No. 13-1234

In the

SUPREME COURT OF THE UNITED STATES

DAVID LEON RILEY,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent,

*****

On Writ of Certiorari To
The Supreme Court of California

*****

BRIEF FOR PETITIONER

*****

Team # 2

Counsel for Petitioner

QUESTIONS PRESENTED

(1)

Whether a police search of the digital contents of a smartphone following its seizure incident to arrest is exempt from the Fourth Amendment warrant requirement?

(2)

Even if the search in this case is exempt from the Fourth Amendment warrant requirement, is the warrantless search of the digital contents of a personal cell phone reasonable under this Court's jurisprudence?

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STATEMENT OF FACTS

San Diego Police performed a vehicle stop on David Riley after observing his vehicle's expired registration tags. During the stop, police discovered that Riley was driving with a suspended license. Officers made the decision to impound the car, and inventory its contents pursuant to department procedures. While conducting this search, an officer discovered two handguns under the hood of Riley's car and placed him under arrest. At the scene, the arresting officer took Riley's cellphone, examined the recent text messages, and discovered what appeared to be gang communications. Once Riley was at the police station, a detective the arresting officers contacted reviewed photographs and video clips on the phone. The officers considered this to be a valid search incident to arrest. The California Court of Appeals held that Riley's cellphone was immediately associated with his person when arrested, and therefore the search incident to arrest was lawful. *People v. Riley*, 2013 Cal. Ct. App. LEXIS 1033, at *1-29 (4th Dist. Feb. 8, 2013), *cert. granted*, (U.S. Jan. 15, 2014) (No. 13-1234).

1. On August 2, 2009, an Oldsmobile belonging to David Riley was parked in front of the Urias family home near a road intersection. Three men sitting near Riley's car opened fire with two guns (.40 and .45 caliber casings were recovered from the scene), as Mr. Webster, a rival gang member, passed through the intersection – causing his vehicle to crash. *Id.* at 2. The Oldsmobile exited the scene, and was located by police the following day in a gang area hidden under a car cover. *Id.* Three eyewitnesses to the shooting declined to positively identify Riley as one of the shooters. *Id.* at 3.

2. On August 22, 2009, Officer Dunnigan performed a traffic stop on Riley, who was driving his other car (a Lexus), because the vehicle's registration tags were expired. *Id.* at 5. Officer Dunnigan then discovered that Riley possessed an expired license, and decided to

impound the car pursuant to department procedure. *Id.* at 6. Officer Ruggerio arrived on scene to assist in the impound and inventory search of the vehicle, while Officer Dunnigan waited with Riley on an embankment. *Id.* at 7. Upon examining the engine compartment, Officer Ruggerio discovered two handguns, and Officer Dunnigan placed Riley under arrest. Neither officer was aware of Riley's identity, nor his suspected connection with the prior shooting. *Id.* Officer Dunnigan noticed several indicia of gang affiliation in the car, and then searched Riley's cellphone including text message entries that started with the letter "K" preceded by the letter "C," commonly used to signify "Crip Killer." *Id.* at 8; J. Order 1-3, 2. Officer Dunnigan contacted gang specialist Detective Malinowski who met Riley and the officers at the police station. The Detective proceeded to look through the phone, watch video clips of gang street boxing containing Riley's voice, and view photographs of Riley making gang signs. *Riley*, 2013 Cal. Ct. App. LEXIS 1033, at 8. At trial, a gang expert testified to Riley's membership in the Lincoln Park gang, the rivalry with the gang of Mr. Webster, and the plausible gang connection to the shooting.

4. Riley filed a motion to suppress the evidence seized during the inventory search, and the contents of the cell phone search. The trial court upheld the cellphone search as within the permissible scope of a booking search using the reasoning of *People v. Diaz*, 51 Cal.4th 84 (2011). On appeal, the Court of Appeals held that the cell phone was found on Riley's person which, "establishes that Riley's cell phone was immediately associated with his person when he was arrested, and therefore the search of the cell phone was lawful whether or not an exigency still existed." *Riley*, 2013 Cal. Ct. App. LEXIS 1033, at 19.

The California Supreme Court declined to review.

This Court granted certiorari. (Jan. 15, 2014).

