1   IN THE SUPREME COURT OF THE UNITED STATES

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3   UNITED STATES,   :

4   Petitioner   :   No. 13-212

5   v.   :

6   BRIMA WURIE   :

7   - - - - - - - - - - - - - - - - - - x

8   Washington, D.C.

9   Tuesday, April 29, 2014

10

11   The above-entitled matter came on for oral

12   argument before the Supreme Court of the United States

13   at 11:36 a.m.

14   APPEARANCES:

15   MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General,

16   Department of Justice, Washington, D.C.; on behalf of

17   Petitioner.

18   JUDITH H. MIZNER, Assistant Federal Public Defender,

19   Boston, Mass.; on behalf of Respondent.

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1   C O N T E N T S

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1           P R O C E E D I N G S

2               (11:36 a.m.)

3       CHIEF JUSTICE ROBERTS:        We'll hear argument

4   next in Case 13-212, United States v. Wurie.

5       Welcome back.

6       (Laughter.)

7       ORAL ARGUMENT OF MICHAEL R. DREEBEN

8           ON BEHALF OF PETITIONER

9       MR. DREEBEN:        Thank you, Mr. Chief Justice,

10  and may it please the Court:

11      The facts of this case, United States v.

12  Wurie, I think, illustrate why any categorical rule that

13  would preclude searches of cell phones incident to

14  arrest would be inconsistent with historical practice

15  and detrimental to law enforcement.

16      This is a case where what the officers did

17  was see a phone ringing.  On the outside screen, the

18  caller was identified as "my house."  The officers

19  opened up the phone, pressed one button to see that the

20  call came in from "my house" and pressed another to see

21  what the phone number was.  That's all they did.

22      That kind of a search serves valid,

23  time-honored functions in the search situation of

24  helping to ascertain the identity of the offender.  This

25  was a crucial fact because a few minutes later, Wurie
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1 lied about where he lived, which was relevant to the

2 police ultimately obtaining a warrant to search his

3 house. They didn't know where he was. They would not

4 be able to --

5   JUSTICE SOTOMAYOR: I'm not -- I'm not

6 sure. If he was at the precinct, they could have gotten

7 a warrant, and once he lied about his arrest, they would

8 have known he wasn't living there and would have gotten

9 a warrant.

10   MR. DREEBEN: Justice Sotomayor, you could

11 almost always say in search-incident-to-arrest cases

12 that the police could have gotten a warrant. It's --

13 I'm not talking about cases where somebody is carrying a

14 gun and the police take the gun off them and -- and they

15 secure it that way. But in all of the other cases that

16 you could imagine that involve searches for evidence,

17 letters, which occur in the historical cases; billfolds,

18 which have been discussed here, once the officer has it,

19 you could say the officer shouldn't be able to look in

20 it because that could be done under a warrant. There's

21 no time constraint. There's no destruction of evidence

22 constraint.

23   Here, in fact, there actually is a

24 destruction-of-evidence threat with respect to the

25 general category of cell phones, and that's what this

 1 Court has been asked to look at, the general category,

 2 cell phones and smartphones.

 3   We discussed earlier the threat of remote

 4 wiping and whether airplane mode is an effective counter

 5 to that. There is the other threat that I think is even

 6 more critical to law enforcement today, and that is

 7 encryption. Because if the phone turns off and becomes

 8 encrypted, officers can go to the magistrate and ask for

 9 a warrant, but it may be months or years or never if

10 they can break through the encryption and actually

11 obtain the evidence.

12   So to the extent that the traditional

13 destruction-of-evidence rationale justified the search

14 of a cell phone or justified the search of traditional

15 items, it applies even more strongly with respect to

16 cell phones than it does with most of the items that

17 might be seized from a person.

18   So Wurie, I think --

19 JUSTICE SOTOMAYOR: Please tell me about

20 encryption, because I know people can encrypt, but I

21 thought they had to do that when they put the

22 information in the phone.

23 MR. DREEBEN: No. As best I understand it,

24 Justice Sotomayor, many smartphones today are equipped

25 with built-in encryption. Apple has hardware encryption

1   and software encryption. Samsung and HTC and other

2   brands are quickly following with strong encryption.

3   The encryption is deployed in a way that if you don't

4   have the key, the data that's on the phone is useless.

5   The key is often stored in memory and it's accessible

6   only when you can get into the phone.

7   Now, if the phone is on and functioning

8   because the person has been arrested while they are, for

9   example, making a phone call, you can get access to the

10   phone and you can attempt to get information from the

11   phone without the encryption key being an obstacle. But

12   if the encryption is deployed, that can sometimes be an

13   insuperable barrier even to the manufacturer.

14   JUSTICE SOTOMAYOR: I'm not sure how on the

15   scene the police are going to look at everything in a

16   cell phone anyway. They've got to be doing something to

17   save it. If the encryption can be --

18   MR. DREEBEN: Well, no. The -- the evidence

19   is -- the information on the phone is encrypted -- this

20   is my understanding, Justice Sotomayor -- but the phone

21   itself has the key to decrypt it because the user

22   obviously wants to get access to the information.

23   JUSTICE BREYER: I mean, you have a problem.

24   Apparently, neither you nor I actually have this on

25   their phone, as far as I know. So I'm imagining

1   something. Maybe you have it. There is some kind of

2   system that once it goes "bzzz," you never can get the

3   stuff again except after eight months, and when this

4   "bzzz" happens, is it happens at least ten minutes after

5   the arrest and not before, so the policeman would have

6   time to look at it. But the -- by the time you get to

7   the stationhouse, the "bzzz" has already happened, so

8   now nobody else can. Maybe there is such a thing. I've

9   never heard of it before this minute or before the

10 briefs. Well, why wouldn't -- you see I'm similarly

11 incredulous about it from my tone of voice because I

12 don't see why somebody who wanted to "bzzz" actually to

13 keep the police away wouldn't do it after 30 seconds.

14   MR. DREEBEN: So if you have an iPhone,

15 Justice Breyer, and I don't know what kind of phone that

16 you have --

17   JUSTICE BREYER: I don't either because I

18 can never get into it because of the password.

19   (Laughter.)

20   MR. DREEBEN: It's encrypted. And that's

21 the problem. The phones are set up to protect the data

22 and I think this is something also revealing about --

23   JUSTICE BREYER: My point is, somebody who

24 really wants to go to all that trouble will surely have

25 it turn off after 30 seconds and the policeman won't be

1 able to look at it either.

2   MR. DREEBEN: Not all criminals are so

3 clever that they manage --

4   JUSTICE BREYER: Yeah. Well, but the dim

5 criminal who is thinking about the magistrate at the

6 station but not thinking about the policeman. I mean,

7 you see what I'm doing with my questions?

8   MR. DREEBEN: I think --

9   JUSTICE BREYER: I'm casting a little cold

10 water on this as a rationale.

