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STATE OF MICHIGAN
IN THE SUPREME COURT

On Appeal from the Court of Appeals
(Jonathan Tukel, P.J., Douglas B. Shapiro and Jane M. Beckering, JJ.)

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KRISTOPHER ALLEN HUGHES,

Defendant-Appellant.

Supreme Court Case No. 158652

Court of Appeals Case No. 338030

Lower Court Case No. 2016-260154-FC

AMICUS CURIAE BRIEF OF THE CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN, THE AMERICAN CIVIL LIBERTIES UNION, AND THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN IN SUPPORT OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION 3

RELEVANT FACTS 5

ARGUMENT 7

I. The Affidavit in Support of the Warrant to Seize and Search Mr. Hughes's Cell Phone Did Not Establish Probable Cause Because It Offered No Case-Specific Facts Suggesting That Evidence of Drug Trafficking Would Be Found There. 7

  A. Affidavits Must Establish Probable Cause That Evidence Will Be Found in the Place To Be Searched. 7

  B. An Officer's "Training and Experience," Without More, Is Insufficient to Establish Probable Cause to Search. 8

  C. Allegations Based Only on "Training and Experience" Are Especially Inadequate When Officers Seek To Seize and Search the Entirety of Someone's Cell Phone, Which Contains Vast Amounts of Extremely Private and Sensitive Data. 11

  D. The Cases Cited by the State Show Only How Training and Experience Can Buttress, Not Substitute For, Other Evidence to Establish Probable Cause to Search a Specific Place. 13

II. The Fourth Amendment Prohibited Investigators From Searching for Evidence of a New Crime, At Least Without Seeking a Second Warrant. 15

  A. Warrants Must Particularly Identify the Crime For Which Evidence Is Sought and Limit Searches Accordingly. 16

  B. The Fourth Amendment Requires That Searches of Electronic Data Be Limited to the Scope of the Warrant. 19

  C. The Court of Appeals Wrongly Held That the Initial Warrant Gave the Police Broad License to Search For Evidence of Any Crime at All. 23

III. Trial Counsel Was Ineffective for Failing to Challenge the Search of the Cell Phone Data in the Instant Case on Fourth Amendment Grounds. 25

CONCLUSION 26

RECEIVED by MSC 7/31/2020 8:51:12 PM

RECEIVED by MSC 7/31/2020 8:51:12 PM

TABLE OF AUTHORITIES

Cases

ACLU v Clapper,
785 F3d 787 (CA 2, 2015) 1

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419 F Supp 3d 142 (D Mass, 2019) 1

Andresen v Maryland,
427 US 463; 96 S Ct 2737; 49 L Ed 2d 627 (1976).. 16

Arizona v Gant,
556 US 332; 129 S Ct 1710; 173 L Ed 2d 485 (2009).. 7

Berger v New York,
388 US 41; 87 S Ct 1873; 18 L Ed 2d 1040 (1967).. 17

Boyd v United States,
116 US 616; 6 S Ct 524; 29 L Ed 746 (1886)... 7

Carpenter v United States,
585 US __; 138 S Ct 2206; 201 L Ed 2d 507 (2018).. 1, 7, 13

Commonwealth v White,
475 Mass 583; 59 NE3d 369 (2016) 8

Florida v Harris,
568 US 237; 133 S Ct 1050; 185 L Ed 2d 61 (2013).. 7

Groh v Ramirez,
540 US 551; 124 S Ct 1284; 157 L Ed 2d 1068 (2004).. 15

Horton v California,
496 US 128; 110 S Ct 2301; 110 L Ed 2d 112 (1990); 17, 18

Illinois v Gates,
462 US 213; 103 S Ct 2317; 76 L Ed 2d 527 (1983).. 8

Johnson v VanderKooi,
__ Mich App __; __ NW2d __ (2019) (Docket Nos. 330536, 330537) 2

Katz v United States,
389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967).. 18

Marron v United States,
275 US 192; 48 S Ct 74; 72 L Ed 231 (1927 16

Maryland v Garrison,
480 US 79; 107 S Ct 1013; 94 L Ed 2d 72 (1987) 16

People v Armstrong,
490 Mich 281; 806 NW2d 676 (2011) 25

People v Darwich,
226 Mich App 635; 575 NW2d 44 (1997) 11

People v Frederick,
500 Mich 228; 895 NW2d 541 (2017) 1

People v Hughes, unpublished per curiam opinion of the Court of Appeals,
issued September 25, 2018 (Docket No. 338030) 18, 23

People v Hughes,
505 Mich 855; 934 NW2d 273 (2019) 3

People v Hughes,
943 NW2d 646 (2020) 3

People v Nunez,
242 Mich App 610; 619 NW2d 550 (2000) 10

People v Randolph,
502 Mich 1; 917 NW2d 249 (2018) 26

People v Russo,
439 Mich 584; 487 NW2d 698 (1992) 14

People v Whitfield,
461 Mich 441; 607 NW2d 61 (2000) 13, 14

People v Woodard,
321 Mich App 377; 909 NW2d 299 (2017) 24

People v Zuccarini,
172 Mich App 11; 431 NW2d 446 (1988) 11

Riley v California,
573 US 373;134 S Ct 2473; 189 L Ed 2d 430 (2014) 1, 11, 12, 22

Stanford v Texas,
379 US 476; 85 S Ct 506; 14 L Ed 2d 431 (1965) 7, 13, 17

State v Thein,
138 Wash 2d 133; 977 P2d 582 (1999) 8

RECEIVED by MSC 7/31/2020 8:51:12 PM

Texas v Brown,
460 US 730; 103 S Ct 1535; 75 L Ed 2d 502 (1983).. 8

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828 F3d 375 (CA 6, 2016).. 8, 10

United States v Carey,
172 F3d 1268 (CA 10, 1999).. 21

United States v Castro,
881 F3d 961 (CA 6, 2018).. 17

United States v Comprehensive Drug Testing, Inc,
621 F3d 1162 (CA 9, 2010) (en banc).. 20, 22

United States v Danhauer,
229 F3d 1002 (CA 10, 2000).. 9

United States v Ellison,
632 F3d 347 (CA 6, 2011).. 8

United States v Frazier,
423 F3d 526 (CA 6, 2005).. 9

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824 F3d 199 (CA 2, 2016) (en banc).. 1

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432 US App DC 234; 867 F3d 1265 (2017).. 10, 13

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439 F3d 1263 (CA 10, 2006).. 20

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661 F3d 271 (CA 6, 2011).. 16

United States v Higgins,
557 F3d 381 (CA 6, 2009).. 9

United States v Hill,
459 F3d 966 (CA 9, 2006).. 7, 21

United States v Jacobsen,
466 US 109; 104 S Ct 1652; 80 L Ed 2d 85 (1984).. 18, 23

