APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

REHEARING ORDER

APPENDIX TABLE OF CONTENTS (Cont.)

OTHER DOCUMENTS

OPINION OF THE COURT OF CRIMINAL APPEALS OF TEXAS (MAY 11, 2022)

PUBLISH

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

THE STATE OF TEXAS

v.

JOHN WESLEY BALDWIN,

Appellee.

No. PD-0027-21

On the State's Petition for Discretionary Review from the Fourteenth Court of Appeals Harris County

MCCLURE, J., delivered the opinion of the Court, in which HERVEY, RICHARDSON, NEWELL, and WALKER, JJ., joined. KELLER, P.J., filed a dissenting opinion in which YEARY, KEEL, and SLAUGHTER, JJ., joined. YEARY, J., filed a dissenting opinion.

OPINION

During a capital murder investigation, investigators obtained a search warrant for Appellee John Wesley Baldwin's phone pursuant to Texas Code of Criminal Procedure article 18.0215(c)(5)(B). In a motion to suppress, Appellee objected to the search warrant's

supporting affidavit, which contained generic statements about the use of cell phones. The trial court and the court of appeals both concluded that the affidavit did not contain sufficient facts to establish a fair probability that a search of the cell phone found in Appellee's vehicle would likely produce evidence in the investigation of the murder. We granted review to answer this question: under what circumstances may boilerplate language about cell phones be considered in a probable cause analysis? We hold that boilerplate language may be used in an affidavit for the search of a cell phone, but to support probable cause, the language must be coupled with other facts and reasonable inferences that establish a nexus between the device and the offense. Because the affidavit in the instant case failed to do so, we discern no abuse of discretion on the part of the trial court and no error on the part of the court of appeals.

Background

On September 18, 2016, Adrianus Michael Kusuma was shot and killed during a robbery at his residence. The homeowner's brother, Sebastianus Kusuma, witnessed the murder and said the perpetrators were two black men who fled in a white, four-door sedan. Investigators learned that, shortly after the murder, one of the Kusuma's neighbors saw a white, four-door sedan exit the neighborhood at a very high rate of speed.

Investigators obtained security footage from a nearby residence showing a white sedan suspiciously circling the neighborhood, not only on the day of the capital murder, but on the day before as well. On four separate occasions, the sedan entered a cul-de-

sac, drove to the front of the residence where the murder occurred, and then turned around.

One neighbor came forward and informed investigators that a white sedan had passed by his residence three times shortly before the murder. The neighbor added that the sedan was driven by a large black male.

Another neighbor came forward and said that she had seen a white, four-door sedan "casing" the neighborhood on the day before the offense. This neighbor said there were two occupants in the sedan, and both were black men. This neighbor took a picture of the sedan, capturing the license plate.

Investigators determined that the sedan in the photo was registered to Appellee's stepfather, who claimed he sold the sedan to Appellee. Appellee's stepfather told investigators that Appellee was living at his girlfriend's apartment.

Investigators located the sedan at the apartment and followed Appellee as he left in the sedan. A marked unit eventually pulled Baldwin over for unsafely crossing two lanes of traffic in a single maneuver and for driving over the "gore zone," which is the triangular portion of a highway exit. Baldwin was arrested for those traffic violations, as well as for driving with an expired license and for failing to show identification on demand.

Appellee made a lengthy statement to the police. He consented to a search of the sedan, and a cell phone was found inside. Appellee refused to consent to a search of the phone, so investigators obtained a search warrant. The following affidavit was submitted in support of the search warrant:

On September 18, 2016, at 2120 hours, your Affiant was assigned to investigate the robbery and murder of Adrianus Michael Kusuma, an Asian male, date of birth September 27, 1982, having occurred at his home located at 21522 Canvasback Glen in unincorporated Harris County, Texas. Upon arrival at the scene, Affiant spoke with Sebastianus Kusuma, the brother of the complainant, who was home at the time of the robbery and murder, a person Affiant found credible and reliable. Sebastianus Kusuma advised he was upstairs in his room when he heard a loud banging noise emanating from downstairs. Sebastianus Kusuma went downstairs to investigate and was confronted by a masked black male, armed with a handgun, at the base of the stairs. The masked gunman demanded money and began to assault Sebastianus Kusuma with his fists and the handgun in the dining room of the home. While he was fighting with this male, Sebastianus Kusuma stated he heard a gunshot coming from the kitchen area of the home and turned to see a second black male, also masked, running from the back of the house toward the dining room. The two gunmen grabbed a box of receipts and money from the Kusumas' family run business and fled the residence through the front door. Sebastianus Kusuma followed the two males from the home and witnessed them getting into a white, 4-door sedan and flee [sic] the scene. Sebastianus Kusuma returned to the home to search for his brother and found him lying

on the kitchen floor near the back door. Adrianus Michael Kusuma had sustained a gunshot wound to the chest and was unconscious and unresponsive. The rear door of the residence was open and the door frame shattered from having been kicked in by the suspects.

The neighborhood where this murder occurred consists only of a circling boulevard with multiple small cul-de-sac streets that extend from the main boulevard. Vehicles may only access the neighborhood from one street that leads east off Gosling Road.

During the course of conducting the scene investigation, affiant learned that a neighbor, who lives near the entry street to the subdivision, was outdoors at approximately 8:45 PM when he observed a white, 4-door sedan exiting the neighborhood at a very high rate of speed. Within minutes of this vehicle exiting the neighborhood, this citizen observed emergency vehicles entering the neighborhood and thought the white vehicle may be connected to the response of emergency vehicles into the neighborhood.

Further, while conducting this investigation, Affiant was advised by Sergeant Mark Reynolds, a certified peace officer reputably employed by the Harris County Sheriffs Office and also assigned to the Homicide Division and assisting in this investigation, that he was approached by a citizen who advised a white, 4-door Lexus vehicle, bearing Texas license plate # GTK-6426, was observed

driving through the neighborhood, and specifically, past the residence at 21522 Canvasback Glen, on multiple occasions on Saturday, September 17, 2016. The citizen found the repeated circling of the neighborhood and the complainant's home so suspicious that she photographed the vehicle on her smartphone and captured the license plate. Based on the suspicious circumstances presented by this vehicle one day before the murder, this citizen feared the occupants, two black males, were possibly responsible for the robbery and murder.

Affiant and other investigators from the Homicide Division canvassed the neighborhood for residences that may have security cameras. Three (3) residences were located that had recording surveillance systems operating. Video from these surveillance systems were reviewed and one system captured video images of a white, 4-door vehicle, similar in appearance to the white Lexus registered under license plate GTK-6426, circling the neighborhood on Saturday, September 17, 2016 and Sunday, September 18, 2017 [sic]. Specifically, the video system located at 21622 Redcrested Glen captured images of the vehicle at 2:03 PM on Saturday, September 18, 2016, and the same vehicle on Sunday, September 19, 2016 at 8: 15 PM, 8:16 PM and 8:23 PM.[1] On each instance, the vehicle

[1] In her affidavit, Deputy Casey Parker mistakenly identified the dates as "Saturday, September 18, 2016," and "Sunday, September 19, 2016." But in two other sentences in the affidavit, she

entered the cul-de-sac and drove to the circle in front of 21622 Redcrested Glen and turned around, leaving the view of the camera. On the 8:23 PM event, the vehicle paused momentarily before leaving the view of the camera. The residence at 21622 Redcrested Glen is only 5 residences to the north of the location where Sebastianus Kusuma observed the suspects in the robbery enter the white vehicle and flee the scene.

Affiant also interviewed a citizen at 21423 Mandarin Glen who advised that on Sunday, September 18, 2016, at a time estimated by him to be right at duck [sic], observed a white, Lexus GS300 vehicle, driven by a large black male lapped his residence three (3) times. Shortly after this vehicle passed by his residence the last time, the citizen stated he heard the sirens of emergency vehicles and came outside to see what was happening. The address of 21423 Mandarin Glen is approximately 2.5 blocks from the residence where the robbery and murder occurred.

On September 22, 2016, the vehicle bearing Texas license plate GTK-6426 was stopped by patrol deputies for traffic violations and

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correctly identified September 17, 2016 as a Saturday and September 18, 2016 as a Sunday. Both the magistrate and the trial court properly concluded that the incorrect dates were typographical errors. And while Appellee does not complain about this typographical error, we note that purely technical or clerical discrepancies in dates or times do not automatically invalidate search or arrest warrants. *See Green v. State*, 799 S.W.2d 756, 759 (Tex. Crim. App. 1990).

was being operated by John Wesley Baldwin III, a black male, date of birth June 15, 1988. Baldwin gave consent to search the vehicle and a Samsung Galaxy5, within a red and black case was recovered. Baldwin stated that the phone carried the number 832-541-2500.

Based on your Affiant's training and experience, Affiant knows that phones and "smartphones" such as the one listed herein, are capable of receiving, sending, or storing electronic data and that evidence of their identity and others may be contained within those cellular "smart" phones. Affiant also knows it is possible to capture video and photos with cellular phones. Further, Affiant knows from training and experience that cellular telephones are commonly utilized to communicate in a variety of ways such as text messaging, calls, and e-mail or application programs such as google talk or snapchat. The cellular telephone device, by its very nature, is easily transportable and designed to be operable hundreds of miles from its normal area of operations, providing reliable and instant communications. Affiant believes that the incoming and outgoing telephone calls, incoming and outgoing text messaging, emails, video recordings and subsequent voicemail messages could contain evidence related to this aggravated assault investigation.

Additionally, based on your Affiant's training and experience, Affiant knows from other

cases he [sic] has investigated and from training and experiences that it is common for suspects to communicate about their plans via text messaging, phone calls, or through other communication applications. Further, Affiant knows from training and experiences that someone who commits the offense of aggravated assault or murder often makes phone calls and/or text messages immediately prior and after the crime.

Affiant further knows based on training and experience, often times, in a moment of panic and in an attempt to cover up an assault or murder that suspects utilize the internet via their cellular telephone to search for information. Additionally, based on your Affiant's training and experience, Affiant knows from other cases he has investigated and from training and experiences that searching a suspect's phone will allow law enforcement officers to learn the cellular telephone number and service provider for the device. Affiant knows that law enforcement officers can then obtain a subsequent search warrant from the cellular telephone provider to obtain any and all cell site data records, including any and all available geo-location information for the dates of an offense, which may show the approximate location of a suspect at or near the time of an offense.

Based on Affiant's training and experience, as well as the totality of the circumstances involved in this investigation, Affiant has reason to believe that additional evidence

> consistent with robbery and/or murder will be located inside the cellular telephone, more particularly described as: a Samsung Galaxy5, within a red and black case, serial #unknown, IMEI #unknown. Affiant believes that call data, contact data, and text message data, may constitute evidence of the offense of robbery or murder. Affiant marked the phone with the unique identifier HC16-0149834 and it is currently located at 601 Lockwood, Houston, Harris County, Texas.

A magistrate issued the search warrant. A Harris County grand jury indicted Appellee for the murder of Adrianus Kusuma in the course of robbing him.

Motion to Suppress

Appellee filed a motion to suppress the statements he made to the police and the evidence found on his cell phone. The Honorable Judge Denise Collins of the 208th District Court held a hearing on the motion on December 18, 2018. She found that the traffic stop was pretextual but lawful and denied the motion to suppress Appellee's statements. Judge Collins then determined that the affidavit was insufficient to connect either Baldwin or his cell phone to the capital murder.[2] Judge Collins orally noted three

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[2] Judge Collins's oral finding:

> The probable cause directed at that phone, there is nothing in that warrant directing probable cause to Mr. Baldwin at all. . . . [T]here is nothing in the warrant to tie that vehicle to Mr. Baldwin other than he was stopped four days later driving it; and I don't find that is sufficient to create the probable cause that the phone that he had would contain evidence of a capital murder.

particular omissions within the affidavit: (1) the affiant reported that one witness had identified the driver of the sedan as a "large black male," but the affiant merely described Baldwin as a "black male," without identifying his size; (2) the affiant did not explain how investigators had tracked down Baldwin to his girlfriend's apartment, even though that information was known to them; and (3) the affiant did not indicate that Baldwin was the actual owner of the sedan where the cell phone was found. Judge Collins granted Appellee's motion as to the cell phone evidence only; however, she did not put her ruling or findings in writing.

In a written order dated January 11, 2019, the Honorable Judge Greg Glass, the newly elected judge of the 208th District Court, granted Appellee's motion in its entirety (as to both the cell phone evidence and Appellee's statements) without holding a hearing or making written findings. The State appealed the order, raising two issues in its brief. First, the State argued that Judge Glass should not have suppressed the cell phone evidence because, when viewed in the light most favorable to the magistrate's decision, the affidavit supported a finding of probable cause. Second, the State argued that Judge Glass should not have suppressed Baldwin's statements because Judge Collins had previously found that the traffic stop was lawful, and that finding was supported by evidence developed at the hearing.

The Interlocutory Appeal and Abatement

Due to the conflicting rulings, the Fourteenth Court of Appeals abated the appeal and remanded the case to Judge Glass with instructions to conduct

a hearing and clarify the scope of his order. The court of appeals explained that it could not address the sufficiency of the affidavit without first addressing the lawfulness of the traffic stop. If the traffic stop had been unlawful, then all the evidence would need to be suppressed under the exclusionary rule (unless an exception applied, which the State had not suggested). The lower court refused to infer from Judge Glass's ruling a finding as to the lawfulness of the traffic stop. On remand, Judge Glass held a brief hearing and explained that he had intended to adopt his predecessor's rulings. He then signed an amended order granting Appellee's motion as to the cell phone evidence only.

Because the amended order mooted the State's argument that the traffic stop was lawful, the court of appeals only addressed the sufficiency of the search warrant affidavit. In a panel opinion, with Justice Bourliot dissenting, the court of appeals reversed Judge Glass's ruling and remanded the case to the trial court. *State v. Baldwin*, No. 14-19-00154-CR, 2020 WL 4530149, at *1 (Tex. App.—Houston [14th Dist.] Aug. 6, 2020, *withdrawn and superseded on reh'g,* 614 S.W.3d 411 (Tex. App.—Houston [14th Dist.] Dec. 10, 2020) (en banc).

Appellee filed a motion for rehearing and a motion for en banc reconsideration. The en banc court of appeals granted his motion for en banc reconsideration, withdrew its prior opinion, and affirmed Judge Glass's ruling granting Appellee's motion to suppress the evidence found on his cell phone. *State v. Baldwin*, 614 S.W.3d 411, 413 (Tex. App.—Houston [14th Dist.] 2020) (en banc) (op. on rehearing). Justice Zimmerer joined Part II of the majority opinion only and filed a

concurring opinion. *Id.* at 419. Justice Christopher filed a dissenting opinion joined by Chief Justice Frost and Justices Wise and Jewell. *Id.* at 419, 422.

