No. 13-132

In The Supreme Court of the United States

DAVID LEON RILEY,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Writ Of Certiorari To The California Court Of Appeal, Fourth District

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

Whether evidence admitted at petitioner's trial was obtained in a search of petitioner's cell phone that violated petitioner's Fourth Amendment rights.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

STATEMENT

1. Petitioner was a member of a San Diego "Blood" gang called "Lincoln Park." On August 2, 2009, he and two other gang members were standing near an intersection when a member of the rival "Crips" gang drove by. Pet. App. 2a. The Bloods fired "numerous shots" at the passing car, causing it to crash. *Id*. They then drove off in a red Oldsmobile, which police later discovered parked a few miles away. *Id*. The Oldsmobile was registered to petitioner, and there was a traffic citation in petitioner's name in the glove compartment. Tr. 723, 854-855.[1]

About three weeks later, petitioner was driving in a different car. San Diego police officer Charles Dunnigan – who was not involved in investigating the earlier shooting, or aware of Riley's involvement in that shooting or his gang affiliation – stopped the car because it had expired registration tags. Tr. 111, 117, 121; J.A. 6-7. When he checked petitioner's license, he discovered that it had been suspended. J.A. 4. Following standard procedures, Dunnigan then decided to impound the car, and an assisting officer conducted a pre-impound inventory search. J.A. 5-6. In the engine compartment, the assisting officer discovered two handguns. Tr. 584-587; J.A. 9. The officers then arrested petitioner for carrying the concealed firearms. Tr. 123-124, 126, 163; J.A. 7-9.

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[1] "Tr." and "CT" refer to the reporter's transcript and clerk's transcript filed in the court of appeal.

In searching petitioner incident to the arrest, Officer Dunnigan found items suggesting gang membership: a green bandana in petitioner's pocket, and a keychain with a miniature pair of red-and-green Converse shoes. J.A. 8-9. Dunnigan also looked at the cell phone petitioner had in his pocket and noted that text entries starting with a "k" were preceded by a "c," which Dunnigan recognized as a Blood gang symbol (signifying "Crip Killer"). J.A. 8. After finding this evidence of gang affiliation, Dunnigan called Detective Duane Malinowski, of the police department's Gang Suppression Team, to help process petitioner's arrest. J.A. 7, 10, 28.

Detective Malinowski was off-duty that day but came into the station, arriving the same morning. J.A. 15. When he arrived, petitioner was still in the patrol car in the station sallyport. *Id*. Malinowski took petitioner to an interview room; obtained identifying information; read petitioner his rights; ascertained that petitioner did not wish to provide a statement; returned petitioner to the custody of the initial arresting officers; and then "went through [petitioner's] personal property and stuff." J.A. 15-16. Unlike Dunnigan, Malinowski knew petitioner; was familiar with his "infamous reputation in the Lincoln Park street gang"; and suspected him of involvement in the August 2nd shooting. J.A. 16-19.

Detective Malinowski knew that gang members often take pictures of themselves with firearms. J.A. 20. Looking for further evidence to connect petitioner to the firearms found hidden in his car, Malinowski

looked through the photos and videos on the cell phone that had been seized from petitioner during the arrest. *Id*. He did not find pictures of petitioner with the firearms, but he did find video clips of gang members engaged in "street boxing," a common gang initiation. J.A. 11. In the clips, Malinowski could hear petitioner making comments such as "Get brackin', Blood" and "Get him blood. Brack and Blood on Lincoln" – gang terminology encouraging the boxing. J.A. 12-13. There were also photographs showing petitioner and others making gang signs, including the hand sign for the letter "L." J.A. 30-32. Some of the videos and photos on petitioner's phone also showed petitioner's red Oldsmobile. J.A. 12, 30-32.

2. In this case, the State charged petitioner and two others with participating in the August 2 shooting. *See* Pet. App. 1a.[2] As aggravating factors, the State alleged that the offenses were gang-related and involved using firearms. *Id*.

Petitioner moved to suppress evidence found on his cell phone as the fruit of invalid warrantless searches. Tr. 269-270. After an evidentiary hearing, the trial judge denied the motion, concluding that the phone was an item properly seized from petitioner's person, similar to a wallet, purse, or address book, and was validly searched incident to his arrest. J.A.

