No. 13-___

IN THE

Supreme Court of the United States

DAVID LEON RILEY,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari
to the California Court of Appeal, Fourth District

PETITION FOR A WRIT OF CERTIORARI

Patrick Morgan Ford
ATTORNEY AT LAW
1901 First Avenue
Suite 400
San Diego, CA 92101

Kevin K. Russell
GOLDSTEIN & RUSSELL, P.C.
5225 Wisconsin Ave., NW
Suite 404
Washington, DC 20036

Jeffrey L. Fisher
Counsel of Record
Pamela S. Karlan
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@law.stanford.edu

QUESTION PRESENTED

Whether or under what circumstances the Fourth Amendment permits police officers to conduct a warrantless search of the digital contents of an individual's cell phone seized from the person at the time of arrest.

TABLE OF CONTENTS

QUESTION PRESENTED i

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT CONSTITUTIONAL PROVISION.........1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT..................7

I. Federal And State Courts Are Openly Divided Over Whether The Fourth Amendment Permits Police Officers To Search The Digital Contents Of An Arrestee's Cell Phone Incident To Arrest. 7

   A. Background..7

   B. The Conflict 11

II. The Propriety Of Cell Phone Searches Incident To Arrest Should Be Resolved Now. 14

   A. The Issue Greatly Affects Personal Privacy And Day-To-Day Police Operations. 14

   B. Additional Percolation Would Not Aid This Court's Consideration Of The Issue.....16

III. This Case Is An Excellent Vehicle For The Court To Resolve The Conflict.............................19

IV. The Fourth Amendment Prohibits Searching The Digital Contents Of A Cell Phone Incident To Arrest. 21

A. Neither Of The *Chimel* Rationales For Searches Incident To Arrest Is Present Here. 22

B. The Profound Privacy Concerns Related To Cell Phones Make It Unreasonable To Search Them Without Warrants. 25

CONCLUSION 28

APPENDIX

Court of Appeal's Decision 1a

Denial of Discretionary Review 24a

California Supreme Court's opinion in *People v. Diaz* 25a

TABLE OF AUTHORITIES

Page(s)

Cases

Arizona v. Gant, 556 U.S. 332 (2009) ....*passim*

Atwater v. City of Lago Vista, 532 U.S. 318 (2001) 14

Chimel v. California, 395 U.S. 752 (1969).........*passim*

Commonwealth v. Phifer, 979 N.E.2d 210 (Mass. 2012) 12

Diaz v. California, 132 S. Ct. 94 (2011) 6

Hawkins v. State, 723 S.E.2d 924 (Ga. 2012) 12

Missouri v. McNeely, 133 S. Ct. 1552 (2013) 23

New York v. Belton, 453 U.S. 454 (1981)......15, 26, 27

Newhard v. Borders, 649 F. Supp. 2d 440 (W.D. Va. 2009)....................11

People v. Diaz, 244 P.3d 501 (Cal. 2011), *cert denied*, 132 S. Ct. 94 (2011)..................*passim*

People v. Nottoli, 130 Cal. Rptr. 3d 884 (Cal. Ct. App. 2011)....................15

Sibron v. New York, 392 U.S. 40 (1968)....................22

Silvan W. v. Briggs, 309 Fed. App'x 216 (10th Cir. 2009) 12

Smallwood v. State, 113 So. 3d 724 (Fla. 2013)....................*passim*

State v. Boyd, 992 A.2d 1071 (Conn. 2010), *cert. denied*, 131 S. Ct. 1474 (2011) 12

State v. Carroll, 778 N.W.2d 1 (Wis. 2010) 13

State v. Smith, 920 N.E.2d 949 (Ohio 2009), *cert. denied*, 131 S. Ct. 102 (2010)....................13, 23, 26

Stoner v. California, 376 U.S. 483 (1964)..................21

Thornton v. United States, 541 U.S. 615 (2004).......22

Trupiano v. United States, 334 U.S. 699 (1948).......21

United States v. Chadwick, 433 U.S. 1 (1977) ....*passim*

United States v. Curtis, 635 F.3d 704 (5th Cir. 2011) 24

United States v. Edwards, 415 U.S. 800 (1974) 20, 21

United States v. Finley, 477 F.3d 250 (5th Cir. 2007), *cert. denied*, 549 U.S. 1353 (2007) 12, 19

United States v. Flores-Lopez, 670 F.3d 803 (7th Cir. 2012) ....*passim*

United States v. Jones, 132 S. Ct. 945 (2012).....17, 28

United States v. Knights, 534 U.S. 112 (2001).........27

United States v. Murphy, 552 F.3d 405 (4th Cir. 2009), *cert. denied*, 129 S. Ct. 2016 (2009) 12, 19

United States v. Robinson, 414 U.S. 218 (1973) ....*passim*

United States v. Ross, 456 U.S. 798 (1982)...............26

United States v. Wurie, __ F.3d __, 2013 WL 2129119 (1st Cir. May 17, 2013)...................*passim*

Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) 27

Wyoming v. Houghton, 526 U.S. 295 (1999) 27

Constitutional Provision

U.S. Const., amend. IV .... *passim*

Statutes

28 U.S.C. § 1257(A) 1

Cal. Penal Code § 186.22(b)(4)(B) 5

Cal. Penal Code § 246 5

Other Authorities

Anderson, Leanne, People v. Diaz: *Warrantless Searches of Cellular Phones, Stretching the Search Incident to Arrest Exception Beyond the Breaking Point*, 39 W. St. U.L. Rev. 33 (2011) 18

Brown, Edmund G., Letter from Edmund G. Brown Jr., Governor, to Members of the California State Senate (Oct. 10, 2011) 6

Cal. Senate Bill 914 (2011) 6

Clark, M. Wesley, *Searching Cell Phones Seized Incident to Arrest*, FBI L. Enforcement Bull. (Feb. 2009) 14

Dwyer, Terrence P., *Cell Phones, Privacy, and the Fourth Amendment*, PoliceOne.com (Aug. 10, 2012) 16

