NO. 22-_____

In the Supreme Court of the United States

JAKE J. MCGOVERN,

Petitioner,

v.

STATE OF NEBRASKA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Nebraska

PETITION FOR A WRIT OF CERTIORARI

ANDY SIMRIN
COUNSEL OF RECORD
ANDY SIMRIN PC
P.O. BOX 4733
PORTLAND, OR 97209-4733
(503) 221-8728
ANDYSIMRIN@OREGONAPPEALS.NET

SEPTEMBER 7, 2022 *COUNSEL FOR PETITIONER*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

1. Is a warrant to search a cell phone overbroad, in violation of the Fourth Amendment, if it authorizes the search of evidence on the phone in addition to the evidence for which there is probable cause?

2. Does the good faith exception to the exclusionary rule invariably salvage the search of a cell phone that is conducted pursuant to a warrant that is supported by probable cause?

LIST OF PROCEEDINGS

Nebraska Supreme Court

No. S-21-144

State of Nebraska, *Appellant and Cross-Appellee,* v. Jake J. McGovern, *Appellee and Cross-Appellant.*

Date of Final Opinion: June 10, 2022

Hall County Court, Nebraska

State of Nebraska v. Jake J. McGovern,

Case No. CR 19-252

Judgment and Conviction Date: December 14, 2020

Sentencing Date: February 17, 2021

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PROCEEDINGS ii

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

I. Procedural Posture 3

II. Summary of Facts 5

REASONS FOR GRANTING THE PETITION 11

CONCLUSION 21

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

NEBRASKA SUPREME COURT

Opinion of the Nebraska Supreme Court (June 10, 2022) 1a

DISTRICT COURT OF HALL COUNTY NEBRASKA

Order On Defendant's Motion to Suppress (March 9, 2020) 49a

Order On Defendant's Second Motion to Suppress (September 17, 2020) 55a

Judgment and Conviction (December 14, 2020) 59a

Order of Sentence (February 17, 2021) 62a

OTHER DOCUMENTS

Affidavit in Support of a Search Warrant (September 25, 2018) 68a

Second Search Warrant and Affidavit (November 15, 2018) 79a

Brief of Defendant in Support of Motion to Suppress (December 2019) 107a

Defendant's Brief in Support of Second Motion to Suppress (August 2020) 178a

TABLE OF AUTHORITIES

Page

CASES

Arizona v. Gant,
556 U.S. 332, 129 S. Ct. 1710,
173 L. Ed.2d 485 (2009).. 13

Berger v. State of New York,
388 U.S. 41, 99, 87 S. Ct. 1873,
18 L. Ed.2d 1040 (1967).. 12

Marron v. United States,
275 U.S. 192, 48 S. Ct. 74,
72 L. Ed. 231 (1927) 12

Mink v. Knox,
613 F.3d 995 (10th Cir. 2010) 15

Riley v. California,
573 U.S. 373, 134 S. Ct. 2473,
189 L. Ed.2d 430 (2014)..................... 11, 13, 14, 15

United States v. Bass,
785 F.3d 1043 (6th Cir. 2015) 16, 17

United States v. Christie,
717 F.3d 1156 (10th Cir. 2013) 15

United States v. Di Re,
332 U.S. 581, 68 S. Ct. 222,
92 L. Ed.2d 210 (1948) 12

United States v. Leon,
468 U.S. 897, 104 S. Ct. 3405,
82 L. Ed.2d 677 (1984) 14, 20

United States v. Meek,
366 F.3d 705 (9th Cir. 2004) 17

United States v. Morton,
___ F.4th ___, (5th Cir. 2022)....................... 17, 18

