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Appendix in Support of

Application for Extension of Time

To File Petition for Writ of Certiorari

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
August 22, 2022
Lyle W. Cayce
Clerk

No. 19-10842

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

BRIAN MATTHEW MORTON,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:19-CR-17-1

Before RICHMAN, *Chief Judge*, and JOLLY, JONES, SMITH, STEWART, DENNIS, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, COSTA, WILLETT, HO, DUNCAN, ENGELHARDT, OLDHAM and WILSON, *Circuit Judges*.*

GREGG COSTA, *Circuit Judge*, joined by RICHMAN, *Chief Judge*, and JONES, SMITH, STEWART, SOUTHWICK, HAYNES, HO, DUNCAN, ENGELHARDT, OLDHAM, and WILSON, *Circuit Judges*:

State troopers arrested Brian Morton after finding drugs in his car during a traffic stop. Morton also had three cellphones in the car. A state

* Judge Jolly chooses not to dissent or to join Judge Graves's dissent. He chooses to stand by the initial panel opinion.

judge later signed warrants authorizing searches of the phones for evidence of drug crime. The warrants allowed law enforcement to look at photos on the phones. When doing so, troopers discovered photos that appeared to be child pornography. This discovery led to a second set of search warrants. The ensuing forensic examination of the phones revealed almost 20,000 images of child pornography. This federal prosecution for receipt of child pornography followed.

Even though search warrants authorized everything law enforcement did when searching the cell phones, Morton argues the evidence discovered during those searches should be suppressed. We disagree because law enforcement is usually entitled to rely on warrants, and none of the exceptions that undermine good-faith reliance on a judge's authorization applies.

I

Shortly after midnight, state trooper Burt Blue pulled over Morton's van on Interstate 20 about fifty miles west of Fort Worth. After approaching the driver's side door, Blue smelled marijuana. Morton eventually admitted he had marijuana in the van. Blue then searched Morton and found an Advil bottle in his right pocket. The bottle contained several different colored pills that Morton admitted were ecstasy. Morton was arrested.

Blue and another trooper searched the van. Inside a plastic container wrapped in tape they discovered two plastic bags, one of which contained a small amount of marijuana. They also found a glass pipe with marijuana. In addition to the drug evidence, the troopers discovered approximately 100 pairs of women's underwear, a number of sex toys, and lubricant. A backpack with children's school supplies was also inside the van. A lollipop was inside a cupholder. Based on what they found in the van, the troopers were concerned Morton was a sexual predator.

The troopers also seized three cellphones during the search of the van. A few days after Morton's arrest, Blue applied for search warrants for the three phones. The search warrants sought evidence of drug possession and dealing.

In the affidavits he submitted in support of the warrants, Blue recounted the traffic stop and the drug evidence discovered in the van and on Morton. He also explained why, based on his experience, he believed it likely that the cellphones contained evidence of illegal drug activity. People often communicate via cellphone to arrange drug transactions. And "criminals often take photographs of co-conspirators as well as illicit drugs and currency derived from the sale of illicit drugs."

A state district judge concluded that probable cause existed for the searches and signed the three warrants. Each warrant allowed troopers to search for various items on the phones including "photographs, digital images, or multimedia files in furtherance of narcotics trafficking or possession."

While searching the phones, Blue and a Department of Public Safety agent saw images they believed were child pornography. They stopped searching and sought new warrants seeking evidence of child pornography. The same state district judge issued the new warrants. The forensic search of the phones that followed located 19,270 images of child pornography on the three phones.

A federal grand jury charged Morton with receipt of child pornography. Morton moved to suppress the pornographic images found on the phones. He argued that probable cause did not support the initial warrants allowing the phone searches. The good-faith doctrine did not apply, he continued, because the affidavits were too "general in nature" to tie the phones to drug activity. He also briefly contended that the search of the

phone for drug evidence was pretextual because the troopers were really concerned that Morton might have committed sex crimes.

The district court refused to suppress the evidence. It concluded that the good-faith exception to the suppression rule applied.

After losing his suppression motion, Morton entered a conditional guilty plea that allowed him to challenge the searches on appeal.

Morton's appeal initially succeeded. A panel of our court concluded that, although the "affidavits successfully establish probable cause to search Morton's contacts, call logs, and text messages for evidence of drug possession," *United States v. Morton*, 984 F.3d 421, 427 (5th Cir. 2021), they do not establish probable cause "that the photographs on Morton's phones would contain evidence pertinent to [that] crime," *id.* at 428. The panel also held that the good-faith exception did not apply because reasonable officers should "have been aware that searching the digital images on Morton's phone—allegedly for drug-trafficking-related evidence—was unsupported by probable cause." *Id.* at 430.

Our full court vacated that decision and agreed to hear this case en banc. *See United States v. Morton*, 996 F.3d 754 (5th Cir. 2021).

II

Riley v. California, one of the recent Supreme Court cases applying the Fourth Amendment to modern technology, held that the search of a cellphone incident to arrest requires a warrant. 574 U.S. 373 (2014). Morton and supporting amici view this case as a follow-on that allows us to flesh out when probable cause exists to believe that certain applications on a cellphone contain incriminating evidence. They argue that *Riley*'s warrant requirement will be a mere formality if officers can search an entire phone based on

nothing more than the fact that criminals sometimes use phones to conduct their illicit activity.

Despite the invitation to treat this as another difficult case addressing how "the degree of privacy secured to citizens by the Fourth Amendment" is affected "by the advance of modern technology," *Kyllo v. United States*, 533 U.S. 27, 33–34 (2001), a longstanding rule resolves the case: Evidence should not be suppressed when law enforcement obtained it in good-faith reliance on a warrant. *See United States v. Leon*, 468 U.S. 897 (1984).[1]

The good-faith rule flows from two central features of modern Fourth Amendment jurisprudence: the warrant requirement and the suppression remedy. The Supreme Court has held that a warrant is generally required for certain searches, most notably searches of the home and most recently searches of cellphones incident to arrest. *See Riley*, 574 U.S. at 403; *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (noting that "searches and seizures inside a home without a warrant are presumptively unreasonable" (internal quotation omitted)). Behind the warrant requirement is the idea that the "inferences which reasonable men draw from evidence" to decide if probable cause exists should "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1948) (Jackson, J.). Although obtaining a warrant from that neutral judge may

[1] We recognize that it will "stunt the development of Fourth Amendment law" if courts too often avoid the underlying constitutional question and deny suppression motions based on the good-faith rule. *See Davis v. United* States, 564 U.S. 229, 245–46 (2011) (summarizing this argument the defendant advanced); *cf. Pearson v. Callahan*, 555 U.S. 223 236 (2009) (giving courts discretion to rule only on the "clearly established" inquiry for qualified immunity but recognizing that deciding the underlying constitutional question is "often beneficial"). In this instance, however, we conclude that the good-faith rule offers the most appropriate resolution by the full court.

burden law enforcement before it conducts the search, the police obtain a benefit after the search. When a court reviews an after-the-fact challenge to the search, "the resolution of doubtful or marginal cases . . . should be largely determined by the preference to be accorded to warrants." *United States v. Ventresca*, 380 U.S. 102, 109 (1965). As a result, "[s]earches pursuant to a warrant will rarely require any deep inquiry into reasonableness." *Leon*, 468 U.S. at 922 (quoting *Illinois v. Gates*, 462 U.S. 213, 267 (1983) (White, J., concurring in judgment)).

To this unwillingness to second guess the magistrate who authorized the warrant, the exclusionary rule adds another component. As a judicially-created remedy rather than a constitutional requirement, the exclusionary rule is justified by the deterrent effect of suppressing evidence when it was obtained unlawfully. *Id.* at 906. A key consideration in deciding when suppression will deter is whether "law enforcement officers have acted in objective good faith." *Id.* at 908. The need to punish police conduct and thus deter future violations via suppression "assumes that the police have engaged in willful, or at the very least negligent, conduct." *Id.* at 919 (quoting *United States v. Peltier*, 422 U.S. 531, 539 (1975)). The exclusionary rule is not aimed at "punish[ing] the errors of judges and magistrates" who issue warrants. *Id.* at 916.

Deference to the judge issuing the warrant and the exclusionary rule's focus on deterring police misconduct results 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 922 (quoting *United States v. Ross*, 456 U.S. 798, 832 n.32 (1982)).

Normally, but not always. The Supreme Court identified four situations when "a reasonably well trained officer would have known that the

search was illegal despite the magistrate's authorization." *Id.* at 922 n.23. Reliance on a warrant is unreasonable when: 1) the magistrate issued it based on information the affiant knew was false or should have known was false but for reckless disregard of the truth; 2) the magistrate wholly abandoned the judicial role; 3) the warrant is based on an affidavit so lacking in probable cause as to render belief in its existence unreasonable; and 4) the warrant is facially deficient in particularizing the place to be searched or things to be seized. *Id.* at 923; *see also United States v. Triplett*, 684 F.3d 500, 504 (5th Cir. 2012).

III

Morton principally tries to defeat good faith by invoking the third exception, which involves what are commonly known as "bare bones" affidavits.[2] "'Bare bones' affidavits contain wholly conclusory statements, which lack the facts and circumstances from which a magistrate can independently determine probable cause." *United States v. Satterwhite*, 980 F.2d 317, 321 (5th Cir. 1992).

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[2] Morton also invokes the first exception that applies when law enforcement misleads the magistrate with false information in the affidavit. We succinctly address this argument because the full court is unanimous in rejecting it and Morton may not have adequately raised it in district court.

The alleged falsehood is keeping from the magistrate that the affiant's motive was not obtaining evidence of drug crime but investigating suspicions that Morton was a sexual predator. In other words, Morton is arguing that the reason for obtaining the warrant was pretextual. Even if Morton could prove this motive, it would not matter. The Supreme Court has repeatedly held that the Fourth Amendment inquiry, including the existence of probable cause, is objective. *See, e.g., Brigham City*, 547 U.S. at 404–05 (2006); *Whren v. United States*, 517 U.S. 806, 813 (1996); *see also United States v. McKinnon*, 681 F.3d 203, 210 (5th Cir. 2012) (explaining that the officer's motive in searching a vehicle did not matter). It is telling that Morton's primary authority on this issue is a vacated opinion. *See United States v. Pope*, 452 F.3d 338, *vacated by* 467 F.3d 912 (5th Cir. 2006).

