

No. 13-132

IN THE
Supreme Court of the United States

DAVID LEON RILEY,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari
to the California Court of Appeal, Fourth District

**BRIEF OF THE NATIONAL
ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS AS *AMICUS CURIAE* IN SUPPORT
OF PETITIONER**

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INTEREST OF AMICUS CURIAE¹

The National Association of Criminal Defense Lawyers (“NACDL”) is a nonprofit voluntary professional bar association that works on behalf of the United States advancing the mission of the nation’s criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. NACDL was founded in 1958.

NACDL has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL’s members include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges. NACDL provides amicus assistance on the federal and state level in cases that present issues of importance, such as the one presented here, to criminal defendants, criminal defense lawyers, and the proper and fair administration of criminal justice.

¹ Counsel of Record for the parties received timely notice of amicus curiae’s intent to file this Brief. Petitioner filed blanket consent to the filing of amicus curiae briefs on August 15, 2013. A letter of consent from the Respondent to the filing of this brief has been lodged with the Clerk of the Court pursuant to Rule 37.2. In accordance with Rule 37.6, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party.

REASONS FOR GRANTING THE WRIT

This Court should grant review because the smartphone has assumed a unique role in modern society. The mobile computing revolution has fundamentally altered how people incorporate technology and data into their everyday lives. This case, unlike other petitions before this court, most completely presents the question of how a smartphone is to be treated under the Fourth Amendment.

I. The Modern Smartphone Is A Historically Unique Device With Profound Societal Implications.

Any smartphone is capable of storing digital information locally, meaning that the physical device is the repository of the information. It is when we are discussing localized storage that analogizing these devices to containers is arguably appropriate. However, the volume of information stored strains that analogy.

The base unit of measurement of all stored digital data is the bit, which is a binary value of 0 or 1. The byte, which is the smallest unit of data storage, is eight bits. Eight bits yields 2^8 , or 256 permutations of 0 or 1 – that number is the amount necessary to store a single alphanumeric such as the letter “A.”

In the early days of digital storage, space was measured in kilobytes (KB), or 1000 bytes. The standard 5.25” floppy disk in production in 1982 held

1185.5KB. That capacity was quickly replaced with the megabyte (MB), or 1,000,000 bytes. The 3.5" floppy disk in widespread use by 1987 held 1.44MB, or 1,440,000 bytes.

The number of bytes required to produce a digital document varies depending upon the program that created and stores the document. In addition to the text content, various packet and formatting bytes are lost to the program. A rough average of physical pages per megabyte, however, is provided in Table 1 (below).

Table 1: Average Pages of Data per MB²

<u>Document Type</u>	<u>Pages per MB</u>
MS Word files	63
Email files	97
Microsoft Excel files	161
Lotus 1-2-3 files	280
PowerPoint files	17
Text Files	662
Image Files	15

² These estimates are industry standard and widely reproduced. SETEC Investigations, *How Many Pages per Gigabyte and Megabyte?* (2006), http://www.setecinvestigations.com/resources/techhints/Pages_per_Gigabyte.pdf.

By the mid-1990's, the 3.5" floppy disk gave way to the CDROM as the industry standard for portable data. The standard 74-minute CDROM contained 333,000 sectors, each housing 2,048 bytes, for a total storage capacity of 650MB. One CDROM replaced over 450 3.5" floppy disks.

By the millennium, the DVD had supplanted the CDROM as the default removable storage mechanism. DVD storage varied upon the model of DVD drive reader; the most basic, DVD-1, contained 1.46 Gigabytes (GB), a Gigabyte equaling one billion bytes. The highest standard, DVD-18, contained 17.08 GB of data.

In the 1990's, along with CDs and DVDs, digital storage devices began to include cell phones, Personal Digital Assistants, and thumb drives. Those devices, too, grew in storage capacity at an astonishing rate. In 2007, when Apple launched the iPhone, the initial model held 4 GB of data. Three years later, Apple released the iPhone 4.0 which held 32 GB of data. The current model holds 64 GB.

