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STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

People of the State of Michigan, Plaintiff/Appellant, v. Michael Georgie Carson, Defendant/Appellee.	Docket No. 166923 Court of Appeals No. 355925 57th Circuit Court No. 20-5054-FC

/

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STATEMENT OF JURISDICTION

Mr. Carson concurs that this Court has jurisdiction over this appeal pursuant to MCR 7.303(B)(1).

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STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS ERRED BY HOLDING THAT THE WARRANT TO SEARCH DEFENDANT'S CELL PHONE VIOLATED THE FOURTH AMENDMENT'S PARTICULARITY REQUIREMENT?

II. WHETHER THE COURT OF APPEALS ERRED BY FAILING TO SEVER ANY VALID PORTIONS OF THE SEARCH WARRANT FROM ANY INVALID PORTIONS?

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FACTS

The investigation started on November 29, 2019 when Deputy Midyett responded to Mr. Billings' home. Defendant's Appendix, pp. 42-43 (Def. App'x). Mr. Billings was a neighbor of Mr. Carson's. He was retired from driving a truck. He went to California in 2019 with his wife. She did not return and they divorced. In the fall of 2019, he had back surgery and temporarily moved in with his brother in Cheboygan. Def. App'x, pp. 31-33; Appellant's App'x, pp. 53-56.

Mr. Billings had decided to downsize his personal belongings and knew that Mr. Carson was familiar with selling things online. He asked Mr. Carson and Mr. Carson's girlfriend, Brandi DeGroff, to sell things for him and gave him a key to his home. Def. App'x, p. 34; Appellant's App'x, pp. 57-59. Mr. Billings claimed that he had two safes in his shop room. It contained old coins, one-hundred-dollar bills and important personal papers. The safes could be opened with a combination lock or a key. Most of the currency was in yellow bank money straps. He claimed that the safes contained between $59,000.00 and $63,000.00 in cash. Def. App'x, pp. 35-41.

In the fall of 2019, he retrieved the key from Mr. Carson or Ms. DeGroff. He called the police when he noticed numerous items of property (mostly cash or coins) were missing. When he tried to use the combination, it would not work so he called a locksmith. Once the safe was open, he realized the extent of the theft. Appellant's App'x, pp. 60-64.

On February 26, 2020, Deputy Midyett was asked by D/Sgt. Matt Leirstein to execute an arrest warrant on Mr. Carson at Mr. Carson's home. He chose 4:00 a.m. to make the arrest. Deputy Midyett explained that D/Sgt. Leirstein had said the phone would be beneficial and if it was discovered to seize it. Def. App'x, pp. 17-18. He allowed Mr. Carson to smoke a cigarette and allowed him to enter the house to get dressed. The Deputy told Mr. Carson that since he was under arrest he would have to accompany him wherever he went. *Id,* pp. 18-19. As they went into the

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bedroom, the Deputy saw a cell phone on a charger on a nightstand. Mr. Carson was sitting on the bed putting on his socks. The Deputy claimed the phone was within his arms reach but he made no gestures or advance toward the phone. Deputy Midyett asked Mr. Carson if it was his cellphone and Mr. Carson said it was. The Deputy then told Mr. Carson he was going to seize it. The Deputy testified that he told Mr. Carson that the phone was part of the investigation but there was no further discussion. *Id*, pp. 21-22. On cross-examination during the suppression hearing, trial defense counsel confirmed that Mr. Carson was under arrest before he went back into the house to get dressed. *Id*, p. 22.

The government then presented several witnesses who attempted to establish that Mr. Carson did not have steady income yet Mr. Carson and Ms. DeGroff were seen with large amounts of cash in various circumstances. Many of these witnesses provided statements from Ms. DeGroff but Ms. DeGroff did not testify. Def. App'x, pp. 47-50; 51-57; 59-62.

D/Sgt. Leirstein testified as to obtaining a search warrant for the contents of the cellular phone seized by Dep. Midyett. The examination of the phone included text messages the detective claimed created admissions of Mr. Carson and were incriminating. *Id*, pp. 63-64.

PROCEEDINGS BELOW

On February 21, 2020, Mr. Carson was charged with Count 1, safe breaking, Count 2, Larceny $20,000 or more, Count 3, Receiving and Concealing Stolen Property $20,000 or more, Count 4, Larceny in a Building, and as a Fourth Habitual Offender based on an offense date of August 1, 2019. He was arraigned in District Court on February 26, 2020. The preliminary examination was waived. The original information was filed on May 22, 2020. Mr. Carson filed a motion to suppress the cellular phone on June 26, 2020. On July 2, 2020, the government filed an amended information charging an additional four counts of conspiracy for each of the existing

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charges. The hearing on the motion was heard on July 7, 2020 at which time the trial court denied the motion. A written opinion and order denying the motion was entered on July 15, 2020.

Mr. Carson filed a motion in limine regarding certain messages from his phone on July 23, 2020. This motion was heard on August 31, 2020. The motion was denied in part and trial counsel stipulated to some items coming in for context. Def. App'x. pp. 26-27. On October 5, 2020, the government filed another amended information.

The matter went to a jury trial on October 19, 20, and 21, 2020. Mr. Carson was found guilty on all counts. Sentencing occurred on December 15, 2020 and Mr. Carson was sentenced as follows: 10 years to 20 years for Count 1, safe breaking and Count 5, conspiracy; 9 years to 20 years for Count 2 Larceny over $20,000, Count 3, Rec & Conc. Over $20,000 and the related conspiracies in Counts 5 and 6, respectively; 3 years to 15 years for Count 4, Larceny in a building and Count 8, Conspiracy to commit Larceny in a building. Restitution was ordered in the amount of $80,010.00 with state minimum costs of $544.00, a crime victim rights fee of $130.00. Court costs were waived. Def. App'x, pp. 93-94.

Mr. Carson timely submitted a claim of appeal through retained counsel on January 4, 2021. After extensions, Mr. Carson timely filed a motion for new trial on September 10, 2021. Appellant's App'x, pp. 133-183. The trial court granted an evidentiary hearing on ineffective assistance of counsel. The trial court conducted a *Ginther* hearing on April 28, 2022 and issued a written opinion on May 17, 2022 which instructed Defendant to submit a proposed final order. Appellant's App'x, pp. 184-192. The trial court signed and entered that final order on May 26, 2022. The matter then proceeded in the Court of Appeals and the Court of Appeals reversed in a published opinion on February 15, 2024. The state filed an application for leave to appeal which this Court granted on September 25, 2024.

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LAW/ARGUMENT

I. THE COURT OF APPEALS DID NOT ERR BY HOLDING THAT THE WARRANT TO SEARCH DEFENDANT'S CELL PHONE VIOLATED THE FOURTH AMENDMENT'S PARTICULARITY REQUIREMENT.

A. Preservation of the issue and standard of review.

1. Preservation of the issue.

Mr. Carson asserts that this issue was preserved by both parties.

2. Standard of review.

The Court of Appeals reviewed the denial of the motion to suppress in the context of ineffective assistance of counsel. Appellant's App'x, p. 7. Because the decision as to the validity of a search warrant in the context of the particularity requirement is a constitutional issue, review of that question is de novo. The Court of Appeals analysis did not state a specific standard of review but the language used demonstrated a de novo review. The phrasing of this Court's order granting leave suggests that the first question in this appeal will be addressed in the context of the Fourth Amendment's particularity requirement. This being a constitutional question, review is de novo." ***People v Sierb***, 456 Mich 519, 522; 581 NW2d 219 (1998).