A look at some bare-bones affidavits from Supreme Court cases shows just how bare they are. One affidavit, from the Prohibition Era, said nothing more than that the agent "has cause to suspect and does believe that certain merchandise . . . has otherwise been brought into the United States contrary to law, and that said merchandise is now deposited and contained within" the defendant's home. *Nathanson v. United States*, 290 U.S. 41, 44 (1933). Another affidavit, this one supporting an arrest warrant, said only that, on a certain day, the defendant "did receive, conceal, etc., narcotic drugs, to-wit: heroin hydrochloride with knowledge of unlawful importation" and that the affiant "believes" certain people "are material witnesses in relation to this charge." *Giordenello v. United States*, 357 U.S. 480, 481 (1958). Similarly, the allegations supporting an arrest warrant were bare bones when the only information was that "defendants did then and there unlawfully break and enter a locked and sealed building." *Whiteley v. Warden*, 401 U.S. 560, 563 (1971). Lastly, Houston police officers obtained a search warrant based only on their statement that they "received reliable information from a credible person and do believe that [drugs] are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law." *Aguilar v. Texas*, 378 U.S. 108, 109 (1964). These affidavits do not detail any facts, they allege only conclusions.

Also consider affidavits we have found to be bare-boned. In what we described as a "textbook example of a facially invalid, 'barebones' affidavit," the officer listed just the defendant's "biographical and contact information" and then stated "nothing more than the charged offense, accompanied by a conclusory statement" that the defendant committed that crime. *Spencer v. Staton*, 489 F.3d 658, 661–62 (5th Cir. 2007), *withdrawn in part on reh'g* (July 26, 2007). In another case, an officer obtained a warrant to search a motel room based on an affidavit stating nothing more than that the officer "received information from a confidential informant" who was known to him

and who had "provided information in the past that ha[d] led to arrest and convictions." *United States v. Barrington*, 806 F.2d 529, 531 (5th Cir. 1986). As these cases illustrate, bare-bones affidavits contain "wholly conclusory" statements such as "the affiant 'has cause to suspect and does believe' or '[has] received reliable information from a credible person and [does] believe.'" *United States v. Pope*, 467 F.3d 912, 920 (5th Cir. 2006) (internal quotations omitted).

The affidavits used to search Morton's phones are not of this genre; they have some meat on the bones. Each is over three pages and fully details the facts surrounding Morton'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. 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." *Satterwhite*, 980 F.2d at 321.

The affidavits, then, put all the relevant "facts and circumstances" before the state judge, allowing him to "independently determine" if the notoriously fuzzy probable-cause standard had been met. *See id.*; *see also Gates*, 462 U.S. at 232 ("[P]robable 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."). In other words, the judge made a judgment call. Judgment calls in close cases are precisely when the good-faith rule prevents suppression based on after-the-fact reassessment of a probable-cause determination. *Leon*, 468 U.S. at 914 ("Reasonable minds frequently may differ on the question whether a particular affidavit

establishes probable cause, and we have thus concluded that the preference for warrants is most appropriately effectuated by according 'great deference' to a magistrate's determination." (quoting *Spinelli v. United States*, 393 U.S. 410, 419 (1969))).

Although he invokes the bare-bones exception, Morton does not confront the caselaw showing it applies to affidavits that are wholly conclusory. He instead mostly challenges the probable-cause determination assessment itself, contending that the facts "merely establish[ed] probable cause for a user-quantity drug possession arrest and not probable cause to search the entire communication and photographic contents of [his] phones." Drug possessors, he points out, are less likely to use phones for drug activity than are dealers. He contends it would gut *Riley* if the linking of criminal activity to cellphones can be based on nothing more than an officer's experience that certain offenders often use cellphones in connection with their crimes. But this is not such a case. Morton 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.[3] *See United States v. Bams*, 858 F.3d 937, 945 (5th Cir. 2017); *United States v. Lindsay*, 3 F.4th 32, 40 (1st Cir. 2021); *United States v. Peterson*, 2019 WL 1793138, at *11–12 (E.D. Va. Apr. 24, 2019); *see also United States v. Eggerson*, 999 F.3d 1121, 1127 (8th Cir. 2021) ("It would be unreasonable and impractical to demand that judges evaluating probable cause must turn a blind eye to the virtual certainty that drug dealers use cell phones.").

[3] The concurring opinion points out that the affidavits did not identify the existence of three phones as a reason why the troopers suspected Morton of dealing drugs. But together the affidavits placed the fact of Morton's multiple phones before the state judge, who is charged with making an objective evaluation of probable cause.

It is a close call whether the evidence recounted in the affidavits established probable cause for drug trafficking as opposed to drug possession. And if the evidence indicated only possession, then it is another close call whether there was probable cause to believe that evidence of drug possession would be found on the phones. But as we have emphasized, on close calls second guessing the issuing judge is not a basis for excluding evidence.

Viewed in their entirety, the affidavits supporting the warrants are far from bare bones. It thus was reasonable to rely on the warrants and search the phones.

For most of this case, Morton's argument was the one we have just addressed: that searching any part of his phones was unjustified because the affidavits establish probable cause only for drug possession and not the trafficking that is more logically tied to phones. But even the panel originally hearing this appeal did not accept that argument despite holding that the photos should have been suppressed. The panel recognized probable cause existed to "search Morton's contacts, call logs, and text messages" on his phone, just not the photos. 984 F.3d at 427–28*; id.* at 431 (concluding that "the magistrate did not have a substantial basis for determining that probable cause existed to extend the search to the photographs on the cellphones"). Morton now runs with this theory that good-faith should be "analyzed separately" for each area to be searched. Because he did not make this claim in the district court or in his original appellate brief, it is forfeited, and we are not deciding it.

Even if we could consider Morton's new argument advocating a piecemeal analysis, it would not change our holding that the good-faith rule applies. At least one other court has taken the approach of the original panel in this case and analyzed whether an affidavit is bare bones for particular items to be searched. *See Burns v. United States*, 235 A.3d 758, 774 (D.C.

2020) ("The affidavits were thus classic 'bare bones' statements as to everything on Mr. Burns's phones for which Detective Littlejohn made a claim of probable cause beyond three narrow categories of data for which the affidavits made proper factual showings."). Our precedent takes a different approach. When a defendant moved to suppress evidence obtained under a warrant that authorized the seizure of "twenty-six categories of evidence, primarily written and electronic documents," our good-faith inquiry did not parse probable cause for each category. *See United States v. Cherna*, 184 F.3d 403, 406 (5th Cir. 1999). We instead focused on whether the affidavit as a whole was bare bones, while "keep[ing] in mind that it is more difficult to demonstrate probable cause for an 'all records' search of a residence than for other searches." *Id.* at 409. That is, the scope of a warrant may influence whether it is bare bones. An affidavit that is not bare bones for a limited search could be bare when supporting a broader search. Keeping the focus on the entirety of the affidavit as *Cherna* does is the traditional bare-bones inquiry, *see, e.g, Leon*, 468 U.S. at 926 (referring to a "'bare bones' affidavit" not parts of an affidavit), and consistent with the ultimate question whether an officer would know the affidavit is "so lacking in probable cause as to render belief in its existence unreasonable" despite a judge's finding that probable cause existed, *id.* at 923.

Viewing the entire affidavit against the broad phone search it authorized, it is borderline rather than bare bones. And even if our caselaw allowed a photographs-only inquiry and Morton preserved that argument, we would still not characterize the evidence supporting that request as "wholly conclusory." *Cf. United States v. Burgess*, 576 F.3d 1078 (10th Cir. 2009) (recognizing that it was reasonable to search a computer for "trophy photos" of drug activity based on not much more evidence than exists here).

The officers relied in good faith on the warrants the state judge issued. On finding images that appeared to be child pornography, they went back to

the judge for additional warrants (Morton does not challenge how the searches were conducted). We see no unreasonable law enforcement conduct that warrants suppression of the evidence the searches discovered.

* * *

We do not decide if the state judge should have authorized full searches of the phones based on these affidavits. We decide only that the officers acted in good faith when relying on the judge's decision to issue the warrants. This ruling hardly nullifies *Riley* as Morton, amici, and the dissent suggest. Before *Riley*, police could have searched Morton's phones on the spot after arresting him. *See United States v. Finley*, 477 F.3d 250, 259–60 (5th Cir. 2007), *overruled by Riley*, 573 U.S. at 373. Because of *Riley*, the officers had to obtain warrants. For better or worse, the warrant requirement and good-faith rule make the judge presented with the warrant application the central guardian of Fourth Amendment rights.[4] That has long been true when officers seek to search a home; *Riley* makes it true for searches of cellphones incident to arrest.

The judgment is AFFIRMED.

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[4] The role of the judge who must authorize a warrant is absent from the dissent's recounting of how officers might be able to search cellphones after "find[ing] evidence of small quantities of illicit drugs for personal use during an automobile stop." Dissenting Op. 4–5.

STEPHEN A. HIGGINSON, *Circuit Judge*, with whom ELROD and WILLETT, *Circuit Judges*, join, and with whom HO and WILSON, *Circuit Judges*, join as to Part II, concurring in the judgment:

I 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. *United States v. Satterwhite*, 980 F.2d 317, 321 (5th Cir. 1992).

I.

Because we can decide this case on the good faith exception, the majority opinion appropriately declines to address whether there was probable cause to search Morton's cell phone. I write separately to address the majority's response to Morton's argument that a finding of probable cause here would conflict with the reasoning, though not necessarily the holding, of *Riley v. California*, 573 U.S. 373 (2014), in which the Supreme Court held that police officers must obtain a warrant before searching the contents of an arrestee's cell phone, rather than conducting a search of the cell phone incident to arrest.

The only facts in the affidavit to support probable cause for a search of Morton's cell phone were that: (1) he possessed a user-quantity of drugs, (2) he simultaneously possessed a cell phone, and (3) the officer "kn[ew] through training and experience" that individuals, including those possessing illicit drugs, use their cell phones to communicate. If these three facts are sufficient to support probable cause for the search here, then any time an officer finds drugs (or other contraband for that matter) on a person or in a vehicle, there is probable cause to search the *entire contents* of a nearby cell phone.

Of course, *Riley* requires that officers first get a warrant, 573 U.S. at 403, but if the fact that the arrestee was carrying a cell phone at the time of

arrest is sufficient to support probable cause for a search, then the warrant requirement is merely a paperwork requirement. It cannot be that *Riley*'s holding is so hollow.[1]

II.

The heightened privacy interest that *Riley* recognized an arrestee has in the contents of their cell phone stems in part from the quantitative and qualitative differences between the data stored on a cell phone and any "other objects that might be kept on an arrestee's person." *Id.* at 393. Cell phones contain an enormous amount of personal information dating back months or years, including data that has no physical equivalent, like browser history or geolocation information. *Id.* at 394-96. Therein lies the problem with a cell phone search premised solely on the simultaneous possession of drugs and a phone. It is not merely the lack of probable cause that evidence of drug possession or trafficking would be found on the phone, but also that with such a meager showing, officers would gain unfettered access to all of "the privacies of life." *Id.* at 403 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

The original panel opinion in this case presented one potential solution to this problem by requiring probable cause for each category of data to be searched. *United States v. Morton*, 984 F.3d 421, 425-26 (5th Cir. 2021). This approach runs into practical problems, including the fact that

[1] The majority's response to the contention that "it would gut *Riley* if the linking of criminal activity to cellphones can be based on nothing more than an officer's experience that certain offenders often use cellphones in connection with their crimes" is that, here, there was something more—namely, the presence of multiple cellphones. It is true that we have recognized that the presence of multiple phones in a car—when combined with other strong evidence—can support a conviction for drug trafficking, *United States v. Bams*, 858 F.3d 937, 945 (5th Cir. 2017). But the affidavits here did not mention that multiple phones were found in the car, let alone rely on that fact to support probable cause.

