

No. 13-132

IN THE
Supreme Court of the United States

DAVID LEON RILEY,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

**On Writ of Certiorari To The California Court of
Appeal, Fourth Appellate District**

**BRIEF OF *AMICI CURIAE* ASSOCIATION OF
STATE CRIMINAL INVESTIGATIVE AGENCIES,
INTERNATIONAL ASSOCIATION OF CHIEFS OF
POLICE, NATIONAL SHERIFFS' ASSOCIATION,
MAJOR CITY CHIEFS ASSOCIATION,
MAJOR COUNTY SHERIFFS' ASSOCIATION,
ASSOCIATION OF PROSECUTING ATTORNEYS,
AND ROCKLAND COUNTY DISTRICT ATTORNEY,
IN SUPPORT OF RESPONDENT**

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QUESTION PRESENTED

Whether the officers' searches of the cell phone seized incident to petitioner's arrest were lawful under the Fourth Amendment.

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INTEREST OF THE *AMICI CURIAE*¹

The Association of State Criminal Investigative Agencies is composed of 39 state criminal investigative agencies, including state divisions/bureaus of criminal investigation and state police agencies. As the representative of the law enforcement officials who daily put their lives on the line to protect the public and solve crimes, the Association has an intense interest in law enforcement's ability to quickly and accurately collect information that will protect the public, ensure officer safety, and enable the successful prosecution of criminals.

Founded in 1893, the International Association of Chiefs of Police (IACP), with more than 22,000 members in 101 countries, is the world's oldest and largest association of police executives. IACP's mission, throughout the history of the association, has been to identify, address, and provide solutions to urgent law-enforcement issues. IACP represents the interests of law-enforcement agencies at the federal, state, and local levels. Association members include law-enforcement officers and law-enforcement administrators who are charged with the responsibility of protecting citizens from criminals, both nationally and internationally.

The National Sheriffs' Association, a 26 U.S.C. § 501(c)(4) non-profit, was formed in 1940 to promote

¹ No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

the fair and efficient administration of criminal justice and protect the Office of Sheriffs. The Association has over 21,000 members and is the advocate for over 3,000 sheriffs located throughout the United States. The National Sheriffs' Association promotes the public-interest goals and policies of law enforcement in the nation, and it participates in judicial processes where the vital interests of law enforcement and its members are being affected.

The Major City Chiefs Association is a professional association of Chief police executives representing the largest cities in the United States, Canada, and the United Kingdom. MCCA membership comprises Chiefs and Sheriffs of the 66 largest law-enforcement agencies in the United States, nine largest in Canada and two in the United Kingdom. They serve 89.9 million people (69.5 US; 10.5 Canada; 9.9 UK) with a sworn workforce of 239,063 (161,664 US; 20,506 Canada; 56,893 UK) officers and non-sworn personnel.

The Major County Sheriffs' Association, a 26 U.S.C. § 501(c)(4) non-profit, is an association of elected sheriffs representing the nation's largest counties with populations of 500,000 people or more, serving over 100 million Americans. The Major County Sheriffs' Association works to promote a greater understanding of law-enforcement strategies to address future problems and identify law-enforcement challenges facing the members of its organization.

The Association of Prosecuting Attorneys (APA) was founded as a national organization to represent all prosecutors and provide additional resources such as training and technical assistance in an effort to develop proactive and innovative prosecutorial practices that prevent crime, ensure equal justice, and

make our communities safer. The APA acts as a global forum for the exchange of ideas, allowing prosecutors to collaborate with each other and other criminal-justice partners. The APA also serves as an advocate for prosecutors on emerging issues related to the administration of justice, among other ways by submitting briefs as *amicus curiae* in appropriate cases. The APA's board of directors includes current elected prosecutors from different states throughout the nation.

The Rockland County District Attorney's Office has the responsibility and authority to both investigate and prosecute crimes and offenses in Rockland County and undertake all efforts necessary to proactively prevent the commission of crimes. Rockland County is a suburb located about 25 miles from New York City. Rockland's law-enforcement community is typical of smaller jurisdictions that lack the manpower and fiscal resources that many larger jurisdictions possess. Thus, rules that further local law enforcement's ability to quickly gather information as incidents occur are paramount to both protecting local residents and prosecuting offenders. Limitations of the kind contemplated in this case often have an outsized effect on smaller jurisdictions.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Riley asks this Court for a blanket rule that “when officers seize smart phones incident to lawful arrests, they may not search the phones’ digital contents without first obtaining a warrant.” Pet. 3. Such a rule is inconsistent with this Court’s precedents and is bad public policy.

