No. 22-6489

IN THE SUPREME COURT OF THE UNITED STATES

BRIAN MATTHEW MORTON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's denial of petitioner's motion to suppress evidence obtained from his cellphone, on the ground that officers acted in objective good-faith reliance on a warrant.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

United States v. Morton, No. 19-cr-17 (July 16, 2019)

United States Court of Appeals (5th Cir.):

United States v. Morton, No. 19-10842 (Aug. 22, 2022)

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-21a) is published at 46 F.4th 331. The opinion of the court of appeals granting rehearing en banc and vacating the initial panel opinion is published at 996 F.3d 754. The opinion of the court of appeals panel (Pet. App. 22a-36a) is published at 984 F.3d 421. The opinion of the district court denying petitioner's motion to suppress (Pet. App. 43a-47a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2022. On November 17, 2022, Justice Alito extended the time

within which to file a petition for a writ of certiorari to and including December 5, 2022, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted of receiving a visual depiction of a minor engaged in sexually explicit conduct, in violation of 18 U.S.C. 2252(a)(2) and (b)(1). Judgment 1. He was sentenced to 108 months of imprisonment, to be followed by ten years of supervised release. Judgment 2. After a panel of the court of appeals vacated the district court's judgment, see Pet. App. 22a-36a, the full court of appeals granted rehearing en banc and affirmed the judgment, id. at 1a-21a.

1. In September 2018, shortly after midnight, Texas state trooper Burt Blue stopped petitioner's white utility van as it sped down Interstate 20, 50 miles west of Fort Worth, Texas. Pet. App. 2a, 43a. Trooper Blue -- a 14-year law-enforcement officer with extensive training and experience in narcotics highway interdiction and drug investigations and eight years of experience as a drug-recognition expert -- noticed a strong odor of marijuana as he approached the van. Id. at 2a, 23a-24a.

Another officer arrived to assist with the stop, and the officers asked petitioner to exit the van. Pet. App. 2a. While searching petitioner, they found an Advil bottle containing 16

ecstasy pills bearing different colors but the same distinct stamp and arrested him for drug possession. Id. at 2a, 23a, 46a. In the van, the officers found a backpack containing a small amount of marijuana; a glass pipe with marijuana; three bags with over 100 pairs of women's underwear; wipes; genital lubricant; over a dozen sex toys; a bag with school supplies (pencils, erasers, colored markers, pens); and a lollipop in the cup holder. Id. at 2a, 23a. The officers also discovered three cell phones. Id. at 3a.

Trooper Blue applied for search warrants for the three phones found in the van with the drugs. Pet. App. 3a; see C.A. ROA 296-310. The search-warrant affidavits set forth, among other things, Trooper Blue's determination of probable cause that the phones contained evidence of drug possession and possible distribution. Pet. App. 3a. The warrants also listed the types of evidence that he sought to seize from the phones, including telephone numbers, address books, call logs, text messages, photographs, digital images, and multimedia files related to and "in furtherance of [petitioner's] narcotics trafficking or possession." Id. at 23a n.1 (emphasis omitted).

The affidavits then outlined Trooper Blue's drug-related experience and training. C.A. ROA 298, 303, 308; see Pet. App. 23a-24a. Trooper Blue explained that in light of that experience and training, he knew that individuals use cell phones to arrange for the illicit receipt and delivery of controlled substances.

Pet. App. 3a. Trooper Blue specifically highlighted that the knowledge that he had acquired through his experience and training included the knowledge that "criminals often take photographs of co-conspirators as well as illicit drugs and currency derived from the sale of illicit drugs," and his corresponding belief that "photograph images stored in the cellular telephone may identify other co-conspirators and show images of illicit drugs and currency derived from the sale of illicit drugs." Id. at 30a n.6 (emphases omitted).

The affidavits then set forth the specific offense facts. C.A. ROA 298-299. Trooper Blue recounted the traffic stop and its time of night -- 12:06 a.m. Id. at 298. He described the van speeding down the interstate, the strong odor of marijuana, and the search revealing marijuana, women's underwear, and sex toys. Ibid.; Pet. App. 9a. Trooper Blue then described the 16 ecstasy pills in the Advil bottle. Pet. App. 9a. Finally, he confirmed that each phone was located inside the van with the drugs, that each belonged to petitioner, and that petitioner was the only person who used each of them. C.A. ROA 298.

A state judge authorized the searches after finding that the affidavits established probable cause. Pet. App. 3a. During the search, the officers uncovered images that appeared to be child pornography, and they stopped the search until they could obtain additional warrants that specifically authorized a search for evidence of that crime. Ibid. After obtaining a second set of

search warrants, a forensic search of petitioner's phones revealed nearly 20,000 images of child pornography, including images with infants, bestiality, and bondage of minors. Ibid.; see C.A. ROA 328.

