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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 Court of Appeal of California, Fourth Appellate District, Division One

BRIEF OF THE STATES OF ARIZONA, ET AL., AS *AMICI CURIAE* SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the Fourth Amendment prohibits a police officer from searching a cell phone as part of a search incident to an arrest.

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INTEREST OF AMICI CURIAE

The amici States have a vital interest in ensuring their law enforcement officers are able to employ predictable, workable rules in the field. Searching an arrestee incident to an arrest is one such bright-line rule. Searches incident to arrest help preserve valuable evidence, which in turn enables the States to protect their citizens from dangerous offenders and punish those who disregard the law. Arrest-based searches also help ensure the safety of those tasked with enforcing the law, and may assist in correctly identifying arrestees who provide false identities to authorities. Thus, the amici States have a strong interest in ensuring their law enforcement officers are able to continue to conduct searches incident to arrest, regardless of the nature of the item searched. *See United States v. Robinson*, 414 U.S. 218, 224–37 (1973).

SUMMARY OF THE ARGUMENT

This Court has embraced the search-incident-to-arrest exception to the warrant requirement for over a century. *See Weeks v. United States*, 232 U.S. 383, 392 (1914) (stating that the right to search incident to an arrest has "always [been] recognized under English and American law"). The search of a person lawfully arrested is intended, in part, to "vindicate society's interest in having its laws obeyed" by preserving evidence. *Robinson*, 414 U.S. at 228 (quoting *Terry v. Ohio*, 392 U.S. 1, 26 (1968)). And, of course, a search incident to arrest—regardless of the nature of the offense—helps to ensure the safety of law enforcement officers. *Robinson*, 414 U.S. at 234–35 & n.5 (discussing the dangers police officers face during an arrest). The Court has also recognized that evidence

adduced from a search incident to an arrest may provide a "means of identifying the criminal." *Id*. at 232 (quoting *Holker v. Hennessey*, 42 S.W. 1090, 1093 (1897)). Given these weighty interests, the search-incident-to-arrest exception has long been recognized as providing a broad, "unqualified authority . . . to search the person of the arrestee." *Robinson*, 414 U.S. at 225; *Illinois v. Lafayette*, 462 U.S. 640, 644 (1983) (recognizing the search-incident-to-arrest exception extends to areas "within the arrestee's immediate control").

The importance of the search-incident-to-arrest exception is amplified, not diminished, by its application to new technology, including cell phones. Cell phones are not only capable of providing valuable evidence of a criminal offense, but are also often an instrumentality of a crime. Moreover, evidence on a cell phone is ephemeral and may be lost if officers are required to obtain a warrant before a search. Because the danger to police officers is at its pinnacle at the time of arrest, they should be able to take all reasonable measures to protect themselves, including searching a cell phone to help identify the arrestee and determine whether an arrestee's associates are in the area and pose a risk to them. These many justifications support this Court's continuing adherence to the "broadly stated" rule that a search incident to an arrest includes all items within an arrestee's immediate control. *Robinson*, 414 U.S. at 226.

Further, law enforcement officers need clear, workable rules in order to ensure their own safety, as well as to preserve evidence. Retreating from the broad rule recognized in *Robinson* because of the

capabilities of cell phones would require officers to make impromptu decisions regarding the appropriateness of a particular search based upon a myriad of factors associated with each particular arrest. The scope of the rule should not depend on the technological capability of a particular phone. Regardless of whether a phone is basic or "smart," the information on the phone is subject to loss unless officers can conduct an immediate search. It would also be unrealistic to require law enforcement officers to make on-the-spot determinations regarding the technological capability of a particular phone in order to later defend a search incident to arrest. Consequently, this Court should recognize that the contents of an arrestee's cell phone—like the contents of a notebook, ledger, wallet, diary, or other item under an arrestee's immediate control at the time of arrest—is subject to being searched as an incident of arrest.

ARGUMENT

THE SEARCH OF A CELL PHONE IS REASONABLE UNDER THE SEARCH-INCIDENT-TO-ARREST EXCEPTION TO THE WARRANT REQUIREMENT.

