No. _____

In the Supreme Court of the United States

KRISTOPHER DEAN PUTNAM, *PETITIONER*,

v.

UNITED STATES OF AMERICA, *RESPONDENT*

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

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QUESTIONS PRESENTED FOR REVIEW

In *Riley v. California*, 573 U.S. 373 (2014), the Court held that police officers must generally obtain a warrant before searching a cell phone seized incident to arrest because of the distinctive privacy interests in digital information. The Court did not address what a search warrant application for a cell phone must contain in order to establish probable cause.

The questions presented are:

1. Does the Fourth Amendment permit the issuance of a search warrant for a cell phone absent case-specific facts connecting the alleged crime and the phone?

2. Does the good faith exception to the exclusionary rule apply where the search warrant application for a cell phone lacks case-specific facts connecting the alleged crime and the phone?

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Petitioner Kristopher Dean Putnam asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on November 13, 2023.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

RELATED PROCEEDINGS

- *United States v. Putnam*, No. 1:21-cr-00115-RP (W.D. Tex. Dec. 5, 2022) (judgment of conviction)
- *United States v. Putnam*, No. 22-51061 (5th Cir. Nov. 13, 2023)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

OPINION BELOW

A copy of the opinion of the court of appeals, *United States v. Putnam*, No. 22-51061 (5th Cir. Nov. 13, 2023) (per curiam), is reproduced at Pet. App. 1a–4a.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on November 13, 2023. Justice Alito granted Putnam's motion to extend the time for filing a petition for writ of certiorari to March 12, 2024. *See Putnam v. United States*, No. 23A655. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the U.S. Constitution provides:

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

U.S. Const. amend. IV.

STATEMENT

1. The fire that sparked this case. Around 6:13 p.m. on April 26, 2020, a fire engulfed a travel trailer in Austin, Texas, and claimed the life of the woman inside. An autopsy the following day

confirmed that the woman died from smoke inhalation and severe burns, but the medical examiner could not determine whether she was incapacitated before the fire started. The Travis County Fire Marshal ultimately concluded more than a year later that there was a "strong possibility" that the fire was an accidental electrical fire, and that "there is not any evidence that shows it was an intentional act."

But on the night of the fire, local detectives learned that Putnam was a regular at the property—sleeping there several nights a week. The remainder of the week, Putnam stayed at his mother's apartment. During the afternoon of the fire, Billy Hope (the deceased's boyfriend) and Putnam had been working on cars at the property until 3:00 or 4:00 p.m. Billy had been fighting with the deceased and decided to go to his mother's house for the night. When he left, the deceased had gone to sleep in the trailer, and Putnam was asleep under a tree outside. Around 6:19 p.m., Putnam called his friend, Jeremy, and was "crying" about the fire. Putnam asked Jeremy to pick him up and, using his cell phone, shared his nearby location at 6:36 p.m. They drove to tell Billy about the fire. Jeremy showed his phone to the detectives to confirm the times and locations of when Putnam called him.

Throughout the night, Putnam made inconsistent statements to detectives about when and how he discovered the fire, as well as his exact whereabouts on the property. He admitted that he had lied to the detectives but denied any involvement in setting the fire. Although Putnam was not under arrest, the detectives ask Putnam to give them his phone. He complied.

2. The search warrant, a week later. On May 4, 2020, a Travis County District Judge issued a search warrant to seize any and all information on Putnam's cell phone related to the offense of "Capital Murder/Capital Felony/P.C. 19.03."[1] The warrant authorized the seizure of "any and all information" contained on the cell phone:

> including, but not limited to, contacts, call logs (incoming calls, outgoing calls and missed calls), global positioning system (GPS) locations, metadata, text messages, electronic mail (email), notes, visual depictions (both motion video and still pictures), messages and/or images sent through social media accounts, digital data stored on the aforementioned device and/or digital data stored on remote "cloud" servers or storage accessed through the aforementioned device and any other information that could be related to the offense.

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[1] A person commits capital murder if he "intentionally or knowingly causes the death of an individual" in one of 10 different ways. *See* Tex. Penal Code § 19.03(a)(1)–(10); *see also* § 19.02(b)(1).

The detective who provided the affidavit in support of the warrant application summarized his belief that the crime of capital murder by arson had been committed and that Putnam's cell phone may contain information related to that offense. But as evidence of the crime, the detective stated only that there had been a fire on April 26, 2020, at a travel trailer that claimed the life of a woman. There was no allegation that the fire was suspected to have had an incendiary origin.

The detective then recounted Putnam's inconsistent statements. At the scene of the fire, Putnam told detectives that his friend, Jeremy, had picked him up at the property to go to the store. Putnam noticed the fire when he and Jeremy returned but explained that Jeremy did not notice the fire because he had been distracted by his phone. The affiant detective opined that he did not believe Putnam's initial statement that Jeremy would not have noticed the fire because the trailer was only 40–50 feet away from the roadway and some of the 911 callers had reported the fire from a few blocks away.