Consider police officers who pull alongside a sedan parked near a local courthouse. The officers observe bomb-making materials in the front seat, two steaming cups of coffee, and a single passenger—the driver—who is frantically sending a text message on his smartphone. The officers have probable cause to arrest. But if they are barred from examining the phone without first obtaining a warrant, they will be unable to locate and stop the driver’s accomplice—the bomber—who is preparing to detonate a bomb inside the courthouse.

Or imagine officers responding to an APB who arrest a man matching the description of a known child predator. The arrestee’s smartphone holds an email that contains the address of a young child who has been kidnapped and is being abused by the arrestee’s accomplice. But by the time the officers obtain a warrant and arrive on the scene, the child has been removed to another location or murdered.

Such exigencies go far beyond the immediate safety of officers and members of the public. If officers arrest a man as part of a routine traffic stop, he may call an accomplice with his “one phone call” to remotely erase all the contents of his smartphone before the police can obtain a warrant to search it, that would have revealed thousands of pictures and videos containing child pornography.

The above scenarios are all hypothetical. But the anecdotes set forth below are not; they arise from real cases involving real criminal acts and evidence. The anecdotes demonstrate that there is a compelling governmental interest in searching cell phones incident to arrest in all cases, an interest that, as with any search incident to arrest, overcomes any expectation of privacy in personal effects. Accordingly, the Court should affirm the California Supreme Court and hold that officers may search smartphones incident to arrest without first obtaining a warrant. Alternatively, and at a bare minimum, the Court should grant law enforcement officials the leeway to search cell phones incident to arrest when they have reason to believe the phones contain evidence of past, present, or future crime.

STATEMENT

San Diego police officers stopped petitioner Riley due to expired registration tags on the car he was driving. During the stop, the officers discovered Riley was driving with a suspended license and impounded the car. A standard inventory search revealed two loaded firearms, hidden in the engine compartment. The police arrested Riley.

In the officers' search incident to their arrest of Riley, an officer cursorily examined the address book in Riley's cell phone and saw that a number of entries started with "ck," a well-known mark that Blood gang members use to signify "Crip Killer."

At the police station, a supplemental review of Riley's cell phone revealed videos and pictures of gang activity. And the police later learned—through means not at issue here—that Riley's cell phone had been used near the location of a shooting that caused a Crip gang member to drive off the road and crash his car.

Additional evidence at trial established that Riley and fellow Lincoln Park gang members were in fact involved in that shooting. A jury convicted Riley of shooting at an occupied vehicle, attempted murder, and assault with a semiautomatic firearm.

The trial court denied Riley's motion to suppress the cell phone evidence based on *People v. Diaz*, 51 Cal. 4th 84, 93, 244 P.3d 501 (2011). The California Supreme Court in *Diaz*, relying on this Court's decisions in *United States v. Robinson*, 414 U.S. 218 (1973), *United States v. Edwards*, 415 U.S. 800 (1974), and *United States v. Chadwick*, 433 U.S. 1 (1977), determined that the cell phone was appropriately searched:

[T]he key question in this case is whether defendant's cell phone was "personal property . . . immediately associated with [his] person" (*Chadwick, supra*, 433 U.S. at p. 15) like the cigarette package in *Robinson* and the clothes in *Edwards*. If it was, then the delayed warrantless search was a valid search incident to arrest. [*Diaz*, 244 P.3d at 505.]

The *Diaz* court concluded that the phone was personal property on the defendant's person at the time of his lawful arrest and was therefore subject to search under this Court's precedents.

Riley appealed his conviction, and the California Court of Appeals affirmed. That court held that *Diaz* controlled, and that the search of Riley’s phone was a valid search incident to arrest because the phone “was ‘immediately associated’ with [Riley’s] ‘person’ when he was stopped.” *People v. Riley*, 2013 WL 475242 (Cal. Ct. App. Feb. 8, 2013). The California Supreme Court denied Riley’s petition for review without comment.

