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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

BRIEF ON APPEAL OF
PEOPLE OF THE STATE OF MICHIGAN

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Dated: November 20, 2024

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STATEMENT OF JURISDICTION

The Court has discretionary jurisdiction to review a decision of a panel of the Court of Appeals. MCR 7.303(B)(1). This Court granted leave to appeal on September 25, 2024.

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STATEMENT OF QUESTIONS PRESENTED

In this Court's order granting leave to appeal, it sought briefing on four questions:

1. Did the Court of Appeals err in holding that the warrant to search the defendant's cell phone violated the Fourth Amendment's particularity requirement?

   Appellant's answer: Yes.

   Appellee's answer: No.

   Trial court's answer: Yes.

   Court of Appeals' answer: No.

2. Did the Court of Appeals err in failing to sever any valid portions of the search warrant from any invalid portions?

   Appellant's answer: Yes.

   Appellee's answer: No.

   Trial court's answer: Did not answer.

   Court of Appeals' answer: No.

3. Did the Court of Appeals err in holding that the good-faith exception to the exclusionary rule did not apply?

   Appellant's answer: Yes.

   Appellee's answer: No.

   Trial court's answer: Yes (having found good faith applicable before appeal).

   Court of Appeals' answer: No.

4. Did the Court of Appeals err in finding that trial counsel deprived the defendant of his right to the effective assistance of counsel by failing to move to suppress the evidence obtained from his cell phone on these grounds?

Appellant's answer:	Yes.
Appellee's answer:	No.
Trial court's answer:	Yes (having denied the motion for a new trial on this ground).
Court of Appeals' answer:	No.

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CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the U.S. Constitution provides:

> 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 primary issue in this appeal is straightforward: whether the search warrant for Mr. Carson's cell phone met the particularity requirement of the Fourth Amendment. In answering that question, the published decision below did not look to the binding precedent on point. Instead, the majority left out meaningful scrutiny of the warrant language, added its own conceptions of privacy and police work, and peppered in a few out-of-state cases. This is a recipe for a novel decision that is out of step with precedent. The decision below is a marked departure from binding Fourth Amendment jurisprudence, and this Court should correct it.

To uncover and prove crime—as here, where someone conspires with another to steal the life savings from a trusting, elderly neighbor by breaking into his safe and then heading to the casino—law enforcement looks for evidence. With a warrant, law enforcement is permitted to first secure the data of a cell phone and then search within that data for evidence of identified crimes, consistent with the terms of the warrant. The warrant here contains limitations of its own—limitations that fit comfortably within longstanding precedent governing the particularity requirement. It is limited to a single, identified phone of Defendant Michael Carson, permits searching only for evidence related to two specific crimes, and directs officers to search for "records or documents" related to those crimes, including "any data, image, or information that is capable of being read or interpreted by a computer" and "text messages, text/picture messages, pictures and videos."

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Premised on a misconception of how cell phone searches are conducted, the majority below concluded that the warrant was not adequately particular. The panel found that the "warrant did not place any limitations on the permissible scope of the search of defendant's phone," and that police were "given free license to peruse" the phone. (App'x p 12.) That is not accurate. Under *People v Hughes*, 506 Mich 512, 552–554 (2020), the warrant's limitations cabin any search of the phone; law enforcement must "reasonably direct[ ]" their search to evidence of the identified crimes, and must not look for evidence of other crimes (or anything else, for that matter).

The majority's preferred course—here, permitting a cell phone search only of "correspondence between" Carson and his co-conspirator but requiring a blind eye toward "photographs and videos" that would be evidence of the same crimes—is borne of armchair police work. To demand this inordinate specificity "undermine[s] legitimate law enforcement practices and unduly restrict[s] officers well beyond the dictates of the Fourth Amendment." *Hughes*, 506 Mich at 541.

Even if particularity was a problem here, the proper course would have been to sever the invalid parts of the warrant. Instead, the majority below chose to exclude *all* evidence obtained, even from the parts of the warrant it deemed "wholly appropriate." This too was erroneous.

Finally, the exclusionary rule does not apply. Application of the exclusionary rule does not follow from every Fourth Amendment violation; it is a discrete question that rises and falls with the flagrancy of the police conduct and the need to

deter future misconduct. Here, law enforcement drafted and applied for, and a magistrate issued, a search warrant that is in line with established precedent. But the Court of Appeals' lack of analysis of that precedent led to its finding that the officer's conduct was "particularly egregious." Any officer looking to the legal decisions that bind and direct the officer's conduct would rightly be surprised. This warrant would be valid but for the panel's seismic shift in the law, and no officer could be expected to guess whether or how a future appellate panel (over a reasoned dissent) might alter the law. Exclusion is not appropriate.

Ultimately, Carson's trial counsel did not move to suppress evidence on these bases, nor should he have. He did not provide ineffective assistance of counsel for choosing not to advance a meritless argument, and Carson cannot show prejudice.

This Court should confirm that a search warrant meets the particularity requirement if it identifies the *crime* which the evidence relates to, the *location* of the place to be searched, and *the scope* of the objects to be seized. It is important not only for the bench and bar, but for the law enforcement community charged with investigating and uncovering crime, that this Court reverse the Court of Appeals' novel approach.

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STATEMENT OF FACTS AND PROCEEDINGS

Carson offers to help Billings and then Billings' life savings disappears.

Sixty-nine-year-old Don Billings had developed health problems that interfered with his ability to enjoy his multi-level home. (App'x pp 53–56 (10/19/2020 Jury Trial I Tr).) In August 2019, around 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*. at 57–58.) Carson was to get 20% of the selling price of the items as commission. (*Id*. at 58.) Prior to giving Carson a key to the house, Billings and Carson talked about what items Billings wanted sold. (*Id*. at 58–59.)

A month or two later Billings noticed some of his collectible coins were missing. (*Id*. at 60–61.) This prompted Billings to get his key back from Carson. (*Id*.) When Billings confronted Carson about the missing coins, Carson denied taking them. (*Id*. at 61.) Although Carson sold several pieces of Billings' property, he gave Billings just $1,500 to $1,700. (*Id*. at 62.)

Three months after letting Carson have unlimited access to his home, Billings attempted to open his safes to check on his money, coins, and precious metal bars. (*Id*. at 63.) 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, "every bit of it," was gone. (*Id*. at 63–65.) He immediately called law enforcement to make a report. (*Id*. at 64.)

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Carson quits his job and sees an influx of cash, which he spends at the casino.

Just before they got access to Billings' safes, Carson and DeGroff's joint bank account had $283 in it at the end of July 2019. (See App'x p 93 (10/21/2020 Jury Trial Tr III).) Yet, Carson quit his job in late July or early August 2019. (App'x pp 69–70 (10/20/2020 Jury Trial Tr II).) Carson told his boss that "he ran across some money and some valuables, gold I believe, in a locker that he bought online." (*Id.* at 70.) So, Carson said, he "had a lot of money [and] he didn't need to work for a while." (*Id.*)

In August, Carson and DeGroff started going out most every night, often to the casino—leaving around dinner and only returning home in the early morning. (*Id.* at 74–75.) In August alone, Carson played about $57,000 at the casino; DeGroff played nearly $13,000. (*Id.* at 71–73.)