Detectives interviewed Putnam later that night at his mother's apartment. There, Putnam recounted that, after he had fallen asleep under the tree, Jeremy had woken him up and they left together. About two minutes after they left the property, he realized

he had forgotten his backpack. Jeremy returned him to the property and left for the store. At the property, Putnam realized the trailer was in flames. He started banging on the trailer, but it was 70% engulfed in flames at that time. He did not call 911 because he was busy banging on the trailer.

Putnam said that he called Jeremy, and Jeremy told him to share his location, which he did. Putnam said it took Jeremy a long time to pick him up because he was at the store buying lotto tickets. Jeremy picked Putnam up and they went to notify Billy.

When asked if he started the fire, Putnam answered, "[i]f I started that fire my name is Leeroy Jenkins and I'm black and you can see I ain't none of those." When asked if he knew who started the fire, Putnam again said, "[i]f I did my name is Leeroy Jenkins and I'm black."

Detectives confronted Putnam about his inconsistencies. Putnam admitted that his story about Jeremy waking him up was a lie and that he knew leaving the scene made him look guilty. When asked why he left the scene, he said he did not want to deal with someone dying around him again.

Putnam again told detectives that he had been asleep under a tree next to some tires on a Spider Man mat. He said his dog woke him up and that was when he saw the fire and began banging on

the trailer. Detectives determined that the Spider Man mat where Putnam had been asleep was 26 feet from the trailer. An arson investigator opined:

> Known progression of fire from unnoticeable to fully developed is not instant, and would provide many signs prior to reaching this level and ventilating through doors and windows. A fire that size would give sensory alerts long before reading the described level of involvement (feeling heat, smelling smoke, potential smoke, inducing coughing, noise from structural elements collapsing and noise from items inside the fire falling windows, etc.).

Based on the inconsistent information that Putnam later admitted was false, Jeremy's verifying evidence about when Putnam contacted him, and the Fire Marshal's opinion about when—in general—a fire becomes noticeable, the detective averred that "the communications stored within [Putnam's] phone were believed to be valuable evidence in establishing [his] whereabouts near the time of the fire and his potential involvement in this fire and the death of Dana Crocker-Norman." Thus, the detective sought to search the entire contents of Putnam's cell phone, including cloud storage, for information that could be related to the "alleged offense of murder."

3. The cell phone search. On May 15, 2020, the detective received storage devices containing the extracted data from Putnam's cell phone. Categories of evidence were put into separate folders. The first folder the detective opened was "videos," at which

time he identified what he believed to be child pornography. He then viewed several video thumbnails, and he again saw what he believed to be child pornography. He ceased his review of data and sought and obtained a second search warrant to search the contents of Putnam's cell phone for evidence related to child pornography. Pursuant to the second search warrant, more than 3,000 images and 300 videos of child pornography were discovered on Putnam's cell phone. The cell phone also contained messaging conversations in which Putnam sent pornographic images to persons the detective believed were minors.

4. Indictment for child pornography. Putnam was indicted on two counts related to the child pornography discovered on his cell phone. Count One alleged that, between March 28, 2020, and April 23, 2020, Putnam distributed child pornography, in violation of 18 U.S.C. § 2252(a)(2); and Count Two alleged that on or about April 26, 2020, Putnam knowingly possessed child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B).

5. Putnam moved to suppress the contents of the cell phone. Putnam argued that the illicit images discovered on his cell phone were poisonous fruit of the unconstitutional search and ought to be suppressed. And the good-faith exception did not apply to the search of the cell phone for two reasons. First, there was no

indicia of probable cause to support the warrant. Putnam's inconsistent statements and the mere fact that he used his cell phone around the time of the fire were not sufficient to create a nexus between his phone and the alleged crime. In addition, there was no probable cause linking all the different types of categories of content, such as videos, recordings, or data stored elsewhere, with the alleged crime. Second, there was no particularity about the place to be search, items to be seized, or temporal scope of the search. The district court denied the motion.

6. Plea and sentencing. Putnam conditionally pleaded guilty to both counts in the indictment pursuant to a written plea agreement, expressly reserving his right to challenge the district court's denial of his motion to suppress. The district court imposed a sentence of 188 months' imprisonment for each count, to run concurrently, followed by concurrent terms of 10 years' supervised release, and ordered restitution in the amount of $58,000.

7. Appeal. On appeal, Putnam raised three arguments. *First*, the affidavit supporting the warrant failed to provide any probative evidence that capital murder/arson—the alleged crime—had

been committed.[2] The affidavit alleged only that 1) a fire occurred; 2) a person perished; and 3) Putnam lied about his precise whereabouts on the property when he discovered the fire. No probative facts alleged that the fire was suspicious or had an incendiary origin, contrary to plainly established law. *See Michigan v. Tyler*, 436 U.S. 499, 506 (1978) ("[t]o secure a warrant to investigate the cause of a fire, an official must show more than the bare fact that a fire has occurred"); *see also Michigan v. Clifford*, 464 U.S. 287, 294 (1984) (a fire of undetermined origin may be enough under the lower legal threshold to secure an administrative warrant, but a criminal search warrant to gather evidence of criminal activity);

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[2] Tex. Penal Code § 19.03(a)(2) requires as an essential element of the crime that a person willfully burned the building. *See Massey v. State*, 226 S.W.2d 856, 268 (Tex. Cr. App. 1950); Tex. Penal Code § 28.02; *see also Adrian v. State*, 587 S.W.2d 733, 735 (Tex. Crim. App. 1979) (an essential element of arson is proof that someone "designedly" set the fire); *Duncan v. State*, 7 S.W.2d 79 (Tex. Crim. App. 1928) ("The record is without any evidence suggesting any connection of appellant with this fire or that such a fire was incendiary").

