No. 22-6777

IN THE SUPREME COURT OF THE UNITED STATES

FHARIS DENANE SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

KENNETH A. POLITE, JR.
Assistant Attorney General

TYLER ANNE LEE
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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 (W.D. Mich.):

United States v. Smith, 20-cr-71 (Apr. 26, 2021)

United States Court of Appeals (6th Cir.):

United States v. Smith, 21-1457 (Sept. 9, 2022)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is not published in the Federal Reporter but is available at 2022 WL 4115879. The order of the district court denying petitioner's motion to suppress (Pet. App. 39a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 2022. A petition for rehearing was denied on November 17, 2022 (Pet. App. 37a). The petition for a writ of certiorari was filed on February 9, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Michigan, petitioner was convicted of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2); possessing methamphetamine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i). Judgment 1. He was sentenced to 138 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-36a.

1. On April 18, 2020, police officers in Kalamazoo, Michigan located and arrested petitioner at a gas station pursuant to an outstanding warrant. Pet. App. 2a. In petitioner's vehicle, officers found a loaded semi-automatic pistol, ammunition, 2.61 grams of methamphetamine, a digital scale with white residue, and two cell phones. Ibid.

That evening, a Kalamazoo detective sought a warrant to search the two cell phones. Pet. App. 2a. In the supporting affidavit, the detective stated that he was investigating a shooting that had occurred a week earlier. Id. at 2a-3a. The affidavit stated that a known source who had requested anonymity had told police that petitioner and another individual, Dauntrell Walker, were present at the scene of the shooting and that both men had fired guns at the deceased. Id. at 3a. The affidavit also stated that multiple

sources had advised the police that petitioner and Walker had been involved in the shooting; that police had received information that one of the shooters may have sustained a gunshot wound during the incident; and that the detective himself knew petitioner and Walker to have a history of involvement in weapon possession and violent acts in Kalamazoo. Ibid.

The affidavit further stated that when Walker was arrested on the same day, he had a fresh wound on his lower back consistent with a gunshot wound, and that petitioner was arrested in possession of a loaded firearm and two cell phones. Pet. App. 3a. The affidavit noted that those facts "corroborate[d] the information" given by the anonymous source. Ibid. (citation omitted). The detective explained in the affidavit that he had 15 years of experience and "kn[ew] 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." Ibid. (citation omitted). The affidavit stated that the detective believed that a search of petitioner's cell phones would yield evidence about the shooting. Id. at 4a.

A state court judge authorized the searches after finding that the affidavit established probable cause. Pet. App. 4a. During a search of one of petitioner's phones, officers found

evidence of drug-dealing activity, including text messages sent on the day of petitioner's arrest in which petitioner and another individual arranged to meet at a gas station and the other individual stated he "need[ed] $100 worth." Ibid.

2. A federal grand jury charged petitioner with possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2); possessing methamphetamine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and possessing a firearm in furtherance a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i). Indictment 1-3. Petitioner moved to suppress the text-message evidence found on his phone, asserting that the search warrant was issued without probable cause. Pet. App. 4a. Petitioner also asserted that the good-faith exception to the exclusionary rule should not apply because the affidavit was "so lacking in probable cause to render official belief in its existence entirely unreasonable." Id. at 50a.

The district court denied petitioner's motion. Pet. App. 39a, 71a. The court found that, after considering the "totality of the circumstances" and the "deference" accorded to the state court judge's probable-cause determination, the warrant was "lawfully issued * * * and accordingly, the search of the cell phone was appropriate." Id. at 69a-70a. The court further found that even if the warrant's supporting affidavit lacked probable cause, the "good faith exception to the search warrant requirement"

applied and "the officers could rely on the warrant in good faith" under United States v. Leon, 468 U.S. 897 (1984). Pet. App. 70a-71a.

Petitioner proceeded to trial, where the text messages were admitted into evidence. Pet. App. 4a. The jury found petitioner guilty of all three counts charged in the indictment. Id. at 5a. The district court sentenced petitioner to 138 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3

3. The court of appeals affirmed in an unpublished decision, agreeing with the district court that the good-faith exception applied. Pet. App. 1a-20a; id. at 33a-36a.

Judge Guy authored the lead opinion, which first discussed probable cause, but "elect[ed] to not decide" that issue. Pet. App. 15a; see id. at 7a-15a. Turning to the good-faith exception, the lead opinion noted that "in his initial brief on appeal" petitioner "failed to challenge" the district court's finding that the good-faith exception applied, and that the court generally treats arguments not raised in the opening brief as "'forfeited.'" Id. at 15a (citation omitted). It then went on, "[e]ven so," to determine that petitioner's "belated" argument that the good-faith exception did not apply was "unavailing." Ibid. The lead opinion found that the only possible basis for declining to apply the good-faith exception -- a "'bare bones'" affidavit -- inapplicable, emphasizing that the affiant's "'training and experience,'" the

tips "suggesting [the shooting] was a coordinated attack," and petitioner's possession of "a loaded gun and two cell phones when he was arrested" all supported a potential connection between the crime and the phones. Id. at 17a; see id. at 16a-18a.

