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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MICHAEL GEORGIE CARSON,

Defendant-Appellee.
_____/

Supreme Court No.

Court of Appeals No. 355925

Emmet Circuit Court No. 20-005054-FC

APPLICATION FOR LEAVE TO APPEAL OF APPELLANT PEOPLE OF THE STATE OF MICHIGAN

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STATEMENT OF JURISDICTION, JUDGMENT APPEALED, AND GROUNDS FOR APPLICATION

The Court has discretionary jurisdiction to review a decision of a panel of the Court of Appeals. MCR 7.303(B)(1). In this case, the Court of Appeals issued a published decision on February 15, 2024, reversing the criminal convictions in the case and remanding the matter for further proceedings in the trial court. *People v Carson*, ___ Mich App ___, ___ (2024), slip op at 2; MCR 7.305(A)(1)(a).

In this decision, the majority of the Court determined there was (1) a violation of the Double Jeopardy clause based on Carson's convictions for both Larceny and Receiving and Concealing Stolen Property, (2) a violation of the particularity requirement for the search warrant of Carson's cell phone due to being overly broad, and (3) a denial of the application of the good faith exception to the exclusionary rule. *Carson,* ___ Mich App at ___; slip op at 1–2; App'x A. In a concurring opinion, a panel judge further indicated his belief that the cell phone warrant was deficient for failing to establish a sufficient nexus between the phone and the investigation. *Carson,* ___ Mich App at ___ (Hood, J., concurring); App'x B. In a dissenting opinion, a panel judge disagreed with all three determinations of the majority, and after considering all of Carson's claims of error determined none of them merited reversal. *Carson,* ___ Mich App at ___ (Redford, J., dissenting); slip op at 14; App'x C.

This application challenges the determination of the majority that the cell phone search warrant violated the particularity requirement of the Fourth

Amendment by being overly broad, and the failure of the majority to apply the good faith exception to the exclusionary rule.

A finding that a cell phone search warrant is overly broad, coupled with the denial of the application of the good faith exception to the exclusionary rule, is a case of first impression in Michigan, and the pervasiveness of cell phones in our society and the amount of evidence potentially preserved on them, this is an issue involving "a legal principles of major significance to the state's jurisprudence." MCR 7.305(B)(3).

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STATEMENT OF QUESTIONS PRESENTED

1. The majority below bypassed the plain limitations in the search warrant that cabined the search to records and documents "pertaining to the investigation of Larceny in a Building and Safe Breaking," and invented and applied a novel standard for search warrant particularity that is inconsistent with this Court's precedent. Did the Court of Appeals reversibly err in its published decision?

   Appellant's answer: Yes.

   Appellee's answer: No.

   Trial court's answer: Did not answer.

2. Despite the Court of Appeals' creation and application of a new standard of particularity that is inconsistent with long-established law and expectations, the majority found that the police officer's search warrant was not issued in good faith. Did the Court of Appeals err?

   Appellant's answer: Yes.

   Appellee's answer: No.

   Trial court's answer: No.

CONSTITUTIONAL PROVISIONS INVOLVED

US Const, Am IV

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.

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INTRODUCTION

The Court of Appeals majority created and applied a novel theory of the particularity requirement for search warrants that is in severe tension with this Court's recent opinion in *People v Hughes*, 506 Mich 512 (2020). The majority below, in a published decision, effectively created a cell-phone-specific approach to the Fourth Amendment's protections. The panel's decision appears to require cell-phone search warrants to state not only the crimes under investigation and the place to be searched (which this warrant did), but now specific identification of the only subparts or folders *within* a phone to be searched. This is akin to requiring a real property search warrant to specify which file cabinets or bathrooms it is limited to. But just like in a home, this Court is "cognizant that a criminal suspect will not always store or organize incriminating information on his or her digital devices in the most obvious way or in a manner that facilitates the location of that information." *Id.* at 540–541. As the Court of Appeals readily acknowledged, its analysis has no foundation in Michigan precedent. And it overlooks the reality that suspects do not advertise where they hide incriminating information.

What is more, rather than suppressing evidence from the aspects of the search found objectionable, the panel suppressed *all* evidence yielded from the search warrant, even that which the panel regarded as "wholly appropriate."

The decision below creates new legal regime of statewide consequence, potentially affecting numerous valid search warrants authorized under preexisting law. Such a shift in governing law highlights yet another flaw in the decision below: that all evidence obtained from the warrant must be suppressed because it

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was so obviously facially invalid that the officer lacked good faith in relying on it. A finding of lack of good faith here is startling, since this new particularity standard was news not only to the police officer who drafted it, but the magistrate who authorized it, the trial court judge who evaluated it, the dissenting judge below, and defendant's trial counsel (who did not challenge the viability of the warrant), not to mention prosecutors across the State. And yet, the majority found that "no reasonable officer could have relied in objective good faith" upon the warrant. The court below appears to have misunderstood the proper application of the good faith exception. This presents another, independent basis for this Court's review.