Massey, 226 S.W.2d at 859 (proof merely that building burned is not sufficient to show that the fire was of incendiary origin).[3]

Second, the affidavit supporting the warrant failed to provide any probative evidence that created a sufficient nexus between Putnam's cell phone and the alleged crime. Putnam was not a "criminal"—he was not under arrest—and there were no facts to support a "strong probability" that Putnam had committed murder or arson. Thus, he was entitled to full-strength Fourth Amendment protections. *Cf. United States v. Riley*, 573 U.S. 373, 392 (2014) (an

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[3] Putnam also argued that the obvious error affected his substantial rights because no other exceptions to the Fourth Amendment would have authorized the general and comprehensive search of Putnam's cell phone. And the error was so serious that it warranted relief. The Framers of the Fourth Amendment most strongly opposed general searches that allowed for the rummaging through the "privacies of life." *See Riley*, 573 U.S. at 403. Searching for and seizing evidence of any crime—which was otherwise unsuspected at the time of the search—without probable cause is exactly the kind of harm the Fourth Amendment was intended to prevent. The error was especially flagrant because the investigation into the fire ultimately concluded that there was "not any evidence" that the fire was an "intentional act," and there was a "strong possibility" that the fire was an accidental electrical fire. Thus, the absence of probable cause in the detective's affidavit was not some kind of scrivener's error, but because *no facts existed* that a crime had occurred.

arrestee has diminished privacy interests). While the detective described his experience and training in investigating "narcotics, property, and violent crimes," he made no statement that connected a person's cell phone use with the commission of a capital murder committed by arson.[4] Rather, the affidavit set out the legal, normal ways Putnam used his cell phone at the trailer—he used the phone to call his mom, and on the night of the fire he called Jeremy "crying." While Putnam made inconsistent statements about when and how he first saw the fire, there was no probative evidence in the affidavit that the contents of the cell phone would answer the question of Putnam's precise locations at the property or when he saw the fire. And even if the location data were that precise, Putnam's location was not evidence that the fire had an incendiary origin, nor was it evidence of any other crime. There was no evidence that tied the vast majority of the content on

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[4] The affidavit stated that the "Affiant has experience in conducting and assisting with criminal investigations, especially narcotics, property, and violent crimes investigations including homicide. Affiant has received specialized training in conducting these types of investigations. Affiant has been employed by the Travis County Sherrif's Office … since 2007 and is currently assigned to the Criminal Investigations Division – Homicide Unit detective. Affiant holds an advanced Texas peace officer license."

Putnam's cell phone to the alleged crime, and no explanation from the detective about what kind of evidence may exist in the various categories of digital data. The mere fact that Putnam had a cell phone and used it in legal ways around the time of the fire was not probable cause to support the search of the entire contents of a cell phone without gutting *Riley* and the heightened Fourth Amendment interests in personal cell phones.

Third, the warrant lacked the requisite particularity of the types of evidence to be seized within a defined temporal scope. The warrant, like its supporting affidavit, cited the capital murder statute broadly, defined the scope of the search without regard to date, and included the entire contents of the cell phone and any offsite storage the phone can access. While the affidavit's narrative identified an interest in identifying Putnam's location on the day of the fire, the scope of the requested search included every conceivable, generic category of data that would exist on the physical phone or in off-site cloud storage. Neither the warrant, nor the affidavit, provided a description of the items to be seized at all. *Groh v. Ramirez*, 540 U.S. 551, 558 (2004) (warrant identifying only a single dwelling residence lacked particularity).

The Fifth Circuit affirmed, holding that the executing officer relied on the warrant in good faith. Pet. App. 4a. It reasoned that

the "facts indicat[ed] that Putnam had provided false information about his whereabouts shortly after the fire, and it included a Fire Marshal's evaluation of Putnam's statements that contradicted his version of events." Pet. App. 4a. Putnam also failed to show "that the warrant was so facially deficient in failing to particularize the place to be searched or the things to be seized that the executing officers could not reasonably presume it to be valid." Pet. App. 4a.

REASONS FOR GRANTING THE WRIT

I. This case presents the important and reoccurring question of how the probable cause requirement applies to cell phone search warrants.

In *Riley*, this Court held that police generally must obtain a warrant to search a cell phone seized incident to arrest. The Court treated cell phones differently from other objects in the search-incident-to-arrest context because, for the overwhelming majority of Americans, they hold "the privacies of life" and "a cell phone search would typically expose the government to far more than the most exhaustive search of a house." *Riley*, 573 U.S. at 396. Although raised at oral argument, the Court's opinion left unresolved what a search warrant application for a cell phone must contain to establish probable cause. *See* Transcript of Oral Argument at 14, *Riley*, 573 U.S. 373 (No. 13-132) (Ginsburg, J: "What would the police have to show [to get a warrant]?"). This case can answer that question, clarifying what constitutes probable cause to issue a warrant to search a cell phone, and whether the warrant application must allege some case-specific nexus between the phone and the crime.