[2] Petitioner separately pled guilty to carrying a concealed firearm in a vehicle, carrying a loaded firearm, and receiving stolen property. Pet. Br. 7 n.5.

23. In particular, she noted Detective Malinowski's testimony that "in his experience persons and gang members do take photos of themselves and their crimes and he expected there could be such photos on the cell phone." *Id*.

The jury at petitioner's first trial could not reach a verdict with respect to petitioner. By the time petitioner was retried, the California Supreme Court had decided *People v. Diaz,* 244 P.3d 501 (2011), upholding a search of the text-message folder of a cell phone as a search incident to arrest. *Id*. at 502. *Diaz* reasoned that the question was controlled by this Court's decisions in *United States v. Robinson*, 414 U.S. 218 (1973) and *United States v. Edwards,* 415 U.S. 800 (1974):

> Under these decisions, the key question in this case is whether defendant's cell phone was "personal property . . . immediately associated with [his] person[,]" like the cigarette package in *Robinson* and the clothes in *Edwards*. If it was, then the delayed warrantless search was a valid search incident to defendant's lawful custodial arrest.

244 P.3d at 505 (citation omitted). The Court concluded that because Diaz's cell phone was found on his person at the time of a lawful arrest, it was properly searched at the police station after the arrest. *Id*. at 505-506, 511. Before petitioner's second trial, the trial court concluded that *Diaz* further supported a ruling that the searches of petitioner's cell phone were lawful incident to his arrest. J.A. 26.

At the second trial, Detective Malinowski testified about materials found on petitioner's phone. J.A. 29-33. He indicated that in one of the video clips on the phone he could see the back portion of petitioner's red Oldsmobile. J.A. 30. He also discussed three photographs that were admitted into evidence as Exhibits 39-41. J.A. 30-31. One photograph shows petitioner standing in front of his Oldsmobile making an "L" shaped sign with his hand, with a fellow Lincoln Park gang member in the background. J.A. 31, 42. The others show the same two individuals by the car making different hand signs. J.A. 31-32, 43-44.

San Diego Police Detective Scott Barnes, a gang expert, testified regarding the Lincoln Park gang and petitioner's membership. *See, e.g.*, J.A. 35-41. Among other things, he explained that the photographs in Exhibits 39-41 showed petitioner and another Lincoln Park gang member, Gerald Haynes, making various gang-related hand signs next to petitioner's car. J.A. 35-36, 38-39, 42-44. Barnes also testified that he had watched videos from petitioner's cell phone showing two Lincoln Park gang members street boxing, with petitioner's car visible in one video, and with audio of petitioner's voice using gang-related terms. J.A. 40-41. None of the videos was admitted into evidence or shown to the jury. Based on his review of the evidence, Barnes opined that petitioner was a member of the Lincoln Park gang. Tr. 1044-1045.

Other evidence at trial showed that the guns found in petitioner's engine compartment were those

used in the August 2 shooting, and that petitioner's DNA was on one of the guns. Tr. 635-640, 943-944. As noted above, the red Oldsmobile used in the shooting was registered to petitioner, and a traffic ticket issued to him was found in the glove compartment. Tr. 723, 854-855. The Police also obtained – using an investigative subpoena, unchallenged in this case – phone company records showing that petitioner's phone had been used near the location of, and around the same time as, the shooting, and several minutes later near where police eventually found the Oldsmobile. Tr. 1008-1012.

The jury also heard recordings of several calls made by petitioner from jail. Tr. 894-900. In one call, petitioner asked an unidentified woman "what exactly did my charges say?" After she said there were "gun charges," he asked, "But did it have – did it have any shooting stuff? It just had gun charges[,] right?" C.T. 237. The woman told petitioner that it only had gun charges and a charge of driving without a license. *Id*. Petitioner asked, "No type of shooting or any. . . ." She said that it had some other "stuff" but that she did not know what it meant. Petitioner said, "it would say like attempted something or something like that." *Id*. In a later call, petitioner said, "like no way that that [stuff], it's gonna come back to me like no matter what, the ballistics, it's gonna show. . . ." C.T. 239. In a third call, petitioner talked about getting bailed out because he knew what was going to "hit eventually." C.T. 242.

