No. 22-6777

In the
United States Supreme Court
October Term, 2022

Fharis Denane Smith,

Petitioner

v.

United States of America,

Respondent

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

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Reply Brief for Petitioner

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

Counsel for Petitioner

Table of Authorities

Page(s)

Federal Cases

Constitutional Provisions

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Reply Brief for the Petitioner

While arguing that the courts below made the appropriate factual findings which now bind the higher courts, the Government does not discuss the most glaring omission of the affidavit here, the absence of evidence connecting the crime to the cell phones. Possessing a cell phone is not illegal and is not a sign of criminal activity. Coming under government scrutiny does not justify searching a cell phone without probable cause and facts connecting the cell phone to the crime under investigation.

I.

Petitioner discusses three affidavits supporting search warrants the one in this case, 82a-84a; the one in *United States v. Griffith*, 867 F.3d 1265, 1269-70 (D.C. Cir. 2017); and the one in *United States v. Morton*, 984 F.3d 421, 428 fn 6 (5th Cir. 2021). The Government and Petitioner agree that *Morton* and *Smith* are consistent but disagree on most other aspects of this case.

The government argues that the facts in *Griffith* bear little resemblance to the facts in this case, discussing the detailed facts of the cases. It is not the detailed facts that create the conflict between the Circuits. What creates the conflict between the Fifth and Sixth Circuits, on the one hand, and the D.C. Circuit, on the other hand, are affidavits lacking facts connecting the crime under investigation to the item searched and the attempt to substitute for the missing connection a general invocation of the police officer's belief that people have information on cell phones that will help criminal investigations.

In distinguishing *Griffith* from *Smith, t*he Government discusses three assumptions. The first assumption was that Griffith owned a cell phone. The second assumption was that any phone was likely to be found at the place to be searched. And the final assumption was that any phone would contain incriminating evidence. Brief in Opposition, pp. 10-11. The Government asserts that the affidavit in *Griffith* included no information about ownership of a cell phone, while in *Mitchell,* the investigator had the phone. First, the Government never connects the seized phone to the crime under investigation in the affidavit, namely the homicide.

Second, the affidavit in this case never asserts that the perpetrators in the homicide even had cell phones or used them. Third, the only information that the phone would contain incriminating information came from the general beliefs of the affiant, not facts. Appendex 84a.

There is a disconnect between the crime under investigation and the items searched in all three cases. The government attempted to connect the homicide to cell phones by substituting investigators' beliefs and assumptions instead of facts. The D.C. Circuit refused to allow this, while the Fifth and Sixth Circuits allowed the substitution of investigators' beliefs and assumptions for specific facts.

II.

The Government distinguishes *Riley v. California*, 573 U.S. 373 (2014), involved "only *warrantless* searches of cell phones—not a search pursuant to a warrant like the issue here." Brief in Opposition, p.8. This Court addressed the search-pursuant-to-arrest doctrine. Nonetheless, *Riley* addresses the pervasiveness of cell phones. And this Court did not limit its discussion in *Riley* to warrantless searches:

> The United States asserts that a search of all data stored on a cell phone is "materially indistinguishable" from searches of these sorts of physical items. Brief for United States in No. 13-212, p. 26. That is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together. Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse. A conclusion that inspecting the contents of an arrestee's pockets works no

> substantial additional intrusion on privacy beyond the arrest itself may make sense as applied to physical items, but any extension of that reasoning to digital data has to rest on its own bottom.

Riley v. California, 573 U.S. at 393. This Court discussed the change resulting from increased capacity and variety of information on a cell phone with what one carried in a billfold. Today adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives. "Allowing the police to scrutinize such records on a routine basis is quite different from allowing them to search a personal item or two in the occasional case." *Riley v. California*, 573 U.S. at 395.

The Government argues that searching a cell phone differs from searching a house, implying that a lower level of protection is appropriate. Brief in Opposition, p. 11. *Riley* addressed this issue and rejected such a view:

> Today, by contrast, it is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate. Allowing the police to scrutinize such records on a routine basis is quite different from allowing them to search a personal item or two in the occasional case.

Riley v. California, 573 U.S. at 395 (Citation omitted).

Under the Government's analysis, once one is arrested, then their cell phone is fair game upon the invocation of the investigator's belief that cell phones can lead to evidence. Using the same logic, once one is arrested, the authorities could obtain a search warrant because people involved in criminal activity regularly have evidence of their illegal activity in their homes and authorities have employed facts obtained from houses in the successful prosecution of criminals.

III.

The Government seeks to admit the evidence under the good-faith exception under *United States v. Leon*, 468 U.S. 897, 902 (1984). The Government seeks to rely on the sophisticated generalizations of the investigators and yet rely on the *Leon* good-faith exception for the sophisticated investigators who do not know that a magistrate must have facts to connect the crime to the item searched. To establish probable cause, the Government urges reliance on the experience and sophistication of the affiant. And then, to qualify for the *Leon* exception, the Government must rely on the fact that the affiant did not know that it was necessary to provide the magistrate with information connecting the cell phones to the homicide, the crime under investigation.

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 in the circuits.

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