Federal and state courts across the country have employed different approaches to probable cause challenges to cell phone search warrants. Many courts have upheld warrants without requiring specific evidence connecting the phone and the alleged

crime, relying instead on the type of crime at issue, the number of participants, or an officer's experience that suspects may have evidence of crimes on their phones. *See United States v. Barron-Soto*, 820 F.3d 409 (11th Cir. 2016); *Glispie v. State*, 793 S.E.2d 381 (Ga. 2016); *Johnson v. State*, 472 S.W.3d 486 (Ark. 2015); *State v. Henderson*, 854 N.W.2d 616 (Neb. 2014); *Stevenson v. State*, 168 A.3d 967 (Md. 2017); *United States v. Brewer*, 2017 WL 4118347 (3d Cir. 2017) (unpublished); *United States v. Lowe*, 676 F. App'x. 728 (9th Cir. 2017) (unpublished). These courts did not identify any limiting principles to account for the distinctive privacy implications of digital data.

Other courts have based their holdings on the presence or absence of specific evidence connecting the phone and the crime. *See United States v. Bass*, 785 F.3d 1043 (6th Cir. 2015); *United States v. Mathis*, 767 F.3d 1264 (11th Cir. 2014); *United States v. Opoku*, 556 F. Supp.3d 633, 644 (S.D. Tex. 2021) ("Mindful that a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house, a warrant to search a cell phone must similarly be based on more than (1) the fact that a codefendant possesses a cell phone and (2) the truism that people often communicate plans via cell phones") (emphasis in original) (cleaned up); *United States v. Ramirez*, 180 F. Supp. 3d 491 (W.D.

Ky. 2016); *Commonwealth v. White*, 59 N.E.3d 369 (Mass. 2016); *State v. Holland*, 865 N.W.2d 666 (Minn. 2015).

Guidance is needed from the Court regarding whether it intended that the very characteristics of a cell phone that necessitate a warrant—their ubiquity and immense storage capacity—also justify its issuance as a matter of course.[5] When Chief Justice Roberts expressed concern during oral argument in *Riley*'s companion case, *United States v. Wurie*, that "the police would be able to articulate why almost every application, every entry into a cell phone would reasonably be anticipated to have evidence of a particular crime," counsel for the United States responded, "to the extent you think that's an inevitable generalization and there is a certain way of looking at it in which that's correct, then the interposition of a warrant requirement would do nothing." Transcript of Oral Argument at 17–18, *United States v. Wurie*, 573 U.S. 373 (2014) (No.

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[5] *See* Adam Gershowitz, *The Post-Riley Search Warrant: Search Protocols and Particularity in Cell Phone Searches,* 69 VAND. L. REV. 585, 590, 593 (2016) (noting that "[i]n an alarming number of post-*Riley* cases, search warrants authorized police with extremely limited suspicion of criminal activity to rummage through reams of unrelated private data" and that "post-*Riley* search warrants … have been issued (and some upheld on appeal) despite a staggering lack of probable cause and particularity").

13-212). For the warrant requirement to "do something," this Court must give it force by ensuring that it is not used to justify the type of general warrant to rummage through a cache of every suspect's most private thoughts, communications, activities, associations, interests, and relationships that the Fourth Amendment was designed to protect against.[6] By interpreting the Fourth Amendment's probable cause requirement to demand a case-specific nexus between the alleged crime and the phone, this Court would ensure that cell phone data receives protection commensurate with the privacy interests at stake.

A. To establish probable cause, a search warrant application must provide a nexus between the place to be searched and the crime.

A search warrant application must establish a nexus between the place to be searched and the suspected criminal behavior to comply with the Fourth Amendment. *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 307 (1967); *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (stating that the task of a magistrate presented with a

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[6] *See* Orin Kerr, *Executing Warrants for Digital Evidence,* 48 TEX. TECH. L. REV. 1, 10-11 (2015) (arguing that warrant searches for digital evidence "look disturbingly like searches for all evidence" and the "result seems perilously like the regime of general warrants that the Fourth Amendment was enacted to stop").

search warrant application is to determine whether, given all of the circumstances in the accompanying affidavit, "there is a fair probability that contraband or evidence of a crime will be found in a particular place"). And "[t]he critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978) (footnote omitted).

While the type of crime is a proper consideration in the probable cause calculus, it does not necessarily establish a fair probability that evidence will be found in a particular location. *See United States v. Falso*, 544 F.3d 110, 122 (2d Cir. 2008) (holding that warrant to search computer for child pornography was not supported by probable cause). In then-Judge Sotomayor's words, an "affidavit's general statement" that "computers are utilized by individuals who exploit children (which includes collectors of child pornography) to … locate, view, download, collect and organize images of child pornography found through the internet" failed to establish nexus because "[t]here simply is nothing in this statement indicating that it is more (or less) likely that Falso's computer might contain images of child pornography." *Id*. "Conclusory statements"

that evidence is in a given location cannot establish probable cause because they give the magistrate no basis for making his or her own judgment regarding probable cause and render the magistrate "a mere ratification of the bare conclusions of others." *Gates*, 462 U.S. at 239; *see also Falso* 544 F.3d at 122 ("the affidavit's sweeping representation that computers are used by those who exploit children to, inter alia, view and download child pornography, would be equally true if 1% or 100% of those who exploit children used computers to do those things").

