No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

BERNARD LINDSEY — PETITIONER,

VS.

UNITED STATES — RESPONDENT.

_____

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

_____

PETITION FOR WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the mere presence of two cell phones in the petitioner Bernard Lindsey's home provided sufficient grounds, under the Fourth Amendment, to search the entire contents of each phone, when the warrant application established probable cause to believe only that the petitioner was engaged in selling drugs but was devoid of any specific evidence that he used any phone to transact any suspected drug deal.

2. Whether this Court should resolve a split among the circuits as to whether a defendant's failure in the lower court to precisely articulate an argument in support of a motion to suppress – here, Mr. Lindsey's argument that the search warrant lacked sufficient particularity – renders the argument unreviewable on appeal, even for plain error.

LIST OF PARTIES

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

RELATED CASES

The following proceedings are related to this proceeding:

1. *United States v. Lindsey*, No. 18-cr-101-SM, U.S. District Court for the District of New Hampshire. Judgment entered November 8, 2019.
2. *United States v. Lindsey*, No. 19-2169, U.S. Court of Appeals for the First Circuit. Judgment entered June 29, 2021.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW……ii

LIST OF PARTIES……iii

RELATED CASES……iii

TABLE OF CONTENTS……iv

INDEX TO APPENDICES……v

TABLE OF AUTHORITIES……vi

PETITION FOR WRIT OF CERTIORARI……1

OPINION BELOW……1

JURISDICTION……1

CONSTITUTIONAL PROVISIONS INVOLVED……2

STATEMENT OF THE CASE ……3

REASONS FOR GRANTING CERTIORARI……6

I. The First Circuit Court of Appeal's ruling that the mere presence of two cell phones in Mr. Lindsey's home provided sufficient grounds to search their entire contents is incompatible with this Court's decision in *Riley v. California* and other prior rulings laid down by this Court, and presents the important and recurring question of federal law as to what information is necessary to establish a sufficient nexus to search a cellphone or other electronic device which should be settled by this Court ……6

II. This Court should resolve a circuit split as to whether a defendant's failure to precisely articulate an argument in support of a motion to suppress – here a claim that the search warrant lacked sufficient particularity – rendered the argument *unreviewable* on appeal, even for plain error, especially where the threshold question of whether the error was preserved was at least a close call……14

CONCLUSION……18

INDEX TO APPENDICES

APENDIX A – Opinion in the United States Court of Appeals for the First Circuit (June 29, 2021) ……App. 1

APENDIX B – Judgment in a Criminal Case in the United States District Court of New Hampshire (November 8, 2019) ……App. 27

APENDIX C – Denial of Petition for Rehearing in the United States Court of Appeals for the First Circuit (October 5, 2021) ……App. 34