United States v Johnson,
848 F3d 872 (CA 8, 2017).. 14

RECEIVED by MSC 7/31/2020 8:51:12 PM

United States v Jones,
159 F3d 969 (CA 6, 1998) 9

United States v Jones,
565 US 400; 132 S Ct 945; 181 L Ed 2d 911 (2012) 1

United States v Katzin,
769 F3d 163 (CA 3, 2014) 1

United States v Khounsavanh,
113 F3d 279 (CA 1, 1997) 9

United States v Lalor,
996 F2d 1578 (CA 4, 1993) 9

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923 F3d 907 (CA 10, 2019), certiorari denied 140 S Ct 417 (2019) 21

United States v Lyles,
910 F3d 787 (CA 4, 2018) 9, 10

United States v Otero,
563 F3d 1127 (CA 10, 2009) 20, 21

United States v Pitts,
6 F3d 1366 (CA 9, 1993) 9

United States v Portalla,
496 F3d 23 (CA 1, 2007) 12

United States v Richards,
659 F3d 527 (CA 6, 2011) 20

United States v Rios,
881 F Supp 772 (D Conn, 1995) 9

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942 F3d 43 (CA 1, 2019) 9

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918 F Supp 524 (D RI, 1996) 9

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456 US 798; 102 S Ct 2157; 72 L Ed 2d 572 (1982) 17

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RECEIVED by MSC 7/31/2020 8:51:12 PM

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14 F3d 1093 (CA 6, 1994) 8, 9

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911 F2d 272 (CA 9, 1990) 9

United States v Walser,
275 F3d 981 (CA 10, 2001), ... 21, 22

United States v Wey,
256 F Supp 3d 355 (SDNY, 2017) 20

United States v Williams,
974 F2d 480 (CA 4, 1992) 9

Warden, Md Penitentiary v Hayden,
387 US 294; 87 S Ct 1642; 18 L Ed 2d 782 (1967) 8

Wiggins v Smith,
539 US 510; 123 S Ct 2527; 156 L Ed 2d 471 (2003) 25

Constitutions and Statutes

US Const, Am IV 7

Const 1963, art 1, § 11 7

Other Authorities

CDAM Bylaws, art 1, sec 2 2

Kerr, *Executing Warrants for Digital Evidence: The Case for Use Restrictions On Nonresponsive Data*, 48 Texas Law Rev 1 (2015) 23

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US Dep't of Justice, *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations* (2009) 20

RECEIVED by MSC 7/31/2020 8:51:12 PM

RECEIVED by MSC 7/31/2020 8:51:12 PM

INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization. The ACLU of Michigan is a state affiliate of the ACLU. Both organizations are dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws and, for decades, have been at the forefront of efforts nationwide to protect the full array of civil rights and liberties, including the right to the protections enshrined in the Fourth Amendment. The ACLU and the ACLU of Michigan have frequently appeared before courts (including this one) throughout the country in Fourth Amendment cases, both as direct counsel and as amici curiae. *See Carpenter v United States*, 585 US __; 138 S Ct 2206; 201 L Ed 2d 507 (2018) (warrantless acquisition of cellphone location information); *ACLU v Clapper*, 785 F3d 787 (CA 2, 2015) (bulk collection of call records), *United States v Katzin*, 769 F3d 163 (CA 3, 2014) (warrantless GPS tracking), *Alasaad v Nielsen*, 419 F Supp 3d 142, 147 (D Mass, 2019) (warrantless searches of electronic devices at the border), *Riley v California*, 573 US 373;134 S Ct 2473; 189 L Ed 2d 430 (2014) (cellphone searches incident to arrest), *United States v Jones*, 565 US 400; 132 S Ct 945; 181 L Ed 2d 911 (2012) (warrantless GPS tracking), *United States v Ganias*, 824 F3d 199 (CA 2, 2016) (en banc) (storing hard-drive data not responsive to a warrant for years); *People v Frederick*, 500 Mich 228; 895 NW2d 541 (2017) (warrantless "knock and

[1] Pursuant to MCR 7.312(H)(4), amici state that no counsel for a party authored this brief in whole or in part, nor did any such counsel or a party make a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici, their members, or their counsel made such a monetary contribution.

talk”); *Johnson v VanderKooi*, __ Mich App __; __ NW2d __ (2019) (Docket Nos. 330536, 330537) (warrantless fingerprinting).

Since its founding in 1976, Criminal Defense Attorneys of Michigan (“CDAM”) has been the statewide association of criminal defense lawyers in Michigan, representing the interests of the criminal defense bar in a wide array of matters. CDAM has more than 400 members. As reflected in its bylaws, CDAM exists to “promote expertise in the area of criminal law, constitutional law and procedure and to improve trial, administrative and appellate advocacy,” “provide superior training for persons engaged in criminal defense,” “educate the bench, bar and public of the need for quality and integrity in defense services and representation,” and “guard against erosion of the rights and privileges guaranteed by the United States and Michigan Constitutions and laws.” *CDAM Bylaws*, art 1, sec 2. Toward these ends, CDAM regularly conducts training seminars for criminal defense attorneys, publishes a newsletter with articles relating to criminal law and procedure, and provides information to the state legislature regarding contemplated legislation. CDAM is often invited to file amicus curiae briefs by the Michigan appellate courts.

Based on its extensive experience representing indigent criminal defendants in the Michigan courts, CDAM has substantial institutional expertise regarding the protections guaranteed by the Michigan and United States Constitutions. CDAM has a significant interest in review of the question presented because the Court of Appeals’s decision is contrary to clearly established constitutional protections and threatens to subject indigent criminal defendants to improperly broad and arbitrary exercises of police power.

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This Court invited CDAM and other amici to file an amicus brief in this matter. *People v Hughes*, 505 Mich 855; 934 NW2d 273 (2019). The Court gave amici permission to file this brief on or before July 31, 2020. *People v Hughes*, 943 NW2d 646 (2020).

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INTRODUCTION[2]

The Court has asked for amici's contributions on five questions related to the propriety of the police search of Kristopher Allen Hughes's cell phone and the use of the information stored there to convict him of robbery. The cell phone was seized pursuant to a warrant issued in the context of a drug trafficking investigation. However, the police did not provide any case-specific, objective facts tying Mr. Hughes's phone to the alleged wrongful acts. Furthermore, investigators subsequently searched the phone for evidence of the different and separate crime of robbery. No magistrate issued a warrant for that search and there was no showing of probable cause. Amici urge the following conclusions in response to the Court's questions, which are explained fully in the argument that follows:

1. *The affidavit in support of the search warrant issued during the criminal investigation into drug trafficking did not authorize police to obtain all of Mr. Hughes's cell phone data.* Search warrants may issue only if there is probable cause to believe that evidence will be found in the place to be searched. The affidavit filed in support of the warrant provided only that in the officer's "training and experience," drug dealers commonly use their phones in connection with their crimes. (App E 33a). But that is not enough to establish probable cause under the Fourth Amendment. Because there was no case-specific evidence connecting the phone to the illicit activity in which Mr. Hughes was

[2] Amici thank Thomas McBrien, a student at the NYU School of Law and ACLU Summer 2020 intern, for his significant contributions to this brief.

allegedly involved, the affidavit was insufficient to justify a search of Mr. Hughes's phone.