A. The Policies Furthered by the Broad Search-Incident-to-Arrest Exception Apply to the Contents of a Cell Phone.

In *Robinson*, this Court discussed the extended history of the search-incident-to-arrest exception, noting that its validity "has been regarded as settled from its first enunciation . . . ." 414 U.S. at 224–26; *see also Maryland v. King*, — U.S. —, 133 S. Ct. 1958, 1971

(2013) (stating that "[t]he validity of the search of a person incident to a lawful arrest . . . has remained virtually unchallenged") (quoting *Robinson*, 414 U.S. at 224); *Gustafson v. Florida*, 414 U.S. 260, 264–65 (1973) (noting the search-incident-to-arrest exception existed "both at common law and in the early development of American law"). The two principal justifications for the exception are the need to preserve evidence and the need to ensure the safety of the arresting officer. *Robinson,* 414 U.S. at 224–36; *see also Chimel v. California*, 395 U.S. 752, 763 (1969) (stating that the need to preserve evidence and the need for officer safety also allows for a search incident to arrest of items within an arrestee's "immediate control"). A third basis for the exception is to provide a "means of identifying the criminal." *Robinson*, 414 U.S. at 232 (quoting *Holker*, 42 S.W. at 1093).

The search-incident-to-arrest exception is expansive, and does not depend "on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." *Robinson*, 414 U.S. at 235; *see also Arizona v. Gant*, 556 U.S. 332, 338–39 (2009) (noting that the search-incident-to-arrest exception "derives from interests in officer safety and evidence preservation that are *typically* implicated in arrest situations") (emphasis added); *Virginia v. Moore*, 553 U.S. 164, 177 (2008) ("The interests justifying [a] search [incident to an arrest] are present *whenever* an officer makes an arrest.") (emphasis added); *Robinson*, 414 U.S. at 237 (stating that if an "arrest is lawful, the privacy interest guarded by the Fourth Amendment is subordinated to a legitimate and overriding governmental concern . . . even if that

search is not narrowly limited by the twin rationales of seizing evidence and disarming the arrestee") (Powell, J., concurring).

Ultimately, *Robinson* recognized a police officer's "unqualified authority" to search upon a lawful custodial arrest. 414 U.S. at 229–30. Because this authority stems from the validity of the underlying arrest, the scope of the exception is necessarily broad and includes *any* item where evidence may be concealed. *See Knowles v. Iowa*, 525 U.S. 113, 118 (1998) ("In *Robinson*, we held that the authority to conduct a full field search as incident to an arrest was a 'bright-line rule,' which was based on the concern for officer safety and destruction or loss of evidence, but which did not depend in every case upon the existence of either concern."); *see also United States v. Edwards*, 415 U.S. 800, 803 (1974) ("It is also plain that searches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention.").

And, because there is broad authority to search for evidence of the crime, a search incident to an arrest necessarily entails an officer's ability to search documents and similar items that may provide evidence of a crime, even if personal information is revealed. *See, e.g., United States v. Flores-Lopez*, 670 F.3d 803, 807 (7th Cir. 2012) (stating that "opening the diary found on the suspect whom the police have arrested, to verify his name and address and discover whether the diary contains information relevant to the crime for which he has been arrested, clearly is permissible"); *United States v. Watson*, 669 F.2d 1374, 1384 (11th Cir. 1982) (stating that since a wallet "was

taken from [the defendant's] person during a search incident to arrest, [t]he seizure of documents found within the wallet was within the proper scope of the search") (internal citations omitted); *United States v. McFarland*, 633 F.2d 427, 429 (5th Cir. 1980) (rejecting as frivolous defendant's contention that the seizure of a piece of paper "was the product of an impermissibly broad search incident," noting that the very "purpose of the doctrine permitting searches incident to arrest is to allow discovery and preservation of destructible evidence"); *United States v. Gomez*, 807 F. Supp. 2d 1134, 1144 (S.D. Fla. 2011) ("Historically, . . . the broad grant of authority to search [incident to an arrest] includes highly private articles on a person like a wallet or purse, a briefcase, a backpack or personal bag, an address book or organizer, highly private places like a person's home closet . . . .") (collecting cases, footnotes omitted).