SUMMARY OF ARGUMENT

I. A police examination of a cellphone incident to arrest to reveal the contents of that device is a Fourth Amendment search that requires a warrant based upon probable cause. This Court's Fourth Amendment jurisprudence establishes that a search for general criminal investigation is prohibited. Recognizing the exigencies and the benefit of a bright-line rule, this Court established a search incident to arrest exception to the warrant requirement that must be justified by either a heightened risk to police safety or due to risk of evidence destruction by the arrestee. Because a cellphone poses no risk to officer safety, and because there is not a heightened risk of evidence destruction, a cellphone may never be searched without a warrant incident to arrest. This Court should hold that the search in this case was unconstitutional by applying the search incident to arrest doctrine to prohibit the search of cellphones using the search incident arrest exception.

II. Despite the search incident to lawful arrest doctrine, the warrantless search of the contents of a personal cell phone is impermissible because it violates the reasonable expectation of privacy. This court's jurisprudence has established that a reasonable expectation exists when an expectation of privacy is exhibited, and that expectation is one that society is prepared to recognize as reasonable. Because Riley exhibited an expectation of privacy in his cell phone, and society accepts that a cell phone is a personal item containing a wealth of private information, the warrantless search of a cell phone is unreasonable. The finding of unreasonableness is not mitigated by any exceptions because there was neither exigency nor identification purposes behind the search. As such, this court must find that the warrantless search of a cell phone violates the reasonable expectation of privacy that one has in its digital contents and is therefore unconstitutional.

ARGUMENT

I. A POLICE SEARCH OF A CELLPHONE SEIZED INCIDENT TO ARREST IS A FOURTH AMENDMENT SEARCH REQUIRING A WARRANT BASED UPON PROBABLE CAUSE.

Unchecked government power is no less dangerous today than at the time the Bill of Rights was written, indeed, the ability of government to extract voluminous private data from small digital devices makes protection against "unreasonable search and seizure" all the more vital. U.S. Const. amend. IV. The search of a cell phone incident to a lawful arrest is *per se* unconstitutional, and a violation of the user's reasonable expectation of privacy in the digital contents of the device. Unlike this Court's recognized exceptions for a search of individuals or the passenger compartment in a motor vehicle, which serve to identify potential threats to police and preserve evidence, the search of a cell phone exposes intimate details of the user's private life that the Fourth Amendment was intended to shield from unjustified government intrusion. A cell phone is not a 'searchable' container within the meaning of this Court's jurisprudence. Any argument to the contrary rests on a legal fiction incompatible with the Fourth Amendment, and antithetical to the adoption of bright line rules this Court has adopted to clearly delineate police authority. A cell phone is a means of communication as well as a repository of private texts, photographs, bank records, music, documents, calendars, and other types of data traditionally located in the home, and afforded substantial protection from government intrusion.

A. The History of the Fourth Amendment and This Court's Fourth Amendment Decisions Establish That Police Searches Incident to Arrest Unnecessary to Preserve Evidence or Protect Police Are A Fourth Amendment Search.

The Fourth Amendment states, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and

particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. This Court has interpreted the Reasonableness Clause and Warrant Clause together, holding that warrantless searches are, "*per se* unreasonable under the Fourth Amendment, subject only to a few specifically established and well-defined exceptions." *Katz v. U.S.*, 389 U.S. 347, 357 (1967); *see also Investigations and Police Practices*, 42 Geo. L.J. Ann. Rev. Crim. Proc. 3, 22 (2013). In the context of search incident to a lawful arrest, warrantless searches are both reasonable, and an exception to the warrant requirement. *U.S. v. Robinson*, 414 U.S. 218, 235 (1973). Nonetheless, this Court has explained that,

> It is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants whenever reasonably practicable . . . This rule rests upon the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities.

Chimel v. California, 395 U.S. 752, 758 (1969) (holding unconstitutional a warrantless house search) (quoting *Trupiano v. U.S.*, 334 U.S. 699, 702 (1948)).

The strong warrant preference expressed by the Court in *Robinson*, has its foundation in our colonial experience under the Act of Frauds, specifically that of 1696, which authorized "customs officers in the colonies . . . to conduct warrantless searches at their discretion," and were augmented with writs of assistance that gave customs officers power to search based on subjective suspicion. Blane Michael, *Reading the Fourth Amendment: Guidance for the Mischief That Gave it Birth*, 85 N.Y.U. L. Rev. 905, 907 (2010). James Otis, a Massachusetts lawyer, challenged this practice in the oft cited The Writs of Assistance Case, *see*, *e.g.*, *Frank v. Maryland*, 359 U.S. 360, 364 (1959), advancing two themes, "the fundamental Privilege of House" and "the inevitability of abuse when government officials have the sort of unlimited discretion sanctioned by the writ or assistance," which James Madison incorporated in writing

the Fourth Amendment. *Id.* (quoting Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. Rev. 925, 946-47 (1997)).