2. *Mr. Hughes's reasonable expectation of privacy in his cell phone data was not extinguished when the police seized his cell phone and its data in a prior investigation.* To satisfy the Fourth Amendment, the face of the warrant must particularly describe the crime for which there is probable cause and the place or things to be searched. Searches may not exceed these boundaries. These Fourth Amendment requirements ensure that the police will not use a warrant as cover to fish through nonresponsive information for evidence of other crimes, as the officers did here. These clear-cut rules serve to protect the ongoing reasonable expectation of privacy Mr. Hughes retained in his cell phone data, which can be intruded upon only when justified by probable cause.

3. *The search of the cell phone data in the instant robbery case was not within the scope of probable cause underlying the search warrant issued during the concurrent criminal investigation into drug trafficking.* Here, the prosecutor in the robbery case directed the forensic analyst to enter search terms associated with the robbery. The relevant evidence was not obtained as a result of the drug crime investigation. Indeed, there is no indication that the cell phone was ever searched for evidence of drug trafficking.

4. *For the reasons above, officers' search of the cell phone data in the instant case was unconstitutional*; and

5. *Trial counsel was ineffective for failing to file a motion to suppress the results of the forensic examination of Mr. Hughes's cell phone.*

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RELEVANT FACTS

Kristopher Hughes was tried three times before a jury found him guilty of an armed robbery that took place on August 6, 2016. The charges related to allegations that Mr. Hughes—with the help of Lisa Weber—robbed the victim's home. The issue at trial was whether Mr. Hughes was the robber. Ms. Weber was the primary witness identifying Mr. Hughes, but she had credibility problems such that the first two juries could not confidently rely on her identification. (App N 140a, 373a-379a, 401a-405a).

After the third trial, the jury convicted Mr. Hughes. Newly-introduced evidence obtained by searching Mr. Hughes's cell phone bolstered Ms. Weber's testimony and made the difference.

Investigators had obtained Mr. Hughes's phone pursuant to a search warrant in a separate and unrelated investigation of drug trafficking. Detective Matthew Gorman submitted the affidavit supporting the search warrant, stating that a confidential informant had tipped off the police that Mr. Hughes and an accomplice were selling drugs and in possession of crack cocaine, large amounts of money, and weapons. (App E 39a, ¶ 5). It also stated that, while undercover, the detective purchased drugs from Mr. Hughes's alleged partner in crime while Mr. Hughes was present. (*Id.* at 40a, ¶ 9). The affidavit in support of the search warrant, however, made no mention of a robbery. The warrant, dated August 11, 2016, authorized police to seize "any . . . devices capable of digital or electronic storage" to search for "any records pertaining to the receipt, possession and sale or distribution of controlled substances." (App E 30a).

While the affidavit established probable cause that Mr. Hughes was involved in narcotics trafficking, the only allegations in the affidavit suggesting that evidence of that crime would be on Mr. Hughes's cell phone was an assertion that in the affiant's training and experience "drug traffickers commonly use electronic equipment to aid them in their drug trafficking activities."

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(App E 38a-42a). Officers executed the warrant the following day and obtained Mr. Hughes's cell phone from his person during a pat down search. (App N 318a).

At Detective Gorman's request, Detective Wagrowski, who has expertise in cell phone forensics, initiated a forensic examination of the phone on August 23, 2016. (*Id.* at 325a). The detective accomplished this using Cellebrite, the brand name for a forensic tool designed to extract all the data from a phone. (*Id.* at 325a-326a). The detective generated a report containing data extracted from the phone. (*Id.* at 327a; App G 48a-51a). This information included text messages, call logs, photographs, and other data. (App N 327a). According to Detective Wagrowski, the report was more than 600 pages long and contained "over 2,000 call logs, [] over 2,900 text message[s] or SMS messages, and over 1,000 pictures." (*Id.* at 329a).

The next step in any forensic process is to conduct a search of the extracted data. Almost all data seizures end up with far more raw data than a person can reasonably review manually, such as the thousands of text messages and photographs on the phone in this case. Thus, digital querying—using keywords or other criteria—is often essential to any device search and seizure because it can effectively winnow the huge amounts of data to that information the searcher is looking for. The record does not reflect, however, that investigators ever searched the report for evidence of drug trafficking.

At some later point—the timing of which is unclear, but perhaps months later—the prosecutor asked Detective Wagrowski to search the 600-plus-page report for evidence of the robbery, specifically communications between Mr. Hughes and Ms. Weber. The detective searched for three phone numbers: two belonging to Ms. Weber and one belonging to the victim. (*Id.* at 329a). The detective also searched the records for words such as "Lisa," "Kris," and various iterations of Mr. Hughes's alleged nickname, "Killer." (*Id.* at 334a-338a). The results of

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these searches were introduced in the third robbery trial as Prosecution Exhibits 4-6 and 9-15. (App G 48a-51a; App H 52a-57a; App I 58a-63a). The jury then convicted Mr. Hughes.

ARGUMENT

I. The Affidavit in Support of the Warrant to Seize and Search Mr. Hughes's Cell Phone Did Not Establish Probable Cause Because It Offered No Case-Specific Facts Suggesting That Evidence of Drug Trafficking Would Be Found There.

A. Affidavits Must Establish Probable Cause That Evidence Will Be Found in the Place To Be Searched.

The United States and Michigan Constitutions protect people against unreasonable searches and seizures by requiring that all search warrants be based on probable cause and describe with particularity the places and items to be seized and searched. US Const, Am IV; Const 1963, art 1, § 11. These provisions are meant to protect against general warrants, a hated English practice that allowed a general rummaging through the life of anybody suspected of a crime. See *Stanford v Texas*, 379 US 476, 481; 85 S Ct 506; 14 L Ed 2d 431 (1965) (general warrants were "the worst instrument of arbitrary power . . . that ever was found in an English law book"), quoting *Boyd v United States*, 116 US 616, 624; 6 S Ct 524; 29 L Ed 746 (1886).

The probable cause requirement protects people in two ways: it ensures there is adequate justification for a search, see *Arizona v Gant*, 556 US 332, 345; 129 S Ct 1710; 173 L Ed 2d 485 (2009), and it limits the scope of the search based on the warrant, see *United States v Hill*, 459 F3d 966, 973 (CA 9, 2006). This requirement serves the goal of the Fourth Amendment "to place obstacles in the way of a too permeating police surveillance." *Carpenter*, 138 S Ct at 2214 (citation and quotation marks omitted).