For the benefit of lower courts, the legal community, law enforcement, and the general public, this Court should grant leave to appeal to correct the several errors committed below and provide guidance detailing what constitutes a sufficiently particular search warrant for a cell phone under the Fourth Amendment.

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STATEMENT OF FACTS AND PROCEEDINGS

Carson offers to help Billings.

Don Billings had developed health problems that interfered with his ability to enjoy his multi-level home. (10/19/2020 Tr Jury Trial II, pp 26–28.) When Billings moved in with his brother, he was grateful to have his neighbors – Mike Carson and Brandy DeGroff – offer to help him sell certain household items on-line. (*Id*., pp 29–30.) Carson was to get a 20% commission of the selling price of the items. (*Id*., p 30.) Prior to giving Carson a key to the house, Billings and Carson talked about what items Billings wanted sold. (*Id*., pp 30–31.)

A month or two later Billings noticed some of his collectible coins were missing. (*Id*., pp 45–46.) This prompted Billings to get his key back from Carson. (*Id*.) When Billings confronted Carson about the missing coins, Carson denied taking them. (*Id*., p 46.) For all the things Carson sold of Billings', he only gave Billings $1,500 to $1,700. (*Id*., p 47.)

Billings discovers his life savings is gone.

Three months after letting Carson have unlimited access to his home, Billings attempted to open his safe to check on his money, coins, and metal bars. (*Id*., p 48.) But the combination would not work. (*Id*.) With the aid of a locksmith, the safe doors were opened, and Billings discovered that his life savings was gone. (*Id*., pp 48–50.) He immediately called law enforcement to make a report. (*Id*., p 49.)

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Carson is arrested and his cell phone is seized.

During the investigation of the theft from Billings, an arrest warrant was obtained for Carson. (7/7/2020 Tr Mot to Suppress, p 29.) Carson was arrested at his home and his cell phone was seized incident to his arrest as part of the investigation. (*Id*., pp 8, 11–12; 7/15/2020 Op & Order, p 2.)

When asked, Carson gives the deputies the access code and allowed the use of his finger to unlock the phone so it could be put into airplane mode. (Mot to Suppress Tr, pp 13–14.) No search of the phone was conducted until a search warrant was issued later in the investigation. (Op & Order, p 2.)

Carson is convicted and sentenced to prison.

At trial, defense counsel argued that there was a lack of evidence against Carson, Carson and DeGroff had won money at the casino and sold a truck, and that the investigation was insufficient. (10/21/2020 Tr Jury Trial III, pp 67, 71–76, 84–87.) The prosecutor, on the other hand, focused on how Carson and DeGroff did not have money prior to the deal to sell Billings' property and were then seen with a lot of money. (*Id*., pp 50, 55–58, 60, 92.) And that the text messages obtained from the cell phone search warrant demonstrated that Carson and DeGroff were trying to break into Billings' safe. (*Id*., pp 51–54, 92.)

Following a three-day trial, and a little over an hour-and-a-half of deliberations, the jury returned finding Carson guilty of all counts – Safe-Breaking, Larceny over $20,000, Receiving and Concealing Stolen Property over $20,000, Larceny in a Building, Conspiracy to Commit Safe-Breaking, Conspiracy to Commit

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Larceny over $20,000, Conspiracy to Commit Receiving and Concealing Stolen Property over $20,000, and Conspiracy to Commit Larceny in a Building. (*Id*., pp 115–116.)

At sentencing, defense counsel was limited in his arguments at the direction of appellate counsel. (12/15/2020 Tr Sentence Hrg, pp 14–15.) As a result, defense counsel advocated for a middle of the guidelines sentence. (*Id*., pp 14, 17–18.) Carson asked to be released on bond pending his appeal because he had health issues and to take care of his family. (*Id*., pp 16–17, 19–21.) The prosecutor focused on Carson's criminal history and the devastating effect on Billings – arguing for a 10-year minimum sentence. (*Id*., pp 18–19.)

The trial court noted Carson's criminal history and that after stealing the victim's life savings rather than keep the money to care for his family, he wasted it. (*Id*., pp 21–23.) The trial court sentenced Carson to a minimum of 10 years on the most serious charge, with all charges to be served concurrently. (*Id*., pp 23–24.)

Carson pursues relief in the trial court.

