No._____

IN THE

SUPREME COURT OF THE UNITED STATES

ARTHUR WHITLEY,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari
To the Texas Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

Whether the Fourth Court of Appeals' legal analysis of the nexus between evidence about a murder investigation and information in the Petitioner's cell phone, as alleged in the affidavit in support of a search warrant for the Petitioner's cell phone violates well-established federal search warrant precedent, and nullifies this Court's landmark holding in *Riley v. California*, 573 U.S. ___ (2014)?

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PRAYER

The petitioner, ARTHUR WHITLEY, (Petitioner) respectfully prays that a writ of certiorari be granted to review the judgment and opinion of the Fourth Court of Appeals of Texas, against the Petitioner, reverse the judgment of the Fourth Court of Appeals, and remand this case for reconsideration of the merits.

OPINIONS BELOW

On June 6, 2018, the Fourth Court of Appeals of Texas issued an opinion affirming Mr. Whitley's conviction for murder, in *Whitley v. State*, No. 04-17-00438-CR (Ct. App. – San Antonio 2018) (unpublished)

On July 30, 2019, the Fourth Court of Appeals of Texas issued an order denying Mr. Whitley's panel and *en banc* petitions for rehearing. Justice Rebecca Martinez issued a dissent to the denial without first requiring a response from the State.

On February 27, 2019, the Texas Court of Criminal Appeals refused Mr. Whitley's petition for discretionary review. *See* Cause No. PD-0929-18.

On March 21, 2019, a petition for certiorari, *Juan Zamudio v. United States*, Cause No. 18-1529, was filed on March 21, 2019. A response to this petition was filed by the government on July 8, 2019.

JURISDICTION

On June 6, 2018, the Texas Fourth Court of Appeals of Texas affirmed Mr. Whitley's conviction for murder, and sentence of 60 years in the Texas Department of Criminal Justice - Institutional Division (TDCJ-ID). *See Whitley v. State*, No. 04-17-00438-CR (Ct. App. – San Antonio 2018) (unpublished).

On February 27, 2019, the Texas Court of Criminal Appeals refused Mr. Whitley's petition for discretionary review of the Fourth Court of Appeals' decision. *See* Cause No. PD-0081-13.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Petitioner's questions implicate the Fourth Amendment's right against unreasonable searches and seizures, which provides in relevant part as follows:

> 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.

U.S. Const. amend. IV.

STATEMENT OF THE CASE

A. Procedural History of the Case:

Petitioner, Arthur Whitley was indicted for murder (Count I), and for possessing a weapon as a felon (Count II). CR. 6-7. [1] He waived his right to a jury trial, electing to be tried and punished before the trial court (CR 106-07). On June 23, 2017, the trial court convicted Petitioner on both counts (6RR32; CR119-20), and sentenced him to 50 years in the Texas Department of Criminal Justice Institutional Division (TDCJ-ID). 6RR38; CR119-20. Petitioner timely appealed his conviction and sentence on June 27, 2017. CR132. The Fourth Court of Appeals affirmed the conviction in an unpublished opinion *See Whitley v. State*, No. 04-17-00438-CR (Tex. App. - San Antonio – June 6, 2018) (unpublished) (Opinion), and denied panel and *en banc* rehearing on July 30, 2018, with Justice Rebecca Martinez "[d]issent[ing] to the denial of the Motion for Rehearing *En Banc* without [first] requesting a response [from the State]." (citing TEX. R. APP. P. 49.2). A petition for discretionary review was denied by the Texas Court of Criminal Appeals, on February 27, 2019.

[1] The Clerk's Record on appeal, titled CR [page number] and the Reporters Record, is referred to as RR [page number].

Mr. Whitley's petition for a writ of certiorari was timely filed on May 28, 2019.