Gershowitz, Adam M., *The iPhone Meets the Fourth Amendment*, 56 UCLA L. Rev. 27 (2008) 17

Kerr, Orin S., *Foreword: Accounting for Technological Change*, 36 Harv. J. L. & Pub. Pol'y 403 (2013) 17

Kish, Byron, Comment, *Cellphone Searches: Works Like a Computer, Protected Like a Pager?*, 60 Cath. U. L. Rev. 445 (2011) 18

Knott, Jana L., Note, *Is There an App for That? Reexamining the Doctrine of Search Incident to Arrest in the Context of Cell Phones*, 35 Okla. City U. L. Rev. 445 (2010)....................................18

Maclean, Charles R., *But, Your Honor, a Cell Phone Is Not a Cigarette Pack: An Immodest Call for a Return to* Chimel *Justifications for Cell Phone Memory Searches Incident to Arrest*, 6 Fed. Cts. L. Rev. 37 (2012)....................17

Mass. Mun. Police Training, Legal Update: *Searching Cell Phones Incident to Arrest* (2012) 16

Orso, Matthew E., *Cellular Phones, Warrantless Searches, and the New Frontier of Fourth Amendment Jurisprudence*, 50 Santa Clara L. Rev. 183 (2010)..17

Oxton, Chelsea, Note, *The Search Incident to Arrest Exception Plays Catch Up: Why Police May No Longer Search Cell Phones Incident to Arrest Without a Warrant*, 43 Creighton L. Rev. 1157 (2010)..18

Park, Eunice, *Traffic Ticket Reasonable, Cell Phone Search Not: Applying the Search-Incident-to-Arrest Exception to the Cell Phone as "Hybrid,"* 60 Drake L. Rev. 429 (2012)...........18

Snyder, Ashley B., Comment, *The Fourth Amendment and Warrantless Cell Phone Searches: When Is Your Cell Phone Protected?*, 46 Wake Forest L. Rev. 155 (2011)...18

Stewart, Ben E., Note, *Cell Phone Searches Incident to Arrest: A New Standard Based on* Arizona v. Gant, 99 Ky. L.J. 579 (2010-2011)......18

U.S. Dep't of Justice, Computer Crime & Intellectual Prop. Section, Criminal Div., *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations* (2009)..16

Warfield, J. Patrick, Note, *Putting a Square Peg in a Round Hole: The Search-Incident-to-Arrest Exception and Cellular Phones*, 34 Am. J. Trial Advoc. 165 (2010) 18

Woyke, Elizabeth, *Debate Over Warrantless Cellphone Searches Heats Up*, Forbes (Sept. 7, 2011)...26

PETITION FOR A WRIT OF CERTIORARI

Petitioner David Leon Riley respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal, Fourth District, Division One, in Case No. D059840.

OPINIONS BELOW

The opinion of the California Court of Appeal (Pet. App. 1a) is unpublished but can be found at 2013 WL 475242. The order of the California Supreme Court denying review (Pet. App. 24a) is unpublished. The relevant trial court proceedings and order are unpublished.

JURISDICTION

The California Supreme Court denied review on May 1, 2013. Pet. App. 24a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(A).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment states in relevant part: "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."

STATEMENT OF THE CASE

1. Early in the morning on August 22, 2009, the police pulled over petitioner David Riley, a local college student, who was driving his Lexus near his home in San Diego. The officer who initiated the stop, Charles Dunnigan, told petitioner that he had pulled him over for having expired tags. Pet. App. 3a, 5a. Officer Dunnigan soon learned that petitioner

was driving with a suspended license and thus decided to impound petitioner's car.

At the inception of an impound, San Diego Police Department policy requires officers to conduct an inventory search of the vehicle in order to document its contents. Pet. App. 5a. Officer Dunnigan called in another officer to assist with this task. Tr. 112. During the inventory search, the officers discovered two firearms under the car's hood. Pet. App. 3a, 6a. Based on this discovery, Officer Dunnigan placed petitioner under arrest for carrying concealed and loaded weapons. Pet. App. 6a.

During the arrest, Officer Dunnigan seized petitioner's cell phone from his person. Pet. App. 15a.[1] The phone was a Samsung Instinct M800 "smartphone" – a touch-screen device designed to compete with Apple's iPhone, capable of accessing the internet, capturing photos and videos, and storing both voice and text messages, among other functions. *Samsung Instinct Touchscreen Cell Phone: Features*, Samsung, http://www.samsung.com/us/mobile/cell-phones/SPH-M800ZKASPR-features (last visited July 28, 2013).

Upon seizing petitioner's phone, officers performed two separate, warrantless searches of its

[1] Some testimony presented at trial suggested that petitioner's phone might have been sitting on the seat of his car instead of on his person at the time of arrest. Pet. App. 15a. But the trial court found that "the cell phone . . . was on [Riley's] person at the time of the arrest," and the California Court of Appeal treated that finding as binding for purposes of appeal. *Id.* Accordingly, petitioner proceeds here on the basis of that finding as well.

digital contents. First, Officer Dunnigan scrolled through the phone's contents at the scene. He noticed that some words (apparently in text messages and the phone's contacts list) normally beginning with the letter "K" were preceded by the letter "C." Pet. App. 6a; Tr. at 114-15. Officer Dunnigan believed that the "CK" prefix referred to "Crip Killers," a slang term for members of a criminal gang known as the "Bloods." Tr. at 114-15.

The second search of petitioner's phone took place hours later at the police station. After conducting an interrogation in which petitioner was nonresponsive, Detective Duane Malinowski, a detective specializing in gang investigations, went through petitioner's cell phone. The detective searched through "a lot of stuff" on the phone "looking for evidence." Tr. 176, 193. Detective Malinowski found several photographs and videos that suggested petitioner was a member of a gang. Pet. App. 4a, 6a-7a. He also found a photo of petitioner with another person posing in front of a red Oldsmobile that the police suspected had been involved in a prior shooting.