11   MR. DREEBEN: Yeah. And I -- my response to

12 you is that having tried to ascertain the empirical

13 reality of this problem, it is greatly feared by law

14 enforcement. We've documented that by the numerous

15 studies, the National Institute of Standards and

16 Technology study that talks about the grave concerns

17 that encryption's raised. It's not the biggest problem

18 if you get the phone in an active state and you can

19 begin to look through it. It does have unpredictable

20 capabilities of becoming encrypted if it's turned off or

21 if certain apps are deployed on it. And for that

22 reason --

23   JUSTICE SOTOMAYOR: But you have to keep the

24 phone going anyway till you can get to a place where you

25 do something with it.

 1   MR. DREEBEN: A lot of these searches occur,

 2 Justice Sotomayor, at the side of the road where the

 3 officer opens -- in the Riley case, the officer opened

 4 the phone right on the heels of the arrest and he

 5 immediately saw evidence that the individual was a gang

 6 member, something that he hadn't had personal knowledge

 7 of before, because every letter K was preceded by a C,

 8 which indicated to him it meant Crip killer, which

 9 indicated he was a member of the Bloods gang. So it's a

10 very common thing for officers to take advantage of the

11 information that's on a phone just the way that they

12 would take advantage of the information that's on a

13 person to find out who they are dealing with.

14   And I think it was asked in the Riley

15 argument whether there were instances in which phones

16 have been used to trigger dangers. And there are

17 instances in which people have used their cell phones

18 right before an arrest to call in a posse of their

19 accomplices to basically attack the police. And by

20 looking at the cell phone quickly, if it's available to

21 the -- to the officers, they can look quickly and see if

22 there was a text sent in the last five minutes or a

23 phone call that might actually protect their safety,

24 which is another one of the traditional justifications

25 of search incident to arrest.

1   This is a categorical exception, as the

2   Court recognized twice last term, both in Maryland v.

3   King decision and in the McNeely decision, the Court

4   recognized that search-incident-to-arrest was a

5   categorical exception to the normal warrant requirement.

6   JUSTICE GINSBURG: Mr. Dreeben, something

7   that you said about the encryption. What -- what is the

8   experience of the police? Isn't it so that most cell

9   phones when they're found on a person are not open,

10   that -- that they are locked?

11   MR. DREEBEN: Justice Ginsburg, I would not

12   be able to answer a question about what condition most

13   cell phones are found in. The fact that this issue has

14   arisen repeatedly in cases across the country indicates

15   that at least in a significant number of cases, the

16   phones are not locked and the officers are able to

17   obtain access to the information.

18   Now, if they are not able to obtain access

19   to the information, I want to tie this back to things

20   that could give the Court some comfort if the Court were

21   concerned about the possibility for police searching too

22   much evidence in cell phones that's not relevant to the

23   crime for which the person is arrested or his identity.

24   Now, we talked earlier about the crime of

25   arrest limitation, which I think would screen out a

1 great many, not all, minor crimes. The Court has, at

2 least in the Welsh v. Wisconsin case, talking about

3 exigent circumstances justifying an entry into the home,

4 distinguished between serious and minor crimes. That's

5 another possible line that the Court could explore. I'm

6 not as much in favor of that one because I do think that

7 the officers have an interest in determining, no matter

8 who they have arrested, who that person is, because the

9 person could pose an unknown threat even if they are

10 stopped only for a traffic violation. Ascertaining

11 their identity through their cell phone is a useful way

12 to do that.

13 There are also potential duration limits on

14 a search-incident-to-arrest. As its name indicates,

15 it's incident to the arrest, and this Court's decisions

16 have described the lowering or reduction of expectation

17 of privacy of an arrestee as occurring for a reasonable

18 time and to a reasonable extent after the arrest, then

19 other Fourth Amendment doctrines kick in. So to the

20 extent that most of these searches are going to occur

21 either at the scene of the arrest --

22 JUSTICE SOTOMAYOR: Once we put in that

23 limit, you'll just download the phone at the station and

24 everything, their medical records, their tax returns,

25 even when they're not relevant to the crime, will be

1   part of your database.

2   MR. DREEBEN: Okay. Well, that - that is my

3   last potential limiting principle. This Court need not

4   consider in this case the consequences of downloading

5   the entire contents of a cellphone to a UFED, a

6   universal forensic extraction device which the briefs

7   have talked about. That didn't happen in either of

8   these cases. These cases involve manual searches of the

9   information that's available to the user of the phone.

10   Once the information has been captured into

11   an electronic database separately in an extraction

12   device, there is at least an argument that at that point

13   the evidence is preserved and potentially the warrant

14   requirement would have a different application, at least

15   if the search of that forensic database was going to go

16   beyond ascertaining identity and verifying officer

17   safety considerations.

18   The Court does not need to examine that in

19   this case. It may well be that expectations of privacy

20   do not exist as to information that the user himself can

21   quickly access on a phone, the kind of thing the police

22   are likely to look at when they make an arrest because

23   they are interested in developing evidence that relates

24   to the crime, protecting their safety and ascertaining

25   identity. They are not really interested in going

 1   through all an arrestee's medical records and

 2   photographs and so forth.

 3   JUSTICE SOTOMAYOR: Your brief suggested a

 4   limitation with respect to access to the iCloud.

 5   MR. DREEBEN: Yes.

 6   JUSTICE SOTOMAYOR: Could you tell me how

 7   you tell the difference?

 8   MR. DREEBEN: Well, I think that would be

 9   something that officers would have to develop protocols

10   based on changing technology to address. We do not

11   claim here the authority to use the phone to access data

12   that is not on the phone, in the cloud, and it may well

13   be that in the future more information will migrate to

14   the cloud, less will be on the phone, and that may shift

15   what the officers can actually do.

16   JUSTICE KAGAN: But I thought the whole

17   ideas of smartphones, Mr. Dreeben, and increasingly so,

18   was that even the user doesn't know what what's on the

19   cloud or not.

20   MR. DREEBEN: So to the extent that that is

21   true, Justice Kagan, law enforcement officers, to ensure

22   they're complying with the Fourth Amendment, would have

23   to take the phone off the network. And that is best

24   practices. It's discussed in all of the forensic

25   manuals that we cited to the Court. You want to take

1   the phone off the network to avoid the remote wiping

2   problem, to avoid corruption of data through new data

3   coming in. It's sound forensic practice to do that and

4   it also serves what we think is a limiting principle.

5   Again, the Court doesn't have to decide that limiting

6   principle in this case. There's no claim that any cloud

7   data was accessed in this case. We're only saying that

8   the search-incident-to-arrest doctrine serves a valuable

9   function, serves a particularly valuable function with

10   cellphones, because they are so commonly used as the

11   medium of the commission of crimes. They are carrying

12   the same kind of information that the individual

13   previously would have carried in paper and it seems

14   somehow a little odd to say that because information has

15   migrated from paper onto a smartphone that the officers

16   have a critical need to obtain --

17   JUSTICE KENNEDY: I don't think it's odd to

18   say that we're living in a -- in a new world. Justice

19   Kagan's questions point out the fact that someone

20   arrested for a minor crime has their whole existence

21   exposed on this little device. From your argument, you

22   want us just to adopt a categorical rule, it's in the

23   custody of the police, they can search it. Do you have

24   -- do you have any limiting principles that we should

25   considerate at all as a fallback position?