TABLE OF AUTHORITIES – Continued

Page

United States v. Morton,
984 F.3d 421 (5th Cir. 2021) 18

United States v. Otero,
563 F.3d 1127 (10th Cir. 2009) 15

United States v. Riccardi,
405 F.3d 852 (10th Cir. 2005) 15

United States v. Richards,
659 F.3d 527 (6th Cir. 2011) 17

United States v. Russian,
848 F.3d 1239 (10th Cir. 2017) 16

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV .... passim

U.S. Const. amend. XIV, § 1 .... 2, 6

STATUTES

28 U.S.C. § 1257 2

Neb. Rev. Stat. § 28-311.08(1) 5, 12

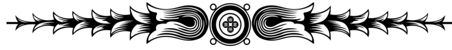
Neb. Rev. Stat. § 28-311.08(2) 4

Neb. Rev. Stat. § 28-320 3

Neb. Rev. Stat. § 29-319(1) 3

OTHER AUTHORITIES

Thomas K. Clancy,
THE FOURTH AMENDMENT, ITS HISTORY
AND INTERPRETATION (3d ed. 2017) 10



PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Jake J. McGovern, pursuant to Supreme Court Rule 12, files this Petition and respectfully asks that a writ of certiorari issue to review the decision filed by the Nebraska Supreme Court on June 10, 2022, in which it concluded that "viewing of videos [in addition to those to which probable cause extended] was a reasonable search with the scope of the warrant's authorization." *State v. McGovern*, 311 Neb. at 734. (App.34a).

OPINIONS BELOW

The opinion of the Nebraska Supreme Court is reported at *State v. McGovern*, 311 Neb. 705, 974 N.W.2d (2022), and is reproduced in the appendix to this petition at App.1a. The order granting the motion to suppress the initial search warrant of the District Court of Hall County, Nebraska dated March 9, 2020 is reproduced in the appendix at App.49a. The subsequent order denying a motion to suppress on a second search warrant, dated September 17, 2020, is included at App.55a. The District Court entry of judgment and conviction is reproduced at App.59a.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Title 28 U.S.C. § 1257, which provides for review of cases from final judgments or decrees rendered by the highest court of a State where any right is claimed under the Constitution of the United States. The opinion of the Nebraska Supreme Court affirming the trial court's denial of Petitioner's motion to suppress was issued on June 10, 2022.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. IV

The 4th Amendment to the United States 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. XIV, § 1

Section 1 of the 14th Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

> are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. Procedural Posture

On April 5, 2019, Deputy County Attorney Hinrichs filed in the Hall County Court of Nebraska an Information charging Petitioner with two counts of Sexual Assault in the First Degree,[1] Sexual Assault in the Third Degree[2] and three counts of Recording a

---

[1] Neb. Rev. Stat. § 29-319(1) provides:

> Any person who subjects another person to sexual penetration (a) without the consent of the victim, (b) who knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct, or (c) when the actor is nineteen years of age or older and the victim is at least twelve but less than sixteen years of age is guilty of sexual assault in the first degree.

[2] Neb. Rev. Stat. § 28-320 provides, in part:

> (1) Any person who subjects another person to sexual contact (a) without consent of the victim, or (b) who knew or should have known that the victim was physically or mentally incapable of resisting or appraising the nature of his or her conduct is guilty of sexual assault in either the second degree or third degree.

Person in a State of Undress.[3] On December 9, 2020, Hinrichs filed an Amended Information charging Petitioner with Sexual Assault in the First Degree, Sexual Assault in the Third Degree and Recording a Person in a State of Undress. All of the crimes were alleged to involve a single victim, K.S., and were alleged to have occurred in October or November of 2017.

Petitioner waived his right to a jury, and the court conducted a bench trial on December 8, 2020. The court found Petitioner guilty on all three charges.

The State of Nebraska appealed, arguing that the District Court imposed an excessively lenient sentence. Petitioner cross-appealed, arguing that the District Court erred by denying his second motion to suppress. The Nebraska Supreme Court affirmed on the appeal and on the cross-appeal.

---

* * * * * *

> (3) Sexual assault shall be in the third degree and is a Class I misdemeanor if the actor shall not have caused serious personal injury to the victim.

[3] Neb. Rev. Stat. § 28-311.08(2) provides, in part:

> (2) It shall be unlawful for any person to knowingly and intentionally photograph, film, or otherwise record an image or video of the intimate area of any other person without his or her knowledge and consent when his or her intimate area would not be generally visible to the public regardless of whether such other person is located in a public or private place.

