No. 20-995

# In the Supreme Court of the United States

ANTHONY VETRI,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## PETITION FOR A WRIT OF CERTIORARI

ANTHONY VETRI
*PETITIONER PRO SE*
REG# 69695-066
USP COLEMAN 1
P.O. BOX 1033
COLEMAN, FL 33521

JANUARY 20, 2021

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## QUESTIONS PRESENTED

1. Whether the Fourth Amendment requires more stringent privacy considerations in authorizing a warrant for the seizure of a cellphone and the manner its data is search.

2. Whether the District court and court of appeals for the third circuit erred in determining the government met its burden to support a conviction under the advance knowledge requirement for aiding and abetting a murder under 924(j)(1) and 2, announced in *Rosemond v. United States*, 572 U.S. 65, 134 S.Ct. 1240, 188 L.Ed.2d 248 (2014) or The *Pinkerton v. United States*, under 28 U.S. 640 (1947) reasonably foreseeable requirement.

## LIST OF PROCEEDINGS

United States Court of Appeals for the Third Circuit

No. 18-2372

*United States of America v. Anthony Vetri, Appellant*

Date of Final Opinion: April 23, 2020

Date of Rehearing Denial: June 11, 2020

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United States District Court for the Eastern District of Pennsylvania

Criminal No. 15-157

*United States of America v. Anthony Vetri, Michael Vandergrift, Defendants*

Date of Final Opinion: November 22, 2017

Date of Final Order: November 8, 2017

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## PETITION FOR A WRIT OF CERTIORARI

Anthony Vetri, *Pro Se*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, in case No. 18-2372

## OPINIONS BELOW

The non-precedential opinion of the court of appeals is reported at *United States v. Vetri*, 811 F.App'x 79 (3d Cir. 2020) (App.1a). The memorandum opinion of the district court is reported at *United States v. Vetri*, No. 15-157-2, 2018 WL 8950729 (E.D. Pa. May 30, 2018) (App.40a)

## JURISDICTION

The judgment of the court of appeals was entered on April 23, 2020. A petition for rehearing was denied June 11, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS

**U.S. Const., amend. IV**

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

**U.S. Const., amend. V**

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**U.S. Const., amend. VI**

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

## STATEMENT OF THE CASE

Petitioner Anthony Vetri's criminal convictions was founded on evidence taken in an unconstitutional search of his iPhone. And it followed a trial where the government failed to meet its required burden under the two vicarious criminal liabilities submitted to the jury: aiding and abetting (18 U.S.C. Section 2(a)), and *Pinkerton v. United States*, 328 U.S. 640 (1946). This petition calls upon this Court to hold the government to its obligations under the Fourth, Fifth and Sixth Amendments and vacate Mr. Vetri's conviction.

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of aiding and abetting a murder, in the course of using and carrying a firearm in relation to a drug trafficking offense, in violation of 18 U.S.C. §§ 924(j)(1), 2 and conspiracy to distribute 30 mg oxycodone tablets, in violation of 21 U.S.C. § 846. He was sentenced to a term of life imprisonment and a consecutive term of 240 months.

1. In or about April 2012, agent Charles F. Doerrer of the ATF was assigned to a multi-agency taskforce to assist with the investigation into petitioner. (App.72-73a). On June 3, 2013, he applied for a search warrant submitting an affidavit to a Magistrate Judge for authorization to search petitioner's residence at 403 Marsden Avenue. (App.59a). Outlined within the affidavit, agent Doerrer details a lengthy investigation of various individuals in the Delaware County and Philadelphia areas, who authorities had reason

to believe was engaged in a conspiracy to illegally distribute 30 mg Oxycodone tablets, insurance/wire/bank fraud and filing false tax returns. According to agent Doerrer, in early or mid-2009 to late 2011 or January 2012, petitioner was receiving large sums of Oxycodone tablet from pharmacy owner or operator Mitesh Patel and distributing them through Angelo Perone and eventually Michael Vandergrift. (App.74a, 79a).