1   MR. DREEBEN: Yes, Justice Kennedy, I do.

2 The first one that I think has been discussed in both

3 arguments and Justice Scalia has brought it up as well,

4 is that the evidence to be searched, unless there's some

5 exigency, should be relevant to the crime of arrest and

6 the Court can articulate that in a way that would

7 prevent roving searches or speculative searches.

8   JUSTICE KENNEDY: Well, that -- that was for

9 an expired license.

10   MR. DREEBEN: So I don't think it's

11 necessarily --

12   JUSTICE KENNEDY: -- or is it the guns that

13 were under the hood in the other case?

14   MR. DREEBEN: In the Riley case, the guns

15 were under the hood and the arresting officers found a

16 green bandana and some red and white Converse shoes, I

17 believe.

18   JUSTICE KENNEDY: The crime of arrest was

19 the expired license.

20   MR. DREEBEN: No. The crime of arrest was

21 the firearms in Riley. It was only after they found --

22   JUSTICE KENNEDY: That's correct, after the

23 stop, yes.

24   MR. DREEBEN: -- the firearms in the impound

25 search did they actually conduct the arrest. And at

1   that point the ultimate search that occurred was because

2   there was a known propensity of gang members to document

3   their use of firearms in pictures. And so that's what

4   the arresting officer was looking for. It's no

5   different than what he would have looked for on the

6   arrestee's person in his wallet. So it wasn't the kind

7   of cloud-based search, search into health records. It

8   was a scope-focused search.

9   So I think that there are limiting

10   principles, Justice Kennedy, that you referred to. One

11   is when the officer is looking for crime of

12   arrest-related material and there is evidence that can

13   be plausibly said is crime of arrest-related material on

14   the phone, he can look for that.

15   The Court could couple that, if it wasn't

16   satisfied that that was a sufficient limitation, with a

17   scope-based limit which would say that you can't look

18   everywhere on the phone where there's no realistic

19   chance that there's going to be evidence related to the

20   crime of arrest. You can't just rove through the phone.

21   You need to keep a scope focus. And that can be

22   enforced and would be enforced by defendants, I can

23   assure you, through post hoc litigation and suppression.

24   And the police would have to conform their conduct to

25   the constraints of the Fourth Amendment in conducting

1   the search.

2   JUSTICE GINSBURG: What do you mean by scope? You can look

3   at e-mails but not something else? What would the scope

4   limitation be?

5   MR. DREEBEN: It would depend on the crime.

6   So if you were looking for evidence related to the crime

7   of possession of child pornography, you could certainly

8   go through photographs. If you were looking for another

9   crime, potentially drug trafficking, you would look for

10   things like drug ledgers, recent contacts, lists of

11   customers and not necessarily in videos.

12   CHIEF JUSTICE ROBERTS: It's very hard to

13   see how that limit would be applied. You can see and

14   the police would be able to articulate why almost every

15   application, every entry in a cellphone would reasonably

16   be anticipated to have evidence of a particular crime.

17   Obviously e-mails, obviously call logs. Even, you know,

18   Facebook. I mean, if it's a weapons crime, maybe they've got

19   pictures of themselves with guns. I mean, I have

20   trouble imagining what application, what entry police

21   could not say it's reasonably likely that there would be

22   evidence of the crime.

23   MR. DREEBEN: So, Mr. Chief Justice, to the

24   extent that you think that's an inevitable

25   generalization and there is a certain way of looking at

1   it in which that's correct, then the interposition of a

2   warrant requirement would do nothing because the warrant

3   would say, search the cell phone for evidence related to

4   drug trafficking and then the phone would be searched in

5   exactly that manner.

6   JUSTICE BREYER: No, the point of a warrant is

7   that a person who is not involved and is objective

8   listens to what the policeman is saying, knowing that

9   sometimes, like me or any other human being, a policeman

10   can get a little carried away. So if, in fact, he does

11   show the warrant, that there is this basis, you issue

12   the warrant. Many, many -- and if he doesn't you don't.

13   It isn't because they're different legal questions.

14   It's just you want that third dispassionate mind to

15   review what the facts are.

16   Now, if that's a purpose of having a

17   warrant, how long does it take to get a warrant in the

18   mine run of these cases? Is it not a matter of hours in

19   most places?

20   MR. DREEBEN: It may be in some places and

21   not in others.

22   JUSTICE BREYER: In some places I'm sure

23   it's difficult. But I'm saying most places, major

24   cities, et cetera, my guess was -- and I want to be

25   corrected if I'm wrong -- it's a matter of a few hours

1   and you could do it more quickly if you needed to. Am I

2   right about that?

3   MR. DREEBEN: I don't know that you are,

4   Justice Breyer.

5   JUSTICE BREYER: Well, you are in a

6   department that keeps track pretty much. You're much

7   more expert than I. And therefore I would like your

8   best guess on the mine run of things of a range of time

9   to get a warrant.

10   MR. DREEBEN: So, Justice Breyer, it varies

11   considerably in the 50 States and the Federal Government

12   depending on where you are, the availability of

13   magistrates, the complexity of the case. I would

14   differentiate this from the McNeely case, where the

15   Court was pretty confident that you could get a warrant

16   quickly. The reason that the Court could be pretty

17   confident about that is drunk driving is a very simple

18   crime, and the officer has very simple observations in

19   order to validate it and there are forms that can be

20   prepared to get a warrant.

21   With the great -- we're talking now about

22   every crime for which people are arrested.

23   JUSTICE BREYER: I see your point. I see

24   your point.

25   MR. DREEBEN: And the facts are going to be

1   more complicated.

2   JUSTICE BREYER: Assume a range. But my

3   question I'm trying to get to is this. What, from what

4   you've said is the harm in saying, yes, you need a

5   warrant, but remember, there are exigent circumstances?

6   So where is someone -- the bell rings on the phone.

7   Depending on the kind of crime, it may be pretty

8   important to let the policeman answer to find out where

9   it's coming from, because it may be other people on the

10 gang who are coming with weapons. Or alternatively, if

11 you're right on the technology, it may be someone about

12 to push a buzzer that will erase the information.

13   So remember we have the exigent

14 circumstances. If your view of the technology is right,

15 they will perhaps be used with common sense and caution.

16 But you don't need a special rule other than the rule,

17 get a warrant. How will that hurt?

18   MR. DREEBEN: That is a special rule for the

19 search-incident-to-arrest content. It's -- we've

20 discussed a variety of special rules, but that rule

21 completely compromises the interests in search-incident-to-arrest,

22 because they have always assumed that the

23 interest in police discovering evidence that could help

24 them in the prosecution, that could protect their

25 safety, and that would avoid destruction is paramount

     1   given the reduced expectations of privacy of the

     2   arrestee.

     3   JUSTICE BREYER: Can you work with exigent

     4   Circumstances. Why?

     5   MR. DREEBEN: No. And this is why I -- I

     6   hope that I can make this clearer, because the encryption

     7   problem is what makes it impossible for the police to be

     8   confident that you can take the time to go and get a

     9   warrant and you won't lose the data forever. Encryption

    10   kicks in when the phone is turned to a setting that

    11   automatically will occur on most modern cell phones that

    12   turns the phone off and then the phone's contents become

    13   encrypted and that's when you need the password to open

    14   it up. And if you don't have that password, you're not

    15   going to be able to do it. And law enforcement's

    16   forensic labs aren't going to be able to get around it

    17   in -- except with extraordinary efforts and

    18   extraordinary time.