On appeal, Carson blamed defense counsel for his convictions including failing to pursue the suppression of the results of the cell phone search warrant. (9/10/2021 Def's Mot for New Trial.) While asserting that the warrant lacked probable cause, Carson also claimed that the method and scope of the search was invalid due to the cell phone being "dumped" into a single document. (9/10/2021 Motion for New Trial, p 16.) The trial court gave Carson the opportunity to make his argument and held a *Ginther* hearing. (*Ginther* Hrg Tr.) *People v Ginther*, 390

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Mich 436 (1973). Following the hearing, the trial court denied relief. (5/17/2022 Op & Order foll *Ginther* Hrg.) Regarding Carson's claims of error regarding the search warrant, the trial court did not specifically find error in the warrant but determined that even if there was error defense counsel was not ineffective for failing to file a motion to suppress because the good faith exception to the exclusionary rule applied and there was not a reasonable probability of a different outcome if the motion had been filed. (*Id*., pp 4–6.) *Strickland v Washington*, 466 US 668, 688, 694 (1984).

Carson pursues relief in the Court of Appeals.

Following the denial of relief in the trial court, Carson re-asserted his claims of error in the Court of Appeals. Because Carson failed to raise the search warrant issue before the trial court, the Court of Appeals evaluated it under the rubric of ineffective assistance of counsel.

Regarding his particularity claim, on appeal Carson again argued that the method and scope of the search was invalid due to the cell phone being "dumped" into a single document. (Def's Appeal Br, p 32.) Not based on the language used to specify the extent of the search and seizure. (*Id*.) Carson also argued that it was unreasonable for the officer to rely on the affidavit of the search warrant to support the search, so the good faith exception should not apply. (*Id*., p 36.)

In response to this claim, the Court of Appeals analyzed the language of the warrant, with the majority of the panel determining that its scope was overly broad, violating the particularity requirement. *Carson*, __ Mich App at __; slip op 12. In Carson's cell phone search warrant, the prosecutor sought to search and seize,

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> Any and all records or documents* pertaining to the investigation of Larceny in a Building and Safe Breaking. As used above, the term records or documents includes 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 computer. In order to search for any such items, searching agents may seize and search the following: cellular devices; Any physical keys, encryption devices and similar physical items that are necessary to gain access to the cellular device to be searched or are necessary to gain access to the programs, data, applications and information contained on the cellular device(s) to be searched; Any passwords, password files, test keys, encryption codes or other computer codes necessary to access the cellular devices, applications and software to be searched or to convert any data, file or information on the cellular device into a readable form; This shall include thumb print and facial recognition and or digital PlN passwords, electronically stored communications or messages, including any of the items to be found in electronic mail ("e-mail"). Any and all data including text messages, text/picture messages, pictures and videos, address book, any data on the SIM card if applicable, and 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. [2/27/2020 Cell Phone SW, p 1; App'x D.]

In addition to finding this language violative of the particularity requirement, the majority determined that because the warrant "was so deficient by virtue of its failure to particularize the places to be searched and things to be seized that the executing officers could not have reasonably presumed it to be valid." *Carson*, __ Mich App at __; slip op 15.

In opposition to this finding, because the search warrant was limited to finding evidence of "Larceny in a Building and Safe Breaking," the dissent determined that the warrant was sufficiently particular and even if it was not, the good faith exception to the exclusionary rule should apply. (Phone SW, p 1.) *Carson,* ___ Mich App at ___ (Redford, J., dissenting); slip op at 10–13.

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Despite this being a case of first impression, that the trial court approved the warrant, that the dissent opined that the warrant was not defective, and without analyzing whether the exclusionary rule should apply to the facts of the case, the majority also determined that the good faith exception did not apply and reversed Carson's convictions. *Id*. at 13, 15–16, 18.

STANDARD OF REVIEW

The determination whether someone has been deprived effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579 (2002). The court "must first find the facts, and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id*. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

ARGUMENT

I. The decision below created a novel and problematic approach to determining the appropriate particularity of a search warrant.

Over a well-reasoned dissent, the Court of Appeals majority nullified a cell phone search warrant based on its assessment that the warrant authorized "an unfettered search of a phone's entire contents." *Carson*, ___ Mich App at ___; slip op at 13. This, despite the fact that the warrant—supported by an ample affidavit from law enforcement—limited the search to cell phone "records or documents pertaining to the investigation of Larceny in a Building and Safe Breaking" against Carson. In doing so, the decision below generated an entirely new and unduly

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stringent approach to evaluating the particularity of search warrants. Its approach creates friction with this Court's decision in *People v Hughes* and will hamstring law enforcement from effectively investigating crime. And even though the majority found "it would have been wholly appropriate" to issue a narrow warrant for communications between Carson and DeGroff, the panel suppressed that evidence, too. *Id.*, slip op at 12.

This Court should grant leave to appeal.

A. The Fourth Amendment protects against "general warrants" that allow law enforcement to search a person's property for general evidence of criminality.

The Fourth Amendment protects against the issuance of a "general warrant" by requiring a "particular description" of the place to be searched and the things to be seized. *Andresen v Maryland*, 427 US 463, 480 (1976), quoting *Coolidge v New Hampshire*, 403 US 443, 467 (1971); US Const, Am IV. This requirement exists to limit "an officer's discretion when conducting a search pursuant to a warrant." *People v Hughes*, 339 Mich App 99, 108 (2021). This requirement limits the scope of a warrant to a specific crime. *Id.* It further avoids "the risk of the wrong property being searched or seized." *People v Hampton*, 237 Mich App 143, 151 (1999).