Today, even where a warrant is not constitutionally necessary, the Fourth Amendment, "generally bars officials from undertaking a search or seizure absent individualized suspicion." *Chandler v. Miller*, 520 U.S. 305, 308 (1997). "[O]nly when a governmental purpose aside from crime-solving is at stake [does the court] engage in the free-form 'reasonableness'. . . suspicionless searches are *never* allowed if their principal end is ordinary crime-solving." *Maryland v. King*, 133 S. Ct. 1958, 1982 (2013) (Scalia, J., dissenting); *see also Florida v. Jardines*, 133 S. Ct. 1409 (2013) (holding a dog sniff of curtilage around a home to be an unconstitutional search). For instance, this Court recently held that the placement of a GPS tracker on the car of a suspected drug trafficker, and its subsequent warrantless use, was an unconstitutional trespass and search of the defendant's property. *U.S. v. Jones*, 132 S. Ct. 945, 953 (2012).

This Court's holdings in *Jones* and *Jardines* explicitly prohibit police searches conducted without a warrant for the purposes of crime-solving, even where the police intrusion was minimal, unknown to the targeted citizen, and would have been reasonable if performed using a warrant. Police action in both cases violated the Fourth Amendment because the prohibition against unreasonable search does not attach based on the level of physical intrusion; rather, warrantless searches are *per se* unreasonable, and the burden is on the government to justify infringement. Even in *King,* where this Court held the collection of DNA subsequent to a lawful arrest was permissible, the holding was for the narrow purpose of "knowing for an absolute certainty the identity of the person arrested, in knowing whether he is wanted elsewhere, and in ensuring his identification in the event he flees prosecution." *King* 133 S. Ct. at 1977. A

cellphone search accomplishes none of the *King* identification objectives, and is certainly a less reliable form of identification than biometric verification. Accordingly, a police search of the digital contents of a cellphone is both a trespass and a Fourth Amendment search requiring a warrant based upon probable cause, absent some other recognized exception.

B. The Decisions of this Court in *Chimel*, *Belton*, *Gant*, and *Chadwick* Establish That A Cellphone Search is Never Justified as a Search Incident to Arrest.

Recognizing the exigencies of law enforcement, this Court developed an exception to the warrant requirement enabling police to conduct a search of a person incident to lawful arrest. *U.S. v. Robinson*, 414 U.S. 218, 236 (1973) (upholding a jacket pocket search that uncovered heroin tablets in a cigarette container). The Court stated that search incident to lawful arrest, "of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also 'reasonable' search under that Amendment." *Id.* at 235. In *Belton*, this Court applied *Robinson* to permit a search of the passenger compartment of a vehicle because, "lawful custodial arrest justifies the infringement of any privacy interests the arrestee may have." *New York v. Belton*, 453 U.S. 454, 460 (1981). That holding created a bright-line rule that eliminated an ex post examination of facts in a particular case by judges, and instead fixed an arbitrary level of permissible police conduct incident to arrest. *Id*. at 463-64 (Brennan, J., dissenting) (arguing "the court today turns its back on the product of [the *Chimel* analysis]"); *see Thornton v. U.S.*, 541 U.S. 615, 623 (2004) (Rehnquist, J.) ("The need for a clear rule, readily understood by police officers and not depending on differing estimates of what items were or were not within reach of an arrestee at any particular moment, justifies the sort of generalization which *Belton* enunciated."). Generally, these early cases permitted a search incident to arrest, without regard to the container searched, so long as the predicate arrest was valid; thereby clearly delineating the rights of citizens and the authority of police. *See Thorton*, 541 U.S. at 235.

Since *Belton*, this Court has consistently cabined the scope of police searches. The container doctrine announced in *Chadwick* was one judicial mechanism for limiting police discretion. In *Chadwick*, federal agents were tipped off to the transportation of drugs via Amtrak, and interceded to arrest and search three suspects when a suspected passenger offloaded a double-locked footlocker into the trunk of a car at his destination. *U.S. v. Chadwick*, 433 U.S. 1, 4-5 (1977). This Court held that search unconstitutional, reasoning that an individual who places personal effects inside a double-locked footlocker expects them to remain free from public inspection, and explaining that, "one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause." *Id.* at 11. Similarly, one who utilizes password technology on their cellphone has manifested an expectation of privacy, and is due protection of the warrant clause. However, a manifestation of privacy is not dispositive in the search incident arrest context, because that exception applies in all circumstances without an individualized examination of the arrestee's expectation of privacy.