Court of Appeals Opinions

En Banc Majority Opinion

The court below determined that the affidavit did not contain sufficient and particularized facts to establish probable cause that a search of Appellee's cell phone was likely to produce evidence in the investigation of the murder. *Id.* at 415-16. Instead, the affidavit establishes that the perpetrators left the murder scene in a white four-door sedan, two neighbors saw a white four-door sedan in the neighborhood the day before and the day of the murder, and security footage recorded a white sedan in the neighborhood the day before and the day of the murder. *Id.* at 416. However, "there are no facts from which to infer that the witnesses all saw the same sedan" or that the security footage recorded the same sedan the witnesses saw. *Id.* The only fact tying Appellee to the neighborhood is the photo of the license plate taken the day before the murder. *Id.* At most, according to the lower court, "the magistrate could infer that [Appellee] (or someone driving his car) was in the neighborhood the day before the murder." *Id.*

The court below relied on *State v. Duarte*, 389 S.W.3d 349, 354 (Tex. Crim. App. 2012), for the proposition that for the magistrate's implied finding to be reasonable, the warrant application must show a correlation between Appellee's car and the car used in the murder. *Baldwin*, 614 S.W. 3d at 416. Applying *Duarte*, the court below found there was no evidence

that Appellee's car was the same car in the neighborhood on the day of the murder and used in the murder. *Id*. The court noted,

> it would strain credulity to conclude that in a county with nearly five million people that evidence of a crime probably would be found in a someone's car just because he was in the neighborhood the day before the offense in a car the same color as the one driven by a suspect who also happened to be Black.

Id. (citing *Amores v. State*, 816 S.W.2d 407, 412-16 (Tex. Crim. App. 1991)). Therefore, the warrant application showed no nexus between Appellee's car and the car at the scene of the murder. *Id*. at 417.

The lower court also distinguished between the instant case and *Ford v. State*, 444 S.W.3d 171, 193 (Tex. App.—San Antonio 2014), *aff'd*, 477 S.W.3d 321 (Tex. Crim. App. 2015). *Baldwin*, 614 S.W.3d at 416-17. In *Ford*, the car was specifically described as a Chevy Tahoe with a roof rack and horizontal stripes, and other facts tied the defendant to the incident. *Ford,* 444 S.W.3d at 180. In the instant case, according to the lower court, nothing distinctive tied Appellee's car to the one seen at the murder. *Baldwin*, 614 S.W.3d at 416-17.

The court below was also critical of the "generic recitations about the abstract use of cell phones" in the affidavit. *Id*. For example, the affiant stated that cell phones "are commonly utilized to communicate in a variety of ways such as text messaging, calls, and e-mail or application programs such as google talk or snapchat" and that "it is common for suspects to communicate about their plans via text messaging,

phone calls, or through other communication applications." *Id.* However, this generic language that "a smart phone may reveal information relevant to an offense and that suspects might communicate about their plans on a cell phone is not sufficient to establish probable cause to seize and search a cell phone." *Id.*; *see Martinez v. State*, No. 13-15-00441-CR, 2017 WL 1380530 at *3 (Tex. App.—Corpus Christi Feb. 2, 2017, no pet.) (mem. op, not designated for publication); *see also Duarte*, 389 S.W.3d at 360.

Ultimately, the intermediate court held that, "while magistrates may draw reasonable inferences from . . . the four corners of an affidavit, if too many inferences are drawn, 'the result is a tenuous rather than a substantial basis for the issuance of a warrant.'" *Baldwin,* 614 S.W.3d. at 418 (quoting *Davis v. State*, 202 S.W.3d 149, 157 (Tex. Crim. App. 2006)). In this case, the nexus between the car Appellee was driving and the car seen at the murder scene was "tenuous at best." *Id.* Extending that nexus to include Appellee's cell phone would be extending the reach of probable cause too far. *Id.*

Concurring Opinion

Justice Zimmerer filed a concurring opinion, disagreeing with the majority that there was no nexus between Appellee's car and the murder, while agreeing with the majority that the affidavit did not establish a nexus between criminal activity and the cell phone. *Id.* at 419. The concurring opinion noted that the cases cited by both the dissent and the State contained "more particular facts tying the cell phone to the alleged offense" than the affidavit in the case before us. *Id.* at 422. Specifically, Justice Zimmerer

stated, "The affidavit in this case goes no further than broad statements that 'criminals often use cell phones' and 'criminals often make plans on cell phones.'" *Id.* Therefore, because the affidavit in this case provided no facts that a cell phone was used during the commission of the offense, the magistrate could not reasonably infer that evidence of the murder could be found on the cell phone. *Id.*

Dissenting Opinion

Justice Christopher, joined by Chief Justice Frost and Justices Wise and Jewell, dissented and criticized the majority for supplanting its judgment for that of the magistrate and imposing a rigid and unrealistic standard for probable cause. *Id.* Instead, the dissenters would hold the magistrate "implicitly found that there was probable cause to believe that a search of Appellee's cell phone would likely produce evidence in the investigation" of the murder. *Id.* at 422-23. According to the dissent, the magistrate's finding is based on the facts, inferences, and a "common-sense reading of the affidavit." *Id.* at 424.

Petition for Discretionary Review

On petition for discretionary review, the State argues that the affidavit supported the magistrate's implied finding of probable cause because it contained sufficient facts showing that a search of Appellee's cell phone would probably produce evidence of preparation and the identity of the other participant in the murder. In addition, the State argues that particularized facts are not required. Instead, according to the State, nothing other than the affiant's assumption that "It is common for suspects to communicate about their

plans via text messaging, phone calls, or through other communication applications" is necessary to connect the murder with Baldwin's phone.

We granted review of the following two issues:

(1) Did the court of appeals depart from the proper standard of review by substituting its own judgment for that of the magistrate who viewed the warrant affidavit and found probable cause?

(2) Did the court of appeals employ a heightened standard for probable cause, departing from the flexible standard required by law?

Analysis

While we agree that the court of appeals' analysis failed to give deference to the magistrate's implied findings with respect to the nexus between the sedan and murder, the court of appeals was correct in concluding that the boilerplate language was insufficient to establish a fair probability that evidence of the murder would be found on the cell phone.

i. The Court of Appeals Misapplied the Law with Respect to the Nexus Between Appellee's Car and the Car in the Incident

Probable cause exists when, under the totality of the circumstances, there is a fair probability that contraband or evidence of a crime will be found in a particular location. *Duarte*, 389 S.W.3d at 354. This is a flexible, non-demanding standard. *Id*. The duty of reviewing courts is to ensure a magistrate had a substantial basis for concluding that probable cause existed. *Id*. Reviewing courts must give great deference

to a magistrate's probable cause determination, including a magistrate's implicit finding. *State v. McLain*, 337 S.W.3d 268, 271-72 (Tex. Crim. App. 2011). Even in close cases, reviewing courts give great deference to a magistrate's probable cause determination to encourage police officers to use the warrant process. *Duarte*, 389 S.W.3d at 354. When in doubt, reviewing courts should defer to all reasonable inferences a magistrate could have made. *Rodriguez v. State*, 232 S.W.3d 55, 61 (Tex. Crim. App. 2007). Reviewing courts should not invalidate a warrant by interpreting an affidavit in a hyper-technical rather than common-sense manner. *Id.* (n. 25); *McLain*, 337 S.W.3d at 271-72.

In determining whether an affidavit provides probable cause to support a search warrant, an issuing court and a reviewing court are constrained to the four corners of the affidavit. *McLain*, 337 S.W.3d at 271-72. We must examine the supporting affidavit to see if it recited facts sufficient to support conclusions (1) that a specific offense was committed, (2) that the property or items to be searched for or seized constitute evidence of the offense or evidence that a particular person committed it, and (3) that the evidence sought is located at or within the thing to be searched. Tex. Code Crim. Proc. Ann. art. 18.01(c).

Appellee argues that the court of appeals properly applied the standard of review by holding (1) that the statements in the affidavit did not support reasonable inferences that all the vehicles were the same and (2) that there was no nexus between the white sedan observed fleeing the murder and the vehicle Appellee was driving four days later. We disagree with both

Appellee's and the majority's conclusion that there was no nexus between Baldwin's vehicle and the offense.

The State alleges that it was reasonable for the magistrate to infer that the Lexus that Appellee was driving four days after the offense was linked to the capital murder. We agree. The magistrate considered evidence from the homeowner's brother, neighbors, and security footage and made an implied finding that all three witnesses saw the same vehicle. The magistrate could have reasonably determined that—even in a county as populous as Harris County—the sedan observed by neighbors and captured by security footage was the same sedan witnessed by the complainant's brother. For one thing, while the complainant's brother did not describe the car he saw in detail, his description narrowed the class of cars by color and number of doors, and his description did not differ from the descriptions of the car observed by neighbors and captured by security footage.

Moreover, the brother's description fit the car that drove by the complainant's residence multiple times the day before the murder and that was captured on camera circling the neighborhood. On this point, we agree with the dissent's observation: the separate sightings were too similar and too coincidental to be unrelated. The majority ignores that part of the affidavit describing the neighborhood as having only a single point of ingress and egress and a single circling boulevard with multiple cul-de-sacs branching out from the main boulevard. The dissent continued that, because of this fact, the magistrate could reasonably infer:

1. Because thru traffic is not possible in this neighborhood, there is a reasonable proba-

bility that the vehicles seen most frequently there belong to the residents of the neighborhood, which would also tend to explain why two separate neighbors became suspicious of an unfamiliar sedan circling the area.

2. Because the neighbors' suspicions were raised on two consecutive days about sedans that were similar in appearance, there is a reasonable probability that the neighbors witnessed the same sedan, and that its driver was deliberately circling the neighborhood in preparation for the capital murder.

3. Because the sedan was positively linked to Baldwin through the license plate, there is a reasonable probability that Baldwin was the driver witnessed by the homeowner's brother and that Baldwin participated in the capital murder.

Baldwin, 614 S.W.3d at 424 (Christopher, J., dissenting). We agree that the court of appeals' analysis departed from the law in this instance because it didn't give enough deference to the magistrate's implied findings and applied an overly demanding standard for probable cause.

ii. The Search Warrant Affidavit Did Not Establish a Nexus Between Criminal Activity and the Cell Phone

Under Texas law, to search a person's cell phone after a lawful arrest, a peace officer must submit an application for a warrant to a magistrate. The application must "state the facts and circumstances that provide the applicant with probable cause to believe

that (A) criminal activity has been, is, or will be committed; and (B) searching the telephone or device is likely to produce evidence in the investigation of the criminal activity described in Paragraph (A)." Tex. Code Crim. Proc. Ann. art. 18.0215(c)(5).

While there is no statutory definition of "probable cause," under the Fourth Amendment, an affidavit is sufficient to establish probable cause if, from the totality of the circumstances reflected in the affidavit, the magistrate was provided with a substantial basis for concluding that probable cause existed. *Illinois v. Gates*, 462 U.S. 213, 238-39, (1983). However, *Gates* noted that the conclusory allegations alone are insufficient to support a finding of probable cause and that "sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others." *Id*. at 239.

Gates then highlighted two cases that "illustrate the limits beyond which a magistrate may not venture in issuing a warrant." *Id*. In *Nathanson v. United States*, 290 U.S. 41, 44, 46 (1933), the Supreme Court held that the sworn statement of an affiant that "he has cause to suspect and does believe" that liquor illegally brought into the United States is located on certain premises was conclusory and failed to establish probable cause. The *Gates* Court observed, "[a]n affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause, and the wholly conclusory statement at issue in *Nathanson* failed to meet this requirement." 462 U.S. at 239.

Once again in *Aguilar v. Texas*, 378 U.S. 108, 109 (1964), the Supreme Court held that an officer's

statement that "[a]ffiants have received reliable information from a credible person and do believe" that heroin is stored in a home is insufficient to establish probable cause. The *Gates* Court continued, "[a]s in *Nathanson*, this is a mere conclusory statement that gives the magistrate virtually no basis at all for making a judgment regarding probable cause." *Gates*, 462 U.S. at 239.

While these two examples did not use boilerplate language, it is clear that the jurisprudence of the Supreme Court has consistently cautioned against "bare bones" affidavits, instead requiring some sort of corroboration to the conclusory statement when a magistrate makes a probable-cause determination. Indeed, in *Gates*, the Supreme Court held that, under the totality of the circumstances, an anonymous tip was coupled with other facts and reasonable inferences, and therefore the magistrate had a "substantial basis" that a search would uncover evidence of a crime. *Id.* at 246. While we have not previously weighed in on the use of generic language in the affidavit for a warrant to search a mobile phone, we have previously held that affidavits which contain "mere conclusory allegations" are insufficient to establish probable cause. *See Rodriguez v. State*, 232 S.W.3d 55, 61 (Tex. Crim. App. 2007). Most notably, in *State v. Duarte*, we reiterated that warrants should not be issued on "bare conclusions alone." 389 S.W.3d at 354 (quoting *Gates*, 462 U.S. at 239).

As applied to cell phones and boilerplate language, the holding in *Duarte* has been interpreted by a few intermediate courts to stand for the proposition that the affidavit must contain particularized facts demon-

strating a fair probability that evidence relating to the offense would be located in the mobile phone.

In *Diaz v. State*, investigators recovered the back cover of a cell phone and a cell phone battery in a house following a burglary. 604 S.W.3d 595, 598 (Tex. App.—Houston [14th Dist.] 2020), *aff'd,* 632 S.W.3d 889 (Tex. Crim. App. Oct. 27, 2021). Three cell phones found on Diaz were searched pursuant to a warrant. *Id.* at 599. Diaz filed a motion to suppress, arguing that the probable-cause affidavit failed to establish a nexus between the cell phones and the burglary. *Id.* His motion was denied. *Id.* Because the probable-cause affidavit stated that police recovered cell phone parts from the crime scene, the Fourteenth Court of Appeals found that that the magistrate could have reasonably inferred the perpetrators possessed or used cell phones before or during the burglary and that the recovered cell phones could have evidence of the burglary. *Id.* at 604. The court of appeals expressly stated that it wasn't relying on statements in the probable-cause affidavit that criminals generally use cell phones in crimes. *Id.* The lower court's analysis merits quoting at length:

> Here, appellant argues that nothing, "other than the officer's generalized assumptions" that criminals utilize cellular telephones to communicate and share information regarding crimes they commit, connected the specified offense with the phones to be searched. We disagree because, excluding any reliance on Sergeant Angstadt's assertion that generally criminals use cellular telephones and other electronic devices to facilitate criminal activity, other facts in the affidavit establish a

sufficient nexus between the cell phones and the alleged offense.