"criminals can—and often do—hide, mislabel, or manipulate files to conceal criminal activity." *United States v. Stabile*, 633 F.3d 219, 237 (3d Cir. 2011).

Another approach, proposed by a leading Fourth Amendment scholar, would impose "use restrictions" on data that is outside the scope of the warrant, possibly by limiting application of the plain view doctrine in the context of digital searches. *See* Orin S. Kerr, *Executing Warrants for Digital Evidence: The Case for Use Restrictions on Nonresponsive Data*, 48 TEX. TECH L. REV. 1, 9, 19-20 (2015). At least one state supreme court has adopted a use restriction approach, *see State v. Mansor*, 421 P.3d 323, 344 (Or. 2018), and another has suggested that it might do so in the future, *Preventative Med. Assocs. v. Commonwealth*, 992 N.E.2d 257, 274 (Mass. 2013). After *Riley* and *Carpenter v. United States*, 138 S. Ct. 2206, 2220 (2018), in which the Supreme Court held that the third-party doctrine does not apply to cell-site location information, it would be unsurprising if the Court, again acknowledging the need to adapt rules constructed for the physical world to the reality of the digital world, recognized an exception to another longstanding Fourth Amendment doctrine, this time plain view. *See* Kerr, *supra*, at 20; *see generally Kyllo v. United States*, 533 U.S. 27, 33-34 (2001).

And there may be still other solutions that have yet to be identified. State courts face these dilemmas much more often than we do, and their continued innovation in this area—along with the valuable insights of Fourth Amendment scholars and those with the necessary technological expertise—will undoubtedly aid the lower federal courts and the Supreme Court in reaching a solution that protects privacy and the Framers' conception of reasonableness. To my eye, that conception is unlikely to approve plain view full access to, and use of, what the Supreme Court has observed is more private information than would be contained in an entire home, where plain view access has obvious and significant limits. *Riley*, 573 U.S. at 396-97.

JAMES E. GRAVES, JR., *Circuit Judge*, joined by DENNIS, *Circuit Judge*, dissenting:

Despite cautionary case law from this court that we "should resist the temptation to frequently rest [our] Fourth Amendment decisions on the safe haven of the good-faith exception, lest [we] fail to give law enforcement and the public the guidance needed to regulate their frequent interactions," the majority avoids dealing with the "close call" question of probable cause. *United States v. Molina-Isidoro*, 884 F.3d 287, 293 (5th Cir. 2018) (Costa, J., specially concurring). We should not fall into this "inflexible practice" that the Supreme Court warned against in *Leon* "of always deciding whether the officers' conduct manifested objective good faith before turning to the question whether the Fourth Amendment has been violated." *United States v. Leon,* 468 U.S. 897, 923 (1984). In failing to analyze this case for probable cause, the majority condones the government's extensive and intrusive search of cell phones and its failure to provide any explanation of how those particular phones relate to the charged crime. In essence, it insulates officers from having to connect the dots between their general knowledge and experience—as detailed in a probable cause affidavit—and the basis for that specific search warrant. *See United States v. Pope*, 467 F.3d 912, 920 (5th Cir. 2006) (disavowing affidavits based on an officer's general suspicions or beliefs as "bare bones"). I dissent.

First, this case must be viewed against the proper backdrop. Searching a cellphone is much more invasive than a self-contained search of a pocket, compartment, or bag. As Learned Hand noted, it is "a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him." *Riley v. California*, 573 U.S. 373, 396 (2014) (citation omitted). "A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in

any form—unless the phone is." *Id.* at 396-97. Here, law enforcement conducted a traffic stop that produced evidence of a marginal offense. Then, they used this evidence as an excuse to gain unfettered access to a device saturated with personal, private information.

Probable cause exists when "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). We require a "nexus between the [place] to be searched and the evidence sought." *United States v. Freeman*, 685 F.2d 942, 949 (5th Cir. 1982) (collecting cases). Here, Morton was charged with simple possession based on 16 ecstasy pills, a small bag of marijuana, and a glass pipe. Trooper Blue's affidavit stated that he believed Morton's phones contained evidence of possession of ecstasy and marijuana "and other criminal activity." Notably, Trooper Blue's affidavit indicates that he already had firsthand evidence of Morton's possession offense. One, he found the drugs on Morton. And two, Morton "admitted to . . . the possession of marijuana and [e]cstasy." Morton did not have a large quantity of drugs, a large sum of cash, or anything else that would have indicated he was anything more than an admitted drug possessor, not a drug dealer.

However, in an attempt to gain access to Morton's phones, Trooper Blue made sweeping generalizations about "other criminal activity" and cell phone use, yet not once did he mention why such evidence could or would be on Morton's phone. Nor did he connect his suspicions to Morton's simple possession offense. Not even in passing. He instead hinged his affidavit on general conclusions about cellphones and criminals. As the Supreme Court has noted, "[i]t would be a particularly inexperienced or unimaginative law enforcement officer who could not come up with several reasons to suppose evidence of just about any crime could be found on a cell phone." *Riley*, 573 U.S. at 399. However, such speculation cannot be used to allow "police officers unbridled discretion to rummage at will among a person's private

effects." *Id.* (citation omitted). Trooper Blue's generalizations lack a nexus to the crime of simple possession, and there was no probable cause for the warrant to issue.

For this same reason, the good faith exception does not apply. This court has repeatedly held that a nexus is necessary to claim the protection of the good faith exception. *See, e.g., United States v. Garcia*, 27 F.3d 1009, 1014 (5th Cir. 1994) (noting in the discussion on the officer's good faith reliance that "[t]he affidavit must tend to show some nexus between the [area] to be searched and the evidence sought."); *United States v. Brown*, 567 F. App'x 272, 284 (5th Cir. 2014) (unpublished) (including the lack of nexus "between [defendant's] trafficking activities and his residence" among the deficiencies in the warrant's supporting affidavit); *United States v. Triplett*, 684 F.3d 500, 506–07 (5th Cir. 2012); *United States v. Fields*, 72 F.3d 1200, 1214 (5th Cir. 1996); *United States v. Gant*, 759 F.2d 484, 488 (5th Cir. 1985); *cf. Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 307 (1967) (indicating in the context of a seizure of "mere evidence" that "[t]here must, of course, be a nexus . . . between the item to be seized and criminal behavior.").

Where the affiant claims—without explaining *why*—he "has cause to suspect and does believe" or—without explaining *how*—he "[has] received reliable information from a credible person and [does] believe" that the search will result in the discovery of illegal activity, we deem such affidavits "bare bones." *Pope*, 467 F.3d at 920 (internal quotations omitted). And the root issue with "bare bones" affidavits is that they do not explain how or why the affiant's attested knowledge and the specific facts connect.

Under *Leon*, the Supreme Court noted that the critical inquiry in this analysis is whether the affidavit "provide[s] evidence sufficient to"—at a minimum—"create disagreement among thoughtful and competent judges as to the existence of probable cause." 468 U.S. at 926; *see also U.S. v. Bosyk,*

933 F.3d 319, 333 (4th Cir. 2019); *U.S. v. Davis*, 530 F.3d 1069, 1083 n.3 (9th Cir. 2008); *U.S. v. Luong*, 470 F.3d 898, 903 (9th Cir. 2006). Cramming facts into a supporting affidavit does not make reliance on the resulting warrant more objectively reasonable *unless* those facts are probative as to probable cause. But the majority departs from this approach and exalts quantity over quality. For instance, the majority lauds the fact that the supporting affidavit in this case was "over three pages" long; specified the locations where the marijuana, ecstasy, and glass pipe were found; and stated the quantity of ecstasy pills recovered (namely, sixteen). *Ante,* at 9. But the search of Defendant's phone was justified only on the basis that people who *sell* drugs, and other "criminals," might have inculpatory photographs on their phones. And none of these facts indicate that Morton *sold* drugs or otherwise possessed them for anything other than personal use.

In short, Trooper Blue makes sweeping generalizations about criminal activity and cell phone use, yet not once does he mention why such evidence could or would be on Morton's phone or how it relates to simple possession. No reasonable officer could have perceived the facts alleged in the supporting affidavit to be "indicia of probable cause" to support a search of Defendant's phone. *Leon*, 468 U.S. at 923.

Lastly, I fear that the incentive for law enforcement to imitate Trooper Blue's conduct in this case will be both strong and widespread. It is routine for officers to find evidence of small quantities of illicit drugs for personal use during an automobile stop. If the officer then wishes to gain access to such person's phone—and, with it, "[t]he sum of [his or her] private life," *Riley*, 573 U.S. at 394—the majority's approach imposes virtually no costs against doing so. All the officer needs to do is state what drugs they found, where they found it, and provide boilerplate language about how "cellphones are used for receipt and delivery of illegal narcotics." *Ante,* at 9. The officer can

then take refuge in the majority's holding that he is protected by the good faith exception. This is unjust, unfair, and unconstitutional.

I respectfully dissent.

United States Court of Appeals for the Fifth Circuit

No. 19-10842

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

BRIAN MATTHEW MORTON,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:19-CR-17-1

ON PETITION FOR REHEARING EN BANC

(Opinion January 5, 2021, 5 CIR., 2021, 984 F.3D 421)

Before OWEN, *Chief Judge*, and JONES, SMITH, STEWART, DENNIS, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, COSTA, WILLETT, HO, DUNCAN, ENGELHARDT, OLDHAM, and WILSON, *Circuit Judges*.

PER CURIAM:

A member of the court having requested a poll on the petition for rehearing en banc, and a majority of the circuit judges in regular active service and not disqualified having voted in favor,

IT IS ORDERED that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs. Pursuant to 5th Circuit Rule 41.3, the panel opinion in this case dated January 5, 2021, is VACATED.

