

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL GOYNES, Petitioner,

vs.

STATE OF NEBRASKA, Respondent.

On Petition for Writ of Certiorari to
The Nebraska Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether the Fourth Amendment prohibits the search of the content of a suspect's cell phone when the affidavit in support of the search provides no nexus between the crime under investigation and the use of the cell phone.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Michael Goynes respectfully petitions for a writ of certiorari to the Nebraska Supreme Court in *State v. Goynes* No. S-18-135.

OPINION BELOW

The opinion of the Nebraska Supreme Court is reported at 303 Neb. 129, 927 N.W.2d 346 (2019) (No. S-18-135) and is attached at (App. A).

STATEMENT OF JURISDICTION

The Nebraska Supreme Court issued its opinion on May 17, 2019 (App. A). This Court's jurisdiction is invoked under 28 U.S.C. Section 1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

I.

The Fourth Amendment states that "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."

II.

The Fourteenth Amendment states in pertinent part that "... nor shall any state deprive any person of life, liberty, or property. Without due process of law..."

STATEMENT OF THE CASE

The Petitioner, Michael Goynes was convicted by a jury of Murder in the First Degree, Use of a Deadly Weapon (firearm) to Commit a Felony, and Possession of a Deadly Weapon by a Prohibited Person. He was sentenced to life in prison on the murder charge, 45 to 50 years in

prison on the charge of Use of a Deadly Weapon to Commit a Felony, and 20 to 25 years in prison on the charge of Possession of a Deadly Weapon by a Prohibited Person.

At 4:25 p.m. on April 25, 2016, Omaha police were called to an Omaha apartment complex for a report of gunshots fired. Upon arrival, they found Barbara Williams laying dead on the ground in front of an exterior stoop attached to the apartment building. She had been shot in the chest. The investigation led to Goynes as a suspect in the shooting and he turned himself in to police on April 30, 2016. When Goynes was taken into custody, he was in possession of an LG Tribute 5 cell phone. Police seized the cell phone and obtained a search warrant authorizing the examination and extraction of electronically stored information contained in the cell phone.

The affidavit in support of the search warrant indicated that two witnesses observed the shooting. These two witnesses were acquainted with Goynes and identified him as the shooter. Both witnesses observed Goynes exit a white vehicle before approaching the stoop where Williams and two males were seated, and commence firing. Both witnesses observed other occupants of the white vehicle but none of them ever exited the vehicle.

Goynes filed a motion to suppress the information obtained from the cell phone based on the warrantless seizure of the cell phone and the absence of probable cause to believe items of evidence would be found in the contents of the phone. Additionally, Goynes asserted that the search warrant violated the particularity requirement of the Fourth Amendment.

At the hearing on the motion to suppress, the State placed the search warrant and the affidavit in support into evidence. These documents are included herein and identified as "Appendix B". In addition to the information stated above, the affidavit recited a litany of generic assertions as to why police believe that information about a crime will be found in the

contents of a cell phone. The affidavit provided no evidence from any source that the shooter had communicated about the shooting over his cell phone, that the shooter used his cell phone to take photographs or video of the shooting, or that the shooter communicated about the shooting on social media. The affiant, Detective Larry Cahill of the Omaha police homicide unit, testified at the motion hearing. He acknowledged that the eyewitnesses did not provide any information or evidence that they observed the shooter using or possessing a cell phone when they saw him during the commission of the shooting.

The trial court denied the motion to suppress and the prosecution was allowed to present the information obtained from the phone pursuant to the search warrant at Goynes' trial. This evidence included information that the phone was in frequent use before and after the shooting but there was an absence of phone activity between 4:19 p.m. and 5:08 p.m. on April 25th. The evidence also included browsing activity after the shooting to include accessing websites of local news channels coverage of the homicide.

After his conviction, Goynes appealed and the Nebraska Supreme Court affirmed the trial court's findings that there was sufficient probable cause to search the contents of the cell phone and that the search warrant did not violate the particularity requirement of the Fourth Amendment.