B. Courts have employed conflicting approaches to challenges to cell phone search warrants.

Since *Riley*, federal and state courts that have considered probable cause challenges to search warrants for cell phones can be divided into two groups: those that require phone-specific facts and those that do not.[7]

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[7] *See* Andrew Huynh, *What Comes after Getting a Warrant: Balancing Particularity and Practicality in Mobile Device Search Warrants Post*-Riley, 101 CORNELL L. REV. 187, 190, 209–10 (2015) (acknowledging conflicting approaches among courts to issuing search warrants for cell phones and observing that *Riley*'s warrant requirement, while ostensibly a sweeping victory for privacy rights of cell phone owners, left

Of the courts that do not require phone-specific facts, they have upheld search warrants based on the type of crime at issue or the number of participants in the criminal venture. In this case, the Fifth Circuit's approach went further—it ignored the need for case-specific facts by upholding a search warrant for a suspect's cell phone without any affirmation that evidence related to capital murder or arson would be found on the phone.

This stands in stark contrast with other federal and state courts that have held that, to establish probable cause, a search warrant application must contain particularized evidence that the phone was used in connection with the offense. *See, e.g., Ramirez*, 180 F. Supp. 3d at 495 (an officer's training and experience, while a consideration, "cannot substitute for the lack of evidentiary nexus in this case prior to the search, between the cell phone and any criminal activity") (quoting *United States v. Schultz*, 14 F.3d 1093, 1097 (6th Cir. 1994); *Commonwealth v. Perkins,* 82 N.E.3d 1024, 1033 (Mass. 2017) (holding that affidavit supporting warrant

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open several questions including, "what must go into a warrant—itself based on predigital methods—to comport with the Fourth Amendment protection?" and "what do law enforcement officers and prosecutors need to include in a search warrant to balance investigatory interests with privacy considerations?").

for suspect's cell phone sufficiently connected criminal activity to phone where "police had detailed and specific knowledge concerning the defendant's use of a cellular telephone to arrange drug transactions, and a particular number with which that cellular phone had been in contact at a specific time").

1. Courts that rely on the type of crime or the number of participants.

Some courts have held that warrants for cell phones were supported by probable cause because the type of crime at issue requires some form of communication. *See, e.g., Barron-Soto*, 820 F.3d at 413, 416 (holding that probable cause to search phone was established where affiant stated that "people involved in the distribution and sale of drugs … commonly communicate with customers or sources of supply through the text or 'SMS' system of their cellular phones"); *Lowe,* 676 F. App'x. at 733 (holding that cell phone search warrant was supported by probable cause where police had evidence that Lowe was selling drugs, Lowe had drugs on his person at the time of his arrest, police recovered several firearms in Lowe's apartment, and the ATF agent's affidavit stated that "based on his experience and training in conducting federal

firearms and narcotics investigations, drug dealers commonly use cell phones to facilitate the sale of drugs").[8]

This approach is problematic because "[e]ven an individual pulled over for something as basic as speeding might well have locational data dispositive of guilt on his phone." *Riley*, 573 U.S. at 399. Consequently, the Court explicitly rejected the type-of-offense approach in the context of searches of cell phones incident to arrest in *Riley*.[9]

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[8] *See also Glispie v. State,* 793 S.E.2d 381, 385 & n.1 (Ga. 2016) (holding that warrant for cell phone was issued on probable cause where warrant application provided that a large amount of drugs and cash in small denominations were found on Glispie's person at the time of his arrest so "it was reasonable for the magistrate to infer that the cell phones in Glispie's possession at the time of his arrest were used as communicative devices with third parties for drug deals") (footnote omitted).

[9] The courts that have simply relied on the type of crime to find probable cause functionally impute the offense-of-arrest approach this Court rejected for cell phones in the search-incident-to-arrest context. In *Arizona v. Gant,* 556 U.S. 332, 343 (2009), this Court held that circumstances unique to the vehicle context justify a search incident to arrest of an arrestee's vehicle when it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle. In *Riley,* the United States proposed applying the *Gant* offense-of-arrest standard

Several courts have also found probable cause where the crimes were alleged to have been committed by multiple people absent any evidence that those people communicated by phone. *See, e.g., Johnson*, 472 S.W.3d at 490 (holding that search warrant application established probable cause that "the phone may have been used as a communication device regarding the homicide" "before, during, or after [the shootings] occurred" where confidential informant identified Johnson and another man in the shooting and the other suspect implicated himself and Johnson); *Henderson*, 854 N.W.2d at 632 (holding that search warrant for cell phone was supported by probable cause "[b]ecause Henderson was working with at least one other person to commit the shootings" and, therefore,

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to allow for searches of cell phones incident to arrest whenever it is reasonable to believe that the phone contained evidence of the crime of arrest. This Court rejected the offense-of-arrest approach in the context of cell phone searches, not only because *Gant* relied on the unique circumstances presented by vehicles, but also because "a *Gant* standard would prove no practical limit at all when it comes to cell phone searches." *Riley,* 573 U.S. at 399. This is because "[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." *Id.* The Court warned that "applying the *Gant* standard to cell phones would in effect give 'police officers unbridled discretion to rummage at will among a person's private effects.'" *Id.* (quoting *Gant,* 556 U.S. at 345).