B. The U.S. Supreme Court's privacy determinations regarding cellphones.

The Fourth Amendment to the United States Constitution says that "no Warrants shall issue, but upon probable cause . . . and *particularly describing* the place to be searched, **and** *the* persons or *things to be seized*." U.S. CONST. amend. IV (emphasis added). The constitutionality of a warrant is determined by the four corners of the warrant, although the government can incorporate by express reference affidavits and other material. See ***Groh v Ramirez***, 540 US 551, 557–58; 124 SCt 1284; 157 LEd2d 1068 (2004). ***Groh*** is the most recent U.S. Supreme Court decision regarding the particularity requirement of the Fourth Amendment (except for a case

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dealing with anticipatory warrants).[1] The purpose of the particularity requirement is not limited to the prevention of general searches. See ***Maryland v Garrison***, 480 US 79, 84; 107 SCt 1013; 94 LEd2d 72 (1987). A particular warrant also "assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." ***United States v Chadwick***, 433 US 1, 9; 97 SCt 2476; 53 LEd2d 538 (1977) (citing ***Camara v Municipal Court of City and County of San Francisco***, 387 US 523, 532; 87 SCt 1727 (1967)), abrogated on other grounds, ***California v Acevedo***, 500 US 565; 111 SCt 1982; 114 LEd2d 619 (1991). The Supreme Court made it clear that the officer's duty in executing a search warrant is to ensure the search is lawfully authorized and *lawfully conducted*. ***Groh***, *supra*, at 563 (emphasis added). The Supreme Court in ***Groh*** adopted phrasing from ***United States v Stefonek***, 179 F3d 1030, 1032-1033 (C A 7, 1999) that held a warrant to be a general warrant when its description of items to be seized was "evidence of crime." ***Groh***, *supra*, at 562-563, citing ***Stefonek***, *supra*, at 1032-1033.

The same presumption that applies to warrantless searches applies equally to warrants where the defect is a lack of particularity. ***Groh***, *supra*, at 559, citing ***Massachusetts v Sheppard***, 468 US 981, 988, n 5; 104 SCt 3424; 82 LEd2d 737 (1984). Even where searching officials act with restraint in the items they seize, the warrant is still invalid if the restraint was of the officer's doing and not that of the warrant itself as authorized by a neutral, detached magistrate. ***Groh***, *supra*, at 561.

Moving forward from 1776 to 2020 and the introduction of computers, cellular telephones, smartphones, global positioning system, and a worldwide cellular telephone network, all of the envisioned privacy interests can be contained in a person's pocket on a single electronic device.

[1] ***United States v Grubbs***, 547 US 90; 126 SCt 1494; 164 LEd2d 195 (2006).

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The Founding generation crafted the Fourth Amendment as a "response to 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." ***Riley v California***, 573 US 373, 403; 134 S.Ct. 2473; 189 LEd2d 430 (2014). Cell phones seized incident to an arrest had been routinely searched pursuant to the recognized exception for such searches. Because of the advancement of the technology including storage capacity, internet connectivity, and multiple communication platforms, the United States Supreme Court held in ***Riley*** that cellular telephones may no longer be searched incident to arrest without procuring a search warrant that satisfies the well-established requirements for a warrant. ***Riley***, *supra*, at 403.

In ***Chimel v California***, 395 US 752; 89 SCt 2034; 23 LEd2d 685 (1969), the U.S. Supreme Court limited the physical scope of a search incident to an arrest holding that an entire house cannot be searched pursuant to an arrest in that house. Another limitation occurred in ***United States v Chadwick***, *supra* at 15 where the Court held that the exception was limited to "personal property . . . immediately associated with the person of the arrestee," (200–pound, locked footlocker could not be searched incident to arrest), abrogated on other grounds by ***California v Acevedo***, *supra*. The result in ***Riley*** flowed from the Court's recognition of the enormous privacy interests implicated by searches of cellphones including both the quantity and quality (personal nature) of data on them. ***Riley***, *supra*, at 393-398. Thus, the rationale for excluding these devices for the search-incident-to-arrest exception to the warrant requirement.

Among the data that concerned the Court was location data. This led to ***Carpenter v United States***, 585 US 296, 303; 138 SCt 2206; 201 LEd2d 507 (2018) which held that a long-used statute that allowed law enforcement to obtain cell-site location information (CSLI) was no longer sufficient due to the significant intrusion into personal privacy created by the massive amounts of

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data gleaned from this information. The Stored Communications Act is codified at 18 USC §2701 et seq. It originally required a warrant for the contents of a stored electronic communication that is stored for 180 days or less. 18 USC §2703(a).[2] The contents of a communication stored in a remote computing service could be obtained without prior notice to the subscriber only if the government obtained a warrant. 18 USC §2703(b)(1). All other records held by the electronic communication service provider could be obtained by law enforcement by obtaining a court order pursuant to the Act without prior notice to the subscriber. 18 USC §2703(c). The only requirement for obtaining the court order was for the governmental entity to provide "specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." 18 USC §2703(d).[3] This section, 18 USC §2703 was amended April 24, 1996, October 11, 1996, June 23, 1988, October 26, 2001,[4] November 2, 2002,[5] January 24, 2003, January 6, 2006, October 19, 2009, March 23, 2018,[6] November 16, 2018. The current version was effective January 1, 2019. The relevant and material standard for obtaining the order never changed.

Carpenter was focused on historical cell phone records that provide "a comprehensive chronicle of the user's past movements." ***Carpenter***, *supra*, at 300. The Sixth Circuit had affirmed the denial of Carpenter's motion to suppress. ***United States v Carpenter***, 819 F3d 880 (C A 6,

[2] All references to 18 USC §2703 in this paragraph are citing to the version in effect until April 23, 1996 unless otherwise specified.
[3] Compare the emphasized language "relevant and material to an ongoing criminal investigation" to the language from the search warrant in the instant case " where the affiant believed "that the execution of this search warrant will assist with the furtherance of this criminal investigation."
[4] The title of the section was changed from "requirements for governmental access" to "required disclosure of customer communications or records" with this amendment.
[5] This amendment required the provider to also disclose the means and sources of payment for the service including any credit card or bank account number. 18 USC §2703(c)(2)(f), eff. Jan. 24, 2003.
[6] This amendment expanded the time frame for obtaining the content of a communication (18 USC §2703(a)) and allowed qualifying foreign governments to obtain records as well. 18 USC §2703(h), eff. March 23, 2018.

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2016). The government has not mentioned ***Carpenter*** in its brief and will likely suggest it should be limited to location data. This limitation should not occur. ***Carpenter*** recognized that the ***Riley*** decision was driven by the "immense storage capacity" on a cell phone. ***Carpenter***, *supra*, at 305, citing ***Riley***, *supra*, at 393. The government's ability to learn details of intensely private information is what prompted the Supreme Court to apply a higher standard. The lower standard had been established in a statute for decades which is a clear indication that the Supreme Court intended it to apply to all of the private information on a cell phone. In the context of the instant case, that would include things such as "patterns of life."

In analyzing the issue, the Supreme Court looked to the privacy interests in a person's physical location and movements. The Court went through the history of government tracking of persons and the evolving technology as well as the concept that third party records are usually possessed by the service provider. The logic of the third-party ownership concept was rejected by the Court because the government "leverages the technology of the wireless carrier" and the location information was protected by the Fourth Amendment. ***Carpenter***, *supra*, at 307-310. Granted, the Court specifically excluded things such as real-time CSLI, "tower dumps," conventional surveillance, location data in other types of business records, or matters of foreign affairs or national security. ***Carpenter***, *supra*, at 316. But the Court also noted that

> "[v]irtually any activity on the phone generates CSLI, including incoming calls, texts, or e-mails and countless other data connections that a phone automatically makes when checking for news, weather, or social media updates. Apart from disconnecting the phone from the network, there is no way to avoid leaving behind a trail of location data. As a result, in no meaningful sense does the user voluntarily "assume[ ] the risk" of turning over a comprehensive dossier of his physical movements. [***Smith v Maryland***, 442 US 735, 745; 99 SCt 2577; 61 LEd2d 220 (1979)]."