The jury found petitioner guilty of assault with a semi-automatic firearm and attempted murder, and that he had personally used a firearm and had committed the offenses for the benefit of a criminal street gang. Pet. App. 1a. The trial court sentenced him to imprisonment for 15 years to life. *Id*.

3. The California Court of Appeal affirmed. Pet. App. 1a-23a. Among other things, it rejected petitioner's renewed claim that evidence admitted at his trial was obtained through improper warrantless searches of his phone. The court reasoned that petitioner's phone "was 'immediately associated' with his 'person' when he was stopped" and that, under this Court's cases and the California Supreme Court's decision in *Diaz*, the searches were lawful incident to petitioner's arrest. *Id*. at 10a-11a, 15a. The California Supreme Court denied petitioner's request for further review. *Id*. at 24a.

SUMMARY OF ARGUMENT

The law has long recognized that it is reasonable for police to search an individual they arrest, and to seize and examine personal effects discovered during such a search. Such searches serve legitimate interests in safety, identification, and securing evidence, and the invasion of privacy involved follows from the arrest itself. These considerations justify searches incident to all valid arrests, both at the scene and later at the police station. This categorical approach

provides clear guidance and a practical rule for operation in the field.

Here, the police properly obtained from petitioner's cell phone the photos and video clips used at his trial. Petitioner does not contest that the phone was properly seized from his person during a valid arrest. It was therefore permissible for the police to examine the phone and its contents as they did, both immediately at the scene and then as part of the ensuing investigation. That conclusion is properly reached under the bright-line rule long applied in similar situations. On the facts of this case, however, the evidence at issue was properly obtained under any potential standard. Examination of videos and photographs on the phone was reasonably related to the officers' investigation of the crime for which petitioner had been arrested; and considerations of safety, identification, and the securing of evidence against possible loss or destruction support the search of petitioner's phone at least as strongly as they have supported searches of other items found on the person of arrestees.

Petitioner argues for a new rule restricting searches of cell phones incident to arrest because of the nature and volume of data they may hold. California recognizes the remarkable advances that have been, and continue to be, made in communications, storage, and networking technology. The facts of this case, however, provide no basis for departure from longstanding Fourth Amendment standards. A phone containing information such as personal communications,

contact information for associates, and the photos and video clips at issue here is not different in kind from wallets, address books, personal papers, or other items that have long been subject to examination by police if carried on the person of an individual who is validly arrested. Nor do the circumstances here raise special First Amendment or other concerns. While technology has increased the amount of information an individual may practically choose to carry, neither the form nor the volume of the information at issue here provides a sound basis for redrawing clearly established Fourth Amendment lines, or reveals any special or unjustified invasion of petitioner's privacy interests.

This case involves photographs and video clips stored on and retrieved from a phone seized in 2009. Nothing about the circumstances here justifies creating new rules treating cell phones such as petitioner's differently from all other items seized from the person of arrestees. The better course is to apply settled principles unless and until some change in conditions produces a result that is manifestly unreasonable on demonstrated facts. Here, the facts reflect only solid police work leading to a sound and just result.

More generally, new technology may affect Fourth Amendment analysis in complex and unforeseeable ways. Continued rapid change is sure; less sure is how and to what extent innovation in digital technology will affect, for example, the accessibility of data stored on phones and its vulnerability to destruction or alteration; the use of phones not only to

store data but to share it in various ways; what steps individuals can readily take to protect data on their phones if they choose; and what data is physically stored on the phone, as opposed to stored elsewhere but available for ready access. Moreover, as these aspects of technology continue to evolve, so may the social expectations relating to them that must be taken into account in determining what is "reasonable" under the Fourth Amendment. All this counsels caution in the judicial formulation of new constitutional rules directed at particular types or categories of devices.

ARGUMENT

I. Under Existing Law, The Police Were Entitled To Search Photos And Videos On Petitioner's Phone As An Incident To His Lawful Arrest

Warrantless searches incident to arrest have long been permitted under the Fourth Amendment, based on the historical practice and understanding that officers conducting a proper arrest may search the person arrested and "seize the fruits or evidence of crime." *Weeks v. United States*, 232 U.S. 383, 392 (1914). The relevant law "has historically been formulated into two distinct propositions" that "have been treated quite differently." *United States v. Robinson*, 414 U.S. at 224. On the one hand, a search "of the *person* of the arrestee" is permitted simply "by virtue of the lawful arrest," *id*.; it "requires no additional justification," *id*. at 235. On the other hand, searches

"of the area within the control of the arrestee" have generated "differing interpretations as to the extent of the area which may be searched." *Id*. at 224. Here, the search of petitioner's cell phone was properly upheld under *Robinson*'s categorical rule, but was also valid even if tested under the rationale of cases involving area searches.