The Fourth Amendment and this Court's holdings establish that searches incident to arrest are justified only where necessary to ensure officer safety or to preserve evidence, *Chimel*, 395 U.S. at 763, such as a search of an arrestee's pockets, *Robinson* 395 U.S. at 236, or the contemporaneous search of the passenger compartment of a car, *New York v. Belton*, 453 U.S. at 460 (defining a container as "any object capable of holding another object"). Recently in *Gant*, in the context of automobiles, this Court held that the search incident to arrest exception may only be invoked to search "a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Arizona v. Gant*, 556 U.S. 332, 343 (2009). The Court explained that the factual predicate of an arrest dictates the permissible scope of the subsequent search, "[w]hereas Belton

and Thornton were arrested for drug offenses, Gant was arrested for driving with a suspended license – an offense for which police could not expect to find evidence in the passenger compartment of Gant's car." *Id.* at 344. Given the universal constitutional rationale underlying the search-incident doctrine, if a search-incident arrest of a passenger compartment of a vehicle is unconstitutional because the search is unrelated to the justification to seize an individual, a search of a cellphone incident to a traffic stop is equally unconstitutional.

The issue before the Court is whether police may, by invoking the search incident to arrest exception, look through an arrestee's cellphone data, including: call records, texts, email, photographs, videos, voice recordings, and bank records, among other things, for the purpose of police safety or discovering evidence. Several Circuit Courts have permitted a cellphone search incident to arrest of: a phone found on arrestee's person, *Silvan W. v. Briggs*, 309 F.3d Appx. 216, 225 (10th Cir. 2009); to confirm a cellphone's number, *U.S. v. Flores-Lopez*, 670 F.3d 803, 810 (2012); of call records and text messages viewed during police interrogation, *U.S. v. Finley*, 477 F.3d 250, 254 (7th Cir. 2007); and of evidence discovered in text messages but unrelated to the arresting charge, *U.S. v. Curtis*, 635 F.3d 704, 710-11 (7th Cir. 2011) (declining to apply *Gant* retroactively, and explaining that if it did, the court would "decline to suppress the text messages under the exclusionary rule's good-faith exception.").

The First Circuit, in contrast, recently held that warrantless phone searches are not authorized by the search incident to arrest exception, *U.S. v. Wurie*, 728 F.3d 1 (1st Cir. 2013), *cert. granted*, 2014 LEXIS 650 (Jan. 17, 2014), and only the courts in *Wurie* and *Flores-Lopez* considered the permissible scope of a cellphone search in light of this Court's holding in *Gant*. Similar disagreement exists among state courts. *Compare Gracie v. State*, 92 So. 3d 806 (Ala. Crim. App. 2011) (holding cellphone search following arrest does not violate Fourth

Amendment), *with State v. Smith*, 920 N.E.2d 949, 956 (Ohio 2009) (holding warrantless search of cellphone prohibited by Fourth Amendment). Clearly, reasonable minds can disagree, but this Court's precedents make clear that a warrantless search incident to arrest of a cellphone is never justified because it does not ensure police safety or preserve evidence – the two justifications underlying all searches incident to arrest. *See, e.g., Thornton* 541 U.S. at 225-26.

1. The Police Safety Justification to Search a Cellphone Is Incompatible with this Court's Search Incident to Arrest Cases.

Under *Gant,* a search incident to arrest is justified when an arrestee is in possession or recently occupied a container, in order to protect police safety, or to preserve evidence where evidence related to the arrest could be expected given the nature of the underlying crime. Unlike jacket pockets, a passenger compartment, backpack, or other accessible container, a cellphone fails to meet the definition of container for the purposes of police safety. Plainly, a cellphone *contains* an immense quantity of data, *Smallwood v. Florida*, 113 So. 3d 724, 731-32 (Fla. 2013), but a cellphone is not a container in the sense that it obstructs other objects from the plain view of police, by shielding them within. *Wurie* 728 F.3d at 10. There is no risk of a criminal suspect drawing a weapon from within the phone; rather, officers who seize a phone know exactly what lies within: data. *Id.* Judge Posner observantly noted that a clever criminal could have a stun gun that masqueraded as a cellphone; however, that court then rejected the government's police safety argument because, "once in the hands of an arresting officer, [the phone] endangered no one." *Flores-Lopez*, 670 F.3d at 806.

