ("The constitutionality of a warrant is determined by what is contained in the four corners of the warrant, although the government can

RECEIVED by MSC 1/16/2025 3:50:33 PM

incorporate by express reference affidavits and other material."). For purposes of this appeal, the warrant affidavit is of no moment.

While the issues of probable cause and nexus are not part of this appeal, Carson's focus only highlights that there are other guardrails independent of the particularity doctrine protecting citizens against Fourth Amendment violations. For the execution of any given search warrant, there must be:

- Probable cause to support a search warrant, see, e.g., *United States v Ventresca*, 380 US 102, 107 (1965).
- A nexus between the probable cause in the affidavit and the scope of the warrant, see *Warden v Hayden*, 387 US 294, 307 (1967).
- A sufficiently particular identification of the place to be searched and things to be seized, see *Andresen v Maryland*, 427 US 463 (1976).
- A law enforcement search that is limited and "reasonably directed at uncovering the evidence specified in the search warrant," *People v Hughes*, 506 Mich 512, 554 (2020).

In tandem, these legal doctrines work to ensure that citizens' constitutional rights are protected. It is not as if, without the Court of Appeals' rework of the particularity doctrine, citizens will be subject to rummaging searches at the whims of law enforcement.

RECEIVED by MSC 1/16/2025 3:50:33 PM

B. *Carpenter v United States* requires the State to get a warrant but says nothing about particularity.

Carson places a heavy burden on *Carpenter v United States*, 585 US 296 (2018) to justify his position, a burden that *Carpenter* cannot carry. Just like *Riley*,[1] which was the lodestar for the Court of Appeals' erroneous opinion (see App'x p 13), *Carpenter* does not speak to the particularity of search warrants. The issue presented was "whether the Government conducts a search under the Fourth Amendment when it accesses historical cell phone records that provide a comprehensive chronicle of the user's past movements." *Carpenter*, 585 US at 300. Pre-*Carpenter*, a federal statute permitted law enforcement to use a federal statute to compel disclosure of telecommunications records, including cell-site location information without meeting the requirements of the Fourth Amendment. *Id.* at 301–302. Thus, the *Carpenter* Court considered whether individuals have a reasonable expectation of privacy in their cell-site location data; if they do, then the reduced burden on the government would not suffice under the Fourth Amendment. "[T]he unique nature of cell phone location records," *id.* at 309, the Court held, requires that "an individual maintains their legitimate expectation of privacy in the record of his physical movements" even though a third party (like a telecom provider) holds that information. *Id.* at 310.

[1] Recently, the Tenth Circuit pushed back against an attempt to conflate *Riley* and a particularity claim: "To apply *Riley* to Mr. Salas's case would be to cherry-pick and graft a holding from an independent area of Fourth Amendment law. We do not conflate legal doctrines so casually." *United States v Salas*, 106 F4th 1050, 1059 (CA 10, 2024) (cleaned up).

RECEIVED by MSC 1/16/2025 3:50:33 PM

But, of course, that does not mean that the State cannot retrieve that information. Instead, the Fourth Amendment kicks in, making "the Government's obligation . . . a familiar one—get a warrant." *Id.* at 317. And the Court made clear that this was decision was "a narrow one." *Id.* at 316. This holding echoes *Riley*, which only held that when the State wants to search the contents of a cellphone, it typically has a single means to do so: "get a warrant." 573 US at 403.

Here, the government did precisely that. It got a warrant. The question before this Court is whether the warrant satisfied the standard for particularity. As described at length in the People's principal brief, it meets that standard. (People's Br at 12–34.)

C. Carson's reference to other authority is largely distinguishable and consistent with the People's position.

Carson points to other jurisdictions' decisions concerning particularity. Like the Court of Appeals' references to sister-state authority (see People's Br at 32–33), the warrant found invalid in *Commonwealth v Young*, 287 A3d 907 (Pa Super Ct 2022) is distinct. In fact, the *Young* warrant would be unconstitutional under the People's theory. It fails one of the elements that the People ask this Court to enforce—identifying the crimes under investigation to which the evidence must relate. See *id.* at 913, 926; see also *id.* at 931 (the warrant permitted seizure of any file "regardless of type, time of creation, *or nexus with any crimes being investigated*") (emphasis added). Thus, that warrant would also fail the test advanced by the People.

RECEIVED by MSC 1/16/2025 3:50:33 PM

Likewise, *People v Covlin,* 58 Misc. 3d 996 (NY Sup Ct 2018) is no help to Carson. Like the warrant in *Young*, the cell phone search warrant "simply authorized a search for 'all stored electronic information' and 'electronic security equipment and devices' on the phone." *Id.* at 1002. The crimes under investigation appeared in the supporting affidavit, but, importantly, did not appear in the warrant. *Id.* As the court put it, "It was the affidavit's reference to two specific computer crimes which particularized its scope. That particularity was absent from the warrant." *Id.* Again, this warrant would fail under the People's theory.