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
January 5, 2021
Lyle W. Cayce
Clerk

No. 19-10842

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

BRIAN MATTHEW MORTON,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:19-CR-17-1

Before JOLLY, SOUTHWICK, and WILSON, *Circuit Judges.*

E. GRADY JOLLY, *Circuit Judge*:

In this appeal, we are asked to determine whether the good faith exception to the Fourth Amendment's exclusionary rule allows officers to search the photographs on a defendant's cellphones for evidence of drug possession, when the affidavits supporting the search warrants were based only on evidence of personal drug possession and an officer's generalized allegations about the behavior of drug traffickers—not drug users. We hold that the officers' affidavits do not provide probable cause to search the photographs stored on the defendant's cellphones; and further, we hold that the good faith exception does not apply because the officers' reliance on the

defective warrants was objectively unreasonable. And while respecting the "great deference" that the presiding judge is owed, we further hold that he did not have a substantial basis for his probable cause determination with regard to the photographs. We thus conclude that the digital images found on Morton's cellphones are inadmissible, and his conviction is therefore VACATED. Accordingly, the case is REMANDED for further proceedings not inconsistent with this opinion.

I.

Brian Matthew Morton was stopped for speeding near Palo Pinto, Texas. After the officers smelled marijuana, he gave consent to search his van. Officers found sixteen ecstasy pills, one small bag of marijuana, and a glass pipe. When, however, they discovered children's school supplies, a lollipop, 14 sex toys, and 100 pairs of women's underwear in the vehicle, they became more concerned that Morton might be a pedophile. After arresting Morton for drug possession, one of the officers, Texas Department of Public Safety (DPS) Trooper Burt Blue, applied for warrants to search Morton's three cellphones that were found in the van. Trooper Blue's affidavits[1] for the search warrants mentioned no concerns about child exploitation; instead, the warrants purported to seek more evidence of Morton's criminal drug activity based on Trooper Blue's training and experience—fourteen years in

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[1] The affidavits and warrants were identical to each other except for naming different cellphones to be searched. The paragraph of the affidavits describing the objects of the search reads:

> It is the belief of affiant that suspected party was in possession of and is concealing in [the cellphones] . . . [e]vidence of the offense of Possession of [ecstasy], possession of marijuana and other criminal activity; to wit telephone numbers, address books; call logs, contacts, recently called numbers, recently received calls; recently missed calls; text messages (both SMS messages and MMS messages); *photographs, digital images, or multimedia files in furtherance of narcotics trafficking or possession.*

law enforcement and eight years as a "DRE-Drug Recognition Expert"—as well as the drugs found in Morton's possession and his admission that the drugs were in fact marijuana and ecstasy.

Relying on these affidavits, a judge issued warrants to search Morton's phones. While searching the phones' photographs, Trooper Blue and another officer came across sexually explicit images of children. The officers then sought and received another set of warrants to further search the phones for child pornography, ultimately finding 19,270 images of sexually exploited minors. The government then indicted Morton for a violation of 18 U.S.C. § 2252(a)(2) for the child pornography found on his three cellphones. The subject of drugs had vaporized.

In pretrial proceedings, Morton moved to suppress this pornographic evidence. He argued that the affidavits in support of the first set of warrants failed to establish probable cause to search for his additional criminal drug activity. The government responded by stating that the warrants were supported by probable cause and, if not, then the good faith exception to the exclusionary rule—first announced by the Supreme Court in *United States v. Leon*, 468 U.S. 897 (1984)—should apply. The district court ruled in favor of the government, and Morton later pled guilty to the child pornography charge while reserving his right to appeal the district court's suppression decision. He was sentenced to nine years in prison, and this appeal of the suppression ruling followed.

II.

On appeal, when examining a district court's ruling on a motion to suppress, we review questions of law de novo and accept factual findings unless they are clearly erroneous or influenced by an incorrect view of the law. *United States v. Gentry*, 941 F.3d 767, 779 (5th Cir. 2019); *United States v. Fulton*, 928 F.3d 429, 434 (5th Cir. 2019). We view the evidence in the

light most favorable to the prevailing party. *United States v. Ganzer*, 922 F.3d 579, 583 (5th Cir. 2019). In reviewing a district court's denial of a suppression motion for evidence obtained pursuant to a search warrant, our precedent usually applies a two-step test. *United States v. Allen*, 625 F.3d 830, 835 (5th Cir. 2010). First, we decide whether the good faith exception should apply. *Id.* If the good faith exception applies, then no further inquiry is required. *Id.* If the good faith exception does not apply, we proceed to a second step of analysis, in which we review whether the issuing judge had a substantial basis for determining that probable cause existed. *Id.*

The good faith exception to the suppression of evidence obtained in violation of the Fourth Amendment arises when an officer's reliance on a defective search warrant is "objectively reasonable." *United States v. Sibley*, 448 F.3d 754, 757 (5th Cir. 2006). In such a case, the evidence obtained from the search "will not be excluded." *Id.* This court has decided that the good faith exception applies to most searches undertaken pursuant to a warrant unless one of the four situations enumerated in *Leon* removes the warrant from the exception's protection. *Leon*, 468 U.S. at 923; *see Franks v. Delaware*, 438 U.S. 154, 171 (1978). Only one of these "exceptions to the good faith exception" is relevant here: Morton alleges that the warrant "so lack[ed] indicia of probable cause" that the officers' reliance on it was "entirely unreasonable." *Leon*, 468 U.S. at 923.

To determine if there were indicia of probable cause, the reviewing court will usually be required to look at the affidavit supporting the warrant, but, even so, all of the circumstances surrounding the warrant's issuance may be considered. *United States v. Payne*, 341 F.3d 393, 400 (5th Cir. 2003); *United States v. Fisher*, 22 F.3d 574, 578 (5th Cir. 1994). Affidavits must raise a "fair probability" or a "substantial chance" that criminal evidence will be

found in the place to be searched for there to be probable cause. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 371 (2009) (cleaned up).

Here, as suggested by this court's precedent, we turn to Trooper Blue's affidavits supporting the search warrants. The affidavits seek approval to search Morton's contacts, call logs, text messages, and photographs for evidence of his drug possession crimes. As the government properly conceded at oral argument,[2] separate probable cause is required to search each of the categories of information found on the cellphones. Although "[t]reating a cell phone as a container . . . is a bit strained," the Supreme Court has explained that cellphones do "collect[] in one place many distinct types of information." *Riley v. California*, 573 U.S. 373, 394, 397 (2014). And the Court's opinion in *Riley* went to great lengths to explain the range of possible types of information contained on cellphones.[3]

Riley made clear that these distinct types of information, often stored in different components of the phone, should be analyzed separately. This requirement is imposed because "a cell phone's capacity allows even just one

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[2] Oral Argument at 27:28, United States v. Morton, No. 19-10842, http://www.ca5.uscourts.gov/OralArgRecordings/19/19-10842_10-5-2020.mp3:

> The Court: Do you say you're entitled to everything inside that phone so long as you can look at anything inside the phone?
>
> The Government: No, your Honor.
>
> The Court: Or do you need probable cause for each individual sort of category of information that could be found there?
>
> The Government: That's correct.

[3] *See id.* at 393 (emphasizing that the term "cellphone" is "misleading shorthand" because cellphones are in fact minicomputers that also can serve as "cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers"); *id.* at 394 (noting that "[e]ven the most basic phones" might hold photographs, messages, a calendar, a phone book, "and so on"); *id.* at 396 (describing all of the possible apps as a "range of tools for managing detailed information").

type of information to convey far more than previously possible." *Id.* at 394. Just by looking at one category of information—for example, "a thousand photographs labeled with dates, locations, and descriptions" or "a record of all [a defendant's] communications . . . as would routinely be kept on a phone"—"the sum of an individual's private life can be reconstructed."[4] *Id.* at 394–95. In short, *Riley* rejected the premise that permitting a search of *all* content on a cellphone is "materially indistinguishable" from other types of searches. *Id.* at 393. Absent unusual circumstances, probable cause is required to search each category of content. *Id.* at 395 (stating that "certain types of data" on cellphones are "qualitatively different" from other types); *id.* at 400 (analyzing data from a phone's call log feature separately); *see also Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018) (analyzing data from a phone's cell tower location signals separately).

This distinction dovetails with the Fourth Amendment's imperative that the "place to be searched" be "particularly describ[ed]." U.S. CONST. amend. IV.; *cf.*, *e.g.*, *United States v. Beaumont*, 972 F.2d 553, 560 (5th Cir. 1992) ("General warrants [which lack particularity] have long been abhorred in the jurisprudence of both England and the United States."). Probable cause and particularity are concomitant because "—at least under some circumstances—the lack of a more specific description will make it apparent that there has not been a sufficient showing to the magistrate that the

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[4] Moreover, the Supreme Court intimated in *Riley* that searching a phone may be akin to searching a defendant's house—if not even more invasive. *Id.* at 396–97 (noting that a "cell phone search would typically expose to the government *far more than the most exhaustive search of a house*" because a phone "not only contains in digital form many sensitive records previously found in the home," but it also "contains a broad array of private information *never found in a home in any form*") (emphases added); *id.* at 403 (comparing general searches of cellphones to the "general warrants and writs of assistance . . . which allowed British officers *to rummage through homes* in an unrestrained search for evidence of criminal activity" against which the Founders fought) (emphasis added).

described items are to be found in a particular place."[5] WAYNE R. LAFAVE, 2 SEARCH & SEIZURE § 4.5 (6th ed. 2020).

Here, this observation means that the facts as alleged in Trooper Blue's affidavits must raise a "fair probability" or a "substantial chance" that evidence relevant to Morton's crime—that is, simple drug possession—will be found in each place to be searched: his contacts, his call logs, his text messages, and his photographs. There must be a specific factual basis in the affidavit that connects each cellphone feature to be searched to the drug possession crimes with which Morton was initially charged.

III.

A.

The affidavits successfully establish probable cause to search Morton's contacts, call logs, and text messages for evidence of drug possession. In attesting that probable cause exists, officers may rely on their experience, training, and all the facts available to them. *Ornelas v. United States*, 517 U.S. 690, 700 (1996); *United States v. Escamilla*, 852 F.3d 474, 481

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[5] This requirement is especially important in the context of searches of digital devices that contain so much content. *See, e.g.*, Adam M. Gershowitz, *The Post-*Riley *Search Warrant: Search Protocols and Particularity in Cell Phone Searches*, 69 VAND. L. REV. 585, 597–600 (2016); *id.* at 609 (noting that in drug cases, warrants frequently "authorize searches for photos and videos [on phones] . . . for which there is typically no probable cause"); Andrew D. Huynh, Note, *What Comes After "Get A Warrant": Balancing Particularity and Practicality in Mobile Device Search Warrants Post-*Riley, 101 CORNELL L. REV. 187, 190 (2015) ("The Court's lengthy discussion about the amount of personal information accessible on a modern mobile device suggests that a search warrant's particularity may be the next subject for scrutiny."); William Clark, *Protecting the Privacies of Digital Life:* Riley v. California, *the Fourth Amendment's Particularity Requirement, and Search Protocols for Cell Phone Search Warrants*, 56 B.C. L. REV. 1981, 1984 (2015) ("As the U.S. Supreme Court held in *Riley*, to allow the police unguided review of the entire contents of a cell phone when executing a search warrant would authorize the exact type of general warrants that the Fourth Amendment forbids.").

