No. 13-212

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2013

UNITED STATES OF AMERICA,
Petitioner,

-v.-

BRIMA WURIE,
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to the provisions of Rule 39 of the Rules of this Court, the respondent, Brima Wurie, moves to file the attached Brief in Opposition to Petition For Writ of Certiorari to the United States Court of Appeals for the First Circuit without prepayment of costs and to proceed *in forma pauperis*.

The petitioner was represented in the United States Court of Appeals for the First Circuit by counsel appointed pursuant to the Criminal Justice Act (18 U.S.C. § 3006A).

Judith H. Mizner
Counsel of Record for Petitioner

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Whether the Fourth Amendment permits the police to search the contents of a cell phone seized from a person who has been lawfully arrested, without first obtaining a search warrant?

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STATEMENT

As described in the First Circuit opinion, Boston police officers stopped an individual whom they believed had just engaged in a drug transaction with Brima Wurie and found him to be in possession of crack cocaine. That individual identified Wurie as the person from whom he had bought the drugs and said that Wurie lived in South Boston. Wurie, who was being followed by other officers, was arrested after he parked his car and taken to the police station; two cell phones, keys and cash were seized from him there. *United States v. Wurie*, 728 F.3d 1, 1-2 (1st Cir. 2013). Officers saw that one of the phones "was repeatedly receiving calls from a number identified as 'my house' on the external caller ID screen on the front of the phone." *Id.* at 2. An officer opened the phone, pressed a button to access the phone's call log and then pressed another button to find the telephone number associated with the "my house" calls. *Id.* An officer used an online telephone directory to obtain an address for that phone number. *Id.* Officers went to that address, occupied by a woman and a baby, "entered the apartment to 'freeze' it while they obtained a search warrant" and, during the execution of the warrant, seized, *inter alia*, a firearm, crack cocaine and marijuana *Id.*

Wurie was charged in a three-count indictment with being a felon in possession of a firearm (count 1), distribution of cocaine base (the drugs seized from the individual) (count 2), and possession with intent to distribute cocaine base (the drugs seized from the apartment) (count 3).

Wurie moved to suppress the evidence obtained as a result of the warrantless search of his cell phone; the district court denied the motion. A jury convicted Wurie on all counts after a four-day trial. The district court sentenced Wurie to a term of 262 months on counts 1 and 3 and 240 months on count 2, to be served concurrently.

On appeal to the U.S. Court of Appeals for the First Circuit, that court, after noting that federal and state courts have addressed warrantless cell phone data searches with "a variety of approaches" and "disparate reasoning," 728 F.3d at 5-6, rejected the government's argument that the search of the cell phone was simply a permissible warrantless search incident to arrest under *United States v. Robinson*, 414 U.S. 218 (1973), and *United States v. Edwards*, 415 U.S. 800 (1974). The court recognized the privacy interest in cell phone data, noting the storage capacity and access to information provided by "'[e]ven the dumbest of modern cell phones,'" *id.* at 8-9 & n.10, and the potential access to a large array of personal information from a search. The court analyzed the search of the data in a cell phone under the rationales of *Chimel v. California*, 395 U.S. 752 (1969), as described in *Arizona v. Gant*, 556 U.S. 332, 339 (2009) – "protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy" – and concluded that neither rationale justified the warrantless search of Wurie's cell phone for two reasons.

First, the government did not argue that cell phone data searches were necessary for officer protection. 728 F.3d at 10. Second, the suggestion that the search was "arguably" necessary to prevent the destruction of evidence was more theoretical than real, and "[w]eighed against the significant privacy implications inherent in cell phone data searches, we view such a slight and truly theoretical risk of evidence destruction as insufficient." *Id.* at 10-11. Thus, consistent with the approach taken in *Robinson*, the court of appeals held that "warrantless cell phone data searches are *categorically* unlawful under the search-incident-to- arrest exception, given the government's failure to demonstrate that they are ever necessary to promote officer safety or prevent the destruction of evidence." *Id.* at 12 (emphasis in original). The court also noted that the government had not raised

other exceptions to the warrant requirement, such as the exigent circumstances exception, which might justify a warrantless search of cell phone data under certain circumstances. *Id.* at 13-14.