B. Facts:

Petitioner was arrested on the basis of Calvin Williams' eye witness account to have seen Petitioner commit murder. Williams's eyewitness claim, and the anecdotal allegation by the affiant in an affidavit in support of the search warrant for the Petitioner's cell phone, that cell phones generally contain evidence of criminal activity, were found sufficient by a state magistrate to have established the nexus between the murder, and evidence of that murder in the cell phone. Pursuant to the warrant, evidence was extracted from Petitioner's cell phone and, along with other evidence, presented by the state at his trial.

There was evidence at trial that the Petitioner was housed at the Crosspoint halfway house facility, while serving the last leg of a federal sentence. Petitioner's stay there was at all times supported by records kept at the facility, and routine bunk bed counts, which gave him an alibi defense to the murder. Also, Williams's eyewitness testimony at trial was colored by his negotiated expectation for a reduction of his sentence in a federal sentencing hearing that was pending at the time that he testified for the state. There was also cell phone location evidence,

obtained from the Petitioner's cell phone records, that placed the Petitioner's cell phone - but not him - within miles of the site of the shooting.

By contrast, the evidence extracted from the phone that was presented at the Petitioner's trial was compelling. This evidence included cell phone text and picture evidence, as well as the fruits from that search, to include a video recording at a Texaco gas station, and information about a certain Brittany Bremby as the owner of a red car that the video was claimed to depict as picking up the Petitioner at the Texaco location, at a time that he was supposed to be housed at Crosspoint. This evidence was heavily relied upon and argued by the state to convict the Petitioner.

C. Fourth Court of Appeals' Opinion

On appeal, the Petitioner argued that probable cause was lacking to issue the cell phone warrant because the affidavit was lacking in facts that connected the Petitioner's cell phone with the murder. Specifically, the Petitioner argued that the affidavit in support of the cell phone warrant lacked probable cause because its supporting affidavit failed to establish a nexus between the data contained in the Petitioner's cell phone, and the murder, all in violation of the Fourth Amendment, as recently promulgated by the United States Supreme Court's landmark opinion in *Riley v. California* (*supra*), the Fourteenth Amendment to the United States

Constitution, and Articles 38.23 and Chapter 14 of the Texas Code of Criminal Procedure. The Fourth Court of Appeals discussed the contents of the affidavit in support of the cell phone search warrant:

> *During the course of the investigation, Detective Michael Muniz obtained a warrant to search the contents of Whitley's cell phone. The affidavit in support of the search warrant stated the following:*
>
> *Your Affiant is assigned to the Homicide Unit of the San Antonio Police Department and was assigned to investigate the murder designated by case number SAPD15111127. On 05/26/2015 officers of the San Antonio Police Department responded to 311 Ferris in the City of San Antonio for a shooting. Upon arrival they discovered Michael Whitley seated in a lawn chair, deceased from an apparent gunshot wound. Witnesses were located and transported to Police Headquarters to provide statements in this case. A witness identified Arthur Whitley arriving at 311 Ferris and then pulled out a handgun from his waistband and shot Michael Whitley multiple times before fleeing the scene along with another individual. An arrest warrant was obtained charging Michael [sic] Whitley with the offense of murder. Later the same day, the 26th of May, Michael [sic] Whitley was arrested. Michael [sic] Whitley was found to be in possession of the phone named in this warrant and reported it was his phone.*
>
> *It is the belief of your Affiant, through his experience, cell phones contain evidence of geographical information of where an individual was, the individuals the person was in contact with on a specific date and time to include witnesses, accomplices, a list of contacts, photographs and videos identifying these contacts.*

Opinion, at *2-3. Rejecting the Petitioner's suppression challenge, the following constitutes the Fourth Court's entire reasoning:

> *Whitley next contends the affidavit failed to establish a nexus between the cell phone data and the murder. As previously noted, however, a "magistrate may use logic and common sense to make inferences" from the facts stated in the affidavit. Elrod, 538 S.W.3d at 556. In this case, the affidavit stated Whitley was present at the murder scene, and the magistrate could have inferred the cell phone data could confirm Whitley's geographic location. In addition, the affidavit stated Whitley fled the scene with another individual, and the magistrate could have inferred the cell phone data could identify this other individual who could be either a witness or an accomplice. Accordingly, based on the four corners of the affidavit and the inferences the magistrate could draw based on the facts provided, the magistrate could have determined the affidavit established a nexus between the cell phone data and potential evidence regarding the murder.*
>
> *Because the affidavit provided the magistrate with a substantial basis for concluding that probable cause existed, Whitley's first issue is overruled, and we need not address Whitley's challenge to an alternate basis for the trial court's ruling.*

The Fourth Court affirmed the conviction in an unpublished opinion. *See Whitley v. State*, No. 04-17-00438-CR (Tex. App. - San Antonio – June 6, 2018) (unpublished) (Opinion).

Unlike the other evidence at his trial, the unsuppressed evidence that was extracted from the Petitioner's cell phone and presented at trial clearly contributed to his conviction. Weighed under Tex. R. Evid. 44.2(a)'s constitutional error-based, appellate standard on appeal, had the Fourth Court sustained the Petitioner's suppression challenge on appeal, it would have been compelled to reverse the

Petitioner's conviction because it could not have determined, beyond a reasonable doubt, that the error did not contribute to his conviction. *See* Tex. R. App. P. 44.2(a). [2]

The Fourth Court denied panel and *en banc* rehearing on July 30, 2018, but not without Justice Rebecca Martinez's "[d]issent to the denial of the Motion for Rehearing *En Banc* without [first] requesting a response [from the State]." (citing TEX. R. APP. P. 49.2). A petition for discretionary review of the Fourth Court's ruling was denied by the Texas Court of Criminal Appeals on February 27, 2019. Mr. Whitley's petition for a writ of certiorari was timely filed on May 28, 2019. A corrected petition is due to be filed no later than July 29, 2019.

[2] It bears noting that, unlike the case with federal search warrants, Texas law, under Tex. Crim. Pro. art. 38.23(b), does not provide a good faith exception for a warrant that is lacking in

REASON FOR GRANTING THE WRIT

> In light of this Court's landmark opinion in *Riley v. California,* 573 U.S. __ (2014), which requires that law enforcement obtain a search warrant before information in a cellular phone is searched, the Court should grant Certiorari and clarify and reaffirm that before a magistrate issues a search warrant for information contained in a cellular phone, the Affiant must present facts that establish a nexus between the information sought to be retrieved from the cellular phone and the alleged criminal behavior, as held in *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 307 (1967).

A. Legal Arguments

Petitioner will discuss the holdings from Texas and federal courts that have both found and rejected a nexus, focusing on the facts that allege the minimum nexus connection between the crime investigated, and a cell phone's data. These opinions further explain how anecdotal evidence, including general opinions by affiants about how cell phones can contain evidence of crime, are insufficient to establish the nexus requirement under *Riley*.

"Importantly, there must be a nexus between the items sought to be seized and the alleged criminal behavior." *Kennedy v. State*, 338 S.W.3d 84, 93 (Tex. App. - Austin 2011) (citing *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 307 (1967)). That nexus is automatically established when the items sought are contraband or the fruits obtained from or the instruments used in the criminal

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probable cause.