In the shooting incident, three individuals had reportedly fired several shots at a passing car before fleeing in a red Oldsmobile. The police believed the shooting was gang related. After finding the photos on petitioner's phone indicating that he owned a red Oldsmobile and that he was connected to gang activity, and after ballistics testing suggested that the firearms seized during petitioner's traffic stop were used in the shooting incident, law enforcement came to believe that petitioner had been involved in that incident.

2. The State ultimately charged petitioner and two others with shooting at an occupied vehicle, attempted murder, and assault with a semiautomatic firearm.[2] The State also alleged that petitioner committed these crimes for the benefit of a criminal street gang – an allegation that not only rendered evidence of petitioner's alleged membership in a nefarious street gang admissible (and, indeed, highly relevant) at trial but also exposed him under California law to significantly enhanced sentences. The two co-defendants eventually pleaded guilty to involvement in the crime, but petitioner insisted on his innocence.

Prior to trial, petitioner moved to suppress all of the evidence the police had obtained during the searches of his cell phone. Tr. at 269-70. As is pertinent here, petitioner argued that the search of his cell phone violated the Fourth Amendment because it was performed without a warrant and without any exigency otherwise justifying the search. Tr. at 269-70. The trial judge rejected this argument, ruling that the searches were legitimate searches incident to arrest. Pet. App. 7a-8a.

The trial ended in a hung jury, but the State elected to retry petitioner. During the second trial (as at the first), none of the State's four eyewitnesses could identify petitioner as one of the shooters. The

---

[2] The State separately charged petitioner in conjunction with the traffic stop with carrying a concealed firearm in a vehicle, carrying a loaded firearm, and receiving stolen property. Petitioner pleaded guilty to all three charges and was sentenced to four years in prison. Those convictions are not at issue here.

State, therefore, relied on circumstantial evidence to connect petitioner to the crime. Among other things, the State showed the jury the photo of petitioner posing in front of the Oldsmobile with one of the co-defendants. In addition, the State presented videos from petitioner's cell phone showing street boxing fights involving both co-defendants, in which petitioner could be heard in the background encouraging the co-defendants and shouting gang-related comments.

The jury convicted petitioner on all three charges. Pursuant to California law, the trial court stayed petitioner's sentences on the two convictions carrying lesser sentences, activating petitioner's sentence only on the conviction that carried the longest sentence, in this case shooting at an occupied vehicle. Without the gang enhancement, this crime is punishable by a maximum of seven years in prison. Cal. Penal Code § 246. With the gang enhancement, however, petitioner's conviction for shooting at an occupied vehicle required the court to sentence him to fifteen years to life in prison. Pet. App. 1a; *see also* Cal. Penal Code § 186.22(b)(4)(B).

3. While petitioner's case was proceeding to trial, the California Supreme Court decided *People v. Diaz*, 244 P.3d 501 (Cal. 2011). In that decision, which is reproduced at Pet. App. 25a-65a, the California Supreme Court held by a 5-2 vote that the Fourth Amendment's search-incident-to-arrest doctrine permits the police to search a cell phone (even some time later at the stationhouse) whenever the phone is "immediately associated with [the arrestee's] person" at the time of the arrest. Pet. App. 33a-34a. The majority acknowledged that its holding deepened a

conflict on the issue among federal courts of appeals and state supreme courts. *Id.* 47a n.17. But the majority maintained that only this Court has the power to distinguish searching the digital contents of a cell phone from this Court's prior decisions allowing police officers to search the physical contents of ordinary containers incident to arrest. *Id.* 47a.

Mr. Diaz filed a petition for a writ of certiorari. Shortly thereafter, the California Legislature passed a bill requiring the police to obtain a search warrant before searching the contents of any "'portable electronic devices,' including cellular telephones." Supplemental Br. in Opp. 1, *Diaz v. California*, 132 S. Ct. 94 (2011) (No. 10-1231), 2011 WL 4366007, at *1 (describing Senate Bill 914 (2011)). After the State brought this bill to this Court's attention, *see id.*, the Court, at the State's urging, denied review. 132 S. Ct. 94 (2011). One week later, California Governor Jerry Brown vetoed the state legislature's bill, stating that the "courts are better suited to resolve the complex and case-specific issues relating to constitutional search-and-seizures protections." Letter from Edmund G. Brown Jr., Governor, to Members of the California State Senate (Oct. 10, 2011), *available at* http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0901-0950/sb_914_vt_20111009.html.

4. The California Court of Appeal affirmed petitioner's convictions. As is relevant here, the court held that "*Diaz* controls the present case" because the cell phone was "immediately associated with [petitioner's] person" at the time of his arrest. Pet. App. 15a.

5. Petitioner sought discretionary review in the California Supreme Court. As is pertinent here, he

renewed his argument that the warrantless searches of his cell phone violated the Fourth Amendment. Pet. for Review at 13-20. The California Supreme Court denied review without comment. Pet. App. 24a.

REASONS FOR GRANTING THE WRIT

Federal courts of appeals and state courts of last resort are openly and intractably divided over whether the Fourth Amendment permits the police to search the digital contents of an arrestee's cell phone incident to arrest. This issue is manifestly significant. It also has had more than sufficient time to percolate. This Court should use this case – which presents the issue in the context of a modern "smartphone" and a particularly comprehensive fact pattern – to resolve the conflict and to hold that the Fourth Amendment prohibits such searches without a warrant.

I. Federal And State Courts Are Openly Divided Over Whether The Fourth Amendment Permits Police Officers To Search The Digital Contents Of An Arrestee's Cell Phone Incident To Arrest.

A. Background

The conflict over whether the Fourth Amendment permits police officers to search the digital contents of cell phones incident to arrest arises from (1) seemingly divergent threads in this Court's precedent and (2) disagreement over the import of qualitative differences between cell phones and traditional physical containers that might be seized incident to arrest.

1. The modern framework for analyzing the search-incident-to-arrest exception to the warrant requirement emanates from *Chimel v. California*, 395 U.S. 752 (1969). In that case, this Court explained that, in order to "seize weapons and to prevent the destruction of evidence," the Fourth Amendment permits police officers to search "the arrestee's person" and "the area into which an arrestee might reach" while being arrested. *Id.* at 763-64 (internal quotation marks and citation omitted).