A police officer has probable cause to conduct a search when "the facts available to [him] would 'warrant a [person] of reasonable caution in the belief'" that contraband or evidence of a crime is present. *Florida v Harris*, 568 US 237, 243; 133 S Ct 1050; 185 L Ed 2d 61 (2013),

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quoting *Texas v Brown*, 460 US 730, 742; 103 S Ct 1535; 75 L Ed 2d 502 (1983) (alterations in original). An affidavit supporting a search warrant must indicate "that contraband or evidence of a crime will be found in a particular place." *Illinois v Gates*, 462 US 213, 238; 103 S Ct 2317; 76 L Ed 2d 527 (1983). There must "be a nexus . . . between the item to be seized and criminal behavior." *Warden, Md Penitentiary v Hayden*, 387 US 294, 307; 87 S Ct 1642; 18 L Ed 2d 782 (1967); accord *United States v Brown*, 828 F3d 375, 382 (CA 6, 2016) (requiring that affidavits must set forth "sufficient facts demonstrating why the police officer expects to find evidence in the [place to be searched] rather than in some other place") (citation omitted). This connection must be specific and concrete, not vague or generalized. See *Brown*, 828 F3d at 375.

B. An Officer's "Training and Experience," Without More, Is Insufficient to Establish Probable Cause to Search.

An officer's training and experience alone is not sufficient to establish probable cause. While training and experience may be relevant to determining probable cause, it cannot substitute for specific facts. See *United States v Schultz*, 14 F3d 1093, 1097 (CA 6, 1994); *Commonwealth v White*, 475 Mass 583, 584–585; 59 NE3d 369 (2016); *State v Thein*, 138 Wash 2d 133, 147–148; 977 P2d 582 (1999) (broad generalizations in affidavit that drug dealers often store their drugs at home were insufficient to establish probable cause). This holds even in situations in which decades of experience lead an officer to believe that evidence could be found in a certain place. See, e.g., *Brown*, 828 F3d at 384 ("[I]f the affidavit fails to include facts that directly connect the residence with the suspected drug dealing activity . . . it cannot be inferred that drugs will be found in the defendant's home—even if the defendant is a known drug dealer."). A supporting affidavit must allege facts specific to the investigation, such as a reliable confidential informant purchasing drugs in a suspect's home, to establish probable cause to search that particular place. See *United States v Ellison*, 632 F3d 347, 349 (CA 6, 2011); *United*

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States v Jones, 159 F3d 969, 974–975 (CA 6, 1998); *cf. United States v Higgins*, 557 F3d 381, 390 (CA 6, 2009); *United States v Frazier*, 423 F3d 526, 532 (CA 6, 2005).[3]

Training and experience may buttress actual, particularized facts, perhaps even establishing probable cause where it would otherwise be absent. But permitting a search based solely on an officer's experience in other cases and general evidence of wrongdoing in this one "would be to invite general warrants authorizing searches of any property owned, rented, or otherwise used by a criminal suspect—just the type of broad warrant the Fourth Amendment was designed to foreclose." *United States v Schultz*, 14 F3d 1093, 1097–1098 (CA 6, 1994); accord

[3] See also, e.g., *United States v Roman*, 942 F3d 43, 51–52 (CA 1, 2019) ("We have further expressed skepticism that probable cause can be established by the combination of the fact that a defendant sells drugs and general information from police officers that drug dealers tend to store evidence in their homes." (quotation marks and citation omitted)); *United States v Lyles*, 910 F3d 787, 793–794 (CA 4, 2018) ("The government invites the court to infer from the trash pull evidence that additional drugs probably would have been found in Lyles's home. Well perhaps, but not probably."); *United States v Danhauer*, 229 F3d 1002, 1006 (CA 10, 2000) (repetitive statements about the defendants' house and allegations that the defendants were manufacturing drugs were insufficient to establish probable cause to search the house); *United States v Rowland*, 145 F3d 1194, 1204 (CA 10, 1998) ("Probable cause to search a person's residence does not arise based solely upon probable cause that the person is guilty of a crime."); *United States v Khounsavanh*, 113 F3d 279, 285 (CA 1, 1997) (controlled buy was not per se sufficient to establish probable cause to search a residence); *United States v Lalor*, 996 F2d 1578, 1582–1583 (CA 4, 1993) ("residential searches have been upheld only where some information links the criminal activity to the defendant's residence"), quoting *United States v Williams*, 974 F2d 480, 481–482 (CA 4, 1992); *United States v Rosario*, 918 F Supp 524, 531 (D RI, 1996) ("While this court acknowledges the extensive training and expertise of agent Kelleher, her statements in the affidavit simply provide generalized information regarding how drug traffickers operate."); *United States v Rios*, 881 F Supp 772, 776–777 (D Conn, 1995) (officer's general averments based on training and experience do not, standing alone, constitute a substantial basis for the issuance of a search warrant). Some courts have ruled the opposite way. See, e.g., *United States v Pitts*, 6 F3d 1366, 1369 (CA 9, 1993) ("[I]n the case of drug dealers, evidence is likely to be found where the dealers live."), citing *United States v Terry*, 911 F2d 272, 275 (CA 9, 1990).

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United States v Griffith, 432 US App DC 234, 244; 867 F3d 1265 (2017); *People v Nunez*, 242 Mich App 610, 622–624; 619 NW2d 550 (2000) (O'CONNELL, J., concurring). Drug dealers often keep controlled substances in their homes, purses, or cars. But police generally are not permitted to search these places without investigation-specific reasons to believe evidence will be found there. See *Brown*, 828 F3d at 385. The same principle applies to cell phones. *United States v Lyles*, 910 F3d 787, 795 (CA 4, 2018) (probable cause to believe that residence was connected to drug trafficking insufficient basis for searching phone found on the premises); *Griffith*, 867 F3d at 238, 243 (allegation that in the affiant's experience gang members "maintain regular contact with each other" and "often stay advised and share intelligence about their activities through cell phones and other electronic communication devices and the Internet" insufficient to justify search of home for cell phone).

Here, Detective Gorman's affidavit alleged only that in the officer's experience, people who are engaged in drug trafficking store records or other relevant information about that crime on digital devices. But training and experience alone do not establish probable cause that evidence of a suspected crime will be found on the cell phone of a particular suspect. The confidential informant whose reports provided the basis for the search warrant reported "observations and conversations" that contributed to probable cause to believe that Mr. Hughes was dealing crack cocaine. (App E 39a-40a). The informant did not report any controlled substance-related electronic conversations or record-keeping involving the cell phone.

Indeed, courts must ensure that investigators do not evade the Fourth Amendment by uttering magic words, including "based on my training and experience." This is especially true when the thing to be searched or seized, such as a cell phone, is not contraband. See *Griffith*, 867 F3d at 1275 ("Because a cell phone, unlike drugs or other contraband, is not inherently illegal,

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there must be reason to believe that a phone may contain evidence of the crime."). Were an allegation that criminals generally used their cell phones to communicate or take photos sufficient to establish probable cause, police would be able to get a warrant to search digital media in essentially every single drug case—and perhaps even every criminal case—without ever having any specific reason to believe evidence of a crime would be found there. If that were the law, any suspicion of virtually any crime could be the basis for invasive government searches of our most private data.