A. The Law Has Long Allowed Police To Search Objects Found On The Person Of An Individual Who Is Lawfully Arrested

1. The leading case on searches of a person incident to a lawful arrest is *United States v. Robinson,* 414 U.S. 218 (1973). There, an officer arrested the defendant for driving with a revoked driver's license. Searching the defendant's pockets, he found a crumpled-up cigarette package. *Id*. at 223. Opening the package, he discovered fourteen capsules of heroin. *Id*. at 223. These were used to convict the defendant of possessing and concealing heroin. *Id*. at 219, 223.

In assessing the constitutionality of this search, *Robinson* observed that the rule allowing warrantless searches incident to a lawful arrest "has historically been formulated into two distinct propositions." *Id*. at 224. First, "a search may be made of the *person* of the arrestee by virtue of the lawful arrest." *Id*. Second, "a search may be made of the area within the control of the arrestee." *Id*. The Court explained that these two types of searches "ha[d] been treated quite

differently." *Id*. Searches of the area surrounding an arrest had been "subject to differing interpretations as to the extent of the area which may be searched." *Id*.; *see* Part I.B, *infra*. In contrast, "[t]he validity of the search of a person incident to a lawful arrest" had been "regarded as settled from its first enunciation," and had "remained virtually unchallenged until the present case." *Id*.

In *Robinson*, the court of appeals reasoned (much as petitioner does here, *see, e.g.*, Pet. Br. 10) that the only two justifications for a search incident to arrest were to disarm the arrestee and to prevent the destruction of evidence of the crime for which the arrest was made. *See* 414 U.S. at 228-229, 233 & n.4. Because "there could be no evidence or fruits" of a revoked-license offense to be found on Robinson's person (*id*. at 233), and because there was no particular reason to fear that Robinson was armed or dangerous (*see id*. at 236 & n.7), the court concluded that the Fourth Amendment permitted no more than a protective frisk incident to the arrest (*id*. at 227, 233).

This Court rejected both that result and the reasoning that underlay it. First, the Court examined the history of searches of the person incident to arrest. It noted that in cases dating back to the 1914 *Weeks* decision (which first adopted a federal exclusionary rule), "no doubt had been expressed as to the unqualified authority of the arresting authority to search the person of the arrestee." *Id*. at 225; *see id*. at 224-226. Similarly, although authorities describing "the history of practice in this country and in

England" were "sparse" and "sketchy," they "tend[ed] to support the broad statement of the authority to search [a person] incident to arrest" found in the Court's prior decisions. *Id*. at 230, 232-235.

Finally, the Court expressed "fundamental disagreement" with the court of appeals' premise that there should be case-by-case litigation concerning the presence or absence of safety or evidentiary concerns sufficient to justify a search of the person of any particular arrestee. It emphasized, instead, the need for a clear, categorical rule to govern police conduct in this common situation, and adopted just such a rule:

> The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and . . . in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment,

> but is also a "reasonable" search under that Amendment.

Id. at 235; *see also Gustafson v. Florida,* 414 U.S. 260, 266 (1973) (companion case) ("it is the fact of custodial arrest which gives rise to the authority to search"); *Missouri v. McNeely*, 133 S. Ct. 1552, 1559 at n.3 (2013) (recognizing *Robinson*'s adoption of a categorical rule).

Finally, in applying that rule to the facts of the case before it, *Robinson* did not distinguish between a search of the person of the arrestee and a further examination of an object found during that search. Instead, it concluded that, "[h]aving in the course of a lawful search come upon the crumpled package of cigarettes, [the officer] was entitled to inspect it; and when his inspection revealed the heroin capsules, he was entitled to seize them as 'fruits, instrumentalities, or contraband' probative of criminal conduct." 414 U.S. at 236 (quoting *Harris v. United States*, 331 U.S. 145, 154-155 (1947)).