II. Summary of Facts[4]

On the morning of September 25, 2018, J.S. reported that he had seen a man crouched down by the bathroom window of J.S.'s apartment in Kearney, Nebraska, just as J.S.'s girlfriend had entered the bathroom to take a shower. J.S. yelled at the man, who took off running. Officer Newell responded to the report, and asked J.S. to show him the route that the man had taken when he fled. While doing so, J.S. found a cell phone and gave it to Newell.

Newell seized the phone and took it to the police station, where he and Investigator Warrington prepared an affidavit in support of an application for a warrant to search the phone. In his affidavit, Newell stated that J.S. had reported seeing the man crouching to peer through a gap in the bathroom window's blinds. Newell believed the phone "may contain evidence of the crime of Unlawful Intrusion"[5] and may have "captured photographs and or video of [the girlfriend] in a state of undress." The affidavit also stated that the phone would contain evidence of its account, which could identify the suspect. The affidavit requested a warrant authorizing a search of the phone "for evidence relating to unlawful intrusion."

---

[4] This summary is taken from the Nebraska Supreme Court's opinion.

[5] Neb. Rev. Stat. § 28-311.08(1) provides, in part:

> It shall be unlawful for any person to knowingly intrude upon any other person without his or her consent in a place of solitude or seclusion.

The Buffalo County issued the warrant. The warrant authorized the search for "evidence relating to the offenses of Unlawful Intrusion."

Warrington then searched the phone using software that "pulled together anything identified as a possible image and placed it in a gallery. He did not locate any photographs taken during the September 25, 2018 event. He did, however, locate images that appeared to be "thumbnails" of videos of an undressed woman, some of which depicted a woman who appeared to be sleeping. Warrington watched the videos, some of which had "2017" in their title. One video appeared to depict an unconscious woman being sexually assaulted.

Warrington then examined text messages and metadata to identify the victim of the sexual assault. Law enforcement identified K.S., who had been in a relationship with Petitioner that ended in 2018, as the victim. K.S. confirmed that the sexual assault depicted in the videos occurred in 2017 in Grand Island, which is located in Hall County, Nebraska.

On October 29, 2018, Grand Island police then searched the phone and determined that the phone had an "associated Google Gmail address." A research specialist working for the Grand Island Police then sought a warrant to obtain information from Google LLC.

On October 28, 2019, Petitioner filed a Motion to Suppress the results of the cell phone searches. Petitioner's motion asserted the searches violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution and Article I, section 7 of the Nebraska Constitution because (1) that the warrant application lacked probable cause, (2) that

"the search warrant's limited scope was knowingly violated by Kearney law enforcement during their extensive search of the cellular device, (3) that Grand Island law enforcement obtained a copy of the phone's contents and searched them without first obtaining a warrant, and (4) that Grand Island subsequently sought a warrant to search for additional phone-related data and that that warrant application exploited a prior violation of Petitioner's constitutional rights.

On March 9, 2020, the District Court of Hall County issued an Order granting that Motion to Suppress. (App.49a) The court explained that, "once Officer Newell viewed evidence indicating there was evidence of a further crime in Hall County, Nebraska, a second search warrant should have been applied for outline the types of evidence which would have been relevant for the Hall County case."

On March 31, 2020, Warrington submitted a renewed Affidavit in Support of a Search Warrant to search Petitioner's phone. Warrington's new affidavit explicitly acknowledged that it was based on information gleaned from his September 25 and September 26, 2018 searches of Petitioner's phone. In particular, it described his observation of videos depicting "possible sexual assault including sexual contact and penetration from another person as the victim was unconscious or sleeping, and had occurred on a prior date of our offense."

The Buffalo County Court issued the requested warrant, authorizing the search "for evidence relating to the offenses of 1st Degree Sexual Assault."

Petitioner filed a second Motion to Suppress on June 30, 2020. In that motion, Petitioner noted that

his first Motion to Suppress had been granted. Relying on the same Federal and State constitutional provisions, he contended that all evidence discovered from the search of his phone and derivative evidence should be suppressed. He further contended "that all evidence (tangible or intangible), directly flowing from the Constitutional violations [should] be suppressed as a fruit of the poisonous tree."