The Supreme Court expressly held that the CSLI data is within the expectation of privacy protected by the Fourth Amendment and obtaining it was a search. The lower standard of the

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statute was rejected because it was below the probable cause standard. The Supreme Court actually rephrased the standard as requiring a showing that the "cell-site evidence might be pertinent to an ongoing investigation." ***Carpenter***, *supra*, at 317. It takes no imagination or speculation to conclude that the Supreme Court would view e-mails, texts, and telephone logs as also receiving the same protection. This is not because utilizing these features creates a CSLI entry but because they have replaced a person's private letters, private expressions, political views, sexual interests, relationships, and associations from storage in one's home, heart or brain to a digital file in a perfectly preserved representation viewable with clicks of a button or the swipe of a finger.

C. The Michigan Supreme Court's recognition of cellphone privacy interests

Riley was decided in 2014. ***Carpenter*** was decided in 2018. The warrant in the instant case to search the telephone was obtained on March 3, 2020. On December 28, 2020, this Court issued its decision in ***People v Hughes***, 506 Mich 512; 958 NW2d 98 (2020). The recognition of the increased privacy interests in cellphones as articulated in ***Riley***, *supra*, led off the analysis. ***Hughes***, *supra*, at 109-110. The ***Hughes*** Court framed the question as "whether the seizure and search of cell-phone data pursuant to a warrant extinguishes that otherwise reasonable expectation of privacy in the entirety of the seized data." The answer was "no." ***Hughes***, *supra*, at 539. The Court held that a warrant authorizing search and seizure of cell-phone data "allows officers to examine the seized data only to the extent *reasonably consistent with the scope of the warrant*" (emphasis added). *Id*. The Court explained that ***Riley*** distinguished cell-phone data from other items subject to search incident to arrest because of the privacy interests at stake. *Id*, at 530, citing ***Riley***, *supra*, at 393. After concluding that ***Hughes*** retained a privacy interest in the remaining data on his cellphone, the Court then analyzed whether the second review of the data by a different officer for a different crime was within the scope of the warrant. *Id*, at 536-537.

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Two primary considerations drove the analysis: a) the particularity requirement, and b) ***Riley***'s recognition of extensive privacy interests. The Court then went through the purposes of the particularity requirement discussed *ante* in this brief. An initial requirement is that the warrant must identify the specific offense for which police have established probable cause. ***Hughes***, citing ***Berger v State of New York***, 388 US 41, 55-56; 87 SCt 1873; 18 LEd2d 1040 (1967); ***Andresen v Maryland***, 427 US 463, 479-480; 96 SCt 2737; 49 LEd2d 627 (1976); ***United States v Galpin***, 720 F3d 436, 445 (C A 2, 2013). In the instant case, the government has repeatedly claimed the warrant contained the proper limitation by identifying the crimes of larceny in a building and safebreaking. See Paragraph 2 of the affidavit in support of the search warrant. Appellant App'x, p. 123.[7] But that is only one of the requirements.

> [S]ome 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, for even particularized descriptions will not always speak for themselves in evidencing criminality.
>
> ***Hughes***, *supra*, at 538 citing ***Warden, Md. Penitentiary v Hayden***, 387 US 294, 307; 87 SCt 1642; 18 LEd2d 782 (1967).

Hayden stands for the proposition that when a search warrant is seeking evidence as opposed to fruits or instrumentalities of crime or contraband, the particularity requirement must be expressed clearly for the former because the nexus is not inferable as it is with the latter. ***Hayden***, *supra*, at 306-307. ***Hughes*** makes it clear that a connection between the particularized description of the objects to be seized and the criminal behavior must be established to a probable cause standard and passed upon by a neutral, detached magistrate. Particularity insures that the scope of the warrant is limited to that for which probable cause was established. The warrant in

[7] The warrant and affidavit for the cell phone were (trial court) Appendix Item 2 and Exhibit B at the hearing on the motion for new trial.

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Hughes failed as to the armed robbery because the scope of the search went outside the crime identified in the warrant (drug-trafficking). ***Hughes***, at 540.

To provide guidance, the Court provided some factors to consider in deciding whether the forensic steps of the search process were "reasonably directed at uncovering the evidence specified in the search warrant." ***Hughes***, *supra*, citing ***United States v Loera***, 923 F3d 907, 917, 922 (C A 10, 2019).

> (a) the nature of the criminal activity alleged and the type of digital data likely to contain evidence relevant to the alleged activity;
> (b) the evidence provided in the warrant affidavit for establishing probable cause that the alleged criminal acts have occurred;
> (c) whether nonresponsive files are segregated from responsive files on the device;
> (d) the timing of the search in relation to the issuance of the warrant and the trial for the alleged criminal acts;
> (e) the technology available to allow officers to sort data likely to contain evidence related to the criminal activity alleged in the warrant from data not likely to contain such evidence without viewing the contents of the unresponsive data and the limitations of this technology;
> (f) the nature of the digital device being searched;
> (g) the type and breadth of the search protocol employed;
> (h) whether there are any indications that the data has been concealed, mislabeled, or manipulated to hide evidence relevant to the criminal activity alleged in the warrant, such as when metadata is deleted or when data is encrypted; and
> (i) whether, after reviewing a certain number of a particular type of data, it becomes clear that certain types of files are not likely to contain evidence related to the criminal activity alleged in the warrant.
> ***Hughes***, *supra*, at 543-546 (footnotes and citations omitted).

Mr. Carson asserts that using this factored totality-of-the-circumstances test is not necessary in the instant case. This is so primarily because the affidavit itself (and the warrant) sought to obtain enormous amounts of digital information that would have nothing to do with this larceny in a building or safebreaking. It is also appropriate because the ***Hughes*** Court acknowledged that this process would likely only be needed where a properly limited and

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reasonable review of data also disclosed evidence of criminal activity unrelated to the warrant. *Id*, at 546.

D. Application of ***Hughes*** to the instant case.

All data types, categories, applications and functions were subjected to search.

The affiant claims that data obtained from "these devices" can assist law enforcement in establishing the involvement of a possible suspect or suspects. Appellant's App'x, p. 125, ¶3.w. The strong inference with this language is that probable cause does not yet exist as to a particular suspect or a particular communication because the police were seeking data that would establish a "possible" suspect.

The affiant claims that the data can assist law enforcement in establishing communication activity/behavior, patterns, anomalies, patterns of life and often the identity of the device user. There is simply no room to make a non-frivolous argument that this language is precisely what Riley and Carpenter were addressing. Some of the cases discussing particularity use the phrasing of "nexus" between the items to be seized and the criminal activity for which probable cause has been established. The descriptions used in ***Riley*** about the significant invasion of privacy caused by CSLI and its characteristics of time span and accuracy actually fall short of the immense invasion of privacy encapsulated in the scope of language used by the affiant in the instant case.

Paragraph 3.x also provided a clear signal that the affiant wanted to examine a broad time frame to discern the patterns of life he was seeking to establish. Appellant's App'x, p. 125. Further support for the unlawful scope of the warrant if found in the last sentence of Paragraph 3.x) "This is most effectively accomplished by reviewing a larger segment of records ranging prior to and after the incident under investigation if possible." Appellant's App'x, pp. 125-126.

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Missing from the affidavit is any indication from the alleged victim that he ever communicated with Mr. Carson or his (then) wife by telephone, text message, e-mail, or social media. Paragraphs 3.o) and p) summarize an interview with Mr. Carson's (then) wife and make no assertion that she used a telephone or a cellular phone or the internet. Appellant's App'x, p. 125. Paragraphs 3.q) through 3.s) summarize an interview with Alan Olsen which again fails to assert that Mr. Olsen communicated with Mr. Carson by telephone, cellphone, text messages, or social media. *Id*. Paragraphs 3.t) and 3.u) summarize a second interview with the alleged victim and again fail to establish any communications with Mr. Carson by telephone, cellular phone, text message, e-mail, or social media. *Id*.

Other than the affiant saying that mobile communication devices are "often" used as instrumentalities of crime, no nexus exists at all between Mr. Carson's cellphone – much less the data stored on it – and the criminal activity identified in the warrant. Even assuming that naming the two crimes in the introductory phrase of Paragraph 2 of the warrant (property to be searched for and seized) is some sort of limitation, the expansive language of the various pieces of data run against every conceivable purpose of ***Riley*** and ***Hughes***.

