STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant,

v.

MICHAEL GEORGIE CARSON **No. 166923**
Defendant-Appellee.

COA No. 355925
L.C. No. 20-005054-FC

BRIEF BY PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN'S APPLICATION FOR LEAVE TO APPEAL

THOMAS JAY WEICHEL
President
Prosecuting Attorneys
Association of Michigan

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

JON P. WOJTALA
Chief, Research, Training, and Appeals

TIMOTHY A. BAUGHMAN (P 24381)
Special Assistant Prosecuting Attorney
11TH Floor
Detroit, Michigan 48226
Phone: (313) 224-5792

Table of Contents

Table of Authorities . . . . . -ii-

Statement of the Question . . . . . -1-

Statement of Facts . . . . . -2-

Argument

I. A search warrant for a cell phone allows a search through the whole phone; further, if the warrant here was overbroad, the text messages found should not be excluded because 1) the reliance on the judicial order—the search warrant—by the officers was reasonable; and 2) the warrant is severable. . . . . -3-

A. Introduction . . . . . -3-
B. "Yes, Warrants Allow a Search Through the Whole Phone" . . . -4-
C. There was here no insolent use of police authority, and so exclusion of probative evidence would inflict gratuitous harm on the public interest . . . . . -7-
1. Even if the warrant was defective, the reliance on it by the police was not unreasonable . . . . . -7-
2. The text messages are admissible even if the warrant description is overbroad, as no evidence found in the "places" within the cell phone that the Court of Appeals believes should not have been searched was found nor admitted into evidence . . . . . -12-

Relief . . . . . -15-

Table of Authorities

Case **Page**

FEDERAL CASES

Arizona v Evans,
514 U.S. 1, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995) 11

Brewer v Williams,
430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977) 4

Herring v. United States,
555 U.S. 135, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009) 12

Massachusetts v Sheppard,
468 U.S. 981, 104 S. Ct. 3424, 82 L. Ed. 2d 737 (1984) 8, 9, 11

United States v. Brown,
984 F.2d 1074 (CA 10, 1993) 13

United States v. Castro,
881 F.3d 961 (CA 6, 2018) 13

United States v. Leon,
468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677
(1984) 7, 9, 10, 11, 12

United States v. Morales,
987 F.3d 966 (CA 11, 2021), cert. denied, 142 S. Ct. 500,
211 L. Ed. 2d 303 (2021) 12

United States v Peltier,
422 U.S. 531, 95 S. Ct. 2313, 45 L. Ed. 2d 374 (1975) 8

United States v. Richards,
659 F.3d 527 (CA 6, 2011) 13

Utah v. Strieff,
579 U.S. 232, 136 S. Ct. 2056, 195 L. Ed. 2d 400 (2016) 8

STATE CASES

People v. Carson,
2024 WL. 647964 (Mich. Ct. App. Feb. 15, 2024). 3, 5, 6, 7

People v. Keller,
479 Mich. 467 (2007) 13

State v. Jandreau,
288 A.3d 371(ME, 2022) 13

State v. Klingenstein,
608 A.2d 792 (Md.App.,1992) 7

OTHER

Orin S. Kerr, "Executing Warrants for Digital Evidence: The Case for Use Restrictions on Nonresponsive Data," 48 Tex. Tech L. Rev. 1 (2015) 7

Orin S. Kerr, "Searches and Seizures in a Digital World," 119 Harv. L. Rev. 531(2005) 6, 7

LaFave, Search & Seizure (6th ed.) 13

Statement of the Question

I.

Does a search warrant for a cell phone allow a search through the whole phone; further, if the warrant here was overbroad, should the text messages found be admissible because 1) the reliance on the judicial order—the search warrant—by the officers was reasonable; and 2) the warrant is severable?

The Court of Appeals answered NO

Amicus answers YES

The People answer YES

Statement of Facts

Amicus joins the Statement of Facts of the People.

Argument

I.

A search warrant for a cell phone allows a search through the whole phone; further, if the warrant here was overbroad, the text messages found should not be excluded because 1) the reliance on the judicial order—the search warrant—by the officers was reasonable; and 2) the warrant is severable.