That number continues to grow. In 2009, data storage manufacturers announced the development of the next-generation data storage architecture for phones, SDXc (Secure Digital Extended Capacity). The iPad2, one of the first devices to employ SDXc, is available in a 128 GB configuration. And SDXc is expected to push iPhones and other smartphones into the area currently reserved for laptop computers: the terabyte. Smartphones with storage in the 1-2 TB

range are expected within this decade.³ To place that number in perspective, a 1 TB phone could contain all the data listed in Table 2 (below), *all at once*, and still only be three-quarters full:⁴

Table 2: Localized Data Capacity of 1 TB Devices

120 hours of DVD quality video (approx. 100 GB)
720 hours of audio recordings (approx. 100 GB)
22,200 high-res color photographs (approx. 100 GB)
6,300,000 pages of MS Word documents (approx. 100 GB)
160,000,000 pages of Excel spreadsheets (approx. 100 GB)
97 million emails (approx. 100 GB)

With SDXc as the new storage architecture standard, individuals will truly have the capacity to store an entire lifetime's data in their pocket. Videos

³ See Gary Krakow, *Smartphones, Meet the Terabyte*, The Street (Feb. 17, 2009), <http://www.thestreet.com/story/10464195/smartphones-meet-the-terabyte.html>; and *Terabyte Capacity for Smartphones* at <http://www.telecomasia.net/content/terabyte-capacity-smartphones-0>.

⁴ Determining digital storage capacity is simply a mathematical calculation. To aid in that calculation, petitioner refers this court to a number of data storage computational aids online. See e.g., <http://www.unitarium.com/data> or <http://www.lexbe.com/hp/Pages-Megabyte-Gigabyte.aspx>.

of one's wedding, the birth of one's children, and every family reunion and school performance will easily fit on the device. Assuming 10 one-minute voicemails a day, everyday each year, the phone will hold over eleven years of voicemail messages. If you took three photographs of your child everyday of his life, from birth through high-school graduation, they would all fit on the phone with room to spare. It would easily contain not just every document you authored, but every page of every document you have ever read. Finally, it would hold every email and text message you have ever received or sent – *for your entire lifetime.*

A. Distributed Computing And Cloud Data Give Mobile Computing Infinite Capacity

Even though the capacity of localized storage strains traditional human conceptualizations of size, it is dwarfed by a cellphone's secondary storage mechanism: cloud data.

Cloud data is not stored locally, at least not all of it. Rather, the physical device contains tags, or permanent conduits (i.e., saved encrypted passwords and account numbers) to data stored outside the physical device, on distributed systems shared across the internet. As one commentator summarized:

“Experts have coined the term ‘Web 2.0’ to describe the shift in Internet usage from consumption to participation and metaphorically refer to this virtual platform as ‘the cloud,’ where users interact with Internet

applications and store data on distant servers rather than on their own hard drives.”

David A. Couillard, Note, *Defogging the Cloud: Applying Fourth Amendment Principles to Evolving Privacy Expectations in Cloud Computing*, 93 Minn. L. Rev. 2205, 2205 (2009).

Freed from physical restrictions, cloud computing allows cellphones to achieve infinite data capacity. By distributing data storage outside the device, and using the local storage to house conduits and tags to that data, pulling it down to the device on demand, there is literally nothing that cannot be stored on a device that fits in one’s pocket. And most new cellphone applications are utilizing this technology.

For the iPhone, for example, Bank of America, U.S. Bank, and all major financial institutions have applications which link the phone via cloud computing to the user’s bank account, including full histories of deposits, payments, loans, credit, etc. GEICO, Allstate, and all major insurers have similar apps linking the phone to insurance account information. And applications such as HealthCloud and GoogleHealth are designed to link the mobile device directly with offsite health records maintained by doctors and hospitals.

B. Smartphone Usage Is Now Societally Ubiquitous

The development of mobile data has represented one of the largest technological revolutions in human history. In 2002, roughly 16%

of the world's population owned a cellphone. In just seven years, that number quadrupled:

“By the end of 2009, there were an estimated 4.6 billion mobile cellular subscriptions, corresponding to 67 per 100 inhabitants globally (Chart 1). Last year, mobile cellular penetration in developing countries passed the 50 per cent mark reaching an estimated 57 per 100 inhabitants at the end of 2009. Even though this remains well below the average in developed countries, where penetration exceeds 100 per cent, the rate of progress remains remarkable. Indeed, mobile cellular penetration in developing countries has more than doubled since 2005, when it stood at only 23 per cent.”