On September 17, 2020, the District Court of Hall County issued an Order denying Petitioner's Second Motion to Suppress. (App.55a). The Order acknowledged that, under Nebraska law, the State could have appealed the Order granting the first Motion to Suppress, but elected not to do so. Instead, the Order recited, the State sought and obtained the Second Warrant. The District Court explained that "the law-of-the-case doctrine does not preclude a second search."

The District Court continued:

> . . . the initial review of all of the videos on the Defendant's phone was a lawful search under search warrant number one and that the videos were first seen in 'plain view.' Because the lawful viewing showed evidence of another possible crime, law enforcement's second search under the second search warrant is not unlawful exploitation of a prior illegality and the Court must therefore overrule the Defendant's Motion to Suppress.

The Nebraska Supreme Court began its analysis by accepting Petitioner's concession that the cell phone would contain evidence identifying the subscriber to the cell phone account, thus identifying the person who crouched outside of J.S.'s bathroom window on

September 25, 2018. However, the court concluded that Officer Newell's affidavit in support of the first warrant established probable cause "to search the phone for photographs and videos." *State v. McGovern*, 311 Neb. at 724-25. (App.22a).

The court then noted that it had previously observed that "officers cannot predict where evidence of a crime will be located in a cell phone or call records or in what format, such as texts, videos, photographs, emails, or applications." *State v. McGovern*, 311 Neb. at 726. (App.24a). Likewise, the court noted, "there is no way for law enforcement to know where in the digital information associated with cell phones it will find evidence of the specified crime." *Id.* Consequently:

> . . . a brief examination of all electronic data associated with a cell phone is usually necessary in order to find where the information to be seized is located, and such examination is reasonable under the Fourth Amendment.

Id. at 727. (App.25a).

In light of the foregoing, the Nebraska court concluded:

> . . . The nature of the crime—unlawful intrusion—limited the scope of the search; law enforcement officers knew they were to search for evidence regarding the device's owner or user along with such things as photographs and videos. The warrant also listed specific areas to be searched within the cell phone, which were consistent with those described in the affidavit. We reject McGovern's argument that the first search warrant did not

> satisfy the particularity requirements of the Fourth Amendment.

State v. McGovern, 311 Neb. at 728. (App.26a).

The court then asserted:

> A consequence of analogizing cell phones to filing cabinets or to containers is that "in any legitimate search that permits looking at digital data, potentially all data can be examined to ascertain what it is."

State v. McGovern, 311 Neb. at 733 (App.32a) (quoting Thomas K. Clancy, THE FOURTH AMENDMENT, ITS HISTORY AND INTERPRETATION (3d ed. 2017)).

That being so, the court concluded that:

> . . . it was reasonable to search files containing images and to view videos to determine whether they were responsive to the warrant. In doing so, law enforcement observed images showing a woman in a state of undress. Such images could be consistent with the crime and fall within the scope set forth on the face of the initial warrant. Further, the viewing of videos was a reasonable search within the scope of the warrant's authorization because discovery of the sexual assault—which was intertwined with filming the intimate area of another—occurred while the officer was searching for evidence of unlawful intrusion.

State v. McGovern, 311 Neb. at 733-34. (App.34a).

The Nebraska Supreme Court held that, because the search pursuant to the first warrant was lawful, the authorization to search again pursuant to the

second warrant was untainted. *State v. McGovern*, 311 Neb. at 734-35. Additionally, the court held, to the extent that the first warrant may have been defective, the officer executing the search pursuant to it did so in good faith. *Id.* at 729-30. (App.28a-29a).

REASONS FOR GRANTING THE PETITION

In *Riley v. California*, 573 U.S. 373, 134 S. Ct. 2473, 189 L. Ed.2d 430 (2014), this Court held that the warrantless search of a person's cell phone incident to arrest was unreasonable. In doing so, this Court explained:

> Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.' The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. 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.

Riley, 573 U.S. at 403.