> [T]he test for determining the sufficiency of the description of the place to be searched is (1) whether the place to be searched is described with sufficient particularity to enable the executing officer to locate and identify the premises with reasonable effort, and (2) whether there is any reasonable probability that another premises might be mistakenly searched. [*Id.*, citing *United States v Gahagan*, 865 F2d 1490, 1496 (CA 6, 1989).]

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The area to be searched is particular enough to be valid "if the description is such that the officer with a search warrant can, with reasonable effort ascertain and identify the place intended." *Steele v United States*, 267 US 498, 503 (1925). The search of a cell phone "must be 'reasonably directed at uncovering' evidence of the criminal activity alleged in the warrant." *Hughes*, 506 Mich at 537–539.

Courts have justifiably warned about the specter of "general warrants," which are unconstitutional. The U.S. Supreme Court's decision in *Riley v California* noted the historical driving force behind the Fourth Amendment—the "reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity." 573 US 373, 403 (2014). After reviewing the ways in which cell phones have come to contain vast amounts of information about individuals' personal lives, the Court made it straightforward: "Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—*get a warrant*." *Id.* at 403 (emphasis added).

The purpose of avoiding general warrants was recently reiterated by this Court:

> By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored *to its justifications*, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit. [*Hughes*, 506 Mich at 539 (emphasis added), quoting *Maryland v Garrison*, 480 US 79, 84 (1987).]

This Court's recent unanimous opinion in *Hughes* is highly instructive, and it should have governed the Court of Appeals' resolution of this case. *Hughes*

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concerned whether a warrant to search a suspect's cell phone data for evidence of one crime enables a search for evidence of another crime without a separate search warrant. 506 Mich at 552–553. The Court, rightfully and unsurprisingly, held that the answer is "No." Yet in announcing that rule, the Court made clear that, "Nothing herein should be construed to restrict an officer's ability to conduct a reasonably thorough search of digital cell-phone data to uncover evidence of the criminal activity alleged in a warrant." *Id.* at 553.

This admonition must be read with a view of the search warrant at issue in the case—it authorized the search of three separate residences and his vehicle for "evidence of drug trafficking," as well as "any cell phones" seized during the search, which "shall be permitted to be forensically searched or manually searched, and any data that is able to be retrieved there from shall be preserved and recorded." *Id.* at 519. The warrant also contained a broad limitation, allowing search and seizure of "any records pertaining to the receipt, possession and sale or distribution of controlled substances including but not limited to documents, video tapes, computer disks, computer hard drives, and computer peripherals." *Id.* at 520.

This Court's discussion in *Hughes* effectively implies that the broad warrant that authorized the search of three residences, one vehicle, and any cell phones found within them did not constitute a general warrant. Instead, it was law enforcement's movement beyond the search for drug trafficking evidence that ran afoul of the Fourth Amendment. *Id.* at 540, 553. As explained below, to the extent it attempted to follow *Hughes*, the Court of Appeals majority came up short.

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B. The Court of Appeals failed to credit the actual language of the search warrant and issued a ruling that is inconsistent with *Hughes*.

The Court of Appeals committed multiple errors in its review of the search warrant. First, it failed to properly examine the full language of the search warrant, effectively nullifying its plain limiting language. Second, the majority expressed a narrow view of what is relevant to a criminal investigation. Finally, its opinion creates and applies a new standard that is in notable tension with this Court's unanimous decision in *Hughes*.

1. Ignoring relevant language in the search warrant, the Court of Appeals' erroneously characterized the search warrant in this case as lacking any limitation.

The court concluded that the "warrant did not place any limitations on the permissible scope of the search of defendant's phone." *Carson*, ___ Mich App at ___; slip op at 12. This is inaccurate. The very first sentence of the warrant severely limited the scope of the search in conjunction with the specific law enforcement purpose: "Any and all records or documents pertaining to the investigation of Larceny in a Building and Safe Breaking." The limitation was to the particular crime that the defendant was being investigated for; that in itself removes this warrant from the label of a "general warrant." The dissent recognized this, stating, "This opening sentence provided context for all that followed in the paragraph, necessarily placing limitations and parameters on the nature and scope of the information and data that could be sought or retrieved by law enforcement when

searching the cell phone's digital record." *Carson,* ___ Mich App at ___ (Redford, J., dissenting); slip op at 10.