APENDIX D – Search Warrant and Application ……App. 35

APENDIX E – Transcript of Motion to Suppress Hearing ……App. 51

TABLE OF AUTHORITIES CITED

CASES

Carpenter v. United States,
138 S. Ct. 2206 (2018) 10

Dalia v. United States,
99 S. Ct. 1682 (1979) 7

Florida v. Harris,
133 S. Ct. 1050 (2013) 8

Illinois v. Gates,
462 U.S. 213 (1983) 7

New Jersey v. T.L.O.,
105 S.Ct. 733 (1985) 7

Poolaw v. Marcantel,
565 F.3d 721 (10th Cir. 2009) 12

Riley v. California,
573 U.S. 37 (2014) 6, 10

United States v. Adams,
971 F.3d 22 (1st Cir. 2020) 11

United States v. Bain,
874 F.3d 1 (1st Cir. 2017) 9

United States v. Benevento,
836 F.2d 60 (2d Cir. 1987) 9

United States v. Bethal,
245 F. App'x 460 (6th Cir. 2007) 9

United States v. Bowline,
917 F.3d 1227 (10th Cir. 2019) 16

United States v. Burke,
633 F.3d 984 (10th Cir. 2011) 16

United States v. Camacho,
661 F.3d 718 (1st Cir. 2011) 12

United States v. Centeno-González,
989 F.3d 36 (1st Cir. 2021) 16

United States v. Crooker,
688 F.3d 1 (1st Cir. 2012) 16

United States v. Daniels,
803 F. 3d 335 (7th Cir. 2015) 16

United States v. Dixon,
787 F.3d 55 (1st Cir. 2015) 7

United States v. Feliz,
182 F.3d 82 (1st Cir. 1999) 7

United States v. Griffith,
867 F.3d 1265 (D.C. Cir. 2017) 9, 13

United States v. Indelicato,
865 F.2d 1370 (2d Cir. 1989) 9

United States v. Lindsey,
3 F.4th 32 (1st Cir. 2021) 15, 16

United States v. McMillian,
786 F.3d 630 (7th Cir. 2015) 16

United States v. Mora,
989 F.3d 794 (10th Cir. 2021) 13

United States v. Ribeiro,
397 F.3d 43 (1st Cir. 2005) 9

United States v. Roman,
942 F.3d 43 (1st Cir. 2019) 7, 9, 11

United States v. Schultz,
14 F.3d 1093 (6th Cir. 1994) 9

United States v. Soto,
794 F. 3d 635 (6th Cir. 2015) 17

Ybarra v. Illinois,
100 S. Ct. 338 (1979) 8

Zurcher v. Stanford Daily,
98 S. Ct. 1970 (1978) 8

STATUTES AND RULES

28 U.S.C. § 1254.....1

Fed. R. Crim. P. 12.....15, 16

OTHER AUTHORITIES

U.S. Const. amend IV.....2

U.S. Const. amend XIV.....2

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The Opinion of the First Circuit Court of Appeals appears at Appendix A to the petition and is reported as *United States v. Lindsey*, 3 F.4th 32 (1st Cir. 2021). The opinion of the United States District Court for the District of New Hampshire appears at Appendix B and is reported at *United States v. Lindsey*, No. 18-CR-101-SM, 2019 WL 5653852 (D.N.H. Oct. 31, 2019).

JURISDICTION

The date on which the United States Court of Appeals for the First Circuit decided my case was on June 29, 2021. A timely petition for rehearing was denied by the United States Court of Appeals for the First Circuit on October 5, 2021, and a copy of the order denying rehearing appears at Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Under this Court's July 19, 2021, emergency order, this petition is timely filed pursuant to Supreme Court Rule 20.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides 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.

The Fourteenth Amendment to the United States Constitution provides in relevant part as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Procedural Background

On June 27, 2018, Bernard Lindsey was indicted in the United States District Court for the District of New Hampshire on one count of possession with intent to distribute a controlled substance in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C). On February 20, 2019, Mr. Lindsey was charged in a superseding indictment with one count of possession with intent to distribute cocaine and fentanyl, in violation of 21 U.S.C. § 841 (a)(1) and (b)(1)(C), and one count of possession with intent to distribute five grams or more of methamphetamine, in violation of 21 U.S.C. § 841 (a)(1) and (b) (viii). On January 2, 2019, Mr. Lindsey filed a motion to suppress evidence recovered from the execution of a search warrant on two cell phones. The motion to suppress was denied in an oral order following oral argument on January 30, 2019. Mr. Lindsey was convicted on both counts after a two-day jury trial held on April 16 and 17, 2019. On November 7, 2019, the court sentenced Mr. Lindsey to 80 months on both counts, to be served concurrently.

Mr. Lindsey filed a timely notice of appeal on November 12, 2019. On June 29, 2021, the First Circuit denied Mr. Lindsey's appeal and affirmed his convictions. On July 30, 2021, Mr. Lindsey filed a petition for rehearing *en banc* which was denied on October 5, 2021.

Factual Background

On April 16, 2018, Mr. Lindsey was on probation in New Hampshire, when his probation officers made an unannounced visit to his home. Upon entry into the apartment, the officers observed the smell of marihuana, and saw another individual, Bryson London, on the couch. Probation officers recovered a black case on the couch next to Mr. London, which contained various amounts of cocaine, methamphetamine, and fentanyl, along with other drug dealing equipment. Mr. London had approximately thirty dollars on his person, as well as a cell phone, which he was using when the officers first arrived. Mr. Lindsey had approximately three thousand dollars in his pocket. One cellphone was found on his person, and another cellphone was found on the table in front of him. Both were "smart phones" and appeared to be the same model. Additional amounts of marihuana and other drug paraphernalia were found in the apartment.