Engrafted onto that is the principle that the Fourth Amendment requires a warrant to describe, with particularity, the place to be searched. The "central purpose" of the particularity requirement is to prevent an intrusion into protected privacy "under a warrant describing another." *Berger v. State of New*

York, 388 U.S. 41, 99, 87 S. Ct. 1873, 18 L. Ed.2d 1040 (1967) (quoting *Marron v. United States*, 275 U.S. 192, 48 S. Ct. 74, 76, 72 L. Ed. 231 (1927)).

Petitioner contended that the first warrant in this case did not meet the Fourth Amendment's particularity requirement. The Nebraska Supreme Court rejected that contention, but in the next breath opined that, "any legitimate search that permits looking at digital data, potentially all data can be examined to ascertain what it is." *State v. McGovern*, 311 Neb. at 733. (App.32a). The State of Nebraska cannot have it both ways. Either the warrant, read in the context of its supporting affidavit, satisfies the particularity requirement or it permits the searching of private information unrelated to the information that justified issuance of the warrant.

Here, the Nebraska Court indicated that "it was reasonable to search files containing images and to view videos to determine whether they were responsive to the warrant." *State v. McGovern*, 311 Neb. at 733-34. (App.33a-34a). But it is axiomatic that a search cannot be justified by what it reveals. *United States v. Di Re*, 332 U.S. 581, 595, 68 S. Ct. 222, 92 L. Ed.2d 210 (1948) ("We have had frequent occasion to point out that a search is not to be made legal by what it turns up").

Petitioner does not dispute, at this juncture, that Officer Newell's first affidavit established probable cause to believe evidence of the crime of Unlawful Intrusion[6] would be found on the phone in question.

---

[6] Neb. Rev. Stat. § 28-311.08(1) provides:

> It shall be unlawful for any person to knowingly intrude upon any other person without his or her consent in a place

That affidavit indicated that the alleged crime was committed on September 25, 2018, when J.S. observed a person peering through his bathroom blinds while his girlfriend was preparing to shower. J.S. found the phone while he was showing Newell the path that the voyeur took when he fled after J.S. yelled at him.

Officer Newell's first affidavit did not establish probable cause for any crime other than the September 25 Unlawful Intrusion. In *Riley*, this Court observed that applying the *Gant* standard "would prove no practical limit at all when it comes to cell phones [because that would] give 'police officers unbridled discretion to rummage at will among a person's private effects.'" *Riley*, 537 U.S. at 399 (quoting *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed.2d 485 (2009) for the proposition that "*Gant* generally protects against searches for evidence of past crimes"). That is necessarily true whether the search of a cell phone is authorized as an incident to arrest or by a warrant supported by probable cause for an offense.

In this case, the affidavit established probable cause for a single crime allegedly committed on September 25, 2018. It did not hint at any crime that may have occurred in 2017 (the crimes ultimately alleged in this case). Any image or video file created prior to the time J.S. saw Petitioner crouching outside of his bathroom window would have had a date stamp inconsistent with the date and time that J.S. observed Petitioner looking through his bathroom window.

---

of solitude or seclusion. Violation of this subsection is a Class I misdemeanor. A second or subsequent violation of this subsection is a Class IV felony.

Nonetheless, the Nebraska Supreme Court concluded that it was reasonable to search those files. To the extent that the warrant authorized the search of files on the phone other than those to which probable cause extended, the warrant did not meet the Fourth Amendment's particularity requirement. To the extent that the warrant, read in the context of the supporting affidavit, would be read as excluding the 2017 files by particularly describing the place to be searched, the officers executing the warrant could not possibly rely on the good faith exception[7] by searching beyond what the parameters of the warrant authorized.

The Circuit Courts of Appeal have grappled, seemingly without success, with the Fourth Amendment's particularity requirement when it comes to cell phone warrants. For example, the Tenth Circuit has written:

> In the context of cell phones and cell phone data, the Supreme Court recently held in *Riley v. California* that a warrant is generally required to search digital information on a cell phone, even when the phone is seized incident to a lawful arrest. ___ U.S. ___, 134 S. Ct. 2473, 2493, 189 L. Ed.2d 430 (2014). We have not yet had occasion to address the effect of *Riley*, but we have previously recognized the importance of the particularity requirement as it pertains to searches of personal computers, because computers 'can contain (or at least permit access to) our diaries, calendars, files, and correspondence' and therefore may be 'especially vulnerable

---

[7] *See United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed.2d 677 (1984).