Carson is arrested and his cell phone is seized.

During the investigation of the theft from Billings, police obtained an arrest warrant for Carson. (App'x p 50 (7/7/2020 Mot to Suppress Hr'g Tr).) Carson was arrested at his home and his cell phone was seized incident to his arrest as part of the investigation. (*Id.* at 45–47.) When asked, Carson gave the deputies the access code and allowed the use of his finger to unlock the phone so it could be put into airplane mode. (*Id.* at 48–49.) No search of the phone was conducted until a warrant was issued later in the investigation. (App'x p 130 (7/15/2020 Op & Order).)

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The phone was sent to the "computer crime unit" in Traverse City, which completed a forensic analysis and "mark[ed] certain items for us for review." (App'x p 76 (10/20/2020 Jury Trial Tr).) The resulting report "isolated a certain text message conversation." (*Id.* at 77.) The early August text message conversation contained the following exchanges between Carson and DeGroff, as read at trial by Detective Matt Leirstein:

> Carson: "Don and Judy were investors in the stock market, complete records for hundreds of thousands of dollars."
>
> DeGroff: "Wow that's crazy. Have you found any records of what's in the space yet?"
>
> Carson: "In the, what, yet?"
>
> DeGroff: "Lol, . . . , safe"
>
> Carson: "No I'm guessing it's all on the computer."
>
> DeGroff: "I'm turning it on when I go . . . up there again."
>
> Carson: "I just did. It says . . . Home screen says, 'Welcome Don' ".
>
> DeGroff: "Does it ask for security?"
>
> Carson: "No. Opens right up. There isn't anything on it that I can see. You look later. This is more your field."
>
> Carson: "We need to go through those pennies. If there's a 1943 copper penny in there. It's worth millions, these people said. Also, the 1943s pennies can go for twenty thousand dollars each."
>
> DeGroff: "Holly Molly! That's a lot. . . . That's the most of money."
>
> Carson: "I'm thinking that these guys cashed out stocks, and whatnot, and converted to cash and gold and silver in the safes."
>
> * * *
>
> Carson: "Yeah, right. It's all you've done is use me and cheat on me."

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> DeGroff: "Right. Um, use you for what? 'Cause I haven't made any money or help you steal sixty thousand dollars? And cheat? When? Tell me when I had the opportunity to fucking cheat? You are the one who didn't work most of the summer and hasn't held a single job." [*Id.* at 77–81.]

(To avoid a full recitation of the lengthy text conversations here, it is set out in the Court of Appeals' majority opinion. (See App'x pp 3–5).)

Carson is convicted.

At trial, defense counsel argued that there was a lack of evidence against Carson, that Carson and DeGroff had come into a windfall of money at the casino and sold a truck, and that the investigation was insufficient. (App'x pp 103–113 (10/21/2020 Jury Trial Tr III).) 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 it. (*Id.* at 93, 98–101, 114.) The prosecution also highlighted that the text messages obtained from the cell phone search warrant plainly demonstrated that Carson and DeGroff were trying to break into Billings' safe. (*Id.* at 94–97, 114.)

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, receiving or concealing stolen property, larceny in a building, and related conspiracy charges.[1] (*Id.* at 115–116.)

[1] The Court of Appeals ruled that Carson's convictions of both larceny and receiving or concealing stolen property violated the guarantee against double jeopardy. (App'x pp 8–10.) The People have not appealed that decision.

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Carson pursues relief in the trial court.

In his post-conviction motion for a new trial, Carson claimed his counsel was ineffective for failing to pursue the suppression of the results of the cell phone search warrant. (App'x p 133 (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. (*Id.* at 157.) The motion does not pointedly raise a particularity issue; the motion claims only that the "method of the search and the scope of the seizure are invalid because the government performed a 'dump' of the phone" that contained "every single item of data" on it. (*Id.*)

The trial court gave Carson the opportunity to make his argument and held a *Ginther* hearing. (App'x p 117 (4/28/22 *Ginther* Hr'g Tr).) Appellate counsel asked trial counsel why he did not file a motion to suppress, to which trial counsel responded, "Well, because the Affidavit was fine," and "then I look at this search warrant, and frankly, this search warrant probably provides a basis to look for that cell phone" and testified, "I'm surprised it said as much as it did." (*Id.* at 120–121.) Counsel also agreed that during his practice in criminal law, he had seen the "broad" language used in the warrant, "any and all documents." (*Id.* at 122.)

Following the hearing, the trial court denied relief. (App'x p 184 (5/17/2022 Op & Order).) The court did not find error in the warrant but determined that, even if there was, defense counsel was not ineffective for choosing not to move to suppress because the good-faith exception to the exclusionary rule applied and there

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was not a reasonable probability of a different outcome if the motion had been filed. (*Id*. at 187–189.)

Carson pursues relief in the Court of Appeals.

Following the denial of relief in the trial court, Carson re-asserted his claims in the Court of Appeals. Again, Carson did not directly raise the particularity issue as a matter of plain error, instead subsuming it under an ineffective-assistance theory. (8/23/22 Mich Ct App Br at 28–35.) And again, Carson argued that the method and scope of the search was invalid due to the cell phone being "dumped" into a single document. (*Id*. at 32.) 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*. at 36.)

In response to this claim, the Court of Appeals majority opinion, authored by Judge Maldonado, determined that the scope of the search warrant was overly broad, violating the Fourth Amendment's particularity requirement. (App'x p 12.) In Carson's cell phone search warrant, which was limited to a specific cell phone identified by a serial number, law enforcement sought to search and seize,

> 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

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> 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. [App'x p 127.]

Ultimately, the majority found this warrant violative of the particularity requirement on the ground that it "did not place any limitations on the permissible scope of the search of defendant's phone." (App'x p 12.)

The majority did not consider the concept of severance. As the dissent explains, severance occurs where "the constitutionally infirm portion" of a search warrant "is separated from the remainder and evidence seized pursuant to that portion is suppressed." (*Id.* at 34 (Redford, J., dissenting (citation omitted)).) The majority did not engage in severance even though it stated that "it would have been wholly appropriate to issue a warrant authorizing" a search for correspondence between DeGroff and Carson. (*Id.* at 12.)

Finally, the majority held that the exclusionary rule should apply. Even though this was a case of first impression, a magistrate approved the warrant, and the trial court found no infirmity, 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

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presumed it to be valid." (*Id.* at 13, 15–16, 18.) On this ground, the majority reversed Carson's convictions and remanded for possible retrial. (*Id.* at 18.)[2]

The dissent disagreed on several levels. Because the search warrant was limited in its language to searching for records or documents related to "Larceny in a Building and Safe Breaking," the dissent found that the warrant was sufficiently particular. (*Id.* at 31–33.) Even if some aspect of the warrant was not adequately particular, only evidence seized pursuant to the infirm portion of the warrant should be severed. (*Id.* at 33–35.) Thus, the damning text messages should not be suppressed. (*Id.* at 34–35.)