This Court elaborated on the search-incident-to-arrest doctrine in *United States v. Robinson*, 414 U.S. 218 (1973). There, this Court upheld an officer's search of a crumpled cigarette package found on the defendant's person during his arrest. Rejecting the argument that the search was unlawful because the package was unlikely to contain any weapon or evidence related to the crime of arrest, this Court reasoned that searches incident to arrest do not depend on "the probability in a particular arrest situation that weapons or evidence would in fact be found." *Id.* at 235. This Court also stated – perhaps even more categorically – that "[i]t is the fact of the lawful arrest which establishes the authority to search." *Id.*

At the same time, this Court has indicated that a lawful arrest does not always allow the police to search items they seize during that arrest. In *United States v. Chadwick*, 433 U.S. 1 (1977), this Court held that the Fourth Amendment did not allow officers to search a locked footlocker they had seized from a person while arresting him. This Court reasoned that once the officers had "exclusive control" over the footlocker, "there [was] no longer any danger

that the arrestee might gain access to the property to seize a weapon or destroy evidence." *Id.* at 15. More recently, this Court held that the search of an arrestee's vehicle incident to arrest violates the Fourth Amendment when the arrestee is handcuffed in the patrol car at the time of the search. *Arizona v. Gant*, 556 U.S. 332 (2009). Applying *Chimel*, this Court explained that where "there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply." *Id.* at 339.

2. Courts across the country are now "struggl[ing] to apply [this] Court's search-incident-to-arrest jurisprudence" – a set of legal rules largely developed decades ago, before the digital era – to the question whether the Fourth Amendment permits warrantless "search[es] of data on a cell phone seized from the person." *United States v. Wurie*, ___ F.3d ___, 2013 WL 2129119, at *4 (1st Cir. May 17, 2013).

Modern cell phones provide ready access to a vast array of personal data, and are distinct from the types of possessions – such as cigarette packages and footlockers – this Court has previously considered. For one thing, while physical containers face obvious space-related constraints, cell phones are capable of storing a virtually limitless amount of information in a single, compact device. Accordingly, individuals can carry exponentially larger quantities of personal information on their person than they ever could prior to the advent of cell phones.

Additionally, cell phones are capable of storing, recording, and accessing private information in a

variety of forms. Typical "smartphones" contain, for example, a digital rolodex of contacts, several months or even years of past text and email correspondence, and detailed appointment calendars. Indeed, "[e]ven the dumbest of modern cell phones gives the user access to large stores of information. For example, the 'TracFone Prepaid Cell Phone,' sold by Walgreens for $14.99, includes a camera, MMS (multimedia messaging service) picture messaging for sending and receiving photos, video, etc., mobile web access, text messaging, voicemail, call waiting, a voice recorder, and a phonebook that can hold 1000 entries." *United States v. Flores-Lopez*, 670 F.3d 803, 806 (7th Cir. 2012).

Beyond the advanced capabilities of the phones themselves, modern cell phones incorporate computers that allow individuals to access the internet, presenting additional privacy concerns. Thus, a search incident to arrest could, at the touch of a button, become a search of private and confidential information such as medical records, banking activity, and work-related emails. *See Smallwood v. State*, 113 So. 3d 724, 729 (Fla. 2013).[3] The contents of a person's cell phone can also contain intimate details and video of people's private lives, potentially exposing them to extreme embarrassment or worse. *See, e.g.*, *Newhard v. Borders*, 649 F. Supp.

---

[3] *See also* Maeve Duggan & Lee Rainie, Pew Research Ctr.'s Internet & Am. Life Project, Cell Phone Activities 2012, at 2 (2012), *available at* http://pewinternet.org/~/media//Files/Reports/2012/PIP_CellActivities_11.25.pdf (noting that 29% of cell phone owners use their phones for online banking, and 31% access medical information).

2d 440, 443-44 (W.D. Va. 2009) (noting that after the police arrested a school teacher for a DUI, they searched his cell phone and found sexually explicit photos of him and his girlfriend and then shared the photos with other officers and members of the public).

B. The Conflict

The struggle to apply this Court's precedent to the unique technological capabilities of cell phones has divided federal courts of appeals and state courts of last resort over whether police officers may search the digital contents of a cell phone incident to arrest. At least six courts hold that the Fourth Amendment permits such searches, while at least three others hold that it does not.

1. Three federal courts of appeals and three state courts of last resort have concluded that the Fourth Amendment permits police officers to search all or at least some of the digital contents of a cell phone incident to arrest. Three courts, including the California Supreme Court, rely on *Robinson* to hold that such searches are categorically permitted, reasoning "there is no legal basis" for distinguishing the digital contents of a cell phone from any other item that the police may discover and seize from a person incident to arrest. *People v. Diaz*, 244 P.3d 501, 510 (Cal. 2011), *cert. denied*, 132 S. Ct. 94 (2011) (reproduced at Pet. App. 43a); *United States v. Murphy*, 552 F.3d 405, 411-12 (4th Cir. 2009), *cert. denied*, 129 S. Ct. 2016 (2009); *United States v. Finley*, 477 F.3d 250, 259-60 (5th Cir. 2007), *cert. denied*, 549 U.S. 1353 (2007). Accordingly, these

courts hold that police officers may always search any digital contents within a cell phone without seeking a warrant.[4]

Three other courts have held that police may search certain digital files within cell phones incident to arrest, without opining whether every type of file is open to such inspection. *United States v. Flores-Lopez*, 670 F.3d 803, 809-10 (7th Cir. 2012) (search to obtain the cell phone's number); *Commonwealth v. Phifer*, 979 N.E.2d 210, 216 (Mass. 2012) (search of recent call list); *Hawkins v. State*, 723 S.E.2d 924, 926 (Ga. 2012) (search to obtain text messages that was limited "'as much as is reasonably practicable by the object of the search'") (internal quotation marks and citation omitted).