The affidavit stated that two men were involved in the home invasion and that police recovered several parts of one or more cell phones at the scene. From this, the magistrate reasonably could infer that the perpetrators possessed or utilized one or more cell phones before or during the planning or commission of the offense and that any recovered cell phones could have evidence of the offense. For instance, the magistrate reasonably could infer that the intruders' scheme of pretending to be police officers necessitated planning, which could have been orchestrated by telephonic communication.

The affidavit also stated that DNA testing could not exclude appellant as a source of DNA on the sunglasses left at the scene, thus directly tying appellant to the crime scene. From this, the magistrate reasonably could infer that appellant was the owner of both the sunglasses and the cell phone or phones from which pieces detached during the offense and were left at the scene. Further, the affidavit provided that appellant was associated with at least two phone numbers and that police recovered a total of five cell phones in appellant's immediate possession or control upon his arrest. The magistrate reasonably could infer that appellant utilized these phones interchangeably and that evidence of criminal activity on one phone could have been transferred to another.

Diaz, 604 S.W. at 603-04.

Likewise, in *Walker v. State*, the Fourteenth Court of Appeals once again found that there was a fair probability that evidence relating to the commission of an offense, capital murder, would be found on the appellant's cell phone. 494 S.W.3d 905, 909 (Tex. App.—Houston [14th Dist.] 2016, pet ref'd). In *Walker*, investigators determined that the homicide complainant's cell phone was missing from his belt clip. *Id.* at 907. Police determined the car seen leaving the scene was the complainant's car. *Id.* The next day, when police located the complainant's car and initiated a traffic stop, Walker was driving the car with complainant's cell phone in his hand. *Id.* Walker admitted to being involved in the shooting. *Id.* The Fourteenth Court of Appeals found that a substantial basis for probable cause rested in the particularized facts connecting Walker to the cell phone. *Id.* at 909. In particular, the court cited allegations that Walker and the complainant had been communicating via Walker's cell phone planning robberies around the time that the complainant was killed and the fact that the complainant's stolen property was later found in Walker's possession. *Id.*

Although only a handful of cases address this specific issue[3], the courts below seem comfortable

[3] The Thirteenth Court of Appeals has also addressed this issue, albeit in an unpublished opinion, holding that a magistrate had a substantial basis for finding that probable cause existed to search a cell phone based on facts that the defendant communicated with his cohorts via cell phone. *Martinez v. State*, No. 13-15-00441-CR, 2017 WL 1380530, at *3 (Tex. App.—Corpus Christi Feb. 2, 2017, no pet.) (mem. op., not designated for publication). In *Martinez*, investigators pulled over a vehicle bearing the same license plate that the complainants in a suspected

with the use of boilerplate language in affidavits for warrants to search mobile phones, so long as the generic language is coupled with "other facts." Certainly, this holding seems consistent with article 18.0215(c)(5) of the Texas Code of Criminal Procedure, which requires an affidavit offered in support of a warrant to search the contents of a cell phone to "state the facts and circumstances that provide the applicant with probable cause to believe . . . searching the telephone or device is likely to produce evidence in the investigation of . . . criminal activity."

Which brings us to the issue we seek to resolve in this case: Is generic, boilerplate language about cell phone use among criminals sufficient to establish probable cause to search a cell phone? We hold it is not. Instead, specific facts connecting the items to be

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armed robbery had recorded. *Id*. at *2. Operating the vehicle was Eduardo Sanchez, who was accompanied by his girlfriend, Flor Garcia. *Id*. A subsequent search of Flor's apartment yielded evidence including, among other things, a red, white, blue and gray striped shirt (which the victim identified as the same shirt worn by the robber) and a gold necklace (which the victim identified as his own). *Id*. Flor told investigators that Martinez was one of the two subjects who committed the robbery, and she confirmed Martinez's identity by his phone number. *Id*. at *2-3. Sanchez confirmed that Martinez participated in the robbery with him. *Id*. at *3.

When arrested, Martinez had a cell phone on his person. *Id*. The probable-cause affidavit used to support the search of the cell phone included the above facts and concluded with boilerplate language that because cell phones are prevalent today, evidence tying Martinez to the robbery might be found on his cell phone. *Id*. After concluding that the trial court properly denied Martinez's motion to suppress, the Thirteenth Court of Appeals noted in *dicta* that such boilerplate language in an affidavit by itself doesn't establish sufficient probable cause to search a cell phone. *Id*.

searched to the alleged offense are required for the magistrate to reasonably determine probable cause. To hold otherwise would condone the search of a phone merely because a person is suspected to have committed a crime with another person. Put another way, all parties suspected of participating in an offense would be subject to having their cell phones searched, not because they used their phones to commit the crime, but merely because they owned cell phones.

In the instant case, the parties and the justices of the court of appeals disagree as to whether there were sufficient "other facts" present. The majority found that the only "other fact" in this case is that two black men committed the offense together and that this was insufficient to connect the mobile phone to the offense. For the dissent, that fact was sufficient to establish that the men might have used their cell phones to coordinate. The majority thinks the dissent's conclusion goes too far. We agree with the majority. While we defer to all reasonable inferences that the magistrate could have made, there are simply no facts within the four corners of the affidavit that tie Appellee's cell phone to the offense. The affidavit before us indicates nothing more than that neighbors saw a certain white sedan with a black driver circling their neighborhood the day before the offense occurred, a similar sedan was seen quickly leaving the neighborhood after the offense, and that Appellee, a black man, was driving the very same vehicle four days after the offense, and that this coincidence somehow necessarily connects Appellee's phone to the offense. That witnesses affirm the description and license plate number of the white sedan, as well as its registration to Appellee's father, are facts that

support the nexus of the vehicle to the offense, they have no bearing on whether Appellee's phone is connected with the offense. The affidavit contains nothing about the phone being used before or during the offense. Suspicion and conjecture do not constitute probable cause, and "the facts as recited in the affidavit in this cause evidence nothing more than mere suspicion." *Tolentino v. State*, 638 S.W.2d 499, 502 (Tex. Crim. App. 1982). Therefore, the magistrate erred by substituting the evidentiary nexus for the officer's training and experience and generalized belief that suspects plan crimes using their phones. The boilerplate language in itself is not sufficient to provide probable cause in this case, nor does the remaining affidavit set forth details in sufficient facts to support probable cause. Considering the whole of the affidavit, there is no information included that suggest anything beyond mere speculation that Appellee's cell phone was used before, during, or after the crime.

Presiding Judge Keller's dissent here adopts much of the reasoning of the dissent in the court below. Specifically, this dissent finds that a crime such as the one alleged here, "committed by two people, acting together over the course of two days," requires coordination. Keller, P.J., Dissenting Op. at 3. Therefore, "cell phone use would be expected," justifying the search of a phone, even if there are no facts showing that a phone was used in the planning or execution of the crime. *Id.* at 3. This dissent's reasoning would allow for the issuance of a warrant for a cell phone, without evidence that the phone was used to plan or execute the crime, as long as the offense required coordination and communication. *Id.* at 3-4. It appears the only limiting principle to this urged holding "could

be crimes that would be less likely to involve the use of a cell phone and might not support probable cause to search," such as evading arrest. *Id.* at 3. This seemingly bright-line distinction between crimes that require planning versus spontaneous crimes is contrary to the Fourth Amendment and the jurisprudence of our State, which require more than "bare conclusions" or speculation for a search warrant. *See Rodriguez*, 232 S.W.3d at 61; *Duarte,* 389 S.W.3d at 354 (quoting *Gates*, 462 U.S. at 239).

In the present case, there is no evidence that the suspects planned the offense over multiple days other than the fact that Baldwin's white sedan was seen in the neighborhood the day before the offense. There is no evidence that these particular suspects communicated about the crime by cell phone, as there was in *Walker*, 494 S.W.3d at 909. All that is present here is that two black men committed an offense together, which is clearly insufficient to establish a connection between cell phone usage and the offense.

Conclusion

The record, while viewed in the light most favorable to the magistrate's ruling, supports the trial court's conclusion that the affidavit contained insufficient particularized facts to allow the magistrate to determine probable cause for a warrant to search the phone. Insofar as the court of appeals affirmed the trial court's order granting the motion to suppress evidence obtained from the cell phone found in Baldwin's vehicle, we affirm.

Delivered: May 11, 2022

PUBLISH

DISSENTING OPINION OF PRESIDING JUDGE KELLER (MAY 11, 2022)

KELLER, P.J., filed a dissenting opinion in which YEARY, KEEL and SLAUGHTER, JJ., joined.

I agree with the Court that (so-called) boilerplate language in a probable-cause affidavit about cell phones can be considered by a court but must be coupled with other facts and reasonable inferences to establish a nexus between the device and the offense. But I disagree with the Court's conclusion that the affidavit in this case failed to establish a nexus.

The probable-cause affidavit included the following non-generic, particularized facts that I believe established a nexus between the phone and the offense. The affidavit described a robbery and murder committed by two black males. The offenses took place at a home in a neighborhood that consisted of a circling boulevard with multiple small cul-de-sacs off the main street. The neighborhood was accessible from only one street. The murder victim's brother saw the men who had committed the crime flee the scene in a white, four-door sedan. The day before the murder, a neighbor saw a white, four-door Lexus sedan, occupied by two black males, suspiciously circling several times through the neighborhood, including driving by the house where the murder later occurred. This neighbor took a photograph of the car's license plate number. Shortly after the murder, a different neighbor saw a white, four-door sedan leave the neighborhood at a high rate of speed. Another neighbor who lived two and a half blocks from the murder saw a white Lexus GS300 lap his house three times on the day of

the murder. Surveillance videos from the neighborhood on the day before and the day of the murder showed a car similar in appearance to the car with the license plate in the photo. On the day of the murder, the video showed the car circling the neighborhood and pausing in front of a house a few doors down from the scene of the murder. Four days later, the car with that license plate was stopped and, with consent, was searched. Appellee was the driver, and his cell phone was found in the car during that search.

The Court agrees that the car Appellee was driving was itself sufficiently linked to the robbery and murder. The cell phone was found in that car. The cell phone's presence in Appellee's car that was linked to the crime is itself a fact linking the phone to the crime.[1]

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[1] *United States v. Johnson*, 726 Fed. Appx. 393, 403 (6th Cir. 2018), *vacated on other grounds*, 139 S. Ct. 2772 (2019) (phone found at residence at which marijuana was being grown); *People v. Reyes*, 174 N.E.3d 127, 140 (Ill. App. [2d Dist.] 2020), *appeal denied*, 169 N.E.3d 346 (Ill. 2021), *cert. denied*, 142 S. Ct. 295 (2021) (upholding search of phone pursuant to warrant and remarking, "The discovery of the phone in his car also supports the inference that it was there during the offenses. Hence, Judge Collins reasonably could infer that the phone contained evidence of the offenses, because (1) it was recovered from defendant's car or, alternatively, (2) defendant carried it on his person and he was at the crime scene."); *Carter v. State*, 105 N.E.2d 1121, 11-28-29 (Ind. App.), *transfer denied* (Ind. 2018) (court found sufficient nexus between drug dealing and cell phone because drugs were found with defendant in vehicle and cell phone was recovered from defendant); *State v. Every*, 274 So.3d 770, 782-83 (La. App. [5th Cir.]), *writ denied*, 274 So.3d 1260 (La. 2019) (phone that was found in car and belonged to the defendant was determined to have sufficient connection to murder and robbery given armed entry by defendant and co-defendant together).

And the crime here—capital murder—was committed by two people, acting together over the course of two days, and it was the kind of crime that involves coordination, so cell phone use would be expected. There could be crimes that would be less likely to involve the use of a cell phone and might not support probable cause to search.[2] But it should come as no surprise that a cell phone would be used in the planning and commission of a crime such as the one before us,[3] at least when the defendant had an accomplice.[4]

Finally, I agree with the dissenting opinion in the court of appeals that "[i]t is common for suspects to communicate about their plans via text messaging, phone calls, or through other communication applications."[5] As the dissent put it:

> This statement establishes that criminal suspects use cellphones for planning purposes, and that fact has some bearing here because the affidavit established that the capital murder was committed, not by a lone wolf, but by two men acting in concert who prepared for the offense over the course of two days. The

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[2] If the crime had been, say, evading arrest in a vehicle, the presence of a phone in the car might not be significant.

[3] *See United States v. James*, 3 F.4th 1102, 1105 (8th Cir. 2021) (upholding search warrant to search cell tower records to identify possible robber from cell phone hits at various robbed locations).

[4] *See supra* at n.1 (citing *Every*).

[5] *State v. Baldwin*, 614 S.W.3d 411, 425 (Tex. App.—Houston [14th District] 2020) (Christopher, J., dissenting).

> magistrate could have reasonably concluded that this joint activity required a certain level of coordination and communication, the evidence of which might be discovered on a cellphone.[6]

I would hold that the particularized facts described above, coupled with what we know about how cell phones are used, were sufficient to establish probable cause to search the cell phone.

I respectfully dissent.

Filed: May 11, 2022

PUBLISH

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6 *Id.*

DISSENTING OPINION OF JUDGE YEARY (MAY 11, 2022)

YEARY, J., filed dissenting opinion.

"Boilerplate" is not a dirty word. In the legal context, it usually refers to standardized language that is frequently pre-printed on a contract or other legal document for the sake of convenience, since it will be applicable far more often than not.[1] The Court points to nothing in the warrant affidavit in this case that appears to have been pre-printed, and it seems to use the descriptor "boilerplate" interchangeably with "generic." So, I take it that the Court only means to communicate that the language it says is "boilerplate" has general application; and that, because of that very generality, such language is insufficient, on its own, to supply the degree of particularity required to satisfy probable cause.

Unlike the Court, and for the same reasons expressed in Presiding Judge Keller's dissent, I am persuaded that the affidavit furnished by the officer in this case expressed at least probable cause to believe that evidence of the crime would be found by examining the entire contents of the phone. But even if I did not join the Presiding Judge in that view, I would be troubled by the Court's willingness to approve the trial court's seemingly wholesale exclusion of all evidence that might be, or have been, gathered from the phone without first considering whether the facts stated in the affidavit were sufficient to search

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[1] *See, e.g.*, BLACK'S LAW DICTIONARY 216 (11th ed. 2019) ("1. Ready-made or all-purpose language that will fit in a variety of documents.").

at least certain unique applications on the phone that would certainly lead to actionable evidence. Foremost among these unique applications would be the one that would identify the name of the phone service provider.