Police then applied for a search warrant for an additional search of the home and an unrestricted search of the entire contents of the two recovered cell phones. In addition to recounting the above-described events on April 16, 2018, the warrant application stated that five days earlier, witnesses had seen multiple drug sales out of Mr. Lindsey's car and that Mr. Lindsey's car had been seen in another location where suspected drug activity took place.[1] The affidavit did not, however, include any information that on any of these occasions Mr. Lindsey was seen talking on or even handling a cell phone, let alone that he did so in a manner that suggested he

[1] App. 4. "App.__" refers to the numbered appendixes filed herewith.

was using a phone to make a drug transaction. Apart from the fact that two cell phones were recovered from Mr. Lindsey's apartment and that Mr. Lindsey was apparently engaged in dealing drugs from his apartment, the only evidence in the affidavit that was offered to support an inference that evidence of his drug dealing would be found on the recovered phones was this highly generalized assertion from the affiant:[2]

> [T]hrough [Officer Womersley's] training and experience drug dealers will utilize several cell phones to conceal their drug business. They often change number, use 'burner phones' that are prepaid phones that they just keep changing once the minutes are used.

Although the warrant application lacked any description of Mr. Lindsey's use of the cellphones to conduct any drug activity, the warrant allowed for an unfettered search of the phones' complete contents, and left the scope of the search, and what information might be recovered from it, entirely to the discretion of the searching officers.

The ensuing search of cellphones revealed a number of text messages which suggested that Mr. Lindsey had previously engaged in selling drugs. Although no information was provided to the jury about Bryson London's history or the contents of his phone (Mr. London was said to be on the phone when officers arrived), the government was permitted to use the evidence of Mr. Lindsey's prior drug dealing to argue that he, and not Mr. London, possessed and intended to distribute the drugs found in the carrying case discovered next to Mr. London.

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[2] App. 5.

REASONS FOR GRANTING CERTIORARI

I. The First Circuit Court of Appeal's ruling that the mere presence of two cell phones in Mr. Lindsey's home provided sufficient grounds to search their entire contents is incompatible with this Court's decision in *Riley v. California* and other prior rulings laid down by this Court, and presents the important and recurring question of federal law as to what information is necessary to establish a sufficient nexus to search a cellphone or other electronic device which should be settled by this Court.

This Court should grant certiorari because the First Circuit's ruling that the mere presence of two cell phones in Mr. Lindsey's home provided a sufficient reason to search the entire contents of each phone for evidence of drug dealing, contravenes the principles set forth in *Riley v. California* and other prior decisions laid down by this Court.[3] *Riley* recognized that the privacy interest one has in a contemporary cellphone is on par with, and in many ways greater than, the privacy interest that one has in their home.[4] Thus, *Riley* held that police are required to obtain a warrant before searching a cell phone seized incident to arrest.[5] But beyond the warrant requirement, and the highly flexible probable cause standard that it entails, this Court has not elucidated what minimum facts are necessary to demonstrate probable cause that evidence of alleged criminal activity will be found on a suspect's cellphone. This unaddressed issue of federal law is of great national importance given the ubiquitous use of cellphones in our contemporary society, the associated privacy concerns recognized in *Riley*, and the relative ease with which

[3] *Riley v. California*, 134 S. Ct. 2473 (2014).
[4] *Id.*
[5] *Id.*

the probable cause standard can be diluted. In this case, the First Circuit appears to have applied a less stringent standard to justify the search of Mr. Lindsey's phones, and one that, in practical application, hues much closer to a "reasonable suspicion" than "probable cause" standard. Certiorari review is thus necessary, both to correct the error and to establish a consistent and clear federal standard.

To satisfy the Fourth Amendment, a search-warrant application must reveal probable cause to believe two things: (1) that "a crime has been committed—the 'commission' element," and (2) that "enumerated evidence of the offense will be found at the place searched—the so-called 'nexus' element."[6] Probable cause must be based on specific and particularized facts rather than conjecture or generalized observations, and those facts must warrant a person of reasonable prudence to believe that evidence of the crime will be found in the place to be searched.[7] Ultimately, a magistrate judge considering the "nexus" element must "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit" there exists a "fair probability that evidence of a crime will be found" in the place to be searched.[8]

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[6] *United States v. Dixon*, 787 F.3d 55, 59 (1st Cir. 2015) *quoting United States v. Feliz*, 182 F.3d 82, 86 (1st Cir. 1999); *New Jersey v. T.L.O.*, 105 S.Ct. 733, 750 (1985) (a search is "'reasonable' in Fourth Amendment terms only on a showing of probable cause to believe that a crime has been committed and that evidence of the crime will be found in the place to be searched").