> to a worrisome exploratory rummaging by the government.'

United States v. Christie, 717 F.3d 1156, 1164 (10th Cir. 2013).

> We have thus drawn a 'recognizable line' in considering how much particularity is required for computer searches.

Id.

> On the one hand, we have invalidated warrants authorizing computer searches 'where we could discern no limiting principle: where, for example, the warrant permitted a search of 'any and all' information, data, devices, programs, and other materials,' or 'all computer and non-computer equipment and written materials in [a defendant's] house.' *Id.* at 1164–65 (first quoting *United States v. Otero*, 563 F.3d 1127, 1132–33 (10th Cir. 2009); then quoting *Mink v. Knox*, 613 F.3d 995, 1011 (10th Cir. 2010)). On the other hand, we have stated, 'warrants may pass the particularity test if they limit their scope either 'to evidence of specific federal crimes or to specific types of material.'

Christie, 717 F.3d at 1165 (quoting *United States v. Riccardi*, 405 F.3d 852, 862 (10th Cir. 2005) (alteration incorporated)).

> This approach can be extended to searches of cell phones, which the Supreme Court has characterized as "minicomputers that also happen to have the capacity to be used as a telephone." *See Riley*, 134 S. Ct. at 2489. And

> here, we have little difficulty concluding the warrant on which Deputy Wilson relied to search Russian's phones was invalid for lack of particularity.

United States v. Russian, 848 F.3d 1239, 1245 (10th Cir. 2017).

Although the court concluded that the warrant to search Russian's phones lacked the requisite particularity, the court upheld the search on the basis of the good faith exception. *Russian*, 848 F.3d at 1245

In *United States v. Bass*, 785 F.3d 1043 (6th Cir. 2015), the defendant was arrested for identity theft. When officers arrived at his home to arrest him, they observed the defendant laughing and typing into his cell phone. *Bass*, 785 F.3d at 1046.

Officers sought a warrant to search Bass's phone. The supporting affidavit "set forth a substantial basis to believe such evidence [of wire fraud, credit fraud and identity theft] existed on Bass's cell phone, but it was unclear as to the particular <u>format</u> in which the evidence existed." *Bass*, 785 F.3d at 1049 (emphasis in original). In upholding the search over Bass's particularity challenge, the court explained:

> Here, the warrant authorized the search for any records of communication, indicia of use, ownership, or possession, including electronic calendars, address books, e-mails, and chat logs. At the time of the seizure, however, the officers could not have known where this information was located in the phone or in what format. Thus, the broad scope of the warrant was reasonable under the circum-

> stances at that time. *See* [*United States v. Richards*, 659 F.3d 527, 541 (Sixth Cir. 2011)] (quoting *United States v. Meek*, 366 F.3d 705, 716 (9th Cir. 2004) ("The proper metric of sufficient specificity is whether it was reasonable to provide a more specific description of the items at that juncture of the investigation.")).

Bass, 785 F.3d at 1050.

In the Fifth Circuit, the recent case of *United States v. Morton*, ___ F.4th ___ (5th Cir. August 23, 2022) bears some parallels to Petitioner's case. In that case, the defendant was arrested for drug crimes after state troopers stopped his van, smelled marijuana and then found ecstasy in a bottle in the defendant's pocket. Two troopers then searched the van. In the van, the troopers found marijuana, a glass pipe, 100 pairs of women's underwear, sex toys, a lubricant, a backpack containing children's school supplies, a lollipop in a cupholder and three cell phones. *Id.* (slip opinion at 2).[8] One of the troopers sought and obtained warrants to search the cell phones. His supporting affidavits recounted the traffic stop and the discovery of drug evidence in the van. Based on his experience, the trooper averred that it was "likely that the cellphones contained evidence of illegal drug activity. While searching the phones, the trooper and a public safety officer saw images that they believed to be child pornography. The discontinued their search, then sought and obtained additional warrants to search them for

---

[8] The opinion does not address the lawfulness of the stop, the search of the defendant or the search of the van and the backpack found within it.

child pornography. A forensic search pursuant to those warrants revealed over 19,000 images of child pornography. After losing his motion to suppress, Morton entered a conditional guilty plea to receipt of child pornography *Id.* (slip opinion at 3-4).