2. Later the same Term, the Court considered a situation in which a further seizure and search of items immediately associated with an arrestee took place some time after the initial arrest. In *United States v. Edwards*, 415 U.S. at 801, officers arrested the defendant for attempting to break into a post office, transported him to the local jail, and held him overnight. Meanwhile, their investigation revealed paint chips near the point of attempted entry. *Id*. In the morning, the officers seized the clothing that

Edwards had been wearing at the time of his arrest, examined it, and found paint chips matching those found at the scene. *Id*. at 802.

Noting the rule the Court had just confirmed in *Robinson* concerning searches incident to custodial arrests, the *Edwards* Court found it "also plain that searches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention." *Id*. at 803. It agreed with prior cases, from this Court and the courts of appeals, that "perceived little difference" between the two situations. *Id*. at 803-804. The ultimate seizure and search, the Court reasoned,

> was and is a normal incident of a custodial arrest, and reasonable delay in effectuating it does not change the fact that Edwards was no more imposed upon than he could have been at the time and place of the arrest or immediately upon arrival at the place of detention. The police did no more on June 1 than they were entitled to do incident to the usual custodial arrest and incarceration.

Id. at 805. Indeed, the Court found it "difficult to perceive what is unreasonable about the police's examining and holding as evidence those personal effects of the accused that they already have in their lawful custody as the result of a lawful arrest." *Id*. at 806. Rather,

> once the accused is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search

> at the time and place of his arrest may lawfully be searched and seized without a warrant even though a substantial period of time has elapsed between the arrest and subsequent administrative processing, on the one hand, and the taking of the property for use as evidence, on the other.

Id. at 807.

Over the years, the principles of *Robinson*, *Gustafson*, and *Edwards* have been applied to a wide variety of items seized from individuals during lawful arrests, including wallets, purses, address books, diaries, other personal papers, pagers, and phones. *See* Parts I.C.1.b and II.A, *infra*.

B. Cases Addressing Searches Of The Area Of An Arrest Have Not Questioned The Categorical Rule Applicable To The Arrestee's Person And Effects

As *Robinson* explained, 414 U.S. at 224, the Court's cases have distinguished between searches of the person of an arrestee, including items found on his person, and those that extend beyond the person to the area in which the arrest is made. In *Chimel v. California*, 395 U.S. 752 (1969), the Court overruled cases that had allowed broad area searches incident to a lawful arrest, instead limiting searches beyond the person to "the area into which an arrestee might reach in order to grab a weapon or evidentiary items." *Id*. at 763; *see id*. at 766-768. Later cases applying *Chimel* have elaborated on that standard for area

searches, notably in the context of arrests made in or near cars. None of those cases, however, has disturbed the categorical rule applicable to items seized from the person of the arrestee.

1. In *Chimel*, officers arrested the defendant in his home and then conducted a warrantless search of the entire home, on the premise that such a search was permitted incident to the arrest. *See id*. at 753-754, 760. Acknowledging that "the decisions of this Court bearing upon that question ha[d] been far from consistent," *id*. at 755, the Court reexamined the issue and concluded that the approval of warrantless searches had extended too far beyond the core case of the arrestee's own person, *see id*. at 755-763. In that core case, the Court reasoned, it was always reasonable to search the arrestee for weapons, and "to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." *Id*. at 762-763. As to the area of the arrest, however, the Court concluded that incidental warrantless searches should extend only to "the area into which an arrestee might reach in order to grab a weapon or evidentiary items." *Id*. at 763.

In *United States v. Chadwick*, 433 U.S. 1, 14-15 (1977), the Court reaffirmed that searches of items found on arrestee's person and in his "'immediate control' area" were always permissible, but declined to extend that rule to a 200-pound, double-locked footlocker that the defendants there had placed in the trunk of a car just before they were arrested. In that situation, the Court reasoned, there was no danger

the defendants could have gained access to the trunk to seize a weapon or destroy evidence; and "[u]nlike [the] searches of the person" involved in *Robinson* and *Edwards*, search of the footlocker "[could not] be justified by any reduced expectations of privacy caused by the arrest." *Id*. at 15-16 & n.10.

Notably, *Chadwick* did not apply to the facts before it the special standards applicable to automobile searches. *Id*. at 11-13. Some years later, however, the Court overruled the result reached on *Chadwick*'s facts (and its application in later cases) in favor of "one clear-cut rule to govern automobile searches," allowing the search of any container found in a car if the police have probable cause to believe it contains contraband or other evidence of crime. *California v. Acevedo*, 500 U.S. 565, 579 (1991); *see id*. at 576-581.