2. A federal grand jury charged petitioner with one count of receipt of a visual depiction of a minor engaged in sexually explicit conduct. Pet. App. 3a. Petitioner moved to suppress the evidence found on his phones, arguing that the first set of search-warrant affidavits had failed to establish probable cause to search his phones. Ibid. Petitioner also asserted that the good-faith exception to the exclusionary rule should not apply because those affidavits were "too 'general in nature' to tie the phones to drug activity." Ibid.

The district court denied petitioner's motion. Pet. App. 43a-47a. The court rested its denial on the good-faith exception to the exclusionary rule, and thus did not express a view on whether the affidavits had been sufficient to establish probable cause. Id. at 45a-47a. In doing so, the court found (inter alia) that "it is clear [the affidavits] contain sufficient details to allow a neutral magistrate to reasonably infer that [petitioner]'s phones could contain information connected to his purchase and possession of controlled substances." Id. at 46a. The court accordingly determined that petitioner had failed to show why the officers' reliance on the warrants was unreasonable, or any other

basis for "why the good-faith exception to the exclusionary rule[] does not apply." Id. at 47a; see id. 46a-47a.

3. Petitioner thereafter pleaded guilty pursuant to a conditional plea agreement that reserved his ability to appeal the denial of his suppression motion. Pet. App. 4a. The district court sentenced petitioner to 108 months of imprisonment, to be followed by ten years of supervised release. Judgment 2.

A panel of the court of appeals reversed the denial of petitioner's motion to suppress and vacated petitioner's conviction and sentence. See Pet. App. 22a-36a. The panel took the view that the Fourth Amendment mandates separate probable cause for "each of the categories of information found on the cellphones," id. at 26a; that the affidavits had not provided probable cause for searching the phones' photographs in particular, id. at 29a; and that the officers' reliance on the warrants for that purpose fell outside the good-faith exception, id. at 33a.

4. The full court of appeals vacated the panel's opinion and granted the government's petition for rehearing en banc. 996 F.3d 754. In an opinion joined by two members of the original panel, the en banc court of appeals affirmed the district court's denial of petitioner's motion to suppress, agreeing that the good-faith exception applied. Pet. App. 1a-21a.

The court of appeals highlighted that the good-faith exception "flows from" an "unwillingness to second guess" the

neutral and detached magistrate who issues the warrant, as well as the exclusionary rule's focus on deterring police misconduct. Pet. App. 5a-6a. The court explained that those principles, taken together, "result[] in the good-faith exception to the suppression remedy: A 'warrant issued by a magistrate normally suffices to establish' that a law enforcement officer has 'acted in good faith in conducting a search.'" Id. at 6a (quoting United States v. Leon, 468 U.S. 897, 922 (1984)).

The court of appeals next recognized that this Court has identified four situations where law enforcement's "[r]eliance on a warrant is unreasonable" and, therefore, the good-faith exception to the exclusionary rule does not apply. Pet. App. 6a-7a. As relevant here, the court noted that one such situation is when "the warrant is based on an affidavit so lacking in probable cause as to render belief in its existence unreasonable" -- also known as a "'bare bones' affidavit[]." Id. at 7a.

The court of appeals rejected petitioner's claim that the affidavits at issue here qualified as the sort of "'bare bones' affidavits" that would render it unreasonable for an officer to rely on a neutral magistrate's finding of probable cause in executing a warrant. Pet. App. 7a; see id. at 7a-13a. After reviewing examples of affidavits that this Court and the court of appeals itself had previously deemed insufficient for purposes of good-faith reliance, see id. at 8a-9a, the court determined that

the "affidavits used to search [petitioner]'s phones are not of this genre; they have some meat on the bones," id. at 9a.

The court of appeals explained that each of the affidavits "fully details the facts surrounding [petitioner]'s arrest and the discovery of drugs and his phones. They explain where the marijuana and glass pipe were discovered, the number (16) and location of the ecstasy pills, and the affiant's knowledge that cellphones are used for receipt and delivery of illegal narcotics." Pet. App. 9a. The court highlighted that the affidavits specifically described Trooper Blue's knowledge "through training and experience that criminals often take photographs of co-conspirators as well as illicit drugs and currency derived [from] the sale of illicit drugs." Ibid. "Whatever one might conclude in hindsight about the strength of the evidence it recounts," the court continued, "the affidavit is not 'wholly conclusory.'" Ibid. (citation omitted).

The court of appeals observed that petitioner "does not confront the caselaw" involving bare bones affidavits and "instead mostly challenges the probable-cause determination assessment itself." Pet. App. 10a. Among other things, the court rejected petitioner's assertion that its decision "would gut" this Court's decision in Riley v. California, 573 U.S. 373 (2014), by allowing "the linking of criminal activity to cellphones" to "be based on nothing more than an officer's experience that certain offenders often use cellphones in connection with their crimes." Pet. App.