Agent Doerrer also believed petitioner filed at least three false insurance claims that resulted in insurance companies sending him reimbursement checks, via U.S. mail, from 2009 until 2012. (App.85-86a). He further explained because the proceeds petitioner allegedly made from the Oxycodone conspiracy and the false insurance claims was not declared on his income tax filings in 2009, 2010 and 2011, and because records indicated petitioner's lawful companies and bank accounts was registered to his home, there was probable cause to believe that evidence of the tax violations and false insurance claims was being stored within petitioner's residence. (App.86a, 100-101a). Accordingly, agent Doerrer concluded "in order to determine his true tax liability and scope of the frauds, and identify all sources and all amounts of any unreported income and proceeds of fraud schemes, agents [would] need to reconstruct [petitioner's] federal income tax returns, as set forth in Attachment B showing income or expenses are relevant to the investigation and evidence of the criminal schemes." (App.103a). The evidence sought to be seized related almost exclusively to documentary evidence of financial

crimes.[1] The Magistrate subsequently authorized the warrant to search for evidence at petitioner's residence "concerning a violation of Title 26, United States Code, Section(s) 7201 and 7206(1); Title 18, United States Code, Sections 1341, 1343, 1344, and 1956." *id.* (App.60a) (*emphasis added*).

On June 4, 2013, the federal task force executed the warrant on petitioner's residence. Among other things not relevant to this petition, agents seized 7 (seven) smartphones, in which they used software to extract and then search all digital data therein. In one of the smartphones, agents found a video Petitioner recorded of his two-year-old daughter, which was approximately 1 minute 43 seconds in length. 1 minute 10 seconds into the video, it could be heard petitioner asking his daughter "what did the gangsters do to Bo?"[2] in which she replied "Boom, Boom, Boom, Boom." (App. 22a). No charges were filed on petitioner for the

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[1] Agent Doerrer explained that based on his training and experience in participating in financial investigations involving unreported income and narcotics traffickers, he specifically knew it was common for individuals to utilize electronic equipment such "as computers, telex machines, facsimile machines, currency counting machines, telephone answering machines and pagers to generate, transfer, count, record and/or store the information described above. (App.96-98a). As explained further through this petition, this list did not include cellphones.

[2] "Bo," the nickname of Mitesh Patel partner Gbolahan Olabode and an alleged member of the Oxycodone conspiracy, was murdered in January of 2012. While the agent Doerrer was a member of the federal task force investigating Bo's murder, he did not submit any facts in the affidavit related to Bo's murder, that authorities were investigating petitioner as a person of interest or that they was looking for evidence petitioner was in anyway involved in his murder.

offenses outlined in agent Doerrer affidavit, however, approximately Four years later, Petitioner was arrested in connection with Bo's murder and conspiracy to distribute Oxycodone.

2. Petitioner was charged with conspiracy to distribute Oxycodone tablets, in violation of 21 U.S.C. § 846 and aiding and abetting a murder, in the course of using and carrying a firearm in relation to a drug trafficking offense, in violation of 18 U.S.C. § 924(j)(1) & 2. (App.47-48a, 51-52a). He moved to suppress the video evidence being admitted at trial, arguing the inclusion of the cellphones in the warrant was not supported by probable cause and the warrant itself was overbroad.[3] The government opposed Petitioner's motion.

Following a hearing, the district court ordered supplemental briefing "on the issue of whether the search of [petitioner's] cell phone was impermissibly broad in light of the scope of the warrant and the evidence to be seized." The court narrowed the question to "the parameters of the search conducted of the cell phone and evidence seized as a result thereof." (App.40a). Petitioner's supplemental brief focused on emphasizing attachment B of the warrant was invalid to the extent of the cellphones. Asserting the development of case law on searches of digital content in cellphones, including *Riley v. California*, 573 U.S. 373 (2014), petitioner argued warrants that include cellphones demanded heightened scrutiny under the Fourth Amendment and could not rely on facts that

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[3] The only mention of cellphones in the warrant was in attachment B(c), which authorized seizures of "Cellular Telephones (including searching the memory thereof)." (App.57a-at 3)

supported probable cause, or satisfied the particularity requirements to other items translated into probable cause or could meet the particularity requirement as to allow the search of cellphone contents. (App.32-33a). The government responded contending, in its view, a cell phone "is not really much more than a filing cabinet for digital information," and thus the agents were permitted to search the cell phone for records as if it were simply a filing cabinet in [petitioner's] home," and further, even though the affidavit failed to include any facts pertaining to cell-phones, there was nine "communications" referenced in the affidavit that "would at least imply that there had been telephone calls or some communications of some sort from [petitioner] to other people" which was enough to establish probable cause to search petitioner's cellphones.[4] (App.32a).