[7] *Dalia v. United States*, 99 S. Ct. 1682, 1692 (1979) ("The Fourth Amendment requires that search warrants be issued only upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized").

[8] *United States v. Roman*, 942 F.3d 43, 50 (1st Cir. 2019) *citing Feliz*, 182 F.3d at 86, *quoting Illinois v. Gates*, 103 S. Ct. 2317, 2332 (1983).

In general, this Court has rejected "rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach."[9] However, there are some obvious minimum requirements. For example, in *Ybarra v. Illinois*, this Court held that "[w]hen the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person [,and] [t]his requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be."[10] Likewise, with respect to the search of a home, this Court has held that the "inquiry is not whether 'the owner of the property is suspected of crime' but rather whether '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.'"[11] Circuit courts have consistently held that the mere fact that someone is known to be currently engaged in drug dealing, does not, without more, provide probable cause to search their residence, even if the affidavit includes a statement from an experienced officer that persons engaged in such activity generally keep evidence of it in their homes. For example, in *United States v. Roman,* the First Circuit affirmed its previously "expressed skepticism that probable cause can be established by the combination of the fact that a defendant sells drugs and general information from police officers

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[9] *Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013).

[10] *Ybarra v. Illinois*, 100 S. Ct. 338, 342 (1979).

[11] *Zurcher v. Stanford Daily*, 98 S. Ct. 1970, 1976 (1978) (internal quotation marks omitted).

that drug dealers tend to store evidence in their homes," noting that probable cause required at least "the addition of *specific facts* connecting the drug dealing to the home" that is to be searched.[12] Accordingly, the First Circuit held that "'generalized observations' of this type should be 'combined with specific observations,' or facts 'connecting the drug dealing to the home' to permit an inference of nexus to a defendant's residence."[13]

The minimal requirements for establishing a nexus to search a home are important because, as this this Court acknowledged in *Riley v. California,* "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

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[12] *Roman*, 942 F.3d at 51 *citing United States v. Bain* 874 F.3d 1, 23-24 (1st Cir. 2017) (emphasis added); see also *United States v. Bethal*, 245 F. App'x 460, 468 (6th Cir. 2007) (finding that "the affidavit contained sufficient information to support a probable cause finding for the issuance of an arrest warrant for [the defendant] for the two drive-by shootings" but "it did not meet that standard upon which to base a search for weapons or drugs in [the defendant's] home").

[13] *Roman*, 942 F.3d at 51 *citing United States v. Ribeiro*, 397 F.3d 43, 50-51 (1st Cir. 2005); *Bain*, 874 F.3d at 24; *see also United States v. Benevento*, 836 F.2d 60, 71 (2d Cir. 1987) (agent's expert opinion "standing alone, might not be sufficient to establish a link" between the place searched and the criminal activity), abrogated on other grounds by *United States v. Indelicato*, 865 F.2d 1370 (2d Cir. 1989);*United States v. Schultz*, 14 F.3d 1093, 1097 (6th Cir. 1994) (an officer's training and experience "cannot substitute for the lack of evidentiary nexus"); *United States v. Griffith*, 867 F.3d 1265 (D.C. Cir. 2017) (Although defendant was suspected of homicide, insufficient nexus to search home for a cell phone when there was "no observation of [the suspect's] using a cell phone, no information about anyone having received a cell phone call or text message from him, no record of officers recovering any cell phone in his possession at the time of his previous arrest (and confinement) on unrelated charges, and no indication otherwise of his ownership of a cell phone at any time").

private information never found in a home in any form."[14] This Court emphasized the same principles in *Carpenter v. United States*, where access to cellular site location information was considered to expose "an intimate window into a person's life, revealing not only his particular movements, but through them his familial, political, professional, religious, and sexual associations,"[15] that it "[held] for many Americans the 'privacies of life,'" and that a cell phone was "such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy."[16] Thus, based on *Riley* and *Carpenter*, the minimum requirements for establishing a nexus to search a cellphone should be at least as protective as they are for a home—i.e. there must be specific facts connecting the alleged drug activity to the particular cellphone that is to be searched, and those facts must be more than just the generalized observations of law enforcement that such evidence is commonly found on a cellphone.