There were no limitations inferred or expressed.

A piece of data is identified as "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." This language is one of the factors to be considered regarding whether a search unrelated to the original authorization is likely and whether it will be reasonable. Steps taken by a citizen to protect information is and has been a key factor in deciding whether the expectation of

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privacy is reasonable. ***Riley*** established that the expectation is, in fact, reasonable. Appellant's App'x, p. 123, ¶2.

Another piece of data is identified as "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." The same analysis as abve applies. *Id*.

The last sentence of the description of the property to be searched for and seized includes e-mails, text messages, text/picture messages, pictures and videos, address book, any data on the SIM card if applicable and then goes on to repeat the language of "all records and documents" created, modified, or stored . . . ." *Id*. This is somewhat repetitive of the second sentence but this is very broad as to the types of data and it is all inclusive.

There was no temporal limitation in the warrant itself. Indeed, the affidavit made it clear that the affiant intended for the search to cover a "larger segment of records ranging prior to and after the incident under investigation if possible." The time frame identified in the warrant was August 2019 through October 2019 but that was clearly not intended by the affiant as a limitation. Even if it was, it was not a limitation imposed by the reviewing magistrate.

E. The Court of Appeals resolution of the case.

The Court of Appeals cited to Michigan law that restated the purpose of the particularity requirement: to provide guidance and prevent undirected discretion in determining what to seize. *Carson*, Appellant's App'x, p. 7, citing ***People v Unger***, 278 Mich App 210, 245; 749 N.W.2d 272 (2008). The Court of Appeals then cited to ***Hughes***, *supra*, and focused on the conclusion that allowing a search of an entire device for evidence that could be found anywhere on the phone is to allow a prohibited general search. *Id*, citing ***Hughes***, *supra*, at 542. As noted above, the affidavit

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contained the time frame of the allegations. The Court of Appeals, however, properly excluded the contents of the affidavit in its analysis because there were no words of incorporation. ***Carson,*** Appellant's App'x, p. 8, n. 7, citing ***People v Brcic***, 342 Mich App 271, 277-82; 994 NW2d 812 (2022).

The Court of Appeals declared this a general warrant and proceeded to provide some examples of limitations the reviewing magistrate could have imposed. These consisted of text/SMS messages between Mr. Carson and his (then) wife or messages through social media message applications. Mr. Carson does take issue with whether the affidavit provided probable cause to believe that Mr. Carson used his phone to communicate with her. There was nothing in the affidavit that would not require speculation or conjecture to conclude they used a phone or social media to communicate. Conclusions of probable cause must be based on facts or inferences from those facts. The existence of a domestic partnership, to counsel's knowledge, has never been held to establish that as probable cause for seizure of electronic communications. The Court of Appeals then provided its own phrasing of the concerns of ***Riley***, *supra*, adopted in ***Hughes***, *supra*:

> The warrant that was actually issued placed no limitations on the scope of the search and authorized the police to search everything, specifically mentioning photographs and videos. Authorization for a search of defendant's photographs and videos, despite there being no evidence suggesting that these files would yield anything relevant, is particularly troubling in light of the tendency of people in our modern world to store compromising photographs and videos of themselves with romantic partners on their mobile devices. Moreover, people usually can directly access file storage systems such as Dropbox and Google Drive directly from their phones, creating a whole new realm of personal information that the police was given free license to peruse. The pandemic also saw the emergence of applications such as "BetterHelp" and "Talkspace" through which people can have text message-based sessions with their psychotherapists, and applications such as "MyChart" allow mobile storage of detailed medical records as well as private conversations between patients and doctors. [. . .]. Indeed, there are likely many people who would view an unfettered search of the contents of their mobile device as more deeply violative of their privacy than the sort of general search of a home that the framers originally intended to avoid.
> ***Carson***, Appellant's App'x, p. 8.

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The limitation of ***Hughes*** (a second search of data for a different crime) was not lost on the Court of Appeals. They realized that they were not dealing with a subsequent search where a previous warrant provided guidance. The analysis was properly aimed at whether the warrant was too broad to support the search at issue. ***Carson***, Appellant's App'x, p. 9 n. 8.

The Court of Appeals then looked to decisions from several other states. All of the decisions listed were decided after ***Riley*** and ***Carpenter***. The Connecticut Supreme Court focused on the absence of limitations on the areas of the phone to search and a time frame reasonably related to the crimes. ***State v Smith***, 344 Conn 229, 250-252; 278 A3d 481 (2022). The Oregon appellate court rejected a warrant that authorized seizure of any item that might later serve as evidence of a crime. ***State v Bock***, 310 Or App 329, 335, 485 P3d 931 (2021). In ***Richardson v State***, 481 Md 423, 438, 468; 282 A3d 98 (2022), identifying the crimes under investigation was not a sufficient limitation when the warrant sought to search the entire phone. The expansive "any and all" language, the absence of search protocols, and the absence of a temporal limitation were so egregious that simply naming the offense was insufficient. See also ***State v Wilson***, 315 Ga 613, 615-616; 884 SE2d 298 (2023).

It is also important to point out what the Court of Appeals did not do in Mr. Carson's case. They did not require warrants or affidavits to include specific or even general search protocols. They did not require that warrants or affidavits be limited to data with certain characteristics (communications, logs, photographs, social media, texts, etc) or used in certain applications. They did not require that time limitations be tailored to some arbitrary standard. They did not require that limitations be fashioned in the narrowest possible terms knowing that an officer could always reapply for another warrant if a reasonable observation revealed probable cause for another class or type of data. They placed no burdens on law enforcement that did not exist as of the ***Riley***

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decision in 2014. Once ***Riley*** and ***Carpenter*** made it clear that the search of cellular phones had to be pursuant to a validly issued warrant, the particularity requirement accompanied those holdings automatically.

F. Trends in other jurisdictions.

The government complains about the Court of Appeals recognizing how some sister-states have handled the particularity requirement since Riley and Carpenter. Government Brief, pp. 32-33. There are several others however that demonstrate how other states are respecting the rulings of the United States Supreme Court.

In ***Terreros v State***, 312 A3d 651 (Del. 2024), the Delaware Supreme Court held a search warrant to be a general warrant based in large part on the decisions in ***Riley*** and ***Carpenter***. Terreros' significant other found certain internet search terms in his search history while looking through his cell phone. Her daughter then reported to her that Terreros had allegedly molested her. She reported the allegation to the police along with what she observed on the phone. The police obtained a search warrant to search between the dates of 11/19/19 – 11/23/19 for "[a]ny and all messages, any and all messaging apps, all search history, all photographs, videos, GPS coordinates, incoming and outgoing calls from November 18, 2019, to November 23, 2019." ***Terreros***, *supra*, at 656.

The Delaware Supreme Court held that the warrant was a general warrant because it violated the requirement for particularity. *Id*, at 661-662. Based on Third Circuit Court of Appeals decisions, the Delaware Supreme Court stated that insufficiently particular warrants fell into two categories: 1) general warrants which allow exploratory rummaging, and 2) an overbroad warrant which allows items to searched for when only portions of those items are supported by probable cause. The Delaware Supreme Court was of the opinion that the difference drove the remedy. A

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general warrant requires suppression of all items seized but an overbroad warrant can be salvaged by suppressing only the items for which probable cause did not exist. *Id*, at 663.[8]

In ***Commonwealth v Young***, 287 A3d 907, 931, n. 12 (Pa Super Ct 2022), a warrant which allowed for phones and all the files thereon regardless of whether they had a nexus to the alleged crimes, and which did not reference an affidavit which might have limited its scope, was too broad under the Fourth Amendment. The items to be searched for in the ***Young*** warrant were very similar to the items in the instant case: all data stored electronically, text/SMS messages, pictures/images, videos, call data logs for ingoing/outgoing/dialed and missed calls, micro SD memory device storage, e-mails sent/received, all social media messaging, and all internet searches. ***Young***, *supra*, at 913. As part of its analysis, the Pennsylvania Supreme Court recognized the significant privacy interests that citizens have in their cell phones. ***Young***, *supra*, at 920. Among the various challenges, the lack of particularity was an integral part of declaring the warrant to be a general warrant which was in large part based on the ruling in ***Groh v Ramirez***, *supra*. ***Young***, *supra*, at 919-931.