At the conclusion of another hearing, the district court denied the motion. While there was no mentioning of petitioner owning, using or otherwise linking a cellphone to the offenses described in the affidavit, the district court nevertheless reasoned; given "the type of records and documents which agents sought, and the common knowledge about the functions and the abilities of modern day cellphones, [the Magistrate] had substantial basis for including cellphones in the warrant." (App.34a). Petitioner proceeded to trial where the government showed the video to the jury five times, including opening statements, during the presentation of witness testimony and again in its closing arguments. The jury returned a verdict of guilty on both counts.

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[4] In its original briefing, the government did not address this issue, therefore, its view was articulated pursuant to the court's November 8, 2017, supplemental briefing order. *See* App.40-41a.

3. On appeal, among other things, petitioner challenged the district court denial of the video evidence being suppressed and that the government failing to meet its burden he either had advance knowledge his Co-conspirator would use a firearm in the murder, or it could be reasonably foreseeable to him a firearm would be used in the murder. The panel affirmed on both challenges. In its opinion, the panel noted "it [was] perplexing that the body of the affidavit did not mention cellphones." (App.4a). However, it went on to hold "probable caused existed because the totality of the circumstances suggested there was a fair probability that contraband or evidence of a crime would be found in [Petitioner's] cell phones." *id.*

The panel's opinion did not address whether the warrant could be constitutionally valid in authorizing the seizure and search of petitioner's cellphone when no mention of the cellphones was in the affidavit. Rather, the panel determined that the "qualifier" into the question whether there was probable cause was found in the list of electronics agent Doerrer described in the affidavit as often used by drug traffickers was "merely illustrative of the kinds of electronic equipment drug traffickers might use" to hide evidence of their trafficking. *id.* While this list, or nowhere else in the affidavit mentioned cellphones being used or connected to the offenses, the panel nevertheless reasoned "cell phones are plainly among that boarder category of electronic equipment" drug dealers might use to hide evidence. *id.*

The panel also rejected Petitioner's challenge that the district court ruling denying suppression should have been reversed based on evidence in the video

not being in plain view, as the agents virtually watched the whole recording to reach the incriminating evidence. The panel held under Circuit precedent; it was permissible for the agents to play the video "to view its contents as a thorough . . . search requires a broad examination of files on the [cellphone] to ensure that file[s] . . . have not been manipulated to conceal their contents[5]," citing *United States v. Stabile*, 633 F.3d 219, 241 (3d Cir. 2011). *id.* The panel further rejected petitioner's challenge that the evidence was sufficient to establish he had advance knowledge, or reasonable foreseeability, his co-defendant would use a firearm to commit the murder, in furtherance of a drug trafficking offense. The full court subsequently denied petition for *en banc* review. Petitioner Now submits his petition *Pro Se* to this Court for relief.

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[5] While the relevant portion of the video recording where "Bo" was referred to by petitioner and his daughter occurred well over a minute into the recording, The panel decision to hold the plain view doctrine applied was not explained as the evidence was not "immediately apparent" when opening the video.

## REASONS FOR GRANTING THE PETITION

### I. THE FOURTH AMENDMENT REQUIRES HEIGHTENED SCRUTINY OF THE PROBABLE CAUSE AND PARTICULARITY REQUIREMENTS IN ASSESSING WHETHER LAW ENFORCEMENT IS ENTITLED TO SEARCH DIGITAL STORAGE OF CELLPHONES

#### A. Background

This petition presents this Court with the opportunity to consider an important issue; whether modern smartphones requires more stringent privacy protections under the Fourth Amendment then that of physical searches which this Court has tailored the warrant requirements to regulate. Federal courts of appeals and state courts of last resort are openly and intractably divided on the proper application of the probable cause and particularity requirements applied to the digital content stored in cellphones. This issue is manifestly significant. It also has had more than sufficient time to percolate. Given the fact virtually every American uses smartphones and the unique privacy interest digital content implicates, this Court should use this case—which presents the issue in the context of a modern smartphone and a particularly comprehensive fact pattern—to resolve the growing conflict and set clear precedent to account for the continuing evolution of digital storage in smartphones and the heightened privacy interest implicated in *Riley*.

