No. _____

In the
United States Supreme Court
October Term, 2022

Fharis Denane Smith,

Petitioner

v.

United States of America,

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

Petition for Writ of Certiorari

Gary W. Crim
Counsel of Record
943 Manhattan Avenue
Dayton, Ohio 45406-5141
(937) 276-5770
garywcrim@gmail.com

Counsel for Petitioner

Question Presented

To search a target's phone, does probable cause and good faith require a nexus between the target's phone and the crime demonstrated by case-specific facts, or may the magistrate rely on mere police generalities about the role of phones in modern society and non-case-specific conclusions about criminal behavior?

Parties to the Proceeding

Petitioner, Fharis Denane Smith, was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

Table of Contents

Table of Authorities

Page(s)

Federal Cases

Federal Statutes

Constitutional Provisions

No. _____

In the
United States Supreme Court

Fharis Denane Smith,

Petitioner

v.

United States of America,

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

Fharis Denane Smith petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Citations of the Official and Unofficial Reports of the Opinions and Orders.

The Sixth Circuit Court of Appeals decision is not published but is reported at 2022 U.S. App. LEXIS 25359, 2022 WL 4115879 and attached. Appx. A, 1a. The order of the District Court is not reported. Appx. C, 39a.

Statement of Jurisdiction

The Sixth Circuit Court of Appeals issued its opinion on September 9, 2022, extended the time for filing the rehearing petition and denied the timely filed Petition for Rehearing on November 17, 2022. Appx. B, 37a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Statutory and Constitutional Provisions

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

U.S. CONST. amend. IV.

Introduction

There is a circuit split on the requirements for probable cause to seize and inspect cell phones. The Court of Appeals for the District of Columbia has held that an officer's opinion that cell phones could lead to evidence cannot support a warrant and that it is unreasonable for officers to rely on such a warrant. *United States v. Griffith*, 867 F.3d 1265 (D.C. Cir. 2017). The Fifth Circuit has held that such an opinion is sufficient and that officers can rely on such a warrant. *United States v. Morton*, 46 F.4th 331 (5th Cir. 2022) (en banc) (petition for certiorari pending, sub nom. Morton v. United States, United States Supreme Court Case No. 22-6489). The Sixth Circuit in this case with a divided court rejected the finding of probable cause but held that it was reasonable for officers to rely on such a warrant.

The appellate proceedings so far have resulted not in a single opinion but in three separate opinions. First, Judge Guy held that the affidavit provided probable cause for the search warrant and that the seizure of the information should not be suppressed because of *United States v. Leon*, 468 U.S. 897 (1984). Second, Judge Clay dissented, holding that there was no probable cause for the search warrant and that the good-faith exception does not save the evidence. And finally, Judge

Moore concurred in the judgment, holding that there was no probable cause for the search warrant but that the evidence was properly admitted under the good-faith exception of *United States v. Leon*, 468 U.S. 897 (1984).

Requiring evidence connecting items sought to the crime under investigation to secure a search warrant is not a new concept! Forty-five years ago, this Court used a footnote to describe the requirements for a search warrant:

> Two conclusions necessary to the issuance of the warrant must be supported by substantial evidence: that the items sought are in fact seizable by virtue of being connected with criminal activity, and that the items will be found in the place to be searched.

Zurcher v. Stanford Daily, 436 U.S. 547, 556 n.6 (1978). An officer seeking a warrant would have to be very poorly trained to be unaware of the need for a nexus between the crime under investigation and the item seized in the warrant.

This Court recognizes that cellular phones are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude that they were an important feature of human anatomy. *Riley v. California*, 573 U.S. 373, 385 (2014).

Statement

1. Petitioner, Fharis Denane Smith, was arrested on an unrelated misdemeanor on April 18, 2020. The authorities were investigating a homicide that had occurred on April 11, 2020. Smith was arrested with two cell phones, which the government seized and sought a warrant to examine further. The affidavit related facts from various people connecting Smith and another man to the homicide but had no mention of the cell phones at the homicide on April 11, only the existence of the cell

phones at Smith's arrest on April 18. The affidavit also included the opinion of a fifteen-year detective that it would help the homicide investigation if the authorities could examine the cell phones:

> Your affiant knows through training and experience that people involved in criminal activity regularly employ their mobile electronic devices in the planning, the commission, or the concealment of crime and that they will document criminal activity through photographs, text messages, and other electronic data contained within and accessed by such devices. Affiant has employed facts obtained from such devices in the successful prosecution of violent criminals.
>
> By searching the contents of Fharis Smith's mobile devices, affiant believes detectives will be able to learn more about who was at the scene and how events unfolded. Further, that there could be information on the phone including photos, communications and documents that would show whether Smith possessed a firearm or communicated with anyone about his involvement in this matter.
>
> Based on the above facts, your affiant requests that this warrant be issued so that evidence of the crime(s) at hand may be searched for and seized.