    19   So we're not talking about the difference

    20   here between two minutes to get the warrant and looking

    21   at the information. It may be months if you don't take

    22   advantage of looking at it.

    23   JUSTICE SOTOMAYOR: How do you stop it from

    24   going off?

    25   MR. DREEBEN: Now, it -- I think that one of

1   the interesting things that Petitioner did in the Riley

2   case was append to the back of his brief a couple of

3   pictures of Apple's iPhone 5 on how you could go into

4   the phone, if the phone is configured in the way that it

5   was in the pictures that he took, and disable the auto

6   lock feature. What Petitioner did not do was provide

7   similar information for the 500 or so other phones that

8   are on the market and that will be on the market in the

9   coming years so that police officers will be equipped

10 with a manual that will probably be as thick as the New

11 York City telephone book with the various procedures

12 that are needed to prevent any phone from going into an

13 encryption mode and becoming inaccessible. They don't

14 know that at the time they seize the phone, Justice

15 Breyer, and that's why exigent circumstances, unless

16 it's done as a categorical rule, because I did not know

17 whether this phone would encrypt, I searched it, unless

18 you do that, then you are basically putting the officers

19 at the mercy of technology, which will increasingly be

20 able to defeat their ability to conduct the kind of

21 routine searches that they have always conducted in the

22 past.

23   CHIEF JUSTICE ROBERTS: Well, they've got

24 their own technological front in this battle, too, and

25 that's -- I mean, to the extent there are flaws in the

1   Faraday bag, I wouldn't be surprised if that's not

2   improved over the next months or years or whatever.

3   MR. DREEBEN: Mr. Chief Justice, it's an

4   arms race between the forensic capabilities of law

5   enforcement labs and the abilities of cell phone

6   manufacturers and criminals to devise technologies that

7   will thwart them. And they will leapfrog each other at

8   times and there may be periods when law enforcement has

9   the advantage and there may be period where -- periods

10 where those people who want to protect against

11 revelation of data on the phone will succeed.

12   And my only point here is that it would not

13 be a wise rule for this Court to announce, based on

14 today's technology and reasonable projections of

15 technology, that the police will just easily be able to

16 go and get a warrant, because my experience from the

17 people that I had spoken with is that a lot of phones

18 are arriving at the lab in a locked and encrypted state

19 and it's very tough to deal with that. And if the Court

20 does have concerns, as many members of the Court have

21 expressed, about applying, lock stock and barrel, the

22 traditional Robinson rule, there are weigh stations and

23 compromise positions.

24   This case, I think, as California pointed

25 out, both this case and Riley, don't really involve

1   totally unpacking somebody's life from their smartphone.

2   And I'm not suggesting that the Court should resolve

3   these cases by announcing a rule that's just limited to

4   the facts of the cases. But if the Court is looking to

5   preserve some areas for protection, we've talked about

6   limiting the justification for a search, limiting the

7   scope of a search, limiting the duration of a search,

8   and limiting the intensity in the sense of confining it

9   to what can be found manually on the phone.

10   JUSTICE BREYER: Do you -- do you see what I

11   was trying to do with the word "exigency?" I was trying

12   to figure out if that's a way of dealing with the

13   unknown here, which is your problem. That if, in fact,

14   technology is such that the policeman, it's really true

15   if he has five minutes to search, he can get this

16   valuable evidence and if the technology is such that it

17   doesn't even give him five minutes, or if it's such that

18   it gives him four or five hours, or if it's such that he

19   can press a button, or if it's the opposite and they can

20   just cough and encrypt it, well, all that will be fed

21   into the word "exigency," which we wouldn't have to

22   decide now, but rather, you could make your arguments

23   about the real exigency for preventing the destruction

24   later in the context of -- of what turns out to be the

25   technology of the time. That's what was going on.

1   MR. DREEBEN: Justice Breyer, the reason why

2   Robinson adopted a categorical rule is it concluded that

3   such case-by-case adjudication for officers in the field

4   is completely infeasible. And when balancing the

5   important law enforcement interests against the reduced

6   expectations of privacy, Robinson struck a categorical

7   balance. Reverting to an exigent circumstances analysis

8   here would unstabilize all of the law under Robinson.

9   JUSTICE SOTOMAYOR: How about a plain view

10   analysis? Turn on the phone, see if there's been a

11   telephone call within a reasonable amount of time of the

12   arrest or -- or any message that was sent at the time of

13   arrest. That's sort of a plain view situation. It

14   would take care of your person with the picture of him

15   or herself with guns. It would take care of the call to

16   the confederate. It would take care of the -- of the

17   imminent destruction of the phone.

18   MR. DREEBEN: So, Justice Sotomayor, I'm not

19   entirely sure how to articulate that principle, but if

20   it fits within the crime of arrest plus identity

21   principle, then I think it would be a reasonable

22   fallback position.

23   If I could reserve the balance of my time.

24   CHIEF JUSTICE ROBERTS: Thank you, counsel.

25   Ms. Mizner.

1   ORAL ARGUMENT OF JUDITH H. MIZNER

2   ON BEHALF OF THE RESPONDENT

3   MS. MIZNER: Mr. Chief Justice, and may it

4   please the Court:

5   I'd like to first talk about the encryption

6   that we've been discussing. It's not an issue in this

7   case. It was not an issue in Riley. It was not

8   litigated below. And the government has just now said

9   that there are a lot of phones arriving at a lab in a

10   locked state, but do we know whether they're in a locked

11   state because they were locked at the time that they

12   were seized or did they lock subsequently?

13   The number of password-protected phones that

14   are open at the time of arrest is pure speculation. And

15   if they're not open at the time of arrest, the

16   government's argument about locking is irrelevant. The

17   number of password-protected phones that would be

18   inaccessible at a later time is also an unknown and --

19   and speculative quantity.

20   There are devices that can break passwords.

21   Technology advances on both fronts. The government has

22   capabilities of breaking the more typical passwords, the

23   four-digit, four letter passwords within 15 minutes. There

24   are -- you can obtain assistance from manufacturers in

25   obtaining the passwords and ability to --

1   CHIEF JUSTICE ROBERTS: We've -- we've kind

2 of gotten far afield, which I'm sure is not -- may not

3 be fair to Mr. Fisher or Mr. Dumont, we're talking about

4 their case, but in your case why isn't the information

5 in plain view? It says, "my house, my home." They look

6 at it, that's what they see. They don't have to open

7 anything.

8   MS. MIZNER: They saw the words "my house."

9 They did have to open the phone and access the log to --

10   CHIEF JUSTICE ROBERTS: Sure. But I'm

11 saying do you have -- you have no objection to the "my

12 house"?