10a. The court emphasized that "this is not such a case," noting that it was evident from the three simultaneous warrant requests that petitioner "had multiple phones in his car along with the drugs, which our court and others have recognized can indicate that the phones are being used for criminal activity." Ibid. (collecting cases); see id. at 10a n.3.

The court of appeals accordingly declined to "second guess[] the issuing judge['s]" determination, concluding that this was "precisely" the type of case "when the good-faith rule prevents suppression based on after-the-fact reassessment of a probable-cause determination." Pet. App. 9a, 11a (citing Leon, 468 U.S. at 914). And, addressing the reasoning of the original panel opinion on the necessity of showing probable cause and good faith to search the phone for photos specifically, the en banc court found both that petitioner had forfeited the argument and that the court's precedent does not apply the good-faith inquiry on a category-by-category basis. Id. at 12a.

Judge Higginson, joined in whole by two judges and in part by two others, concurred in the judgment, noting that they "agree with the majority that the affidavit supporting the warrants in this case was 'borderline rather than bare bones,' and, therefore that the good faith exception applies," rendering it appropriate to decline to address probable cause. Pet. App. 14a (citation omitted); see id. at 14a-16a. The concurrence went on to express concern with the potential implications of a probable-cause

determination on the facts here and suggested that potential solutions could be explored in future cases. Ibid.

Judge Graves, joined by one other judge, dissented, taking the view that the affidavits had not established a sufficient nexus to a crime of simple possession and that the good-faith exception should not apply. See Pet. App. 17a-21a. A third judge "ch[o]se[] to stand by the initial panel opinion." Id. at 1a n.*.

ARGUMENT

Petitioner contends (Pet. 10-31) that the affidavits failed to establish probable cause to search his cell phones and that the court of appeals erred in applying the good-faith exception to the exclusionary rule. The court, however, did not decide the first issue, and its fact-specific decision on the second was correct and does not conflict with any decision of this Court or another court of appeals. No further review is warranted.

1. Petitioner errs in suggesting (Pet. 10-15) that the decision below conflicts with this Court's decision in Riley v. California, 573 U.S. 373 (2014). In Riley, this Court addressed "whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested." Id. at 378. The Court concluded that neither purpose for the search incident to arrest exception to the warrant requirement -- to secure "the officer's safety" and to "prevent * * * concealment or destruction [of evidence]," id. at 383 (citation omitted) -- justified the warrantless search of a cell

phone. Id. at 387-390. In doing so, the Court made clear that its holding "is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest." Id. at 401.

Riley thus involved only warrantless searches of cell phones -- not the searches pursuant to a warrant at issue here. Although the Court emphasized unique characteristics of cell phones, including how they differ from most other types of physical evidence, it did so for purposes of explaining why it was not extending to cell phones the search-incident-to-arrest exception to the warrant requirement. See Riley, 573 U.S. at 393-98. As the en banc court explained, the decision below "hardly nullifies Riley," because "[b]efore Riley, police could have searched [petitioner]'s phones on the spot after arresting him. Because of Riley, the officers had to obtain warrants." Pet. App. 13a (citation omitted). The officers here did precisely what this Court instructed in Riley: "Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple -- get a warrant." 573 U.S. at 401.

Petitioner claims the decision below "inverts" the "logic" of Riley because it declined to impose a more stringent nexus requirement for cell phones when considering whether the affidavits sufficiently established probable cause. See Pet. 13-16. But the court of appeals specifically declined to address

whether the affidavits established probable cause. See Pet. App. 13a ("We do not decide if the state judge should have authorized full searches of the phones based on these affidavits."); id. at 14a (Higginson, J., concurring in the judgment) ("[T]he majority opinion appropriately declines to address whether there was probable cause to search [petitioner]'s cell phone."); see also id. at 45a-47a (district court declining to address the issue after finding the good-faith exception applied). This Court is "a court of review, not of first view," Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005), and petitioner identifies no sound reason for this Court to address his current claim about a lack of probable cause in the first instance.

In any event, the affidavits provided the issuing magistrate "with a substantial basis for determining the existence of probable cause." Illinois v. Gates, 462 U.S. 213, 239 (1983); see id. at 238 ("The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place."). Among other things, the affidavits collectively established that petitioner's three phones were in his van with two different types of drugs as he sped down an interstate after midnight. C.A. ROA 296-310. Added to those facts was Trooper Blue's statement that

-- based on his 14 years of experience as a police officer, his extensive training and experience in narcotics highway interdiction and drug investigations, and his eight years as a drug-recognition expert -- cell phones are commonly used in drug transactions. Gov't Supp. C.A. Br. 41-42.