In this case, the First Circuit failed to apply an appropriately stringent test for establishing a nexus to search the cellphones recovered from Mr. Lindsey's home. It was undisputed that the warrant application did not include any specific evidence linking Mr. Lindsey's drug activity to those particular phones, other than their presence in a home where drugs and other accoutrements of drug dealing were recovered. The affidavit offered no specific evidence suggesting that Mr. Lindsey

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[14] *Riley v. California*, 573 U.S. 134 S. Ct. 2473, 2490-91 (2014) (emphasis in original).

[15] *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018).

[16] *Carpenter* 138 S. Ct. at 2218 *citing Riley*, 134 S.Ct. at 2484, 2494–2495.

had used either of the recovered phones to conduct any drug transactions.[17] Indeed, there was no information that Mr. Lindsey was ever seen using any phone to conduct a drug deal. The affidavit was thus "devoid of information from any source" that would connect the particular phones recovered to Mr. Lindsey's drug activity.[18]

While the First Circuit's decision acknowledges that there was no specific evidence linking the recovered phones to Mr. Lindsey's drug activity, it upheld the validity of the warrant on a sliver of fact, holding that because the warrant application asserted that "Lindsey had more than one cellphone and that it is common for drug dealers to use multiple cellphones to conceal their drug activity," a nexus sufficient to allow a search of the entire contents of each phone had been established. [19] The mere fact that there were two phones in Mr. Lindsey's

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[17] *Roman*, 942 F.3d at 50. The First Circuit takes pains to distinguish *Roman* on its facts, but those factual differences do not change the principles at issue here.

[18] *Roman,* 942 F.3d at 51.

[19] App. 12. The case *United States v. Adams*, 971 F.3d 22 (1st Cir. 2020), cited by the First Circuit is easily distinguished. In *Adams*, the defendant, already under suspicion of running a large-scale interstate drug dealing operation that employed rental cars, was pulled over in a rental car. (Brief for the Appellee at 9-10, *United States v. Erick Levar Adams* (2019) (No. 00117515210)). Canine sniffs suggested the recent presence of narcotics in the car; cut corner baggies common in drug transactions were located within the car; and the car appeared to have drug "hides" located within it. *Id*. at 10-11. Most importantly, a total of *five* cell phones were recovered from the rental car, even though no one other than Adams had been in the car at the time he was pulled over, and the warrant application indicated that Adams had previously been arrested with large amounts of drugs and with multiple cell phones on his person, which suggested that Adams himself had a modus operandi of employing multiple cell phones in connection with this drug operation. *Id*. By contrast, Mr. Lindsey's phones were in his home, a place where one is highly likely to keep a back-up, extra, or old phone, as opposed to a rental car, where one would not be expected to keep such items. Moreover, unlike Adams, nothing about the officers' specific knowledge of Mr. Lindsey's prior drug activity suggested that his modus operandi was to use his phone to conduct his drug business.

apartment, as opposed to just one, at best provided a reason to *suspect* that evidence of his drug dealing was on the phone, but it was not sufficient to a establish probable cause that such evidence would be found in the phone. Even the trial court judge acknowledged that there "are legitimate reasons to have multiple cell phones" and that many people have multiple cell phones.[20] The First Circuit's analysis on this point is at odds with its own admonition against relying on overly generalized assertions from law enforcement to replace facts that specifically demonstrate a nexus and it is apparent that the court applied a less stringent standard for establishing a nexus to search a phone than a home. As a practical matter, the standard the First Circuit applied appears to be akin to reasonable suspicion rather than probable cause. Indeed, the First Circuit's finding of probable cause relies on the kind of conjecture, surmise and assumption that courts have frequently condemned, even when the standard at issue is only reasonable suspicion.[21]

In contrast to the First Circuit's decision in this case, in *United States v. Mora*, the Tenth Circuit heeded the privacy concerns that *Riley* cautioned against, and held that the search warrant affidavit did not establish a sufficient nexus between "alien smuggling" and defendant's residence to justify a search for

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[20] App. 57.