13   MS. MIZNER: The "my house" words were in

14 plain view. And under this Court's doctrine, that's

15 not --

16   CHIEF JUSTICE ROBERTS: I assume that that's

17 -- it says "my house" because he's done something with

18 the particular number. If he didn't, it would be the

19 number itself that would show up, right?

20   MS. MIZNER: Yes. And that's part --

21   CHIEF JUSTICE ROBERTS: And so that would

22 also be in plain view?

23   MS. MIZNER: The number was not in plain

24 view.

25   CHIEF JUSTICE ROBERTS: No, no. But I mean,

1   in a -- in a case in which the user had not coded the

2   particular number, the number would show up, I think,

3   right?

4   MS. MIZNER: Yes. And --

5   CHIEF JUSTICE ROBERTS: And that would be --

6   MS. MIZNER: And the number would be in

7   plain view.

8   CHIEF JUSTICE ROBERTS: Okay.

9   MS. MIZNER: But what makes the -- the

10   privacy interest and the associational interest in

11   simply the call logs, which the government has talked

12   about in Mr. Wurie's case, is that it does contain more

13   than simply the numbers dialed. You have the

14   associational information that's created by the user.

15   In this case, it was linking my house to a particular

16   number.

17   It can go well beyond that.   You can link

18   names and nicknames to -- and places to a number. You

19   can link e-mails to a name and a number. You can link a

20   relationship to a name and a number. Doctor, shrink,

21   mom, dad. You can link a photograph to a number. You

22   can link your number -- you can link it to text

23   messages. You can link it to other numbers.

24   So you can provide pattern -- and also

25   patterns of calling that provide additional

1   associational data and could indicate the closeness of a

2   relationship. How often calls were made, when are they

3   made, what's the time of the call, when did it start or

4   stop, the length of the call. You can link notes,

5   either general or about a particular phone call.

6   CHIEF JUSTICE ROBERTS: What do you think,

7   if the phone rings, can the police answer it?

8   MS. MIZNER: The cases that have addressed

9   answering the phone have been in the context of search

10   warrants for houses where, as the police are searching

11   the house, the phone has been ringing. And the courts

12   have said that -- lower courts have said that where

13   answering the phone can be viewed as being within the

14   scope of the search warrant, it is permissible for the

15   police to answer the phone.

16   CHIEF JUSTICE ROBERTS: Well, what about

17   this case where there isn't a search warrant?

18   MS. MIZNER: They didn't answer the phone.

19   CHIEF JUSTICE ROBERTS: The number's in

20   plain view. I mean, is answering the phone -- can you

21   do it or not? You know what number is calling. Is it

22   like someone -- you're conducting a search on the house

23   and somebody knocks on the door? You can open the door,

24   right?

25   MS. MIZNER: Yes. And they perhaps could

1   have answered the phone in this case, but they didn't.

2   JUSTICE KENNEDY: No, but what is your

3   position? What is the rule you want us to adopt in

4   response to the Chief Justice's question?

5   MS. MIZNER: I would say that they could

6   answer the phone.

7   JUSTICE SOTOMAYOR: Under what theory? I

8   don't disagree with you. I just want to know what would

9   be your theory, and what's the limitation?

10   MS. MIZNER: Well, in the sense it's -- it's

11   plain hearing. It is a -- an analogue of plain view.

12   There is nothing particularly private about the ringing.

13   And if you -- the policeman can answer the phone. It

14   doesn't mean that the person on the other end has to

15   respond. It's --

16   JUSTICE SOTOMAYOR: I was thinking in terms

17   of reasonable expectation of privacy. Most people don't

18   pick up other people's phones to answer them unless the

19   phone is lost. And then you pray the person who found

20   it answers it.

21   (Laughter.)

22   MS. MIZNER: And perhaps this would be

23   analogous to -- to that. So the --

24   CHIEF JUSTICE ROBERTS: So do you think --

25   it's got nothing to do with plain hearing. I'm not

1   saying they can't -- obviously they can hear the ring.

2   I'm just -- it's a big, different step to answer it.

3   MS. MIZNER: If the police have seized the

4   phone and they can secure it, pending application for a

5   warrant to engage in a search of its contents, then

6   answering the phone could be viewed as part of -- of

7   securing.

8   JUSTICE ALITO: Does the owner of a cell

9   phone have a reasonable expectation of privacy in the

10 call log?

11   MS. MIZNER: Yes. I believe for the

12 associational data and reasons that I have just

13 articulated, that there is an expectation of privacy in

14 the call log.

15   JUSTICE ALITO: But the cell phone company

16 has all that information, doesn't it?

17   MS. MIZNER: No. The cell phone company

18 has --

19   JUSTICE ALITO: Has the numbers.

20   MS. MIZNER: -- Has the numbers, but it does

21 not have --

22   JUSTICE ALITO: All right. Does the -- does

23 the owner have a reasonable expectation of privacy in a

24 list of the numbers called?

25   MS. MIZNER: Not in the list of the numbers

1   alone, but the call log is not limited to that list of

2   numbers. And your phone bill may not necessarily

3   include, depending on the kind of plan you have, may not

4   include information about the length of the call or --

5   JUSTICE ALITO: The cell phone company won't

6   have information about the length of the call?

7   MS. MIZNER: I think it would depend on --

8   whether they keep that information, it would depend on

9   what kind of plan you have.

10   JUSTICE ALITO: Well, what are we dealing

11   with here? I know everybody wants to talk about global

12   issues, but what -- what are the -- what information are

13   we talking about in this case? We have my home, which

14   you said is in plain view, my house, and then you have

15   the call log.

16   What else do we have?

17   MS. MIZNER: That was all that was accessed.

18   We're talking about the phone number that allowed the

19   police to get to a particular premises.

20   JUSTICE ALITO: Well, if the call log, the

21   numbers called, is not covered by a reasonable

22   expectation of privacy, and my house is not covered by a

23   reasonable expectation of privacy, then where is the

24   search?

25   MS. MIZNER: It -- the search is in opening

1   the phone itself, which is covered by a reasonable

2   expectation of privacy.

3   CHIEF JUSTICE ROBERTS: No, they could --

4   JUSTICE ALITO: And you couldn't do that and

5   look for a razor blade?

6   MS. MIZNER: You could -- you are then --

7   JUSTICE ALITO: Flip open the old style

8   flip-phone to see if there's something inside?

9   MS. MIZNER: Yes, you could examine it, but

10   that is not going to get you the phone number. You had

11   to push -- the officer here had to push a button in

12   order to get access to the call logs. There were two

13   buttons that --

14   JUSTICE ALITO: So you have a reason -- but what

15   is -- where is -- what is the reason -- by pushing the

16   button, you get information that you just told me is not

17   covered by a reasonable expectation of privacy.

18   MS. MIZNER: No, Justice Alito, I believe I

19   said that the information is covered by a reasonable

20   expectation of privacy because there is associational

21   information that is inputted by the owner of the phone.

22   JUSTICE ALITO: Yes, but was any of that

23   used here?

24   MS. MIZNER: It was the link between my

25   house and the -- and the number, yes, that -- that got

1   them to the premises.

2   JUSTICE ALITO: Well, they saw that the number --

3   they saw the phone rang at a particular time, and then

4   if you look at the call log, you can see what call came

5   in at that particular time. And then you know where the

6   call came from that registered as my house.