Specifically, this petition involves a warrant that authorized the search of a residence for financial docu-

ments. While the affidavit supported probable cause for the documents and other material in the house related to financial crimes outlined in the affidavit, there was no mention of cellphones or facts attesting that authorities had reason to believe petitioner cellphones held evidence or was used to facilitate a crime; whether, under the Fourth Amendment, such a warrant could authorize the search of the cellphones digital content when the affidavit failed to attest to any facts to support probable cause as to the extent of the phone digital contents and further failed to described with particularity what specific cellphones agents were authorized to seize or specific areas in its content were authorized to be searched.

1. This Court has established digital data obtained from cellphones creates unique privacy interest which falls squarely in the purview of the Fourth Amendment. When presented with questions of whether prior precedent was sufficient to ensure the technological advancements of cellphones were protected by the constitutional mandate, this Court decisions in those inquiries indicated such searches should be afforded different considerations than any physical searches given the significant storage compacity and nature of sensitive information that was categorically stored in cellphones. In each instance, prior precedent was determined to be inapplicable to allow exceptions to the warrant requirement and the Court implied heightened scrutiny of warrants would be required to ensure the reasonableness of the government intrusions into a citizen privacy by searching digital data.

For example, in *Riley v. California*, 573 U.S. 373 (2014), this Court held that the government must seek a warrant to search cell phones that were seized

incident to an arrest. In so doing, the Court described the unique nature of cell phones in the modern era and distinguished them from other objects that are traditionally the subject of a search incident to arrest. The Chief Justice Roberts explained for the unanimous Court in *Riley*; "Cellphones differ in both a quantitative and a qualitative sense from other objects . . . The term 'cell phone' is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers . . . " He further elaborated on the immense storage capacity of a cell phone, and acknowledged several consequences for privacy interests: "First, a cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier." *id.* at 394.

In addition, Chief Justice Roberts recognized how a cell phones can store internet browsing history, cell location information, and applications that store data in the cloud and not just on the physical device itself. *id.* at 395-96. In cautioning courts about the

breadth of private data available on a phone, he made this relevant observation: "Indeed, a cell phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is." *Id.* at 396-97. (*Emphasis added*). The court in *Riley* recognized a phone's ability to categorically store personal and highly sensitive information and that such a device creates privacy interests even greater than a citizen's home, which indicated a need for stronger protections under the Fourth Amendment.

Subsequently, in *Carpenter v. United States*, 138 S.Ct. 2206, 201 L.Ed.2d 507 (2018), when the Court was tasked with determining whether the Fourth Amendment required a warrant to seize CSLI records, it held that the third-party doctrine was inapplicable, and a warrant was in fact required as location records "[held] for many Americans the 'privacies of life." *id.* at 2217-18 (quoting *Riley*, 573 U.S., at ___, 134 S.Ct. 2473, 189 L.Ed.2d 430, 452). The Court explained the history of Fourth Amendment jurisprudence cautioned inquiries into data derived from cellphones should be "focused on whether the government 'obtains information by physically intruding on a constitutionally protected area . . . ,'" *id.* at 2213 (Quoting *United States v. Jones*, 565 U.S. 400, 405, 406, n.3, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012) (*emphasis added*). Moreover, *Carpenter* further emphasizes heightened scrutiny should be applied to every category of data derived from a cellphone data would be the only way to

sufficiently ensure adequate Fourth Amendment protection Jurisprudence demonstrates when individuals "seeks to preserve something as private," and his expectation of privacy is "one that society is prepared to recognize as reasonable. This Court [has consistently] held that official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause" *ibid.* (Quoting *Smith v. Maryland*, 442 U.S. 735, 740, 99 S.Ct. 2577, 61 L.Ed.2d 220) (*emphasis added*). *Riley* and *Carpenter* makes apparent that permitting a search of all content on a cellphone is materially distinguishable from any other type of search traditionally presented to this Court. It also indicates probable cause should be required to search each category of information within a phone and that those areas searched must be particularly described and linked to the probable cause supporting the search within the affidavit to meet the Fourth Amendment requirements.