REASONS FOR GRANTING THE WRIT

The opinion of the Nebraska Supreme Court allows for the warrantless seizure and subsequent search of the contents of a suspect's cell phone after having obtained a search warrant, even though the police had no information that the cell phone had been used to plan, commit or cover up the crime or that it contained any evidence of the crime. The Nebraska Supreme Court's written opinion in this case does not even attempt to establish a nexus between the cell phone

and the crime under investigation. On the other hand, many courts require evidence of a nexus between the cell phone and the crime under investigation before approving a search warrant for the contents of a cell phone. These courts further require more than a police officer's opinion that a generic suspect's cell phone frequently contains evidence of a crime. To follow the Nebraska Court's opinion to its logical conclusion, if a person is accused of a crime, his cell phone is fair game for police seizure and subsequent search of the device. The fact that there is probable cause to arrest a person for a crime cannot *per se* provide probable cause to search his or her cell phone and other electronic devices. The nexus requirement involves both the issue of probable cause and the particularity requirement of the Fourth Amendment made applicable to the states through the due process clause of the Fourteenth Amendment.

This Court should provide guidance and state unequivocally that without some nexus between a suspect's cell phone and the crime under investigation, there could be no finding of probable cause to search the cell phone. In addition, this Court should state unequivocally that the particularity requirement contained in the Fourth Amendment has heightened relevance when it comes to searching cell phones. Far too many search warrants for cell phones are overly broad and allow police to search for virtually everything contained in the phone. With the ever increasing number of cell phones in the hands of virtually every person over the age of ten, this issue will repeatedly be litigated, with inconsistent results, until this court decides whether or not probable cause for an arrest, without evidence of a nexus between the crime and the suspect's cell phone, provides law enforcement probable cause to seize and search the contents of cell phones.

Many courts, including the Nebraska Supreme court in this case, have dispensed with the nexus requirement when it comes to approving search warrants for cell phones. The Petitioner

urges the Court to require that courts honor the nexus requirement and that, at a minimum, law enforcement provide evidence that a cell phone was used to plan, commit, or cover up a crime or that it contains evidence of a crime before a finding of probable cause can be made.

In *Riley v. California* 573 U.S. 373, 134 S. Ct. 2473, 189 L.Ed. 430 (2014) this Court determined that in most cases, a search of a suspect's cell phone requires a search warrant supported by probable cause. This Court observed that "The fact that an arrestee has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely. Not every search "is acceptable solely because a person is in custody." *Riley v. California*, 573 U.S. 373, 392, 134 S. Ct. 2473, 2488, 189 L. Ed. 2d 430 (2014).

In *Riley* *supra*, Chief Justice Roberts made it clear that the contents of a person's cell phone contain a treasure trove of information about an individual. The opinion outlines the menagerie of types of information contained in the cell phone, including a list of a persons associates, location at a given time and place, the persons interests as disclosed by web browsing history, thousands of photos or videos, and conversations in the form of text messages, just to name a few. Given the galaxy of information retained in a person's cell phone, Chief Justice Roberts reminded courts to be vigilant in preventing overly broad searches and honoring the particularity requirement stating:

"Our cases have recognized that the Fourth Amendment was the founding generation's 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. Opposition to such searches was in fact one of the driving forces behind the Revolution itself.... Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans "the privacies of life," *Boyd*,

supra, at 630, 6 S.Ct. 524. The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. *Riley supra*, 573 U.S. 373, 403, 134 S. Ct. 2473, 2494–95, 189 L. Ed. 2d 430 (2014).

In *Zurcher v. Stanford Daily*, 436 U.S. 547, 556, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978) this court stated that “[t]he critical element in a reasonable search is not that the owner of property is suspected of crime but that there is reasonable cause to believe that the specific ‘things’ to be searched for and seized are located on the property to which entry is sought.” The same concept should be applied to the search of the contents of cell phones.