"it is reasonable to infer that the cell phone that was in his possession was used to communicate with others regarding the shootings before, during, or after they occurred"). Absent case-specific facts that the criminal participants actually communicated via cell phone, this approach fails to connect the phone and the crime and licenses a substantial privacy intrusion based entirely on speculation.

2. Courts that require phone-specific facts.

A number of courts have upheld search warrants based on specific evidence connecting the crime and the phone. *See, e.g., Bass*, 785 F.3d at 1049 (holding that affidavit's statement that Bass and co-conspirators frequently used cell phones to communicate and that Bass was using phone at the time of his arrest satisfied nexus requirement because it "contained sufficient detail to tie this particular phone to Bass's alleged criminal activity"); *Mathis*, 767 F.3d at 1276 (holding that required "connection between defendant and property to be searched" was established where search warrant application for cell phone included evidence that defendant and alleged victim had communicated via cell phone) (citation omitted); *Holland*, 865 N.W.2d at 675, 676 (holding that "'direct connection between the alleged criminal activity and the site to be searched'" was demonstrated by warrant application to search phone and

iPad where murder suspect admitted searching the phrase "can you break your neck falling down the stairs" on both devices) (quoting *State v. Souto*, 578 N.W.2d 744, 749 (Minn. 1998)).

The Supreme Judicial Court of Massachusetts has recognized that the probable cause requirement must be interpreted consistently with the "significant privacy interests" individuals have at stake in their digital data. *White*, 59 N.E.3d at 375 (quoting *Commonwealth v. Dorelas*, 43 N.E.3d 306, 312 (Mass. 2016) (holding that the characteristics that make cell phones distinct from physical evidence require that "a search of its many files must be done with special care and satisfy a more narrow and demanding standard" because "what might have been an appropriate limitation in the physical world becomes a limitation without consequence in the virtual one")).

Police experience that a suspect's phone is likely to contain evidence of the crime under investigation, while a factor in the probable cause analysis, cannot itself establish the nexus between the crime and the device to be searched. Rather, the search warrant affidavit must demonstrate the existence of some particularized evidence related to the crime. *White*, 59 N.E.3d at 375; *cf Perkins*, 82 N.E.3d at 1033 (holding that affidavit supporting warrant for suspect's cell phone sufficiently connected criminal activity to

phone). Relying on the Court's observations in *Riley*, the Massachusetts high court warned that failure to enforce the nexus requirement by demanding that search warrant applications contain evidence particularized to the suspect, his phone, and the crime at issue would result in the routine issuance of cell phone search warrants without any practical limit:

> In essence, the Commonwealth is suggesting that there exists a nexus between a suspect's criminal acts and his or her cellular telephone whenever there is probable cause that the suspect was involved in an offense, accompanied by an officer's averment that, given the type of crime under investigation, the device likely would contain evidence. If this were sufficient, however, it would be a rare case where probable cause to charge someone with a crime would not open the person's cellular telephone to seizure and subsequent search. *See Riley*, [573 U.S. at 399] (only [an] "inexperienced or unimaginative law enforcement officer … could not come up with several reasons to suppose evidence of just about any crime could be found on a cell phone"). We cannot accept such a result, which is inconsistent with our admonition that "individuals have significant privacy interests at stake in their [cellular telephones] and that the probable cause requirement … under both the Fourth Amendment … and art. 14 … [must] serve[ ] to protect these interests."

White, 59 N.E.3d at 377 (citation and footnote omitted).

Similarly, in *Ramirez*, 180 F. Supp. 3d at 493–94, the court held that the affiant's "boilerplate" statement that "individuals may keep text messages or other electronic information stored in their cell phones which may relate them to the crime" "is insuffi-

cient to establish the particularized facts demonstrating fair probability that evidence of a crime would be located on the phone." Recognizing that officer experience is a part of the probable cause analysis, the court held that it cannot "'substitute for the lack of evidentiary nexus' … between the cell phone and the criminal activity." *Id.* at 495 (quoting *United States v. Shultz*, 14 F.3d 1093, 1097 (6th Cir. 1994)). The court declined to adopt the type-of-crime approach. Although Ramirez was arrested for a drug conspiracy (which by definition involves multiple persons and at least tacit communications) and possessed his cell phone at the time of arrest, the court held that this was "insufficient by itself to establish a nexus between the cell phone and any alleged drug activity." *Id.*