[21] *United States v. Camacho*, 661 F.3d 718, 726 (1st Cir. 2011) ("Somewhat more precisely, [reasonable suspicion] demands "a 'particularized and objective basis' for suspecting the person stopped of criminal activity"); *Poolaw v. Marcantel,* 565 F.3d 721, 736 (10th Cir. 2009) ("reasonable suspicion may not be based on a mere hunch or conjecture"); *United States v. Zavala*, 541 F.3d 562, 574 (5th Cir. 2008) ("Although a mere hunch will not suffice, a reasonable suspicion need not rise to the level of probable cause").

"electronic communication devices" in the home.[22] The court found the affiant's "boilerplate statements," that "based on his training and experience, that alien smugglers often use electronic communication devices, GPS devices, and electronic banking systems to conduct operations and store records" failed to "identify facts showing that Defendant possessed, let alone used, any of the supposedly suspicious items in connection with alien smuggling" and were not "specific to Defendant's crime or circumstances."[23]

This case presents a proper vehicle for this Court to clarify that, due to the wealth of private information contained on a cell phone, a phone merits Fourth Amendment protections that are on par with those of a home. Thus, in order to establish a sufficient nexus to search a phone, in addition to establishing probable cause that the defendant committed the offense under investigation, a warrant application must provide specific facts demonstrating that evidence of the crime under investigation will be found on the phone to be searched, and those fact must be more than the generalized assertions of an affiant's experience with like crimes. Moreover, the facts must demonstrate more than a reasonable suspicion that evidence of the particular crime under investigation will be found in the phone, and must allow a finding of probable cause to believe that such evidence will be found in the phone.

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[22] *United States v. Mora*, 989 F.3d 794, 801-802 (10th Cir. 2021).
[23] *Id.*

II. This Court should resolve a circuit split as to whether a defendant's failure to precisely articulate an argument in support of a motion to suppress – here a claim that the search warrant lacked sufficient particularity – rendered the argument *unreviewable* on appeal, even for plain error, especially where the threshold question of whether the error was preserved was at least a close call.

In addition to the nexus argument above, Mr. Lindsey's motion raised defects with respect to both the breadth of the search (i.e., allowing a search of the entire contents of the phone) and the lack of a particular description of the items to be seized. With respect to the breadth of the search, the trial judge acknowledged that the Mr. Lindsey's argument concerned the search for evidence in the "parts of a cell phone that aren't a cell phone,"[24] and counsel plainly stated that there was a problem with "a comprehensive search of every single file on the cell phones."[25] With respect to deficiencies in the description of the items to be seized, the defendant's supporting memorandum cites to the relevant portion of the Fourth Amendment that "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.**"[26] Also in his written motion, Mr. Lindsey specifically complained that the affiant had failed to "describe what evidence he expected to find in the phones which would pertain to the distribution of controlled

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[24] App. 52.

[25] App. 59; In addition, counsel's reply memorandum filed in the District Court clearly set out the privacy concerns raised by searching the entire contents of a modern smart phone.

[26] See Addendum to Appellant's Brief filed in case below at page 22, *citing* U.S. Const. amend. IV (emphasis added).

substances,"[27] and at oral argument on the motion, defense counsel again repeated that "part of the issue…is in the attachment [to the affidavit] that describes the evidence that they're looking for, it's entirely –it clearly was a mistake…it's entirely devoted to searching cell phones for evidence of child pornography…[s]o there **is no description** as opposed to in a drug case where they're describing the procedures that they would be searching for evidence of these drug crimes."[28]

The First Circuit opinion brushed these facts aside and held that even Mr. Lindsey's specific articulation that the warrant application "failed to describe what evidence [the officers] expected to find" did not preserve the argument for appeal because that sentence was "unaccompanied by any mention of the particularity requirement," in the Fourth Amendment.[29] Thus, the First Circuit held that not only was the issue unpreserved, but Mr. Lindsey had waived it, and thus the court refused to consider it at all.

The First Circuit's decision that Mr. Lindsey's argument is not reviewable deepens a preexisting conflict among federal courts of appeals concerning whether under Federal Rule of Criminal Procedure 12, defendants may still receive plain error review for specific arguments not made before the district courts.[30]

The relevant sections of Federal Rule of Criminal Procedure Rule 12 read as follows:

(b) Pretrial Motions

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[27] See Record Appendix filed in case below at page 16.
[28] App. 53-54 (emphasis added).
[29] App. 16.
[30] *United States v. Lindsey*, 3 F.4th 32, 42 (1st Cir. 2021).

...