The affidavit of the officer explained,

> based on your Affiant's training and experience, Affiant knows from other cases he has investigated and from training and experiences that searching a suspect's phone will allow law enforcement officers to learn the cellular telephone number and service provider for the device. Affiant knows that law enforcement officers can then obtain a subsequent search warrant from the cellular telephone provider to obtain any and all cell site data records, including any and all available geo-location information for the dates of an offense, which may show the approximate location of a suspect at or near the time of an offense.

Majority Opinion at 6. There is no question that evidence developed in this case established probable cause to arrest Appellee for the charged offense. The affidavit for search also confirmed that the phone at issue was found with Appellee at the time of his detention and that he admitted being connected to the phone by informing officers of the phone number attached to it at the same time. Majority Opinion at 5. A search of the cell phone for the identity of the service provider could therefore according to a combination of facts developed in the investigation and other facts more generally known to the applicant officer (all of which were stated in the affidavit)—

lead to the development of facts that would demonstrate Appellee's location at the time that the crime occurred as well as on the day before, when neighbors of the victim saw a suspicious vehicle "casing" the neighborhood. Other applications likely to be on the phone also would similarly probably contain information that might show Appellee's location at those times.

The Court all but ignores the actual grounds we granted review to consider: "(1) Did the court of appeals depart from the proper standard of review by substituting its own judgment for that of the magistrate who viewed the warrant affidavit and found probable cause?"; and "(2) Did the court of appeals employ a heightened standard for probable cause, departing from the flexible standard required by law?" Although the Court's opinion gives a modicum of pen-service to the standard of review applied by the court of appeals, the Court's opinion seems to fall into the same error that the State has argued was made by the court of appeals.

Instead of answering the grounds that this Court granted review to assay, concerning whether the court of appeals properly applied the appropriate standard of review to the issue before it, the Court instead makes up a new ground upon which to base its own independent determination: "Is generic, boilerplate language about cell phone use among criminals sufficient to establish probable cause to search a cell phone?" And then, as if answering the actual ground we granted for review, the Court answers its own question: "We hold it is not." Majority Opinion at 21.

The Court's opinion also announces what, in my opinion, is an overly categorical rule that focuses too acutely on whether a warrant relies on so-called boilerplate language. In doing so, the Court fails to

exhibit the great deference that is owed under the Fourth Amendment to the magistrate who issued the warrant in the first place. *See Jones v. State*, 364 S.W.3d 854, 857 (Tex. Crim. App. 2012) (observing that a reviewing court should afford "great deference" to the magistrate's probable cause judgment respecting probable cause, and that the magistrate's view should prevail in "marginal cases"); *Massachusetts v. Upton*, 466 U.S. 727, 733 (1984) ("A deferential standard of review is appropriate to further the Fourth Amendment's strong preference for searches conducted pursuant to a warrant."). And it fails to acknowledge that, at least with regard to certain information and applications that will likely be found within the phone, the affidavit supplies more than sufficient probable cause to justify the magistrate's issuance of the warrant.

The Court could have expressed an opinion that was narrower—one that merely contended that perhaps the court of appeals should have focused on the fact that the general nature of the warrant's search authority was too broad given the limited information contained in the warrant. I would not have joined that opinion either, but it would have been preferable to the opinion that the Court issues today. I believe that the Court's opinion in this case will serve only to significantly inhibit otherwise perfectly constitutional future investigative activities by law enforcement. Neither the law nor the people will be served by this decision, but criminals and their enterprises will benefit.

With these brief further comments, I join the Presiding Judge's dissent.

Filed: May 11, 2022 PUBLISH

EN BANC MAJORITY OPINION OF THE FOURTEENTH COURT OF APPEALS (DECEMBER 10, 2020)

Affirmed and En Banc Majority, Concurring, and Dissenting Opinions filed December 10, 2020.

PUBLISH

IN THE FOURTEENTH COURT OF APPEALS

THE STATE OF TEXAS,

Appellant,

v.

JOHN WESLEY BALDWIN,

Appellee.

No. 14-19-00154-CR

On Appeal from the 208th District Court
Harris County,
Texas Trial Court Cause No. 1527611

Before: FROST, Chief Justice, CHRISTOPHER, WISE, JEWELL, BOURLIOT, ZIMMERER, SPAIN, HASSAN, and POISSANT, Justices.

EN BANC MAJORITY OPINION

This is an interlocutory appeal from an order granting a motion to suppress. In August 2020, a

panel of this court reversed the trial court's suppression order as to cellphone evidence and remanded the case to the trial court for further proceedings. Appellee John Wesley Baldwin filed a motion for rehearing and a motion for en banc reconsideration. A majority of the en banc court voted to grant the motion for en banc reconsideration, and the en banc court has reconsidered this appeal. Today, the en banc court withdraws the majority opinion, vacates the judgment of August 6, 2020, and issues this en banc majority opinion and judgment.

We address whether a search-warrant affidavit set forth facts sufficient to establish probable cause for the search of a cellphone. The trial court ruled that the affidavit was insufficient and suppressed all evidence obtained from the cellphone. We affirm.

Background

While committing a robbery, two masked gunmen shot and killed a homeowner. The homeowner's brother witnessed the offense and said the offenders were Black men who fled the scene in a white, four-door sedan. Around that time, a neighbor observed a white, four door sedan exiting the neighborhood at a "very high rate of speed."

Investigators obtained security footage from a nearby residence which showed a white sedan in the neighborhood on the day before (and on the day of) the murder. Four times, the white sedan entered the street, which ended in a cul-de-sac, and circled the neighborhood where the murder later occurred. A neighbor told investigators that a white sedan had passed by his residence three times shortly before

the murder. That neighbor could only describe the driver as a "large Black male."

Another neighbor said that she had seen a white, four-door sedan in the neighborhood on the day before the murder. She said she saw two Black men in the sedan. She took a picture of the sedan and captured the sedan's license plate. Based on this information, investigators learned that the sedan in the photo was registered to Baldwin's stepfather, who told investigators that he had sold the sedan to Baldwin and Baldwin was living at his girlfriend's apartment.

Investigators located the sedan at that apartment four days after the murder. Baldwin eventually drove away in the sedan, and investigators followed him in unmarked units but requested a marked unit to develop probable cause to stop Baldwin for a traffic violation. Officers in a marked unit eventually pulled Baldwin over for making an unsafe lane change. Baldwin was arrested for the traffic violation, for driving with an expired license, and for failing to show identification on demand. Investigators also impounded the sedan.

After his arrest, Baldwin gave a statement and consented to a search of the sedan. A cellphone was found in the sedan, but Baldwin would not consent to a cellphone search. Investigators applied for a warrant to search the cellphone, and a magistrate issued the search warrant.

Baldwin moved to suppress the evidence of his statements on the grounds that he did not commit a traffic violation and to suppress the cellphone evidence as fruit of the poisonous tree. Alternatively, Baldwin

argued the affidavit in support of the search warrant was legally insufficient to support a finding of probable cause.

The Honorable Denise Collins held a hearing on the motion. After considering the evidence and arguments of counsel, she orally ruled that the traffic stop was lawful and denied the motion to suppress Baldwin's statements. As for the cellphone evidence, Judge Collins determined that the affidavit was insufficient to connect either Baldwin or his cellphone to the murder. Judge Collins ruled that the motion to suppress would be granted in part as to the cellphone evidence, but she did not reduce this ruling or any of her findings to writing before her term of office expired.

The Honorable Greg Glass succeeded Judge Collins. Judge Glass issued a written order on the motion to suppress granting the motion in its entirety without a hearing. Like his predecessor, Judge Glass did not make any written findings. The State brought this interlocutory appeal of Judge Glass's written order, challenging the suppression of the cellphone evidence and Baldwin's statements.

The original court panel set the case for submission with oral argument and raised its own set of concerns. The panel told the parties that the court could not address the sufficiency of the affidavit without first addressing the lawfulness of the traffic stop, because if the traffic stop had been unlawful, then all of the evidence would need to be suppressed under the exclusionary rule. The panel also explained that the court could not determine whether Judge Glass believed that the traffic stop was unlawful or whether he had

intended to adopt the finding from Judge Collins that the traffic stop was lawful.

To settle these questions, the panel abated the appeal and remanded the case to Judge Glass with instructions to clarify the scope of his order. Upon remand, Judge Glass held a brief hearing, during which he explained that he had intended to adopt all of Judge Collins's rulings. Judge Glass signed an amended order granting the motion to suppress as to the cellphone evidence only and denying the motion as to Baldwin's statements. Accordingly, the amended order mooted all the State's issues on appeal except for the one concerning the cellphone evidence.

Analysis

The United States Constitution mandates that a warrant cannot issue "but upon probable cause" and must particularly describe the place to be searched and the persons or things to be seized. U.S. Const. amend. IV. The core of this clause and its Texas equivalent is that a magistrate cannot issue a search warrant without first finding probable cause that a particular item will be found in a particular location. *State v. Duarte*, 389 S.W.3d 349, 354 (Tex. Crim. App. 2012) (citing U.S. Const. amend. IV and Tex. Const. art. I, § 9). Probable cause to support issuing a warrant exists when, under the totality of the circumstances, there is a "fair probability" that contraband or evidence of a crime will be found. *Id.* This is a flexible, non-demanding standard. *Id.* But a magistrate's action cannot be a mere ratification of the bare conclusions of others; a magistrate cannot be a rubber stamp. *Id.*

We must conscientiously review the sufficiency of affidavits on which warrants are issued. *See id*. We may uphold a magistrate's probable cause determination only if the magistrate had a substantial basis for concluding that probable cause existed. *State v. McLain*, 337 S.W.3d 268, 271 (Tex. Crim. App. 2011). When the trial court determines whether probable cause supported the magistrate's issuance of a search warrant, there are no credibility determinations, and the trial court is constrained by the four corners of the affidavit. *Id*. Although a magistrate may not baselessly presume facts that the affidavit does not support, he or she is permitted to make reasonable inferences from the facts recited in the affidavit. *Foreman v. State*, No. PD-1090-18, 2020 WL 6930819, at *2 (Tex. Crim. App. Nov. 25, 2020). Trial and appellate courts apply a highly deferential standard when reviewing a magistrate's decision to issue a warrant because of the constitutional preference for searches to be conducted pursuant to a warrant. *Id*. On appeal, we must interpret the affidavit in a commonsensical and realistic manner, recognizing that the magistrate may draw reasonable inferences and deferring to all reasonable inferences that a magistrate could have made. *See id*.

Nevertheless, an affidavit offered in support of a warrant to search the contents of a cellphone must "state the facts and circumstances that provide the applicant with probable cause to believe . . . searching the telephone or device is likely to produce evidence in the investigation of . . . criminal activity." Tex. Code Crim. Proc. art. 18.0215(c)(5)(B). We have held that such an affidavit "must usually include facts that a cell phone was used during the crime or shortly before

or after." *Diaz v. State*, 604 S.W.3d 595, 603 (Tex. App.—Houston [14th Dist.] 2020, pet. granted) (citing *Foreman v. State*, 561 S.W.3d 218, 237-38 (Tex. App.—Houston [14th Dist.] 2018) (en banc) (noting, in dicta, that "an affidavit offered in support of a warrant to search the contents of a cellphone must usually include facts that a cellphone was used during the crime or shortly before or after"), *rev'd*, No. PD-1090-18, 2020 WL 6930819 (Tex. Crim. App. Nov. 25, 2020)).

We thus analyze whether there were sufficient facts in the affidavit to establish probable cause that a search of Baldwin's cellphone was likely to produce evidence in the investigation of the murder.[1] *See* Tex. Code Crim. Proc. art. 18.0215(c)(5)(B). The affidavit did not contain any particularized facts connecting a cellphone to the offense, which we have required in other warrant cases involving cellphones. *See, e.g.*, *Diaz*, 604 S.W.3d at 604 (in a case involving burglary during an aggravated assault, the magistrate could reasonably infer the perpetrators "possessed or utilized one or more cell phones before or during the planning or commission of the offense" because "several parts of one or more cell phones [were found] at the scene" and "the intruders' scheme [involved] pretending to be police officers [which] necessitated planning"); *Aguirre v. State*, 490 S.W.3d 102, 116 (Tex. App.—

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[1] An affidavit offered in support of a warrant to search the contents of a cellphone must also state the facts and circumstances that provide the officer with probable cause to believe that "criminal activity has been, is, or will be committed." Tex. Code Crim. Proc. art. 18.0215(c)(5)(A). The parties do not dispute that a murder was committed, and we do not address this issue as it is unnecessary to our disposition of the case.

Houston [14th Dist.] 2016, no pet.) (in a case for continuous sexual abuse of a young child, the affidavit established that the defendant had photographed the child complainant with a cellphone); *Walker v. State*, 494 S.W.3d 905, 908-09 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) (in a capital murder case, the affidavit established that the defendant and the complainant had discussed the commission of crimes over a cellphone).

I. Facts Surrounding the Offense

The affidavit establishes that the perpetrators left the scene of the offense in a white, four-door sedan. Two neighbors saw a white, four-door sedan in the neighborhood on the day before and the day of the murder. A surveillance video recorded a white sedan in the neighborhood the day before and the day of the murder. There are no facts from which to infer that the witnesses all saw the same sedan or that the surveillance video recorded the same sedan as the one seen by the witnesses. The only fact tying Baldwin to the neighborhood is the photograph of the license plate on his car taken the day before the murder. None of the facts in the affidavit ties Baldwin or the cellphone found in his vehicle to the commission of this or any other offense. At most, the magistrate could infer that Baldwin (or someone driving his car) was in the neighborhood the day before the murder.