3. The Fifth Circuit's approach: reliance on an officer's generalizations and a suspect's inconsistent statements.

This case represents a marked departure from the Court's recognition that cell phone digital data is protected by the Fourth Amendment and precedent requiring that search warrant applications establish a nexus between the criminal activity and the place to be searched when the search is of any place other than a cell phone. The result is that cell phones within the Fifth Circuit's jurisdiction are afforded less constitutional protection than a home despite this Court's recognition in *Riley* that "a cell phone search would typically expose the government to far more than the most

exhaustive search of a house." *Riley*, 573 U.S. 396–97; *cf. Welsh v. Wisconsin*, 466 U.S. 740, 754 (1984) (recognizing the "special protection afforded the individual in his home by the Fourth Amendment").[10]

As this case reflects, the Fifth Circuit summarily allows generalized officer experience—none of which asserted that cell phones may contain evidence of capital murder or arson—and inconsistent statements about Putnam's precise knowledge about the fire or location—not whether there would be evidence that the fire had an incendiary origin—to support a warrant. *See* Pet. App. 4a. This ignores whether there were any probative facts of the alleged crime or a crime-specific nexus with the cell phone. And the court ignored *Riley* altogether before summarily holding that the

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[10] The Fifth Circuit has previously acknowledged the "close call" of whether evidence recounted in an officer's affidavit established probable cause for drug trafficking as opposed to drug possession sufficient to support a warrant to search a cell phone, but held that "good faith" saved the officer's reliance on the warrant. *United States v. Morton*, 46 F.4th 331, 338 (5th Cir. 2022) (en banc); *but see id.* at 340 (Higginson, J., concurring) (noting that "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.").

"warrant was so facially deficient in failing to particularize the place to be searched or the things to be seized." Pet. App. 4a.

Despite *Riley*'s holding that warrants are required to search cell phones because of their ubiquity and capacity to store tremendous amounts of highly personal information, the Fifth Circuit's approach makes it difficult to conceive of a situation in which probable cause that a suspect committed a crime would not automatically support the issuance of a search warrant for the suspect's cell phone. *Compare with Brewer,* 2017 WL 4118347, at *3 (holding that search warrant was supported by probable cause where the affidavit detailed "ample facts" evidencing suspect's participation in robbery and he claimed ownership of the cell phone that was in his possession at the time of his arrest).

C. Guidance is needed from the Court.

Courts in every jurisdiction in the country have faced or will face the issue of whether the Fourth Amendment permits the issuance of a search warrant for a cell phone absent case-specific facts. Given that "a cell phone search would typically expose to the government far more than the most exhaustive search of a house," *Riley*, 573 U.S. at 396–97, this issue greatly affects both cell phone owners' privacy interests in their phones and daily police protocols.

The convergence of modern society's dependence on cell phones with the fundamental differences between searches of physical places and digital data creates a pressing need for the Court's guidance regarding the application of *Riley*'s principles to the issuance of search warrants for cell phones.[11] Courts that have

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[11] Several commentators have recognized that the warrant-issuing process must be revisited in order to acknowledge the privacy concerns implicated by cell phone searches and recognized in *Riley* and argued that digital evidence requires a different Fourth Amendment analysis. *See, e.g.*, Gershowitz, *supra* note 5 at 585–86, 638 (2016) (arguing that *Riley*'s search warrant requirement has been "far less protective than expected" with warrants issuing absent probable cause and advocating for the imposition of restrictions on search warrants for cell phones because, "for the *Riley* decision to be effective," the Fourth Amendment's guarantees in the context of ever-increasing digital data on cell phones create "the need for nuanced search warrants"); Alan Butler, *Get a Warrant: The Supreme Court's New Course for Digital Privacy Rights After Riley v. California,* 10 DUKE J. CONST. L. & PUB. POL'Y 83, 93, 112 (2014) (discussing implications of *Riley* on Fourth Amendment issues and arguing that as *Riley* "usher[ed] in the era of digital Fourth Amendment rights," the decision "could support significant doctrinal changes in electronic-search-and-seizure" and that "electronic data should be subject to different Fourth Amendment rules").

addressed this issue have reached different results, causing the Fourth Amendment's protections to vary widely according to state and jurisdictional lines. A decision from this Court would provide much needed guidance to law enforcement, courts, and legislators, resulting in search warrants for cell phone data that are reasonable, satisfy the nexus requirement of the Fourth Amendment, and are consistent across the country.

It simply cannot be that the very characteristics of cell phones that generated the need to secure warrants to search them—their

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In Orin Kerr's article, "Executing Warrants for Digital Evidence," he argues that, because digital evidence is different from physical evidence, with *Riley* leading the way, Fourth Amendment principles must be adjusted when applied to new technologies:

> After *Riley,* we can call judicial adoption of a new rule to adjust the equilibrium for computer searches a "*Riley* moment." I expect that *Riley* is just the first in a series of *Riley* moments when the Supreme Court recognizes that the facts of computer searches differ so greatly from the facts of physical searches that new rules are required. New facts demand new law to restore the function of the old law in the new technological environment. Equilibrium adjustment, as shown in *Riley,* can and should point the way forward to new rules for applying the Fourth Amendment in digital evidence cases.

Kerr, *supra* note 6 at 10.

ubiquity and tremendous storage capacity—could also automatically provide the probable cause necessary to issue the warrants. The devices that hold "the privacies of life" cannot be afforded the least constitutional protection for that very reason. While *Riley* represents the harmonization of Fourth Amendment principles with citizens' ever-expanding privacy interests in cell phone data, the approach employed in the present case signifies a marked departure from *Riley*'s reasoning and removes any meaningful limitation on cell phone searches.