> (2) Motions That May Be Made at Any Time. A motion that the court lacks jurisdiction may be made at any time while the case is pending.
> (3) Motions That Must Be Made Before Trial. The following defenses, objections, and requests must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits:
>
> > …
> > (C) suppression of evidence;
> > …
>
> (c) Deadline for a Pretrial Motion; Consequences of Not Making a Timely Motion.
>
> > (1) Setting the Deadline. The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing. If the court does not set one, the deadline is the start of trial.
> > (2) Extending or Resetting the Deadline. At any time before trial, the court may extend or reset the deadline for pretrial motions.
> > (3) Consequences of Not Making a Timely Motion Under Rule 12(b)(3). If a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely. But a court may consider the defense, objection, or request if the party shows good cause.

Courts in several circuits, including the First Circuit have held that plain error review is inapplicable where an untimely argument is made absent a showing of good cause. Under First Circuit precedent, legal arguments that are not "raised squarely" and "actually articulated" in district court, but "merely insinuated," are deemed unpreserved for purposes of appellate review."[31] The Second Circuit, Third Circuit, Seventh Circuit,[32] Eighth Circuit, Ninth Circuit, Tenth Circuit,[33] and the

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[31] *United States v. Lindsey*, 3 F.4th 32, 41–42 (1st Cir. 2021); *see United States v. Centeno-González,* 989 F.3d 36, 48 (1st Cir. 2021); *United States v. Crooker*, 688 F.3d 1, 10 (1st Cir. 2012).

[32] *United States v. Daniels*, 803 F. 3d 335, 351-52 (7th Cir. 2015); *United States v. McMillian*, 786 F.3d 630, 635–36 (7th Cir. 2015) .

[33] *United States v. Bowline*, 917 F.3d 1227 (10th Cir. 2019), *cert. denied*, 140 S. Ct. 1129 (2020); see *United States v. Burke*, 633 F.3d 984 (10th Cir. 2011).

D.C. Circuit have held the same view. As the Tenth Circuit explained in *United States v. Bowline*, Rule 12 "clearly provides only one circumstance in which an untimely motion can be considered—when the movant shows good cause," otherwise appellate review is barred.[34] Accordingly, the First Circuit found that Mr. Lindsey failed to properly preserve the particularity claim and that he was not entitled to any review, absent a showing of good cause for the failure.

On the other hand, the remaining circuits have held that untimely Rule 12 claims raised on appeal for the first time may be reviewed under the plain error standard without a showing of good cause. The Fourth Circuit, Fifth Circuit, Sixth Circuit, and Eleventh Circuit have applied plain-error review under such circumstances. In *United States v. Soto*, the Sixth Circuit applied plain-error review to a misjoinder claim raised for the first time on appeal, refusing to "treat the failure to file a motion as a waiver unless the circumstances of the case indicate the defendant intentionally relinquished a known right."[35] The Sixth Circuit further explained that "the good-cause standard may be difficult to apply on appeal if the issue was not first raised at the district court because review for good cause often requires developing and analyzing facts to determine whether a defendant has shown good cause for the late filing."[36]

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[34] *United States v. Bowline*, 917 F.3d 1227, 1230 (10th Cir. 2019), *cert. denied*, 140 S. Ct. 1129 (2020); see *United States v. Burke*, 633 F.3d 984 (10th Cir. 2011).

[35] *United States v. Soto*, 794 F. 3d 635, 655 (6th Cir. 2015).

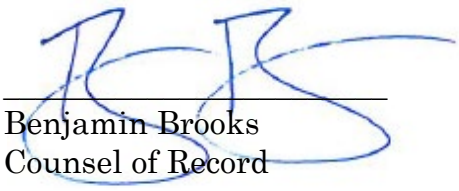
[36] *Id.*

This case presents an excellent vehicle for resolving this conflict, especially because it is notable that in each of the cases cited where the circuit court found that no review was permitted, the claim raised on appeal was not raised at all in the relevant proceedings below. In a case such as this one, where it is at least a close call as to whether the issue was sufficiently preserved, this Court should determine whether the Mr. Lindsey is entitled to plain error review for imperfectly preserved errors. Review is therefore warranted by this Court, and Mr. Lindsey should be given an opportunity to fully brief why, in this case, the lack of particularity in the warrant meets the plain error standard.

Conclusion

WHEREFORE, for all of the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully Submitted,



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