Finally, the Supreme Court of Delaware is an outlier regarding the particularity doctrine.[2] In *Terreros v State*, 312 A3d 651 (Del 2024), the court invalidated a search warrant that limited a cell phone data search of a particular phone to data linked to the defendant's commission of second-degree rape. *Id.* at 656–657. The court found that the warrant, which "in effect" authorized a search for "any and all data" on the phone failed the particularity requirement. *Id.* at 666–667. Intertwined with the court's analysis of particularity was a holding that the affidavit supporting the warrant did not establish a sufficient nexus—"the affidavit only contained a nexus between the crime and Terreros's internet history, but the warrant allowed police to search nearly every category of data on the cell phone." *Id.* at 667. It is not clear whether the court considered the particularity requirement in conjunction with a faulty nexus (which, again, is not at issue here).

[2] See also *Richardson v State*, 481 Md 423, 438, 468 (2022) (holding that identification of the crimes under investigation did not save a warrant that sought to search all data on the phone).

RECEIVED by MSC 1/16/2025 3:50:33 PM

Nevertheless, *Terreros* erred in amplifying the particularity required. The U.S. Supreme Court has permitted broad physical searches that are limited by the nature of the crimes under investigation. (People's Br at 20–22.) And this Court in *Hughes* set up reasonable guardrails to guide law enforcement in a forensic search—that it be reasonably directed toward uncovering evidence of the crimes under investigation. 506 Mich at 542–543. Unlike the Court's rule from *Hughes*, *Terreros* did not consider the importance of the warrant's limitation to the specific crime at issue. In contrast to *Terreros*, this Court was careful to recognize that "a criminal suspect will not always store or organize incriminating information on his or her digital devices in the most obvious way." *Hughes*, 506 Mich at 540–541.

And, on the back end, this Court built in ample limitations for law enforcement's search of a phone. *Id.* at 542–546 (requiring a search be "reasonably directed at finding evidence of the criminal activity identified within the warrant" and detailing multiple factors for courts to consider in scrutinizing whether a forensic search was reasonable). Thus, working in tandem, the particularity doctrine and these search limitations suffice to guard against "general searches."

D. The Court of Appeals' erroneous decision has generated confusion that requires a remedy.

The People have explained at length the deficiencies of the Court of Appeals analysis and its erroneous conclusion. (People's Br at 26–33.) Its sea-change holding was not paired with any guidance about how the particularity doctrine was altered, and the decision's lack of direction compounded its negative effects. Carson

RECEIVED by MSC 1/16/2025 3:50:33 PM

notes that the Court of Appeals did not create new, specific rules to govern the particularity of search warrants. (Def Br at 16–17.) True enough. But this absence makes this Court's reversal all the more necessary. Law enforcement officers, warrant magistrates, defendants, reviewing judges, and attorneys are left to guess what the particularity requirement as applied in Michigan actually requires. These stakeholders should not be left to scour tea leaves.

This Court should reaffirm that a valid search warrant should identify (1) the *crime* which the evidence relates to, (2) the *location* of the place to be searched, and (3) *the scope* of the objects to be seized. See, e.g., *United States v Tompkins*, 118 F4th 280, 287 (CA 2, 2024). (See People's Br at 22–26.) This standard hews closely to *Hughes*, see 506 Mich at 538, and is consistent with several state and federal courts' standards (People's Br at 25–26). And it is workable—it provides guidance to law enforcement and magistrates to know the limits of a sufficiently particular warrant, and grants assurances to individuals that, in conjunction with other Fourth Amendment doctrines, see *supra*, p 3, their rights will be protected.

II. If there had been a particularity problem, courts must apply the severance doctrine to excise only the invalid portion of the warrant.

Asserting that the exclusionary rule is meant as a deterrent to law enforcement, not as a means of "repair," Carson goes on to propose that severability does not meet that goal. (Def Br at 20.) That principle is discussed at length in the People's discussion of the good-faith doctrine. (People's Br at 36–39.) But *deterrence* of law enforcement from seeking non-particularized search warrants is

RECEIVED by MSC 1/16/2025 3:50:33 PM

distinct from *punishing* them for it, which is what Carson suggests should be the sanction for any Fourth Amendment violation. He argues that any defect in the search warrant should nullify it completely, even the aspects of the warrant that are beyond reproach. This broad exclusionary rule is in strong tension with the Supreme Court's repeated admonition that exclusion "has always been [a] last resort, not [a] first impulse." *Utah v Strieff*, 579 US 232, 237 (2016). Why? Because the exclusion of relevant evidence by necessity compromises the truth-seeking function of the court system.

Separately, Carson contends that the severability doctrine should be revised to draw from the law of contracts. (Def Br at 21–22.) A search warrant is not akin to a contract. It does not contemplate a "meeting of the minds," nor are they undergirded by other contract principles. A search warrant is a court-authorized order permitting law enforcement to search and seize items relevant to a crime.

As to application of the severability doctrine to the facts of this case, Carson fares no better. To apply a severance analysis, first, "the court must divide the warrant into categories." *People v Keller*, 479 Mich 467, 479 (2007). Second, the court will "evaluate the constitutionality of each category." *Id.* Where there are both valid and invalid aspects of the warrant, "the court must determine if the valid categories are distinguishable from the invalid ones." *Id.* (quotation marks omitted).