A three-judge panel of the Fifth Circuit initially held that the affidavits in support of the first set of warrants "establish[ed] 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." *United States v. Morton*, ___ F.4th at ___ (slip opinion at 4) (quoting *United States v. Morton*, 984 F.3d 421 (5th Cir. 2021)). On rehearing the case *en banc*, the court concluded that the good faith exception applied, and the search of the images on the phones pursuant to the first set of warrants was therefore not subject to suppression:

> 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.

United States v. Morton, ___ F.4th at ___ (slip opinion at 11-12).

The opinions from the Circuit Courts of Appeal appear to establish that, any time there is probable cause to believe that any evidence of a crime resides

on a cell phone, a warrant will authorize wholesale examination of the entire contents of the phone. Either the difficulty in pinpointing where on the phone the evidence supported by probable cause is located will authorize a broad scope warrant,[9] or good faith will salvage the search of a more narrowly tailored warrant.

It doesn't have to be that way. When an affidavit establishes probable cause to believe evidence of a particular crime will be found on a cell phone, the facts giving rise to probable cause can necessarily exclude at least some of the digital data on the phone. For example, as in Petitioner's case, there was probable cause to believe a voyeur would have photographic and/or video evidence of the crime of unlawful intrusion committed on the date Petitioner was seen peering into J.S.'s bathroom window. But there was no reason to believe that evidence of the crime committed on September 25, 2018 would be found in image files or video files with any different date stamp.

The Nebraska Supreme Court construed the first warrant in this case broadly to permit searching of any image or video file on Petitioner's phone, not just those with the date stamp of September 25, 2018. The court opined that the metadata could have been modified, which appears to have induced the court to construe the warrant so broadly. But under the circumstances of this case, that construction of the warrant was unreasonable for two related reasons. First, Petitioner dropped the phone fleeing from the alleged crime scene when J.S. yelled at him. It is inconceivable that Petitioner could have modified the metadata from the files he was creating between the

---

[9] *Bass*, 785 F.3d at 1050.

instant he was interrupted and the moment he dropped the phone as he was running away. Second, it is simply unfathomable that Petitioner would have previously modified the metadata from older images and video files to match the time and date stamp of his September 25, 2018 crime in advance of committing it.

The affidavit in support of the first warrant in this case identified the particular date and time that J.S. reported having seen someone crouching beneath and looking into his bathroom window while his girlfriend was preparing to shower. To the extent that the warrant omitted that date and time, it did not describe with particularity the place to be searched for evidence of the crime that J.S. had reported.[10] To the extent that law enforcement officers searching Petitioner's phone relied on the first warrant as authorizing the search of all image and video files on the phone, they could not have been operating in good faith, because anyone reading the warrant, which attached and incorporated the affidavit, in a common sense fashion, would have understood that image and video files with date stamps other than September 25, 2018 could not possibly constitute evidence of a crime committed on that date. *Leon*, 468 U.S. at 923 (warrant that "fail[s] to particularize the place to be searched" cannot be relied on in good faith).

---

[10] Though *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed.2d 527 (1983) overruled *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed.2d 637 (1969), the magistrate, in construing an affidavit in support of a warrant request, is still to be guided by common sense. *Massachusetts v. Upton*, 466 U.S. 727, 734, 104 S. Ct. 2085, 80 L. Ed.2d 721 (1984).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant certiorari.

Respectfully submitted,

ANDY SIMRIN
COUNSEL OF RECORD
ANDY SIMRIN PC
P.O. BOX 4733
PORTLAND, OR 97209-4733
(503) 221-8728
ANDYSIMRIN@OREGONAPPEALS.NET

COUNSEL FOR PETITIONER

SEPTEMBER 7, 2022