A review of several illustrative cases reveals the inconsistency with which the nexus requirement is applied, and in some cases is totally ignored. A common thread used to justify the search includes a recitation by the officer affiant that based on officer’s experience, individuals involved in criminal conduct frequently use cell phones, and evidence of the crime is likely to be found on the cell phone. Frequently, as in this case, courts have found that, the officer’s experience, coupled with an allegation of multiple perpetrators, satisfies the probable cause and particularity requirements. Other courts have found to the contrary.

In *Commonwealth v. White* 59 N.E. 3d 369 (Mass. 2016), the prosecutors appealed the trial court’s suppression of evidence obtained from a search of the content of the defendant’s cell phone. The Massachusetts Supreme Judicial Court affirmed the trial court’s ruling and determined that there was insufficient probable cause to search the cell phone. The detectives admitted that they had no information that the cell phone was used in the commission of the crime under investigation nor did they claim that a specific item of evidence was likely to be found on the cell phone. The police relied on their experience that because there were multiple

persons involved in the crime, the defendant's cell phone was likely to contain evidence of the crime. The court found that was insufficient to establish probable cause. The court stated that the absence of a nexus between the crime and the cell phone was fatal to the search.

In rejecting the prosecutor's arguments the court stated:

"The Commonwealth argues, however, that the detectives possessed the functional equivalent of such [particularized] information in the form of the commonsense notion that "cellular telephones are ... necessary to social interactions." On this basis, police inferred that, if the defendant planned and committed multiple crimes with two coventurers, it was likely he did so, at least in part, using his cellular telephone, and that evidence of these communications would be found on the device.

It may well be the case that "many of [those] ... who own a cell phone [in effect] keep on their person a digital record of nearly every aspect of their lives," including, presumably, communications with their coventurers. See *Riley v. California*, 573 U.S. 373, 134 S.Ct. 2473, 2490, 189 L.Ed.2d 430 (2014). Nonetheless, the Commonwealth's argument is unavailing. While probable cause may be based in part on police expertise or on "the practical considerations of everyday life," such considerations do "not, alone, furnish the requisite nexus between the criminal activity and the places to be searched" or seized." *White*, supra. 475 Mass. 583, 591, 59 N.E.3d 369, 376-77 (2016). (Internal citations omitted).

Finally, the court stated:

"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. See *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"). We cannot accept such a result, which is inconsistent with our admonition that "individuals have significant privacy interests at stake in their [cellular telephones] and that the probable cause requirement ... under... the Fourth Amendment ... [must] serve[] to protect these interests." *White*, supra. 475 Mass. 583, 591–92, 59 N.E.3d 369, 377 (2016)

In *United States v. Oglesby* 2019 WL 1877228 (U.S. District Court S.D. Texas decided April 26, 2019), the court suppressed the evidence derived from as search of the content of the defendant's cell phone because there was insufficient probable cause in the supporting affidavit and because the warrant was overbroad and failed the particularity requirement. This case is a good example of the oftentimes close connection between the issue of probable cause and the issue of particularity.

The court emphasized the need for a nexus between the crime for which the evidence is sought and the place to be searched. The court stated that "... the protections given to a cell phone must be at least equal to if not greater than, the protections set out for houses. In *Riley v. California* the Supreme Court noted that the privacy interest in a cell phone may often be greater than that in a home." *Oglesby* supra (slip opinion p. 5). In summarizing the affidavit in *Oglesby*, the court opined that the affidavit, in essence, stated that criminals often leave evidence of their crimes on cell phones, which is not a generalization of the particular crime, but of criminals in general. The court concluded "If these statements are held sufficient, every accusation of criminal activity would automatically authorize a search of a suspect's cell phone, transforming

every arrest warrant into a search warrant and directly contravening the Supreme Court's decision in *Riley*." *Oglesby* supra (slip opinion p. 6).

In *United States v. Ramirez* 180 F. Supp. 3d 491 (U.S. Dist. Ct. W.D. Kentucky 2016), the court suppressed the evidence derived from a search of the contents of the defendant's cell phone stating that the mere fact that the affiant officer claims that through her experience individuals may keep text messages or other information stored in their cell phones which may relate them to the crime and/or co-defendants/victim, coupled with the fact that the defendant was in possession of a cell phone at the time of his arrest, does not establish a sufficient nexus to establish probable cause.