The data in a cell phone is not inherently more private than information on paper or in other documentary forms. A text or email message is essentially an electronic form of a letter or similar form of communication. *See Flores-Lopez*, 670 F.3d at 805 ("A modern cell phone is in one aspect a diary writ large."). Consequently, because there is no principled basis to distinguish a cell phone from any other item containing personal information, "the unqualified authority of the arresting authority to search the person of the arrestee," *Robinson*, 414 U.S. at 225, necessarily allows law enforcement officers to search the data in a cell phone. *See id.* (discussing "the *categorical* recognition of the validity of a search incident to lawful arrest") (emphasis added); *see also People v. Diaz*, 244 P.3d 501, 507 (Cal. 2011) ("Nothing

in [the Supreme Court's decisions on arrest-based searches] even hints that whether a warrant is necessary for a search of an item properly seized from an arrestee's person incident to a lawful custodial arrest depends in any way on the character of the seized item.").

B. No Principled Basis Exists to Exclude the Search of a Cell Phone from the Search-Incident-to-Arrest Exception.

There is no reason to find the search-incident-to-arrest exception inapplicable to cell phones placing them beyond the reach of this well-established law-enforcement tool. *See Robinson*, 414 U.S. at 225–26 (noting a police officer's "affirmative authority" "to find and seize things connected with the crime as its fruits or as the means by which it was committed") (quoting *Agnello v. United States*, 269 U.S. 20, 30 (1925)). Cell phones—including "throwaway phones"—are often used to facilitate criminal offenses, most typically drug offenses. *See*, *e.g.*, *United States v. Brown*, 726 F.3d 993, 996 (7th Cir. 2013) (noting that drug traffickers "frequently had couriers provide prepaid cell phones to their business associates to facilitate communication with [them]"); *United States v. Ham*, 628 F.3d 801, 805 (6th Cir. 2011) (citing testimony of DEA agent that "drug traffickers often use throw-away phones because they can be set up with a fictitious name, making them untraceable"); *United States v. Perez*, 280 F.3d 318, 342 (3d Cir. 2002) (reciting expert testimony presented to explain how drug traffickers use cell phones to frustrate police investigators).

Moreover, cell phones can provide critical evidence relating to a variety of crimes. *See*, *e.g.*, *United States*

v. Willoughby, 742 F.3d 229, 233–41 (6th Cir. 2014) (discussing how defendant used cell phone in furtherance of sex-trafficking of a minor); *United States v. Shibin*, 722 F.3d 233, 236–37 (4th Cir. 2013) (detailing how evidence relating to the defendant's cell phone tied him to a Somalian pirate attack of an American sailing ship); *United States v. Curtis*, 635 F.3d 704, 711 (5th Cir. 2011) (noting that the text messages of a defendant arrested on state-law charges led to evidence that the defendant was also involved in a federal fraud scheme); *United States v. Wilson*, 565 F.3d 1059, 1065 (8th Cir. 2009) (stating that a child sex abuse victim informed officers that the defendant "had used his cellular phone . . . to record her engaging in underage sexual activity"); *Gracie v. State*, 92 So.3d 806, 808 (Ala. Crim. App. 2011) (upholding cell phone search that showed bank robber texted an acquaintance immediately after the robbery and admitted his involvement); *Fawdry v. State*, 70 So.3d 626, 627 (Fla. App. 2011) (indicating that search of arrestee's phone "revealed images of child pornography"); *Sinclair v. State*, 76 A.3d 442, 447–54 (Md. App. 2013) (upholding search of defendant's cell phone, which provided evidence tying him to carjacking).

Valuable, and even crucial, evidence on a cell phone may be destroyed merely "by touching a button." *Flores-Lopez*, 670 F.3d at 807–08 (discussing "local wiping," where pressing a single button deletes a cell phone's contents). Also, a cell phone may "lock" after a certain period of time, rendering it impenetrable in the time it may take to obtain a search warrant. *Id*. at 807 (noting a phone may be "password-protected"). And more sophisticated means of destroying cell phone

evidence also exists, including "remote wiping," *i.e.*, deleting information on a phone from a remote location. *Id*. at 807–08 (stating that "remote-wiping capability is available on all major cell-phone platforms [and that] if the phone's manufacturer doesn't offer it, it can be bought from a mobile-security company");[1] *see also United States v. Lustig*, ___ F. Supp. 2d ____, 2014 WL 940502, at 4, & nn. 3–4 (S.D. Cal. 2014) (noting new technologies designed to prevent law enforcement officers from trying to preserve data on a cell phone).