International Telecommunications Union, *Measuring the Information Society* ix (2010).⁵ The vast majority of Americans now own a cell phone – approximately 91% as of June 2013. Of those cell phone owners, 61% own smartphones.⁶

For many, mobile data is replacing traditional methods of conducting one's life. Mobile banking, for example, is increasingly replacing brick-and-mortar bank branches. This is particularly true in developing countries. India, parts of central Asia,

⁵ Report available at: http://www.itu.int/ITU-D/ict/publications/idi/material/2010/MIS_2010_without_annex_4-e.pdf.

⁶ See Aaron Smith, *Smartphone Ownership – 2013 Update*, Pew Research Ctr.'s Internet & Am. Life Project, 2 (June 5, 2013), available at <http://www.pewinternet.org/Reports/2013/Smartphone-Ownership-2013.aspx>.

and large sections of Africa have bypassed the traditional infrastructure development of the West, and leapt straight into a cellular based model.

“Across Africa, only 20 per cent of families have formal bank accounts, according to a World Bank survey. In Tanzania the percentage is as low as 5 per cent, and in Liberia 15 per cent.

“But the proliferation of mobile telephone services around the continent has opened a new way to extend financial services * * * In the few countries where they have emerged, companies such as M-Pesa can use any phone or phone card to provide affordable services to customers wherever there is a mobile phone signal.

“ * * * *

“According to Mohsen Khalil, the World Bank’s director of global ICT, Wizzit’s operation is one of the most innovative approaches to mobile banking, since it specifically targets the poor. If this model works in South Africa, he says, the World Bank will help the company expand coverage within and beyond the country. ‘We may be looking here at . . . the most effective way to provide social and economic services to the poor.’”

Mary Kimani, *A Bank in Every African Pocket*, United Nations African Renewal, 1-2 (Jan. 2008).⁷

Additionally, for a growing segment of America, accessing information via a portable device has become the norm:

“No longer just for communicating and planning while away from home or the workplace, the cell phone is increasingly a landline substitute. Recent research by the Pew Research Center suggests that 23% of Americans have only a cell phone available for making calls and another 17% have a landline but receive most of their calls on their mobile phone. For some subgroups, the findings are even more dramatic; nearly one-third (30%) of Hispanics and 49% of adults 25-29 are cell-only.”

Amanda Lenhart, *Cellphones and American Adults 2* (2010).⁸

So integral has the cellphone become to day-to-day living that the same study found that 65% of all cellphone owners actually sleep with their phone. *Id.* at 11. A 2012 survey found that 58% of phone owners check their phones at least once an hour, in bed

⁷Study available at:
<http://www.un.org/africarenewal/magazine/january-2008/bank-every-african-pocket>.

⁸ Report available at
http://pewinternet.org/~media/Files/Reports/2010/PIP_Adults_Cellphones_Report_2010.pdf.

before sleep and immediately upon waking. Harris Interactive, *Mobile Mindset Survey*, 2012.⁹

II. This Case Presents The Best Vehicle For This Court's Analysis.

In addition to this case, this court has before it a petition for certiorari in *United States v. Wurie*, No. 11-1792, 2013 WL 2129119 (1st Cir. May 17, 2013), *petition for cert. filed* Aug. 15, 2013 (No. 13-212). However this case is the better vehicle for this court to analyze the issues.

As discussed above, storage capacity, Internet connectivity, and its use as a point of connectivity in all aspects of life make the smartphone the defining device of the mobile computing age. This case involves precisely that device. Here the defendant had a Samsung smartphone, containing data in a variety of formats, including photographs and video.

Wurie, however, involves an older generation “flip phone.” Those devices are anachronisms, the principal use being voice communication, not data transmission. The *Wurie* phone is not the hub of connectivity represented by the smartphone in this case. It could not be used to access health records, financial data, or an Internet search. And at least one lower court has suggested that the nature of the data may affect the Fourth Amendment analysis.

⁹ Report available at <https://www.lookout.com/resources/reports/mobile-mindset>.