While the Michigan Court of Appeals has sometimes upheld searches based on generalized "training and experience" affidavits, see *People v Darwich*, 226 Mich App 635, 636–640; 575 NW2d 44 (1997); *People v Zuccarini*, 172 Mich App 11, 15–16; 431 NW2d 446 (1988), those decisions were wrong. This Court should follow the weight of authority and hold that the Fourth Amendment requires case-specific facts in order to establish probable cause to search a cell phone.

C. Allegations Based Only on "Training and Experience" Are Especially Inadequate When Officers Seek To Seize and Search the Entirety of Someone's Cell Phone, Which Contains Vast Amounts of Extremely Private and Sensitive Data.

Case-specific evidence establishing probable cause is especially important when officers aim to search cell phones, which are nearly ubiquitous and contain vast quantities of private information. In *Riley*, 573 US at 394, the United States Supreme Court noted that the top-selling smart phone had a standard capacity of sixteen gigabytes, which "translates to millions of pages of text, thousands of pictures, or hundreds of videos." Just five years later, the top-selling smart

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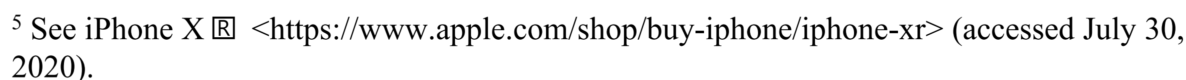
phones[4] came standard with four times the storage capacity.[5] That storage holds individuals' family messages, business information, personal photos, location records, browsing history, political conversations, calendars, prescription and health information, and many other extremely sensitive categories of information. See *id.* at 394–396. Additionally, these devices "are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Id.* at 385. As a result, most Americans now walk around with the entirety of their private lives contained in their pockets. "It 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.* at 399.

The State cites *United States v Portalla*, 496 F3d 23 (CA 1, 2007), to support the idea that cell phones are "essential tools of [the] drug trade," Pl's-Appellee's Supp Br 20 (alteration in brief), and thus worthy of search and seizure even without evidence of their use in criminal acts. But the State's brackets hide an important word: "their." In *Portalla*, the court upheld the conviction of a man designated as a drug trafficking co-conspirator because he knowingly sold "throwaway" phones to drug traffickers. *Id.* at 25. No such evidence was presented in the affidavit here.

More fundamentally, cell phones are not "essential tools of the drug trade" like firearms, drug paraphernalia, or triple-beam scales, except to the extent that they are essential tools of

[4] See Porter, *Apple and Samsung Dominate Top Selling Phone Lists for 2019*, The Verge (February 28, 2020) <https://www.theverge.com/2020/2/28/21157386/iphone-best-selling-phone-worldwide-xr-11-samsung-a-series-counterpoint-research> (accessed July 30, 2020).



[5] See iPhone XR <https://www.apple.com/shop/buy-iphone/iphone-xr> (accessed July 30, 2020).

everyday life. None of those objects also serve as their owners' journals, calendars, political organizing tools, etc. As the D.C. Circuit has noted, "[a] warrant's overbreadth [was] particularly notable because police sought to seize otherwise lawful objects: electronic devices. Courts have allowed more latitude in connection with searches for contraband items like 'weapons [or] narcotics.'" *Griffith*, 867 F3d at 1276, quoting *Stanford*, 379 US at 486.

An officer's ability to rummage through the entirety of virtually every person's life based solely on their training and experience is the exact kind of "too permeating police surveillance" that the Fourth Amendment was designed to thwart. *Carpenter*, 138 S Ct at 2214. When the "place" to be searched is something as sensitive as a cell phone, it is not reasonable to accept an officer's conclusory statements about drug traffickers' general habits to serve as the entirety of probable cause. Searches of these devices must be supported by sufficiently specific probable cause lest everyone's most private effects be open to investigation upon mere suspicion of criminal conduct.

D. The Cases Cited by the State Show Only How Training and Experience Can Buttress, Not Substitute For, Other Evidence to Establish Probable Cause to Search a Specific Place.

An officer's training and experience can help establish probable cause to search a specific location, but it cannot do so alone. *People v Whitfield*, 461 Mich 441, 442–448; 607 NW2d 61 (2000), cited by the State, does not support the State's argument to the contrary—indeed, it proves amici's point. In *Whitfield*, an undercover officer went to a suspect's house, requested heroin, saw envelopes commonly used to package heroin, and was told he would be "take[n] care [of]" if he came back later with a trusted associate. *Id.* at 447. Objective evidence—the suspicious envelopes and conversation—formed the necessary probable cause, albeit interpreted through the lens of the officer's training and experience. The magistrate properly relied on the

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officer's knowledge and experience in concluding that the envelopes, which may have looked innocent to a layperson, were indeed suspicious. See *id.*

Nor can the "nature of the crime" substitute for evidence of probable cause—and the State cites cases in support of that assertion that do not actually help its position. For example, the State cites *United States v Johnson*, 848 F3d 872, 878 (CA 8, 2017), see Pl's-Appellee's Supp Br 17, but there, the affidavit in support of the search warrant incorporated an interview with a child who said the defendant Johnson "downloaded the pictures [of her naked] on his computer that he has at his mom's house in Woodbury," "always downloaded all his pictures on the computers at his mom's house in Woodbury," and "returned to Woodbury 'at least once a week.'" *Id.* at 878 (first alteration in original). It was this factual evidence, not solely the officer's training and experience suggesting that people who commit child sexual abuse crimes store illegal images on computers, that provided the justification for searching Johnson's mother's house. *Id.* Similarly, in *People v Russo*, 439 Mich 584; 487 NW2d 698 (1992), training and experience did not form the entire basis for probable cause, but only served to support the assertion that probable cause was not stale. There, the actual basis of probable cause tying evidence of child sexual assault to Russo's house was an interview with the victim who remembered that assaults had happened in the house, was shown photographic evidence of the assaults in the house afterwards, and knew exactly how the evidence was stored there. *Id.* at 598.

Ultimately, officers must provide some specific reason why they believe evidence of a specific crime will be found in a specific place, and cell phones are no exception. This should not be an onerous requirement for the police, who often use confidential informants to text and call suspected drug dealers. Holding that officers may cite "training and experience" to look through

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the entirety of a person's phone would expose people's most private details whenever they rightly or wrongly came under police suspicion.