Moreover, the dissent determined that the exclusionary rule should not apply because "[t]he police recovered the text messages in objective, good-faith reliance on a search warrant that was confined to seeking evidence pertaining to defendant's participation, if any, in the acts of larceny and safe breaking." (*Id.* at 35.) Finally, the dissent concluded that even if the text messages should have been suppressed because of bad faith, there was not a reasonable probability of a different outcome given the weight of untainted evidence. (*Id.* at 36.)

This Court granted the People's application for leave to appeal.

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[2] Judge Hood concurred in the majority opinion but would have further held that the affidavit in support of the warrant did not establish a sufficient nexus between the crimes of safe breaking and larceny to be found on the cell phone. (App'x pp 19–20.) That distinct issue is not before this Court.

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STANDARD OF REVIEW

Questions of constitutional law, including the Fourth Amendment, are reviewed de novo. *People v Hughes*, 506 Mich 512, 522 (2020).

Regarding Carson's ineffective-assistance claim, 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 "first must find the facts, and then must 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. Applying binding U.S. Supreme Court precedent, the search warrant satisfies the Fourth Amendment's requirement of particularity.

The Fourth Amendment protects against unreasonable searches and seizures and requires a measure of particularity for search warrants.[3] Given the weighty privacy interests in modern cell phones, in order to search one, law enforcement cannot rely on an exception to the warrant requirement but must instead secure a warrant. Law enforcement did that here. An officer crafted a warrant that

[3] Carson has not raised an argument under the Michigan Constitution. See Const 1963, art 1, § 11. Thus, there is no such claim for this Court to review. See *People v Taylor*, 510 Mich 112, 124 (2022) ("Therefore, his challenge is limited only to the federal protections. Defendant's original application for leave to appeal in this Court did not raise an argument under this provision, nor did we ask the parties to address state constitutional principles. We therefore decline to address whether defendant's sentence violates Const 1963, art 1, § 16.").

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identified the specific phone to be searched, named the two crimes for which evidence must relate, and sought a search of records or documents subject to those parameters. The scope of the warrant is endorsed by binding precedent from the U.S. Supreme Court as well as from this Court.

Nevertheless, the Court of Appeals majority labeled the warrant invalid. The majority's qualms stem from an apparent misunderstanding of how cell phone searches are typically conducted, as described in this Court's own caselaw. The majority also relies heavily on its own general conceptions of privacy and police work rather than caselaw. The Court of Appeals' decision upends time-tested practices that both honor the Fourth Amendment and allow for meaningful detection and investigation of crime. This Court should reverse.

A. The Fourth Amendment protects against "blanket authority" to engage in an "unrestrained" search.

The Fourth Amendment provides:

> 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. [US Const, Am IV.]

As ever, "the touchstone of Fourth Amendment analysis" is "reasonableness." *People v Hughes*, 506 Mich 512, 524 (2020), quoting *Birchfield v North Dakota*, 579 US 438, 477 (2016). And absent a recognized exception, a warrant is required for a search to pass muster under the Fourth Amendment. *Id.* at 525.

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One of the purposes of the warrant requirement is to guard against a "general warrant" through the demand for 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). Courts have justifiably warned about the specter of "general warrants" or "writs of assistance"—which were really warrants in name only. Those writs "had given customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws." *Stanford v State of Tex*, 379 US 476, 481 (1965). The U.S. Supreme Court's decision in *Riley v California* also accounted for this 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).

B. *Riley* generally demands a warrant to search a cell phone, and *Hughes* provides guidance for permissible search processes.

Two cases provide indispensable background for the Fourth Amendment's requirements regarding cell phone searches. The first is the U.S. Supreme Court's opinion in *Riley v California*; the second is this Court's opinion in *People v Hughes*.

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1. Given the volume of personal information typically held on a cell phone, *Riley* barred the search of cell phones under the search-incident-to-arrest exception to the warrant requirement, holding that a search warrant is required.

After reviewing the ways in which cell phones have come to contain vast amounts of information about individuals' personal lives, the U.S. Supreme Court rejected the applicability of the search-incident-to-arrest exception to the warrant requirement for searches of a cell phone. 573 US at 401. The Court distinguished cell phones from "other objects that might be kept on an arrestee's person," objects generally subject to the search-incident-to-arrest exception. *Id.* at 393–396. See also *Hughes*, 506 Mich at 540 ("As noted by *Riley*, a home and a cell phone are similarly situated . . . .").

The Supreme Court also rejected other half-measures that would have permitted police searches of a phone without a warrant. For example, the Court rejected the idea of permitting cell searches but only when it is "reasonable to believe that the phone contains evidence of the crime of arrest." 573 US at 398–399. It also turned down a proposal to permit warrantless searches "where an officer reasonably believes that information relevant to the crime, the arrestee's identity, or officer safety will be discovered." *Id.* at 399.

Instead, accounting for the substantial "quantitative and qualitative" differences between cell phones and other items that may be found on an individual's person, *id.* at 393, *Riley* 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). Notably,

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while the Court mandated a warrant, it did not imply or even hint that it modified longstanding precedent governing search warrants. Indeed, as this Court put it, "*Riley* makes clear that, in light of the extensive privacy interests at stake, general Fourth Amendment principles apply *with equal force* to the digital contents of a cell phone." *Hughes*, 506 Mich at 527 (emphasis added).

2. The execution of a cell-phone search warrant permits imaging the data of the phone for a later search reasonably directed at uncovering evidence identified in the warrant.

In its unanimous decision in *Hughes*, this Court "specifically address[ed] the Fourth Amendment requirements for a search of digital data from a cell phone authorized by a warrant," *id.* at 537–538, addressing a follow-up scenario in the wake of *Riley*. This Court first confirmed that individuals retain a reasonable expectation of privacy in their cell-phone data even after police have seized it. *Id.* at 529. Considering that ongoing expectation of privacy, a warrant authorizing the seizure and search of an individual's cell-phone data "allows officers to examine the seized data only to the extent reasonably consistent with the scope of the warrant." *Id.* at 529. Following from that recognition, the Court recounted the Fourth Amendment's particularity requirement, *id.* at 537–543, before rejecting the contention that "it is always reasonable for an officer *to review* the entirety of the digital data seized pursuant to a warrant," *id.* at 541 (emphasis added). Rather, when addressing the execution of a cell phone search warrant, "*as with any other search conducted pursuant to a warrant*," *id.* at 538, "courts and officers [must]

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consider whether the forensic steps of the search process were reasonably directed at uncovering the evidence specified in the search warrant," *id.* at 543 (emphasis added). Applying these principles, this Court held that "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." *Id.* at 552–553.

Beyond this holding, the Court's opinion elucidates the distinction between *seizing* digital data and *searching* it, a distinction the Court of Appeals below appears not to have considered. The facts from *Hughes* regarding law enforcement's handling of the properly seized cell phone data (the subject of a valid search warrant relating to suspected drug trafficking), illustrate this important difference:

> Detective Edward Wagrowski performed a forensic examination of the phone that was seized from defendant, and all of its data was extracted using Cellebrite, software used for extracting digital data. Upon extraction, Cellebrite separated and sorted the device's data into relevant categories by, for example, placing all of the photographs together in a single location. The extraction process resulted in a 600-page report of defendant's cell-phone data, which included more than 2,000 call logs, more than 2,900 text messages, and more than 1,000 photographs. Detective Wagrowski testified at trial that Cellebrite enabled police to enter search terms to isolate data from specific phone numbers or that contained specific words or phrases. If there were no contacts between a searched number and the device being searched, the searcher would receive no results and the software would show a blank screen. [*Hughes*, 506 Mich at 520–521.]