ARGUMENT

I. THIS COURT’S PRECEDENT AND SOUND POLICY SUPPORT THE WARRANTLESS SEARCH OF A CELL PHONE INCIDENT TO ARREST.

This Court in *United States v. Robinson*, 414 U.S. 218 (1973), recognized that a search incident to arrest includes police authority to search any items found on the arrestee, and a more limited authority to search the surrounding area. 414 U.S. at 224. The first authority flows from “the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidence of crime.” *Weeks v. United States*, 232 U.S. 383, 392 (1914). The law enforcement interest at stake is “gathering evidence relevant to the crime for which the suspect had been arrested.” *Thornton v. United States*, 541 U.S. 615, 629 (2004) (Scalia, J., concurring in the judgment). And that interest is particularly compelling in the context of smartphones.

With respect to the authority to search the surrounding area, police conduct is more circumscribed. But the historical reason for such a search—“to find and seize things connected with the crime as its fruits or as the means by which it was committed,” *Harris v. United States*, 331 U.S. 145, 152–53 (1947)—is again directly applicable to smartphones.

Cell phones are unique, however, in that their data can be erased remotely or become inaccessible due to encryption or a passcode in relatively short order. This presents challenges for law enforcement unparalleled in any other context this Court has dealt with previously. As explained below, this challenge can only be met by placing the search of a smartphone incident to arrest within the search-incident-to-arrest doctrine this Court articulated in *Robinson* and *United States v. Edwards*, 415 U.S. 800 (1974).

**A. SMARTPHONE DATA IS HIGHLY
SUSCEPTIBLE TO DESTRUCTION.**

It is true that smartphones can contain a broad variety of personal information. It is equally true that smartphones can contain a broad variety of criminal evidence, from photos, to videos, to text messages. Critically—and very unlike traditional personal property—the memory on a cell phone can be erased (wiped) remotely with a simple command.²

² There is even a smartphone app being developed (*Zones*) that would wipe a phone’s memory based on when the phone is carried into certain locations—such as a police station. Chirgwin, *WhisperSystems creates “suicide pill” for phones*, *The Register* (Jan. 28, 2014), www.theregister.co.uk/2014/01/28whisper_systems_creates_suicide_pill_for_phones/.

A criminal caught with incriminating letters in his coat pocket can do nothing to destroy the letters once the police have taken possession of him. The same criminal with incriminating emails on his smartphone can place his one phone call at the police station to an accomplice who will remotely erase those emails with the swipe of a button. And such evidence destruction is hardly theoretical.

In Orange County, California, the Sheriff's Office was involved in an investigation of a county-wide criminal organization involving narcotic sales and money laundering, tied to storefront marijuana dispensaries. While the Sheriff's Office executed search warrants against the organization, its members were told to immediately destroy all digital documentation on their cell phones.

A later investigation revealed that the members' cell phones contained conversations and records that detailed the organization's criminal activity. Numerous defendants of the organization later admitted that they had a security procedure, complete with an IT department, to immediately and remotely wipe all digital information from their cell phones. All but one cell phone obtained during the Sheriff's Office raid had its contents wiped before search warrants were issued to recover the contents.

In Houston, Texas, while conducting a narcotics investigation, officers arrested Heather Garrett for evading arrest and for assaulting a public servant with her vehicle as she attempted to escape. Upon arrest, they learned that Garrett was a prostitute and worked for a "pimp" named Marcus Barnes. Officers found Garrett's "Backpage.com" listing, and learned that she used her phone to arrange sexual transactions and to communicate with Barnes. Police

seized Garrett's phone for possible follow-up investigation, and planned to request a warrant to search the phone to aid in a long-term investigation of multiple suspects. But after Garrett was booked, officers discovered that Garrett's phone had been erased remotely. There was no information on the phone; it had been restored to its factory settings.

Had law enforcement in the above examples searched the phones as an incident to arrest, they would have discovered critical information in furtherance of their investigations. Because they delayed to obtain a warrant, the criminals destroyed the evidence. Allowing an immediate search while the suspect is in custody, before the suspect receives his obligatory phone call, and before a cohort suspects his missing comrade has been arrested, ensures that electronic data is preserved.

**B. SMARTPHONES POSE TIME-SENSITIVE
ACCESSIBILITY PROBLEMS THAT JUSTIFY
AN IMMEDIATE SEARCH.**

Many cell phones have password locks that trigger automatically after several minutes of non-use. When the lock is triggered, all data on the device can become encrypted. A low battery can also lead to a cell phone losing power and becoming locked or encrypted during the time it would take to obtain a search warrant. Officers can bypass the password lock on some cell phone models using a device such as the Universal Forensic Extraction Device (UFED) for immediate acquisition. See generally www.cellebrite.com. On other cell phones (particularly iPhones), they cannot. Sean Morrissey, *iOS Forensic Analysis for iPhone, iPad and iPod touch* 87 (2010).