But to the contrary, the majority characterized the warrant as if it authorized a search of the defendant's phone pertaining to the investigation of crime, full stop, ignoring that "[t]he search warrant supplied context connecting the particularized description of the venue to be searched, i.e., the cell phone, and the data and information to be seized with the larcenous, safe-breaking criminal conduct that was suspected." *Id.* The majority did note that this important opening sentence did exist in the warrant, but effectively severed it by characterizing it as a "small guardrail" that "was negated by the ensuing instruction to search for such items by searching and seizing the entirety of the phone's contents." *Carson,* ___ Mich App at ___; slip op at 12. This crabbed reading of the warrant, and its disregard of its plain terms, facilitated its conclusion that the "warrant did not place any limitations on the permissible scope of the search of defendant's phone." *Id.*

This alone is an error. *Hughes* extensively cites the guardrail of limiting law enforcement's search to "finding evidence of the *criminal activity identified within the warrant*." 506 Mich at 543 (emphasis added); see also *id.* at 547 (because "the warrant did not authorize a search of defendant's data for evidence *related to the armed robbery*" but for drug trafficking); *id.* at 552–553 ("[A] warrant to search a suspect's digital cell-phone data for evidence of one crime does not enable a search of that same data for evidence of another crime without obtaining a second warrant."). In other words, per *Hughes*, to avoid the problem of a general warrant,

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law enforcement should limit its review of content seized through a search warrant to that which is relevant to uncovering or proving the crimes named in the warrant. That narrowing—of *content*, as opposed to *location*—is sufficient circumspection to avoid a "general warrant." See *State v Savath*, 298 Or App 495, 501 (2019) ("[D]etails regarding specific 'locations' within the phone do little if anything to satisfy the particularity requirement. That is, a description of 'where,' on a device, officers might search, says almost nothing about the information they may seek—the 'what' as to which the warrant must be particular.").

2. The majority's view of what might be relevant for investigating a particular crime is unduly circumscribed.

The Court of Appeals majority seems not to have been "cognizant," as this Court is, "that a criminal suspect will not always store or organize incriminating information on his or her digital devices in the most obvious way or in a manner that facilitates the location of that information." *Id.* at 540–541.

To its credit, the majority did endorse what it considered "probable cause to believe that defendant had used his phone to communicate with DeGroff regarding these crimes," thereby authorizing a search of "correspondence between these two regarding the crimes" including text messages, direct messages through apps or social media platforms, or emails. *Carson,* ___ Mich App at ___; slip op at 12. On that, at least, the People agree.

But the majority's approach severely circumscribed what might be searched based on general ideas about what may or may not be relevant to a criminal

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investigation. For example, the majority stated that there was "no evidence suggesting that [photographs and videos] would yield anything relevant." *Id.* This is, quite simply, untrue. Not only did the search warrant affidavit provide sufficient information to warrant this inference, a slew of caselaw demonstrates individuals take photos of all manner of life events, mundane and not, and share those photos, often widely. Unsurprisingly, those who commit crimes are no exception. It is not uncommon for individuals to take photos of illegal activity, and it is not uncommon for photos of what may seem to be innocuous activity to provide evidence of the commission of a crime.

Notably, the supporting affidavit had information that defendant and DeGroff had stolen substantial sums of money and "were living lavishly on the cash." *Carson,* ___ Mich App at ___ (Redford, J., dissenting); slip op at 11. Is it *unreasonable* to believe that individuals who crack a safe would have photos of expensive or extravagant purchases? That none were found is of no moment. See *Hughes*, 506 Mich at 547 ("So long as it is reasonable under all of the circumstances for officers to believe that a particular piece of data will contain evidence relating to the criminal activity identified in the warrant, officers may review that data, even if that data ultimately provides evidence of criminal activity not identified in the warrant.").

On a more fundamental level, the Court of Appeals' analysis parts with established Supreme Court precedent, which recognizes that "a warrant that authorizes an officer to search a home for illegal weapons also provides authority to

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open closets, chests, drawers, and containers in which the weapon might be found." *United States v Ross*, 456 US 798, 821 (1982). "When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand." *Id.* In principle, this reference to search warrants for real property and vehicles applies just as well to cell phones—just as the law does not typically expect a search warrant to identify the specific rooms or cabinets within a home, it does not expect search warrants to guess at which apps and subfolders a suspect may have stored incriminating evidence.

3. Caselaw, including from this Court, does not require the undue specificity for search warrants that the Court of Appeals now requires.

Limits like these suggested by the Court of Appeals, requiring a warrant to contain specific subsets of locations on a phone, is unreasonable and would unduly limit legitimate law enforcement investigations.

Instead, the better approach is akin to the long-understood warrant authorizing the reasonable search of a whole home, recognizing that "[t]here is no way for law enforcement to know where in the digital information associated with cell phones it will find evidence of the specified crime," and "[s]ophisticated users can hide digital data in complex ways." *State v Short*, 310 Neb 81, 139 (2021), quoting *United States v Bishop*, 910 F3d 335, 336 (CA 7, 2018).