### B. The Conflict

There is a critical struggle by the lower courts to apply the probable cause and particularity requirements to the unique technological capabilities of cellphones. Because these issues was not directly addressed in *Riley, Carpenter* or any subsequent cases from this Court, an important question remains open that must be addressed; how law enforcement warrants to search digital content must be tailored to ensure the Fourth Amendment warrant requirements comport with the unique evolution of digital data in cellphones. The instant petition provides an illustration of that struggle and demonstrates a clear need for the Court to address these issues. Under current

law in the third circuit and various other courts, an affidavit that fails to include facts about a cellphone being linked to or otherwise suspected of holding evidence of a crime does not necessarily preclude authorization of a warrant to search the phone digital content.

1. The third circuit has taken the position that probable cause to search a cellphone can exist, even if there is no phone mentioned in the affidavit, on the basis the "totality of [other] circumstances suggest that contraband or evidence of a crime would be found in a cellphone." (App.4a). For instance, in the affidavit in the instant petition, agent Doerrer did not mention petitioner owned or used a cellphone to facilitate any criminal conduct, nor that authorities had reason to believe evidence of an offense would be hidden within its digital contents. There was also nothing included in the affidavit that indicate anyone seen or heard petitioner use a cellphone during the relevant period. Further, when asserting his expert opinion based on his training and experience in financial and drug investigations, agent Doerrer listed various places, electronics and methods used by criminals to hide evidence of crimes, however, he did not include cellphones as a part of that list. *See* App.105-08a. In fact, agent Doerrer fails to mention cellphones in the affidavit completely. The only mention of cellphones in this matter is in the attachment B of the warrant that details items which was to be seized. There were simply no facts set forth that could support the search of all cellphones in petitioner residence. Critically, the panel noted this in its opinion stating "it [was] perplexing that the body of the affidavit did not mention cellphones," but it neverthe-

less determined probable cause existed based on totality of [other] circumstances suggest that contraband or evidence of a crime would be found in a cellphone," when not one fact supporting such is attested to in the affidavit.

Other courts have taken similar views as the third circuit or have found that probable cause existed to justify the issuance of a search warrant to search all contents within a cellphone based solely on law enforcement experience or that cell phones found near illegal activity are highly likely to contain incriminating evidence. *e.g. United States v. Tatro*, 2016 U.S. Dist. LEXIS 70583 (M.D. FL May 31, 2016) (denying suppression even though the affidavit or warrant didn't mention cellphones, finding pocket computers covered cellphones); *United States v. Christian*, 2017 U.S. Dist. LEXIS 80251 at *9, aff'd, 737 F.App'x 165 (4th Cir. 2018) (holding sufficient nexus can exist between a defendant's criminal conduct and the cellphone even when the affidavit supporting the warrant contains no factual assertions other than based on a agents training and experience that drug dealers use cell phones) *United States v. Fisher*, 2015 U.S. Dist. LEXIS 52573, 2015 WL 1862329 (D. Md. Apr. 22, 2015), (finding probable cause to search a cell phone found in a car where drugs were also found, because "cell phones . . . are acknowledged tools of drug traffickers").[6] As with the third circuit, these cases

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[6] Any information attested to in the affidavit related to drugs involving petitioner was stale; Agent Doerrer stated the last known activity was in late 2011, January 2012. The warrant in the instant case was applied and approved on June 3, 2013, no less than 18 months After known drug activity.

illustrate courts are not properly considering the heightened scrutiny digital data of cellphones entails.