Denying a law enforcement officer the ability to search a cell phone incident to arrest not only risks the destruction of the ephemeral information on the arrestee's phone, it may also result in the loss of other incriminating evidence. For instance, in the companion case to the instant case, the cell phone of an arrested drug dealer kept ringing after the defendant was arrested, indicating the phone was receiving calls from "[his] house." *United States. v. Wurie*, 728 F.3d 1, 2 (1st Cir. 2013). Using information they found on the phone, police officers responded to the arrestee's residence and secured it while they obtained a search warrant. *Id*. After the search warrant was obtained, the officers found, among other things, 215 grams of crack cocaine, a firearm, and ammunition. *Id*. If the

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[1] For some cell phones, even this is unnecessary; instead, information may be deleted automatically when the phone receives new information. *See United States v. Murphy*, 552 F.3d 405, 411–12 (4th Cir. 2009) (discussing the potentially "volatile nature" of a cell phone, *i.e.*, the possibility that "information stored on a cell phone will be automatically deleted"); *see also State v. Sizemore*, 129 So.3d 860, 868 (La. App. 2013) (noting that text messages were lost due to an "auto-delete" setting on arrestee's phone).

officers had not searched the phone, the arrestee's failure to answer the phone could very well "have alerted [his] confederates to his arrest, prompting them to destroy further evidence of his crimes." *Id.* at 17 (Howard, J., dissenting).

Concerns for officer safety also support the reasonableness of searching cell phones incident to arrest. Law enforcement officers have inherently dangerous jobs. In 2012 alone "48 law enforcement officers died as a result of felonious acts," and more than 52,000 others were the "victims of line-of-duty assaults." U.S. Dep't of Justice, Federal Bureau of Investigation, Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted (2012). This is stark evidence that "[e]very arrest must be presumed to present a risk of danger to the arresting officer." *Washington v. Chrisman*, 455 U.S. 1, 7 (1982). This danger "flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty," not the particular underlying grounds for the arrest. *Robinson*, 414 U.S. at 234, n.5; *see also King*, 133 S. Ct. at 1971 ("It is a common occurrence that people detained for minor offenses can turn out to be the most devious and dangerous criminals.") (internal quotation marks omitted). Searching a cell phone incident to an arrest promotes officer safety by allowing officers to determine whether there is a possibility that an arrestee's cohorts may pose a danger.[2] *See*, *e.g.*, *United*

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[2] The cell phone itself can even be used as a weapon. *See Farrington v. Smith*, 707 F.3d 963, 965-66 (8th Cir. 2013) (discussing the possibility that a cell phone may have been "weaponized" and turned into a handgun or that it may contain

States v. Santillan, 571 F. Supp. 2d 1093, 1102–04 (D. Ariz. 2008) (stating that search of arrestee's cell phone helped "to preserve safety" where the arrestee's armed cohorts remained at large).

Furthermore, this Court has noted that evidence adduced from such a search incident to arrest may provide a "means of identifying the criminal." *Robinson*, 414 U.S. at 232 (quoting *Holker*, 42 S.W. at 1093); *Lafayette*, 462 U.S. at 647 (noting that "inspection of an arrestee's personal property may assist the police in ascertaining or verifying his identity"); *Hill v. California*, 401 U.S. 797, 804 (1971) (stating that "aliases and false identifications are not uncommon" when a suspect is arrested). Searching a cell phone incident to arrest may, in some instances, further the important interest of identifying arrestees and ensuring they are processed in the criminal justice system under their correct name. *See King*, 133 S. Ct. at 1970 (noting the well-established need for law enforcement officers to accurately "process and identify the persons" they take into custody).

Finally, law enforcement officers have a responsibility to ensure that arrestees do not pose unwarranted "risks for facility staff" or "the existing detainee population." *Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 566 U.S. ___, 132 S. Ct. 1510, 1518 (2012). When an arrestee is correctly identified, his criminal history can be ascertained, which in turn allows a detention facility to make a more informed housing determination for the newly-

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razor blades); *Flores-Lopez*, 670 F.3d at 806-07 (noting "[o]ne can buy a stun gun that looks like a cell phone").

arrived detainee. *See King*, 133 S. Ct. at 1971–72 ("A suspect's criminal history is a critical part of his identity that officers should know when processing him for detention."). Information discovered on a cell phone may also apprise authorities of an arrestee's gang affiliation and help ensure that rival gang members are not housed together. *See Florence*, 132 S. Ct. at 1518–19 (stating that "[j]ails and prisons also face grave threats posed by the increasing number of gang members who go through the intake process" and that "[t]he identification and isolation of gang members before they are admitted protects everyone in the facility"). In fact, the record in this case demonstrates that the officers were able to confirm Petitioner's gang affiliation upon a quick inspection of the phone at the scene of his arrest. Joint Appendix, at 8.