The passage demonstrates this Court's proper understanding of the common process of a cell phone search. A phone may be *seized* (though not searched) incident to arrest, *Hughes*, 506 Mich at 530, citing *Riley*, 573 US at 388, and a warrant is required to then *search* the phone.

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To conduct a subsequent search of the phone, often "all of its data" is extracted through a software program and then the device's data is sorted into categories, and an often-lengthy report can be produced. See *Hughes*, 506 Mich at 520–521. This is the "most common form of data extraction and analysis" for cell phones, which is sometimes called "imaging" or "copying." Andrew D. Huynh, *What comes after "get a warrant": balancing particularity and practicality in mobile device search warrants post*-Riley, 101 Cornell L Rev 187, 205 (2015). Even the Federal Rules of Criminal Procedure recognize this process and have for 15 years. See FR Crim P 41(e)(2).[4]

Once the phone is imaged, law enforcement has several means to "avoid searching files of the type not identified in the warrant: observing file[ ] types and titles listed on the directory, doing a key word search for relevant terms, or reading portions of each file stored in the memory." *Hughes*, 506 Mich at 546 n 18, quoting *United States v Carey*, 172 F3d 1268, 1276 (CA 10, 1999).[5]

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[4] The 2009 advisory committee's notes further explain: "Computers and other electronic storage media commonly contain such large amounts of information that it is often impractical for law enforcement to review all the information during execution of the warrant at the search location. This rule acknowledges the need for a two-step process: officers may seize or copy the entire storage medium and review it later to determine what electronically stored information falls within the scope of the warrant." FR Crim P 41(e)(2) (committee notes).

[5] See also, e.g., *People v Haupt*, unpublished opinion of the Court of Appeals, issued September 23, 2021 (Docket No. 351593), 2021 WL 4394973, pp *1, *9 (vacated in part on other grounds) ("Detective VanBonn extracted the digital data from the cell phone and loaded it into a software program called Cellebrite, which sorted the data into relevant categories such as contacts, call logs, calendars, e-mail, and photos, and each category of evidence was placed together. Cellebrite enabled the police to search for items outlined in the search warrant."); *United States v Ganias*, 824 F3d

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In other words, law enforcement is not typically permitted to scour every nook and cranny of the data from the individual's cell phone. *Hughes* commands that searches be "reasonably directed" toward the scope of the search warrant. 506 Mich at 538. But this Court made crystal clear that "[n]othing 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." *Hughes*, 506 Mich at 553 (emphasis added). In tandem, this rubric offers a measure of flexibility that both protects against wide-ranging review and permits the reasonable judgment of law enforcement to ferret out evidence of crime.

It bears mention that locating evidence of a crime is not the only use for a reasonably thorough search of cell phone data. Such a search also allows for the identification of *exculpatory* information, should it exist. And if it does, not only must that information be turned over to the defense under *Brady v Maryland,* 373 US 83 (1963), but also the existence of exculpatory evidence will inform a prosecutor's charging decisions before a criminal complaint is even filed.

In sum, *Riley* requires a warrant to search a cell phone; *Hughes* limits those searches to the scope of the warrant and provides valuable background regarding the mechanics of a cell-phone search.

199, 204 (CA 2, 2016) (en banc) ("Norman commenced his analysis . . . by loading the eleven mirrored drives into EnCase—the same software with which Agent Shaver initially created the mirrors—so that he could search the data thereon. After looking at the search warrants, he created a number of keywords, with which he searched for potentially relevant data.").

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C. The particularity requirement for search warrants permits even broad searches so long as they identify the location of the thing to be searched, the crime under investigation, and the scope of the objects to be seized.

Back to particularity. *Riley* generally requires a warrant to search a cell phone, but it said nothing about particularity. See *State v Jandreau*, 288 A3d 371, 380 (Me, 2022) ("*Riley*'s utility for present purposes ends here, however, because the Court simply held that police must obtain a warrant to search the cell phone and did not further explain the meaning of the particularity requirement in the context of warrants to search cell phones."). Relevant U.S. Supreme Court precedent sets the parameters of the Fourth Amendment's particularity requirement.

The foundational case on particularity is *Steele v United States*, 267 US 498 (1925), which did not hesitate to endorse a search warrant that covered an entire dwelling. Under *Steele*, the area to be searched is particular enough "if the description is such that the officer with a search warrant can, with reasonable effort ascertain and identify the place intended." 267 US at 503. The facts in *Steele* itself are informative in adding flesh to the bone—the Prohibition-era warrant authorized the search of a building at 611 West Forty-Sixth Street in New York for "cases of whisky." *Id.* at 503. The warrant permitted a search of "any building or rooms connected or used in connection with the garage, or the basement or subcellar beneath the same"—"*the whole building* [was] the place intended to be searched." *Id.* (emphasis added). The Court concluded that "[t]he search warrant fully complied with the . . . constitutional requirements." *Id.* at 505.

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Decades later, the Supreme Court explained the kind of encompassing language that is permissible to identify the things to be seized, as well as the need to read warrants in their context. *Andresen v Maryland*, 427 US 463 (1976). The *Andresen* decision scrutinized a search warrant that listed numerous, "particularly described documents" to be seized at two locations constituting evidence of false pretenses regarding a real estate transaction for a plot of land identified as Lot 13T. *Id.* at 479, 480 n 10. At the end of the list of items (which included "books, records, documents, papers, memoranda and correspondence showing or tending to show" elements of the crime of false pretenses), the warrant included a catch-all clause: "together with other fruits, instrumentalities and evidence of crime at this time unknown." *Id.* at 479 (cleaned up). The petitioner contended that this clause rendered the warrant an unconstitutionally general one. *Id.* The Court disagreed. It construed this challenged clause in the "context" of the rest of the warrant, *id.* at 480–481, and found it was "clear from the context" that the term "crime" referred to the crime of false pretenses "pertaining to Lot 13T," *id.* at 480–481. *Andresen* confirms the importance of identifying the crime under investigation, but also defers to a common-sense reading of the warrant.

A more recent case identifies the kind of blatant deficiencies that the U.S. Supreme Court has found to fail the particularity requirement. In *Groh v Ramirez*, the Court evaluated a warrant that "did not describe the items to be seized *at all*," and did not "incorporate by reference the itemized list contained in the application" for a warrant. 540 US 551, 554–555, 558 (2004) (emphasis in original). The

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warrant sufficiently identified the place to be searched—"a 'single dwelling residence . . . blue in color' "—but it did not identify *what* was to be seized. *Id.* at 558. As a result, the warrant failed to satisfy the particularity demanded by the Fourth Amendment. *Id.* at 557.

D. The search warrant is valid because it plainly identifies the crimes for which the searched evidence must relate (safe breaking and larceny in a building), the location to be searched (Carson's cell phone), and the scope of the items to be seized (documents and records related to the investigation of those crimes).