2. In direct contrast, one federal court of appeals and at least two state courts of last resort have held that the Fourth Amendment forbids police officers from searching any digital contents of a cell phone incident to an arrest without a warrant. *See United States v. Wurie*, ___ F.3d ___, 2013 WL 2129119, at *11 (1st Cir. May 17, 2013); *Smallwood v. State*, 113 So. 3d 724, 735-36 (Fla. 2013); *State v. Smith*, 920 N.E.2d 949, 956 (Ohio 2009), *cert. denied*, 131 S. Ct.

---

[4] The Tenth Circuit, in an unpublished opinion, has also endorsed the categorical proposition that "the permissible scope of a search incident to arrest includes the contents of a cell phone found on the arrestee's person." *Silvan W. v. Briggs*, 309 Fed. App'x 216, 225 (10th Cir. 2009). Furthermore, the Supreme Court of Connecticut has allowed cell phone searches in the context of the automobile exception, using reasoning that appears to apply with equal force in the search-incident-to-arrest context. *See State v. Boyd*, 992 A.2d 1071, 1089 & n.17 (Conn. 2010), *cert. denied*, 131 S. Ct. 1474 (2011).

102 (2010).[5] Two of these three decisions (*Wurie* and *Smallwood*) post-date this Court's earlier denials of certiorari on this issue and thus cement the conflict.

In the view of these courts, it "defies logic and common sense in this digital and technological age" to equate the contents of a cell phone with the kinds of physical objects at issue in *Robinson* and other cases, *Smallwood*, 113 So. 3d at 733, for cell phones are capable of storing information "wholly unlike any physical object found within a closed container." *Smith*, 920 N.E.2d at 954. Furthermore, these courts note that "[a] search of [a] cell phone's contents [is] not necessary to ensure officer safety" or to safeguard any evidence from "imminent destruction." *Id.* at 955. Consequently, these courts rely on *Chadwick* and *Gant* to hold that "warrantless cell phone data searches are *categorically* unlawful under the search-incident-to-arrest exception." *Wurie*, 2013 WL 2129119, at *10.

---

[5] While declining to base its holding on "whether there was a search incident to arrest," the Wisconsin Supreme Court also has held that police officers may not, absent exigent circumstances, conduct a warrantless search of images stored on a cell phone seized from a person they have detained and handcuffed. *State v. Carroll*, 778 N.W.2d 1, 12 & n.7 (Wis. 2010).

II. The Propriety Of Cell Phone Searches Incident To Arrest Should Be Resolved Now.

A. The Issue Greatly Affects Personal Privacy And Day-To-Day Police Operations.

1. "It is the rare arrestee today who is not found in possession of a cell phone."[6] The vast majority of American adults – approximately 91% as of June 2013 – now own a cell phone. Of those cell phone owners, 61% own smartphones, such as Apple's iPhone and the Samsung device at issue here.[7]

At the same time, police in the United States arrest thousands of people every day. In 2010 alone, there were nearly 11.5 million total adult arrests.[8] These arrests are often triggered by legal infractions as minor as failure to abide by the vehicle code. *Cf. Atwater v. City of Lago Vista*, 532 U.S. 318, 354-55 (2001) (upholding the constitutionality of the arrest of a motorist for failure to fasten her seat belt). Thus,

---

[6] M. Wesley Clark, *Searching Cell Phones Seized Incident to Arrest*, FBI L. Enforcement Bull., Feb. 2009, at 25, *available at* http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/2009-pdfs/february09leb.pdf.

[7] *See* Aaron Smith, Pew Research Ctr.'s Internet & Am. Life Project, Smartphone Ownership – 2013 Update 2, *available at* http://www.pewinternet.org/Reports/2013/Smartphone-Ownership-2013.aspx.

[8] Howard N. Snyder, Bureau of Justice Statistics, U.S. Dep't of Justice, Patterns and Trends: Arrest in the United States, 1990-2010, at 2 tbl.1 (2012), *available at* http://www.bjs.gov/content/pub/pdf/aus9010.pdf.

even routine arrests for minor offenses regularly give rise to the question presented. *See People v. Nottoli*, 130 Cal. Rptr. 3d 884, 893-94, 907 (Cal. Ct. App. 2011) (upholding an officer's "unqualified authority" to search data stored on an arrestee's Blackberry incident to arrest for driving under the influence).

2. In light of the frequency with which people are arrested with cell phones and the judiciary's confusion over whether the police may search the digital contents of those phones, this Court's intervention is critical. As this Court has remarked, "[w]hen a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority." *New York v. Belton*, 453 U.S. 454, 459-60 (1981). And insofar as the courts that have spoken on the issue have reached inconsistent results, the Fourth Amendment's protections currently vary according to state and jurisdictional lines.

Such uncertainty and inconsistency should not persist. To the extent that the Fourth Amendment permits cell phone searches incident to arrest, the current confusion over the issue may cause officers to refrain, in an abundance of caution, from undertaking this investigative tactic. On the other hand, if the Fourth Amendment prohibits such searches absent exigent circumstances or a warrant, officers may be conducting searches that violate legitimate expectations of privacy. Yet all law enforcement agencies can do at the moment is lament, as one agency does in its training materials, that the law in this area is "ambiguous" and "remains

unclear."[9] As one veteran of the New York State Police force recently remarked, the "time is rapidly approaching when the Supreme Court must decide the issue and provide a comprehensive statement on the subject."[10]

B. Additional Percolation Would Not Aid This Court's Consideration Of The Issue.

There is no good reason to delay resolution of the question presented in the hopes that additional lower court opinions will unearth new legal theories or converge on a uniform legal regime.

1. The issue has now been thoroughly ventilated. Numerous federal appellate and state supreme court decisions have explored the legal arguments arising from searching cell phones seized during arrests. Indeed, at least nine such decisions have already been issued – most with dissenting opinions – and

---

[9] Mass. Mun. Police Training, Legal Update: Searching Cell Phones Incident to Arrest 2 (2012), *available at* http://www.mass.gov/eopss/docs/mptc/cell-phone.pdf; *see also* Clark, *supra*, at 26-30 (FBI bulletin noting this "uncertainty"); Computer Crime & Intellectual Prop. Section, Criminal Div., U.S. Dep't of Justice, Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations 32-33 (2009), *available at* http://www.justice.gov/criminal/cybercrime/docs/ssmanual2009.pdf (noting that courts have "disagreed" about whether searching a cell phone incident to arrest is permissible).