In this case, the police were clearly underwhelmed by the Mr. Riley's possession of a cellphone because Riley was permitted to keep his phone while officers conducted their inventory search, and only after that search uncovered two handguns and indicia of gang activity did the police seize and search Riley's cellphone. The detached concern of officers is supported

by data of routine traffic stops where the risk on average (1988-1997) of officer homicide is just 1 in 6.7 million encounters, and the risk of assault is 1 in 10,256. Illya D. Lichtenberg & Alisa Smith, *How Dangerous Are Routine Police-Citizen Traffic Stops?*, 29 J. Crim. Just. 418, 424 (2001). The Fourth Amendment and this Court's cases do not permit post hoc rationalizations of police searches. Absent a police safety justification, there must be a compelling evidentiary expectation for police to search a cellphone incident to arrest.

2. The Preservation of Evidence Justification to Search a Cellphone Is Incompatible with this Court's Search Incident to Arrest Cases.

Because a cellphone search does not ensure officer safety, there must be a compelling evidentiary reason to compel the extension of the *Belton* search-incident arrest rationale to cellphones. An argument advanced by police is that a cellphone is a treasure trove of data that could pertain to crime, and which is vulnerable to destruction by the defendant, an automated computer program, or a third-party. Therefore, it would be imperative to search the phone immediately to ensure that probative evidence is preserved. This may be true in the abstract; however, "the searches at issue in *Robinson* and *Edwards* were the kinds of reasonable, self-limiting searches that do not offend the Fourth Amendment, even when conducted without a warrant." *Wurie*, 728 F.3d at 9-10. In upholding a search for the sole purpose of verifying the phone's number, the court in *Flores-Lopez* explained that, "the police did not search the contents of the defendant's cell phone, but were content to obtain the cell phone's number." 670 F.3d at 810. While the Seventh Circuit's holding is rational and consistent with this Court's holding in *Gant*, the police in *Flores-Lopez* did not engage the broad evidentiary expedition conducted by police in this case. A critical defect in the expansion of the search incident to arrest doctrine to the facts here, and cellphones generally, is the inability for that search to be self-limiting. Because exceptions to the warrant requirement apply whether or not the underlying justification

exists in a particular case, it is especially important for the rule to have a compelling justification. The practical effect of permitting cellphone searches to preserve evidence would be to erode the Fourth Amendment without a corresponding benefit in securing evidence in the overwhelming majority of cases.

The scope of cellphone searches is particularly problematic because discovering evidence necessarily requires the type of generalized investigative search specifically prohibited by this Court's case law and the Fourth Amendment. Functionally, the issue is this: How do police know what to look for amongst 16 GB of data? After finding gang indicators, should the police have checked to see if Riley was paid for allegedly shooting the victim? Perhaps they should have searched his Facebook page to identify Riley's associates, but maybe Mr. Riley prefers Twitter? As these questions make clear, a police officer would have to be permitted to snoop carte blanche through the digital contents of a cellphone to uncover probative evidence, and for the search incident to arrest exception to be of any value.

Thus, the only way for police to be assured that no evidence on the phone was destroyed would be to look at *everything*. Courts have permitted such searches in the context of pagers, because the entire contents of pagers can be destroyed instantaneously with the push of a single button or the removal from a power source. *U.S. v. Ortiz*, 84 F.3d 977, 984 (7th Cir. 1996), *cert. denied*, 84 F.3d 977 (1996). Unlike the deletion of pager data, wiping a cellphone requires multiple steps, and police using reasonable police procedures can easily intervene to prevent such physical destruction by the arrestee. Equally unconvincing is the argument that remote destruction warrants immediate search. Police can easily prevent data deletion by placing the phone in a protective faraday cage or removing the battery. *Flores-Lopez*, 670 F.3d at 809.

Moreover, a search occurs regardless of its scope; the fact that police "learned what they learned" by physically intruding on a suspects property is "enough to establish that a search occurred." *Jardines*, 133 S. Ct. at 1417. Communication devices have traditionally enjoyed heightened Fourth Amendment protection, and courts recognize that citizens have a reasonable expectation of privacy in the contents of their phone. *See*, *e.g., U.S. v. Zavala*, 541 F.3d 563, 577 (5th Cir. 2008) (establishing a reasonable expectation of privacy in a cell phone because of its private contents). The remote risk of the deletion of phone data does not warrant the search of all phone data in *every* circumstance of arrest. Such a search is clearly prohibited by the Fourth Amendment requirement that searches be reasonable, and would be totally divorced from the rationale that supports this Court's search incident to arrest doctrine. Accordingly, this Court should adhere to the bright-line rule established in *Belton* as applied in subsequent cases as recently as *Gant*, and hold that the search of a cellphone is not permissible under the search-incident arrest rule.