An approach that requires phone-specific facts to issue a search warrant for a cell phone logically flows from *Riley*'s rationale. There is no reason to delay resolution of this issue since additional lower court opinions are unlikely to unearth new legal theories or reach uniform results. Just as the Court had to decide whether a cell phone was categorically different from other items found on an arrestee's person in determining whether a warrant was required for its search, the Court must ultimately determine whether, and to what extent, the issuance of search warrants for cell phones should be different from warrants issued for physical locations. The issue is clear cut without need for further percolation.

And this case presents an excellent vehicle for this Court to reverse the trend of state and federal courts upholding cell phone search warrants upon scant evidence and hollowing out the privacy protections created by *Riley*. The crime at issue when the warrant was sought—capital murder/arson—does not require multiple actors or communication with others. The only statement in the warrant application connecting Putnam's phone with the alleged crime was his possession of the phone at the time of the fire and that he used it to communicate with Jeremy, who was not a suspect. And there was no generalized assertion by the affiant that, in his experience, suspects in capital murder cases will use their phones to plan, commit, or document their crime. The reasoning employed by the Fifth Circuit—that inconsistent statements alone provide the catalyst for probable cause—converts *Riley*'s warrant requirement from a meaningful safeguard into a meaningless formality and effectively leaves the place in which "more than 90% of American adults" store "a digital record of nearly every aspect of their lives" without constitutional protection. *Riley*, 573 U.S. at 395.

II. This case presents an opportunity for the Court to clarify the limits of the "good faith exception" to the

exclusionary rule in the context of intrusive cell phone searches.

Courts are also in need of guidance regarding the application of the good faith exception to the exclusionary rule enunciated by this Court in *United States v. Leon*, 468 U.S. 897, 923 (1984), to searches of cell phones pursuant to warrants that were issued without probable cause. Just as probable cause jurisprudence must be reevaluated in the digital context, the vast amount of personal information at stake in the unique context of search warrants for cell phones calls for this Court to revisit the application of the good faith doctrine to the fruits of woefully inadequate cell phone search warrants.

In holding that the good faith exception applies to the present case, the Fifth Circuit looked past *Riley*, holding without explanation that Putnam "has not shown that the search warrant was impermissibly overbroad." Pet. App. 4a. In light of *Riley*'s reasoning, however, a reasonable officer would know both (1) that an affidavit like the one in this case is most problematic where the privacy interests at stake are highest; and (2) that the absence of any statement that describes the nexus between the alleged crime and the cell phone fails to provide the requisite averment regarding the probability that evidence of Putnam's alleged crime might be found in his phone.

In contrast with the Fifth Circuit, some courts have found that the supporting affidavits' failure to establish a nexus between the phones and the crimes precludes good faith reliance on the warrants. *See United States v. Griffith*, 867 F.3d 1265, 1269, 1278–79 (D.C. Cir. 2017) (holding that a warrant issued for a suspect's house to seize any cell phones or electronic devices based on the affiant's statement that in his training and experience, "gang/crewmembers involved in criminal activity maintain regular contact with each other … through cell phones and other electronic devices and the Internet, to include Facebook, Twitter, and E-mail accounts" was not supported by probable cause and "fell short to an extent precluding good-faith reliance on the warrant"); *Ramirez*, 180 F. Supp. 3d at 496 (declining to apply good faith exception to evidence seized pursuant to search warrant for cell phone where affidavit's only particularized facts were a description of the phone, that *Ramirez* was arrested for a drug-dealing conspiracy while possessing the phone, and the affiant's statement that, in her experience, "individuals may keep text messages or other electronic information stored in their cell phones which may relate them to the crime and/or co-defendants/victim").

In holding that the good faith exception did not apply to the fruits of a search of a home for electronic devices, including phones,

pursuant to a warrant, Judge Srinivasan highlighted the critical distinction between evidence that someone committed a crime supporting a seizure of the individual and evidence supporting a search of a place:

> [W]e do not doubt that most criminals—like most people—have cell phones, or that many phones owned by criminals may contain evidence of recent criminal activity. Even so, officers seeking authority to search a person's home must do more than set out their basis for suspecting him of a crime. The affidavit in this case might have established the authority to seize an individual; it fell materially short of justifying a search of his home.

Griffith, 867 F.3d at 1279. The same standard must be applied to searches of cell phones pursuant to facially inadequate warrants.

In a post-*Riley* world, any reasonable officer should know that failing to provide an allegation that, in his experience, indicates some evidence of the alleged crime may be on a suspect's cell phone cannot justify the issuance of a search warrant. But the affidavit in this case provided no way for the magistrate to evaluate the likelihood that a crime was even committed or that evidence of Putnam's crimes would be on his phone. The good faith exception to the exclusionary rule should not be applied to salvage such woefully inadequate warrants—like the one in this case—to search the place in which individuals have the greatest expectation of privacy.

CONCLUSION

FOR THESE REASONS, Putnam asks this Honorable Court to grant a writ of certiorari.

Respectfully submitted.

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