In ***People v Covlin,*** 58 Misc 3d 996, 70 NYS3d 342, 348–49 (N Y Sup Ct 2018), a warrant authorizing that "'all stored electronic information' and 'electronic security equipment and devices'" on a cell phone was not sufficiently particular. Without citing ***Riley*** or ***Carpenter***, this New York Court lamented on the frequency with which overly broad or general warrants for electronically stored data were being issued. Most of them were procedural in that system but a factor was the unique context presented by digital data. The New York Court did not seek to reduce the particularity requirement but its comments were aimed at highlighting points in the system

[8] The Delaware Supreme Court stated that this distinction came from the United States Supreme Court. ***Terreros***, *supra*, at 668. The cases that were cited, however, were from the Third Circuit Court of Appeals and those cases did not cite to any United States Supreme Court case that generated the distinction. *Id,* citing ***United States v. Yusuf***, 461 F.3d 374, n.19 (3d Cir. 2006).

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where the particularity requirement was being overlooked so those procedural steps could be improved. ***Covlin***, *supra*, 70 NYS3d at 356-357.

Mr. Carson does not present these cases as authoritative to this Court. What they do show, however, is that many other states are also recognizing the significant privacy interests that involve cell phones. These other courts did not hesitate to recognize the vitality of the purpose of the Fourth Amendment in protecting long-recognized privacy interests from the prying eyes of government. While the government claims sufficient guardrails were present, the disclosure of the entire 935 pages of the forensic download and the specific, expressed intention to determine "patterns of life" show that the search warrant entirely failed to curtail the scope of the actual search. This warrant would not have gained approval from these other state courts, it did not gain approval from the Michigan Court of Appeals and it should not gain approval from this Court.

II. THE COURT OF APPEALS DID NOT ERR BY FAILING TO SEVER ANY VALID PORTIONS OF THE SEARCH WARRANT FROM ANY INVALID PORTIONS.

A. Preservation of the issue and standard of review.

1. Preservation of the issue.

Mr. Carson asserts that this issue was preserved by both parties.

2. Standard of review.

The Court of Appeals majority decision did not engage in an effort to sever any invalid portions of the warrant for valid portions to determine if across-the-board suppression was warranted. The determination of validity of an entire search warrant or portions of it is a constitutional question which is reviewed de novo. ***Sierb***, *supra*.

B. The warrant has no valid portions.

In ***People v Keller***, 479 Mich 467; 739 NW2d 505 (2007), this Court recognized the rule that a warrant authorizing a search for an array of items can have valid and invalid portions

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regarding the sufficiency of probable cause. This limits the application of the exclusionary rule only to the invalid portions. ***Keller***, *supra*, at 478 citing ***United States v Sells***, 463 F3d 1148, 1150 (C A 10, 2006). ***Sells***, however goes on to say that the doctrine of severability "applies only if 'the valid portions of the warrant [are] *sufficiently particularized*, distinguishable from the invalid portions, and make up the greater part of the warrant.'" ***Sells***, *supra*, at 1151, citing ***United States v Naugle***, 997 F2d 819, 822–23 (C A 10, 1993). Counsel for Mr. Carson has yet to find a United States Supreme Court decision that approves of this practice.

While the blanket good-faith exception to the exclusionary rule is discussed, *post*, severability of a warrant still seeks to find a loophole for the government in the exclusionary rule. As such, if the severability doctrine actually meets constitutional muster, it must be narrowly drawn in favor of the citizen. ***Boyd v United States***, 116 US 616, 635; 6 SCt 524; 29 LEd 746 (1886). ***Weeks v United States***, 232 US 383; 34 SCt 341; 58 LEd 652 (1914) established the exclusionary rule at the federal level. ***Wolf v Colorado***, 338 US 25; 69 SCt 1359; 93 LEd 1782 (1949) established it at the state level via the Fourteenth Amendment. Of equal importance is ***Elkins v United States***, 364 US 206; 80 SCt 1437; 4 LEd2d 1669 (1960). ***Elkins*** ruled that unconstitutionally seized evidence obtained by state officers could not be used in a federal criminal trial. ***Elkins***, *supra*, at 223-224. A statement within that opinion helps address this issue: "The [exclusionary] rule is calculated to prevent, not to repair. Its purpose is to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it." ***Elkins***, *supra*, at 217. This observation led to the following when considering the number of unlawful searches and seizures that never come to the attention of the courts because nothing is found:

> 'Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently

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> are guilty.' ***Brinegar v. United States***, 338 U.S. 160, 181, 69 S.Ct. 1302, 1313, 93 L.Ed. 1879 (dissenting opinion).
> ***Elkins***, *supra*, 217-218, citing ***Eleuteri v Richman***, 26 NJ 506, 513; 141 A2d 46, 50 (1958).

In light of the purposes of the exclusionary rule, the doctrine of severability is on questionable footing where an entire warrant is lacking in probable cause. It is especially questionable when dealing with a facially invalid warrant. In ***Cassady v Goering***, 567 F3d 628 (C A 10, 2009), a sheriff's request to apply the doctrine of severability in a civil case was rejected. The rejection rested on the fact that it is typically applied in criminal cases but more specifically that – in the Tenth Circuit – the severability doctrine is only applicable where "the valid portions of the warrant [are] sufficiently particularized, distinguishable from the invalid portions, and make up the greater part of the warrant." ***Cassady***, *supra*, at 637, citing ***Naugle***, *supra*, at 822.

United States v Leon, 468 US 897; 104 SCt 3405; 82 LEd2d 677 (1984) contains no suggestion that severability would salvage an invalid warrant primarily because the case involved a facially valid warrant. ***Leon***, *supra*, at 903. The doctrine of severability has existed for many years in the civil context related to contracts. Many parties to a contract express this intent by including a specific provision into the contract. Absent an express declaration, the judicially applied doctrine allows severance of a void term "unless that term is 'central to the parties' agreement.'" ***Stokes v Millen Roofing Co***, 466 Mich 660, 666; 649 NW2d 371 (2002). This concept is shared by the language of ***Keller*** that severability can apply where the valid portions, inter alia, make up the greater part of the warrant. The similarities, however, end there.

Mr. Carson asserts that if the civil contract doctrine is going to be applied in the search warrant context, then the entire doctrine should be applied and not only the part that infringes on the deterrent aspects of the exclusionary rule. Contracts in violation of public policy are void. ***Allard v Allard (On Remand)***, 318 Mich App 583, 598; 899 NW2d 420 (2017) (quotation marks

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and citation omitted). See also ***Krause v Boraks***, 341 Mich 149, 155; 67 NW2d 202 (1954) (explaining that "neither law nor equity will enforce a contract made in violation of ... a statute or one that is in violation of public policy") (quotation marks and citation omitted). In determining severability, the "primary consideration ... is the intent of the parties." ***Prof Rehab Assoc v State Farm Mut Auto Ins Co***, 228 Mich App 167, 174; 577 NW2d 909 (1998). A search warrant is obtained ex parte so there is no basis at all to investigate the intent of the parties to the contract because there is no contract. Additionally, the statute allows for the affidavit in support of the search warrant to be suppressed for long periods of time. A search warrant that is lacking in probable cause or otherwise violates the Fourth Amendment is clearly in violation of public policy. The damage done to the deterrent purpose of the exclusionary rule greatly outweighs any governmental interest in executing a search warrant that is even partially invalid. This is not a matter of degree. It is a matter of the Courts faithfully performing their duties to respect the constitutional protections embodied in the Fourth Amendment. Those protections were hard earned and no encroachment should be tolerated.