activity at issue, but the nexus is not automatic when the items sought are "mere evidence." *Id*.; *see also Joseph v. State*, 807 S.W.2d 303, 307 (Tex. Crim. App. 1991) (describing "mere evidence" as evidence that is "connected with a crime" but is not "fruits, instrumentalities, or contraband"). For mere evidence, "probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction." *Id*. citing (*Hayden*, 387 U.S. at 307). *See also United States v. Freeman*, 685 F.2d 942, 949 (5th Cir. 1982) ("Facts in the affidavit must establish a nexus between the house to be searched and the evidence sought."); *United States v. Broussard*, 80 F.3d 1025, 1034-35 (5th Cir. 1996) (A warrant to search a particular place only issues upon probable cause if the attached affidavit "establish[es] a nexus between the [place] to be searched and the evidence sought. That nexus may be established, however, by direct observation or through normal inferences as to where the articles sought would be located.") (citing *Freeman*, at 1034); *United States v. Solorio-Hernandez*, Cause No. 5:15-CR-156-3 at *5 (S.D. Tex. June 5, 2015) (granting motion to suppress after determining that the affidavit was "bare bones" as to the nexus element, explaining that "the fact that there is probable cause to believe that a person has committed a crime does not automatically give [government agents] probable cause to search his house for evidence of that crime.") (citing *Freeman* at 949);

Johnson v. State, 722 S.W.2d 417 (Tex. Crim. App. 1986) (overruled on other grounds). On this authority, the fact that there was probable cause to believe that the Petitioner committed murder, did not give a magistrate the authority to issue a search warrant for the Petitioner's cell phone, to search for evidence of that crime.

Riley's landmark holding is rendered meaningless if law enforcement is allowed to sidestep the nexus element, simply by submitting a sworn affidavit that is devoid of facts that link the cell phone to the targeted criminal activity. The affidavit in the Petitioner's case failed to establish any facts that linked the cell phone and the murder. Specifically, the only factual allegation about the phone in the affidavit is that the Petitioner "was found to be in possession of the phone," and that when asked, he "reported that it was his phone," at the time of his arrest - which was 8 hours after the murder (the affidavit did not explain this time gap). But there was no evidence and no allegation in the affidavit that the Appellant possessed the phone from the time of the shooting to the moment that he gave his statement. In fact, it would have been impossible for the affiant to have alleged this at the time he applied for the warrant since, as he admitted in his testimony at the Petitioner's trial, the affiant had no information that the Petitioner was using a cell phone during the commission of the murder. *See* 3RR303. Recent *post-Riley*

opinions require some evidence linking a cell phone to a crime, beyond its simple possession or ownership by a suspect, at the time of the suspect's arrest.

1. Facts are Needed to Establish Nexus

For example, in *Martinez v. State*, No. 13-15-00441-CR, 2017 Tex. App. LEXIS 879 (Tex. App. – Corpus Christi-Edinburg 2017) (unpublished), apart from the fact that Martinez was in possession of the target cell phone when arrested, the Court explained that the affidavit cited 1. two named eye-witnesses, Eduardo Sanchez and Flor Garcia, both of whom positively identified Martinez as an active participant in the robbery, and 2. "Flor Garcia knew Martinez's phone number, implying that a point of communication had been previously established between the two." *Martinez*, at *7. The Court reasoned that thus, "it [wa]s "fairly probable…that Martinez and his cohorts communicated via cell phone in preparation for and in furtherance of the Matas' robbery. *Id*. at *7-8 (citing *Gates*, 462 U.S. at 246 (observing that probable cause requires only a fair probability of criminal activity, not a certain showing of such activity).

As additional authority for its holding, *Martinez* referenced *Walker v. State*, 494 S.W.3d 905, 909 (Tex. App. - Houston [14th Dist.] 2016, *pet. ref'd*), as "concluding that a fair probability of criminal activity existed to search appellant's cell phone based on the search-warrant affidavit's allegation that appellant and the

murder victim had been communicating *via* appellant's cell phone, planning robberies around the time that the victim was killed.". *Id*. at *8. In a more recent opinion that upheld a nexus finding the Amarillo Court of Appeals explained:

> Here, the warrant sought to search Appellant's cell phone, a particular thing. Detective Chalifoux's affidavit attached to the warrant alleged that Appellant, a particular person, had committed certain specified offenses. That is, Appellant forced K.V., a person under the age of seventeen, to perform numerous sex acts and attempted to force her to perform a sex act while threatening her with a firearm. *See Sims* [*v. State*]*,* 526 S.W.3d [638] at 545 [(Tex. App. – Texarkana 2017)]. **In his affidavit, Detective Chalifoux established a nexus between the item to be searched (the cell phone) and the offenses being investigated by stating that Appellant had contacted K.V. on his cell phone and invited her to go to a club. Prior to the call, Appellant had been contacting K.V. on Facebook (potentially via the use of his cell phone). In addition, K.V.'s grandmother indicated that her granddaughter had been contacted through Facebook messenger by Appellant's girlfriend who indicated that Appellant would pay if K.V. agreed to "leave this alone." Interpreting the affidavit within its four corners in a commonsense fashion, a magistrate could have reasonably inferred from these statements that evidence concerning the commission of the offenses being investigated would be found on Appellant's cell phone.** *See Bonds* [*v. State*], 403 S.W.3d at 873 [(Tex. Crim. App. 2013)] (affidavit established sufficient nexus between criminal activity, the things to be seized, and the place to be searched).

See Roberts v. State, Nos. 07-16-00165-CR, 07-16-00166-CR, 2018 Tex. App. LEXIS 1804, at *16-17 (Tex. App. – Amarillo (March 9, 2018)) (unpublished) (emphasis added). Absent facts to connect the murder to the cell phone, bald,

conclusory and boilerplate allegations by the affiant could not provide the necessary nexus to establish probable cause to issue the cell phone warrant.

2. Affiant's Bald and Conclusory Allegations Cannot Support Probable Cause

"An affidavit will not justify the issuance of a search warrant if it simply contains conclusory statements that provide no basis for determining if probable cause actually exists" *Kennedy*, 338 S.W.3d at 92 (citing *Rodriguez v. State*, 232 S.W.3d 55 at 61 (Tex. Crim. App. 2007); *Ashcraft v. State*, 934 S.W.2d 727, 733 (Tex. App. - Corpus Christi 1996, *pet. ref'd*)). And, "an affidavit will only be effective if it contains allegations that amount to something greater than the affiant's suspicion or the "repetition of another person's mere suspicion." *Id*. (citing *Adair v. State*, 482 S.W.2d 247, 249 (Tex. Crim. App. 1972)).

In the Appellant's case, it was the affiant's "belief, through his experience, that cell phones contain evidence of geographical information of where an individual was, the individuals the person was in contact with on a specific date and time to include witnesses, accomplices, a list of contacts, photographs and videos identifying these contacts." *See* affidavit, *supra*. But these bald allegations are insufficient to carry probable cause. After considering the affiant's "attempts to establish a nexus between the robbery and Martinez's cell phone by generally

noting that, because cell phones are 'prevalent' in 'today's age,' evidence connecting Martinez to the robbery might be found in his phone," the panel in *Martinez* concluded that "such boilerplate language in an affidavit, standing alone, does not supply probable cause sufficient to search a criminal suspect's cell phone." *See Martinez* at *8-9. In support of this holding, the Corpus Christi-Edinburg appellate court cited a United States District Court opinion in *United States v. Ramirez*, 180 F. Supp. 3d 491, 494 (W.D. Ky. 2016), where the district judge observed that an affidavit's boilerplate language claiming that "[criminal suspects] may keep text messages or other electronic information stored in their cell phones which may relate them to the crime and/or co-defendants/victim" does not demonstrate particularized facts supporting probable cause. *Ramirez* merits further discussion.