7   MS. MIZNER: But you wouldn't know that it

8   was my house absent the information that the owner of

9   the phone had put in.

10   JUSTICE ALITO: Why -- why is that

11   so and maybe I don't understand the facts.

12   If -- if a phone rang right now and you look at the call

13   log and you see what call came in at 12:13, and you know

14   that the call came from my house, and you see the number

15   from -- of the call that came in at 12:13, wouldn't you

16   know that that was the number from my house?

17   MS. MIZNER: But you wouldn't know from the

18   call log alone without information input by the phone

19   owner on that log that it was my house once they get the

20   number.

21   CHIEF JUSTICE ROBERTS: Well, if it

22   wasn't -- if it wasn't input, you would have the number

23   itself in plain view.

24   MS. MIZNER: Yes. But you would then -- you

25   could go to some kind of reverse directory to get an

1   address. But you have no -- what is the reason to

2   believe that that number --

3   CHIEF JUSTICE ROBERTS: You wouldn't know it

4   was the house.

5   MS. MIZNER: -- has anything to do with the

6   defendant's house.

7   JUSTICE KENNEDY: Can -- can -- can the

8   police search the person's wallet and find an -- an

9   index card with a number, my house? Can he do that --

10   MS. MIZNER: I believe --

11   JUSTICE KENNEDY: -- and use the information

12   obtained?

13   MS. MIZNER: I believe that the police can

14   examine the contents of a --

15   JUSTICE KENNEDY: Examine the contents of

16   the wallet but not read it? I -- I don't understand the

17   issue.

18   MS. MIZNER: And --

19   JUSTICE KENNEDY: Is -- may the police or

20   may not the police examine a wallet, find the number

21   that says my house, and act on that information to

22   investigate the crime? Yes or no?

23   MS. MIZNER: This Court has not addressed

24   the reading of information examined in -- in -- in

25   searching for incident to arrest.

1   JUSTICE KENNEDY: Well, it seems to me that

2 it's fairly clear that it's part of the contents that

3 are seized, that are on -- in the possession of the

4 arrestee, and that the police can act on it.

5   MS. MIZNER: Well, under the justifications

6 of Chimel and -- which were reiterated in -- in Robinson

7 and in Gant and McNeely, the justifications are officer

8 safety and evidence preservation. It doesn't -- which

9 does not necessarily encompass reading.

10   But to address the case of the cell phone, I

11 don't think you have to resolve whether it's appropriate

12 to read paper documents that you come across in

13 examining a paper or not.

14   CHIEF JUSTICE ROBERTS: No, but the point is

15 the only -- the only information they got and used was

16 the phone number and address of his house, right?

17 And -- and that it was his house, right?

18   MS. MIZNER: But that --

19   CHIEF JUSTICE ROBERTS: That's on your

20 driver's license, isn't it? So -- and --

21   MS. MIZNER: Your residence is, but this was

22 not -- then they needed his driver's license, which they

23 had.

24   CHIEF JUSTICE ROBERTS: So I guess I'm just

25 trying to see what greater invasion of privacy there was

1   in this case than the police looking at your driver's

2   license when you're carrying it around in your wallet.

3   MS. MIZNER: Because my house may not

4   necessarily be the house in which you reside. You may

5   have chosen to attach that description --

6   CHIEF JUSTICE ROBERTS: So the problem here

7   was that he called -- he indicated that a number was his

8   house, and it might not have been his house?

9   MS. MIZNER: The problem is that the police

10 searched his phone in order to associate information

11 contained in the phone with what they were able to

12 observe in plain view.

13   JUSTICE BREYER: There had to be two

14 buttons, two buttons.

15   MS. MIZNER: Yes.

16   JUSTICE BREYER: Now, was there a claim made

17 in this case that exigent circumstances, destruction of

18 evidence, or officer safety justified the search?

19   MS. MIZNER: No.

20   JUSTICE BREYER: No? Okay.

21   So I guess that if there is a rule that says you

22 can search phones, then you could do it. After all, you

23 might search a phone and come up with an advertisement

24 for a Walt Disney movie, which is perfectly public.

25   But if the rule is you can't search phones,

1   then you win, even though in this case they came up with

2   something that was -- is -- is that right or not?

3   MS. MIZNER: Yes. So --

4   JUSTICE BREYER: I mean, if, in fact, you

5   can search the phone thoroughly for everything in the

6   person's life, they might have come up with something

7   when he was six years old, there is, in fact, a picture

8   of an elephant at the zoo. Totally public.

9   But it would still fall within the rule,

10   which what I thought one of the things we're arguing

11   about in this case.

12   MS. MIZNER: Yes, Justice Breyer, and we

13   believe that the seize-and-secure rule that we are

14   proposing meets the needs of law enforcement by allowing

15   them to maintain custody of the --

16   JUSTICE BREYER: All right. Well, what is

17   your argument for the proposition, look, when you search

18   a phone, sometimes what you come up with is perfectly

19   public information; sometimes what you come up with is

20   private information. Now, you want to say the absolute

21   rule should be no.

22   But what's your argument, rather than trying

23   to say sometimes if you get the private information, no;

24   but if you get the public information, yes, et cetera?

25   MS. MIZNER: Because everything is so

1   intermingled on a cell phone or a tablet or a computer,

2   you don't know what you're going to be getting when you

3   push those buttons and start rummaging through the

4   digital contents of the phone.

5   JUSTICE ALITO: In determining whether the

6   examination of information on a cell phone is --

7   constitutes a search, what do you think we -- we are

8   doing? Are we trying to -- to -- are we answering an

9   empirical question, what is the reasonable expectation

10   of privacy of a -- of a person in 2014 who has a cell

11   phone in his or her -- on his or her person? Or are we

12   legislating what we think is a good privacy rule?

13   MS. MIZNER: I think the Court is

14   determining whether or not in 2014 an individual has a

15   reasonable expectation of privacy against government

16   intrusion into a device that carries around an

17   increasingly large percentage of somebody's personal and

18   private information.

19   JUSTICE ALITO: All right. Well, a lot of

20   that -- part of that is the person must act -- people

21   must actually have that expectation. That must be the

22   expectation of people at large in 2014, that they think

23   that everything that's on their cell phones is private,

24   or they think some of the information on the cell phones

25   is private, or they think nothing on the cell phone is

1 private. Where do you think we should look to answer

2 that question about what people in 2014 think about that

3 question?

4   MS. MIZNER: I think from the fact that

5 people carry them with them in -- in a pocket or in a

6 purse, that that exhibits an expectation of privacy.

7 You don't expect people to be rummaging through your

8 pockets or -- or through the items you're carrying.

9   JUSTICE ALITO: But why is that so? Cell

10 phones are different. I'm not going to say for a --

11 suggest for a second that there are like things that

12 existed in the pre-digital area. But in the pre-digital

13 era, presumably people didn't have a reasonable

14 expectation of privacy in papers, letters, things like

15 that that they had, of photos in a billfold, numbers,

16 addresses, things that they might -- they might be

17 carrying on their persons.