Assuming that this doctrine is even acceptable to the United States Supreme Court,[9] the first step is to divide the warrant into categories. This warrant does not even survive the first step. The list of things to be searched for and seized is:

1. Any and all records or documents* pertaining to the investigation of Larceny in a Building and SafeBreaking. 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.

[9] A dissent in ***Keller*** raised this question as well. ***Keller***, *supra*, at 484 (M. F. Cavanagh, J, and Kelly, J. dissenting).

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2. 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 accessary to gain access to the programs, data, applications and information contained on the cellular device(s) to be searched;

3. 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;

4. This shall include thumb print and facial recognition and or digital PIN passwords, electronically stored communications or messages, including any of the items to be found in electronic mail (e-mail).

5. 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. Appellant's App'x, p. 123.

The breadth of the language makes it a bit challenging, but Mr. Carson asserts there are basically three categories: a) any and all electronic data files; b) physical items necessary to access the physical device, and c) digital or non-physical information to gain access to the device or files (encrypted and un-encrypted) files on the device.

The warrant contains no words of incorporation of the affidavit. This means the only limitation is the names of the offenses the affiant believes are under investigation: larceny in a building and safebreaking. In the instant case, the items admitted at trial were text messages. Government Trial Exhibit 9 consisted of 9 pages of text messages between Mr. Carson and his

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(then) wife from August 5, 2019 to November 27, 2019 and a single page of the contacts log from the phone. Def. App'x, pp. 3-12. The testimony accompanying this exhibit was from the lead detective at Appellant's App'x, pp. 76-89.

Keller is also difficult to apply because the warrant in ***Keller*** envisioned three different categories of evidence but all involving controlled substances: 1) marihuana, 2) distribution evidence, and 3) possession evidence. ***Keller***, *supra*, at 479. Probable cause existed only for marihuana and not for distribution. Even though a controlled substance offense, this Court viewed "distribution" as a distinct crime from possession and rightfully so. *Id*, at 480. The Court concluded that since searching for marihuana opened up the entire house to examination, the valid portion was the majority portion. This analysis simply does not translate to the instant case. The primary target here was digital data stored anywhere on the phone. No distinction was made as to time, type of application, whether the data was on the phone or accessible using an application connected to a remote server. Even if the affidavit is considered, it never specified that Mr. Carson or his (then) wife ever communicated with each other or the alleged victim by using the phone or an application that a phone might contain.

Keller and the federal appellate cases do not make it clear whether "category" means a) an associated crime, b) the physical characteristics of the evidence, c) data stored locally as opposed to remotely, or d) data stored on different types of applications within a phone. Additional possibilities exist: applications, logs, albums, photographs, videos, voicemails, text messages, social media posts, security files, system files, downloaded applications, archived files, etc. All of these issues that leave the severability doctrine questionable are capable of being solved with a proper investigation and inserting the required particularity elements into the affidavit and incorporating that affidavit into the warrant.

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The doctrine of severability assumes that an invasion of privacy has been authorized but then excuses the unauthorized portions depending on relativity. Line-drawing has always been discouraged in terms of privacy rights. The only line that has resilience is probable cause. Once the police are inside a home (or in Mr. Carson's case his phone), their eyes can land on anything and everything. The violation of privacy cannot be reversed. As noted above, the only effective way to accomplish the goals of the exclusionary rule is to remain focused on its purpose. If all of the evidence seized pursuant to a severable warrant is not suppressed, there is no deterrent to drafting overly broad warrants.[10] The purpose of the exclusionary rule is to deter – not to repair. ***Elkins***, *supra*, at 217.

III. THE COURT OF APPEALS DID NOT ERR BY HOLDING THAT THE GOOD-FAITH EXCEPTION TO THE EXCLUSIONARY RULE DID NOT APPLY.

A. Preservation of the issue and standard of review.

1. Preservation of the issue.

Mr. Carson asserts that this issue was preserved by both parties.

2. Standard of review.

The Court of Appeals majority decision determined that the good-faith exception to the exclusionary rule did not apply because this was a facially invalid general warrant. The Court of Appeals also concluded that no reasonable officer could have relied on the warrant in objective good faith. *Carson*, Appellant's App'x, p. 14. The determination of application of the good-faith exception to the exclusionary rule is a matter of law which is reviewed de novo. ***People v Goldston***, 470 Mich 523, 527-528; 682 NW2d 479 (2004) (adopting the good faith exception in Michigan).

[10] In ***People v Kazmierczak***, 461 Mich 411; 605 NW2d 667 (2000) (which predated ***Keller*** by seven years), this Court held that "evidence" seized in violation of the Fourth Amendment is inadmissible in criminal proceedings with no qualifications.

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The application of Fourth Amendment principles is reviewed de novo. ***People v Hammerlund***, 504 Mich 442, 451; 939 NW2d 129 (2019).

B. Application of the Fourth Amendment principles.

Mr. Carson asserts that Paragraphs 3.w, 3.x, and 3.y of the affidavit coupled with the failure to identify the training and experience of the officer and the extensively broad categories listed, make further discussion of the application of the exclusionary rule unwarranted. The argument and analysis above demonstrates both facial invalidity and the lack of good-faith reliance. See ***People v Czuprynski***, 325 Mich App 449, 472; 926 NW2d 282 (2018); ***People v Hellstrom***, 264 Mich App 187, 197; 690 NW2d 293 (2004). See also ***United States v Leon***, *supra* at 925 (It frequently will be difficult to determine whether the officers acted reasonably without resolving the Fourth Amendment issue).

The grant of leave specifically required that the issue be discussed so the analysis will begin with ***United States v Leon***, *supra* at 905. The ***Leon*** Court wrote that "our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." 468 US at 922 n. 23. "The objective standard ... requires officers to have a reasonable knowledge of what the law prohibits." *Id*. at 919 n. 20. The concept of "reasonable reliance" can sometimes be influenced by the facts of a particular case. See, ***Groh v Ramirez***, supra at 563 – 566.

After ***Leon***, there are four situations where good-faith reliance will not apply: (1) where the issuing magistrate was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard for the truth; (2) where the issuing magistrate wholly abandoned his judicial role and failed to act in a neutral and detached fashion, serving merely as a rubber stamp for the police; (3) where the affidavit was nothing more than a

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"bare bones" affidavit that did not provide the magistrate with a substantial basis for determining the existence of probable cause, or where the affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) where the officer's reliance on the warrant was not in good faith or objectively reasonable, such as where the warrant is facially deficient. ***United States v Hython***, 443 F3d 480, 484 (C A 6, 2006), citing, ***Leon***, at 923. The burden is on the government to show that an exception to the exclusionary rule applies. ***Leon***, *supra*, at 923 (When officers have acted pursuant to a warrant, the prosecution should ordinarily be able to establish objective good-faith without a substantial expenditure of judicial time).

This Court adopted the good-faith exception to the exclusionary rule in ***Goldston***, *supra*. The Court of Appeals utilized the category of the warrant being facially invalid to the extent that no reasonable officer could have relied on it in objective good faith. The Court of Appeals made reference to a specific example of facial deficiency from ***Leon*** "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." *Carson*, slip op at 15, citing ***Leon,*** *supra*, at 923 (emphasis applied in *Carson*).

In ***People v DeRousse***, 341 Mich App 447; 991 NW2d 596 (2022), part of the analysis by the Court of Appeals as to the "good-faith" reliance included testimony by the officer at the suppression hearing. Even though the warrant described only a single-family dwelling, the officer believed the warrant also authorized the search of two pole barns on the building. ***DeRousse***, *supra*, at 466. The author of the search warrant (also the lead detective) did not testify at the suppression hearing in *Carson*. Nonetheless, the affidavit clearly establishes his intent to conduct a very broad search of every item in the phone for information (not just evidence) that would "assist" in the

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investigation. This acknowledged intent on the part of the officer was noted by the Court of Appeals. *Carson*, Appellant's App'x, p. 16.