Down to brass tacks. In *Hughes*, the Court drew the outlines of the particularity requirement: "some context must be supplied by the affidavit and warrant that connects the particularized descriptions of the venue to be searched and the objects to be seized with the criminal behavior that is suspected." 506 Mich at 538. In other words, a valid warrant requires (1) identification of 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. This recitation of elements mirrors a common one. See, e.g., *United States v Tompkins*, 118 F4th 280, 287 (CA 2, 2024) ("This so-called particularity requirement contains three parts. First, a warrant must identify the specific offense for which the police have established probable cause. Second, a warrant must describe the place to be searched. Third, the warrant must specify the items to be seized by their relation to designated crimes.") (cleaned up).

Unlike a statutory subsection or a contract clause, a search warrant should not be dissected with the vigor of a grammarian; rather, it should "be read in a

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common-sense and realistic manner." *People v Russo*, 439 Mich 584, 603 (1992), quoting *People v Landt*, 439 Mich 870, 870 (1991) (order). Likewise, the federal courts of appeals have consistently utilized this lens of "practical accuracy" as opposed to "absolute precision" for electronic device search warrants. *Tompkins*, 118 F4th at 288 (collecting cases). See also *Andresen*, 427 US at 480–481 (reading a clause from a search warrant in the "context" of the rest of the warrant).

Similarly, and underscoring that proving the commission of a crime may require "piecing together many bits of evidence," the Supreme Court has rejected the idea that police were required to identify things to be seized with a contract drafter's level of specificity. *Andresen*, 427 US at 482 n 10; see also *id.* ("The complexity of an illegal scheme may not be used as a shield to avoid detection . . . ."); *Hughes*, 506 Mich at 540–541 ("We are 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."). Applying these principles here, the warrant is valid.

First, the warrant plainly identifies the *crimes* for which the searched evidence must relate. The very first sentence of the description of the property to be searched for and seized provides: "Any and all records or documents* pertaining to *the investigation of Larceny in a Building and Safe Breaking*." The warrant is clear about what the searched or seized evidence must relate to. Records or documents pertaining to carjacking or drug trafficking or sexual assault or loitering would not be searchable under this warrant.

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Second, the warrant identifies the *location* to be searched: a "[c]ellular device belonging to Michael Georgie Carson," an "LG Cellular phone blue in color with" the phone's 21-digit serial number. Hard to get more particular than that.

Third, the warrant permits searching "any and all records or documents," i.e., the *scope* of the search, which is fleshed out in the remainder of the warrant language. It "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." Later, the language includes, "[a]ny and all data including text messages, text/picture messages, pictures and videos, address book[s] . . . ."

Reading the warrant "in a common-sense and realistic manner," *Russo*, 439 Mich at 603, with an eye toward "practical accuracy" as opposed to "absolute precision," see *Tompkins*, 118 F4th at 287, the warrant authorized law enforcement to search a single cell phone for documents and records, as further described in the warrant, related to larceny in a building and safe breaking. As in *Steele,* the warrant authorized law enforcement to search, in effect, the entire location for the enumerated things that related to the specific two crimes at issue. 267 US at 503, 505. And per *Andresen*, broad permission to search an area with an eye toward the investigation of a particular crime is permitted. 427 US at 480–481.

Andresen is particularly instructive. There, the warrant contained a list of things to be seized, including "books, records, documents, papers, memoranda and correspondence," and was accompanied by a general clause, "together with other

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fruits, instrumentalities and evidence of crime at this time unknown." *Id.* at 479 (cleaned up). The instant search warrant similarly contains general language supplemented by specifically identified subsets of data— "text messages, text/picture messages, pictures and videos, address book." Both warrants were limited by the identification of the crimes under investigation and the location.

To buttress this conclusion, several federal and state courts have endorsed search warrants like the one here, with many focusing on an explicit limitation: that evidence to be searched or seized be related to specific, identified crimes. See, e.g., *United States v Salas*, 106 F4th 1050, 1058 (CA 10, 2024), cert den Nov 4, 2024 (reaffirming that "warrants may pass the particularity test if they limit their scope either to *evidence of specific crimes* or to specific types of material" and approving a warrant for electronic devices "records and/or receipts, written or electronically stored" concerning the "use and delivery of controlled substances") (cleaned up; emphasis added); *United States v Cobb*, 970 F3d 319, 328 (CA 4, 2020), as amended (Aug. 17, 2020) (a computer search warrant was "sufficiently particular because it . . . confined the executing officers' discretion by allowing them to search the computer and seize evidence of a specific illegal activity—Wilson's murder on September 7, 2014"); *United States v Neuhard*, 770 Fed Appx 251, 254 (CA 6, 2019) (approving a search warrant for a home, including complete searches of phones and computers inside, for "Any and all records or evidence of the crime of child sexual assault/abuse"); *United States v Brooks*, 427 F3d 1246, 1252 (CA 10, 2005) (approving broad computer warrant where "as a whole, its language more naturally

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instructs officers to search those files only for evidence *related to child pornography*") (emphasis in original). See also *Palmer v State*, 310 Ga 668, 675 (2021) (because "warrants limiting items to be seized to those relevant to enumerated crimes have sufficient specificity," limiting the search to evidence of the murder under investigation was sufficiently particular); *State v Johnson*, 576 SW3d 205, 223 (Mo Ct App, 2019) ("A warrant is sufficiently particular if it cabins the things being looked for by stating what crime is under investigation.") (cleaned up). This weight of authority is consistent with the particularity requirement, and this Court should reverse the Court of Appeals' contrary conclusion.

E. The Court of Appeals' opinion calls for correction.

Unfortunately, while the particularity doctrine is not new, the Court of Appeals majority's understanding of it is. The court erred in several respects. For its legal analysis, the majority did not meaningfully review the warrant's language, nor did it discuss any governing precedent except *Riley*, which does not even mention particularity. The decision below also reflected a mistaken and incomplete understanding of proper police work. Finally, it relied almost exclusively on caselaw that differs in important respects from this case.

1. The opinion below did not scrutinize the language of the search warrant and places undue weight on *Riley*, which said nothing about the particularity requirement.

The majority bypassed analysis of the language of the search warrant. Reviewing that language, the dissenting judge reflected on the importance of the

leadoff sentence. The first sentence—limiting the search and seizure to "[a]ny and all records or documents pertaining to the investigation of Larceny in a Building and Safe Breaking"—supplied "context for all that followed in the paragraph, necessarily placing limitations and parameters on the nature and scope" of law enforcement's search and seizure. (App'x p 32 (Redford, J., dissenting).) Read in its proper context, all that followed was restrained by that limitation, which identified both the two specific crimes and the enumerated list of things to be found. The majority downplayed it as a "small guardrail," failing to acknowledge that it cabined the whole of the warrant to evidence on that particular phone of two specific crimes. *Id.*

Moreover, beyond a brief recital of boilerplate, the opinion below does not review, let alone cite, precedent guiding a court's review of a warrant under the Fourth Amendment's particularity requirement. Instead, the panel placed overwhelming weight on *Riley*, relying on it to support its holding that the warrant here is akin to "police combing through a person's entire home." (App'x p 13.) As described above, *Riley* is an important, lodestar case regarding the Fourth Amendment's requirements for cell phones. Yet *Riley* said *nothing* about particularity. Of course, a warrant must meet constitutional demands, but those parameters were set in a series of cases that do not appear in the Court of Appeals' analysis.