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Courts in sister states haves endorsed and reaffirmed these principles for cell phone warrants. As the Supreme Court of Nebraska put it, "scanning all digital information related to a cell phone is like searching everywhere in a house for evidence of drugs or searching every document in a filing cabinet when the incriminating evidence may be found in any file or folder. Neither search is overbroad." *Short*, 310 Neb at 138. "Criminals don't advertise where they keep evidence," *id.* at 137–138,[1] so instead of imposing "limitations based on file or data type or specific application," *id.* at 139, the "most important constraint in preventing unconstitutional exploratory rummaging is that the warrant limit the search to evidence of *a specific crime*, ordinarily within a specific time period," *id.* at 139 (emphasis added). See also, e.g., *State v Swing*, 98 NE3d 828, 844 (Ohio Ct App, 2017) (approving warrant for cell phone search of "any and all information" related to specific sex crimes because the warrant was "conditioned upon, and limited to, the crime being investigated"); *State v Johnson*, 576 SW3d 205, 221 (Mo Ct App, 2019) (cell phone search warrant "for all data/software" in conjunction with supporting affidavit was sufficiently particular where "the officers could not have known where such evidence was located in the phone or in what format, such as texts, videos, photos, emails, or applications"); *Savath*, 298 Or App at 501

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[1] Orin Kerr, noted Fourth Amendment scholar and UC-Berkeley law professor, reviewed the *Carson* majority's opinion and decried its approach as a "novel interpretation" that "is wrong." Orin S. Kerr, *The Volokh Conspiracy*, March 2, 2024.[1] "[N]ot letting the government look through particular kinds of files makes no sense. You don't know in advance where digital evidence of a crime is going to be." *Id.*

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(particularity concerns the "content," not the "location," of information to be searched or seized).[2]

This approach supports a limitation in the search to "evidence of a specific crime," typically with an additional limitation to a specific time period. *Id.* Conceptually, this treats a cell phone like a file cabinet in which every folder and document in the cabinet will need to be reviewed briefly to determine if it is evidence of the crime that is being sought. *Id.* at 138–139. Consistent with *Riley v California* and *People v Hughes*, this focus permits the cell phone to be searched with a valid warrant that identifies the crime being investigated. 573 US 373, 396 (2014); *Hughes*, 506 Mich at 552–554; see also *Short*, 310 Neb at 138.

The majority apparently (though not explicitly) intends to require law enforcement to detail which subfolders or apps it intends to search within a phone. But this specificity would put cell phone search warrants in a special category, distinct from other locations of property, including the home. Law enforcement is

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[2] Even some of the out of state authority relied on by the majority does not support its holding. In *State v Smith*, see *Carson,* ___ Mich App at ___; slip op at 13, for example, the Connecticut Supreme Court determined that the challenged search warrant failed for particularity for a combination of reasons not present here: "The warrant failed to list types of data this particular device or cell phones in general contain, and the types of data on the phone the affiants sought to search and seize, such as cell phone call logs, text messages, voice messages, photographs, videos, communications via social media, or other evidence of the crime of aggravated assault." 344 Conn 229, 251–252 (2022). It also lacked any time parameters. *Id.* at 252. The warrant here, to the contrary, "list[ed] types of data" and "the types of data on the phone the affiants sought to search and seize." *Id.* at 251. The panel's selective quotation of *Smith* obscured the Connecticut Supreme Court's nuanced review of the search warrant it found to be inadequate.

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often permitted to search an entire vehicle, or an entire house. See, e.g., *Hughes*, 506 Mich at 519; *People v Keller*, 479 Mich 467, 479 (2007) ("[T]he authorized search for marijuana permitted police officers *to search the entire house* and to investigate containers in which marijuana might be found.") (emphasis added); *Ross*, 456 US at 821 ("[A] warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found.").

Unless there is a reason for which the warrant must, in a particular case, be circumscribed to a particular room in the house or area of a vehicle, such specificity is not required. The Fourth Amendment does not expect law enforcement to pick only the defendant's bedroom in a house to which he has full access, just as it does not expect law enforcement to search text messages in a phone but ignore photos, even though there is probable cause that either will assist in the investigation. This kind of detail is not required by the Fourth Amendment and does not reflect a real-world understanding of criminality or the investigation of crime.

Importantly, this well-worn approach does not allow law enforcement to run roughshod over individuals' privacy, as there are already recognized restraints that limit law enforcement from willy nilly reviewing the entire contents of a phone, regardless of investigative value. The search of a house, or a phone, does not necessarily mean that law enforcement now has a blanket authorization to open every nook and cranny within those locations. For example, "a warrant authorizing police to search a home for evidence of a stolen television set would not permit

officers to search desk drawers for evidence of drug possession." *Hughes*, 506 Mich at 539. See also *United States v Ross*, 456 US 798, 824 (1982) ("Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase."). This limitation should help dispel the panel's reasonable concern that a cell phone search could permit law enforcement to review, without probable cause, "text-message based sessions with their psychotherapist" and or rummage through "detailed medical records as well as private conversations between patients and doctors." *Carson,* ___ Mich App at ___; slip op at 11–12.