However, The text of the Fourth Amendment is clear when it commands "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." This "Court usually requires 'some quantum of individualized suspicion' before a search or seizure may take place," to ensure the warrant requirement is met *id. Carpenter* at 2221(citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-61, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976)). Several lower Court are correctly analyzing probable cause inquiries of cellphone content under stricter scrutiny according to this principle. *e.g. United States v. Morton*, 2021 U.S. App. LEXIS 195, at *6-8. (5th Cir. Jan 5, 2021) (due to cellphones holding many distinct types of information, facts must be submitted to support probable cause to search for and seize evidence in each area within the contents of a cellphone); *United States v. Griffith*, 867 F.3d 1265, 432 U.S. App. D.C. 234 (D.C. Cir. 2017) (held warrant unsupported by probable cause as affidavit offered no basis to suspect that defendant own a cellphone or that any phone containing incriminating information would be found in the phone digital contents); *Burns v. United States*, 235 A.3d 758, 772 (D.C. Cir. 2020) (quoting *Groh v. Ramirez*, 540 U.S. 551, 568, 124 S.Ct. 1284, 157 L.Ed. 2d 1068 (2004) (affidavit must demonstrate cause to believe not only that an item of evidence is likely to be found at the place to be searched, but also that there is a nexus between the item to be seized and [the] criminal behavior under investigation)); The inquiry into probable cause into these cases adequately reflect the uniqueness of digital data stored

in a cellphone and ensures each item sought by law enforcement is not only link to the facts outlined in the affidavit, but also limit searches to specific category of information thus barring exploratory searches.

2. Likewise, with the particularity requirement, this Court has long ago established [t]he manifest purpose was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the Court has explained the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit. *Maryland v. Garrison*, 480 U.S. 79, 84 (1987). This Court has made clear in order to comply with the particularity requirement, the warrant must contain two sets of precise descriptions. *Groh v. Ramirez,* 540 U.S. 551(2004); describe the place to be searched with enough detail to allow the police to recognize the location with relative ease. *Garrison*, 480 U.S. at 88-89 (holding the police made "reasonable effort to ascertain and identify" the place to be searched); and it must also describe the persons or things to be seized in order to limit where the police can look and for how long they can look. *Katz v. United States*, 389 U.S. 347, 353 (1967) (stating the Fourth Amendment's protections extend beyond physical intrusions onto property and protect people from secret government wiretapping). These dual demands of particularity ensure that the police establish the proper location for their search and have clear objectives and parameters in mind during in its execution.

The third circuit and other courts have taken views which fail to give the proper consideration to these factors based on *Riley*, and demonstrates a departure from the scrutiny the particularity requirement commands on digital data in cellphones. In this case, the affidavit concluded investigators sought authorization to search for financial documents to assist with the reconstruction of petitioner's financial background for possible tax violations. Agent Doerrer did not submit any facts such documents or related material would be found in a cellphone, much less a video recording of petitioner joking around with his daughter.[7] Further, the warrant did not identify any specific cellphone. Rather, it stated that "cellular telephones (including searching the memory thereof)" (App.66a) was authorized. A warrant authorizing the seizure of financial documents should be limited to such. Under this warrant, according to the third circuit view, it authorized the seizure of every phone in petitioner residence, allowed agents to search every file and application within their contents and

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[7] While agent Doerrer outlined various offenses that petitioner was allegedly involved in, he did not mentioned the investigation into Bo's murder, even though he was assigned to the taskforce that was investigating the offense and stated Bo was a part of the pill distribution conspiracy within the affidavit. While this issue is not before this Court, petitioner emphases this fact to illustrate one of the consequences resulting from the particularity requirement not being correctly enforced. Third Circuit has extended its precedent which authorizes law enforcement to examine all files in computers to ensure they are not mislabeled in effort to hide evidence of a crime to cover cellphones and necessarily violates the particularity requirement. *United States v. Stabile*, 633 F.3d 219, 241 (3d Cir. 2011). This allows the government to view digital content outside of the scope of the warrant.