[10] Terrence P. Dwyer, *Cell Phones, Privacy, and the Fourth Amendment*, PoliceOne.com (Aug. 10, 2012), http://www.policeone.com/investigations/articles/5907286-Cell-phones-privacy-and-the-Fourth-Amendment/.

some dedicating dozens of pages to the issue. *See supra* Part I.B. (By comparison, when the Solicitor General recommended, and this Court granted, certiorari in *United States v. Jones*, 132 S. Ct. 945 (2012), involving the propriety of warrantless GPS tracking, there were only four such opinions on the issue. *See* Pet. for Writ of Cert. at 20-23, *Jones*, 132 S. Ct. 945 (No. 10-1259).) These courts now openly acknowledge the increasing division. *See, e.g.*, *United States v. Wurie*, ___ F.3d ___, 2013 WL 2129119, at *5 (1st Cir. May 17, 2013); *United States v. Flores-Lopez*, 670 F.3d 803, 805 (7th Cir. 2012); *Smallwood v. State*, 113 So. 3d 724, 733 n.5 (Fla. 2013); *People v. Diaz*, Pet. App. 47a n.17 (Cal. 2011). The First Circuit recently refused to consider the issue en banc, with two judges deeming such a rehearing pointless and calling instead for this Court to resolve the issue. *United States v. Wurie*, ___ F.3d ___, 2013 WL 3869965 (1st Cir. July 29, 2013).

In addition, there is a rich body of academic scholarship exploring the doctrinal and policy-related consequences of different legal regimes that might govern this issue. One article surveys the different approaches that a court might take without itself taking a position. *See* Adam M. Gershowitz, *The iPhone Meets the Fourth Amendment*, 56 UCLA L. Rev. 27 (2008). Another article argues that warrantless cell phone searches incident to arrest should be categorically prohibited. *See* Charles R. Maclean, *But, Your Honor, a Cell Phone Is Not a Cigarette Pack: An Immodest Call for a Return to the* Chimel *Justifications for Cell Phone Memory Searches Incident to Arrest*, 6 Fed. Cts. L. Rev. 37 (2012). Still others contend that such searches should be permitted only under certain

circumstances. *See, e.g.*, Orin S. Kerr, *Foreword: Accounting for Technological Change*, 36 Harv. J. L. & Pub. Pol'y 403 (2013); Matthew E. Orso, *Cellular Phones, Warrantless Searches, and the New Frontier of Fourth Amendment Jurisprudence*, 50 Santa Clara L. Rev. 183 (2010); Eunice Park, *Traffic Ticket Reasonable, Cell Phone Search Not: Applying the Search-Incident-to-Arrest Exception to the Cell Phone as "Hybrid,"* 60 Drake L. Rev. 429 (2012).[11]

2. Additional percolation is particularly unlikely to reap any benefits in light of the nature of courts' disagreement over the question presented. On one side of the split, courts believe that this Court's decisions in *Robinson* and the other cases from the 1970's constitute "binding precedent" that requires

---

[11] There also are a number of student-authored works offering perceptive analyses. *See, e.g.*, Byron Kish, Comment, *Cellphone Searches: Works Like a Computer, Protected Like a Pager?*, 60 Cath. U. L. Rev. 445 (2011); Jana L. Knott, Note, *Is There an App for That? Reexamining the Doctrine of Search Incident to Arrest in the Context of Cell Phones*, 35 Okla. City U. L. Rev. 445 (2010); Ben E. Stewart, Note, *Cell Phone Searches Incident to Arrest: A New Standard Based on* Arizona v. Gant, 99 Ky. L.J. 579 (2010-2011); Chelsea Oxton, Note, *The Search Incident to Arrest Exception Plays Catch Up: Why Police May No Longer Search Cell Phones Incident to Arrest Without a Warrant*, 43 Creighton L. Rev. 1157 (2010); Leanne Anderson, People v. Diaz*: Warrantless Searches of Cellular Phones, Stretching the Search Incident to Arrest Exception Beyond the Breaking Point*, 39 W. St. U. L. Rev. 33 (2011); Ashley B. Snyder, Comment, *The Fourth Amendment and Warrantless Cell Phone Searches: When Is Your Cell Phone Protected?*, 46 Wake Forest L. Rev. 155 (2011); J. Patrick Warfield, Note, *Putting a Square Peg in a Round Hole: The Search-Incident-to-Arrest Exception and Cellular Phones*, 34 Am. J. Trial Advoc. 165 (2010).

treating searches of cell phones identically to searches of any other objects. *Diaz*, Pet. App. 47a; *see also id.* at 51a (Kennard, J., concurring) (agreeing with the majority's approval of unrestricted cell phone searches "[u]nder the compulsion of directly applicable Supreme Court precedent"); *United States v. Finley*, 477 F.3d 250, 259-60 (5th Cir. 2007) (treating *Robinson* as controlling); *Flores-Lopez*, 670 F.3d at 805 (characterizing *Finley* and *Murphy* as relying on a "literal reading" of *Robinson*). Accordingly, these courts opine that "[i]f . . . the wisdom of [this Court's] decisions 'must be newly evaluated' in light of modern technology, then that reevaluation must be undertaken by the high court itself." *Diaz*, Pet. App. 47a (citation omitted).

On the other side of the split, courts do not think that this Court's prior cases control the outcome here. These courts perceive the digital contents of cell phones as being qualitatively different than the simple, physical items that this Court has previously treated as automatically searchable. *Smallwood*, 113 So. 3d at 731-32. That being so, these courts maintain that "*Robinson* is neither factually nor legally on point," *id.* at 730, and that it is perfectly "compatible" with this Court's jurisprudence to forbid the police from searching cell phones under the search-incident-to-arrest doctrine, *Wurie*, 2013 WL 2129119, at *10.

Only this Court can decide which of these two conflicting views of its precedent is correct.