Given the speed with which cell phone technology advances, the constant revisions to smart-phone software, the proliferation of various smart-phone models, and the customization offered on the various models, it is unrealistic to expect officers spending long hours on their beat to also remain up to date on all of the latest technological developments, and anticipate in every given situation which phones can be accessed and wiped remotely, which can become password protected remotely, and how much time it takes for the password protection and encryption to take effect. This makes a case-by-case assessment of the exigency of each search highly impractical.

**C. TRACKING FEATURES ACTIVATED BY
LATER SEARCHES CAN COMPROMISE
INVESTIGATIONS AND OFFICER SAFETY.**

Loss of access to crucial evidence on the phone is not the only reason for a blanket rule permitting a search incident to arrest. Delaying the search until after a warrant is obtained can tip off cohorts using the phone's GPS tracking, resulting in the organization's precautionary destruction of evidence elsewhere, or worse, creating a target for the organization's desperate and dangerous attempt to recover the phone and prevent the search.

Although law enforcement officers frequently attempt to keep seized cell phones from connecting to cellular or data networks, that is not always technically or operationally possible. Consider a situation where one member of a drug cartel is arrested and his phone confiscated. Officers immediately turn it off to prevent a cellular connection.

While back at the station, after a few hours, officers finally obtain a warrant to search the phone and turn it on to download the information that could lead to the location and arrest of other members. While it is on, and despite the officers' best efforts, the device connects to a cellular or data network. The suspect's superior, who is tracking the member's whereabouts using the Find iPhone app or similar app, discovers the phone is located at a police station, and executes their protocol for immediately removing the operation to a new, unknown location, thwarting the investigation and the opportunity for a major drug bust.

D. SMARTPHONES POSE UNIQUE EVIDENCE-PRESERVATION AND OFFICER-SAFETY CHALLENGES THAT MAKE A CASE-BY-CASE ASSESSMENT UNREALISTIC.

The ephemerality of cell phone data, accessibility problems, and special dangers inherent in searching cell phone data, make case-by-case search decisions impractical for officers in the field. Officers must often make “split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.” *Graham v. Connor*, 490 U.S. 386, 396–97 (1989). It is not realistic to expect them to be able to make case-by-case search decisions given the prevalence of cell phones with encryption and password locks and remote wiping, when the window for decision may often be a matter of minutes or less.

In addition to racing against a potential password lock, arrests, and in particular traffic stops, are often conducted in public view, where an unknown accomplice or member of the arrestee's gang can see the arrest taking place and quickly destroy the evidence on the phone remotely without any cues from

the arrestee. This adds particular urgency that is difficult to calculate and assess as the scene develops and information becomes available during the stop or arrest. Failure to search the cell phone in time can mean the loss of access to time-sensitive evidence of a crime, which the officers would have cause to retrieve moments later when they discover there is more to the traffic stop than expired plates.

This particular case provides a keen example. It was not until officers conducted the inventory search that they discovered firearms hidden in a manner that gave them cause to believe Petitioner Riley was involved in gang activity and search the phone for those connections. Fortunately, the evidence of the criminal activity was not destroyed before officers discovered firearms in their routine inventory. But that was a distinct possibility. By searching the phone at the scene, officers minimized the risk that evidence of an attempted murder would be destroyed.

Contrary to what the Petitioner and *Amici* assert, an immediate search—rather than waiting the several hours it can take to obtain a warrant—is the only way to fully protect law enforcement’s profound interest in preventing destruction of such evidence.

The Brief of *Amicus Curiae* Electronic Privacy Information Center discusses a number of low-cost techniques and tools for preventing a “wipe” signal from reaching the phone until a warrant can be obtained. But turning off the phone (which could encrypt and lock the data), removing the battery (which also could encrypt and lock the data), or enclosing it in a Faraday bag or something like it (which can occasionally leak a cellular signal), would

only work until the bag must be opened and the phone turned on to connect it to an extraction device.

At that point, and despite efforts to keep such devices from connecting to a network, the phone may become immediately vulnerable to a remote “kill pill” signal. Even if the connection lasts only a moment, that will instantly trigger destruction of all evidence on the phone or expose the cell phone’s location.³ Thus, any delay in searching the phone inevitably creates an opportunity for a cohort or the suspect (if, for example, bail is posted before a warrant issues) to destroy evidence or possibly endanger the safety of law-enforcement agents.