The dissent viewed the search of Wurie's cell phone as within the scope of a permissible search incident to arrest. It was limited to a search for a particular phone number and was, in the dissent's view, no different from the search of containers such as a wallet or address book, both of which had been upheld by courts. 728 F.3d at 15-17. The dissent also concluded that there was a risk that others might have destroyed evidence after Wurie did not answer his phone. *Id.* at 17.

The First Circuit denied the government's motion for rehearing en banc on July 29, 2013. *See* Doc. 00116566242 (filed July 16, 2013); Doc. 00116561839 (filed July 29, 2013)

On July 16, 2013, the government filed a motion "to clarify that the Court's judgment 'vacat[ing] [Wurie's] conviction' applies only to Counts One and Three of the Indictment." It "assume[d]"the court did not intend to vacate Wurie's conviction on the distribution charge because, as had been noted in a footnote of the government's brief, the evidence on that count stemmed from the testimony of an officer describing the alleged sale and the cocaine seized from an individual after that event, all of which occurred prior to Wurie's arrest and the warrantless search of his cell phone. *See* Doc. 001165556244 (filed July 16, 2013). The court granted the government's motion on August 2, 2013, stating that "[t]he conviction on count II [upon which the district court had imposed a twenty-year sentence] stands" Doc. 00116564386 (filed Aug. 2, 2013). The court denied Wurie's motion for reconsideration, in which he asserted that the evidence obtained as a result of the warrantless cell phone search did, in fact, play a significant role in the conviction on count 2, without opinion on August 30, 2013. *See* Doc. 00116566386 (filed Aug. 7, 2013); Doc. 00116576470 (filed Aug. 30, 2013).

REASONS FOR DENYING THE WRIT

I. Review Should Await Further Development of the Issue in the Circuit Courts of Appeals and State High Courts

A. Introduction

The Fourth, Fifth, and Seventh Circuits and the highest courts of the states of California, Georgia, and Massachusetts have upheld warrantless searches of cell phones incident to arrest with varying rationales.[1] The First Circuit, the highest courts of the states of Florida and Ohio and federal district courts in California and Florida have rejected warrantless cell phone searches incident to arrest with varying rationales. The varied rationales underlying these opinions, the fact that eight United States Courts of Appeals (and most state high courts) have not addressed the issue in precedential opinions, and the rapid rate at which the technology involved is evolving, all counsel waiting for the lower federal and state courts to further evaluate the array of legal issues and the impact of technological advances involved in this area before this Court resolves what differences, if any, will remain after further development.

B. Current Judicial Decisions

All of the judicial decisions in this area address this Court's search incident to arrest jurisprudence, as expressed in *Chimel v. California*, 395 U.S. 752 (1969), *United States v. Robinson*, 414 U.S. 218 (1973), *United States v. Edwards*, 415 U.S. 800 (1974), *United States v. Chadwick*, 433 U.S. 1 (1977), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565 (1991), and

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[1] The Tenth Circuit, in an unpublished opinion, not precedential under its rules (10th Cir. R. 32.1(A)), simply asserted, without analysis, that "the permissible scope of a search incident to arrest includes the contents of a cell phone found on the arrestee's person," citing *United States v. Finley*, 477 F.3d 250 (5th Cir. 2007) (discussed *infra* at 7). *Silvan W. v. Briggs*, 309 F. App'x. 216, *6 (10th Cir. 2009).

Arizona v. Gant, 556 U.S. 332 (2009). At this time, there are differing views as to how those decisions apply and should apply to searches of cell phones seized from people who have been arrested.

1. Cases Holding That the Contents of a Cell Phone May Not Be Searched Incident to Arrest Without a Search Warrant

The First Circuit opinion examined the privacy interest in cell phone data in today's society and the potential invasion of privacy from law enforcement access to that data, and viewed the cell phone as more than a mere container such as a cigarette pack. In rejecting the government's argument that the warrantless search of Mr. Wurie's cell phone was justified as incident to his arrest, the court focused on the rationales for warrantless searches incident to arrest described and applied by this Court in *Chimel* and *Gant* – officer safety and the prevention of destruction of evidence – and concluded that those rationales did not support categorical warrantless searches of cell phones seized incident to arrest. The court recognized that particular circumstances may justify a warrantless cell phone search under other recognized exceptions to the warrant requirement.