III. This Case Is An Excellent Vehicle For The Court To Resolve The Conflict.

The facts of this case, unlike many of the others involving searches of cell phones seized during

arrests, would allow this Court to consider different variations on the propriety of cell phone searches and thus to deliver comprehensive guidance on the issue. This is so for two reasons.

First, this case involves a range of different types of digital content stored on cell phones. The officers in this case examined not only simple text viewable on rudimentary of cell phones but also photos and video recordings more characteristic of smartphones. This case thus affords this Court the opportunity to consider – as one court has suggested might be important, *see Flores-Lopez*, 670 F.3d at 809-10 – whether any particular kinds of digital content present different privacy concerns than others.

Second, petitioner challenges the constitutionality of two distinct searches of his cell phone's digital contents: one at the scene of his arrest and another at the stationhouse several hours later by an officer who was not even present at the scene during the arrest. Many cases present one or the other scenario, but rarely does a case cleanly present both.

This Court's precedent suggests that such temporal and geographic considerations could be relevant to the propriety of searching cell phones seized during arrest. In *United States v. Edwards*, 415 U.S. 800 (1974), this Court upheld a warrantless search of a detainee's clothes that he was still wearing ten hours after his arrest, stating at one point that a "reasonable delay" in effectuating a search incident to arrest does not undermine its legitimacy. *Id.* at 805. On the other hand, this Court has stated that "a search can be incident to arrest only if it is substantially contemporaneous with the arrest," *Stoner v. California*, 376 U.S. 483, 486

(1964), and that a warrantless search incident to arrest must be grounded in the "inherent necessities of the situation *at the time of the arrest*," *Chimel v. California*, 395 U.S. 752, 759 (1969) (emphasis added) (quoting *Trupiano v. United States*, 334 U.S. 699, 705, 708 (1948)). Moreover, this Court explained in *United States v. Chadwick*, 433 U.S. 1 (1977), that "warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest if the search is *remote in time or place* from the arrest." *Id.* at 15 (emphasis added) (internal quotation marks and citation omitted). Accordingly, if this Court were to address only a single cell phone search at the scene or later in a stationhouse, it might leave police and lower courts still unsure of the law governing the other situation.

IV. The Fourth Amendment Prohibits Searching The Digital Contents Of A Cell Phone Incident To Arrest.

Contrary to the California Supreme Court's view, the Fourth Amendment forbids police officers from searching cell phones incident to arrest for two reasons. First, once a cell phone is securely in police control, neither of the reasons identified in *Chimel v. California*, 395 U.S. 752 (1969), for conducting searches incident to arrest justifies searching the phone's digital contents. Second, the profound privacy concerns attendant to cell phones make it unreasonable for police officers to search digital content without a warrant.

A. Neither Of The *Chimel* Rationales For Searches Incident To Arrest Is Present Here.

1. As this Court has repeatedly explained, the search-incident-to-arrest exception requires a search to be "'reasonably limited' by the 'need to seize weapons' and 'to prevent the destruction of evidence.'" *Chimel*, 395 U.S. at 764 (quoting *Sibron v. New York*, 392 U.S. 40, 67 (1968)). "If there is no possibility" that the arrestee could gain access to a weapon or destroy evidence, "both justifications for the search-incident-to-arrest exception are absent and the rule does not apply." *Arizona v. Gant*, 556 U.S. 332, 339 (2009); *see also Thornton v. United States*, 541 U.S. 615, 627 (2004) (Scalia, J., concurring in the judgment) ("[C]onducting a *Chimel* search is not the Government's right; it is an exception – justified by necessity. . . .").

Neither of the *Chimel* justifications applies to the digital contents of cell phones. While officers may inspect a cell phone's physical components to detect weapons, a phone's *digital* contents – such as text messages, emails, photos, or videos – can never threaten officer safety. Furthermore, once officers separate an arrestee from his phone, they can eliminate any risk that he might destroy digital evidence on the phone. While some courts have speculated that the data in cell phones might be subject to remote "wiping" or destruction, *e.g.*, *United States v. Flores-Lopez*, 670 F.3d 803, 807-09 (7th Cir. 2012), the First Circuit has correctly recognized that officers have at least three options to prevent such action. They may turn off the phone (or put it in airplane mode); place it in an inexpensive bag that

prevents any signals from entering or escaping; or "mirror (copy) the entire cell phone contents . . . without looking at the copy." *United States v. Wurie*, ___ F.3d ___, 2013 WL 2129119, at *9 (1st Cir. May 17, 2013) (citation and internal quotation marks omitted). Thus, once a cell phone is in police custody, "the state has satisfied its immediate interest in collecting and preserving evidence." *State v. Smith*, 920 N.E.2d 949, 955 (Ohio 2009). If it wishes to search the phone's contents, it may seek a warrant. *Id.*; *cf. Missouri v. McNeely*, 133 S. Ct. 1552, 1562 (2013) (noting that police can now can obtain warrants within minutes).

2. The California Supreme Court resisted this analysis on the ground that this Court's holding in *United States v. Robinson*, 414 U.S. 218 (1973), forecloses it. According to the California Supreme Court, this Court's analysis in that case (and in subsequent cases referencing *Robinson*) affords "no legal basis" for distinguishing between a seized item itself and its contents. *People v. Diaz*, Pet. App. 25a, 43a (Cal. 2011). Once the police seize an item incident to an arrest, they automatically may "*open and examine*" the item – even digital contents within a cell phone. *Id.* 42a.

This reasoning overreads this Court's cases. *Robinson* and other cases discussing its holding stand only for the proposition that, where there is *some chance* that a search is needed to protect police or preserve evidence, courts are not required to engage in a "case-by-case adjudication" to determine "the probability in a particular arrest" that the arrestee in fact has weapons or destructible evidence. *Robinson*, 414 U.S. at 235. Thus, even though it is unlikely that

a cigarette package (or a wallet or purse) might hold a weapon, it is possible it might contain, for instance, a razor blade. Where, however, there is *no chance* that the search is necessary to discover weapons or to preserve evidence, this Court's holdings in *United States v. Chadwick*, 433 U.S. 1, 15 (1977), and *Gant* instruct that the Fourth Amendment prohibits a warrantless search. *See Chadwick*, 433 U.S. at 15 (prohibiting search of a footlocker seized during arrest); *Gant*, 556 U.S. at 343 (same for search of a vehicle incident to arrest).