Other discussion of *Chimel* has likewise often come in cases involving cars. In *New York v. Belton*, 453 U.S. 454, 455-457 (1981), for example, the Court considered how *Chimel*'s reachable-area rule should apply to the passenger compartment of a car, when an officer validly arrested the occupants but had already removed them from the car by the time he conducted his search. Citing *Robinson*, the Court emphasized the desirability of "a straightforward rule, easily applied, and predictably enforced." *Id*. at 459. Concluding that items in the passenger compartment of a car would "generally" be within the area reachable by an arrestee, and seeking "to establish the workable rule for this category of cases," the Court held that an officer validly arresting the occupant of a car could

search the passenger compartment as an incident of the arrest. *Id*. at 460. Again citing *Robinson*, the Court made clear that this rule allowed officers to "examine the contents of any containers found" in the passenger area, whether open or closed, and regardless of whether a particular container "could hold neither a weapon nor evidence of the criminal conduct for which the suspect was arrested." *Id*. at 461; *see also id*. ("the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have").

In *Thornton v. United States*, 541 U.S. 615, 617-618 (2004), the Court extended the rule of *Belton* to a situation in which police first made contact with an arrestee just after he had parked and gotten out of his car, and in which the officer had handcuffed the defendant and placed him in the back of a patrol car before searching the passenger compartment of the car. Again stressing the need for clear rules, rather than situation-specific inquiries, the Court held that an officer could search the passenger compartment of a car incident to the arrest of a "'recent occupant.'" *Id*. at 624; *see id*. at 620-624.

More recently, however, the Court has limited *Belton* and *Thornton* to "the rare case," holding instead that "the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at

the time of the search." *Arizona v. Gant*, 556 U.S. 332, 343 & n.4 (2009). At the same time, the Court adopted in part a rule suggested by Justice Scalia's separate opinion in *Thornton*. *Id*. at 343-344. Although the point "does not follow from *Chimel*," the Court "conclude[d] that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" *Id*. at 343 (quoting *Thornton*, 541 U.S. at 632 (Scalia, J., concurring in the judgment)).

2. All of these post-*Robinson* cases have discussed applications of *Chimel* to objects in the area of an arrest. None of them has questioned the categorical rule of *Robinson* itself, addressing objects on the person of an arrestee. On the contrary, later opinions discussing or adverting to *Robinson* have recognized that, for that situation, *Robinson* expressly adopted a bright-line rule.

In *Michigan v. DeFillippo*, 443 U.S. 31, 35 (1979), the Court cited *Robinson* for just this proposition: "The constitutionality of a search incident to arrest does not depend on whether there is any indication that the person arrested possess weapons or evidence. The fact of a lawful arrest, standing alone, authorizes a search." In *Belton* and *Thornton*, the Court emphasized the same categorical aspect of *Robinson*. *See* 453 U.S. at 459; 541 U.S. at 620. While *Gant* ultimately adopted a different approach for vehicle searches in the recent-occupant context, it nowhere questioned this understanding of *Robinson* as it

applies to searches of the person and any items he is carrying. In *Knowles v. Iowa*, 525 U.S. 113, 118-119 (1998), the Court declined to extend *Robinson* to the context of police issuing citations without making a custodial arrest – but reaffirmed *Robinson*'s adoption, in the arrest context, of "a 'bright-line rule,' which was based on the concern for officer safety and destruction or loss of evidence, but which did not depend in every case upon the existence of either concern." Likewise, in *Virginia v. Moore*, 553 U.S. 164, 176-177 (2008), the Court again emphasized the categorical nature of the *Robinson* rule: "The interests justifying search are present whenever an officer makes an arrest. . . . The state officers *arrested* Moore, and therefore faced the risks that are 'an adequate basis for treating all custodial arrests alike for purposes of search justification.'" *Id*. at 177 (quoting *Robinson*, 414 U.S. at 235).