Here, the affidavit provided insufficient information connecting Mr. Hughes's cell phone with drug trafficking crimes. It may be that drug dealers often use their phones to store evidence of their crimes, but without facts establishing that Mr. Hughes was using *this* phone to store evidence of *his* crimes, there is no probable cause to seize the phone. For these reasons, amici answer this Court's first question in the negative: The affidavit in support of the drug trafficking search warrant was inadequate, the warrant was improper, and the seizure and any subsequent searches of the phone were unconstitutional.

II. The Fourth Amendment Prohibited Investigators From Searching for Evidence of a New Crime, At Least Without Seeking a Second Warrant.

Even if the warrant authorizing the search and seizure of Mr. Hughes's phone in connection with the drug investigation had been appropriate, the officers' subsequent search of the phone for evidence of robbery was not. The Fourth Amendment "requires particularity in the warrant," which is meant to restrict investigators' discretion as to what and where to search. See *Groh v Ramirez*, 540 US 551, 557; 124 S Ct 1284; 157 L Ed 2d 1068 (2004). Warrants must provide a description of the type of evidence sought. *Id.* They may authorize searches only for evidence of the crime for which the affidavit establishes probable cause, and no other. Moreover, officers may conduct searches only as authorized by the warrant.

The particularity requirement is especially important in the context of digital searches in which the entirety of a person's private life is in the hands of the police. It may be reasonable for police to over-*seize* digital data (for example, an entire hard drive or cell phone) because it is so voluminous and intermingled with non-responsive information that sorting through it at the scene of a seizure is not practicable. But it is unreasonable for the police to capitalize on the logistical

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difficulties of digital evidence collection to affirmatively search for evidence of crimes for which there is no probable cause showing and no warrant. Otherwise, each warrant authorizing the search of a cell phone, computer, or online service for evidence of a particular crime would automatically become a general warrant that allowed a rummaging through the entirety of a person's private life. The Fourth Amendment forbids this result.

A. Warrants Must Particularly Identify the Crime For Which Evidence Is Sought and Limit Searches Accordingly.

To prevent exploratory rummaging in a person's belongings, the Fourth Amendment's particularity requirement requires that a warrant give investigators sufficient guidance as to where to search and what to search for. *Marron v United States*, 275 US 192, 196; 48 S Ct 74; 72 L Ed 231 (1927). Warrants must prevent invasive "fishing expeditions" by authorizing searches only for evidence of a crime for which there is probable cause. See *Maryland v Garrison*, 480 US 79, 84; 107 S Ct 1013; 94 L Ed 2d 72 (1987) (this "requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit"). The particularity requirement "prevents the seizure of one thing under a warrant describing another." *Andresen v Maryland*, 427 US 463, 479; 96 S Ct 2737; 49 L Ed 2d 627 (1976).

It is not good enough for a warrant to simply identify the places or items to be searched; the warrant must also specifically describe what agents are permitted to search *for*. "[T]he scope of a warrant should be confined to evidence relating to a specific crime, supported by probable cause." *United States v Hanna*, 661 F3d 271, 286 (CA 6, 2011). Warrants authorizing searches for evidence of "crime" must be explicitly or implicitly narrowed to the specific crime for which probable cause has been shown. See *Andresen*, 427 US at 479. Without that narrowing, the

warrant would be unconstitutionally overbroad. See, e.g., *id.*; *United States v Castro*, 881 F3d 961, 965 (CA 6, 2018).

The particularity requirement is even more important when the privacy interests in the place to be searched are highly sensitive. In *Stanford*, 379 US at 511–512, for example, the Supreme Court explained that "the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain." In *Berger v New York*, 388 US 41, 56; 87 S Ct 1873; 18 L Ed 2d 1040 (1967), the Supreme Court similarly stated that the need for particularity "is especially great in the case of eavesdropping" because such surveillance "involves an intrusion on privacy that is broad in scope."

The particularity requirement demonstrates, and helps ensure, that individuals retain an expectation of privacy in places and effects for which there is no probable cause to search. The purpose of the particularity requirement is to protect these private places and effects from "rummaging," as the particularity of the warrant limits the permissible scope of the search. For example, a valid warrant to search for a rifle in someone's home does not permit officers to open a medicine cabinet where a rifle could not fit. See *Horton v California*, 496 US 128, 141; 110 S Ct 2301; 110 L Ed 2d 112 (1990); *United States v Ross*, 456 US 798, 824; 102 S Ct 2157; 72 L Ed 2d 572 (1982). A person retains a reasonable expectation of privacy in the contents of their medicine cabinet, even if investigators had authority to search for a rifle in the home.

More than that, a warrant to search for one kind of evidence does not extinguish a persons's expectation of privacy with respect to other, subsequent searches at all. The mere fact that police executed a valid search of a house for evidence of one kind on one day does not permit them to return to search for evidence of other crimes thereafter on the theory that the

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original search eliminated the person's expectation of privacy. Searches of personal devices and data are no different in this fundamental respect. Warrants permit officers to invade a legitimate expectation of privacy for a particular purpose—to execute a specific search—consistent with the restrictions on police power set forth in the Fourth Amendment. Those restrictions ensure that any invasion of privacy is reasonable, no more invasive than necessary, and justified under the circumstances. Consequently, a warrant does not extinguish a person's expectation of privacy wholesale, forever, and for all purposes. It permits a carefully limited intrusion. Searches for items that would be evidence of other crimes not described in the warrant are unconstitutional because they are, in effect, warrantless searches—and warrantless searches that do not fall into any exception are by definition unreasonable. See *Katz v United States*, 389 US 347, 357; 88 S Ct 507; 19 L Ed 2d 576 (1967).

In this case, the Court of Appeals held that, because Mr. Hughes's data already had been lawfully extracted from his phone pursuant to the August 12 search warrant, he no longer had any reasonable expectation of privacy in that data. See *People v Hughes*, unpublished per curiam opinion of the Court of Appeals, issued September 25, 2018 (Docket No. 338030), p 3. That is wrong. A seizure deprives an individual of control over their property but does not reduce their reasonable expectation of privacy in the contents of the property. See *Horton*, 496 US at 133. That is why, "[e]ven when government agents may lawfully seize such a package to prevent loss or destruction of suspected contraband, the Fourth Amendment requires that they obtain a warrant before examining the contents of such a package." *United States v Jacobsen*, 466 US 109, 114; 104 S Ct 1652; 80 L Ed 2d 85 (1984). Warrants require probable cause and particularity exactly because searching for evidence of an unrelated crime is not permitted, even when the object is lawfully seized.

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Indeed, the warrant in this case was issued as part of a drug trafficking investigation, and nothing else. Critically, the warrant on its face authorized police to seize "any . . . devices capable of digital or electronic storage" to search for "any records pertaining to the receipt, possession and sale or distribution of *controlled substances*." (App E 30a). Neither the affidavit nor the warrant refer in any way to a robbery; thus, the warrant did not and could not authorize a search for evidence of that crime. The investigators' use of keywords to find evidence of that crime under the auspices of a drug dealing investigation is akin to officers looking in the medicine cabinet under the auspices of searching for an illegal firearm. It is a violation of the Fourth Amendment's warrant requirement and is unconstitutional.