The dissent contends that we "refuse[ ] to defer to the magistrate's implied finding [that all three witnesses saw the same sedan] because the first two witnesses did not record a license plate." To the contrary, for the magistrate's implied finding to be reasonable, the warrant application must show a cor-

relation between Baldwin's vehicle and the vehicle used in the offense. *See Duarte*, 389 S.W.3d at 354. There is no evidence that Baldwin's car, which was in the neighborhood on the day before the murder, was the same car in the neighborhood on the day of the murder and used in the offense. It would strain credulity to conclude in a county with nearly five million people that evidence of a crime probably would be found in someone's car just because he was in the neighborhood on the day before the offense in a car the same color as the one driven by a suspect who also happened to be Black. *See, e.g.*, *Amores v. State*, 816 S.W.2d 407, 412-16 (Tex. Crim. App. 1991) (holding warrantless arrest was not supported by probable cause when police received report of burglary "in progress involving a black male putting something in the trunk of a car," the location of the burglary was at an apartment complex that had numerous previous reports of criminal activity, the officer "within one minute of the report" observed a Black male sitting behind the wheel of a car in the parking lot of the apartment complex, the Black male was about to drive away, and the officer "knew no 'blacks' lived at these apartments"). The warrant application yields no nexus between Baldwin's vehicle and the vehicle at the scene of the offense. *See Diaz*, 604 S.W.3d at 603-04 (acknowledging that "facts in the affidavit [must] establish a sufficient nexus between the cell phones [to be searched] and the alleged offense").

In its response to Baldwin's motion for en banc reconsideration, the State relies on *Ford v. State* in an attempt to show a nexus between the white sedan that Baldwin was driving four days after the incident and the white sedan from the incident. However, the

car in the *Ford* case was specifically identified (Chevy Tahoe with roof rack and horizontal stripes), and a plethora of other specific facts linked the defendant to the incident, such as DNA, witness testimony, and surveillance photos of the vehicle on the night of the incident. 444 S.W.3d 171, 193 (Tex. App.—San Antonio 2014), *aff'd*, 477 S.W.3d 321 (Tex. Crim. App. 2015). The dissent takes issue with the fact that we require a description of the vehicle more specific than white, four-door sedan to support probable cause. But that is exactly the point. There is nothing distinctive that would tie Baldwin's white car to the one seen at the offense.

Nothing in this record beyond the color of the sedan, its number of doors, and the race and gender of its driver indicates that the sedan in the affidavit was the same sedan as the one seen in the neighborhood. Without any further information connecting the two vehicles, it is not reasonable to infer that they were one and the same in the third largest county in the country. *Cf. Amores*, 816 S.W.2d at 416 (holding lack of description of suspect beyond his gender and race, general description of vehicle, and lack of information regarding source or credibility of information were insufficient facts to support probable cause to believe the suspect had committed a burglary).

II. Reasonableness of Cellphone Search

We discuss the lack of nexus between the sedan and the crime as a significant aspect of the case because it lays the predicate to determine whether there was probable cause to search the cellphone. But our above discussion merely underpins the issue before us: whether it was reasonable for the magistrate

to connect the cellphone seized from the vehicle to any evidence of the offense. As for the language in the affidavit regarding cellphones, aside from a brief statement that a cellphone was found in the sedan driven by Baldwin, the rest of the affidavit includes only generic recitations about the abstract use of cellphones. There was no connection between (1) Baldwin's sedan and the vehicle observed leaving the scene of the offense, (2) Baldwin and the offense, or (3) the cellphone and any communication or evidence surrounding the incident. The affiant stated generally that cellphones "are commonly utilized to communicate in a variety of ways such as text messaging, calls, and e-mail or application programs such as google talk or snapchat" and that "it is common for suspects to communicate about their plans via text messaging, phone calls, or through other communication applications."

A cellphone is unique in that it can receive, store, and send the "most intimate details of a person's individual life." *State v. Granville*, 423 S.W.3d 399, 408 (Tex. Crim. App. 2014); *see also Riley v. California*, 573 U.S. 373, 386 (2014) ("Cell phones . . . place vast quantities of personal information literally in the hands of individuals."). Accordingly, generic, boilerplate language like the language in the affidavit that a smart phone may reveal information relevant to an offense and that suspects might communicate about their plans via cellphone is not sufficient to establish probable cause to seize and search a cellphone. *See Martinez v. State*, No. 13-15-00441-CR, 2017 WL 1380530, at *3 (Tex. App.—Corpus Christi Feb. 2, 2017, no pet.) (mem. op., not designated for publication) (citing *U.S. v. Ramirez*, 180 F. Supp. 3d 491, 494

(W.D. Ky. 2016)); *see also Duarte*, 389 S.W.3d at 360 (holding boilerplate affidavit containing insufficient particularized facts did not allow magistrate to determine probable cause to issue a search warrant).

Under the dissent's reasoning, any time more than one person is involved in a crime, police officers would have probable cause to search a cellphone. That is not the law in Texas. Our binding precedent requires a connection between cellphone usage and the offense. *See, e.g.*, *Diaz*, 604 S.W.3d at 604 (involving cellphone parts found at location of offense and evidence that suspects planned to impersonate officers); *Walker*, 494 S.W.3d at 909 ("A substantial basis for probable cause rests in the allegations that appellant and the complainant had been communicating via appellant's cell phone, planning robberies around the time that the complainant was killed while being robbed of possessions later found in appellant's possession."). The dissent states that boilerplate language is enough to establish probable cause when "coupled with other facts," but the only other fact in this case is that two Black men committed the offense together.[2] No other Texas case cited by the dissent goes so far as to hold that the only "other fact" needed is that two suspects were involved in planning an offense. For example, in *Diaz*, a case relied on by the dissent, several cellphone parts were found at the scene, tying at least one cellphone to the offense. 604 S.W.3d at 604. Similarly, in *Walker*, a capital murder case, the

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[2] The dissent says that "the capital murder was committed by two individuals who planned their offense over at least two days" but points to no evidence that the suspects planned the offense over at least two days other than the fact that Baldwin's white sedan was seen in the neighborhood the day before the offense.

suspect "exchanged numerous text messages and phone calls with the complainant around the time of the shooting," tying a cellphone to the murder. 494 S.W.3d at 909. Here, no facts tie a cellphone to the offense. There are no facts showing "that a cell phone was used during the crime or shortly before or after," which we have noted is usually required to support a finding of probable cause. *Compare Diaz*, 604 S.W.3d at 603, *with Foreman*, 2020 WL 6930819, at *5 (holding magistrate could reasonably infer auto shop had a video surveillance system because "concrete indications" in the affidavit showed the business had "a unique need for security on its premises and had in fact deployed some security measures").

While magistrates may draw reasonable inferences from the words contained within the four corners of the affidavit, if too many inferences are drawn, "the result is a tenuous rather than a substantial basis for the issuance of a warrant." *Davis v. State*, 202 S.W.3d 149, 157 (Tex. Crim. App. 2006). In this case, the nexus between the vehicle that Baldwin was driving and the vehicle seen at the crime is tenuous at best. Extending that nexus to include Baldwin's cellphone based on nothing more than a recitation that it is common for people to communicate their plans via text messaging, phone calls, or other communication applications would be extending the reach of probable cause too far.

Considering the totality of the circumstances, we conclude that the affidavit did not contain sufficient facts to establish a fair probability that a search of the cellphone found in Baldwin's vehicle would likely produce evidence in the investigation of the murder.

CONCLUSION

We affirm the trial court's order granting the motion to suppress evidence obtained from the cell-phone found in Baldwin's vehicle.

/s/ Frances Bourliot
Justice

En Banc Court consists of Chief Justice Frost and Justices Christopher, Wise, Jewell, Bourliot, Zimmerer, Spain, Hassan, and Poissant. Justice Bourliot authored an En Banc Majority Opinion, which Justices Spain, Hassan, and Poissant joined in full, and which Justice Zimmerer joined as to Part II. Justice Zimmerer authored an En Banc Concurring Opinion. Justice Christopher authored an En Banc Dissenting Opinion, which Chief Justice Frost and Justices Wise and Jewell joined.

Publish — Tex. R. App. P. 47.2(b).

CONCURRING OPINION OF JUSTICE ZIMMERER (DECEMBER 10, 2020)

EN BANC CONCURRING OPINION

In this interlocutory appeal from an order granting a motion to suppress the majority concludes the search warrant affidavit did not contain sufficient facts to establish a fair probability that a search of the cellphone found in Baldwin's vehicle would likely produce evidence in the investigation of the murder. En route to that conclusion the majority analyzes the nexus between Baldwin's vehicle and the offense and concludes there was no nexus between Baldwin's vehicle and the alleged capital murder. I disagree with the majority's conclusion that there was no nexus between Baldwin's vehicle and the offense. Because I agree with the majority's conclusion that the search warrant affidavit did not establish a nexus between criminal activity and the cellphone I concur in the court's judgment.

The background facts are sufficiently stated in the en banc majority and dissenting opinions. I write separately to address the trial court's ruling on probable cause and reasonable inferences.

I agree with the dissent's analysis with regard to the nexus between the vehicle Baldwin was driving and the alleged offense[1]. As noted by the dissent, how-

[1] The affidavit references twice to a "white 4-door sedan", once to "a white, 4-door Lexus vehicle, bearing Texas license plate #GTK-6426," once to "a white, 4-door vehicle, similar in appearance to the white Lexus registered under license plate GTK-6426," and once to "the vehicle" when referring to a vehicle

ever, that does not end our analysis. Relying on *Riley v. California*, 573 U.S. 373, 401 (2014), which addressed the warrantless search of a cellphone incident to arrest, the dissent correctly notes that the evidence showing a nexus between the vehicle and the alleged offense is not sufficient by itself to support the search of the cellphone. There must have been additional facts in the affidavit establishing probable cause that a search of the cellphone would likely produce evidence in the investigation of the capital murder. *See* Tex. Code Crim. Proc. art. 18.0215 (c)(5)(B).

We normally review a trial court's motion-to-suppress ruling under a bifurcated standard of review, under which we give almost total deference to the trial court's findings as to historical facts and review de novo the trial court's application of the law. *State v. McLain*, 337 S.W.3d 268, 271 (Tex. Crim. App. 2011). However, when the trial court determines probable cause to support the issuance of a search warrant, credibility is not at issue; rather, the trial court grants or denies a motion to suppress based on what falls within the four corners of the affidavit. *Id.* When reviewing a magistrate's decision to issue a warrant, appellate courts as well as trial courts apply a highly deferential standard of review because of the constitutional preference for searches conducted under

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observed to have circled three times in front of the crime scene. Known to the citizen informants, and to police, was distinctive body damage including a two to three foot gash in the right quarter panel and a distinctive dent on the rear facing portion of the trunk. However, since the facts describing the distinctive nature of the vehicle were not included in the affidavit, this specificity is not included in our analysis of the magistrate's knowledge.

a warrant over warrantless searches. *Id.* As long as the magistrate had a substantial basis for concluding that probable cause existed, we will uphold the magistrate's probable-cause determination. *Id.* We are not to view the affidavit through hypertechnical lenses; instead, we must analyze the affidavit with common sense, recognizing that the magistrate may draw reasonable inferences from the facts and circumstances contained in the affidavit's four corners. *Id.* When in doubt, we defer to all reasonable inferences that the magistrate could have made. *Id.* at 272; *see also Foreman v. State*, Nos. PD-1090-18; PD-1091-18, 2020 WL 6930819 at *3 (Tex. Crim. App. Nov. 25, 2020).

Although no single rubric definitively resolves which expectations of privacy are entitled to protection under the Fourth Amendment to the United States Constitution, the analysis is informed by historical understandings of what was deemed an unreasonable search and seizure when the Fourth Amendment was adopted. *Carroll v. United States*, 267 U.S. 132, 149 (1925). On this score, the Supreme Court has recognized that the Fourth Amendment seeks to secure "the privacies of life" against "arbitrary power." *Boyd v. United States*, 116 U.S. 616, 630 (1886). Second, and relatedly, the Court recognized that a central aim of the Framers was "to place obstacles in the way of a too permeating police surveillance." *Carpenter v. United States*, ___ U.S. ___, 138 S. Ct. 2206, 2213-14 (2018) (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)).

The Fourth Amendment, as well as Article 1, section 9 of the Texas Constitution, requires that a warrant affidavit establish probable cause to believe

a particular item is at a particular location. *Jennings v. State*, 531 S.W.3d 889, 892 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd). The core of the Fourth Amendment's warrant clause and article I, section 9, of the Texas Constitution is that a magistrate may not issue a search warrant without first finding probable cause that a particular item will be found in a particular location. *State v. Duarte*, 389 S.W.3d 349, 354 (Tex. Crim. App. 2012); *see* U.S. Const. amend. IV; Tex. Const. art. I, § 9. Under the Fourth Amendment, probable cause exists when, under the totality of the circumstances, there is a fair probability or substantial chance that contraband or evidence of a crime will be found at a specified location. *Bonds v. State*, 403 S.W.3d 867, 873 (Tex. Crim. App. 2013); *Long v. State*, 525 S.W.3d 351, 366 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd) (citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). This standard is "flexible and nondemanding." *Bonds*, 403 S.W.3d at 873.

Probable cause must be found within the "four corners" of the affidavit supporting the search warrant. *McLain*, 337 S.W.3d at 271. Magistrates are permitted to draw reasonable inferences from the facts and circumstances contained within the four corners of the affidavit. *Davis v. State*, 202 S.W.3d 149, 154 (Tex. Crim. App. 2006). However, "[w]hen too many inferences must be drawn, the result is a tenuous rather than substantial basis for the issuance of a warrant." *Id*. at 157. Probability cannot be based on mere conclusory statements of an affiant's belief. *Rodriguez v. State*, 232 S.W.3d 55, 61 (Tex. Crim. App. 2007). A reviewing court's assessment of the affidavit's sufficiency is limited to "a reasonable reading" within the four corners of the affidavit while

simultaneously recognizing the magistrate's discretion to draw reasonable inferences. *Duarte*, 389 S.W.3d at 354.

The Court of Criminal Appeals has observed that "a cell phone is unlike other containers as it can receive, store, and transmit an almost unlimited amount of private information" that "involve[s] the most intimate details of a person's individual life, including text messages, emails, banking, medical, or credit card information, pictures, and videos." *State v. Granville*, 423 S.W.3d 399, 408 (Tex. Crim. App. 2014). Because such information may or may not be "associated with criminal activity," depending on the circumstances, the State must prove on a case-by-case basis that the incriminating nature of the cell phone was immediately apparent to the officers who seized it, based on the facts and circumstances known to the officers at the moment the phone was seized.