C. The majority below even suppressed text message evidence that it agrees was properly included in the search warrant.

Even if the Court of Appeals had properly found an overbreadth problem with the warrant, it entirely ignored the proper remedy. The majority agreed that the search warrant's inclusion of messages between Carson and DeGroff was "wholly appropriate," *id.* at 12 (including "confessions" by Carson, *id.* at 18), yet it concluded that the consequence for its holding that the warrant "did not satisfy the particularity requirement," *id.* at 14, was to suppress *all* evidence yielded from the warrant. The majority threw out the baby with the bathwater.

Suppression of evidence seized pursuant to a search warrant is not required for "anything described in the valid portions of the warrant." *People v Keller*, 479 Mich 467, 478 (2007) (cleaned up). See also *Carson,* ___ Mich App at ___ (Redford,

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J., dissenting); slip op at 11, quoting *United States v Greene*, 250 F.3d 471, 477 (CA 6, 2001) (cleaned up) (the Constitution "requires the suppression of evidence seized pursuant to that part of the warrant, but [it] does not require the suppression of anything described in the valid portions of the warrant[.]"). The proper course is to "sever the infirm portion of the search warrant from the remainder which passes constitutional muster." *Id.*, quoting *United States v Blakeney*, 942 F2d 1001, 1027 (CA 6, 1991).

In reviewing the severability question, a court is obliged to divide the warrant into categories, and evaluate the constitutionality of each to determine whether severability is appropriate. *Keller*, 479 Mich at 478–479. The Court of Appeals determined that at least one category of the search was proper: "it would have been wholly appropriate to issue a warrant authorizing the police to engage in a search of the phone's contents limited in scope to correspondence between these two regarding the crimes." *Carson,* ___ Mich App at ___; slip op at 12. (See also *id.* (the search warrant identified "any and all data" to include "text messages").

Even though the dissent discussed and applied this line of authority, the majority did not grapple with it at all. Indeed, it did not evaluate whether evidence that it found was properly encompassed within the warrant should have been suppressed.

This Court should grant leave to appeal and reverse the decision below.

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II. The good faith exception to the exclusionary rule should apply here, where the Court of Appeals recognized this as an issue of first impression in Michigan, departed from this Court's prior jurisprudence in *Hughes*, and where sister state resolution of the issue is in its infancy and continues to develop.

The Court of Appeals readily admitted that it was "aware of no binding authority discussing the analysis of whether the language of a warrant authoring a search of cell phone data comports with the particularity requirement." *Carson,* ___ Mich App at ___; slip op at 13. Yet, on the next page of its opinion, the Court found that "this was a facially invalid general warrant upon which no reasonable officer could have relied in objective good faith." *Id.* at 14. The Court's holding is erroneous, and one that needs correction—not only would the evidence be suppressed in this case, but in cases involving many similarly worded search warrants that have, until now, found no resistance in Michigan courts. See, e.g., *Hughes*, 506 Mich at 553 ("Nothing herein should be construed to restrict an officer's ability to conduct a reasonably thorough search of digital cell-phone data to uncover evidence of the criminal activity alleged in a warrant.").

The exclusionary rule permits, but does not require, the suppression of evidence for a constitutional violation. *People v Goldston*, 470 Mich 523, 528–531 (2004). Since the purpose of the rule is to deter police misconduct, it should not be applied to evidence that is obtained in "objective, good faith reliance on a search warrant." *Id.* at 526. The determination of the applicability of the exclusionary rule requires a cost and benefit analysis balancing the interest of deterring "official misconduct," against excluding trustworthy evidence obtained "in reliance of a

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search warrant subsequently found to be defective." *Id*. at 529, citing *United States v Leon*, 468 US 897, 906–907 (1984).

A. Objectively reasonable, good faith search warrants are entitled to the good faith exception.

The good faith exception counsels for the admission of evidence when the officer's reliance on the approved search warrant is objectively reasonable and conducted in good faith. *Leon*, 468 US at 922; *Goldston*, 470 Mich at 526. The application of the exclusionary rule over the good faith exception is rare and should only apply for a subsequently invalidated search warrant in four circumstances.[3]

First, if the officer misleads the issuing judicial officer with false information in the affidavit "that the affiant knew was false or would have known was false except for his reckless disregard of the truth." *Leon*, 468 US at 923, citing *Franks v Delaware*, 438 US 154 (1978). Second, when the issuing judicial officer completely abandons his or her role as a neutral arbitrator. *Id*., citing *Lo-Ji Sales, Inc v New York*, 442 US 319 (1979). Third, when the affidavit is so lacking probable cause that belief in the warrant's validity is unreasonable. *Id*., citing *Brown v Illinois*, 422 US 590, 610–611 (1975). And fourth, when a warrant is "so facially deficient – i.e., in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid." *Id*., citing

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[3] In *People v Czuprynski*, 325 Mich App 449, 472 (2018), the Court cited only three exceptions to the good faith exception as articulated in *Leon*, 468 US at 915. Since *Leon* does not address particularity in that part of the opinion, this other part of *Leon* is referenced.