Just last Term, the Court again cited *Robinson* as an example of the "limited class of traditional exceptions to the warrant requirement that apply categorically and thus do not require an assessment of whether the policy justifications underlying the exception . . . are implicated in a particular case." *Missouri v. McNeely*, 133 S. Ct. at 1559 n.3. Finally, in *Maryland v. King*, 133 S. Ct. 1958, 1970-1971 (2013), the Court approvingly quoted both *Robinson*'s own observation that "'[t]he validity of the search of a person incident to a lawful arrest has been regarded as settled from its first enunciation, and has remained virtually unchallenged,'" and *DeFillippo*'s

restatement of *Robinson*'s bright-line rule. *See also id*. at 1978 (noting that "unlike . . . a citizen who has not been suspected of a wrong, a detainee has a reduced expectation of privacy," and quoting *Edwards* for the proposition that "'both the person [of an arrestee] and the property in his immediate possession may be searched at the station house'" (alterations changed)).

C. The Evidence At Issue Here Was Properly Obtained Under Any Standard

The Court's cases have thus established a categorical rule permitting arresting officers to seize and search items of personal property found on the person of an arrestee – either at the time and place of an initial arrest or within a reasonable time thereafter. Cases addressing search and seizure of items in the *area* of an arrest have focused instead on whether the object was found in a place where the arrestee might have reached to grab a weapon or destroy evidence – with a special rule, in the context of vehicle passenger compartments, that police may freely search for evidence of the crime of arrest. Finally, some justices have suggested that if the rationale for a search is the discovery or preservation of evidence, it should be limited to a scope reasonably related to the crime of arrest, or perhaps other crimes already known or suspected. Under the circumstances of this case, the proper rule is the categorical one of *Robinson* and *Edwards*. In any event, however, the photographic

and video evidence used at petitioner's trial was properly obtained under any of these standards.

1. The photos and videos were found in searches of an object recovered from petitioner's person during his arrest

San Diego police properly searched petitioner's cell phone, both at the scene of the initial arrest and later when petitioner had been brought to the police station, because petitioner was carrying the phone on his person at the time he was arrested for carrying loaded firearms concealed in his car. *See* Pet. Br. 4. Only after the lawful arrest did Officer Dunnigan first examine petitioner's cell phone and see that some entries starting with a "k" were preceded by a "c," indicating a gang affiliation. J.A. 8. Not long thereafter, a detective specializing in gang activity, who had been called to the police station to assist with the arrest, further reviewed photo and video files on the phone. That examination revealed materials that were later used at trial. Under *Robinson* and *Edwards*, these searches were properly performed incident to petitioner's arrest, and were categorically reasonable under the Fourth Amendment.

a. That result is compelled by precedent, and by the long tradition the precedent reflects. *See, e.g.*, *Robinson*, 414 U.S. at 224-225; *Edwards*, 415 U.S. at 802-804; *see also Gustafson*, 414 U.S. 267 (Stewart, J., concurring) ("To hold otherwise would . . . mark an abrupt departure from settled constitutional

precedent."). But both the tradition and the precedent are also based on reason and common sense.

First, as the Court has observed, the interests in officer safety and in safeguarding evidence "are present whenever an officer makes an arrest." *Moore*, 553 U.S. at 177. Second, even if that point might be argued in marginal cases, where police are making custodial arrests any argument for case-by-case evaluation is overwhelmed by the general probabilities, the importance of the interests at stake, and the need for clear guidance. *See, e.g.*, *Thornton*, 541 U.S. at 632 (Scalia, J., concurring in the judgment) ("When officer safety or imminent evidence concealment or destruction is at stake, officers should not have to make fine judgments in the heat of the moment."); *id*. at 626 ("Authority to search the arrestee's own person is beyond question."). Third, in making an arrest the police have a compelling interest in ascertaining or verifying the identity of the arrestee, *see, e.g.*, *Maryland v. King*, 133 S. Ct. at 1971-1972 (citing cases), which is likely to be best served in the first instance by examining items found on the individual's person. Fourth, the safety, evidentiary, and identification purposes of a search of the person could not be effectively served if officers were allowed to seize items but not examine them. *See, e.g.*, *People v. Chiagles*, 237 N.Y. 193, 197 (1923) ("The search being lawful, [an officer] retains what he finds if connected with the crime."); *cf. id*. at 198 ("Search would be mere futility if what is found could not be used.").