States v. Flores-Lopez, 670 F.3d 803, 809 (7th Cir. 2012)

In terms of a technological spectrum, the phone in *Wurie* is closer to a 1980's pager than a modern smartphone. In short, the technology at issue in *Wurie* has already expired beyond its shelf life. Although mobile computing will certainly continue to evolve, it will never return to an age where Internet connectivity and social networking is lacking. *Wurie* asks this court to evaluate the Fourth Amendment in the context of a technology that is fixed in a point in the past that will never return.

III. The Smartphone In This Case, Unlike The Phone In *Wurie*, May Possess First Amendment Overtones Affecting The Fourth Amendment Analysis.

Lower courts have noted that, by their range of capabilities, ease of access, and societal saturation, smartphones are the quintessential free speech instruments of our age:

“The trial court aptly described a personal computer as ‘the modern day repository of a man's records, reflections, and conversations.’ CP at 200. Thus, the search of that computer has first amendment implications that may collide with fourth amendment concerns. When this occurs, we closely scrutinize compliance with the particularity and probable cause requirements. *Zurcher v. Stanford Daily*, 436 U.S. 547, 564, 98 S.Ct. 1970, 56 L.Ed.2d 525

(1978); *Stanford v. Texas*, 379 U.S. 476, 485, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965); *Perrone*, 119 Wash.2d at 547, 834 P.2d 611 (“Where a search warrant authorizing a search for materials protected by the First Amendment is concerned, the degree of particularity demanded is greater[.]”). *See also Stenson*, 132 Wash.2d at 692, 940 P.2d 1239 (search warrants for documents are generally given closer scrutiny because of potential for intrusion into personal privacy).”

State v. Nordlund, 53 P.3d 520, 525 (Wash. Ct. App. 2002).

This Court has afforded heightened protection to First Amendment instruments. The warrantless seizure of such material is a form of prior restraint, a long disfavored practice. *Roaden v. Kentucky*, 413 U.S. 496, 503 (1973) (when an officer “br[ings] to an abrupt halt an orderly and presumptively legitimate distribution or exhibition” of material protected by the First Amendment, such action is “plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment standards.”). *See also Rossignol v. Voorhaar*, 316 F.3d 516, 522 (4th Cir. 2003) (Where sheriff’s deputies suppressed newspapers critical of the sheriff “before the critical commentary ever reached the eyes of readers, their conduct met the classic definition of a prior restraint.”).

In an age when anyone with a cellphone can blog, post to newsgroups, capture still photo and video, send correspondence, and use all form of social mass communication, an officer’s warrantless seizure of an individual’s first amendment instrumentality must be accorded a stricter standard. *See Robinson v.*

Fetterman, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005) (By restraining an individual from “publicizing or publishing what he has filmed,” officer’s “conduct clearly amounts to an unlawful prior restraint upon [] protected speech.”); see *Channel 10, Inc. v. Gunnarson*, 337 F. Supp. 634, 637 (D.Minn. 1972) (“it is clear to this court that the seizure and holding of the camera and undeveloped film was an unlawful ‘prior restraint’ whether or not the film was ever reviewed.”). The warrantless seizure of material protected by the First Amendment “calls for a higher hurdle in the evaluation of reasonableness” under the Fourth Amendment. *Roaden*, 413 U.S. at 504.

This Court has noted that, when faced with a close call, “the First Amendment requires [courts] to err on the side of protecting * * * speech rather than suppressing it.” *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 457 (2007). See also *Bertot v. Sch. Dist. No. 1, Albany Cnty., Wyo.*, 613 F.2d 245, 252 (10th Cir. 1979) (“We prefer that governmental officials acting in sensitive First Amendment areas err, when they do err, on the side of protecting those interests.”).

IV. Lower Court Divisions Make This The Right Time For This Court To Consider The Issue.

State and Federal courts are deeply divided over whether the Fourth Amendment permits the police to search the digital contents of an arrestee’s cell phone incident to arrest. The petition before this Court thoroughly details that divide.

This issue will not go away, or work itself out. The smartphone has become the central locus of interaction with one's entire digital life. And simultaneously it has become an irresistible target for law enforcement. "It is the rare arrestee today who is not found in possession of a cell phone."¹⁰

Both law enforcement and citizens need clarity from this court in determining what extent cell phones are protected by the Fourth Amendment.