II. AT A MINIMUM, THE COURT SHOULD REJECT PETITIONER’S REQUEST FOR A BLANKET PROHIBITION ON CELL PHONE SEARCHES INCIDENT TO ARREST.

Even if the Court creates a special constitutional exception for smartphones, the Court should reject the categorical bar that Riley requests. When there are important law-enforcement justifications for such a search, officers should be able to conduct a search.

Consider this Court’s decision in *Arizona v. Gant*, 556 U.S. 332 (2009). There, this Court held that a search incident to arrest does not categorically include a vehicle passenger compartment after the arrestee has already been placed in an officer squad car. But the Court still acknowledged that officers

³ *Amici* also mention the option of using a Sensitive Compartmented Information Facility or SCIF. But this is anything but a low-cost option and is cost-prohibitive for most law-enforcement agencies. See www.adamoconstruction.com/what-is-scif.php.

could conduct a “search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle.” 556 U.S. at 335.

The circumstances here are far more compelling than in *Gant*, because, unlike the defendant in *Gant*, Petitioner Riley did not need to be near the evidence in his cell phone to destroy it. As explained above, he, or a passing friend, family member, or gang member could accomplish that task remotely. Thus, to actually “seize the fruits or evidence of crime,” *Weeks*, 232 U.S. at 392—that is, wrest it from the arrestee’s control to prevent its destruction—law enforcement must be allowed to immediately search the phone and, ideally, download the information to a secure location.

This can be accomplished almost immediately in the field, or in relatively short order at the station, with a Universal Forensic Extraction Device. With many (but not all) cell phone models, the UFED can bypass the access code and then download the data to a USB flash device or other electronic storage. See Sean Morrissey, *iOS Forensic Analysis for iPhone, iPad and iPod touch* 25 (2010). Critically, and contrary to what certain *Amici* suggest, this is *not* a search of private information on remote servers; it is only a transfer of data actually on the phone, which places the data in a secure location where it cannot be destroyed remotely.

The problem is particularly acute for those models whose password encryption cannot be bypassed. Accessing the phone immediately can be crucial to avoiding a password lock. With iPhones, for instance, the password lock can only be bypassed and the data accessed by Apple at its headquarters in Cupertino,

California. According to recent reports, Apple takes approximately two months simply to process the legal requests, and several additional months to actually access and acquire the data and submit the results to the requesting law enforcement agency.

If an iPhone is accessible due to recent use by the arrestee, there may be little time before the password lock takes effect. When officers have reason to believe the phone contains evidence of a crime, it makes no sense to require the officer to nevertheless obtain a search warrant, send the phone to Cupertino, California for evidence collection, and then wait months for results. This places an unreasonable burden on law enforcement's compelling interest in the rapid retrieval of evidence that could lead to the successful prosecution of criminals, prevent future crimes, and ensure public safety.

* * *

Under well-established circuit precedent, officers can already search a wide variety of personal items seized from a person at the time of his arrest. Such searches can and often will reveal embarrassing personal information about the arrestee. E.g., *United States v. Ortiz*, 84 F.3d 977, 984 (7th Cir. 1996); *United States v. Diaz-Lizaraza*, 981 F.2d 1216, 1223 (11th Cir. 1993) (pager, address book, wallet); *United States v. Uricoechea-Casallas*, 946 F.2d 162, 166 (1st Cir. 1991) (wallet); *United States v. Carrion*, 809 F.2d 1120, 1123, 1128 (5th Cir. 1987) (address book); *United States v. Watson*, 669 F.2d 1374, 1383–84 (11th Cir. 1982) (address book, papers); *United States v. Smith*, 565 F.2d 292, 294 (4th Cir. 1977) (address book); *United States v. Frankenberg*, 387 F.2d 337, 339 (2d Cir. 1967) (diary).

Smartphones should be treated no differently. Accordingly, the Court should uphold the ability of law-enforcement officials to search cell phones incident to arrest, particularly when the information collected comes only from the cell phone and not remote servers.

If, however, the Court should find that cell phones are somehow different than traditional wallets, purses, diaries, papers, and address books, the Court should, at a bare minimum, recognize an officer's authority to search a smartphone without a search warrant when the officer has reason to believe the smartphone may contain evidence of a crime.

CONCLUSION

The judgment of the California Court of Appeals should be affirmed.

Respectfully submitted,

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