II. RILEY HAD A REASONABLE EXPECTATION OF PRIVACY IN THE CONTENTS OF HIS CELL PHONE AND THEREFORE THE WARRANTLESS SEARCH WAS UNREASONABLE.

The Fourth Amendment protects people, not places, "from unreasonable government intrusions into their legitimate expectations of privacy." *Chadwick*, 433 U.S. 1 at 7. Reasonable intrusions into legitimate expectations of privacy include plain view, *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971), exigent circumstances, *Payton v. New York*, 445 U.S. 573, 590 (1980), and administrative searches or searches pursuant to national security, *U.S. v. Martinez-Fuerte*, 428 U.S. 543 (1976). This Court's holdings make clear that searches conducted solely for crime-solving purposes are not "reasonable intrusions." *See Maryland v. King*, 133 S. Ct. at 1982. The police officers that examined the contents of Riley's personal cell

phone conducted an unreasonable search because it violated both of the standards laid out by this Court establishing Riley's reasonable expectation of privacy.

A. Riley Had A Reasonable Expectation Of Privacy In The Digital Contents Of His Cell Phone.

The test to determine whether a reasonable expectation of privacy exists stems from Justice Harlan's concurring opinion in *Katz*- "the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" 389 U.S. at 361 (Harlan, J., concurring).

1. Riley Exhibited An Actual Or Subjective Expectation Of Privacy In The Contents Of His Cell Phone.

Regarding the first prong of the test, Riley exhibited an actual expectation of privacy. The Fifth Circuit held that where an individual takes steps to exclude others from accessing his cell phone, he has a reasonable expectation of privacy in its contents. *Finley*, 477 F.3d at 258. Even if there was no password set on Riley's cell phone, it is widely understood that in relation to the reasonableness of warrantless searches, cell phones differ from containers because of their unique ability to store a wealth of private and personal information. *U.S. v. Zavala*, 541 F.3d at 577. Because his cell phone contained "private and personal information," Riley had an expectation that its contents would remain private when he was stopped by police. In his concurring opinion to this Court's decision in *Thornton*, Justice Scalia explained that searches should be limited to situations where evidence of the crime of arrest could be discovered. 541 U.S. at 632. Here, Riley had an expectation that his cell phone would not be searched because no evidence relevant his expired vehicle registration tags could be found in it.

2. Riley's Expectation of Privacy in the Contents of His Cell Phone Is One That Society Is Prepared to Recognize as Reasonable.

The expectation of privacy that individuals have in the contents of their cell phones has been held to be reasonable. *See U.S. v. Finley*, 477 F.3d at 259, (finding a reasonable expectation of privacy in the contents of a cell phone). The recognition of an expectation of privacy in a cell phone is evident in the development of wiretap and telecommunication statutes, as well as several of this Court's decisions. Many courts, such as the Fifth Circuit in *Zavala*, recognize that expectations of privacy in cell phones are reasonable and protected by the Fourth Amendment. *See Zavala*, 541 F.3d at 577, (holding that there is a reasonable expectation of privacy in a cell phone's "emails, text messages, call histories, address books and subscriber numbers").

This court has held that the expectation of privacy in public items or things visible in plain view is not reasonable. *See Florida v. Riley,* 488 U.S. 445, 451-52 (1989) (finding no reasonable expectation of privacy in marijuana plants being grown in plain view on a property); *California v. Greenwood*, 486 U.S. 35, 39-41 (1988) (finding no reasonable expectation of privacy in the garbage one puts out at the curb); *U.S. v. Ellison*, 462 F.3d 557, 561-63 (6th Cir. 2006) (finding no reasonable expectation of privacy in a license plate number visible on a public road). As such, the warrantless search of cellphone contents visible in plain view would be reasonable under this Court's jurisprudence. The contents of Riley's cell phone, however, were not in plain view, making the search of such contents unreasonable.