seize items that was in no way related to the financial documents outlined within the affidavit. A video of a father and daughter joking has no Nexis to financial offenses agents was authorized to search for, which is demonstrably outside the warrant. Several other courts have adopted the third circuit approach which allowed the government various latitudes to search every category of data in a cellphone. *See United States v. Bishop*, 910 F.3d 335, 336 (7th Cir. 2018) (warrant authorizing the search of all files and applications for evidence of criminal recklessness with a deadly weapon held to meet particularity requirement although no probable cause supported such wide ranging search into files or applications that authorities could not gain such evidence); *United States v. Castro*, 881 F.3d 961 (6th Cir. 2018) (allowing all files searched and explains evidence not described in a search warrant may be seized if it is reasonably related to the offense which formed the basis for the search warrant"); *State v. Johnson*, 576 S.W.3d 205, 222-23 (Miss. State App. court 2019) (adopting *Bishop/ Castro* in holding particularity requirement in a warrant authorizing the search of all data or all files in a cell phone is met so long as the warrant constrains the search to evidence of a specific crime, even if probable cause to search all data is lacking); *People v. English*, 52 Misc.3d 318, 223-23 (NY Supreme Ct. 2016) (same); *United States v. Grinder*, 2018 U.S. Dist. LEXIS 104117 (D MD 2018) (Although items to be seized under a search warrant should be described, the item's description can rely on its relationship to specific crimes detailed in the complaint). These cases represent a large number of courts that have lowered the required standard of mandating law

enforcement be limited in their searches of digital content.

The recognition of the protections being extended to cellphones data in *Riley* and *Carpenter* indicates probable cause and the particularity requirement requires more stringent enforcement with a warrant seeking the authorization to search digital contents of a cellphone. The importance of ensuring law enforcement remain within the parameters of digital data authorized by probable cause is embodied within the particularity requirement. Therefore, under the correct reading of *Riley*, facially broad warrants authorizing the review of the entirety of a cell phone's data should be unconstitutional just as this Court has rejected the authorization of board warrants for searches of citizens houses. *See Riley II*, 134 S.Ct. at 2494-95 (comparing the protections cell phones should receive to the protections homes receive); *e.g. Groh v. Ramirez*, 540 U.S. 551, 557 (2004) (holding a facially broad search warrant for a home violated the particularity requirement). And it also necessarily follows requiring the cellphone(s) that is targeted for seizure be specifically identified as well as each item within its contents to seized, and area searched in the cellphone is linked to the offenses under investigation detailed within the affidavit supporting the warrant authorization.

The lower state and federal courts that has followed these principles and properly considered the implications in *Riley* and *Carpenter* are demonstrably in conflict with third circuit and other courts cited above. *e.g. Morton*, 2021 U.S. App. LEXIS 195, at *6-9 (*Riley* made clear that distinct types of information, often stored in different components of the phone, should be analyzed separately); *Burns*, 235 A.3d at

("It is not enough for police to show there is probable cause to arrest the owner or user of the cell phone, or even to establish probable cause to believe the phone contains some evidence of a crime. To be compliant with the Fourth Amendment, the warrant must specify the particular items of evidence to be searched for and seized from the phone and be strictly limited to the time period and information or other data for which probable cause has been properly established through the facts and circumstances set forth under oath in the warrant's supporting affidavit. Vigilance in enforcing the probable cause and particularity requirements is thus essential to the protection of the vital privacy interests inherent in virtually every modern cellphone and to the achievement of the "meaningful constraints" contemplated in *Riley*") (emphasis added); *United States v. Wey*, 256 F.Supp.3d 355, 383 (S.D NY June 2017) (the Government, once it has obtained authorization to search a [cellphone], may in theory "claim that the contents of every file it chose to open were in plain view and, therefore, admissible even if they implicate the defendant in a crime not contemplated by the warrant," thus presenting a "'serious risk that every warrant for electronic information will become, in effect, a general warrant, rendering the Fourth Amendment irrelevant."); *United States v. Winn*, 79 F.Supp.3d 904, 919 (S.D. Ill. 2015) ("[*Riley*] put the scope of such a wholesale seizure in perspective by explaining that it "would typically expose the government to far *more* than the most exhaustive search of a house."); *State v. Henderson*, 289 Neb. 271, 290-91 (Supreme Court of Neb 2014) ("Given the privacy interests at stake in a search of a cell phone as acknowledged by the Court in *Riley* . . . we think that the Fourth Amendment's particular-

ity requirement must be respected in connection with the breadth of a permissible search of the contents of a cell phone").