In *Ramirez*, the United States argued that the affidavit established a sufficient nexus because Ramirez possessed the phone at the time of his arrest, and "cell phones and firearms are generally considered the 'tools of the trade' of drug traffickers." *Ramirez*, 180 F.Supp. at 495 [] (quoting *United States v. Gorny*, 2014 U.S. Dist. LEXIS 84807, 2014 WL 2860637 (W.D. Pa. 2014)). Rejecting the government's argument, the district court explained:

> The United States argues that the affidavit established a sufficient nexus because Ramirez possessed the phone at the time of his arrest, and "cell phones and firearms are generally considered the 'tools of the trade' of drug traffickers." Obj. 5 (quoting *United States v. Gorny*, 2014 U.S. Dist. LEXIS 84807, 2014 WL 2860637 (W.D. Pa. 2014)).
>
> Even if cell phones are the "tools of the trade" of drug traffickers, the *Gorny* opinion undermines the government's argument regarding the sufficiency of this affidavit. In the very next sentence after "cell phones and firearms are generally considered 'tools of the trade' of drug traffickers," the *Gorny* opinion says: "the basis for the detectives' probable cause to search the cell phones seized from Gorny [arose] from the fact that they knew Gorny himself used cell phones as a tool of his own drug trafficking rather than the suggested empty assertions about drug traffickers generally." 2014 U.S. Dist. LEXIS 84807, [WL] at *6. Further, the two affidavits at issue in *Gorny* provided details of an investigation by undercover officers who received the suspect's phone number during a controlled buy. 2014 U.S. Dist. LEXIS 84807, [WL] at *2.
>
> Here, unlike in *Gorny*, there is nothing in the affidavit asserting that Petter knew Ramirez used the phone as a tool of drug trafficking. Unlike the affidavit in *Gorny* which provided details of the investigation, "[t]he affidavit also omits any information regarding the wiretap warrants, evidence obtained in the search of his residence, or the ongoing investigation by the DEA into Ramirez's alleged involvement in a drug trafficking organization." R. & R. 6.

Ramirez, at *495-96. *Ramirez* was recently cited by the Sixth Circuit Court of Appeals in *United States v. Merriweather*, 728 F. App'x 498 (6th Cir. 2018) (unpublished), where the circuit court explained:

> The non-binding district court case Merriweather cites in his brief is also easily distinguished. *See United States v. Ramirez*, 180 F. Supp. 3d 491 (W.D. Ky. April 12, 2016). In *Ramirez*, the district court held

> both that the affidavit supporting the search warrant for Ramirez's phone was insufficient to show probable cause and that the good-faith exception did not apply. *Id.* at 495-96. That was for very good reasons—but reasons that are absent in this case. The affidavit in *Ramirez* relied only on (1) the fact that Ramirez had a cell phone on him during his arrest for a drug-related conspiracy and (2) the affiant's claim that his training and experience suggest such conspiracies are often facilitated by cell phones. *Id.* at 495. While the affidavit established that Ramirez likely *owned* the phone, the district court held that it was nevertheless "insufficient by itself to establish a nexus between the cell phone and any alleged drug activity," *id.*, and that "[a]n objectively reasonable law enforcement officer would have recognized" the deficiency, *id.* at 496. But the *Ramirez* affidavit did not, as the instant one did, allege that cell phones were used to facilitate two drugs buys from Merriweather or that the particular cell phone at issue was found in a vehicle containing apparent oxymorphone, the very drugs involved in the conspiracy. Those facts take this case outside of *Ramirez*'s ambit—and confirm that an officer could reasonably rely on the affidavit in searching Merriweather's cell phone.

Merriweather, at 506.

Appellate opinions from state courts, such as the Supreme Judicial District of Massachusetts also disagree with the Fourth Court's reasoning. *See Commonwealth v. White*, 475 Mass. 583, 591-92 (2016) (In essence, the Commonwealth is suggesting that there exists a nexus between a suspect's criminal acts and his or her cellular telephone whenever there is probable cause that the suspect was involved in an offense, accompanied by an officer's averment that, given the type of crime under investigation, the device likely would contain