Federal district courts have also refused to uphold warrantless cell phone searches as incident to arrest. In *United States v. Wall*, 2008 WL 5381412 (S.D. Fla. 2008), *aff'd on other grounds*, 343F. App'x 564 (11th Cir. 2009), the district court viewed the search of the defendant's cell phone for text messages during the booking process as not supported by the rationales of a search incident to arrest, officer safety and preservation of evidence – but instead as analogous to the search of a sealed letter, requiring a warrant. *Id.* at *3. The court specifically rejected the reasoning of *United States v. Finley*, 477 F.3d 250 (5th Cir. 2007). In *United States v. Park*, 2007 WL1521573 (N.D. Cal. 2007), the court viewed searches of defendants' cell phones at a police station approximately

90 minutes after their arrests as searches of possessions within their immediate control rather than searches of their person and, therefore, not lawful searches incident to arrest. In reaching that conclusion, the court recognized the cell phone's "capacity for storing immense amounts of private information." *Id.* at *8. The court also noted that the searches went "far beyond the original rationales for searches incident to arrest." *Id.*

The Florida Supreme Court held that *Robinson* was "neither factually nor legally on point" to a determination of the constitutionality of the warrantlesss search of a cell phone seized from an arrestee's person at the time of his arrest for stored data, including photographs. *Smallwood v. State*, 113 So.3d 724, 730 (Fla. 2013). The court viewed the "extensive information and data held in a cell phone" as a fact not involved in *Robinson, id.* at 731, and the cell phone of today as "materially distinguishable" from the "static, limited-capacity cigarette packet in *Robinson*" both quantitatively and qualitatively, *id.* at 732. Applying *Chimel* and *Gant*, the court concluded that once the officer obtained possession of the defendant's cell phone, the decisions' rationales for a warrantless search did not apply and a warrant was required to search the contents of defendant's cell phone. *Id.* at 735. The court viewed the cell phone search as "akin to providing law enforcement with a key to access the home of the arrestee....We refuse to authorize government intrusion into the most private and personal details of an arrestee's life without a search warrant simply because the cellular phone device which stores that information is small enough to be carried on one's person." *Id.* at 738.

In *State v. Smith*, 124 Ohio St.3d 163, 920 N.E.2d 949 (2009), the Ohio Supreme Court held that the warrantless search of a cell phone seized from defendant at the time of his arrest for call records and phone numbers violated the Fourth Amendment. The court refused to characterize a cell phone as a "closed container," deeming the container analogy inapposite given a cell phone's

capacity to store "a wealth of digitized information wholly unlike any physical object found within a closed container." *Id.* at 168. Finding a reasonable and justifiable privacy interest in cell phones given their ability to store large amounts of private data, a privacy interest that went beyond that in an address book or pager, and finding state interests in collecting and preserving evidence, as well as officer safety, to be met when a cell phone has been reduced to police custody, the court concluded that a cell phone's contents could not be searched incident to arrest without a warrant. *Id.* at 169.

2. Cases Holding That the Contents of a Cell Phone May Be Searched Incident to Arrest Without a Search Warrant

The rationales in opinions affirming cell phone searches incident to arrest range widely. Courts have adopted the view of a cell phone as a closed container, viewed the privacy intrusion as minimal; and viewed the potential for lost evidence as key. The Fifth Circuit's opinion in *United States v. Finley*, 477 F.3d 250 (5th Cir. 2007), affirming the warrantless search of a cell phone's call records and text messages, treated the cell phone as a closed container subject to search incident to arrest and relied on *Robinson* for the authority to search for evidence of the arrestee's crime. In *United States v. Murphy*, 552 F.3d 405 (4th Cir. 2009), the Fourth Circuit focused on the need to preserve evidence as the justification for the warrantless search of a cell phone seized incident to arrest for call records and text messages, and rejected an argument that such a search was justified only if the phone had a small storage capacity giving rise to the possibility that information would be lost through automatic deletion.

The Seventh Circuit addressed the search of a cell phone seized from the defendant's person incident to his arrest for its phone number in *United States v. Flores-Lopez*, 670 F.3d 803 (7th Cir.

2012). It viewed the modern cell phone as a type of computer capable of holding "a vast body of personal data", qualitatively different from other conventional physical closed containers such as a purse or an address book. *Id.* at 805. It discussed whether what it deemed "trivial" intrusions required warrants, and the analogy between obtaining a phone's number or address book and opening a diary for the owner's address or leafing through a pocket address book. *Id.* at 806-807. However, the court ultimately decided the case on its conclusion that there was a conceivable, even if not probable, risk of loss of evidence from "remote wiping" of the phone's contents before a warrant could be obtained and the search for the cell phone's number was no more invasive than the search of a conventional container. *Id.* at 807-10. It left unanswered the questions about privacy interests and more extensive searches that it had raised.