Riley's expectation of privacy in the contents of his cell phone was reasonable. In *Smith v. Maryland*, a pen register case, this court held that no reasonable expectation of privacy exists in the phone numbers dialed from a cell phone. 442 U.S. 735, 745 (1979). *Smith* is distinguishable from the case at hand in two critical ways. First, this Court in *Smith* based its holding partially on the fact that the evidence obtained from the pen register (phone numbers) was voluntarily made public by the defendant, and "a person has no legitimate expectation of

privacy in information he voluntarily turns over to third parties." *Id*. at 743-744. Unlike the defendant in *Smith*, Riley did not voluntarily surrender the information obtained from his cell phone to authorities. Moreover, the defendant in *Smith* dialed phone numbers into an automated telephone company operator system, and as this Court stated, "telephone users… know that they must convey numerical information to the phone company; that the phone company has facilities for recording this information; and that the phone company does in fact record this information." *Id*. at 743. Riley, however, did not convey the pictures and contacts list on his cell phone to anyone, let alone the police officers that searched it. Therefore, a finding of reasonableness in Riley's expectation of privacy is not at odds with the precedent set forth in *Smith*.

The second fundamental difference between this case and *Smith* lies in the narrow scope of the *Smith* holding, which stressed the "limited capabilities" of pen registers. *Id*. at 742.

> "These devices do not hear sound. They disclose only the telephone numbers that have been dialed—a means of establishing communication. Neither the purport of any communication between the caller and the recipient of the call, their identities, nor whether the call was even completed is disclosed by pen registers."

Id. at 741. This language reflects the material differences between pen registers and cell phones, and therefore clearly frees this Court from being bound by its ruling. The only information a pen register can provide is numbers- there are no names associated with the numbers, as can be found in a cell phone's contacts list, there are no written communications, as can be found in a cell phone's text messages, and there are no photographs, as can be discovered while scrolling through someone's photo albums. The scope of the warrantless search of Riley's cell phone is vastly broader than the "search" in *Smith*. Police officers testified to "looking through a lot of stuff," including, at the very least, Riley's photographs and videos. As such, any argument by Respondent that *Smith* precludes a finding of a reasonable expectation of privacy in this case is misguided.

B. Riley's reasonable expectation of privacy was violated when officers searched the digital contents of his cell phone.

The search of Riley's cell phone is inconsistent with the protections of the Fourth Amendment because it violated his reasonable expectation of privacy. The information stored in a cell phone is "the kind of information one would previously have stored in one's home and that would have been off-limits to officers performing a search incident to arrest." *U.S. v Wurie*, 728 F.3d at 8. "At the touch of a button, a cell phone search becomes a house search." *Id.* (*quoting Flores-Lopez*, 670 F.3d at 806). "No longer are all of our papers and effects stored solely in satchels, briefcases, cabinets, and folders. Rather, many of them are stored digitally on hard drives, flash drives, memory cards, and discs." Bryan A. Stillwagon, *Bringing an End to Warrantless Cell Phone Searches*, 42 Ga. L. Rev. 1165, 1194 (2008). In virtually no circumstance, besides exigency (which the record clearly indicates is absent here), would a police officer be able to go into a home without a warrant and search through photo albums, social media pages on a laptop, bank statements, letters or any other personal information now commonly found in a cell phone. The fact that all of this information happened to be sitting in Riley's pocket does not negate the warrant requirement- if anything, it reiterates the necessity for protection and moderation in this rapidly growing field.

C. The Search of Riley's Cell Phone Was Not for Identification or Exigency and Therefore the Government's Interest Is Insufficient to Overcome Riley's Reasonable Expectation of Privacy.

This Court has held that warrantless searches are reasonable if they serve to identify a criminal which is "a well-established, legitimate government interest." *Maryland v. King*, 133 S.Ct. at 1963. Any argument that respondent makes justifying the warrantless search for identification purposes is inapposite- a cellphone search is not a reliable form of identification, and the government lacks a legitimate justification to overcome the user's expectation of privacy.

This case fits squarely within Justice Scalia's analysis of the *King* case. In *King*, an arrestee was swabbed for DNA after arrest. *Id*. at 1965. Although the majority held that the DNA swab was equivalent to a photo or fingerprint and therefore constitutional, Scalia's dissenting opinion argued that there are unique differences between DNA and fingerprinting or photographs;

> "What DNA adds—what makes it a valuable weapon in the law-enforcement arsenal—is the ability to solve unsolved crimes, by matching old crime-scene evidence against the profiles of people whose identities are already known... Solving unsolved crimes is a noble objective, but it occupies a lower place in the American pantheon of noble objectives than the protection of our people from suspicionless law-enforcement searches. The Fourth Amendment must prevail."