evidence. If this were sufficient, however, it would be a rare case where probable cause to charge someone with a crime would not open the person's cellular telephone to seizure and subsequent search.") (citing *Riley*, 134 S. Ct. at 2492) (only "inexperienced or unimaginative law enforcement officer … could not come up with several reasons to suppose evidence of just about any crime could be found on a cell phone"); *Commonwealth v. Morin*, 478 Mass. 415, 85 N.E.3d 949 (2017) (same holding). For her part, in *Moats v. State*, 455 Md. 682, 706 (2017), joined in a concurrence by Justice Clayton Greene, Jr., Judge Sally Adkins agreed that the federal good faith exception (applicable to Maryland state criminal cases) saved a warrant with a supporting affidavit constructed like the one at bar, but found the warrant lacked probable cause (which would have required suppression under Tex. Crim. Pro. Art. 38.23, *supra*), explaining "I would not find probable cause where a warrant affidavit cites only an officer's training and experience, yet fails to show any nexus between the suspect's phone and criminal activity" (citing her concurrence in *Stevenson v. State*, 455 Md. 709 (2017) (*Riley* does not address what constitutes probable cause sufficient to obtain a warrant to search a cell phone. I cannot, however, conclude that it is appropriate for this Court to apply *Riley* to permit warrants based primarily on an officer's training and expertise without the necessary facts to support a reasonable inference that the suspect has

used his phone in the commission of a crime or that the phone contains evidence of the crime.) (also joined by Justice Clayton Greene, Jr.)).

Lastly, Petitioner brings to this Court's attention a recently filed petition for a writ of certiorari, which raises the same nexus argument, but in the context of a search warrant for a home, on the simple basis that the owner of the home was a suspected drug dealer. The case is *Juan Zamudio v. United States*, Cause No. 18-1529 (Filed March 21, 2019, response filed by the government on July 8, 2019). [3] The question for this Court in *Zamudio* is:

> Whether a search warrant application that fails to provide any particularized nexus between an individual's alleged drug trafficking activity and the individual's residence can provide probable cause for a warrant to search the residence.

In his petition, *Zamudio* highlights that

> "[s]everal federal courts of appeals, including the Seventh Circuit in the decision below, hold that the mere fact a defendant has engaged in drug trafficking can establish probable cause for a search warrant to search the defendant's home, even if there is no specific evidence linking the drug trafficking to the defendant's home.
>
> Two federal courts of appeals and at least five state courts of last resort, in contrast, require that the search warrant application provide a particularized nexus between the drug trafficking activity and the home to be searched.

[3] Zamudio's petition has been distributed for conference of 10-1-2019.

Petitioner submits *Freeman, supra* as the Fifth Circuit's own holding requiring more than a suspicion of drug trafficking to establish a nexus for probable cause to search that person's home, when considering the circuit splits on this authority that are discussed in *Zamudio*. Petitioner submits that the Court should consider his case jointly with Zamudio's, and grant both certiorari to resolve the failure by the respective appellate courts to require a nexus, as mandated by this Court's well-established precedent, when dealing with search warrants that are issued for residences, and for cellular phones. As noted, similar to the basis for issuing Zamudio's warrant, all the affiant in Petitioner's case was aware of and alleged in the four corners of the affidavit for the cell phone is that the Petitioner was accused of murder, and that because he had in his possession a cell phone at the time that he was questioned by police, which was about 8 hours after the murder (though this time gap was not included in the affidavit), the warrant could be issued on the general allegation that cell phones often contain evidence of crimes. As the Petitioner has noted, Justice Rebecca Martinez of the Fourth Court of Appeals dissented from the Court's refusal to hear the case *en banc*, without first requiring a response from the state on this particular question. The Fourth Court of Appeals' opinion not only nullifies *Riley's* warrant requirement when searching cell phones in Texas, it does so without adequate explanation.

CONCLUSION

For the foregoing reasons, the Petitioner, Arthur Whitley, respectfully prays that this Court grant certiorari, and that it reverse the judgment of the Texas Fourth Court of Appeals.

Respectfully submitted,

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BRIEF DATE: July 24, 2019.