As demonstrated above, the division of the lower courts on these issues has caused uncertainty for citizen, the judiciary and law enforcement alike. Given the large number of Americans that uses cellphones, the frequent need of law enforcement to search the content of cellphones and the lower courts obligation to ensure the constitutional protections of citizens are maintained, this court intervention is critical. With so many courts around the Country divided on these issues, the basis Fourth Amendment protections for cellphones now depends on what jurisdictional lines you may cross. *See New York v. Belton*, 453 U.S. 454, 459-60 (1981) ("[w]hen a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority."). Since *Riley*, the issues have reached its zenith and further percolation would not aid this Court's consideration of the issue. There is no good reason to delay resolution of the question presented in the hopes that additional lower court opinions will unearth new legal theories or converge on a uniform legal regime. Numerous federal and state courts of last resort have issued countless decisions with conflicting views since *Riley* further deepening the divide and inconsistency.

The panel in this case was incorrect in affirming the denial of petitioner's motion to suppress the video evidence taken from the cellphone. Agents did not establish probable cause to search within petitioner's cellphone, let alone video files, and further, the warrant

lacked particularity to the extent of cellphones, a requirement guaranteed by the constitution. Allowing the video to be admitted into petitioner has cause prejudice to both counts which is likely to have affected the jury determination. Under the constitution, law enforcement is not allowed to search any property that a citizen has a reasonable expectation to privacy to without meeting the warrant requirements, which was not done in this case. The video, while tasteless, did not provide evidence to satisfy elements of either counts charged in the indictment. Rather, it was used by the government for its prejudicial impact. Petitioner, who has never been arrested prior to the instant offense, was deprived of his constitutional right to a fair trial by the trial court's error allowing the video to be seen by the jury and the third circuit further erred by affirming that decision. Various courts are similarly affording law enforcement great latitude with investigative tactics which infringes on the constitution protections that are guaranteed. This Court should use this case to hold the government to its constitutional obligations and clarify these issues for the lower court.

## II. JURY INSTRUCTIONS

This petition also calls on this Court to address the whether the district and Circuit erred in determine the government met its burden to support a conviction under the advance knowledge requirement for aiding and abetting a murder 924(j)(1) and 2, announced in *Rosemond v. United States*, 572 U.S. 65, 134 S.Ct. 1240, 188 L.Ed.2d 248 (2014) or The *Pinkerton* reasonably foreseeable requirement. Count Six charged Vetri and Vandergrift under 18 U.S.C.§ 924(j)(l) with using firearms, contrary to 18 U.S.C. § 924(c)(l), during and

in relation to the conspiracy to distribute a controlled substance, and in the course of that violation causing the death of a person under circumstances making the killing a murder. The government had to prove beyond a reasonable doubt that Petitioner either had advance knowledge that Vandergrift would use a firearm to commit the murder, under the aiding and abetting theory, or, at the very least, that Vandergrift's use of a firearm to commit murder was reasonably foreseeable to Petitioner within the scope and in furtherance of the drug conspiracy under the Pinkerton theory.

The district court erred instructing the jury that it could convict petitioner under *Pinkerton* if it found that it was reasonably foreseeable, he aided and abetted Mangold using a firearm to murder Bo. This was a reversal error as Mangold was not a principle or otherwise a member of the underline drug conspiracy a requirement.

In its final jury instruction on the murder count, the district court allowed a conviction of Petitioner based only on Petitioner's knowledge or foreseeability with respect to Vandergrift's use of the firearm, not Mangold's. The court expressly told the jury that Vandergrift was the principal whom Petitioner was charged with aiding and abetting while using and carrying a firearm as charged in the Indictment.

There was no evidence admitted at trial to support Petitioner had advance knowledge or reasonably foreseeability Vandergrift would use a firearm in the offense and the indictment didn't alleged nor did the government argue at trial Mangold was charged in the 924(j)(1) count, a requirement needed for him to be a principle. The Court did not instruct petitioner could be liable for violating 924(j) on the alternative

theory that Mangold and Petitioner conspired to commit some offense making it reasonably foreseeable that Mangold would use a firearm to commit murder in furtherance of that conspiracy, a requirement under *Pinkerton*.

## CONCLUSION

For the foregoing reasons, this Court should Grant the writ certiorari to address to two important issues.

Respectfully submitted,

ANTHONY VETRI
*PETITIONER PRO SE*
REG # 69695-066
USP COLEMAN 1
P.O. BOX 1033
COLEMAN, FL 33521

JANUARY 20, 2021

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