In *Hawkins v. State*, 290 Ga. 785, 723 S.E.2d 924 (2012), the Georgia Supreme Court cited *Finley* and the district court opinion in this case (*United States v. Wurie*, 612 F. Supp. 2d 104 (D. Mass. 2009)) for its conclusion that a cell phone is "roughly analogous" to a container and could, therefore, be searched for text messages exchanged with an undercover officer incident to the arrest of an individual for an attempted drug transaction with that officer. 290 Ga. at 786-87. It rejected any suggestion "that the potential volume of information contained in a cell phone changes its character," *id.* at 787, but viewed the potential volume of information as relevant to the scope of the search permitted to be reviewed in each case. The court also noted that other courts had recognized the potential for the loss of information from cell phones or other similar devices. *Id.* at 787 n.3.

In *Commonwealth v. Phifer*, 463 Mass. 790, 979 N.E.2d 210 (2012), the Supreme Judicial Court of Massachusetts held only that "a limited search of a defendant's cellular telephone's recent call history for evidence directly relating to the crime for which defendant was arrested" was

permissible. It did not address "whether, when a cellular telephone is validly seized incident to arrest, it may always, or at least generally, be searched without a warrant, and if so, the permissible extent of such a search." *Id.* at 791. The court noted a divergence of opinion as to the treatment of the characteristics of cell phones. *Id.* at 794 n.5. The court applied the same analysis, with the same caveats, in another case decided the same day. *See Commonwealth v. Berry*, 463 Mass. 800, 979 N.E.2d 218 (2012).

The Supreme Court of California, in *People v. Diaz*, 51 Cal.4th 84, 244 P.3d 501 (2011), categorized the warrantless search of the text message folder of a cell phone taken from the defendant after his arrest and searched approximately 90 minutes later as incident to arrest based on its conclusion that the phone was, like the cigarette package in *Robinson* and the clothes in *Edwards*, and unlike the footlocker in *Chadwick*, "'personal property...immediately associated with [his] person.'" *Id.* at 93. Whether the phone was a container was irrelevant; the question under this Court's cases was whether it was property. *Id.* at 99-100. It viewed the character of the cell phone, including its capacity for storing personal information, to be irrelevant. *Id.* at 94-95. A concurring justice joined the majority rather than the dissent "under the compulsion of directly applicable United States Supreme Court precedent." *Id.* at 103. A dissenting justice viewed this Court's precedent as "not on all fours" with the case before it and the rationale of the cases relied on by the majority as not applicable to the delayed warrantless search of the cell phone seized from the defendant at the time of his arrest. *Id.* at 108-09. It discussed the scope of the "potential intrusion on informational privacy involved in a police search of a person's mobile phone, smartphone, or handheld computer," *id.* at 104; the distinction between electronic devices and the types of "containers" addressed in this Court's decisions, *id.* at 109; the lack of justification for warrantless action when the phone had been

reduced to the exclusive control of the police, *id.* at 106; and a distinction between bodily privacy and informational privacy, *id.* at 110. It concluded that an arrest could not justify a warrantless search of a cell phone's stored data once the phone was in the exclusive control of the police. *Id.* at 111.

C. Issues That Could Benefit From Further Exploration and Development

Thus, the cases decided to date suggest there are a number of issues that could benefit from further evaluation and consideration, including:

Is a cell phone within the category of property intimately associated with an arrested person? Or is it a possession within an arrestee's immediate control? Is a cell phone simply a closed container? Or is it a repository of such an array of personal and private information that it should be treated differently from a closed container? What expectations of privacy are to be associated with a cell phone? Do expectations of privacy differ based on type of cell phone? Is the availability of cell phone records from the service provider even if the records are overridden or deleted from the cell phone itself a consideration in evaluating potential risk of loss of evidence from seizing but not searching a cell phone without a warrant?

Resolution of the question presented would benefit from further exposition and analysis of these issues in the eight circuits that have not yet addressed the issue in published opinions and/or further consideration by the circuits that have addressed some of the issues, and, perhaps, by further development in state courts.

D. The Impact of Changing Technology

Allowing additional time for lower courts to evaluate and address the impact of changing technology on expectations of privacy may also assist this Court in addressing the issue in the future.