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2. The majority's opinion does not reflect a fulsome understanding of long accepted and constitutional police work, and there are already ample legal guardrails to protect against unfettered police searches.

Without scrutinizing the language of the warrant, the Court of Appeals bemoaned it as authorizing "the modern equivalent of the police combing through a person's entire home in search of any evidence that might somehow implicate the person in the crime for which they were a suspect." (App'x p 13.) But uncolored by the negative characterization of the police "combing through" a person's effects, the Constitution has long permitted searching a person's entire home for evidence of specific crimes when supported by probable cause. See, e.g., *Steele*, 267 US at 503 (a warrant to search "the whole building" at a particular address is constitutional); *Tompkins*, 118 F4th at 289 ("A search warrant does not necessarily lack particularity simply because it is broad. Searches of computers may sometimes need to be as broad as searches of residences pursuant to warrants.") (cleaned up).

Not surprisingly then, Professor Orin Kerr, noted Fourth Amendment scholar at UC-Berkeley, characterized the *Carson* majority opinion as a "novel interpretation" of the particularity requirement that "is wrong." Orin S. Kerr, *The Volokh Conspiracy*, March 2, 2024.[6] Because one cannot know where evidence of a crime might be stashed, the Court of Appeals' understandable concern led it to a poor solution. An analogy highlights the problem: "If the government gets a warrant to search a home for a knife used in a murder, the warrant won't limit the

[6] <https://reason.com/volokh/2024/03/02/yes-warrants-allow-a-search-through-the-whole-phone/>

search to the knife drawer in the kitchen just because a judge thinks that this is where knives usually go." *Id.*

Of course, if supported by probable cause, law enforcement may seek and execute a search warrant for a person's entire home for evidence of an identified crime. That has been clear for a century. See *Steele*, 267 US 498. Officers show up on site with a valid warrant, secure the home, and proceed to search it, guided but hemmed in by the scope of the warrant. The same Fourth Amendment principle applies to cell phones, and a similar process is followed: upon seizing a cell phone, law enforcement gets a search warrant, secures the contents of the phone (through imaging), and "conduct[s] a reasonably thorough search" guided and limited by the warrant. See *Hughes*, 506 Mich at 553. This "reasonably thorough search" permits law enforcement to look for the digital version of the bloody knife beyond the kitchen.

Contrary to the panel majority's understanding, a search for evidence of documents and records (including further elaboration) located in a *particular place* and linked to an *identified crime* is condoned by well-established precedent. That is precisely what a proper search warrant permits. In his majority opinion in *Warden v Hayden*, Justice Brennan roundly rejected the idea that "mere evidence" of a crime may not be searched or seized. 387 US 294 (1967). Indeed, the Court found it "wholly irrational" to distinguish between "mere evidence" of a crime on one hand and "instrumentalities, fruits of crime, or contraband" on the other. *Id.* at 301, 302;

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see also *id.* at 306 ("The premise . . . that government may not seize evidence simply for the purpose of proving crimes has . . . been discredited.").

The majority specifically decries the warrant's inclusion of "photographs and videos" as "particularly troubling" where, in its view, there was no suggestion that there would be "anything relevant." (App'x p 12.) The majority's approach severely circumscribes what can be searched based on restrictive ideas about what may or may not be relevant to a criminal investigation. But this concern is already addressed by the distinct Fourth Amendment requirement that there must be "a nexus" between "the item to be seized and criminal behavior." *Hayden,* 387 US at 307; see also *Hughes*, 506 Mich at 528 n 6. The required nexus is not an unduly demanding one though. Rather, "probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction." *Hayden,* 387 US at 307. In evaluating a nexus, courts must "consider[ ]" "police purposes." *Id.*

That nexus is present here.[7] Carson was suspected of stealing tens of thousands of dollars' worth of money, coins, and precious metal bars from Billings' safe. The affidavit in support of the search warrant included information gleaned

[7] To be clear, the issue of whether the affidavit sufficiently supported the warrant, i.e., whether there was a sufficient nexus, is not before this Court. The Court of Appeals construed Carson's challenge as one to the particularity of the search warrant and ruled on that basis, and it specifically disclaimed any reliance or consideration of the affidavit in its analysis. (See App'x p 11 n 7.)

While the concurring judge below would have ruled that the affidavit did not establish a sufficient nexus between the affidavit's averments and the scope of the warrant, see *Carson*, concurring op at 3, that question is distinct one.

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from an interview with Billings, who said he had given Carson and DeGroff (but no others) a key to his home, that he had "roughly $70,000" "wrapped with yellow bands in $1000 increments" in August or September of 2019, and that in October 2019, he could not open his combination-lock safe before finding it empty. (App'x p 124.) Moreover, after DeGroff voluntarily provided law enforcement a recent bank statement, the affidavit detailed that she and Carson were "generally short of money" before coming into thousands of dollars during the very same time period that Billings' money disappeared. (*Id.* at 124–125.) The affiant had also executed a search warrant for records from a local casino, which revealed that Carson and DeGroff had gambled tens of thousands of dollars between August and December of that year. (*Id.* at 125.) These specific facts were coupled with the affiant's "training and experience" that cell phones are commonly used to "plan, commit, and conceal criminal activity and evidence." (*Id.*)

Consistent with the majority's recognition that cell phones are used pervasively and contain all manner of data, 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. Is it unreasonable to think that Carson might have photos of the loot—maybe for fun or to entice a hopeful buyer? Or unreasonable to suspect he may have photos of recent, expensive purchases that might connect to a large and sudden influx of money? Perhaps there could be photos of safes, or tools that might be used for safe-

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breaking. Each of these pieces of evidence would be supported by probable cause in this case. See *Hayden,* 387 US at 307.

These are just a few examples conjured from behind a keyboard; the real-world of police work does not, and cannot, be limited to the discovery of smoking guns. Often, a criminal case is akin to "a jigsaw puzzle," where "the whole picture" of a perpetrator's scheme "could be shown only by placing in the proper place the many pieces of evidence that, taken singly, would show comparatively little." *Andresen*, 427 US at 482 n 10. This is because "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. The Court of Appeals' ruling will unreasonably stymie good, constitutional police work.

3. The Court of Appeals' citation to out-of-state cases does not support its holding.

The Court of Appeals cited a handful of sister-state cases to support its analysis. But in contrast to the ample authority cited above, Argument I.D, those cases are largely distinct. In *State v Smith*, the Connecticut Supreme Court determined that a search warrant was not sufficiently particular under the Fourth Amendment because "[t]he warrant authorized a search of a 'data extraction,' " a general term for "the entire contents of the cell phone." 344 Conn 229, 251 (2022). What was lacking, the court said, was a "list [of] . . . 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

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evidence of the crime of aggravated assault." *Id.* at 251 (emphasis added). These kinds of specific items *were included* in the search warrant language here, fleshing out the more general language permitting the search of "any and all records or documents." (App'x p 127 ("text messages, text/picture messages, pictures and videos").) And unlike this case, the warrant did not appear to limit the search of that data extraction to evidence of a particular crime. See 344 Conn at 248, 251.