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Massachusetts v Sheppard, 468 US 981, 988–991 (1984). None of these species of bad faith apply here.

B. The Carson majority erred in determining that the good faith exception did not apply.

The majority latched onto this fourth ground, determining that the cell phone search warrant was "facially invalid" to an extent that "no reasonable officer could have relied in objective good faith." *Carson*, slip op at 14; *Leon*, 468 US at 923.[4] This holding is in striking tension with the majority's analysis of the particularity requirement, which found "no binding authority" on the issue in Michigan.

Moreover, speaking to the reasonableness of the warrant under current law, this very warrant was reviewed by the trial court, a neutral arbitrator, who approved it as being a valid request to search Carson's cell phone. (Phone SW Aff; App'x D.) And the majority's dissenting colleague explained that the warrant is not overly broad and does not violate the particularity requirement because it was properly limited by the terms of the cell phone search of "[a]ny and all records or documents pertaining to the investigation of Larceny in a Building and Safe Breaking." (*Id.*, p 1.) *Carson*, __ Mich App at ___ (Redford, J., dissenting); slip op at 9–10.

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[4] There is no allegation or indication of misleading information in the affidavit, that the magistrate abandoned his or her role as a neutral arbitrator, or that the affidavit lacks indicia of probable cause.

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The majority relied on out-of-state courts' opinions that generally coincide with its new rule in Michigan. *Carson*, __ Mich App at ___; slip op at 13–14 (surveying cases). Of course, other states' opinions can be persuasive and present fair arguments to be considered. They are not, however, binding on this Court, and most importantly, they do not reflect *Michigan law*. A Michigan police officer should not be charged with knowledge of various decisions from other states that do not bind his conduct. By finding a lack of good faith, the court effectively punished law enforcement for not having predicted a sea change in Michigan Courts' understanding of the Fourth Amendment.

In light of the acknowledged lack of binding authority on this question, the trial court's ruling and the dissenting judge's disagreement, and the inconsistent legal decisions from other states, the majority's opinion about the likelihood of a law enforcement officer to determine this approved warrant as facially invalid is, simply, unreasonable.

C. The imposition of the exclusionary rule by the majority was improper.

The *Carson* majority failed to follow established law regarding the application of the good faith exception and treated a perceived particularity defect differently than any other warrant defect. *Id.*, at slip op 14–16. Further, it failed to properly consider the purpose of the exclusionary rule and the established framework for such analysis. *Goldston*, 470 Mich 523; *Leon*, 468 US 897.

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The application of the exclusionary rule is a drastic remedy that is reserved for instances in which its use may deter future violations of the Fourth Amendment by law enforcement. *Arizona v Evans*, 514 US 1, 10–11 (1995); *Davis v United States*, 564 US 229, 246 (2011). Before deciding to exclude evidence, the Court must balance the likelihood of deterring future improper conduct against the loss of reliable evidence for prosecution of criminal behavior. *Leon*, 468 US at 908–909. Upon conducting this analysis, the court must give particular consideration of the flagrancy of the police misconduct involved. *Herring v United States*, 555 US 135, 143 (2009). This is because the exclusionary rule exists "to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systematic negligence." *Id*. at 144. Imposition of the rule with no consideration for its purpose may "generate disrespect for the law and administration of justice." *Leon*, 486 US at 908, citing *Stone v Powell*, 428 US 465, 491 (1976).

The only trial evidence obtained resulting from the search of Carson's cell phone were text messages between Carson and DeGroff. As the majority recognizes, there was sufficient probable cause to believe that Carson and DeGroff collaborated to steal from the victim, and that they used their phone to communicate with each other about the crime. *Carson*, __ Mich App at ___; slip op at 12. As a result, the relevancy and reliability of this evidence was significant.

And there is no question that the officer's established probable cause to search Carson's cell phone for text messages. As a result, this highly relevant and reliable evidence was properly supported and not obtained as a result of misconduct

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on the part of the investigating officer. Yet, without any consideration of whether the exclusionary rule was the proper remedy to deter improper police conduct, the majority decided to exclude this important evidence based on its interpretation and reliance on out-of-state court decisions.

The denial of the good-faith exception was error. This Court should reverse the Court of Appeals ruling and reinstate Carson's convictions and sentence.[5]

CONCLUSION AND RELIEF REQUESTED

For the reasons argued above, this Court should grant the application, clarify the proper approach to comply with the particularity requirement, and reverse the decision below.

Respectfully submitted,

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[5] Except as it would conflict with the majority's double jeopardy ruling, which the People do not appeal. *Carson*, ___ Mich App at ___; slip op 8–10.

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