RECEIVED by MSC 1/16/2025 3:50:33 PM

The People contend that the appropriate "categories" depend on the nature of the claimed particularity problem. As Carson aptly notes, the analysis from *Keller* is not entirely instructive because the nature of the particularity problem in *Keller* related to the distinct crimes—evidence of distribution of marijuana as against evidence of possession of marijuana. *Id.* at 478–479. Although there is no particularity problem here for the reasons explained at length, the Court of Appeals' ruling was premised on the *kind* of data sought by the warrant—separating correspondence from photographs and videos, for example. (App'x p 12.) Thus, if a severance analysis was applied, the *kind* of data would be the appropriate categorization.

On to the warrant itself. It contains an element of duplication—it twice references "all records or documents which were created, modified, or stored in electronic or magnetic form and any data, image, or information that is capable of being read or interpreted [by a cellular phone] or a computer." (App'x p 123.) But in addition to that definitional scope of what "records or documents" might encompass, the *kinds* of records or documents are further explicated in the warrant:

> Any and all data including text messages, text/picture messages, pictures and videos, address book[s], [and] any data on the SIM card if applicable … . [*Id.*][3]

[3] The warrant also encompasses physical or digital items or information that are "necessary to gain access" to the specific device to be searched as well as applications or software on the device. This kind of access information includes "physical keys," "encryption devices," and passwords. (*Id.*)

RECEIVED by MSC 1/16/2025 3:50:33 PM

This aspect of the warrant was the focus of the Court of Appeals' opinion. (App'x pp 12–13.) The court endorsed a search for correspondence via text messages or other messaging systems and emails, but it found that "photographs and videos" were completely out-of-bounds. (App'x p 12.) Accordingly, if severance was required, this kind of categorization would be appropriate.

Carson does not grapple with the second *Keller* step: evaluating the constitutionality of each category. *Keller*, 479 Mich at 479. Perhaps this is because it is patently clear, as the even the majority opinion recognized, that "it would have been wholly appropriate to issue a warrant authorizing" a search for correspondence between DeGroff and Carson. (App'x p 12.) Because that is the only evidence obtained from the search warrant to appear at trial, applying severance would yield no change in the evidence before the jury.

III. The officer submitting the warrant request acted in line with longstanding and binding authority.

Whatever the Court's holding on the particularity question, the good-faith exception applies. The officer cannot be said to have acted in bad faith. No Michigan case, published or unpublished, would have suggested the warrant was inadequate. Not even any of the non-binding out-of-state authority that Carson mentions was issued before the warrant was secured in this case. See *supra*, Part I.C. Surely, excluding evidence that was found pursuant to a "wholly appropriate" aspect of the warrant (App'x p 12), cannot serve "to deter deliberate, reckless, or grossly negligent conduct." *Herring v United States*, 555 US 135, 144 (2009).

RECEIVED by MSC 1/16/2025 3:50:33 PM

IV. Counsel was not ineffective.

Given the propriety of the warrant, counsel could not have been ineffective for choosing not to move to suppress. *People v Riley*, 468 Mich 135, 142 (2003). Even assuming a Fourth Amendment violation, no ability to sever the "wholly appropriate" correspondence between the perpetrators, and flagrant police misconduct, reversal is not warranted. Ample evidence, even aside from the silver-bullet text messages, proved Carson's guilt. (See Mich Ct App Op at App'x pp 3–5.) Carson had the only house key other than Billings' hidden spare. (10/19/20 Jury Trial Tr, pp 31–33.) Immediately after Billings gave Carson access to the home, Carson abruptly quit his job despite little money to get by, suddenly came into an influx of cash, and frivolously spent at the casino through all hours of the night. There was no reasonable probability of a different outcome even without the text messages. *Strickland v Washington*, 466 US 668, 688 (1984).

RECEIVED by MSC 1/16/2025 3:50:33 PM

CONCLUSION AND RELIEF REQUESTED

The People respectfully request this Court reverse the Court of Appeals' judgment regarding the proper principles and application of the particularity requirement, the severance doctrine, and the exclusionary rule.

Respectfully submitted,

Dana Nessel
Attorney General

Ann M. Sherman (P67762)
Solicitor General
Counsel of Record

Michael H. Schuitema (P72718)
Emmet County Prosecutor

/s/ Christopher M. Allen
Christopher M. Allen (P75329)
Assistant Solicitor General
PO Box 30212, Lansing, MI 48909
(517) 335-7628

Brent E. Morton (P58526)
Assistant Attorney General
Criminal Appellate and
Parole Appeals Division

Attorneys for Plaintiff-Appellant

Dated: January 16, 2025

WORD COUNT STATEMENT

This document complies with the type-volume limitation of Michigan Court Rules 7.312(A) and 7.212(G) because, excluding the part of the document exempted, this **merits reply brief** contains no more than 3,200 words. This document contains 3,086 words.

/s/ Christopher M. Allen
Christopher M. Allen (P75329)
Assistant Solicitor General
PO Box 30212, Lansing, MI 48909
(517) 335-7628
Attorney for Plaintiff-Appellant