(5th Cir. 2017); *Bigford v. Taylor*, 834 F.2d 1213, 1218 (5th Cir. 1988). Here, Trooper Blue relied on his fourteen years in law enforcement and eight years as a "DRE-Drug Recognition Expert" to assert that suspects' call logs often show calls "arrang[ing] for the illicit receipt and delivery of controlled substances"; stored numbers identify "suppliers of illicit narcotics"; and text messages "may concern conversations" along these lines as well. Since this is true of drug possession suspects in general, and Morton had been found with drugs, Trooper Blue credibly alleges that there is a "fair probability" that these features of Morton's phone would contain similar evidence of Morton's drug possession charges.

These conclusions are supported by simple logic. To possess drugs, one must have purchased them; contacts, call records, and text messages could all easily harbor proof of this purchase. For example, text messages could show a conversation with a seller haggling over the drugs' cost or arranging a location to meet for the exchange. Similarly, Morton could have had his source of drugs listed in his contacts as "dealer" or some similar name, and recent calls with such a person could show a recent purchase. The affidavit makes all of these points. For this reason, we hold that there was probable cause to search Morton's contacts, call records, and text messages for evidence relating to his illegal drug possession.

B.

But the affidavits also asserted probable cause to believe that the photographs on Morton's phones contained evidence of other drug crimes, and on this claim, they fail the test of probable cause as related to the crime of possession. That is, they fall short of raising a "substantial chance" that the photographs on Morton's phones would contain evidence pertinent to his crime of simple drug possession. As we have said, officers are permitted to rely on training and experience when attesting that probable cause exists,

but they must not turn a blind eye to details that *do not* support probable cause for the particular crime. *Bigford v. Taylor*, 834 F.2d 1213, 1218 (5th Cir. 1988) (explaining that officers may not "disregard facts tending to dissipate probable cause").

Here, Trooper Blue supplied two facts to provide probable cause to search the images on Morton's phones. First, Morton was found with less than two ounces of marijuana, a pipe, and sixteen pills that Morton stated were ecstasy. Second, based on Trooper Blue's training and experience, "criminals often take photographs of co-conspirators as well as illicit drugs and currency derived from the sale of illicit drugs." This background led Trooper Blue to assert 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.*" These photographs would, in turn, be evidence of "other criminal activity . . . *in furtherance of narcotics trafficking*" and Morton's drug possession crimes. The search warrant is thus expanded to seek information of an alleged narcotics trafficking conspiracy based solely on Morton's arrest for, and evidence of, simple drug possession.[6]

The syllogism that Trooper Blue offers to gain access to Morton's photographs does not provide adequate grounds for the extensive search. In

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[6] In full, the sole paragraph in each affidavit purporting to provide probable cause to search Morton's photographs reads:

> Affiant knows through training and experience that photographic images taken on cellular telephones can be stored in the telephones [sic] memory and retained for future viewing. Affiant also knows 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.* Affiant believes 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.*

short, the syllogism is (1) Morton was found with personal-use quantities of drugs; and (2) drug dealers often take photos of drugs, cash, and co-conspirators; it therefore follows that (3) the photographs on Morton's phones will provide evidence of Morton's relationship to drug trafficking. The fallacy of this syllogism is that it relies on a premise that cannot be established, namely that Morton was dealing drugs. And here, Trooper Blue disregarded key facts that show that the evidence did not support probable cause that Morton was a drug dealer.

To begin, the quantity of drugs Morton possessed can best be described as personal-use: a single small bag of marijuana and a few ecstasy pills. Further, Morton did not have scales, weapons, or individual plastic bags that are usually associated with those who sell drugs. It is also significant that the officers arrested Morton for possession of marijuana and ecstasy but not distribution of these drugs. *Compare* TEX. HEALTH & SAFETY CODE §§ 481.121, 481.116 *with id.* §§ 481.120, 481.113.[7] In sum, indications of drug trafficking were lacking: no significant amount of drugs; paraphernalia for personal use, not sale; and no large amounts of cash. Or precisely: there was *no* evidence supporting drug trafficking.

Nevertheless, Trooper Blue relied on his knowledge of the behavior of *drug traffickers* to support a search of Morton's photos. Again, we emphasize that the only times Morton's photographs are mentioned in the affidavits are in connection with statements about the behavior of drug traffickers: that "criminals often take photographs of co-conspirators as well

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[7] *Cf. Moreno v. State*, 195 S.W.3d 321, 325–26 (Tex. App. 2006) (collecting cases showing that proving "delivery" under Texas law requires the consideration of factors including the quantity of contraband possessed, the presence and type of drug paraphernalia, and whether the defendant possessed a large amount of cash); *see also United States v. Le*, 512 F.3d 128, 137 (5th Cir. 2007) (Texas statutory references to "delivery" are equivalent to "possession with intent to distribute").

as illicit drugs and currency derived from the sale of illicit drugs," and 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." These suggestions relating to the behavior of *drug traffickers* may well be true,[8] but Trooper Blue cannot rely on these assertions to search the photo contents of the cellphones of a suspect charged with simple possession. Nor was Trooper Blue permitted, in his affidavit, to ignore the evidence that negated probable cause as to trafficking.

Since it seems that no evidence supported probable cause to believe that Morton was dealing in drugs, the affidavit leaves us with only the allegations that (1) Morton was found with drugs so (2) it therefore follows that the photographs on Morton's phones will provide evidence of Morton's crime of drug possession. With only this bare factual support that Morton possessed drugs, the affidavits contain nothing to link Morton's marijuana and ecstasy with the photographs on his phones. The affidavits thus do not create a "fair probability" or a "substantial chance" that evidence of the crime of drug possession will be found in the photographs on Morton's cellphones. Therefore, under these facts and based on the specific language in these affidavits, we hold that probable cause was lacking to search Morton's photographs for proof of his illegal drug possession.[9]

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[8] *See, e.g.*, *United States v. Luna*, 797 F. App'x 158, 160 (5th Cir. 2020) (drug dealers sending photographs of guns, drugs, and cash to each other).

[9] This result is suggested by both our own caselaw as well as the law of other circuits. As Morton argued at oral argument (and the government could not cite a case to the contrary), our precedent is void of any cases in which personal-use quantities of drugs by themselves provide probable cause to search the photos on a defendant's phone. Oral Argument at 41:43, United States v. Morton, No. 19-10842, http://www.ca5.uscourts.gov/OralArgRecordings/19/19-10842_10-5-2020.mp3 ("It still doesn't get you to the images. There's not a single case, based just on training and experience, plus cellphones, plus user-quantity drugs, that you get to get to everything in

C.

Having demonstrated that the warrants to search the photographs stored on Morton's cellphones were not supported by probable cause, we next turn to the question of whether the evidence produced by the search may nevertheless be admitted based upon the good faith exception. To resolve this question, we ask whether the officers' good faith reliance on these defective warrants was objectively reasonable. The district court's decision on the objective reasonableness of an officer's reliance is a question of law that is reviewed de novo. *United States v. Jarman*, 847 F.3d 259, 264

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the phone."). And a Tenth Circuit decision similarly addresses the issues here: after arresting a defendant for drug crimes, officers applied for and received a warrant to search his computers for files containing "names, telephone numbers, ledger receipts, addresses, and other documentary evidence" of drug offenses. *United States v. Carey*, 172 F.3d 1268, 1270 (10th Cir. 1999). No drug-related evidence was found, but the officer undertaking the search also viewed the defendant's photographs and found child pornography. *Id.* at 1271. The Tenth Circuit reversed the district court, holding that these photographs should be suppressed. *Id.* at 1276.

In rejecting the government's argument that the situation was similar to "an officer having a warrant to search a file cabinet containing many drawers," the panel held that this was "not a case in which the officers had to open each file drawer before discovering its contents." *Id.* at 1274–75. Instead, the government "opened a drawer" marked "photographs" for which they did not have probable cause. *Id.* Subsequent Tenth Circuit cases have upheld the approach that *Carey* established, proscribing those searches with no "limiting principle" while sanctioning those that "affirmatively limit the search to evidence of . . . specific types of material" in the digital setting. *United States v. Russian*, 848 F.3d 1239, 1245 (10th Cir. 2017); *United States v. Riccardi*, 405 F.3d 852, 862 (10th Cir. 2005). Other circuits have reached similar results. *United States v. Rosa*, 626 F.3d 56, 62 (2d Cir. 2010) (concluding that a warrant to search a digital device "failed to describe with particularity the evidence sought and, more specifically, to link that evidence to the criminal activity supported by probable cause," resulting in an impermissible "general warrant"); *United States v. Pitts*, 173 F.3d 677 (8th Cir. 1999) (noting in an analogous context outside the realm of digital searches that "when a warrant lists several locations to be searched, a court can suppress evidence recovered at a location in the warrant for which police lacked probable cause but admit evidence recovered at locations for which probable cause was established").

(5th Cir. 2017). In reviewing whether an officer's reliance is reasonable under the good faith exception, we ask "whether a reasonably well-trained officer would have known that the search was illegal" despite the magistrate's approval. *United States v. Gant*, 759 F.2d 484, 487–88 (5th Cir. 1985).

The Supreme Court has observed: "[M]any situations which confront officers in the course of executing their duties are more or less ambiguous, [and] room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability." *Brinegar v. United States*, 338 U.S. 160, 176 (1949). And further, "[m]ere affirmance of belief or suspicion is not enough." *Nathanson v. United States*, 290 U.S. 41, 47 (1933). The facts here lead to the sensible conclusion that Morton was a consumer of drugs; the facts do not lead to a sensible conclusion that Morton was a drug dealer. Under these facts, reasonably well-trained officers would have been aware that searching the digital images on Morton's phone—allegedly for drug trafficking-related evidence—was unsupported by probable cause, despite the magistrate's approval. Consequently, the search here does not receive the protection of the good faith exception to the exclusionary rule.

IV.

However, the good faith exception, applicable to the officers, does not end our analysis. As we have said, if the good faith exception does not save the search, we move to a second step: whether the magistrate who issued the warrant had a "substantial basis" for determining that probable cause to search the cellphones existed. *United States v. Allen*, 625 F.3d 830, 835 (5th Cir. 2010). While the good faith analysis focuses on what an objectively reasonable police officer would have known to be permissible, this second step focuses on the magistrate's decision. The magistrate is permitted to

draw reasonable inferences from the material he receives, and his determination of probable cause is entitled to "great deference" by the reviewing court in all "doubtful or marginal cases." *United States v. May*, 819 F.2d 531, 535 (5th Cir. 1987); *see* 2 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 3.1(c) & n.78 (4th ed. 2019). At the same time, "a reviewing court may properly conclude that, notwithstanding the deference that magistrates deserve, the warrant was invalid because the magistrate's probable-cause determination reflected an improper analysis." *United States v. Leon*, 468 U.S. 897, 915 (1984).