Affidavit for Search Warrant, Appx. E, p. 84a. After receiving the state warrant, the authorities accessed texts interpreted at trial as drug transactions.

2. The Government indicted Smith on three charges: Count One—Felon in Possession of a Firearm. 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(a)(2); Count Two—Possession with Intent to Distribute Methamphetamine, 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(C); and Count Three—Possession of Firearm in Furtherance of Drug Trafficking, 18 U.S.C. § 924(c)(1)(A)(i).

3. Smith moved to suppress the evidence seized under the warrant. At the argument on that motion, the District Judge asked about the connection of the phones to the homicides:

> THE COURT: How does the affidavit connect this phone to the homicide?

> MR. VERHEY: It simply says that Walker had the phone at the time of his arrest seven days after the homicide. And it links, I mean, it says that Walker was one of two people involved in the shooting, which I think is significant, because–
>
> THE COURT: Just focusing on the phone right now.

Appx D, p.56a-57a.

The affidavit is silent about cell phones at the scene of the homicide. The government relied on the general knowledge of the affiant about criminal behavior. The District Court noted the problem with such a position:

> THE COURT: But the fallout from taking that position is, is that whenever someone has a cell phone on them and they have allegedly been involved in a crime involving more than one person, you automatically get into the phone. Am I right about that?
>
> MR. VERHEY: If an officer says people engaged in violent crime have information like that.
>
> THE COURT: All cell phones are searchable at that point pursuant to a warrant?
>
> MR. VERHEY: If --
>
> THE COURT: Is that your position?
>
> MR. VERHEY: If an officer is willing to take an oath and tell a judge that it's been his experience that it is common, I would say all cases like that with concerted activity fall within the probable cause range.

Appx. D, pp. 58a. The District Court overruled the motion to suppress and found that the officers relied on it in good faith. Appx. D, pp. 68a-71a.

4. Smith went to trial, and the jurors convicted him on all three counts. The District Court imposed a sentence of seventy-eight months on each of Counts One and Two, to be served concurrently, and sixty months on Count Three, to be served consecutively to Counts One and Two, and three years of supervised release.

5. Smith appealed his conviction. Two of the Sixth Circuit judges agreed that the affidavit in Smith's case was inadequate because it provided no case-

specific facts establishing a connection between the cell phones and the crime under investigation. One judge would have reversed, but the other judge felt that a veteran detective could rely on such an affidavit despite its lack of case-specific facts. The result, in this case, allows an affiant's opinion to substitute for case-specific facts in determining the nexus between the item searched and the crime under investigation. This result cannot be squared with the existing case law. Probable cause requires more than a "belief" or a "could be."

Reasons for Granting the Writ: This case presents a clear opportunity for the Court to resolve the circuit split on applying the Fourth Amendment requirement of case-specific facts to search warrants for cell phones.

The questions presented—whether probable cause and good faith require a particularized nexus to the target's phone to search it, or whether, instead, the magistrate may rely on mere police generalities about the role of phones in modern society—have provoked intense division and conflict in the courts of appeals.

A. The Circuits do not agree on whether a magistrate must have facts connecting a criminal activity to a cell phone or may rely on the police assertions that people use cell phones.

Had Mr. Smith been in the District of Columbia, the result would have been different. A divided panel of the D.C. Circuit reached a conclusion opposite the Sixth Circuit. In *Griffith*, the affidavit was also for a murder investigation and yielded evidence of another crime, in this case, unlawful firearm possession by a convicted felon. *United States v. Griffith*, 867 F.3d 1265, 1268 (D.C. Cir. 2017). There, a divided panel of the D.C. Circuit reversed the defendant's conviction. The police

suspected the defendant of acting as a getaway driver in a gang-related homicide. They sought and received a warrant to search the defendant's home for his phone, and then to search the phone. After providing probable cause to suspect his involvement in the homicide, the affidavit provided the following language:

> Based upon your affiant's professional training and experience and your affiant's work with other veteran police officers and detectives, I know that gang/crew members involved in criminal activity maintain regular contact with each other, even when they are arrested or incarcerated, and that they often stay advised and share intelligence about their activities through cell phones and other electronic communication devices and the Internet, to include Facebook, Twitter and E-mail accounts.

The majority found this insufficient, noting that the affidavit did not assert that the defendant even owned a cell phone. The affidavit did not provide any nexus between the cell phone and evidence of the homicide. *Griffith*, 867 F.3d at 1271-72. The D.C. Circuit held that the fact that most people now carry a cell phone was not enough to justify a search of a home for all cell phones. *Griffith*, 867 F.3d at 1268.