In *People v Coke*, the Colorado Supreme Court found too general a warrant that "permitted the officers to search all texts, videos, pictures, contact lists, phone records, and any data that showed ownership or possession" of the phone. 461 P3d 508, 516 (Colo, 2020). In contrast to this case, the warrant appears not to have been targeted evidence relating to a particular crime—the warrant was so broad that it allowed officers to search the phone for "[a]ny electronic data that would be illegal to possess (contraband), or fruits or proceeds of *a* crime, or data intended to be used in the commission of *a* crime." *Id.* (emphasis added).

The majority below also nodded to *State v Bock*, but the Oregon Court of Appeals considered and applied its own state constitutional provision concerning particularity, not that of the Fourth Amendment. 310 Or App 329, 335 (2021).

* * *

The Court of Appeals' reworking of the particularity requirement was borne of concern for privacy, but multiple guardrails working in tandem ensure that the Fourth Amendment will be honored. The law requires a nexus linking the probable-cause affidavit to the terms of the search warrant, *Hayden,* 387 US at 307, it

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mandates that the warrant be sufficiently particular, *Andresen*, 427 US at 479–481, and it limits law enforcement searches to those "reasonably directed" to uncover evidence of the identified crimes, *Hughes*, 506 Mich at 554.

Here, Carson's particularity challenge fails because the warrant identified the *crimes* which the evidence must relate to, the *location* of the place to be searched, and *the scope* of the objects to be seized. Because the search warrant was sufficiently particular, it passes constitutional muster. This Court should reverse.

II. Even if a narrow aspect of the search warrant ran afoul of the Fourth Amendment, only evidence obtained pursuant to the invalid part of the warrant should be suppressed.

If the search warrant had been deficient in certain respects, the next inquiry is to determine whether and what evidence should be suppressed. Under precedent from this Court, *People v Keller*, 479 Mich 467, 478 (2007), as well as every federal circuit, see *United States v Sells*, 463 F3d 1148, 1150 n 1 (CA 10, 2006), and as noted by dissenting judge below, courts sever only the part of the warrant that is invalid. The court below did not even engage in severance analysis, instead suppressing all evidence yielded from the warrant. This was error.

Suppression of evidence seized pursuant to a search warrant is not required for "anything described in the valid portions of the warrant." *Keller*, 479 Mich at 478 (cleaned up). The proper course is to "sever the infirm portion of the search warrant from the remainder which passes constitutional muster." (App'x pp 33–34 (Redford, J., dissenting), quoting *United States v Blakeney*, 942 F2d 1001, 1027 (CA 6, 1991).)

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Severance is consistent with the purposes of the exclusionary rule, discussed below, where a search warrant is partially valid. "It would be harsh medicine indeed if a warrant which was issued on probable cause and which did particularly describe certain items were to be invalidated in toto merely because the affiant and magistrate erred in seeking and permitting a search for other items as well." *United States v Riggs*, 690 F2d 298, 300 (CA 1, 1982), quoting 2 W. LaFave, Search and Seizure § 4.6(f) at 111–112 (1978) (cleaned up); see also *United States v Christine*, 687 F2d 749, 758 (CA 3, 1982) ("[W]e not only believe that redaction [i.e., severance] adequately serves the warrant clause and law enforcement goals, but also that it should be used in order to avoid the social cost of unnecessarily excluding validly seized evidence.").

The severance analysis is a multi-step process. *Keller*, 479 Mich at 478. First, "the court must divide the warrant into categories." *Id.* at 479. 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," and also consider "whether the valid categories make up the great part of the warrant." *Id.* (quotation marks omitted). Only "[i]f no part of the warrant particularly describes items to be seized for which there is probable cause, then severance does not apply." *Sells*, 463 F3d at 1151.

The majority below agreed that the search warrant's inclusion of messages, chats, emails, and any other correspondence between Carson and DeGroff was

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"wholly appropriate." (App'x p 12.) Nevertheless, 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.

Despite the broadly held understanding that severance would apply in this kind of case, see *Keller*, 479 Mich at 478; *Sells*, 463 F3d at 1150 n 1, the Court of Appeals did not engage in any severance analysis. This Court need not do so either, as the search warrant is valid in total. But even if the Court disagreed, of the information included in the scope of the warrant that the majority below found beyond the pale, *none was introduced at trial*. Only text messages from the phone were admitted at trial.

If a severance analysis were appropriate, the warrant has sufficient specificity for a court to carve it up. For example, a court could conceivably mark "text messages" and "text/picture messages" as properly searchable, but anything else on the phone as a candidate for suppression. But in the end, even if the Court of Appeals was correct in its particularity analysis, there simply is nothing to suppress because, as the court below believed, the text messages were properly subject to the search.

III. The exclusionary rule does not apply because the officer did not act flagrantly or unreasonably, particularly where the Court of Appeals changed the law regarding the particularity of search warrants.

Even if this Court found a Fourth Amendment violation and ruled that aspects of the search warrant should be severed, the Court must still assess the culpability of the officer in deciding whether to suppress any evidence under the

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exclusionary rule. In other words, severance simply narrows the candidate evidence for suppression—a court must still evaluate whether exclusion is appropriate under exclusionary rule precedent.

The Court of Appeals admitted that it was "aware of no binding authority discussing the analysis of whether the language of a warrant authorizing a search of cell phone data comports with the particularity requirement." (App'x p 13.) Yet, despite the absence of cell-phone-specific precedent, 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 of Appeals majority took the officer to task for the officer's inability to predict the unexpected sea change in law that the panel would later effect. The panel's holding is erroneous.

A. The U.S. Supreme Court has repeatedly confirmed that the exclusionary rule applies not as redress for a constitutional violation, but only as a deterrent measure to guard against flagrant police misconduct.

The exclusionary rule permits the suppression of evidence for a constitutional violation under limited circumstances. *Herring v United States*, 555 US 135, 140 (2009).[8] Whether exclusion of evidence is appropriate in any given case "is an issue separate" from whether a person's Fourth Amendment rights were violated. *United States v Leon*, 468 US 897, 906 (1984).

[8] This Court has adopted the good-faith exception as laid out by U.S. Supreme Court for the Fourth Amendment to govern the corollary provision under Michigan's Constitution, Const 1963, art 1, § 11. *People v Goldston*, 470 Mich 523 (2004). *Goldston*, however, is not relevant here because Carson has only raised a claim premised on the federal constitution. See *supra*, footnote 3.

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As the U.S. Supreme Court has explained "time and again," "the *sole* purpose of the exclusionary rule is to deter misconduct by law enforcement." *Davis v United States*, 564 US 229, 246 (2011) (emphasis in original). The exclusionary rule is not "an individual right," nor does it derive directly from the Fourth Amendment; its imposition is always linked to the necessity of "appreciable deterrence" under the circumstances—to discourage "violations in the future," *Herring*, 555 US at 141 (citation omitted), and to "compel respect for the constitutional guaranty," *Davis*, 564 US at 236, quoting *Elkins v United States,* 364 US 206, 217 (1960).