A. Introduction

The Court of Appeals has reversed the conviction for larceny here on the ground that the search warrant for defendant's cell phone was insufficiently particular in its description of that which was to be seized, and thus overbroad, allowing a search of inappropriate "areas" of the cell phone, and that the good-faith exception did not apply because "no reasonable officer could have relied in objective good faith" on the warrant.[1] But one thing that is clear beyond peradventure is that there was no insolent use of police authority involved in this case. The police took their information to a neutral and detached judicial officer seeking a judicial *order* to search, rather than doing so on their own authority, and they did not prevaricate or omit. Any argument that the police engaged in conduct that ought to be deterred in *any* fashion, much less by the exclusion of probative evidence in a criminal proceeding, is entirely fanciful; if error occurred, it was by *the issuing judge* in his assessment of the requested warrant, not any tentative assessment by officers seeking the warrant, as *only the judge*, not the officers, could order that the search occur.[2] Suppression under these circumstances should

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[1] *People v. Carson*, 2024 WL 647964, at 10 (Mich. Ct. App. Feb. 15, 2024).

[2] It is sometimes forgotten that a search warrant is a judicial *command* to search, not simply a judicial authorization for a search. Warrants are court orders, and state "IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN: I have found that probable cause exists and *you are commanded* to make the search and seize the described property/person" (emphasis supplied).
See https://www.courts.michigan.gov/4a2e8c/siteassets/forms/scao-approved/mc231.pdf.

be intolerable in a criminal justice system that purports to be rational.[3] And, further, the issuing magistrate did not err.

Amicus supports the People's application for leave to appeal, and thus the purpose here is not to persuade the Court of the errors of the Court of Appeals—though some remarks on those points are appropriate—but to persuade the Court that the issues involve "legal principle[s] of major significance to the state's jurisprudence" that the Court of Appeals has wrongly decided, causing material injustice.[4]

B. "Yes, Warrants Allow a Search Through the Whole Phone"[5]

The search warrant described the place to be searched as:

> LG Cellular phone blue in color with serial #GPLML713DCGB2NFL713DL. This device is currently located at the Emmet County Sheriff's Office Property Room, 3640 Harbor Petoskey Rd. Harbor Springs, MI 49770

The search warrant described that to be seized as "any and all records or documents pertaining to the investigation of Larceny in a Building and Safe Breaking," and defined that term records or documents" to include:

> records or documents which were created, modified or stored in electronic or magnetic form and any data, image, or information that is capable of being read or interpreted by a computer.
>
> Any [sic] physical keys, encryption devices and similar physical items that are necessary to gain access to the cellular device to be

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[3] See *Brewer v Williams*, 430 US 387, 97 S Ct 1232, 1248, 51 L Ed 2d 424 (1977) (Burger, C.J., dissenting).

[4] MCR 7.305(B)(3); MCR 7.305(B)(5)(a).

[5] Professor Orin S. Kerr, "Yes, Warrants Allow a Search Through the Whole Phone, A comment on a mistaken way to limit computer searches— focusing on People v. Carson from the Michigan Court of Appeals," https://reason.com/volokh/2024/03/02/yes-warrants-allow-a-search-through-the-whole-phone/

> searched or are necessary to gain access to the programs, data, applications and information contained on the cellular device(s) to be searched; Any [sic] passwords, password files, test keys, encryption codes or other computer codes necessary to access the cellular devices, applications and software to be searched or to convert any data, file or information on the cellular device into a readable form; This [sic] shall include thumb print and facial recognition and or digital PIN passwords, electronically stored communications or messages, including any of the items to be found in electronic mail ("e-mail"). Any and all data *including text messages*, text/picture messages, pictures and videos, address book, any data on the SIM card if applicable, and all records or documents which were created, modified, or stored in electronic or magnetic form and any data, image, or information that is capable of being read or interpreted by a cellular phone or a computer.[6]

The Court of Appeals found the description of that to be seized to be overbroad, though finding that there *was* probable cause to search certain places in the phone for certain items:

- The evidence clearly established that there was probable cause to believe that defendant and DeGroff collaborated to break into Billings's safe and steal its contents, which included his entire life's savings. Given the nature of defendant's and DeGroff's relationship, there was likewise probable cause to believe that defendant had used his phone to communicate with DeGroff regarding these crimes.

- Therefore, it would have been wholly appropriate to issue a warrant authorizing the police to engage in a search of the phone's contents limited in scope to correspondence between these two regarding the crimes; this would include SMS messages, internet-based messaging applications such as Messenger or SnapChat, direct messages sent through social media platforms such as Instagram or Twitter, emails, and other similar applications. The warrant that was actually issued placed no limitations on the scope of the search and authorized the police to search everything, specifically mentioning photographs and videos.

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[6] *People v. Carson*, 2024 WL 647964, at 8.