Here, even giving the magistrate's determination the deference due, we hold that the magistrate did not have a substantial basis for determining that probable cause existed to extend the search to the photographs on the cellphones. Even if the warrants provided probable cause to search some of the phones' "drawers" or "file cabinets," the photographs "file cabinet" could not be searched because the information in the officer's affidavits supporting a search of the cellphones only related to drug trafficking, not simple possession of drugs. There was thus no substantial basis for the magistrate's conclusion that probable cause existed to search Morton's photographs, and the search is not saved by the magistrate's authority. The search was unconstitutional, not subject to any exceptions, and the evidence must be suppressed as inadmissible.

V.

Today, we have held that a reasonably well-trained officer would have known that probable cause was lacking to search the photographs stored on the defendant's cellphones for evidence related to drug possession, which was the only crime supporting a search. Moreover, we have held that any additional assertions in the affidavits were too minimal and generalized to provide probable cause for the magistrate to authorize the search of the

photographs. Because the officers' search of the stored photographs pursuant to the first warrants was impermissible, obviously the use of that information—which was the evidence asserted to secure the second set of warrants—tainted the evidence obtained as a result of that second search, making it the unconstitutional "fruit of the poisonous tree." *See, e.g.*, *United States v. Martinez*, 486 F.3d 855, 864 (5th Cir. 2007). Therefore, the evidence obtained as a result of the second set of warrants is inadmissible.

As we have earlier noted, Morton pled guilty while reserving the right to appeal the district court's order on the motion to suppress. This conditional guilty plea, under Federal Rule of Criminal Procedure 11(a)(2), allows a defendant to "reserv[e] in writing the right to have an appellate court review an adverse determination of a specific pretrial motion." FED. R. CRIM. P. 11(a)(2). Furthermore, "a defendant who prevails on appeal may then withdraw [his] plea." *Id.* Therefore, as to the photographs discovered in the first search of Morton's cellphones and the subsequently discovered evidence from the second searches, we REVERSE the order of the district court denying Morton's motion to suppress, VACATE Morton's conviction and sentence so that he may withdraw his plea, and REMAND this case to the district court for further proceedings not inconsistent with this opinion.

REVERSED, VACATED, and REMANDED.

19-10842

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

BRIAN MATTHEW MORTON,
Defendant-Appellant

On Appeal from the United States District Court
For the Northern District of Texas
Fort Worth Division
District Court No. 4:19-CR-017-O

PETITION OF THE UNITED STATES FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 5th Cir. Rs. 28.2.1 and 35.2.1, the United States:

1. The number and style of this case are *United States v. Brian Matthew Morton*, No. 19-10842.

2. The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

   District Judge: The Honorable Reed C. O'Connor

   Magistrate Judge: The Honorable Jeffrey L. Cureton

   Defense Counsel: Jason Hawkins (Federal Public Defender), Brandon Beck, John J. Stickney

   Counsel for the United States: Prerak Shah (Acting United States Attorney), Aisha Saleem, Leigha Simonton, Amber Grand

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INTRODUCTION

With the Solicitor General's approval—and joined by every other U.S. Attorney's Office in the Fifth Circuit—the U.S. Attorney's Office for the Northern District of Texas seeks rehearing en banc because the panel's opinion sidestepped the central issue Morton raised on appeal, whether a cell-phone search was pretextual, and instead rooted its reversal of the district court in an entirely new rule requiring separate probable cause to search each "place" on a cell-phone, which the panel defined as features like contacts, call logs, text messages, and photographs. *United States v. Morton*, 984 F.3d 421 (5th Cir. 2021). Not only did the panel announce this rule without the benefit of briefing, the rule conflicts with (1) the Supreme Court case on which the panel said it relied, *Riley v. California*, 573 U.S. 373 (2014); and (2) relevant precedent on searches of both cell-phones and their closest equivalent, computers.

Moreover, the panel's novel rule (1) confuses the "place to be searched" (the cell-phone) with the "things to be seized" (contacts, call logs, text messages, photographs) that the warrant-affidavits outlined; (2) requires the impossible—*advance knowledge* of what "places" exist in a cell-phone; and (3) inhibits law enforcement's ability to conduct comprehensive and reliable forensic cell-phone searches. Because of the legal and practical implications of the panel's decision and its conflict with relevant precedent, this case presents a

question of exceptional importance, and this Court should grant rehearing en banc.

STATEMENT OF THE ISSUES

1. Should the en banc Court reconsider the panel's holding that the officers violated the Fourth Amendment by searching the phones' photos, because, in reaching that decision, the panel created a new rule that contravenes existing precedent and is incompatible with forensic-search methodology?

2. Should the Court reconsider the panel's cursory rejection of the good-faith exception, when the officers acted in accord with precedent and the affidavits were not "bare bones"?

STATEMENT OF THE CASE

A state trooper who stopped Morton for speeding immediately smelled marijuana. (ROA.281.) After Morton admitted possessing marijuana, the trooper searched Morton and discovered women's underwear and a bottle containing 16 ecstasy pills in his pockets. (ROA.281.) Morton also had three cell-phones. (ROA.282.) A search of Morton's car revealed marijuana, more women's underwear, sex toys, lollipops, and school supplies. (ROA.282.) Morton was arrested for possessing controlled substances. (ROA.137.)

Shortly thereafter, the trooper prepared affidavits seeking warrants to search Morton's phones to investigate his narcotics activities. (ROA.296-310.)

He described each phone and explained that, based on the facts surrounding Morton's arrest and his training and experience, he believed the phones contained evidence of drug possession and other criminal activity "in furtherance of narcotics trafficking or possession." (ROA.297-99.) The trooper asked for permission to search each phone and disavowed any limits as to where on each phone authorities might need to search to find the evidence in question. (ROA.299-300.)[1] A state judge authorized the searches. (ROA.296-310.)

While searching, officers found child-pornography images, stopped their search, and immediately obtained additional warrants authorizing them to search for such evidence. (ROA.282-83, 287-88.) They ultimately determined that the phones contained almost 20,000 illegal images. (ROA.138.)

A grand jury charged Morton with receiving child pornography. (ROA.20-23.) He moved to suppress the images, alleging no probable cause to

---

[1] The affidavits were identical except for describing the specific cell-phones and provided:

> [A]ffiant asks for the issuance of a warrant that will authorize *the search of said cellular telephone* as described above .... The search includes the examination of stored materials, media, documents, and data, including *but not limited to*: address books; recently called numbers; recently received numbers; digital images; and text messages .... The search *may also include other areas of the cellular telephone* in which said suspected party may store data evidence which is the object of the search requested herein.

(ROA.299-300 (emphasis added).)

search the phones for drug possession and that officers "wanted to get into his phone to search for illegal sexual activity." (ROA.255-65.)

The district court denied the motion without a hearing, finding that the good-faith exception applied because each affidavit "clear[ly] ... contain[ed] sufficient details to allow a neutral magistrate to reasonably infer that Morton's phones could contain information connected to his purchase and possession of controlled substances." (ROA.44-48.) The court noted that the affidavits detailed the traffic stop and "also describ[ed] that, based on the officer's training and experience, 'individuals use cellular telephones to arrange for the illicit receipt and delivery of controlled substances' such as those found in Morton's possession." (ROA.47-48.) The court further concluded that the officers' subjective intent was irrelevant to the searches' reasonableness. (ROA.48.)

Morton entered a conditional guilty plea, and the district court sentenced him to 108 months' imprisonment. (ROA.71, 130.)

In his appellate brief, Morton presented a single issue: "Can the good-faith exception salvage an otherwise infirm search warrant when the affiant-officer intentionally or recklessly misled the magistrate as to the true object of the search?" (Appellant's Brief at 1.) Within his discussion of this issue, he advanced secondary claims that the search-warrant affidavits were "bare

bones" and that the officers lacked probable cause to search the phones for drug-related evidence. (*Id.* at 13-18.)

At argument, Morton pressed the initial claim he presented. *See* https://www.ca5.uscourts.gov/OralArgRecordings/19/19-10842_10-5-2020.mp3 at 1:10-2:00. However, he also argued for the first time that, even if probable cause supported searching the phones for drug-offense evidence, it did not reach the *images* on the phones. *Id.* at 10:00-10:04. Thus, Morton was only then "drawing a line between images and text messages." *Id.* at 11:38. But when asked whether there was at least probable cause to search for communications with the drug seller, Morton's counsel backpedaled and said that he "simply made the distinction between text messages and images to illustrate the egregious nature of this invasion of privacy." *Id.* at 11:38-13:03. Relying on *Riley*, Morton argued that *any* search of the phones, especially the images, required a heightened justification. *Id.* at 15:00-15:12.

The government, in turn, focused on Morton's pretext argument—the cornerstone of his brief. *Id.* at 17:00-17:40. At one point, the Court asked whether the government is "entitled to everything inside the phone so long as you can look at anything inside the phone?" *Id.* at 27:27-27:35. Counsel interpreted the question as one of scope—did the warrant's authorization to search for *drug evidence* allow the government to search for evidence of child

pornography or any other crime? Counsel answered "no," relying on the principle that a probable-cause nexus is required between the offense and the evidence sought.

The Court then asked if the government needed probable cause for "each sort of category of information that could be found there." Still believing they were discussing what items could be searched for and seized per the drug warrant, counsel agreed. *Id.* at 27:32-27:40. To that end, counsel highlighted that the warrants authorized officers to search for certain drug evidence and that they stopped searching upon finding images that fell outside the warrants' scope to obtain additional warrants. *Id.* at 28:03-28:26; 29:54-30:30.

The panel ultimately issued a published opinion, reversing the district court on grounds neither briefed nor discussed at length at argument. *Morton*, 984 F.3d 421. The opinion did not discuss the core issue on appeal: whether seeking a warrant on an allegedly pretextual basis vitiates the good-faith exception. Instead, the panel focused on a different issue after mistakenly reading the warrant-affidavits as asking for authorization to search only a few discreet categories on the phones—"Morton's contacts, call logs, text messages, and photographs"—rather than the entire phones. *Id.* at 425. The panel also misperceived the government's statements at argument as conceding

that authorities must articulate separate probable cause to search each category. *Id.* at 425 & n.2.

Based on these misunderstandings, the panel created a new Fourth-Amendment rule for cell-phone searches: A search-warrant affidavit "must raise a fair probability or a substantial chance that evidence relevant to [the] crime ... will be found in each *place* to be searched"—defining the "places to be searched" as the categories it incorrectly believed officers had specifically asked to search: Morton's "contacts, his call logs, his text messages, and his photographs." *Id.* at 427; *see also id.* ("There must be a specific factual basis in the affidavit that connects each cellphone feature to be searched to the drug possession crimes with which Morton was initially charged."). Applying this new rule, the panel held that "[t]he affidavits successfully establish probable cause to search Morton's contacts, call logs, and text messages for evidence of drug possession" but did not establish probable cause "that the photographs on Morton's phones would contain evidence pertinent to [that] crime." *Id.* at 427-29.