B. The Fourth Amendment Requires That Searches of Electronic Data Be Limited to the Scope of the Warrant.

For practical reasons, officers must frequently seize an entire electronic device and make a copy of the information stored there in order to conduct a lawful search of the data at a later point in time. See Fed R Crim P 41(e)(2)(B) (establishing a seize-first, search-second procedure for electronically stored information, where searches are "consistent with the warrant"). This overseizure is reasonable only because it would be even more unreasonable for the police to camp out in a person's home or business for weeks while segregating responsive from non-responsive data.

But these practical investigatory considerations do not mean that the Fourth Amendment's particularity provisions cease to apply once the government overseizes digital information. Indeed, the Department of Justice's own computer search and seizure manual explains the seize-then-search process. Investigators generally must remove storage media for off-site analysis and create an "image copy" of the hard drive—in other words, extracting the data (a seizure) followed by a later search. During the search, the hard drive "is examined and

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data that falls within the scope of the warrant is identified." US Dep't of Justice, *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations* 86 (2009) (emphasis added). "[A] computer search may be as extensive as reasonably required *to locate the items described in the warrant*." *Id.*, citing *United States v Grimmett*, 439 F3d 1263, 1270 (CA 10, 2006) (emphasis added). The guidelines correctly note that "[w]hen an agent searches a computer under the authority of a warrant, however, the warrant will often authorize a search of the computer only for evidence of certain specified crimes." *Id.* at 90.

Years ago, the Ninth Circuit anticipated the investigators' actions in the instant case, warning that "[t]he process of segregating electronic data that is seizable from that which is not must not become a vehicle for the government to gain access to data which it has no probable cause to collect." *United States v Comprehensive Drug Testing, Inc*, 621 F3d 1162, 1177 (CA 9, 2010) (en banc). If anything, access to digital information makes a carefully particularized search of that data all the more important because officers could readily abuse their access to information outside the scope of their warrant, which they ordinarily would not be permitted to see. *See United States v Richards*, 659 F3d 527, 538 (CA 6, 2011) ("The modern development of the personal computer and its ability to store and intermingle a huge array of one's personal papers in a single place increases law enforcement's ability to conduct a wide-ranging search into a person's private affairs, and accordingly makes the particularity requirement that much more important."), citing *United States v Otero*, 563 F3d 1127, 1132 (CA 10, 2009).

Because the particularity requirement limits the scope of a search pursuant to a warrant, when police overseize data for one search they cannot later use the same overseized data to conduct a second search outside the scope of the initial warrant. For example, in *United States v Wey*, 256 F Supp 3d 355, 407 (SDNY, 2017), the court likened a warrantless second search of

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digital information outside the scope of the first warrant to "the Government seizing some hard-copy notebooks while leaving others it deemed unresponsive behind, and then returning to the premises two years later to seize the left-behind notebooks based on investigative developments but without seeking a new warrant." See also *United States v Loera*, 923 F3d 907, 922 (CA 10, 2019) (search for child pornography unlawful because it was plainly outside the scope of a warrant to search for computer fraud), certiorari denied 140 S Ct 417 (2019); *Hill*, 459 F3d at 974–975 ("the officer is always limited by the longstanding principle that a duly issued warrant, even one with a thorough affidavit, may not be used to engage in a general, exploratory search") (quotation marks and citation omitted).

Two influential cases from the Tenth Circuit show that officers may not search for evidence of a separate crime not identified in the warrant in the course of a digital search. In *United States v Carey*, 172 F3d 1268, 1270 (CA 10, 1999), a police officer searched a laptop for evidence of drug distribution pursuant to a warrant. While searching the laptop, the officer stumbled upon child pornography. *Id.* at 1271. At this point, he began searching for and opening files he believed were likely to contain child pornography, instead of continuing to search only for evidence of drug distribution. *Id.* at 1273. The officer's "unconstitutional general search" violated the suspect's expectation of privacy in data not described in the warrant, so the evidence was suppressed. *Id.* at 1276.

In *United States v Walser,* 275 F3d 981, 984–985 (CA 10, 2001), the facts were similar to *Carey*, but the investigator, upon unexpectedly finding child abuse images, "immediately ceased his search of the computer hard drive and . . . . submit[ted] an affidavit for a new search warrant specifically authorizing a search for evidence of possession of child pornography." Because the officer did not search for evidence of the new crime of possession of illicit images without

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authorization from the magistrate in the form of a warrant based on probable cause, the materials were properly admitted into evidence. *Id.* at 987.

In Mr. Hughes's case, Detective Wagrowski extracted the information from the phone pursuant to the search warrant issued in the earlier drug case. (App N 326a). There is no indication that officers ever searched the 600-page report for evidence of that crime. But at least a month, and maybe months later, the prosecutor in the armed robbery case asked the forensic officer to search the data for calls and texts between Mr. Hughes' phone, and those of Ms. Weber and the victim. (App N 329a). Officers did not obtain the evidence of robbery inadvertently. Rather, they intentionally and explicitly searched the phone outside of the parameters of the existing warrant. This subsequent search was unlawful.[6]

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[6] This is not a case in which the evidence of robbery was in plain view, which is why neither the Court of Appeals nor the State raised the issue below. Plain view, a doctrine that was developed in the context of physical-world searches, requires the government to have been lawfully searching for evidence of the crime identified in the warrant and then stumble upon evidence of a different crime. At that point, the investigators must go get a new warrant. *Walser,* 275 F3d 981, 984–985. Here, the prosecution was searching for evidence of the robbery not identified in the warrant and did not seek a second warrant.

However, this Court should be careful not to suggest that the plain view doctrine could license overbroad searches on different facts. Courts and commentators have repeatedly recognized that, in light of the great volume and variety of information contained in computers, greater protections are required for searches of electronic devices and data than for searches of physical items. See *Riley*, 573 US at 394–395; see also *Comprehensive Drug Testing, Inc*, 621 F3d at 1175; Kerr, *Searches and Seizures in a Digital World*, 119 Harv L Rev 531 (2005). Courts and scholars have considered several different approaches to this problem. The various opinions in *Comprehensive Drug Testing* propose a menu of potential solutions. *See Comprehensive Drug Testing*, 621 F3d at 1179–1180 (KOZINSKI, C.J., concurring) ("summ[ing] up" the court's guidance). One option is to require the use of independent review teams to "sort[], segregat[e], decod[e] and otherwise separat[e] seizable data (as defined by the warrant) from all other data," so as to shield investigators from exposure to information beyond the scope of the warrant. *Id.* at 1179; see *id.* at 1168–1172 (per curiam opinion of the Court). Another is to require the use of technology, including "hashing tools," to identify responsive files "without actually opening the files themselves." *Id.* at 1179 (KOZINSKI, C.J., concurring). And yet another is to "waive reliance upon the plain view doctrine in digital evidence cases," full stop—in other words, to agree not to take advantage of the government's unwillingness or inability to conduct digital searches in a

C. The Court of Appeals Wrongly Held That the Initial Warrant Gave the Police Broad License to Search For Evidence of Any Crime at All.