"Regarding computers and other electronic devices, such as cell phones, case law requires that warrants affirmatively limit the search to evidence of specific crimes or specific types of materials." *Diaz v. State*, 604 S.W.3d 595, 605 (Tex. App.—Houston [14th Dist.] 2020, pet. granted). In *Diaz*, this court found the search warrant affidavit sufficiently connected the cellphone with the offense being investigated. *Id.* at 604 ("The affidavit stated that two men were involved in the home invasion and that police recovered several parts of one or more cell phones at the scene. From this, the magistrate reasonably could infer that the perpetrators possessed or utilized one or more cell phones before or during the planning or commission of the offense and that any recovered cell phones could have evidence of the offense."). In coming to

that conclusion, however, the court did not rely on the affiant's assertions that "the majority of persons, especially those using cellular telephones, utilize electronic and wire communications almost daily" or that "individuals engaged in criminal activities utilize cellular telephones and other communication devices to communicate and share information regarding crimes they commit." *Id.* The *Diaz* court found sufficient probable cause in the affidavit absent those broad generalizations. *Id.*

This court has consistently followed the same analysis with regard to cellphone searches recognizing facts stated in the affidavits that connected the cellphone to be searched with the offense alleged. *See Walker v. State*, 494 S.W.3d 905, 908-09 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd) (affidavit stated that defendant admitted shooting complainant and that defendant and complainant communicated by cellphone and exchanged messages and phone calls around the time of the shooting); *Aguirre v. State*, 490 S.W.3d 102, 116-17 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (affidavit stated that cellphone was used to photograph child complainant in child sexual assault prosecution); *Humaran v. State*, 478 S.W.3d 887, 899 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (affidavit identified defendant's disturbance call as the reason that sheriff's deputies were initially dispatched to the scene and stated that defendant acted with another person to destroy evidence).

The State relies on *Thomas v. State*, No. 14-16-00355-CR, 2017 WL 4679279, at *4 (Tex. App.—Houston [14th Dist.] Oct. 17, 2017, pet. ref'd) (mem.

op. not designated for publication)[2] and *Checo v. State*, 402 S.W.3d 440, 448 (Tex. App. Houston [14th Dist.] 2013, pet. ref'd) each of which relied on affidavits with more specific facts than in this case. In *Thomas*, the affidavit noted that a cellphone was found in a vehicle connected to an armed robbery and that phone calls had been exchanged between co-defendants in which one of the co-defendants admitted that he "hit a lick," which is street slang for robbery, and that the police had caught a co-defendant. 2017 WL 4679279 at *3. In upholding the sufficiency of the affidavit to support the search of the cellphone this court referenced use of the phone to report the robbery and a co-defendant being caught. *Id.* at *4. In *Checo*, this court upheld the sufficiency of an affidavit to support search of a computer for child pornography. 402 S.W.3d at 449-50. The affidavit in *Checo* not only relied on the affiant's training and experience that child pornographers kept child pornography on computers, but also stated that a complainant reported the defendant showing child pornography to her on a computer. *Id.* at 448.

Each of the cases from this court cited by the State and by the dissent contained more particular facts tying the cellphone to the alleged offense than the affidavit in this case. The "bare bones" affidavit in this case lacks sufficient indicia of probable cause because it fails to establish a nexus between the specific crime for which evidence is sought and the cellphone to be searched. The affidavit in this case

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[2] We are not bound by this unpublished decision in a criminal case, *see* Tex. R. App. P. 47.7(a), but address it here because the State cited it in support of its argument that the trial court erred in granting the motion to suppress.

goes no further than broad statements that "criminals often use cellphones," and "criminals often make plans on cellphones." The dissent recognizes that these broad generalizations "exemplif[y] the sort of generalization that does not suffice to establish probable cause, at least under contemporary standards where cellphones are still used by nearly everyone, law-abiding or not."

Having analyzed the affidavit with common sense, recognizing that the magistrate may draw reasonable inferences from the facts and circumstances contained in the affidavit's four corners and deferring to all reasonable inferences that the magistrate could have made, I agree with the en banc majority's conclusion that the affidavit did not contain sufficient facts to establish a fair probability that a search of the cellphone found in Baldwin's vehicle would likely produce evidence in the investigation of the murder. The affiant provided no facts that a cellphone was used during commission of the offense either directly or indirectly such that the magistrate could reasonably infer that evidence of the crime could be found on the cellphone. With these thoughts, I concur in that portion of the en banc majority opinion addressing search of the cellphone.

/s/ Jerry Zimmerer
Justice

Publish — Tex. R. App. P. 47.2(b).

DISSENTING OPINION OF JUSTICE CHRISTOPHER (DECEMBER 10, 2020)

EN BANC DISSENTING OPINION

Broadly speaking, there are two errors with the majority's analysis. First, there is no adherence to the standard of review. The majority has simply supplanted its own judgment for that of the magistrate. And second, there is no adherence to the standard for probable cause. Rather than apply the flexible and non-demanding standard that the law requires, the majority has imposed a rigid and unrealistic standard that will undo all of the dutiful efforts of law enforcement to obtain a search warrant through the proper channels.

I. The Magistrate's Decision

By issuing the search warrant, the magistrate implicitly found that there was probable cause to believe that a search of Baldwin's cellphone would likely produce evidence in the investigation of the homeowner's capital murder. *See* Tex. Code Crim. Proc. art. 18.0215(c)(5)(B). That implied finding was based on the following facts, all of which appear within the search-warrant affidavit:

1. The cellphone was found in Baldwin's sedan four days after the capital murder.
2. There was a nexus between the sedan and the capital murder, which supported a finding that Baldwin participated in the capital murder.

3. Based on the affiant's training and experience, criminals often use cellphones to coordinate their activities, which was significant here because the capital murder was committed by two individuals who planned their offense over at least two days.

The majority takes no issue with the first of these points, but the majority dismisses the second and third points, along with the legal precedent that attaches to them.

II. The Nexus Between the Sedan and the Capital Murder

The affidavit compiles the statements of three different witnesses who set forth the following facts about the sedan:

1. According to the homeowner's brother, who witnessed the capital murder, the two masked gunmen fled the scene in a white, four-door sedan.

2. According to a neighbor, there was a white, four-door sedan that was circling the neighborhood several times in the hours just before the capital murder. This neighbor's statement was corroborated by security footage.

3. According to a separate neighbor, there was a white, four-door sedan that was circling the neighborhood several times on the day before the capital murder. This neighbor was so alarmed by the sedan that she took a picture of it, and her picture captured the sedan's license plate.

The magistrate considered this evidence and made an implied finding that all three witnesses saw the same sedan, which was positively linked to Baldwin through the license plate. That implied finding is entitled to deference because a reasonable person could conclude that the separate sightings were too similar and too coincidental to be unrelated.

Yet the majority refuses to defer to the magistrate's implied finding because the first two witnesses did not record a license plate. The majority also characterizes the magistrate's implied finding as unreasonable because the first two witnesses only provided a general description of a sedan and, under the majority's restrictive view, their statements cannot be unified with the statements of the third witness unless there are more specific descriptions regarding the sedan, like whether it had a roof rack or horizontal stripes.

The majority's standard for probable cause cannot be reconciled with our jurisprudence. The standard is supposed to be "flexible and non-demanding." *See State v. McLain*, 337 S.W.3d 268, 272 (Tex. Crim. App. 2011). But the majority has demanded such a high quantum of proof that nothing less than a hard certainty will suffice. That is plainly not the law. *See State v. Elrod*, 538 S.W.3d 551, 557 (Tex. Crim. App. 2017) ("The process of determining probable cause - does not deal with hard certainties, but with probabilities.").

At the same time that the majority criticizes the so-called lack of evidence, the majority turns a blind eye to the portion of the affidavit that demonstrates the sheer unlikelihood that the witnesses saw three different sedans. This portion discusses the design of the neighborhood, which is described as having only

a single point of ingress and egress. The affidavit further indicates that, once inside the neighborhood, there is just a single "circling boulevard with multiple small cul-de-sacs" branching out from that main boulevard.

These facts about the neighborhood support the following inferences:

1. Because thru traffic is not possible in this neighborhood, there is a reasonable probability that the vehicles seen most frequently there belong to the residents of the neighborhood, which would also tend to explain why two separate neighbors became suspicious of an unfamiliar sedan circling the area.

2. Because the neighbors' suspicions were raised on two consecutive days about sedans that were similar in appearance, there is a reasonable probability that the neighbors witnessed the same sedan, and that its driver was deliberately circling the neighborhood in preparation for the capital murder.

3. Because the sedan was positively linked to Baldwin through the license plate, there is a reasonable probability that Baldwin was the driver witnessed by the homeowner's brother and that Baldwin participated in the capital murder.

All of these inferences stem from a logical and common-sense reading of the affidavit, which is how reviewing courts are supposed to approach the magistrate's determination of probable cause. *See Bonds v. State*, 403 S.W.3d 867, 873 (Tex. Crim. App. 2013).

By not deferring to these reasonable inferences, the majority has usurped the role of the magistrate.

III. The Cellphone

The evidence showing that Baldwin participated in the capital murder is not sufficient by itself to support the search of his cellphone. *Cf. Riley v. California*, 573 U.S. 373, 401 (2014) (holding that the warrantless search of a cellphone cannot be supported under the doctrinal exception for searches incident to arrest). There must have been some additional evidence in the affidavit establishing probable cause that a search of the cellphone would likely produce evidence in the investigation of the capital murder. *See* Tex. Code Crim. Proc. art. 18.0215(c)(5)(B).

As to this point, the majority correctly observes that the affidavit does not contain any particularized evidence connecting Baldwin's cellphone to the capital murder. For example, there is no indication that the cellphone was used to film the capital murder as it was being committed, or that the cellphone had been used to communicate with the homeowner before the capital murder. The affidavit only contains generic recitations about the abstract use of cellphones.

These recitations were all based on the affiant's "training and experience," and included such generalizations as the following:

1. "Phones and smartphones such as the one listed herein are capable of receiving, sending, or storing electronic data."
2. Such phones are capable of containing "evidence of their [user's] identity and others."

3. "Cellular telephones are commonly utilized to communicate in a variety of ways such as text messaging, calls, and e-mail or application programs such as google talk or snapchat."

4. "It is common for suspects to communicate about their plans via text messaging, phone calls, or through other communication applications."

5. "Someone who commits the offense of aggravated assault or murder often makes phone calls and/or text messages immediately prior and after the crime."

6. "Often times, in a moment of panic and in an attempt to cover up an assault or murder[,] suspects utilize the internet via their cellular telephone to search for information."

7. "Searching a suspect's phone will allow law enforcement officers to learn the cellular telephone number and service provider for the device."

8. "Law enforcement officers can then obtain a subsequent search warrant from the cellular telephone provider to obtain any and all cell site data records, including any and all available geo-location information for the dates of an offense, which may show the approximate location of a suspect at or near the time of an offense."

For the most part, these statements are just "boilerplate recitations designed to meet all law enforcement needs for illustrating certain types of

criminal conduct," and affiants should not rely on such generalizations because they run the risk "that insufficient particularized facts about the case or the suspect will be presented for a magistrate to determine probable cause." *See United States v. Weaver*, 99 F.3d 1372, 1378 (6th Cir. 1996).

The fifth statement listed above, which could just as easily be rephrased as "criminals often use cellphones," exemplifies the sort of generalization that does not suffice to establish probable cause, at least under contemporary standards where cellphones are still used by nearly everyone, law-abiding or not. *See Riley*, 573 U.S. at 385 ("These cases require us to decide how the search incident to arrest doctrine applies to modern cell phones, which are now 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.").

Despite the breadth of these generic recitations, the fourth statement listed above is pertinent to the magistrate's determination of probable cause. This statement establishes that criminal suspects use cellphones for planning purposes, and that fact has some bearing here because the affidavit established that the capital murder was committed, not by a lone wolf, but by two men acting in concert who prepared for the offense over the course of two days. The magistrate could have reasonably concluded that this joint activity required a certain level of coordination and communication, the evidence of which might be discovered on a cellphone. *Cf. Foreman v. State*, ___ S.W.3d ___, 2020 WL 6930819, at *4-5 (Tex. Crim. App. 2020) (concluding that the magistrate could reasonably infer that an auto shop was equipped

with a video surveillance system because there were other facts in the affidavit showing that the auto shop had a heightened need for security).

The majority rejects the significance of the fourth statement listed above, supposedly under the belief that all boilerplate language is insignificant under *Martinez v. State*, No. 13-15-00441-CR, 2017 WL 1380530, at *3 (Tex. App.—Corpus Christi Feb. 2, 2017, no pet.) (mem. op., not designated for publication). Setting aside for the moment that *Martinez* is an unpublished decision that has no precedential value, the majority misrepresents the actual holding of that case. The *Martinez* court did not hold that an affidavit containing boilerplate language was insufficient to support the magistrate's finding of probable cause. Quite the opposite, that court determined that an affidavit was sufficient to support the search of a cellphone because, in addition to certain boilerplate language regarding the abstract use of cellphones, there were facts in the affidavit showing that the defendant had committed the offense with other individuals, and there was some indication that these individuals had used cellphones to communicate with one another. The court only indicated that boilerplate language would be insufficient to support a finding of probable cause when such language was "standing alone," which was not the case there (or here).

Rather than suggest that boilerplate language is insignificant, the majority should have recognized the true holding of *Martinez*, which is that boilerplate language about cellphones can be considered in an analysis of probable cause when it is coupled with other facts, especially facts showing that the suspect committed an offense with another individual.

This reasoning is not novel. A court in another jurisdiction has already articulated a clear and objective test for this exact circumstance, stating that "an affidavit establishes probable cause to search a cell phone when it describes evidence of criminal activity involving multiple participants and includes the statement of a law enforcement officer, based on his training and experience, that cell phones are likely to contain evidence of communications and coordination among these multiple participants." *See United States v. Gholston*, 993 F. Supp. 2d 704, 720 (E.D. Mich. 2014).

That test was applied in another capital murder case, with facts very similar to the facts of this case. *See Johnson v. Arkansas*, 472 S.W.3d 486, 490 (Ark. 2015) ("Here, because Johnson was working with at least one other person when the homicide was committed, it is reasonable to infer that the cell phone that was in his possession was used to communicate with others regarding the shootings before, during, or after they occurred.").

A version of this test was applied in a separate case that contained many of the same boilerplate recitations as the affidavit in this case, though the result was different there because the facts did not show that the defendant had committed the offense with another individual. *See United States v. Oglesby*, No. 4:18-CR-0626, 2019 WL 1877228, at *4 (S.D. Tex. Apr. 16, 2019) (holding that a "bare bones" affidavit was insufficient to support a finding of probable cause because the affidavit contained no statements "directly referencing another individual's involvement in the incident").

Our court recently applied this test as well, but only through its reasoning, rather than expressly.