Exclusion of evidence is not to be lightly imposed. The "bitter pill" of exclusion "requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence," compromising the essential truth-seeking function of the courts. *Davis*, 564 US at 237. "The rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging its application." *Herring*, 555 US at 141 (cleaned up). To that end, exclusion "has always been [a] last resort, not [a] first impulse." *Utah v Strieff*, 579 US 232, 237 (2016), quoting *Hudson v Michigan*, 547 US 586, 591 (2006).

This high obstacle is linked to the deliberateness and culpability of the specific officer's conduct and the concomitant need to discourage law enforcement from acting similarly. Unsurprisingly, an officer's conduct cannot typically be considered egregious where an independent magistrate approves and issues a warrant—that "normally suffices to establish that a law enforcement officer has

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acted in good faith in conducting the search." *Leon*, 468 US at 922 (quotation marks omitted).

Case-by-case scrutiny is called for, not "indiscriminate application." *Hudson*, 547 US at 591. In a nutshell,

> [t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, *the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence*. [*Herring*, 555 US at 144 (emphasis added).]

"Where suppression fails to yield appreciable deterrence, exclusion is clearly unwarranted." *Davis*, 564 US at 237 (cleaned up).

Application of the exclusionary rule where the particularity of a warrant is challenged is rare. It should generally apply only when that 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." *Leon*, 468 US at 923, citing *Massachusetts v Sheppard*, 468 US 981, 988–991 (1984).

B. Evidence obtained consistent with binding precedent cannot be subject to the exclusionary rule.

It should be no surprise then that "[e]vidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule." *Davis*, 564 US at 241. Reliance on binding appellate precedent reflects the actions of how "a reasonable officer would and should act under the circumstances." *Id.* In *Davis*, police conducted a routine traffic stop resulting in arrests of the driver and passenger, who were then placed in the back of separate

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squad cars before, consistent with *New York v Belton,* 453 US 454, 458–459 (1981) and *United States v Gonzalez*, 71 F3d 819, 825 (CA 11, 1996), searching the passenger compartment of the vehicle and finding a firearm. *Id.* at 235. Two years later and during the pendency of the appeal in *Davis*, the Supreme Court clarified that *Belton* applies only where "the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Arizona v Gant,* 556 US 332, 343 (2009). Even though the law was later clarified, the Supreme Court made clear that "[t]he police acted in strict compliance with binding precedent, and their behavior was not wrongful." *Davis*, 564 US at 240.

Likewise, the precedent described above contemplates search warrants like the one in this case. See Argument I. Thus, *Davis* counsels strongly in favor of the officer's good faith. How could the officer have engaged in "deliberate, reckless, or grossly negligent conduct" where the Supreme Court's particularity precedent is not at odds with the search warrant? *Herring*, 555 US at 144. One would be hard pressed to understand how a reasonable officer could or should know that a search warrant that would have passed muster under all prior governing precedent would later be found unconstitutional by an appellate court.

Even if the warrant here sat in some precedential limbo, the majority's novel approach certainly did not put officers across the State on notice. This run-of-the-mill warrant is not so outside the bounds of the law that preparing it constitutes "deliberate, reckless, or grossly negligent conduct." *Id.* Here, defense counsel admitted that, "frankly, this search warrant probably provides a basis to look for

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that cell phone" and testified, "I'm surprised it said as much as it did." (App'x pp 120–121.) Nevertheless, the court below determined that the cell phone search warrant was "facially invalid" to an extent that "no reasonable officer could have relied in objective good faith" on it. (App'x p 14.) This, despite a dissenting colleague disagreeing. The majority's holding is in striking tension with the majority's own analysis of the particularity requirement, which found "no binding authority" on the issue in Michigan.

C. The panel's apparent misunderstanding of how cell-phone search warrants are executed contributed to its erroneous conclusion.

The court's holding is premised in large part on the fact that the download of the contents of the phone spanned 1,000 pages and contained much personal information. (App'x p 15.) But the majority appears to misconstrue the mechanics of a how a cell phone is searched. See Argument I.B.2. The common process is reflected in *Hughes*' recognition that "a warrant authorizing the police to seize and search cell-phone data allows officers to *examine the seized data only to the extent reasonably consistent with the scope of the warrant*." 506 Mich at 529 (emphasis added). This plain statement should allay concerns about police combing through cell phone data indiscriminately. Moreover, there is no evidence that the report was "combed through" (nor does this case raise a challenge to the *execution* of the search warrant, but only the particularity of its terms). *Hughes* plainly directed courts to "keep in mind that in the process of ferreting out incriminating digital data it is almost inevitable that officers will have to review *some* data that is unrelated to the

criminal activity alleged in the authorizing warrant." *Id.* at 547 (emphasis in original).

In sum, no officer could be expected to possess foreknowledge that the Court of Appeals would develop and apply a new Fourth Amendment jurisprudence. The exclusionary rule does not apply.

IV. Carson's trial counsel was not ineffective for choosing not to make a novel and meritless motion.

Since Carson has never raised a standalone Fourth Amendment claim, his entitlement to relief depends not only on the issues discussed above, but on whether Carson can show that his counsel was constitutionally deficient for choosing not to file a suppression motion based on the claimed lack of particularity. His trial counsel was not deficient—he was operating under established law. And in any event, the outcome would not reasonably likely have been different.

Carson carries the burden to establish that his counsel provided deficient representation—performance below an objective standard of reasonableness under prevailing professional norms—and that there is a reasonable probability of a different outcome but for that representation. *Bell v Cone*, 535 US 685, 695 (2002), citing *Strickland v Washington*, 466 US 668, 688 (1984).

Relevant here, an attorney's performance must be measured without the benefit of hindsight. *Bell,* 535 US at 698; *People v LaVearn*, 448 Mich 207, 216 (1995). Under the Court of Appeals' sea-change decision, it might be incumbent on an attorney to raise such an issue (though the U.S. Supreme Court's precedent

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would trump the Court of Appeals' reading). But without the 20/20 vision supplied by hindsight, Carson cannot make out his claim. Because there is no constitutional violation, and "[i]neffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion," *People v Riley*, 468 Mich 135, 142 (2003), this Court must reverse.

Even assuming there was a Fourth Amendment particularity violation, no severance doctrine to speak of, and flagrant police misconduct warranting suppression of all evidence stemming from the warrant, the result would not reasonably likely have been different. There was *ample* other proof that Carson stole large sums of money from Mr. Billings. As the dissent below described it, even excluding the damning text messages, there was evidence establishing that

> defendant and DeGroff had direct access to the safes; the balance in the couple's joint bank account dramatically increased after the larceny absent explanation for the funds; defendant quit his job following the theft indicating that he "ran across some money"; defendant and DeGroff began making costly purchases after the larceny; the couple started regularly going out to dinner and the casino following the theft, spending enormous sums of money; items belonging to victim Billings other than the money were found in defendant's home; and the amounts spent by defendant and DeGroff corresponded to the sums stolen from Billings. [App'x p 36.]

This overwhelming evidence requires reversal of the Court of Appeals' disposition. In other words, even if the Court of Appeals is right about everything else, the convictions should still stand as the error was harmless.

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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.

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