In ***United States v Hython***, *supra*, good-faith reliance was not present because objectively reasonable reliance on the affidavit was not sustainable. While inferences are allowed, they must be "drawn between facts that are contained in the affidavit or warrant application, and not on assumptions about standard police practices or unasserted but hypothetically possible facts." ***Hython***, *supra*, at 489.

In ***United States v Lewis***, 81 F4th 640 (C A 6, 2023), the Sixth Circuit declined to apply the good-faith exception to the exclusionary rule. The affidavit in support of the search warrant in that case (for a home and electronics) contained some factual statements about the investigation. But as to the actual existence of child sexually abusive material, it only contained a single sentence which was a conclusion on the part of the affiant. ***Lewis***, *supra*, at 646. This was insufficient to establish probable cause. There was no description of the item allegedly observed on the laptop to provide the reviewing magistrate of factual information to conclude a crime had occurred. The situation in ***Leon*** where the good-faith exception does not apply is wordy: "(3) where the affidavit was nothing more than a "bare bones" affidavit that did not provide the magistrate with a substantial basis for determining the existence of probable cause, or where the affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." ***Lewis***, *supra*, at 647, citing ***Leon***, *supra*, at 923. But the Sixth Circuit also simplified this by explaining that "a bare-bones affidavit is 'a conclusory affidavit' that 'states only the affiant's belief that probable cause existed.' " ***Lewis***, *supra*, at 648, citing ***United States v Williams***, 224 F3d 530, 533 (C A 6, 2000) (quotation omitted). See also ***United States v Weaver***, 99 F3d 1372, 1378 (C A 6, 1996) (A bare-bones affidavit is an affidavit "that states suspicions,

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beliefs, or conclusions, without providing some underlying factual circumstances regarding veracity, reliability, and basis of knowledge[.]")

Even if the facts alleged in the instant affidavit created probable cause for the crime(s) of larceny in a building or safebreaking, the probable cause must include facts to support a substantial basis to believe the place to be searched contains items of evidence that are particularly described. In ***Nathanson v United States***, 290 US 41, 46; 54 SCt 11; 78 LEd 159 (1933), the Supreme Court held that the "mere affirmation of suspicion and belief without any statement of adequate supporting facts" prohibits objectively reasonable reliance on a warrant.

During the evidentiary hearing on the motion for new trial, trial defense counsel testified to the scope of the forensic download provided to him in discovery. He described the contents of the forensic examination as consisting of approximately 1000 pages consisting of everything on the phone. Def. App'x, p. 96. The summary pages of the forensic download were admitted at the evidentiary hearing as Exhibit C. The only time actual content was discussed occurred during cross-examination of trial defense counsel where he said there were "a thousand pages of texts to read and sitting there reading back and forth conversations between husbands and wives and third parties and all that . . ." *Id*, p. 102.

Leon exists so that an officer is not penalized for a magistrate's error. But where the magistrate's error is to the point where reliance on that magistrate's determination is entirely unreasonable, the benefits of the exclusionary rule outweigh the costs. ***Leon***, *supra*, at 921-923. The very words used by the affiant in the instant case demonstrate not only that his conclusions carried the day but also demonstrate the scope of his intent to conduct a complete and pervasive examination of all data on the phone. In light of ***Riley*** and ***Carpenter*** from the United States Supreme Court, the lack of facts showing actual use of the phone for any purpose, and the stated

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intent as to the scope, application of the good-faith exception to the warrant requirement would be a travesty in this case. Whether based on the "bare-bones" concept and lacking in indicia of probable cause or the facial invalidity based on lack of particularity, neither ***Leon*** or ***Goldston*** ever envisioned excusing a warrant of this poor caliber.

IV. THE COURT OF APPEALS DID NOT ERR BY 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.

A. Preservation of the issue and standard of review.

1. Preservation of the issue.

Mr. Carson asserts that this issue was preserved by both parties.

2. Standard of review.

Whether a defendant has received ineffective assistance of counsel is a mixed question of fact and constitutional law. ***People v Armstrong***, 490 Mich 281, 289; 806 NW2d 676 (2011). "A judge must first find the facts, then must decide whether those facts establish a violation of the defendant's constitutional right to the effective assistance of counsel." ***People v Grant***, 470 Mich 477, 484; 684 NW2d 686 (2004). This Court reviews for clear error the trial court's factual findings, and "[w]e review de novo questions of constitutional law." ***Armstrong***, 490 Mich. at 289, 806 N.W.2d 676.

B. Ineffective assistance of counsel.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." ***People v LeBlanc***, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial 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 right to counsel is guaranteed by the United States and Michigan Constitutions. This includes a right to *effective*

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assistance of counsel because it is for the purpose of assisting the defense and ineffective assistance is of no assistance. A defendant charged with a crime has a due process right to counsel that functions at a level of competence that does not fall below an objective standard of reasonableness and therefore denies a defendant a fair trial. A defendant must show that but for the errors of counsel it is likely there would have been a different result.

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." In ***People v Ginther***, 390 Mich 436; 212 NW2d 922 (1973), the Michigan Supreme Court set the standards for properly presenting a claim of ineffective assistance of counsel on appeal. When a defendant asserts that his assigned lawyer was ineffective, the trial court should consider the claim and take testimony on factual disputes. The findings and conclusions should be made a part of the record. *Id*, at 441 – 442. Such claims are rarely of record and claims as to whether certain defenses are viable and whether the defense presented was adequate frequently require a testimonial record in connection with a motion for new trial to provide evidential support for the claim. *Id*, 443.

"Basic procedural errors are also considered in determining whether assistance of counsel has been constitutionally adequate." ***Beasley v United States***, 491 F2d 687, 693 (CA6 1974). Most significantly, ***Beasley*** holds that trial counsel "must assert defenses in a proper and timely manner." *Id*, at 696 (emphasis added). A misunderstanding of or disregard of interpretations of statutes and their application has long been established as outside the range of professionally competent assistance. ***United States v Ocampo***, 919 FSupp2d 898, 909 (E D Mich 2013).

1. Deficient performance.

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The trial court found that the contents of the phone – especially the text messages were integral to the government's case. Appellant's App'x, p. 188. The trial court then made contradictory statements regarding the standard of review. First, the trial court found that if the text messages would have been suppressed there was a reasonable probability that the outcome of the trial would have been different. *Id.* But concluding that same paragraph, the trial court indicated that the question remained whether the motion would have produced a different outcome. *Id*. The trial court then omitted one of the four circumstances from ***Leon***, *supra*, which precludes application of the good-faith exception. *Id*. The trial court then concluded – with no analysis – that the search warrant was not so facially invalid that no reasonably well-trained officer would have believed it established probable cause. Appellant's App'x, p. 189. The trial court then erroneously elevated the standard to miscarriage of justice instead of the required "reasonable probability of a different outcome." The trial court's finding of deficient performance is not clearly erroneous and is supported by the testimony of trial defense counsel. The trial court's conclusion of law, however, is erroneous.

On de novo review, the Court of Appeals adopted the conclusion that counsel's performance as to the failure to challenge the search warrant for the telephone was deficient. *Carson*, Appellant's App'x, p. 16. Trial counsel's deficiency included a misunderstanding of the current state of the law. He testified that he believed the authority to search the phone was automatic where the police had a lawful basis for seizing the phone. *Carson*, Appellant's App'x at 17. Failing to recognize controlling or potentially controlling authority regarding a legal issue is deficient performance. ***People v Yeager***, 511 Mich 478, 490-493; 999 NW2d 490 (2023); ***People v Leffew***, 508 Mich 625, 646; 975 NW2d 896 (2022); ***People v Ceasor***, 507 Mich 884; 954 NW2d 830 (Mem.) (2021); ***People v Douglas***, 496 Mich 557, 585-586; 852 NW2d 587 (2014). See also,

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United States v Frost, 612 FSupp2d 903, 910-912 (N D Ohio 2009). The Sixth Amendment mandates that the State bear the risk of constitutionally deficient assistance of counsel. See ***Murray v Carrier***, 477 US 478, 488; 106 SCt 2639, 2646; 91 LEd2d 397 (1986).