See Diaz v. State, 604 S.W.3d 595, 604 (Tex. App.—Houston [14th Dist.] 2020, pet. granted) ("The affidavit stated that two men were involved in the home invasion and that police recovered several parts of one or more cell phones at the scene. From this, the magistrate reasonably could infer that the perpetrators possessed or utilized one or more cell phones before or during the planning or commission of the offense and that any recovered cell phones could have evidence of the offense.").[1]

The reasoning in these collected authorities applies equally here. Based on all of the facts in the affidavit, the magistrate had a substantial basis for believing that a search of Baldwin's cellphone would probably produce evidence of preparation, which would also include evidence of the identity of the other person who participated in the capital murder.

For all of these reasons, I would conclude that the affidavit contained sufficient facts to support the magistrate's implied finding of probable cause. Because the majority reaches the opposite conclusion, I respectfully dissent.

/s/ Tracy Christopher
Justice

Publish — Tex. R. App. P. 47.2(b).

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[1] The petitioner in *Diaz* asserted two grounds for discretionary review. The first ground concerned a confidential informant and a challenge under *Franks v. Delaware*, 438 U.S. 154 (1978); and the second ground concerned a sufficiency challenge to the search-warrant affidavit. *See Diaz v. State*, No. PD-0712-20 (filed Aug. 11, 2020). The Court of Criminal Appeals granted the petition on the first ground only.

TRIAL COURT'S AMENDED ORDER (FEBRUARY 11, 2020)

IN THE 208TH DISTRICT COURT OF HARRIS COUNTY, TEXAS

THE STATE OF TEXAS

v.

JOHN WESLEY BALDWIN

No. 1527611

Before: Greg GLASS, Presiding Judge.

On this, the 11th day of February, 2020, this Court amends its order in response to Defendant's motion to Suppress evidence to reflect its ruling. This Court's ruling reflects the ruling made orally by Judge Denise Collins following a prior hearing on Defendant's motion to suppress. This order should take the place of the order signed by this Court on January 11, 2019, and found on page 96 of the Clerk's Record on appeal. Defendant's motion to Suppress is GRANTED in part and DENIED in part as follows:

x GRANTED as to the evidence obtained from the Samsung Galaxy 5 phone found in the possession of Defendant pursuant to the search warrant obtained by Casey Parker of the Harris County Sheriff's Office. *See* II R.R.–17-18; III R.R. –10-13.

x DENIED as to the other evidence seized following the traffic stop. *See* II R.R. –5.

Signed and entered this 11th day of February, 2020.

/s/ The Hon. Greg Glass
Presiding Judge
208th District Court
Harris County, Texas

TRIAL COURT'S ORDER GRANTING MOTION TO SUPPRESS (JANUARY 11, 2019)

IN THE 208TH DISTRICT COURT OF HARRIS COUNTY, TEXAS

STATE OF TEXAS

v.

JOHN BALDWIN

No. 1527611

Before: Hon. Greg GLASS, Presiding Judge.

On this the 11 day of January 2019, came on to be heard John Baldwin's Motion to Suppress Illegally Seized Evidence and after considering the evidence and argument of counsel, the motion is hereby:

GRANTED

SIGNED and ENTERED this 11 day of January 2019.

/s/ The Hon. Greg Glass
Presiding Judge
Signed: 1/11/2019

TRIAL COURT'S BENCH RULING GRANTING MOTION TO SUPPRESS (DECEMBER 19, 2018)

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
208TH JUDICIAL DISTRICT

THE STATE OF TEXAS

v.

JOHN WESLEY BALDWIN

Trial Court Cause No. 1527611
Court of Appeals No. 14-19-00154-CR

Before: Honorable Denise COLLINS, Judge.

[December 19, 2018 Transcript, p. 3]

THE COURT: Yesterday we finished the testimony on the Motion to Suppress, a pretty multi-layered Motion to Suppress with all of the issues that were alleged. I have pretty much announced yesterday where the court was in terms of deciding the case.

I am going to give you an opportunity to say whatever else that you wish to say; but I want to review from the beginning what my previous findings were so that they are clear; and if I leave something out, please, ask me so the record will reflect the findings that I make.

Aside from the facts which I think are undisputed in regards to the defendant being stopped in a car was, in fact, John Baldwin, who was stopped in the car on traffic on—will you give me the date again, please. I may have missed that date.

MR. SCARDINO: The 22nd of September.

THE COURT: September 22nd.

MR. SCARDINO: Yes, ma'am.

THE COURT: September 22nd, 2016; is that correct?

MR. SCARDINO: Correct.

THE COURT: That is undisputed.

It is undisputed that the officer and with a collective decision—which doesn't matter I don't think in the long run in terms of what he ended up being charged with—collectively decided to charge him with what the initial patrol officer viewed in his opinion was an unsafe lane change.

The videotape was viewed by the court and from the perspective of the arresting officer or the patrolman who stopped him and the facts that I saw in the video were taken into account in terms of determining whether or not the stop was lawful.

The court finds that the stop was lawful.

The court also finds that notwithstanding the fact that detective or Deputy Thomas stated in his notes as was introduced at the hearing as well as in his offense report that he had seized a Samsung phone at the scene.

The evidence showed that he was mistaken because there was independent evidence to show that the phone was in the vehicle at the time the car was towed; and that when it arrived at the location where they search vehicles at Lockwood, that the phone was also seen there still in the car by another witness who actually searched the vehicle and processed the vehicle; and that that witness, in fact—and I can't recall his name.

Will you give me his name, the CSI officer?

MR. SCARDINO: Kirkley.

MS. DEANGELO: Kirkley.

THE COURT: Deputy Kirkley after he processed the car after he received consent to search which was executed by your client, he then turned the phone over to Deputy Thomas who then gave the phone to the homicide Detective Casey in charge of this case.

If that is not stated clearly, the point is from the evidence the court believes that the phone remained with the vehicle after the instanter arrest and was not removed from the vehicle until, in fact, your client, John Baldwin, signed a consent to search; and it was a pretty blanket consent to search anything in the vehicle; and as such, the court finds that the phone was lawfully obtained.

Now, your next complaint or objection was to the search warrant, itself.

Now, you raised a Franks' claim, and I think this is a unique case in this regard.

The language in the search warrant that was pointed out by the defense as being untruthful is debatable in terms of how that language was used in that warrant.

This is a pretty unusual circumstance. It is not a clear-cut, is the statement true or is the statement not true because clearly one interpretation would be the statement is not true. Another interpretation would be the statement was just inartfully written, and it is true.

So, because of that and because of the unusual nature of that statement, I allowed some extrinsic evidence in terms of hearing whether as to the truth or falsity of that statement in that regard just to her testimony generally, Deputy Parker's general testimony went to that issue in terms of when she did her investigation and she spoke with the defendant, she got a consent to search from him his car. She was also asked, "Did you get a consent to search his phone," and her answer to that question was, "No."

And I may be mistaken if whether Deputy Thomas was asked that same question or not. He may have been; but at any rate, I find her testimony credible that she asked and did not receive a consent to search the phone. So as far as the truth of that statement, it has to be evaluated in terms of interpretation.

Is it true that someone could read that and interpret that as saying that your client, Mr. Baldwin, consented to the search of this phone, yes. I think that is one interpretation.

Another interpretation is a misplaced comma. If you put the comma in, it makes a little more sense. It was poorly written.

So I don't necessarily find that it was intentional in terms of intentionally misrepresenting the truth. Was it careless and a little reckless, perhaps. It depends on how you interpret it.

But the third prong of Franks requires an evaluation or comparison, if you will, to the challenged statement in the warrant or statements and the balance of the probable cause in the warrant.

So when I was preparing for this Motion to Suppress, I read all of the cases that were supplied to me by both sides. They are excellent cases, by the way, I might add from both sides; and in that regard, of course, I read the warrant.

So when this issue arose in terms of what did that statement mean, how did it affect the neutral and detached magistrate's determination of probable cause, I, of course, read the warrant.

Now, in that regard—this is not the proper phrase—but in the light most favorable to the finding of probable cause, I reviewed the warrant; and this court has been—this court. I am talking about myself in the third person—this judge, me, I have been on the bench for 26 years; and I routinely read warrants; and I routinely know and understand what I believe probable cause to be.

There is a case that was given to me by the state where there is an excellent discussion of probable

cause; and simply put, probable cause means is it probable, is it probable that there will be evidence of a crime in a place or a thing, simply put, is it probable based on common sense reason and the law; and I did the evaluation of this warrant based on all of the standards set out in Franks; and I am assuming that Judge Hart did the same.

Now, in my experience sometimes things confuse you, sometimes you are in a hurry, sometimes you miss things; and so I am not discounting one way or the other the fact that Judge Hart signed the warrant.

Could he have possibly misinterpreted that line about consent, perhaps; but whether it is in or whether he did say, "Oh, I thought that the defendant consented," I still have to evaluate the probable cause separate and apart from that statement; and I don't think that would have affected the probable cause either way whether he read it as being consent or whether he didn't read it as being consent. I do think that it is confusing.

Now, I am going to say this. I don't know if the witness understood the question; but I reviewed the record yesterday; and I asked the court reporter to come to the question that I heard you ask, Mr. Scardino, because I wasn't exactly sure; and I am going to read it into the record. This is from the court reporter, and this was on cross-examination from you.

I am going to start with where—and I am showing you this page was Cheryl started the testimony.

The question from Mr. Scardino, "None of the items that were in the car helped anybody determine whether or not Mr. Baldwin had, in fact, committed the crime of an unsafe lane change, was there?"

"Answer: No, sir."

"Question: And in your affidavit that you presented to Magistrate Hart, you didn't have any probable cause to tell Judge Hart of why you should be able to search that phone. You had no independent information from any source that that phone connected information that would help you solve this capital murder case, did you?"

And her answer was, "No, sir."

"Question: You only put what was in your experience as to what you might find in the phone, right?"

"Answer: Yes, sir."

Now, I don't know if she understood the question. I can only go on, you know, the testimony.

I am not basing my opinion on that. I am just pointing that out that this was part of the testimony. My opinion is based on the four corners of this document.

So I am going to start from, I guess, the second paragraph.

The court finds that in the affidavit on Sunday, September 18th, 2016, and at 21:20 hours translated as 8:20 p.m., that she was assigned to investigate—Officer Deputy Casey—I am sorry, Casey Parker. I kept saying Casey, but her last name is Parker. It is Deputy Casey Parker—was

assigned to investigate the robbery and the murder. So I am assuming that is on or about the time from the warrant that the capital murder occurred.

So part of the rendition of facts alleged by her or written by her in the affidavit supporting her warrant to search the phone presented to Judge Hart, she stated among other things about the two black men were in the home; and one person ends up being shot in the chest. Two black men run from the residence, and they were witnessed getting into a white four-door sedan and fleeing the scene.

That is my first observation as far as what is connected to the vehicle or may be connected to the vehicle that was the subject of your client's arrest, the car that he was in and the vehicle that is supposedly tied to the capital murder in this case.

The second reference to anything connected with the car, the white sedan, was at 8:45 p.m. Paragraph Nos. 1, 2, 3, 4, a witness, a neighbor, observed a white four-door sedan exiting the neighborhood at a very high rate of speed.

Now, you can extrapolate that around 8:20 she was assigned to the case, so if that is around and about when it occurred, this car was seen in the time period of the capital murder.

The next paragraph says that information was received from a witness who the day previous to this event on September 17th, 2016, got suspicious of a white vehicle driving around the neighborhood and in the cul-de-sac—let's see if this was in the

cul-de-sac. No, just driving in the neighborhood and circling the neighborhood; and she became suspicious because it was near her vehicle. So she took a picture of the car including the license plate.

So the next paragraph—oh, I am sorry; and she said that she feared that the occupants, two black males, were partly responsible for the robbery and murder that occurred the next day which is, I am assuming, that is why she gave this information to the police; but I am just reading on the four corners that she gave them the information on the next day.

Then the next paragraph talks about that vehicle, the one with the license plate GTK-6426 which later on the evidence shows your client was stopped in, that a vehicle similar to that vehicle was seen on video from home recorders driving in the area on or about the time of the robbery/murder.

So we have the original vehicle with the license plate given to the police, given to the deputies and then a subsequent video in the warrant says was gathered, collected which showed that a car similar to that car that was previously ID'd was in the area and they gave specific times.

Now, I might note here that there is another mistake because when I first read this warrant, I was under the impression that maybe the car had come back the next day; but if you read this, the numbers and the dates are just incorrectly recorded and they have to be because it says—I

am going to start from the beginning of the sentence.

"Video from these surveillance systems were reviewed and one system captured video images of a white four-door vehicle similar in appearance to the white Lexus registered under license plate GTK-6426 circling the neighborhood on Saturday, September 17th, 2016 and Sunday, September 18th, 2017."

Now, I am not sure what that means. So I think that is probably a mistake. So it should have been 2016 and 2017.

The murder occurred on the 18th; is that correct?

MS. DEANGELO: Yes, ma'am.

THE COURT: And that is when she was assigned to the case on September the 18th.

So the next sentence says, "Specifically the video system located at 21622 Redcrested Glen captured images of the vehicle at 2:03 p.m. on Saturday, September 18th, 2016, the same vehicle on Sunday, September 19th, 2016, at 8:15 p.m., 8:16 p.m. and 8:23 p.m."

And just from the obvious the way that it is written, that has to be a mistake because Saturday was the 17th, and Sunday was the 18th and then the next sentence described Saturday as the 18th and Sunday as the 19th. So I am just reading from the four corners, but I am assuming that that is a mistake.

Then the next paragraph now uses the correct date that, on Sunday, September 18th, at a time

estimated by him to be right at—and I am sure that word D-U-C-K must mean and supposed to be D-U-S-K, dusk, observed a white Lexus GS300 driven by a large black male lapped—that is past tense—it should be lap, I guess, observed a male lapping or lapped his residence three times. Shortly after this vehicle passed his residence the last time, the citizen stated he heard the sirens—so I am assuming it was probably seen in close juxtaposition to when the police were called out to the scene of the shooting.

It goes directly from that paragraph to, "On September 26th, 2016, the vehicle bearing Texas license plate GTK-6426 was stopped by patrol deputies for traffic and was being operated by John Wesley Baldwin, III, a black male, date of birth June 15th, 1988."

There misses the questionable statement that was brought up, "Baldwin gave consent to search the vehicle and a Samsung Galaxy 5, within a red and black case was recovered. Baldwin stated that the phone carried the number (832) 541-2500."

So, I am reading directly from Blake versus State. "The test for determination of probable cause in support of the issuance of a search warrant is whether the magistrate had a substantial basis for concluding that a search would uncover evidence of a wrongdoing."