See also *State v. Buckham*, 185 A. 3d 1 (Del. 2018) wherein the court suppressed the search of the content of the defendant's cell phone based on overbreadth of the warrant stating that "... warrants issued to search electronic devices call for particular sensitivity given the enormous potential for privacy violations that unconstrained use of cell phones pose. Modern smartphones store an unprecedented volume of private information, and a top to bottom search of one can permit the government access to far more than the most exhaustive search of a house." *Buckham* supra, 185 A. 3d 1, 18.

In *United States v. Winn* 79 F.Supp. 3d 904 (U.S. Dist. Ct. S.D. Ill. 2015), the court suppressed evidence from the search of the contents of the defendant's cell phone. The court stated that while boilerplate forms or templates used in affidavits may be useful as a starting point, the affidavit must be tailored to the particular facts of the case. The court observed that the template used in the affidavit to authorize the seizure of virtually every piece of data that could conceivably be found on the phone. The court observed that police would not have probable cause to search through and seize such an expansive array of data every time they search a cell

phone. The affidavit in the present case does not include the term "any and all files" that may constitute useful evidence. However, by merely omitting the term "any and all" and substituting a list of literally every function associated with a cell phone, does not overcome the infirmity of being a general warrant that fails the particularity requirement.

Moreover, the affidavit states "Affiant officer seeks to complete a comprehensive and unbiased examination of the data on the device for information which could aid in the investigation; *seeking only prescribed information would jeopardize the completeness of the search as it is typically unknown how the cell phone was used or the technical ability and intent of the user before the device has been examined.*" (Emphasis added).

The search warrant before this Court in this Petition, (Appendix B), granted the broad request authorizing the police to "copy, forensically image, view, photograph, record and conduct forensic analysis of the data obtained from the aforementioned cell phone as well as any data storage devices therein". It further authorizes police to "... examine every file and scan its contents briefly to determine whether it falls within the scope of the warrant." The Nebraska Supreme court decided that this search warrant was not overly broad because it did not use the term "any and all":

The application of the Fourth Amendment should not be left to inane parsing of words or semantics games. The affidavit in support of the search warrant in this case establish absolutely no nexus between the crime under investigation and the cell phone that was searched. Moreover, the affidavit clearly requests, and the warrant permits police to search everything contained in the contents of the cell phone.

It is the position of the Plaintiff that the search warrant is unconstitutional and violates the Plaintiff's rights under the 4th Amendment to the United States Constitution. The Plaintiff further states that the search warrant is unconstitutional and violates the Plaintiff's rights under Article 1, Section 11 of the Nebraska Constitution.

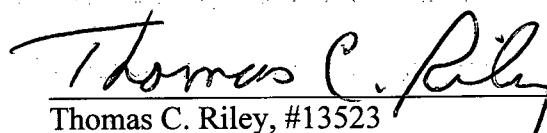
Plaintiff further states that Plaintiff's **10** statement that he had no other information relevant to the search warrant is true. Plaintiff further states that Plaintiff has no other information relevant to the search warrant.

CONCLUSION

The Petitioner respectfully requests that this court grant his Petition for Writ of Certiorari and answer the question presented and rule that

1. Probable cause to arrest a suspect for a crime does not, standing alone also provide probable cause to search the content of a suspect's cell phone;
2. An affidavit in support of a search warrant for the contents of a suspect's phone must provide specific facts establishing a nexus between the crime under investigation and the cell phone;
3. Templates or boilerplate language contained in the affidavit opining that criminals use cell phones in furtherance of their criminal activity must be accompanied by specific facts relative to the crime under investigation and that such general assertions, standing alone do not provide probable cause;
4. The particularity requirement is not satisfied when the search warrant allows police to search everything contained in the contents of the cell phone unless a nexus can be established that links the crime under investigation and the components of the cell phone to be searched.

RESPECTFULLY SUBMITTED:



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