The California Supreme Court pushed *Chadwick* and *Gant* aside, asserting that they are irrelevant because they "involved a search of the area within an arrestee's immediate control, not of the arrestee's person." Pet. App. 37a n.9; *see also* Pet. App. 32a-33a. Yet – as even another court on California's side of the conflict at issue has recognized – there is no basis in law or logic for distinguishing between the two situations. *See United States v. Curtis*, 635 F.3d 704, 712 (5th Cir. 2011). As this Court explained in *Chimel*, the justification necessary for a search incident to arrest is always the same, regardless of whether the police wish to search an arrestee's person or the area "within his immediate control." 395 U.S. at 762-63. In either case, the search must be justified – at least within the realm of possibility – by the need "to remove any weapons," and "to prevent [evidence] concealment or destruction." *Id.* Once "there is no longer any danger that the arrestee might gain access to [property confiscated incident to arrest] to seize a weapon or destroy evidence," the police may not search the property without obtaining a warrant. *Chadwick*, 433 U.S. at 15.

The California Supreme Court's distinction between property seized from the arrestee's "person" and property seized from his "immediate control" would also lead to arbitrary results. Under such a rule, the police could search the digital contents of any cell phone taken from someone's hands or pockets. But if the police arrested someone in her office, they apparently would be unable to search her phone if at that moment it were sitting on her desk. Or if police arrested the driver of a car, they would be unable to search a phone resting in a cupholder. Governmental access to the most sensitive details of a person's private life should hinge on more than such happenstance.

B. The Profound Privacy Concerns Related To Cell Phones Make It Unreasonable To Search Them Without Warrants.

It is also inappropriate to extend *Robinson* to cell phones because "the electronic devices that operate as cell phones of today are materially distinguishable from the static, limited-capacity" containers of the past. *Smallwood v. State*, 113 So. 3d 724, 732 (Fla. 2013). Unlike those containers, cell phones contain "vast" amounts of "very personal" information – from text-based messages to email (some of which may be confidential business material or privileged work product) to appointment records to photos and videos. *Id.* at 732-33. Indeed, a cell phone is not really even "a 'container' in any normal sense of that word." *Flores-Lopez*, 670 F.3d at 806. It is a mini, yet powerful, computer that happens to include a phone.

A cell phone, therefore, should not be treated as "a closed container for purposes of a Fourth

Amendment analysis." *Smith*, 920 N.E.2d at 954. To hold otherwise – and thus to "allow[] the police to search [the data on a cell phone] without a warrant any time they conduct a lawful arrest" – would "create 'a serious and recurring threat to the privacy of countless individuals.'" *Wurie*, 2013 WL 2129119, at *12 (quoting *Gant*, 556 U.S. at 345); *see also* Elizabeth Woyke, *Debate Over Warrantless Cellphone Searches Heats Up*, Forbes (Sept. 7, 2011), http://www.forbes.com/sites/elizabethwoyke/2011/09/07/debate-over-warrantless-cellphone-searches-heats-up/ (explaining that allowing such searches would expose sensitive information commonly stored on businesspersons' cell phones to governmental view).

The California Supreme Court deemed the distinction between cell phones and ordinary containers immaterial, asserting that this Court's decisions "do not support the view that whether the police must get a warrant before searching an item they have properly seized from an arrestee's person incident to a lawful custodial arrest depends on the item's character, including its capacity for storing personal information." Pet. App. 35a (emphasis omitted). In particular, the California Supreme Court asserted that *New York v. Belton*, 453 U.S. 454 (1981), and *United States v. Ross*, 456 U.S. 798 (1982), "expressly rejected the view that the validity of a warrantless search depends on the character of the searched item." *Diaz*, Pet. App. 36a-37a.

But neither case controls here. As the First Circuit has noted, this Court, "more than thirty-five years ago, could not have envisioned a world in which the vast majority of arrestees would be carrying on their person an item containing not physical evidence

but a vast store of intangible data – data that is not immediately destructible and poses no threat to the arresting officers." *Wurie*, 2013 WL 2129119, at *10. Indeed, this Court in *Belton* characterized a "container" as "any object capable of holding another object." 453 U.S. at 460 n.4. This description bespeaks something that holds physical items, not mere digital text and images.

It bears remembering, moreover, that "the ultimate measure of the constitutionality of a governmental search is 'reasonableness.'" *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995). "[T]he reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate government interests.'" *United States v. Knights*, 534 U.S. 112, 118-19 (2001) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

Applying this traditional default formula to the situation here yields a clear outcome: searching a cell phone without a warrant intrudes on personal privacy to an extraordinary degree, and is unnecessary to serve any legitimate governmental interest this Court has identified in its search-incident-to-arrest cases. Indeed, several current Members of this Court have recognized in the related context of GPS tracking that the Fourth Amendment must be sensitive to new technologies enabling police to easily obtain massive amounts of personal information that, at least as a practical matter, would previously have been inaccessible. *See United States v. Jones*, 132 S. Ct. 945, 955-56 (2012)

(Sotomayor, J., concurring); *id.* at 963-64 (Alito, J., concurring in the judgment). Cell phones have wrought just this kind of technological sea change. Accordingly, the Fourth Amendment should require the detached scrutiny of a neutral magistrate before allowing the police to rummage through the digital contents of such a device. Anything less would unduly safeguard the intimate details of the citizenry's business dealings and private affairs.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Jeffrey L. Fisher
Counsel of Record
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@stanford.edu

Patrick Morgan Ford
ATTORNEY AT LAW
1901 First Avenue
Suite 400
San Diego, CA 92101

Kevin K. Russell
GOLDSTEIN &
RUSSELL, P.C.
5225 Wisconsin Ave., NW
Suite 404
Washington, DC 20036

July 30, 2013