The cases the Court of Appeals relied on, see *Hughes*, unpub op at 3, do not undermine the longstanding and clear-cut requirement that officers search only for evidence of the crime for which a magistrate found probable cause and which is particularly described in the text of a warrant. The court's reliance on cases in which individuals had lost their expectation of privacy was misplaced, because in this case the warrant to search Mr. Hughes's phone for evidence of a specific crime did not extinguish Mr. Hughes's expectation of privacy in all the data on his phone.

In *United States v Jacobsen*, 466 US 109, 104 S Ct 1652; 80 L Ed 2d 85 (1984), cited by the Court of Appeals, see *Hughes*, unpub op at 3, the officers' warrantless search of a cardboard box containing suspicious white powder was constitutional only because it did not exceed an earlier private search of the box. See *Jacobsen*, 466 US at 120. Moreover, the Court had to ask the question of whether the field test of the powder inside the box was a search requiring a warrant exactly because, if the test were something other than a "yes/no" indicator of the evidence of contraband, it would have invaded the owner's expectation of privacy. See *id.* at 122. *Jacobsen* does not resemble the facts here: Mr. Hughes did not lose a reasonable expectation of privacy in all of his data such that a search outside of the scope of the warrant

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particularized manner. *Id.* at 1180; *see id.* at 1170–1171 (per curiam opinion of the Court). Additionally, Professor Orin Kerr has argued that the best way to minimize unwarranted intrusions of privacy in electronic searches is to impose use restrictions on nonresponsive data discovered during a lawful search. "[A]gents should only be allowed to use the evidence that is actually described in the warrant. Nonresponsive data found in the course of the search for responsive data should generally be walled off from further use." Kerr, *Executing Warrants for Digital Evidence: The Case for Use Restrictions On Nonresponsive Data*, 48 Texas Law Rev 1, 18 (2015). To avoid unconstitutional general searches, Fourth Amendment law must ensure that investigators are not be able to take advantage of the unique properties of digital storage and reap a windfall by opening non-responsive files and discovering evidence of some other crime.

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would be lawful, just because there was a search warrant authorizing investigation for a particular specified crime.

The Court of Appeals also cited *People v Woodard*, 321 Mich App 377; 909 NW2d 299 (2017), a case involving a consensual blood draw, in which the court held that the defendant could not withdraw consent for blood-alcohol analysis after already having consented to a blood draw for that purpose. See *Hughes*, unpub op at 3. *Woodard* is a narrow ruling related only to a consensual blood draw in the context of an intoxicated driving investigation. See *Woodard*, 321 Mich App at 387 ("[W]e conclude that society is not prepared to recognize a reasonable expectation of privacy in the alcohol content of a blood sample voluntarily given by a defendant to the police for the purposes of blood alcohol analysis."). Mr. Hughes, on the other hand, did not consent to the search of his phone, and the warrant at issue was necessarily limited in scope to evidence of drug distribution. The Court of Appeals implied that there is no meaningful difference between performing blood-alcohol analysis on blood drawn consensually for that purpose, and performing a wide-ranging search for evidence of multiple crimes in cell phone data seized via a warrant based on one specific crime. See *Hughes*, unpub op at 3. On the basis of this inapt analogy, the court would throw out decades of clear constitutional law prohibiting searches for evidence of crimes not named in the warrant. This is error.

If initial overseizure and authorization to search all data extinguished Mr. Hughes's reasonable expectation of privacy in his data, then every warrant to search for data within an electronic device would effectively authorize the police to search any and all data within the device for evidence of any crime, or even just out of perverse curiosity. Such a holding would thoroughly undermine the legal requirement that a warrant be based on probable cause and particularly describe the things to be searched. The Court of Appeals' analysis extrapolates from

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dissimilar cases a holding that runs headlong into long-established Fourth Amendment jurisprudence.

For these reasons, amici answer the Court's second, third, and fourth questions in the negative. Mr. Hughes's reasonable expectation of privacy in his cell phone data was not extinguished when the police obtained the cell phone data in the prior criminal investigation for drug trafficking. The Fourth Amendment's safeguards are designed to protect that expectation of privacy while authorizing a reasonable invasion—*i.e.*, a particularized search—consistent with a probable-cause finding by a neutral and detached magistrate.

The search of the cell phone data in the instant robbery case was not within the scope of the search warrant issued during the criminal investigation into drug trafficking. The search was conducted after the initial data seizure at the request of the prosecutor in the robbery case for evidence of contacts between Mr. Hughes, his alleged accomplice Ms. Weber, and the robbery victim. Because this was a search for evidence of a crime for which there was no warrant, it is presumptively unconstitutional, and no exceptions to the warrant requirement apply.

III. Trial Counsel Was Ineffective for Failing to Challenge the Search of the Cell Phone Data in the Instant Case on Fourth Amendment Grounds.

Amici agree with Mr. Hughes that his attorney was ineffective. To establish ineffective assistance of counsel, a criminal defendant must show that counsel's performance fell below an objective standard of reasonableness and that and that the deficiency prejudiced the defense. *Wiggins v Smith*, 539 US 510, 521; 123 S Ct 2527; 156 L Ed 2d 471 (2003); *People v Armstrong*, 490 Mich 281, 289–290; 806 NW2d 676 (2011). Apparently, the trial attorney represented Mr. Hughes in the drug case as well as the robbery case. He should have examined the statement of probable cause in the context of that case and learned that there were no factual allegations in

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support of the warrant beyond the officer's training and experience. Straightforward legal research would have revealed that that allegation alone is insufficient.

Moreover, the attorney should easily have seen that the subsequent search in the robbery case was unlawful even if the warrant were valid. As the arguments and cases cited above show, well-established Fourth Amendment jurisprudence makes clear that officers could not search Mr. Hughes' cell phone for evidence of any crime except the drug distribution. Every case to have considered the issue has held that searches may only be conducted for evidence of the crime for which there is probable cause.

To establish ineffective assistance of counsel, a defendant must also show that "the deficiencies prejudiced the defendant," meaning there is "a reasonable probability that, but for counsels' unprofessional errors, the result of the proceeding would have been different." *People v Randolph*, 502 Mich 1, 9; 917 NW2d 249 (2018) (quotation marks omitted). Mr. Hughes was tried twice, and the jury twice unable to reach agreement, before prosecutors introduced evidence from the illegal search at trial and finally obtained a conviction. Here, there exists a reasonable probability that, had the trial attorney not failed to assert these clear constitutional arguments, the key evidence convicting Mr. Hughes would have been suppressed.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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July 31, 2020

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