18   MS. MIZNER: You --

19   JUSTICE ALITO: So how do we determine what

20 the -- what the new expectation of privacy is now?

21   MS. MIZNER: I think people did have an

22 expectation of privacy in those items until --

23   JUSTICE ALITO: Then why was it not a search

24 when -- when you -- you searched the pocket of somebody

25 who was arrested and you found the address of someplace?

1   MS. MIZNER: I believe it is a search,

2   Justice Alito. It's a question of whether it is a

3   search that has been justified by an exception to the

4   warrant requirement, the -- the scope -- or the

5   permissible scope of the search incident to arrest.

6   It's still a search.

7   JUSTICE ALITO: All right. What was the --

8   why -- how do we determine whether something has --

9   somebody has a reasonable expectation of privacy in any

10   category of information that is contained on a cell

11   phone?

12   MS. MIZNER: Because of the

13   interconnectivity of the data, I don't think you can say

14   a person has a reasonable expectation of privacy in this

15   app, but not that app, because you don't know what is

16   linked to any other part of the cell phone. So the rule

17   that provides the security that the Fourth Amendment is

18   intended to give an individual would be to say --

19   JUSTICE SOTOMAYOR: Are -- are you -- I --

20   I -- I'm assuming that what you're saying -- you just

21   said it a minute ago -- the Fourth Amendment, the

22   searches incident to arrest are an exception to the

23   Fourth Amendment?

24   MS. MIZNER: Yes, Justice Sotomayor.

25   JUSTICE SOTOMAYOR: And is it your position,

1   I -- I'm assuming this is what this argument's been

2   about, which is whether we're going to extend that

3   exception of -- the exception of searches incident to

4   arrest to a new category, cell phones --

5   MS. MIZNER: Whether --

6   JUSTICE SOTOMAYOR: -- which are different

7   than the traditional item.

8   MS. MIZNER: Whether the scope of a

9   justifiable search-incident-to-arrest is going to

10 include a search of -- of the cell phone.

11   JUSTICE SCALIA: Why do you say they are an

12 exception to the Fourth Amendment? They just don't

13 violate the Fourth Amendment. I mean, the Fourth

14 Amendment covers certain things and it doesn't cover

15 other things. The things that it doesn't cover are

16 not -- not -- not exceptions. They're just things not

17 covered.

18   MS. MIZNER: Well, this Court has espoused a

19 warrant presumption and has said -- has classified the

20 search-incident-to-arrest exigent circumstances as

21 exceptions to the warrant requirements saying that the

22 preference is for a warrant to be obtained, and under

23 certain well-defined circumstances, we are going to say

24 that you need not.

25   JUSTICE SCALIA: Well, but that -- that

1 presumption is -- is simply not -- you don't believe

2 that presumption, do you?

3   MS. MIZNER: I do.

4   JUSTICE SCALIA: There are many more

5 searches conducted without a warrant than with a warrant

6 I -- I bet. I mean, any automobile search, any

7 inventory search, any -- any search of -- of businesses.

8 All sorts of searches are conducted without a warrant.

9   But you still believe that a warrant is the

10 rule and everything else is the exception. I think it

11 may be the opposite, actually.

12   JUSTICE SOTOMAYOR: Unless the exceptions

13 have swallowed the rule.

14   MS. MIZNER: In the exceptions, viewing the

15 search-incident-to-arrest exception as having per -- as

16 having limited parameters as the First Circuit did --

17   JUSTICE KENNEDY: The -- the question is

18 whether it's an unreasonable search, and the warrant

19 clause follows much later. The question is: Is this an

20 unreasonable search?

21   MS. MIZNER: But this Court has --

22   JUSTICE KENNEDY: That's what the

23 Constitution provides.

24   MS. MIZNER: This Court has said in many

25 instances that a search not conducted pursuant to a

1   warrant is unreasonable unless it falls within one of

2   the well-defined exceptions that this Court has

3   recognized to the warrant requirement. But --

4   JUSTICE KENNEDY: Well, it's a search that's

5   reasonable. That's not necessarily an exception.

6   MS. MIZNER: But in terms of reasonableness,

7   this Court is balancing the intrusion against the

8   individual's interest in privacy --

9   JUSTICE ALITO: Yeah, and that's the --

10   MS. MIZNER: -- a traditional balancing

11 test, and we suggest that -- that balance here supports

12 the seize and secure rule that we are advocating.

13   JUSTICE ALITO: No. I understand that. But

14 that -- that's the question that I was asking before.

15 Is it a reasonable search or seizure? All right. So

16 you have to balance the privacy interest versus the law

17 enforcement interest.

18   And how do -- how do we find out what the

19 privacy interests are -- what the privacy expectations

20 are, which go into that balance with respect to cell

21 phones in 2014?

22   MS. MIZNER: Well, on --

23   JUSTICE ALITO: Does it matter? You think

24 it doesn't matter? Maybe people feel very strongly

25 every single thing that's in the cell phone is -- is

1   private, or maybe they don't. Maybe they think some

2   things are private; some things are not private.

3   MS. MIZNER: I think that by virtue of the

4   fact that you carry them around in a generally enclosed

5   container, a pocket, a purse, a briefcase, that that

6   exhibits -- that is an indication that people expect

7   that the cell phone -- that the information contained on

8   their cell phone is private.

9   CHIEF JUSTICE ROBERTS: Well, as opposed to

10   what? Carrying it around somewhere other than your

11   pocket? I mean, do -- do you think there's a difference

12   if it's attached to someone's belt and everybody can see

13   it or if it's in a pocket?

14   MS. MIZNER: No. I believe that because you

15   are carrying it with you, it is -- it's not something

16   that you are exhibiting to the public. You're not

17   exhibiting the contents of the phone to the public.

18   CHIEF JUSTICE ROBERTS: Surely it's more

19   private if it's locked in your car or kept in your

20   house.

21   MS. MIZNER: Yes.

22   CHIEF JUSTICE ROBERTS: Carrying it with you

23   in public makes it less private.

24   MS. MIZNER: But you're not -- it may be

25   less private, but that doesn't mean that you don't have

1   a reasonable expectation of privacy against people

2   taking it from you and starting to intrude and -- and

3   rummage through its contents.

4   JUSTICE GINSBURG: But you're not questioning

5   the ability of the police to take the phone. I thought

6   that that was a given, that incident to the arrest, the

7   police could take the phone. The question is whether

8   they can search it without a warrant.

9   MS. MIZNER: Yes, Justice Ginsburg. I was

10 responding in terms of just a general expectation that

11 people are not going to -- if you -- because you're

12 carrying a phone in public, it doesn't mean that you

13 expect that people are going to walk up and remove it

14 from your belt or remove it from your pocket and start

15 searching its contents.

16   JUSTICE SCALIA: Well, you can say the

17 same thing about a cigarette pack that -- that has

18 cocaine in it.