V. The Nature And Societal Use Of Mobile Data Compels The Result That The Fourth Amendment Prohibits The Warrantless Search Of The Data Of A Cell Phone Incident To Arrest.

Petitioner thoroughly sets out this Court's incident to arrest jurisprudence. That jurisprudence was created in a time when tangible objects were the dominant source of evidence against a defendant. But the mobile computing revolution has altered that fundamental assumption.

A smartphone, and its near infinite data capacity, is not the equivalent of a footlocker as in *United States v. Chadwick*, 433 U.S. 1 (1977). Likewise, simply because technology has allowed us to contain a wealth of data in our pocket, does not

¹⁰ M. Wesley Clark, *Searching Cell Phones Incident to Arrest*, FBI L. Enforcement Bull., Feb. 2009, at 25, available at <http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/2009-pdfs/february09leb.pdf>.

mean that the privacy protections of smartphones are the equivalent of clothing as under *United States v. Robinson*, 414 U.S. 218 (1973) or *United States v. Edwards*, 415 U.S. 800 (1974).

Amicus agrees with Petitioner that the framework of *Chadwick*, *Edwards*, and *Robinson* cannot adequately govern mobile data. As the First Circuit noted, this Court, “more than thirty-five years ago, could not have envisioned a world in which the vast majority of arrestees would be carrying on their person an item containing not physical evidence but a vast store of intangible data – data that is not immediately destructible and poses no threat to the arresting officers.” *Wurie*, 2013 WL 2129119, at *10.

A smartphone, with all the data it can access, and all the privacy expectations accompanying that data, is not the constitutional equivalent of a crumpled cigarette pack. Ultimately the categories that have built up around the Fourth Amendment cannot blindly control. As this Court has said:

“But this effort to decide whether or not a given ‘area,’ viewed in the abstract, is ‘constitutionally protected’ deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places.”

Katz v. United States, 389 U.S. 347, 351 (1967). The touchstone of the analysis is always the reasonable expectation of privacy. *Oliver v. United States*, 466 U.S. 170, 171 (1984).

The exceptions to the warrant requirement are just that – exceptions. They represent the outlier, not the norm. Those exceptions “have been jealously and carefully drawn, and search incident to a valid arrest

is among them.” *Jones v. United States*, 357 U.S. 493, 499 (1958).

The applicability of an exception does not rest upon rigid categories, but upon its reasonableness, and its fundamental purpose.

“The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.”

Bell v. Wolfish, 441 U.S. 520, 559 (1979).

The fundamental purpose behind the search incident to arrest exception, as Justice Frankfurter stated, is necessity:

“ * * * In plain English, the right to search incident to arrest is merely one of those very narrow exceptions to the ‘guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case.’ * * *

“ * * * Its basic roots, however, lie in necessity. What is the necessity? Why is search of the arrested person permitted? For two reasons: first, in order to protect the arresting officer and to deprive the prisoner of potential means of escape, * * * and, secondly, to avoid

destruction of evidence by the arrested person.”

United States v. Rabinowitz, 339 U.S. 56, 71 (1950) (Frankfurter, J. dissenting).

When that necessity is not present, a search under the exception is no longer reasonable. As this Court held in *Gant*:

“If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply.”

Arizona v. Gant, 556 U.S. 332, 339 (2009).

In the case of smartphones, the claim of necessity is illusory. Because mobile computing devices can hold a lifetime of data, and provide a wealth of information about activities and locations, they will always, in theory, be potential repositories of evidence for any conceivable crime.

Faced with the smartphone, the exception threatens to eclipse the Fourth Amendment itself. The warrant exception becomes a proxy for an exploratory search of an entire lifetime’s worth of private information on the hope that some parcel will incriminate a defendant. This cannot be the rule. The Fourth Amendment demands more protection for the societal privacy accorded these devices and their contents.

This Court should grant review in this case and set forth, for the benefit of law enforcement and the citizenry, how the search incident to arrest exception functions in a world now dominated by

smartphones, as opposed to cigarette packs and footlockers.

CONCLUSION

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

Respectfully submitted,

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