- Authorization for a search of defendant's photographs and videos, despite there being no evidence suggesting that these files would yield anything relevant, is particularly troubling in light of the tendency of people in our modern world to store compromising photographs and videos of themselves with romantic partners on their mobile devices.[7]

Professor Orin Kerr is a leading expert on search and seizure, and in particular computer and cell-phone searches.[8] His response to the Court of Appeals decision was that though "[a]ccording to the court, any decent lawyer would have realized that this [the warrant description] was an egregious mistake, so much that the good-faith exception would not apply and the lawyer was ineffective for not litigating the issue," "the error belongs to the Michigan Court of Appeals, it seems to me, not to the defense counsel."[9] As he pithily put it, "[i]f the government gets a warrant to search a home for a knife used in a murder, the warrant won't limit the search to the knife drawer in the kitchen just because a judge thinks that this is where knives usually go. The knife might be in the knife drawer, sure. But it could be in a cupboard, or in the bedroom closet, or underneath a floorboard. The warrant should let the government search there, too." And with the cell phone warrant, "not letting the government look through particular kinds of files makes no sense. You don't know in advance where digital evidence of a crime is going to be. Some apps or file types may be more likely to yield evidence than other apps or file types, but you can't rule them out. Take *Carson*'s concerns with looking through photographs. Based on news stories and

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[7] Id.

[8] "Orin Kerr is one of the country's foremost scholars of the Fourth Amendment and criminal procedure. He helped found the field of computer crime law, which studies how traditional legal doctrines must adapt to digital crime and digital evidence.." https://www.law.berkeley.edu/our-faculty/faculty-profiles/orin-kerr/#tab_profile

See e.g. Orin S. Kerr, "Searches and Seizures in a Digital World," 119 Harv. L. Rev. 531, 537 (2005).

[9] See footnote 5.

cases, it seems to be common for those who steal things to take pictures of what they steal, storing pictures of the loot on their phone. In a case about stolen goods, why should the government be forbidden to search through the photos on a phone to look for that evidence?"[10]

Professor Kerr is, of course, not a judge or a court, and these views are his opinion of the matter. But the opinion is a learned one by an esteemed expert in the field, and counsels that this Court review the issue raised by the People.

C. There was here no insolent use of police authority, and so exclusion of probative evidence would inflict gratuitous harm on the public interest

> "*The . . . exclusionary sanction [is]. . . a carefully controlled scalpel rather than. . . an indiscriminate blunderbuss*."[11]

1. Even if the warrant was defective, the reliance on it by the police was not unreasonable

The purpose of the exclusionary rule is to deter abusive police conduct by denying the Government the fruit of that misconduct; exclusion of the evidence is not a remedy to the defendant for a wrong done him or her, as it is not a personal right of the defendant, nor is it designed "to punish the errors of judges and magistrates."[12] The purpose of the exclusionary rule being to deter police

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[10] Id.

Professor Kerr's solution to privacy concerns expressed in *Carson* has been and continues to be use restrictions on that which is found in "plain view" when searching areas of a cell phone. 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).

[11] *State v. Klingenstein*, 608 A.2d 792, 800 (Md.App.,1992)(Moylan, J.) (aff'd in part, rev'd in part on other grounds, *Klingenstein v. State*, 330 Md. 402, 624 A.2d 532 (Md., 1993)).

[12] *United States v. Leon*, 468 U.S. 897, 916, 104 S. Ct. 3405, 3417, 82 L. Ed. 2d 677 (1984).

It is more than passing strange that non-lawyer police officers may be found to have "unreasonably" relied on a court order—and a search warrant is an order—so that the

misconduct,[13] not to repair or remedy, it is only logical that its application in circumstances where its purpose is not served inflicts gratuitous harm on the public and frustrates the search for truth at trial. The United States Supreme Court recognized the point initially some years ago. For example, in *United States v Peltier*[14] the Court remarked:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.
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> *****
>
> If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.

The good-faith exception was embraced by the Supreme Court in the companion decisions of *United States v Leon*[15] and *Massachusetts v Sheppard.*[16]

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execution of that order may result in inadmissible evidence, the police are subject to criticism, the public interest in ascertaining the truth of the case at trial is harmed, and as to the issuing judge? Nothing happens.

[13] "The exclusionary rule exists to deter police misconduct." *Utah v. Strieff*, 579 U.S. 232, 241, 136 S. Ct. 2056, 2063, 195 L. Ed. 2d 400 (2016).