The panel then dispensed with the good-faith exception in just two paragraphs, concluding that "reasonably well-trained officers would have been aware that searching the digital images on Morton's phone—allegedly for drug trafficking-related evidence—was unsupported by probable cause, despite the

magistrate's approval." *Id.* at 430. The panel thus reversed the district court's good-faith determination and vacated Morton's conviction. *Id.* at 431.

ARGUMENT AND AUTHORITIES

1. Based on a mistaken reading of the warrant-affidavits, the panel created an unworkable cell-phone search rule that conflicts with *Riley* as well as precedent from this Circuit and several others.

In holding that the officers illegally searched the photographs in Morton's phones, the panel first misread the warrant-affidavits and then misapplied Fourth-Amendment law to create a new rule requiring probable cause to search what the panel termed different "places" within a cell-phone.

The panel's holding rests on a misreading of the warrant-affidavits' specification of the "place to be searched." *See* U.S. CONST. amend. IV (a warrant must describe the "place to be searched" and the "items to be seized"). The warrant-affidavits described the "*place* to be searched" as *each phone*, and then asked for authorization to *seize evidence* like *contacts, call logs, text messages, photographs, or multimedia files* that were "in furtherance of narcotics trafficking or possession." (ROA.297.) But the panel conflated the place to be searched (the phone) with the type of evidence sought (calls, texts, photographs), and thus incorrectly construed the trooper's request as asking to search only *certain features* in the phone. *See Morton*, 984 F.3d at 425 (panel stating that "[t]he affidavits seek approval *to search Morton's contacts, call logs, text*

messages, and photographs for evidence of his drug possession crimes" (emphasis added)).

This factual mistake as to what "places" the panel believed the trooper asked permission to search led the panel into a legal error—its conclusion that the trooper must establish separate probable cause to search each of these "places." *Id.* at 427. The panel then held that the trooper failed this new test by establishing "probable cause to search Morton's contacts, call records, and text messages" but not his "photographs." *Id.* at 427-28.[2]

The panel said that it based this new rule on the government's perceived concession at argument and on *Riley*'s discussion of the myriad types of data found on modern cell-phones. *Id.* at 425-26 & n.2. But the government did not concede this rule and instead interpreted the panel's questions as focusing on the warrants' scope. (*See supra* pp.5-7.) And the government disagrees with the correctness or feasibility of such a rule, which *Riley* does not support.

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[2] The panel's core concern appears to be the warrants' authorization of a search for drug-*trafficking* photos when, in the panel's view, the warrant-affidavits supported seeking only drug-*possession* evidence. This concern falls within the Fourth-Amendment overbreadth doctrine. *United States v. Sanjar*, 876 F.3d 725, 735-36 (5th Cir. 2017) ("The warrant must ... not be overbroad, meaning 'there must be probable cause to seize the particular things named in the warrant.'"). Overbreadth prescribes a specific remedy—if officers seize evidence relating to the overly broad provision, the court should sever that provision and then assess whether the warrants still allowed seizure of that evidence. *United States v. Cook*, 657 F.2d 730, 735 (5th Cir. 1981). Perhaps inadvertently, the panel failed to mention overbreadth and instead analyzed its concern under the rubric of what-places-can-be-searched. The government disagrees that the warrants were overbroad and requests an opportunity to brief that issue if that is indeed what the panel intended to hold.

The panel's novel rule conflicts with *Riley* in two ways. First, rather than viewing cell-phones as containing separate places necessitating separate probable-cause showings, *Riley* explained that "a cell phone collects *in one place* many distinct types of information," and it held: "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 375, 403 (emphasis added). *Riley* thus suggests that if an affiant-officer demonstrates probable cause that a phone contains evidence of a specific crime, police can search the phone for that evidence—not just certain features within the phone.

Second, *Riley* outright rejected the kind of distinction the panel made here between different cell-phone "places" precisely because of its unworkability. The government suggested in *Riley* that the search-incident-to-arrest exception could remain for "those areas of the phone where an officer reasonably believes that information relevant to the crime, the arrestee's identity, or officer safety will be discovered." *Id.* at 399. But the Court rejected this idea because "officers would not always be able to discern in advance what information would be found where." *Id.* This observation dovetails with *Riley*'s recognition of the fact that "[t]here are over a million

apps available in each of the two major app stores" and "[t]he average smart phone user has installed 33 apps." *Id.* at 396.[3]

The panel's holding likewise conflicts with relevant federal precedent. *See, e.g.*, *United States v. Bishop*, 910 F.3d 335, 336 (7th Cir. 2018). In *Bishop*, the "warrant described the 'place to be searched' as the cell-phone Bishop carried during" an attempted drug sale. *Id.* Bishop argued that the warrant was "too general ... because it authorized the police to rummage through every application and file on the phone" searching for drug-related evidence. *Id.* The district court denied his suppression motion, and the Seventh Circuit affirmed. *Id.* In rejecting Bishop's argument, that court reasoned: "This warrant *does* permit the police to look at every file on his phone ... But he is wrong to think that this makes a warrant too general. Criminals don't advertise where they keep evidence." *Id.* As "with filing cabinets, the incriminating evidence may be in any file or folder ... [T]he police did not know where on his phone Bishop kept his drug ledgers and gun videos ... This warrant was as specific as circumstances allowed." *Id.* at 337-38; *see also United*

[3] The panel also cited *Carpenter v. United States*, 138 S. Ct. 2206, 2221 (2018), as supportive of its conclusion, reasoning that *Carpenter* analyzed "data from a phone's cell tower location signals separately" from other types of cell-phone data. *Morton*, 984 F.3d at 426. But there was good reason for *Carpenter*'s separate analysis of that location data—it was data collected from third-party service providers, not from forensic examination of different "places" within a cell-phone.

States v. Bass, 785 F.3d 1043, 1049-50 (6th Cir. 2015) ("[T]he officers could not have known where this information was located in the phone or in what format").[4]

The logistical problems that *Riley* and others emphasize—including authorities' inability to predict what information will be found in what format and where in a phone—are precisely what complicate application of the panel's new rule to the drafting of search-warrant applications and have created confusion amongst law enforcement and courts attempting to apply *Morton*'s holding to real-world cell-phone searches. For instance, how could the government know in advance what "places" are in the target's phone and what data types are in each "place" so that it could provide separate probable cause to search each of these "places"? Text messages often contain photos and videos, and photos often contain screenshots of texts, emails, and documents. And more sophisticated applications contain a variety of data types. But law enforcement cannot know any of this until they actually search the phone.

[4] The *Morton* panel said it relied on other circuits' cases, but those cases are inapposite. For instance, it discussed *United States v. Carey*, 172 F.3d 1268, 1276 (10th Cir. 1999) (cited in *Morton*, 984 F.3d at 429 n.9), but that case concerned whether the officer's search exceeded the warrant's scope—an issue different from the rule the panel created here. *See id.*

For similar reasons, this Court has warned against placing analogous restrictions on searches of a cell-phone's closest equivalent—a computer. *See United States v. Triplett*, 684 F.3d 500, 506 (5th Cir. 2012); *Riley*, 573 U.S. at 393 ("The term 'cell phone' is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone."). In *Triplett*, authorities looking for the defendant's missing stepdaughter obtained a warrant to search devices including the defendant's computer. *Id.* at 502. Upon discovering child pornography, they halted the search to secure additional warrants. *Id.* at 503. In rejecting the defendant's argument that "the forensic investigator's search of the computer [under the initial warrant] was too comprehensive," this Court explained that "Fourth Amendment reasonableness is the bedrock principle that guides computer as well as physical searches." *Id.* at 505. Applying this principle, the Court "agree[d] with [other] circuits to have addressed the issue that 'a computer search may be as extensive as reasonably required to locate the items described in the warrant based on probable cause.'" *Id.* (quoting *United States v. Richards*, 659 F.3d 527, 538 (6th Cir. 2011)).

The *Triplett* Court further acknowledged that although "officers should limit exposure to innocent files, for a computer search, 'in the end, there may be no practical substitute for actually looking in many (perhaps all) folders and

sometimes at the documents contained within those folders.'"[5] *Id.* at 506. The *Morton* panel's holding, which limits which "places" law enforcement can search within a cell-phone or "minicomputer," conflicts with this precedent.

Further complicating *Morton*'s application to real-world circumstances is the fact that the forensic tools that the government uses to best ensure the integrity and completeness of data obtained from cell-phones during the execution of warrants do not enable searching their contents by "place" or application. The panel opinion is drafted as though an investigator searches a cell-phone like a user who opens the phone and manually clicks through each application, first inspecting text messages, then emails, and then photographs. But the tools that law enforcement uses for the forensic analysis of cell-phones extract *all cell-phone data* (not simply data from certain applications) in its raw format, producing what is colloquially called a "cell-phone dump." Many forensic search tools attempt to categorize this raw data, but these categories

[5] *Triplett*'s reasoning accords with other circuits' law. *See, e.g.*, *United States v. Cobb*, 970 F.3d 319, 326-30 (4th Cir. 2020), *petition for cert. filed*, No. 20-7256 (U.S., Feb. 19, 2021) ("[S]o long as the Fourth Amendment's basic requirements of probable cause and particularity are met, the executing officers are 'impliedly authorized ... to open each file on the computer and view its contents, at least cursorily, to determine whether the file [falls] within the scope of the warrant's authorization.'"); *Bass*, 785 F.3d at 1049-50 ("Federal courts ... have rejected most particularity challenges to warrants authorizing the seizure and search of entire personal or business computers because criminals can—and often do—hide, mislabel, or manipulate files to conceal criminal activity [such that] a broad, expansive search of the [computer] may be required.") (citing cases).

often do not correspond to specific applications in the way the opinion contemplates. So where the panel envisioned cell-phone searches as similar to a device owner looking through her own phone, investigators executing a warrant necessarily view information stored on the device from an entirely different perspective.

And even though some software tools categorize files, investigators cannot rely on that categorization alone. For example, the programs cannot parse some applications, and investigators must sort that data manually to determine if it is subject to seizure. Cell-phone memory may also engage in "wear-leveling," which involves moving data around the memory-storage chip to allow the writes to be even. As a result, there may be data that could require a physical extraction to recover. A warrant that authorizes a search of only "text messages" or only "photographs" is therefore incompatible with the way authorities conduct forensic analyses of cell-phones and with the way cell-phones store data.

As this discussion shows, rehearing en banc is critical because the new rule deeming each cell-phone feature a separate "place" that cannot be searched without separate probable cause relies on a fundamental mistake of fact, conflicts with relevant law, and is virtually impossible to implement. The

government should at minimum be permitted to fully brief—for the first time—the issue to address both the governing law and the logistical constraints.