19   CHIEF JUSTICE ROBERTS: Or a gun.

20   JUSTICE SCALIA: Or -- or a gun.

21   MS. MIZNER: And the police may seize and

22 examine those containers --

23   JUSTICE SCALIA: Right.

24   MS. MIZNER: -- to see whether or not.

25   JUSTICE SCALIA: And why not the phone.

1 That's exactly the question.

2   MS. MIZNER: Because --

3   JUSTICE SCALIA: Do you have a reasonable --

4 our rule has been if you carry it on your person, you

5 ought to know it is subject to seizure and examination,

6 and that's been the rule.

7   MS. MIZNER: It's the scope of examination

8 that we -- that is at issue with a cell phone. A cell

9 phone is fundamentally different from a cigarette pack.

10 You can open the cigarette pack, you see whether or not

11 there is something that is subject to destruction. But

12 whether there's --

13   JUSTICE SCALIA: And you can open the cell

14 phone and see whatever's in it. So if you carry around

15 a cell phone that isn't encrypted or whatever, you know,

16 you -- you -- you get what you -- what you should have

17 expected. That's -- that's been the rule. If you are

18 arrested, we -- we can seize it and examine it.

19   MS. MIZNER: The question is what is the

20 scope of a permissible examination. And when you're

21 talking about a cigarette pack, you're looking at

22 another physical object. You're not looking at the

23 contents of somebody's home.

24   JUSTICE SCALIA: I understand. But you --

25 so you're arguing for a new rule. The rule right up to

1   now has been you can -- we can seize it. We can examine

2   it totally. If it's a book, we can read every page of

3   the book. You want a new rule for cell phones, right?

4   MS. MIZNER: We want a rule that says that

5   you cannot search the contents of the cell phone without

6   a warrant.

7   JUSTICE SCALIA: At all? At all?

8   MS. MIZNER: On -- absent exigent

9   circumstances.

10   JUSTICE GINSBURG: What would be an exigent

11   circumstance where you could search, in your view?

12   MS. MIZNER: An exigent circumstance?

13   JUSTICE GINSBURG: You said you had -- you

14   are arguing for a flat rule to the police, thou shalt

15   not unless there are exigent circumstances. So what

16   would be an exigent circumstance where the police,

17   without getting a warrant, could search the cell phone?

18   MS. MIZNER: One would be an example of

19   police are investigating a bombing, a upcoming -- a

20   potential bombing, and they have information that the --

21   that whoever is going to set off the bomb is going to --

22   may do it with a cell phone, and is going to be in a

23   particular place at a particular time. You see someone

24   approaching with a cell phone, then suggest that under

25   those circumstances, you could --

1   CHIEF JUSTICE ROBERTS: This is kind of --

2   MS. MIZNER: -- take whatever measures you

3   needed.

4   CHIEF JUSTICE ROBERTS: It's not a bomb, but

5   this a different case. This is somebody in an area

6   selling drugs where the police have told us they

7   typically use cell phones to arrange the deals and the

8   transfers, and this guy is caught with two cell phones.

9   Why would he have two cell phones?

10   MS. MIZNER: Many people have more than --

11   have multiple cell phones. I -- there was no --

12   CHIEF JUSTICE ROBERTS: Really? What is --

13   what is your authority for the statement that many

14   people have multiple cell phones on their person?

15   MS. MIZNER: Just observation. But --

16   JUSTICE SCALIA: You've observed different

17   people from the people that I've observed.

18   (Laughter.)

19   MS. MIZNER: That's probably true.

20   CHIEF JUSTICE ROBERTS: Particularly since

21   they're in their pockets, right?

22   Well, it -- does -- do you -- is it

23   insignificant, in your view, that the cell phone was a

24   method for which criminal transactions were typically

25   undertaken in this area and that the fellow had two cell

1   phones rather than what I would have thought is the more

2   normal one?

3   MS. MIZNER: Yes. I don't believe that that

4   should be a criteria justification for searching either

5   cell phone. The -- it may be convenient for the police

6   to get information related to a crime by -- by searching

7   without a warrant, but this Court has said repeatedly

8   that convenience and efficiency don't override

9   individual constitutional rights.

10   And sanctioning a general evidence gathering

11 search of the entire contents of his cell phone, given

12 the current expansive nature of those contents is an

13 unwarranted expansion of a traditional search incident

14 to arrest, because we are not talking about the kind of

15 traditional containers that holds limited, finite

16 quantities of -- of usually other objects.

17   And there is nothing -- a seize-and-secure

18 rule protects both the individuals' expectations of

19 privacy and security and the government's right to

20 obtain evidence consonant with the protections of the

21 warrant requirement, giving the neutral magistrate an

22 opportunity to determine whether there's probable cause

23 for the search of the cell phone and to define the

24 limits of that search.

25   CHIEF JUSTICE ROBERTS: Mr. Dreeben, you

1   have four minutes remaining.

2   REBUTTAL ARGUMENT OF MICHAEL R. DREEBEN

3   ON BEHALF OF PETITIONER

4   MR. DREEBEN: Mr. Chief Justice, and may it

5   please the Court:

6   A search incident to arrest has always been

7   considered a reasonable search within the meaning of the

8   Fourth Amendment, and I think this case illustrates why

9   that principle well applies to a cell phone.

10   JUSTICE SOTOMAYOR: This is a very big

11   confusion of the Fourth Amendment. The Fourth Amendment

12   doesn't permit reasonable searches without a warrant.

13   It says you need a warrant for -- we've created

14   exceptions to that, but not because a search is

15   reasonable. Virtually every search could be reasonable

16   without a warrant. If you've watched somebody selling

17   drugs, it's very reasonable to go into their house, but

18   absent the exigent circumstance of the drugs

19   disappearing, you can't. So I don't talk about

20   reasonable searches. I talk about --

21   MR. DREEBEN: So Justice Sotomayor, the

22   Fourth Amendment doesn't actually say you do need a

23   warrant. It does protect the right against unreasonable

24   seizures, and it describes what warrants must contain.

25   JUSTICE SCALIA: That's the only thing it

1 prohibits is unreasonable seizures.

2   MR. DREEBEN: That's exactly right. That's

3 the textual prohibition. This Court has created

4 language in its jurisprudence that prefers warrants in

5 certain circumstances, but as the Court recognized in

6 McNealey last term and in Maryland v. King, the search

7 incident to arrest doctrine is a categorical exception

8 and this case illustrates why.

9   The information that was found on the phone

10 was very time sensitive and important to law

11 enforcement. It helped fulfill the typical purposes,

12 the categorical purposes of the search incident to

13 arrest doctrine. It helped verify identity, it helped

14 solve the crime that -- for which the individual was

15 arrested, and it was done in a reasonable and

16 nonintrusive manner. There was nothing about this

17 search that exposed reams of private data to view.

18   To the extent that the data was not in a

19 call log really subject to a reasonable expectation of

20 privacy at all, it was discovered in a search but I

21 think that underscores why the search was limited and

22 reasonable. So this case really, I think, exemplifies

23 why a categorical rule that respondent urges in this

24 case would not be appropriate, and we submit that this

25 Court should reverse the Court of Appeals. Thank you.

1   CHIEF JUSTICE ROBERTS: Thank you,

2   Mr. Dreeben.

3   The case is submitted.

4   (Whereupon, at 12:34 p.m., the case in the

5   above-entitled matter was submitted.)

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