[14] *United States v Peltier*, 422 US 531, 539-542, 95 S Ct 2313, 45 L Ed 2d 374 (1975).

[15] *United States v Leon*, supra.

[16] *Massachusetts v Sheppard*, 468 US 981, 104 S Ct 3424, 82 L Ed 2d 737 (1984).

The facts of the two cases—often ignored—are instructive. In *Leon*, after an extensive investigation, the police took their information to a judge, who issued a search warrant for premises. The judicially-authorized searches produced large quantities of drugs and other evidence. The trial judge found the affidavit supporting the warrant insufficient to show probable cause, largely on the basis of a finding that the confidential informant employed in the affidavit had not been established to be credible. In *Sheppard*, a warrant was sought on a Sunday, and the police had a difficult time finding an appropriate application form. Though the warrant was not for controlled substances, the lead detective employed a form for controlled substances search warrants and modified it. But while the subtitle "controlled substance" was deleted from the form, the reference to "controlled substance" in the body of the application itself, which would, when signed, constitute the warrant, was not deleted. A judge examined the warrant application at his home; the detective pointed out the changes he had made, and the judge said he would make necessary changes to provide a proper search warrant. The judge made some changes, but failed to change the substantive portion of the warrant that *authorized a search for controlled substances*. After the judge returned the warrant to the detective and informed him that it was sufficient to carry out the search, the search was conducted, and incriminating evidence found. That evidence, however, was *not* described in the warrant application, though described in the affidavit, which was not itself a part of the warrant nor made a part by reference.

Leon was decided first; the Court framed the issue as "whether the Fourth Amendment exclusionary rule should be modified so as not to bar the use in the prosecution's case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but

ultimately found to be unsupported by probable cause."[17] The Court answered in the affirmative and reasoned essentially as follows:

- The use at trial of fruits of an unlawful search or seizure works no new Fourth Amendment wrong. Whether to employ the exclusionary sanction is an issue separate from the question of whether the Fourth Amendment rights of the person seeking to invoke the rule were violated by police conduct.

- Application of an exclusionary sanction impedes the truth-finding functions of the criminal justice process. When law-enforcement officers have acted in objective good faith, or their errors have been minor, the magnitude of the benefit conferred on guilty defendants offends basic concepts of justice.

- Indiscriminate application of the exclusionary rule thus may well generate disrespect for the law and the administration of justice, and so its application should be restricted to those circumstances where its deterrent purpose is most efficaciously served.

- The exclusionary rule is not applied on a "but for" basis; exemptions such as dissipation of the taint demonstrate that the exclusionary rule is not applied when its deterrent effect is not worth its cost.

- Reasonable good-faith reliance by law-enforcement officers on other branches of government renders application of a sanction on those officers inappropriate; reliance on statutes or rules not declared unconstitutional at the time of the police action, for example, is appropriate, and exclusion therefore inappropriate to deter that conduct.

- Because the exclusionary rule is designed to deter police misconduct, and not to punish errors of judges and magistrates, application of a sanction to the conduct of the police in taking their information to a neutral and detached magistrate does not serve the purposes of the exclusionary rule, as that conduct is to be encouraged not deterred – at

[17] *Leon*, at 900.

> least so long as there is no misconduct in the obtaining of the warrant, such as by deliberate or reckless misstatements in the affidavit.
>
> - When a police officer acting in *objective* good faith has obtained a search warrant from a judge or magistrate and has acted within its scope in the execution of the warrant, there is no police illegality and therefore nothing to deter. Penalizing the police and the public for an error by the magistrate or judge simply cannot contribute to the purpose of the exclusionary rule of deterring unlawful police conduct.[18]

The Court then applied *Leon* to the facts of *Sheppard*, where there was probable cause for the search but technical defects in the drafting of the warrant and an assurance by the issuing judge that the warrant was sufficient as he had modified it. On these facts, the Court found that the belief by the executing officers that the search was entirely proper—though it was not—had an objectively reasonable basis: "an error of constitutional dimensions may have been committed with respect to the issuance of the warrant, but it was the judge, not the police officers, who made the critical mistake."[19] Because the police had not acted in a manner that required deterring—had engaged in no insolent or reckless use of authority—exclusion of the evidence was inappropriate.[20]

A recent explanation by the Supreme Court of the circumstances that justify exclusion of evidence is instructive here:

> To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and

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[18] *Leon*, at 906-922.

[19] *Sheppard*, at 989.