A similar affidavit was used to secure a search warrant for a cell phone in a Fifth Circuit case: *United States v. Morton*, 46 F.4th 331 (5th Cir. 2022) (en banc). There were over three pages detailing the facts surrounding Morton's arrest and the discovery of drugs and his phones; the affidavit also detailed where the marijuana, glass pipe, and ecstasy pills were discovered. However, when it came to the cell phones, the affidavit provided no case-specific facts, only the affiant's general knowledge about cell phones:

> In support of the request to search for photos on the phones, the affiant explains he "knows through training and experience that criminals often take photographs of co-conspirators as well as illicit drugs and currency derived the sale of illicit drugs." Whatever one might conclude in

> hindsight about the strength of the evidence it recounts, the affidavit is not "wholly conclusory."

Morton, 46 F.4th at 337. As with the other two affidavits cited above, this affidavit provided no facts connecting the items sought to the crime under investigation.

"The fact that an arrestee has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely." *Riley*, 573 U.S. at 392. In *Riley,* the Court, citing Learned Hand from almost 100 years ago, likened a cell phone search to ransacking a person's house for anything incriminating. *Riley*, 573 U.S. at 396-97. The *Riley* Court also noted the English use of a general warrant as one reason the founders adopted the Fourth Amendment. *Riley v. California*, 573 U.S. at 403.

Just as a murder scene does not permit ignoring the probable cause for a search, *Flippo v. West Virginia*, 528 U.S. 11 (1999), being arrested with a cell phone does not automatically allow a ransacking that phone for incriminating evidence. An affidavit must provide the magistrate with facts supporting a search—the affidavit must provide a nexus between the crime and the item searched. The critical element in a reasonable search is not that the property owner is suspected of a crime but that there is reasonable cause to believe that the specific items searched for and seized are located on the property searched. *Wyoming v. Houghton*, 526 U.S. 295, 302 (1999).

Here, the affidavit provided no case-specific facts connecting Smith's cell phones seized on April 18 to the crime that occurred on April 11. Thus, the affidavit did not provide a nexus between the cell phone and the homicide under

investigation—nothing in the affidavit indicated that the cell phones were even present at the homicide. Instead, there was a general assertion that criminals use cell phones. Affidavits with such conclusory statements have long been rejected by courts. An affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause, and conclusory statements fail to meet this requirement. *Illinois v. Gates*, 462 U.S. 213, 239 (1983). While the standard is not high, facts are still required for a neutral magistrate to issue a search warrant.

Here there is nothing in the affidavit indicating that the culprits had a cell phone at the shooting, were communicating with cell phones, or were taking pictures with cell phones at the shooting. An affidavit failing to connect the item searched to the crime alleged cannot justify a search warrant.

B. The Circuits do not agree on the applicability of the good-faith exception to the failure to connect the item sought to the location searched.

The Circuits have taken different approaches to the applicability of the good-faith exception.

The majority in *Griffin* rejected applying the good faith doctrine. In its view, the mere truism that criminals have phones and talk to each other does not represent cognizable evidence of a nexus between any suspected criminal activity and the home or phone. The majority thought the warrant—in addition to its overbreadth—was essentially bare bones as to the necessary nexus. It said:

> [W]e do not doubt that most criminals—like most people—have cell phones, or that many phones owned by criminals may contain evidence of recent criminal activity. Even so, officers seeking authority to search

> a person's home must do more than set out their basis for suspecting him of a crime.

Griffith, 867 F.3d at 1279.

In this case, Judge Moore found the affidavit lacking in probable cause for searching a cell phone because of the absence of facts connecting Smith to the homicide offense. "Ultimately, however, I recognize that the affidavit specified some remote connection between the contents of Smith's cell phone and the shooting." Opinion, p. 35, 35a (J. Moore, concurring)). She relied on the experienced officer's beliefs that the phones found at the time of the arrest on April 18 would have evidence of a homicide on April 11, even though there is no evidence that the cell phones were used or even present at the homicide. Yet in order to apply the good-faith exception, the Court needed evidence that the experienced detective would not know that a warrant requires reasonable cause to believe that the specific things to be searched for and seized are located on the property to which entry is sought—something that has been long established.

This application of *Riley* permits the rummaging through Smith's cell phone without connecting them to the homicide under investigation. The Sixth and Fifth Circuits have turned *Riley* upside down. *Riley* calls for restraint on seizing and searching cell phones. Yet the Fifth and Sixth Circuits hold that it is reasonable for officers to seize and search cell phones when the affidavits provide no connection between the crime under investigation and the items searched.

Conclusion

This case presents the Court with an excellent opportunity to resolve the circuit split on applying the Fourth Amendment requirement of case-specific facts to search warrants for cell phones.

Thus, this Court should grant Smith's petition for a Writ of Certiorari to resolve the split.

s/Gary W. Crim

Gary W. Crim
Counsel of Record
943 Manhattan Avenue
Dayton, Ohio 45406-5141
(937) 276-5770
garywcrim@gmail.com

Attorney for Fharis Denane Smith