This Court stated in *City of Ontario v. Quon*, 560 U.S.746, 130 S. Ct. 2619, 2629 (2010), that "[t]he judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." The Court then decided the issue before it on narrower grounds than employees' privacy expectations when using an employer-provided pager capable of sending and receiving texts. This Court also stated: "Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior." *Id.* Further, "[c]ell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification. That might strengthen the case for an expectation of privacy." *Id.* at 2630. *See also United States v. Jones*, ___ U.S. ____, 132 S. Ct. 945, 955-957 (2012) (Sotomayor, J., concurring) (raising difficult questions about the impact of changes in the use of technology and its affect on societal expectations of privacy); *id.* at 962-64 (Alito, J., concurring in judgment) (addressing use of GPS for long term tracking and the potential impact of the use of technological advances on expectations of privacy).

According to the Pew Research Center, as of May 2013, 91% of the adult population in the United States owns some kind of cell phone, with 56% now owning a smartphone.[2] Phones may allow access to texts and e-mails as well as social media, exposing not only contacts but the content of communications. At present, more and more individuals store their information on networks run by third parties with varying degrees of security (the "cloud") and accessed through the cell phone. A person's phone may serve as a portal to information stored outside the phone, linked to cloud

[2] Aaron Smith, Pew Research Center, "Smartphone Ownership - 2013 Update" (June 5, 2013) p.2, available at http://pewinternet.org/Reports/2013/Smartphone-Ownership-2013.aspx.

network storage for both personal and business data. It may contain passwords to protected sites, allowing access to bank or medical records. The evolution of cell phone technology into cloud-based technology may make a difference to the individual's subjective expectation of privacy or society's view of an objectively reasonable expectation of privacy in cell phone information. That issue, however, has not been raised, much less addressed, in the lower court decisions to date.

The changing technology of the phones themselves may raise additional issues. The newest models use biometrics and other methods to control access. Whether an individual could be required to provide access to officers who have seized his/her phone is yet another issue not yet raised or addressed in the decisions to date.

II. Given the Nature of Mr. Wurie's Phone and the First Circuit's Decision to Leave Mr. Wurie's Conviction on One Count of the Indictment Intact, This Case Does Not Provide a Good Vehicle for Addressing the Propriety or Permissible Scope of Warrantless Searches of Cell Phones Incident to Arrest

The cell phone at issue here was a comparatively unsophisticated flip phone. Today's smart phones have an exponentially greater capacity to store and access a wider range of data than earlier cell phones like Mr. Wurie's. Moreover, the search here was a comparatively limited search for a telephone number. Thus this case is not an appropriate vehicle to resolve the question of the application of the search incident to arrest rationale to the warrantless search of a cell phone seized from an arrestee. Even if it were, and assuming, solely hypothetically, the constitutionality of some warrantless search of a cell phone incident to arrest, this case does not present the broader issues of what, if any, limitations should be placed on the scope of such a cell phone search.

Finally, in granting the government's motion to "clarify" its judgment and asserting that Wurie's conviction for distribution of cocaine base (count 2) stands, the First Circuit left intact a

conviction for which Wurie received a 240-month sentence while vacating his 262-month concurrent sentences on counts 1 and 3. The decision to leave the conviction on count 2 intact also suggests that this Court should await further percolation of the issues and a better vehicle for addressing the issues raised by warrantless searches of cell phones incident to arrest.

III. The First Circuit Fully Considered and Properly Decided the Issue Presented

Respondent submits that the First Circuit came to the correct result. The court evaluated this Court's search-incident-to-arrest jurisprudence from *Chimel v. California* to *Arizona v. Gant*, including *United States v. Robinson*, *United States v. Edwards*, and *United States v. Chadwick*, as well as the decisions from other courts addressing warrantless searches of cell phone data. The search of a cell phone, with its ability to store and access large quantities of even the most personal data, could not be validly equated with the search of the type of containers at issue in *Robinson* and other container search cases, or the search of clothing at issue in *Edwards*. The court properly applied the rationales of this Court's search incident to arrest jurisprudence to the warrantless search of cell phone data, and correctly concluded that warrantless intrusions were not necessary either to safeguard officer safety or preserve destructible evidence. Accordingly, a warrantless search of the cell phone data was constitutionally impermissible.

CONCLUSION

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

Respectfully submitted,

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