[20] And see also *Arizona v Evans*, 514 US 1, 115 S Ct 1185, 131 L Ed 2d 34 (1995), where the error was that of a clerk employed by the court in failing to notify the sheriff's office that an arrest warrant had been quashed; the Supreme Court found evidence discovered incident to arrest on that warrant admissible, as the police had acted in objectively reasonable good faith.

> *sufficiently culpable that such deterrence is worth the price paid by the justice system*. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.[21]

Given the statements in *Leon* that the good-faith exception will not apply where "the issuing magistrate *wholly abandoned* his judicial role . . .[so that] *no* reasonably well trained officer should rely on the warrant,"[22] it is plain that neither should application of the good-faith exception be so limited that it becomes inapplicable in *any* case where the warrant is found to be defective and thereby is effectively extinguished. As one case has put it:

> This case sits at the core of the good faith exception. The officers did everything they should have. They obtained and relied on a warrant from a neutral magistrate and had no reason to think that probable cause was absent despite the magistrate's authorization. They did not mislead the magistrate or withhold material information. Therefore, even if we assume that the magistrate erred in finding probable cause, suppressing the evidence found during the search . . . would do nothing to deter future police misconduct. All that it would do is prevent a factfinder from considering competent and probative evidence of criminal wrongdoing.[23]

This Court should review the matter.

2. The text messages are admissible even if the warrant description is overbroad, as no evidence found in the "places" within the cell phone that the Court of Appeals believes should not have been searched was found nor admitted into evidence

This Court should also consider the question of the severability of the warrant. A valid authorization to search that is severable from an overbroad and

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[21] *Herring v. United States*, 555 U.S. 135, 129 S.Ct. 695, 702, 172 L.Ed.2d 496 (2009) (emphasis supplied) (no exclusion where arrest was based on a warrant that had been recalled, but the recall not entered into the appropriate database).

[22] *United States v. Leon*, 104 S. Ct. at 3421.

[23] *United States v. Morales*, 987 F.3d 966, 974 (CA 11, 2021), cert. denied, 142 S. Ct. 500, 211 L. Ed. 2d 303 (2021).

thus insufficiently particular authorization may be upheld. Many cases hold that only evidence seized in the portion of the search held to be overbroad should be excluded, and there is no such evidence here.

- Infirmity due to overbreadth does not doom the entire warrant; rather, it requires the suppression of evidence seized pursuant to that part of the warrant, but does not require the suppression of anything described in the valid portions of the warrant.[24].

- At least eight circuits have held that where a warrant contains both specific as well as unconstitutionally broad language, the broad portion may be redacted and the balance of the warrant considered valid.[25]

And Professor LaFave has said that "it would be harsh medicine indeed if a warrant issued on probable cause and particularly describing certain items were to be invalidated in toto merely because the affiant and magistrate erred in seeking and permitting a search for other items as well. In the usual case, of course, all the evidence seized under a warrant tainted by some constitutional defect is suppressed simply because the seizure of every item is entirely attributable to the defect. When the warrant's fault is not so pervasive, however, the same objectives of deterrence and integrity may be served in the same way and to the same degree by *limiting suppression to the fruits of the warrant's unconstitutional component*."[26]

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[24] *United States v. Richards*, 659 F.3d 527, 537 (CA 6, 2011) (cleaned up); *United States v. Brown*, 984 F.2d 1074, 1077 (CA 10, 1993); *United States v. Castro*, 881 F.3d 961 (CA 6, 2018) *State v. Jandreau*, 288 A.3d 371, 381 (ME, 2022).

[25] *United States v. Brown*, 984 F.2d at 1077–1078 (collecting cases). And see *People v. Keller*, 479 Mich. 467 (2007).

[26] 2 LaFave, Search & Seizure (6th ed.), § 4.6(f), "Partial Invalidity" (emphasis supplied).

Should the Court reach the exclusionary-rule issue—and it should not, for the reasons stated by Professor Kerr—one component of the inquiry should be the question of severability.

Relief

Wherefore, amicus respectfully requests that this Court grant leave to appeal.

Respectfully submitted,

THOMAS JAY WEICHEL
President
Prosecuting Attorneys
Association of Michigan

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

JON P. WOJTALA
Chief, Research, Training, and Appeals

/s/ TIMOTHY A. BAUGHMAN
Special Assistant Prosecuting Attorney
1441 St. Antoine
Detroit, MI 48226
313 224-5792

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief contains 3693 countable words.

/s/ Timothy A. Baughman
TIMOTHY A. BAUGHMAN
Special Assistant Prosecuting Attorney