Id. In *King*, the fruits of the warrantless search (DNA results) were allowed because of the "unparalleled accuracy" that DNA provides. *Id*. at 1964. Cell phones do not share the "unparalleled accuracy" inherent in DNA identification, and are a far inferior form of identification. The primary use of DNA evidence is to identify an individual and it is equipped to provide an accurate match. The same cannot be said for cell phones. Here, crime solving, rather than identification, was the only plausible objective of the police in searching Riley's cell phone. In *King*, the dissent stressed that the DNA results did not serve to identify, rather, they simply served to solve open cases. *Id*. at 1989. "The mere fact that law enforcement may be made more efficient can never itself justify disregard of the Fourth Amendment." (Wurie, 728 F.3d at 11 (*quoting Mincey v. Arizona*, 437 U.S. 385, 393 (1978))).

Several circuits have permitted cellphone searches for the purpose of affirmatively identifying criminal suspects involved in drug and other crimes that use cellphones as a primary and anonymous form of communication. *See U.S. v. Finley,* 477 F.3d at 260 (holding that incriminating evidence found in arrestee's text messages after a drug sting was permissible as a search incident to lawful arrest); *U.S. v. Pineda-Areola*, 372 Fed.Appx. 661 (7th Cir. 2010) (holding that the search of a defendant's cell phone to identify him as the suspected drug dealer

was permissible). While this purpose is narrow, this Court's privacy cases establish that it is not permissible to search an object without a warrant or other recognized exception where the individual has manifested a reasonable expectation of privacy.

The government's need to obtain and preserve evidence in this case is outweighed by Riley's expectation of privacy. "Privacy rights in the phone are tempered by an arresting officer's need to preserve evidence. This need is an important law enforcement component of the rationale for permitting a search of a suspect incident to a valid arrest." *U.S. v. Young*, 278 Fed.Appx. 242, 245 (4th Cir. 2008). However, "[t]he individual police officer must not be allowed so much latitude that inventory searches are turned into 'a purposeful and general means of discovering evidence of crime.'" *Florida v. Wells*, 495 U.S. 1, 4 (1990) (*quoting Colorado v. Bertine*, 479 U.S. 367, 375 (1987)). Riley's actions satisfied the *Katz* test for exhibiting an expectation of privacy, and case law lays out the standard that the expectation of privacy in a personal cell phone is a reasonable one. Unlike the search of defendants in *Finley* and *Pineda-Areola*, the search of Riley's cell phone did not serve to identify a suspect. The search was not urgent in nature, necessary to preserve evidence or stop ongoing criminal activity (*see Kentucky. v. King*, 131 S. Ct. 1849, 1853-54 (2011) (a warrantless search conducted pursuant to police smelling marijuana and hearing what they believed to be the destruction of evidence was permissible under the exigency exception). The court in *Wurie* attempted to prevent law enforcement from having "access to a 'virtual warehouse' of an individual's 'most intimate communications and photographs without probable cause if the individual is subject to a custodial arrest, even for something as minor as a traffic violation," and if the court were find this search reasonable, the "virtual warehouse" that the *Wurie* court tried to protect would be exposed and open for access. *Wurie*, 728 F.3d at 9.

We do not contend that police do not have the ability to search a cell phone under any circumstances or exceptions. However, this case does not fit within any of those exceptions. Riley had a reasonable expectation of privacy in the contents of his cell phone. If the court today were to hold that the evidence obtained from the warrantless search of Riley's cell phone is permissible, not only would it would be giving the green light for law enforcement everywhere to freely engage in intrusive, warrantless searches, but it would also be going against the very type of intrusion that the Framers intended to protect. The law may be murky in its application to cell phones, but this court must ultimately remember its responsibility to uphold the Constitution and all of the privacy that it protects. In the words of Justice Scalia, "…to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a "search" within the meaning of the Fourth Amendment when it was adopted." *Jones*, 132 S.Ct. at 949 (2012).

CONCLUSION

The Fourth Amendment and this Court's precedents establish that a search of a cellphone incident to a lawful arrest is never permissible absent a warrant obtained pursuant to probable cause. This Court should dismiss the government's search incident to arrest rationale because it is not justified by either police safety or the need to preserve evidence as required by *Belton*. Furthermore, the right of privacy in the digital contents of a cellphone is well established by this Court's precedents. The reasonable expectation of privacy one has in the digital contents of his cell phone must never be overcome by the government's general interest in crime-solving. Because the warrantless search in this case violated Riley's reasonable expectation of privacy, and because the only purpose of the search in this case was to hunt for evidence of other potential crimes, the search is unconstitutional.