And when you have probable cause, it is will it probably uncover evidence of a wrongdoing, not maybe or let's hope. It is probably will, and that

is based on the totality of the circumstances that is presented to the magistrate.

Now, give me one second.

As far as—and I don't know if I am going to call it a misstatement that followed that paragraph, at the end of the paragraph which is the subject of your Franks' allegation.

Could it be considered a misstatement, yes.

Could it be considered poorly written, yes.

Was it intentionally motivated from the evidence, I don't believe so.

Was it carelessly done, perhaps; but I don't think that it was intentionally there to delude the magistrate into finding probable cause because aside from that statement and whether the magistrate believed he consented or not, it still does not—probable cause still has to stand all by itself. So if it doesn't stand all by itself, if it needs that Franks' statement, then it is a different evaluation; but at this point, I don't find that that statement was an intentional violation.

Reckless maybe, careless perhaps but not intentional; but with that said, that analysis has caused me to look at this warrant; and based on my analysis and everything that I have just stated for the record, I don't find that there is probable cause in that warrant to justify the search of the car.

So I will listen to anything that you-all want to say to me, but that is how I have evaluated it.

MR. SCARDINO: I will have nothing to add to that, Your Honor.

THE COURT: Well, I am sure that you wouldn't because I am agreeing with your allegation.

Is there anything that you wanted to add for the record in terms of the warrant on its face?

Is there anything else that you see in there that I did not list?

MS. DEANGELO: Not that I can think of, judge.

I obviously disagree and—

THE COURT: Well, I am sure you do disagree; but here is the thing.

The probable cause directed at that phone, there is nothing in that warrant directing probable cause to Mr. Baldwin at all because there is not even any connection of him in that warrant on the face of this warrant to that vehicle.

So even if you were to argue that the vehicle and how they have outlined the vehicle and it being there at the scene, a similar one there at the scene, there is nothing in the warrant to tie that vehicle to Mr. Baldwin other than he was stopped four days later driving it; and I don't find that is sufficient to create the probable cause that the phone that he had would contain evidence of a capital murder.

That is my finding, okay.

MR. SCARDINO: Your Honor, for the purpose of the record then, is it—so our Motion to Suppress the evidence or the information seized from the phone is suppressed.

THE COURT: It is suppressed for the reasons that I gave. I don't know what exactly they got from the phone, but it is suppressed for the reasons that I gave.

MR. SCARDINO: Yes, Your Honor.

Thank you, judge.

(end of proceedings)

ORDER OF THE COURT OF CRIMINAL APPEALS OF TEXAS DENYING MOTION FOR REHEARING (JULY 27, 2022)

OFFICIAL NOTICE FROM
COURT OF CRIMINAL APPEALS OF TEXAS
P.O. Box 12308, Capitol Station,
Austin, Texas 78711

COA No. 14-19-00154-CR
PD-0027-21

BALDWIN, JOHN WESLEY Tr. Ct. No. 1527611

On this day, the State's motion for rehearing has been denied.

Deana Williamson
Clerk

Cory Stott
Harris County District Attorney's Office
1201 Franklin St Ste 600
Houston, TX 77002-1930
* Delivered Via E-Mail *

SEARCH WARRANT
(SEPTEMBER 23, 2016)

THE STATE OF TEXAS
COUNTY OF HARRIS

TO THE SHERIFF OR ANY PEACE OFFICER OF HARRIS COUNTY TEXAS

GREETINGS:

WHEREAS, Complaint in writing, under oath, has been made before me by C. Parker, a peace officer employed by Harris County Sheriff's Office, and who is currently assigned to the Homicide division/department, with an address of 601 Lockwood, Houston, Harris County, Texas, which complaint is attached hereto and expressly made a part hereof for all purposes and said complaint having stated facts and information in my opinion sufficient to establish probable cause for the issuance of this warrant;

YOU ARE THEREFORE COMMANDED to forthwith search the place therein named, to wit: a Samsung Galaxy5, within a red and black case that has been marked with the unique identifier HC-16-0149834 which is currently located at 601 Lockwood, Houston, Harris County, Texas and is owned by or was found in the possession of John Baldwin with the authority to search for and to seize any and all evidence that may be found therein including, but not limited to: photographs/videos; text or multimedia messages (SMS and MMS); any call history or call logs; any e-mails, instant messaging, or other forms of communication of which said phone is capable; Internet browsing history; any stored Global Positioning System (GPS) data; contact information including e-

mail addresses, physical addresses, mailing addresses, and phone numbers; any voicemail messages contained on said phone; any recordings contained on said phone; any social media posts or messaging, and any images associated thereto, including but not limited to that on Facebook, Twitter, and Instagram; any documents and/or evidence showing the identity of ownership and identity of the users of said described item(s); computer files or fragments of files; all tracking data and way points; CD-ROM's, CD's, DVD's, thumb drives, SD Cards, flash drives or any other equipment attached or embedded in the above described device that can be used to store electronic data, metadata, and temporary files.

YOU ARE FURTHER ORDERED to have a forensic examination conducted of any devices seized pursuant to this warrant to search for the items previously listed.

HEREIN FAIL NOT and due return make hereof.

WITNESS MY SIGNATURE on this the 23 day of September A.D. 2016. at 11:58 O'clock, A.M.

/s/ Brad Hart
MAGISTRATE
230th District Court
Harris County, Texas

AFFIDAVIT
(SEPTEMBER 23, 2016)

THE STATE OF TEXAS
COUNTY OF HARRIS

I, C. Parker, a peace officer employed by Harris County Sheriff's Office, and who is currently assigned to the Homicide division/department, with an address of 601 Lockwood, Houston, Harris County, Texas, do solemnly swear that I have reason to believe and do believe that within a Samsung Galaxy5, within a red and black case that has been marked with the unique identifier HC-16-0149834 which is currently located in 601 Lockwood. Houston, Harris County, Texas and is owned by or was found in the possession of John Baldwin, is evidence including, but not limited to: photographs/videos; text or multimedia messages (SMS and MMS); any call history or call logs; any e-mails, instant messaging, or other forms of communication of which said phone is capable; Internet browsing history; any stored Global Positioning System (GPS) data; contact information including e-mail addresses, physical addresses, mailing addresses, and phone numbers; any voicemail messages contained on said phone; any recordings contained on said phone; any social media posts or messaging, and any images associated thereto, including but not limited to that on Facebook, Twitter, and Instagram; any documents and/or evidence showing the identity of ownership and identity of the users of said described item(s); computer files or fragments of files; all tracking data and way points; CD-ROM's, CD's, DVD's, thumb drives, SD Cards, flash drives or any other equipment attached or embedded in the above

described device that can be used to store electronic data, metadata, and temporary files.

YOUR AFFIANT HAS PROBABLE CAUSE FOR SAID BELIEF BY REASON OF THE FOLLOWING FACTS:

Your Affiant, Casey Parker, is a certified peace officer employed by the Harris County Sheriff's Office and assigned to the Homicide Division. Affiant was assigned to conduct an investigation into the robbery and murder of Adrianus Michael Kusuma, hereafter referred to as the Complainant, which occurred at approximately 8:40 PM on or about September 18, 2016, at 21522 Canvasback Glen, in unincorporated Harris County, Texas. The investigation is documented under Harris County Sheriff's Office Incident number HC16-0149834.

On September 18, 2016, at 2120 hours, your Affiant was assigned to investigate the robbery and murder of Adrianus Michael Kusuma, an Asian male, date of birth September 27, 1982, having occurred at his home located at 21522 Canvasback Glen in unincorporated Harris County, Texas. Upon arrival at the scene, Affiant spoke with Sebastianus Kusuma, the brother of the complainant, who was home at the time of the robbery and murder, a person Affiant found credible and reliable. Sebastianus Kusuma advised he was upstairs in his room when he heard a loud banging noise emanating from downstairs. Sebastianus Kusuma went downstairs to investigate and was confronted by a masked black male, armed with a handgun, at the base of the stairs. The masked gunman demanded money and began to assault Sebastianus Kusuma with his fists and the handgun in the dining room of the home. While he was fighting

with this male, Sebastianus Kusuma stated he heard a gunshot coming from the kitchen area of the home and turned to see a second black male, also masked, running from the back of the house toward the dining room. The two gunmen grabbed a box of receipts and money from the Kusumas' family run business and fled the residence through the front door. Sebastianus Kusuma followed the two males from the home and witnessed them getting into a white, 4-door sedan and flee the scene. Sebastianus Kusuma returned to the home to search for his brother and found him lying on the kitchen floor near the back door. Adrianus Michael Kusuma had sustained a gunshot wound to the chest and was unconscious and unresponsive. The rear door of the residence was open and the door frame shattered from having been kicked in by the suspects.

The neighborhood where this murder occurred consists only of a circling boulevard with multiple small cul-de-sac streets that extend from the main boulevard. Vehicles may only access the neighborhood from one street that leads east off Gosling Road.

During the course of conducting the scene investigation, affiant learned that a neighbor, who lives near the entry street to the subdivision, was outdoors at approximately 8:45 PM when he observed a white, 4-door sedan exiting the neighborhood at a very high rate of speed. Within minutes of this vehicle exiting the neighborhood, this citizen observed emergency vehicles entering the neighborhood and thought the white vehicle may be connected to the response of emergency vehicles into the neighborhood.

Further, while conducting this investigation, Affiant was advised by Sergeant Mark Reynolds, a

certified peace officer reputably employed by the Harris County Sheriff's Office and also assigned to the Homicide Division and assisting in this investigation, that he was approached by a citizen who advised a white, 4-door Lexus vehicle, bearing Texas license plate # GTK-6426, was observed driving through the neighborhood, and specifically, past the residence at 21522 Canvasback Glen, on multiple occasions on Saturday, September 17, 2016. The citizen found the repeated circling of the neighborhood and the complainant's home so suspicious that she photographed the vehicle on her smartphone and captured the license plate. Based on the suspicious circumstances presented by this vehicle one day before the murder, this citizen feared the occupants, two black males, were possibly responsible for the robbery and murder.

Affiant and other investigators from the Homicide Division canvassed the neighborhood for residences that may have security cameras. Three (3) residences were located that had recording surveillance systems operating. Video from these surveillance systems were reviewed and one system captured video images of a white, 4-door vehicle, similar in appearance to the white Lexus registered under license plate GTK-6426, circling the neighborhood on Saturday, September 17, 2016 and Sunday, September 18, 2017. Specifically, the video system located at 21622 Redcrested Glen captured images of the vehicle at 2:03 PM on Saturday, September 18, 2016, and the same vehicle on Sunday, September 19, 2016 at 8:15 PM, 8:16 PM and 8:23 PM. On each instance, the vehicle entered the cul-de-sac and drove to the circle in front of 21622 Redcrested Glen and turned around, leaving the view of the camera. On the 8:23 PM event, the vehicle paused

momentarily before leaving the view of the camera. The residence at 21622 Redcrested Glen is only 5 residences to the north of the location where Sebastianus Kusuma observed the suspects in the robbery enter the white vehicle and flee the scene.

Affiant also interviewed a citizen at 21423 Mandarin Glen who advised that on Sunday, September 18, 2016, at a time estimated by him to be right at duck, observed a white, Lexus GS300 vehicle, driven by a large black male lapped his residence three (3) times. Shortly after this vehicle passed by his residence the last time, the citizen stated he heard the sirens of emergency vehicles and came outside to see what was happening. The address of 21423 Mandarin Glen is approximately 2.5 blocks from the residence where the robbery and murder occurred.

On September 22, 2016, the vehicle bearing Texas license plate GTK-6426 was stopped by patrol deputies for traffic violations and was being operated by John Wesley Baldwin III, a black male, date of birth June 15, 1988. Baldwin gave consent to search the vehicle and a Samsung Galaxy5, within a red and black case was recovered. Baldwin stated that the phone carried the number 832-541-2500.

Based on your Affiant's training and experience, Affiant knows that phones and "smartphones" such as the one listed herein, are capable of receiving, sending, or storing electronic data and that evidence of their identity and others may be contained within those cellular "smart" phones. Affiant also knows it is possible to capture video and photos with cellular phones. Further, Affiant knows from training and experience that cellular telephones are commonly utilized to communicate in a variety of ways such as

text messaging, calls, and e-mail or application programs such as google talk or snapchat. The cellular telephone device, by its very nature, is easily transportable and designed to be operable hundreds of miles from its normal area of operations, providing reliable and instant communications. Affiant believes that the incoming and outgoing telephone calls, incoming and outgoing text messaging, emails, video recordings and subsequent voicemail messages could contain evidence related to this aggravated assault investigation.

Additionally, based on your Affiant's training and experience, Affiant knows from other cases he has investigated and from training and experiences that it is common for suspects to communicate about their plans via text messaging, phone calls, or through other communication applications. Further, Affiant knows from training and experiences that someone who commits the offense of aggravated assault or murder often makes phone calls and/or text messages immediately prior and after the crime. Affiant further knows based on training and experience, often times, in a moment of panic and in an attempt to cover up an assault or murder that suspects utilize the internet via their cellular telephone to search for information.

Additionally, based on your Affiant's training and experience, Affiant knows from other cases he has investigated and from training and experiences that searching a suspect's phone will allow law enforcement officers to learn the cellular telephone number and service provider for the device. Affiant knows that law enforcement officers can then obtain a subsequent search warrant from the cellular telephone provider to obtain any and all cell site data records, including

any and all available geo-location information for the dates of an offense, which may show the approximate location of a suspect at or near the time of an offense.

Based on Affiant's training and experience, as well as the totality of the circumstances involved in this investigation, Affiant has reason to believe that additional evidence consistent with robbery and/or murder will be located inside the cellular telephone, more particularly described as: a Samsung Galaxy5, within a red and black case, serial # unknown, IMEI # unknown. Affiant believes that call data, contact data, and text message data, may constitute evidence of the offense of robbery or murder.

Affiant marked the phone with the unique identifier HC16-0149834 and it is currently located at 601 Lockwood, Houston, Harris County, Texas.

WHEREFORE, PREMISE CONSIDERED, Affiant respectfully requests that a warrant issue authorizing your Affiant and any other peace officer in Harris County, Texas, to search the contents of a Samsung Galaxy5 within a red and black case that has been marked with the unique identifier HC-16-0149834 with the authority to search for and to seize and to analyze the property and items set out earlier in this affidavit.

/s/ Casey Parker
AFFIANT

Sworn to and Subscribed before me on this the 23 day of September, A.D. 2016.

/s/ Brad Hart
MAGISTRATE
230th District Court
Harris County, Texas