Judge Clay dissented in relevant part, on the theory that the warrant lacked probable cause and was so deficient that the good-faith exception was inapplicable. Pet. App. 21a-32a. In his view, "[t]he lack of a nexus between the criminal activity alleged (a homicide) and [petitioner's] cell phone rendered reliance on the warrant objectively unreasonable and the good faith exception inapplicable." Id. at 31a.

Judge Moore wrote a separate opinion concurring in the judgment. Pet. App. 33a-36a. Although she shared Judge Clay's view that the "sources mentioned in the affidavit are insufficiently corroborated" and that probable cause was lacking, she agreed with the lead opinion that the good-faith exception to the exclusionary rule applied. Id. at 33a; see id. at 33a-35a. She observed, as an initial matter, that that petitioner "forfeited the good-faith exception issue on appeal," although she found it "unclear whether the government raised adequately a forfeiture argument." Id. at 33a. And like the lead opinion, she found the affidavit to be more than "bare bones," observing that the affidavit "described a shooting involving two suspects and contained the testimony of an officer who believed that relevant information would be found on one of the suspects' cell phones

based on 'training and experience,'" such that an "officer relying on the warrant could reasonably believe that a judge relied on those allegations to find a connection between the cell phone and the shooting." Id. at 35a (citation omitted). And she "moreover" found that "[i]n light of the allegations connecting [petitioner] to the shooting," "such reliance could not be considered reckless." Ibid.

ARGUMENT

Petitioner contends (Pet. 6-11) that the affidavit failed to establish probable cause to search his cell phone and that the court of appeals erred in applying the good-faith exception to the exclusionary rule.* As to probable cause, the majority below agreed with petitioner that the affidavit did not establish probable cause to search petitioner's cell phone. The court nevertheless affirmed because the officers' reliance on the warrant was reasonable, and therefore, the good-faith exception applied. That fact-specific decision was correct and does not conflict with any decision of this Court or another court of appeals. No further review of the court of appeals' unpublished, and thus nonprecedential, decision is warranted.

1. Petitioner first suggests (Pet. 8, 10) that the decision below conflicts with this Court's decision in Riley v. California, 573 U.S. 373 (2014). That contention lacks merit.

* The pending petition in Morton v. United States, No. 22-6489 (filed Dec. 5, 2022), presents a similar challenge to the application of the good-faith exception to a cell phone search.

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." 573 U.S. 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 a search pursuant to a warrant like the 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 the search-incident-to-arrest exception to the warrant requirement to cell phones. See Riley, 573 U.S. at 393-398. The officer 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." Id. at 403.

Petitioner nevertheless asserts (Pet. 10) that the decision below "turn[s] Riley upside down" because it declined to impose a

more stringent nexus requirement for searching a cell phone pursuant to a warrant. But Riley does not speak to the dispositive issue here -- the good-faith exception to the exclusionary rule in the context of a warrant-based search -- at all. And as the court of appeals correctly recognized, the police conduct here did not "even begin[] to approximate" the kind of unreasonable behavior that would preclude application of that exception. Pet. App. 17a.

The tips reported in the affidavit provided support for petitioner's involvement in the shooting with Walker, and the corroboration of Walker's gunshot wound "made it more likely that Walker (and consequently, [petitioner]) was present at the scene." Pet. App. 35a (Moore, J., concurring in the judgment); see id. at 17a (lead opinion). Added to those facts was the affiant officer's statement that -- based on his 15 years of experience as a police officer -- "individuals involved in criminal activity regularly use their cell phones to plan or conceal crime." Id. at 17a (lead opinion); see id. at 35a (Moore, J., concurring in the judgment). A neutral magistrate, presented with that affidavit, issued a search warrant for the phones, on which a reasonable officer could rely. See, e.g., id. at 35a (Moore, J., concurring in the judgment) (emphasizing that officer's reliance would not be "reckless"). The court of appeals' fact-bound application of the good-faith exception does not warrant further review.

2. Petitioner does not dispute that the unpublished decision here is consistent with the Fifth Circuit's decision in

United States v. Morton, 46 F.4th 331 (en banc), petition for cert. pending, No. 22-6489 (filed Dec. 5, 2022). See Pet. 7-8. And he errs in asserting (Pet. 9-10) that the decision below conflicts with United States v. Griffith, 867 F.3d 1265 (D.C. Cir. 2017).

The D.C. Circuit in Griffith 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 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, 6 (2013)). Nor did the affidavit here involve the multiple assumptions at issue in Griffith. When the officer here applied for a search warrant, he did not have to guess whether petitioner had a cell phone or where it might be located; the officer already possessed two phones belonging to petitioner, found along with a gun, ammunition, drugs, and drug paraphernalia. And the warrant sought evidence of offenses occurring only a week

prior to the seizure of the phones -- not a crime that was committed more than a year earlier. Griffith accordingly does not conflict with the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

KENNETH A. POLITE, JR.
Assistant Attorney General

TYLER ANNE LEE
Attorney

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