In ***Strickland v Washington***, 466 US 668; 104 SCt 2052; 80 LEd2d 674 (1984), the Supreme Court explained that "access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." 466 US, at 685 (quoting ***Adams v United States ex re. McCann***, 317 US 269, 275, 276; 63 SCt 236; 87 LEd 268 (1942)). "Counsel ... has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 US, at 688. Counsel's competence, however, is presumed, *id*., at 689, and the defendant must rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy. *Id*, at 688–689. The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances. *Id*, at 689. In making the competency determination, the court "should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Id*, at 690.

In ***Byrd v Skipper***, 940 F3d 248 (CA 6 2019), the Sixth Circuit held that an attorney's misunderstanding of the law applicable to the issues in the case fell below on objective standard of reasonableness. The attorney misunderstood the law as to the defense of abandonment of a crime and the elements of aiding and abetting under Michigan law. ***Byrd***, *supra* at 253-254. See also, ***United States v Shepherd***, 880 F3d 734, 740 – 742 (CA 5 2018).

As noted above, ***Riley*** and ***Carpenter*** were decided by the United States Supreme Court in 2014 and 2018, respectively. ***Hughes***, *supra*, was decided by this Court in 2020. Trial defense

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counsel's belief that lawful possession of the cell phone by the police equated to the ability to search it has never been the law. The justification for a seizure has long been recognized as different from the justification for a search. ***People v Mahdi***, 317 Mich App 446, 461; 894 NW2d 732 (2016) (consent to search an apartment for drugs did not allow seizure of a wallet, cell phone, and keys). ***Mahdi*** also took note that ***Riley***, *supra*, had already modified the law regarding searches of cell phones. *Id*, at 458. Even if ambiguity existed, such ambiguity was removed by ***Riley*** and ***Carpenter*** by the time of Mr. Carson's trial in October 2020.[11]

Notwithstanding the other claims of ineffective assistance of trial counsel, a single serious error such as failing to file a meritorious motion to suppress can support a claim of ineffective assistance of counsel. ***Kimmelman v Morrison***, 477 US 365, 385; 106 SCt 2574; 91 LEd2d 305 (1986). Whether a motion to suppress is meritorious can be determined from reviewing blackletter law. See ***Edwards v Arizona***, 451 US 477, 486; 101 SCt 1880; 68 LEd2d 378 (1981); ***McNeil v Wisconsin***, 501 US 171, 177; 111 SCt 2204; 115 LEd2d 158 (1991). The analysis includes making a determination as to whether a conceivable strategic reason can be discerned from the record. In this instant case, trial defense counsel had the download from the phone, he had the search warrant and affidavit, and he knew the text messages were going to be used by the government by virtue of participating in the motion in limine before trial. His admissions at the evidentiary hearing and his misunderstanding of the state of the law as to searching the contents of cellphones is a clear indication that the failure to file the motion was not strategic. In ***Hendrix v Palmer***, 893 F3d 906, 922-923 (C A 6, 2018), the error was serious enough to warrant relief under the federal habeas corpus standards.

While not binding, American Bar Association, Standard 4-1.5 (Fourth Edition 2017) states:

Standard 4-1.5 Preserving the Record

[11] ***Hughes***, *supra*, was not decided by this Court until December 28, 2020.

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> At every stage of representation, defense counsel should take steps necessary to make a clear and complete record for potential review. Such steps may include: filing motions, including motions for reconsideration, and exhibits; making objections and placing explanations on the record; requesting evidentiary hearings; requesting or objecting to jury instructions; and making offers of proof and proffers of excluded evidence.

While much of the above discussion includes federal decisions, the failure to file a meritorious motion to suppress evidence has been grounds for deficient performance in Michigan for 30 years at the time of Mr. Carson's trial. In ***People v Thomas***, 184 Mich App 480; 459 NW2d 65 (1990), the Court of Appeals reversed a conviction which a motion to suppress was not filed. In that case, trial defense counsel was aware of a conflict in the arresting officer's testimony at the preliminary examination. He was also aware of grounds to argue against probable cause based on his colleague's arguments at the preliminary examination. Being made aware of a problem with the legality of the arrest but failing to act on it was deficient performance. *Id,* at 66-67.

2. Prejudice.

Harmless error tests do not apply in regard to the deprivation of a procedural right so fundamental as the effective assistance of counsel. ***Glasser v United States***, 315 US 60, 76; 62 SCt 457; 86 LEd 680 (1942); ***Chapman v California***, 386 US 18, 23; 43, 87 SCt 824; 17 LEd2d 705 (Stewart, J., concurring) (1967). To satisfy the prejudice prong, a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, *supra*, at 694.

In the instant case, the failure of trial defense counsel to file a motion to suppress the contents of the cell phone led to the admission at trial of text messages that the government argued established the necessary mental elements, inferred the necessary conduct, and inferred the agreement for the conspiracy counts. The trial court concluded that the text messages were integral

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to the government's case. Detective Leirstein testified to the text messages retrieved from the cellular telephone before the jury. Appellant's App'x, pp. 77-85. While not direct admissions, the jury was free to make incriminating inferences. Because Mr. Billings had such vague recollections and no direct knowledge, it is inarguable that the outcome would have been different if the unlawfully acquired evidence would have been precluded from trial.

Mr. Carson takes issue with the Court of Appeals view of the value of the text messages to the government's case. This is due in part to the Court of Appeals declining to rule on the evidentiary errors that were also presented to that court.

1. Deputy Midyett was allowed to testify to a question he posed to Mr. Carson as to whether the cell phone on the nightstand belonged to Mr. Carson. Mr. Carson responded that it did and the Deputy presented this to the jury. Def. App'x, p. 30. This established Mr. Carson's ownership of the phone and inferred knowledge of the contents of the phone. The Court of Appeals did not rule on this issue which was Issue II below.

2. The items seized from the home of Mr. Carson were obtained through a search warrant that was equally defective as the warrant for the cell phone. The affidavit for the home contained a false statement my the affiant that was material. This was Issue V in the brief to the Court of Appeals but was not ruled on by that Court. Def. App'x, pp. 85-90.

3. Hearsay testimony from the Co-Defendant, Brandi DeGroff (Mr. Carson's then wife), was admitted through the alleged victim, Mr. Billings, her former employer, and the detective.

4. The income information for Mr. Carson and Ms. DeGroff was incomplete as presented to the jury. See *Carson*, Appellant's App'x, p. 17; see also Def. App'x, pp. 97-101.

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5. The testimony about the casino records created a misleading impression as to what they had actually wagered because it was a running total that did not account for losses. See *Carson*, Appellant's App'x, p. 17, Def. App'x, pp. 80-84.

The Court of Appeals tempered its favorable impression of the circumstantial evidence in a footnote that paid the proper respect for the applicable standard of care. *Carson*, Appellant's App'x, p. 18. It would be an injustice to make the "reasonable probability of a different result" analysis in a vacuum. That certainly never occurs in a harmless error analysis. But even with this unjustified but favorable review, the Court of Appeals correctly held that these text messages from the cell phone admitted at trial removed all ambiguities which might have prompted a juror to find a reasonable doubt.

RELIEF REQUESTED

WHEREFORE, Mr. Carson respectfully requests this Honorable Court affirm the Court of Appeals in all respects.

12/26/2024
Date

/s/ J. Nicholas Bostic
J. Nicholas Bostic P40653
Counsel for Mr. Carson

CERTIFICATION OF COMPLIANCE WITH MCL 7.305(D) and MCR 7.212(B)

The brief in support of this application consists of 12,346 words and complies with spacing, margin and font requirements of MCR 7.212(B).

12/26/2024
Date

/s/ J. Nicholas Bostic
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