2. The panel's cursory treatment of the good-faith exception conflicts with well-established precedent.

The panel eschewed long-standing Supreme Court and Fifth Circuit precedent when it reversed the district court's good-faith determination based on its new "cell-phone places" rule. The Supreme Court has repeatedly emphasized that the exclusionary rule's "sole purpose" is to "deter future Fourth Amendment violations." *Davis v. United States*, 564 U.S. 229, 236-37 (2011). Where officers have followed existing precedent, the "absence of police culpability" dooms the suppression claim. *Id.* at 240. Thus, to determine whether a district court properly applied the good-faith exception to deny a suppression motion, this Court asks "[w]hat was the law at the time of the search, and secondly, was the ... search of [the] cell phone objectively reasonable in the light of the then-existing law?" *United States v. Aguilar*, 973 F.3d 445, 449 (5th Cir. 2020).

The law at the time of this search allowed officers to search the cell-phones, including photos, based on their attestation that a search of the phones was necessary to look for evidence relating to Morton's drug offenses. *Triplett*, 684 F.3d at 505 ("[A] computer search may be as extensive as reasonably required to locate the items described in the warrant based on probable

cause."). As the district court correctly found, the search of the phones, including photos, was objectively reasonable in light of that law.

Furthermore, this Court has held on many occasions that when a "warrant is supported by more than a 'bare bones' affidavit, officers may rely in good faith on the warrant's validity." *United States v. Satterwhite*, 980 F.2d 317, 321 (5th Cir. 1992). The affidavits here were plainly not bare bones, but rather provided the judge "with facts, and not mere conclusions, from which he could determine probable cause." *Id.* In fact, the panel concluded that, as a matter of "simple logic," the affidavits provided probable cause to search Morton's phones for evidence of drug possession. *Morton*, 984 F.3d at 427. The panel's new rule that limits *where* the officers could search for that evidence should not preclude application of the good-faith exception.

Thus, although fact-bound good-faith determinations may not ordinarily warrant en banc review, rehearing is necessary here because the panel's holding is not only infected with legal error but requires clairvoyance rather than objective reasonableness, an outcome inconsistent with governing law.

CONCLUSION

The panel opinion is based on a mistake of fact, conflicts with governing law, and is unworkable. The government requests rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that this document was served on Morton's attorney, Brandon Beck, through the Court's ECF system on March 11, 2021, and that: (1) any required privacy redactions have been made; (2) the electronic submission is an exact copy of the paper document; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

s/Amber Grand
Amber Grand

CERTIFICATE OF COMPLIANCE

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s/Amber Grand
Amber Grand

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FORT WORTH DIVISION

UNITED STATES OF AMERICA,	§	
	§	
vs.	§	**No.: 4:19-CR-00017-O**
	§	
BRIAN MATTHEW MORTON (01)	§	

ORDER DENYING DEFENDANT'S MOTIONS TO SUPPRESS

Before the Court is Defendant Brian Morton's Motion to Suppress, (ECF No. 22), filed on February 12, 2019. On February 18, 2019, the Government responded. *See* ECF No. 23. Having reviewed the motion, briefing, and applicable law, the Court finds that the motion should be and is hereby **DENIED**.

I. BACKGROUND[1]

On September 1, 2018, Texas DPS Trooper Blue stopped Defendant Brian Morton for speeding. On approaching Morton's vehicle, Blue detected an odor of marijuana. Blue therefore ordered Morton to stand at the rear of the vehicle. Shortly thereafter, DPS Trooper Alewine arrived. Alewine conducted a search of the vehicle while Blue conducted a search of Morton. The zipper was allegedly down on Morton's pants, and he allegedly had a pair of women's underwear on. Blue recovered an Advil bottle in Morton's pocket, which he opened and found to contain ecstasy pills. Morton was placed under arrest for possession of ecstasy and read his *Miranda* rights.

In Morton's vehicle, the officers found a black backpack that had a container with two plastic bags (one containing a small amount of marijuana), a glass pipe with marijuana, three bags containing women's underwear, wipes, lubrication, sex toys, and a bag containing what officers

[1] These facts are taken from the Interoffice Supplement Report of DPS Trooper Tavis Alewine, Mot. Suppress Ex. B, ECF No. 22; Texas Highway Patrol Investigative Report, *id.* at Ex. C; and the facts presented in the Parties' briefing, *id.* at 1–4; Gov.'s Resp. 1–3, ECF No. 23. As to the pertinent facts that resolve this motion, there is no dispute.

ascertained to be school supplies. In all, the officers found approximately 100 pairs of women's underwear and 14 sex toys in the front of the van. They also found a lollipop in a cup holder, a black dildo on the passenger seat floorboard, and a pink dildo plugged in and charging. And they found three cell phones.

After searching the vehicle, Blue asked Morton if he was a cross-dresser or a pedophile. Morton represented that the underwear and sex toys were his and his wife's. Then, a third trooper arrived, DPS Trooper Espinoza. Espinoza questioned Morton while Blue and Alewine continued to search the van. Espinoza asked Mr. Morton for consent to search Morton's phone, but Morton refused. Espinoza asked Morton if he had child pornography on his phone.

Morton was taken to jail. Blue took one cell phone seized from Morton's van. At the jail, Morton was again asked to consent to a search of his cell phone and Morton again refused. Morton was processed for possession of marijuana under two ounces and for possession of a controlled substance listed in penalty group two greater than one gram but less than four grams.

On September 4, 2018, DPS Trooper Blue drafted affidavits for the three phones requesting warrants to search them for evidence relating to narcotics trafficking and possession. *See* Gov.'s Resp. Exs. C, D, and E, ECF No. 23. A judge reviewed the affidavits, found there was probable cause, and issued the requested warrants. *Id.* Officers then searched the phones in accordance with the warrants and, in the process of doing so, found images of child pornography. The officers halted their search, and, on September 10, 2018, obtained new warrants to search the phones specifically for child pornography. *Id.* at Exs. F, G, and H.

Morton moves to suppress evidence found on his phones, arguing "the search warrants for all three phones found in the vehicle were defective because the affidavits were legally insufficient to establish probable cause of additional criminal activity." Mot. Suppress 5, ECF No. 22.

II. LEGAL STANDARD

The Court applies a two-step test when reviewing a motion to suppress evidence that was seized pursuant to a search warrant. *See United States v. Sibley*, 448 F.3d 754, 757 (5th Cir. 2006). In the first step, the Court determines whether the good-faith exception to the exclusionary rule applies. *Id.*; *see also United States v. Leon*, 468 U.S. 897, 920 (1984). "The good-faith exception provides that where probable cause for a search warrant is founded on incorrect information, but the officer's reliance upon the information's truth was objectively reasonable, the evidence obtained from the search will not be excluded." *Id.* (quoting *United States v. Cavazos*, 288 F.3d 706, 709 (5th Cir. 2002). If the Court finds that the good-faith exception applies, it can deny the motion to suppress without any further inquiry. *See United States v. Cherna*, 184 F.3d 403, 407 (5th Cir. 1999). If the good-faith exception does not apply, then the Court looks to whether there was a substantial basis for the magistrate's determination that probable cause existed. *Id.* at 407.

III. APPLICATION

Morton argues that the good-faith exception does not apply because "[t]he troopers did not establish an indicia of probable cause in their search warrant affidavits of September 4, 2018." Mot. Suppress 9, ECF No. 22. Specifically, Morton claims, "In the search warrant affidavits, Blue includes facts such as Mr. Morton's refusal to consent to a search of his cell phone, that he was wearing women's underwear, and that numerous women's underwear and sex toys were found in the van." *Id.* at 3. He asserts that "[a]bsent in the affidavits are any facts about Mr. Morton or the encounter that would support a belief that evidence of narcotics trafficking or evidence of possession of drugs would be found in Mr. Morton's cell phones." *Id.* Morton contends it is insufficient that "Blue details only his training and experience, without pointing to particularized facts about Mr. Morton's arrest." *Id.* Morton urges the good-faith exception does not apply where

the "affidavits are general in nature" and "[n]o probable cause was presented or established to believe that Mr. Morton's cell phones contained evidence of drug possession." *Id.* at 9–10.

The Government responds that the affidavits in support of the search warrants were sufficiently particularized to support a finding of probable cause. The Government notes "[t]he affidavits . . . state that based on the officer's training and experience, 'individuals use cellular telephones to arrange for the illicit receipt and delivery of controlled substances along with other criminal activity.'" Gov.'s Resp. 6, ECF No. 23 (citation omitted). It also notes "[t]he affidavits also set forth specific details about the drugs found on Morton, including less than two ounces of marijuana as well as 14 Ecstasy pills of varying colors with a distinctive stamp on them," arguing "[e]vidence of where he got the marijuana and Ecstasy and whether he was selling to others could be contained in the phones." *Id.* The Government further contends that the good-faith exception is especially justified here "because the officers showed good judgment and restraint throughout their investigation"—"[w]hen they found child pornography, they stopped their search and obtained three new warrants." *Id.* at 4.

Viewing each September 4, 2018 affidavit as a whole, it is clear they contain sufficient details to allow a neutral magistrate to reasonably infer that Morton's phones could contain information connected to his purchase and possession of controlled substances. *United States v. May*, 819 F.2d 531, 535 (5th Cir. 1987) (noting that a warrant-signing judicial "officer may draw reasonable inferences from the material he receives, and his ultimate probable cause decision should be paid great deference by reviewing courts"). The affidavits recount Morton's stop and arrest, the smell of marijuana in the vehicle, the possession of marijuana, and the possession of 14 ecstasy pills. *See, e.g.*, Mot. Suppress Ex. A, ECF No. 22. They also describe that, based on the officer's training and experience, "individuals use cellular telephones to arrange for the illicit

receipt and delivery of controlled substances" such as those found in Morton's possession. *Id. See United States v. Treanor*, 950 F.2d 972, 972 (5th Cir. 1991) (holding that seized evidence "combined with the officers' experience . . . furnished sufficient probable cause for a search" warrant). And to the extent Morton argues that what the officers really wanted all along was to find evidence of child pornography, Morton does not argue the officers exceeded the scope of the initial warrant and the officers' subjective intent is therefore irrelevant. *See United States v. Causey*, 834 F.2d 1179, 1184 (5th Cir. 1987). Morton has therefore failed to show that the good-faith exception to the exclusionary rule does not apply.

In sum, because the Court finds that there is no showing why the good-faith exception to the exclusionary rules does not apply, no further analysis is necessary. The Court therefore **ORDERS** Defendant Brian Morton's motion to suppress is hereby **DENIED**.

SO ORDERED on this **3rd day** of **March, 2019**.

Reed O'Connor
UNITED STATES DISTRICT JUDGE