In sum, all of the considerations supporting the breadth of the search-incident-to-arrest exception apply with equal, if not greater, force to cell phones. A search of a cell phone incident to arrest is reasonable and not prohibited by the Fourth Amendment. *See Robinson*, 414 U.S. at 236 (holding that "in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment").

C. Law Enforcement Officers Need Clear Workable Rules, Like the One Articulated in *Robinson*.

Law enforcement officers have inherently dangerous jobs and routinely react to rapidly developing situations. This Court has recognized that the danger to a police officer is perhaps at its greatest during an

arrest. *Robinson*, 414 U.S. at 234 & n.5. To provide a straightforward and predictable rule in this context, law enforcement officers must be allowed to search all items under an arrestee's immediate control—including cell phones—as part of a search incident to arrest. *See Dunaway v. New York*, 442 U.S. 200, 213–14 (1979) ("A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."); *see also* 3 W. LAFAVE, SEARCH AND SEIZURE § 5.2(c), at 106–07 (4th ed. 2004) ("A highly sophisticated set of rules [for police officers], qualified by all sorts of ifs, ands and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be literally impossible of application by the officer in the field.").

Robinson itself recognizes the need for a bright-line rule for arrest-based searches: "A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick ad hoc judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search." 414 U.S. at 235; *see also id*. at 225 (discussing "the categorical recognition of the validity of a search incident to lawful arrest"). Retreating from the broad rule stated in *Robinson* based on the capabilities of new technology would expose the decisions of police officers to second-guessing, and subject their on-the-spot judgment to post hoc judicial weight of such factors as the possibility that invaluable evidence will be destroyed,

officer safety issues, and concerns about an arrestee's true identity. A fact-based approach to determine the validity of a search incident to arrest would only add uncertainly to the already unpredictable nature of an arrest.

The reasonableness of the warrantless search of a cell phone does not depend on the technological capabilities of a particular phone. In one case, the defendant argued "that whether a cell phone may be searched without a warrant can be determined only upon the officers ascertaining the cell phone's storage capacity." *Murphy*, 552 F.3d at 411. Under that defendant's theory, a phone with "a small storage capacity may be searched without a warrant due to the volatile nature of the information stored,[3] but a search of a cell phone with a larger storage capacity would implicate a heightened expectation of privacy and thus would require a warrant to be issued before a search could be conducted." *Id*. Courts cannot reasonably expect law enforcement officers to make accurate on-the-spot determinations concerning a cell phone's capabilities in order to assess the risk that electronic evidence may be lost in the time it takes to obtain a

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[3] This apparently refers to phones with limited capacity where the receipt of new information deletes existing information. This particular concern appears to be waning. *See Gomez*, 807 F. Supp. 2d at 1150 n. 17 (stating that it is unlikely that "a modern cell phone, with its continually advancing technology, is at any risk of deleting its call history or text messages folder to make space for incoming calls or text messages"). Nonetheless, information on a cell phone is still volatile given the very real possibility of local or remote "wiping." While the degree of volatility depends on the capabilities of a particular phone, those capabilities are not readily or necessarily apparent to arresting officers.

search warrant. A rule requiring an officer to determine the capability of a particular cell phone before a search is simply unworkable and unreasonable. *See Murphy*, 552 U.S. at 411 (stating that "to require police officers to ascertain the storage capacity of a cell phone before conducting a search would simply be an unworkable and unreasonable rule," that could result in the permanent loss of evidence); *see also Gomez*, 807 F. Supp. 2d at 1150 & n.16 (stating that crafting a specific rule for the search of a cell phone "is very difficult," and the problem "is exacerbated by the continually advancing technology and computing capabilities of hardware, such as 'smart' phones").

Consequently, for all the above reasons, this Court should not retreat from *Robinson's* bright-line rule that all items within an arrestee's immediate control—including a cell phone—may be searched incident to a lawful arrest.

CONCLUSION

This Court should affirm the state court's decision and hold that the search of a cell phone's contents falls within the search-incident-to-arrest exception to the Fourth Amendment.

Respectfully submitted this 9th day of April, 2014.

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