At the very least, those case-specific details were sufficient to allow a neutral magistrate to reasonably infer that petitioner's phones could contain information connected to his purchase and possession of controlled substances, such that the good-faith exception applies. Pet. App. 7a-11a. And in light of the applicability of that exception, a decision in petitioner's favor on probable cause would not only be factbound -- and therefore have limited effect beyond the particulars of this case -- but also would have no practical effect on petitioner's case. See Gates, 462 U.S. at 232 (explaining that probable cause is "a fluid concept -- turning on the assessment of probabilities in particular factual contexts -- not readily, or even usefully, reduced to a neat set of legal rules"); Supervisors v. Stanley, 105 U.S. 305, 311 (1882) (observing that the Court does not grant a writ of certiorari to "decide abstract questions of law * * * which, if decided either way, affect no right" of the parties).

Petitioner contends (Pet. 30) that allowing the majority's reliance on the good-faith exception to "defeat[] review in this case" would mean that review could be precluded "indefinitely." But petitioner's own citations (Pet. 16, 27) belie that claim, as

he refers to various cases in which courts have decided whether probable cause supported warrants to search cell phones. See United States v. Smith, No. 21-1457, 2022 WL 4115879 (6th Cir. Sept. 9, 2022), petition for cert. pending, No. 22-6777 (filed Feb. 9, 2023); United States v. Griffith, 867 F.3d 1265 (D.C. Cir. 2017); United States v. Lindsey, 3 F.4th 32, 39-40 (1st Cir. 2021), cert. denied, 142 S. Ct. 1170 (2022); United States v. Orozco, 41 F.4th 403, 409-411 (4th Cir. 2022). And the decision below itself appeared to acknowledge that a future case may present a more appropriate opportunity to address the probable-cause issue. See Pet. App. 5a n.1.

2. Petitioner likewise errs in contending (Pet. 16-28) that the decision below conflicts with United States v. Griffith, supra. The D.C. Circuit in Griffith instead simply concluded, on the facts of that case, that a warrant authorizing the search of a home for "all electronic devices" was invalid because the supporting affidavit failed to establish probable cause, or justify application of the good-faith exception to the exclusionary rule, in searching the apartment of the girlfriend of a suspected getaway driver from a year-old homicide. See 867 F.3d at 1268-1269 (citation omitted); see also id. at 1275-1276 (additionally concluding that the warrant was invalid for the independent reason that it was overbroad in "allowing the seizure of all electronic devices found in the residence," rather than being limited to

"devices owned by Griffith, which already would have gone too far").

The D.C. Circuit observed that a finding of probable cause, or even good faith, would require accepting three assumptions that, at least in combination, lacked sufficient support. Griffith, 867 F.3d at 1270-1275. The first assumption was that Griffith owned a cell phone, when "the affidavit supporting the warrant application provided virtually no reason to suspect" that he did, and "the circumstances suggested Griffith might have been less likely than others to own a phone around the time of the search": he had been incarcerated for much of time since the homicide; associated with a "potential co-conspirator" who "was known not to have a cell phone"; and no record existed of him ever owning or even "using a cell phone," anyone ever "having received a phone call or text message from him," or officers having recovered a cell phone from him when he was arrested and confined on unrelated charges. Id. at 1270-1273. The second assumption was that any "phone was 'likely to be found at the place to be searched'" -- an apartment belonging to Griffith's girlfriend -- rather than on his person. Id. at 1273 (citation omitted). And the final assumption was that any phone "would contain incriminating evidence" of a year-old homicide, when Griffith "had been confined for some ten months," might well have "delet[ed] incriminating information" from any incriminating phone, or might not even have the same phone. Id. at 1273-1274.

The circumstances of Griffith thus bear little, if any, resemblance to the facts here. Unlike Griffith, this case did not involve the search of a home, "the 'first among equals' when it comes to the Fourth Amendment." 867 F.3d at 1275 (quoting Florida v. Jardines, 569 U.S. 1 (2013)). Nor did the affidavits here involve the multiple assumptions at issue in Griffith. When the officers here applied for a search warrant, they did not have to guess whether petitioner had a cell phone or where it might be located; they already were in possession of three phones belonging to him, found along with drugs and drug paraphernalia in a speeding van after midnight. And the warrant sought evidence of offenses occurring contemporaneously with the seizure of the phone -- not a crime that was committed over a year earlier.

Griffith accordingly does not conflict with the decision below. And while the petition includes (Pet. 16-19) a lengthy discussion of United States v. Smith, 2022 WL 4115879, petitioner recognizes (Pet. 16-19) that the Sixth Circuit's unpublished decision there concluded, consistent with the en banc court here, that the good-faith exception applied to the cell phone search. He therefore fails to identify any conflict in the courts of appeals to support his petition for a writ of certiorari, which should accordingly be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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