Finally, and in part for these very reasons, the mere fact of a lawful custodial arrest necessarily and substantially reduces the arrestee's expectation of privacy, as to his own person and as to any personal property in his immediate possession – not perhaps as against the world, but as against the arresting officers and those legitimately called on to help investigate a crime. *See, e.g.*, *Robinson*, 414 U.S. at 235 ("A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification."). As explained by Justice Powell, concurring in *Robinson* and *Gustafson* (414 U.S. at 237), "the custodial arrest is the significant intrusion of state power into the privacy of one's person. If the arrest is lawful, the privacy interest guarded by the Fourth Amendment is subordinated to a legitimate and overriding governmental concern." Or, as the Court put it in *Edwards*, a lawful arrest takes a person's privacy, to a reasonable extent, "'out of the realm of protection from police interests in weapons, means of escape, and evidence.'" 415 U.S. at 808-809.

b. Petitioner argues at some length that, even if these normal rules would have applied to petitioner's cell phone at the initial scene of his arrest, Detective Malinowski's examination of the phone at the police station was too remote in time and place to be approved. Pet. Br. 44-53. That is not correct.

Examination of petitioner's phone at the station was just as routine an incident of his arrest as a

search at the initial scene. Indeed, it occurred while the arrest was still being processed. *See* pp. 2-3, *supra*. As this Court explained in *Edwards*, "searches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention." 415 U.S. at 803. Of course, for safety reasons, some search of an arrestee will almost always be made immediately. But once the search of both the person and any objects he is carrying has been made reasonable by the fact of the arrest, it is hard to see the benefit, in terms of either privacy or practicality, of insisting that every aspect of the search take place at once, or at the initial scene. In particular, that scene will often be a busy street or highway, or in a public setting that may be difficult to monitor or control, or dark, or exposed to bad weather. While convenience or efficiency often cannot justify burdening rights, in this situation there is no incremental burden. *See Edwards*, 415 U.S. at 805-806 (arrestee is "no more imposed upon" by delayed search than was justified by initial arrest, and "[i]t is difficult to perceive what is unreasonable about the police's examining and holding as evidence those personal effects of the accused that they already have in their lawful custody as the result of a lawful arrest").

That is especially true where, as here, an item is first examined at the original scene. Where items have once "been exposed to police view under unobjectionable circumstances, . . . no reasonable expectation of privacy is breached by an officer's taking a

second look at matter with respect to which [the] expectation of privacy already has been at least partially dissipated." *United States v. Grill*, 484 F.2d 990, 991 (5th Cir. 1973); *see also, e.g.*, *People v. Rivard,* 59 Mich. App. 530, 533-534 (1975) (same); *United States v. Aldaco*, 477 F.3d 1008, 1013-1016 (8th Cir. 2007) (second look at wallet). The Fourth Circuit has expressly applied this reasoning to a cell phone search: "Of course, once the cell phone was held for evidence, other officers and investigators were entitled to conduct a further review of its contents, as [the agent] did, without seeking a warrant." *United States v. Murphy*, 552 F.3d 405, 412 (4th Cir. 2009).

In arguing for a more restrictive rule, petitioner cites cases from this Court that mostly predate *Edwards* and are, in any event, inapposite, dealing with the different question of searches of the area where an arrest is made. *See* Pet. Br. 44-46; *Shipley v. California*, 395 U.S. 818, 819-820 (1969) (search of home when defendant arrested outside); *Preston v. United States*, 376 U.S. 364, 367 (1964) (search of car at storage yard after arrest); *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 220 (1968) (search of car at police station). He also cites four unpublished decisions from lower courts dealing with cell phone searches – three from district courts and one from a state appellate court. Pet. Br. 44 & n.15. Notably, he does not cite three published appellate decisions upholding searches of phones seized during arrests but searched at least in part later. *See United States v. Curtis*, 635 F.3d 704, 712 (5th Cir. 2011) (search of

text messages at the scene and later at Secret Service office); *Murphy*, 552 F.3d at 412 (search of phone numbers at scene and later at station); *United States v. Finley*, 477 F.3d 250, 260, n.7 (5th Cir. 2007) (search of phone after arrestee transported for questioning). At a minimum, a search remains "incident to an arrest for 'as long as the administrative processes incident to the arrest and custody have not been completed.'" *Curtis,* 635 F.3d at 712. That describes Detective Malinowski's examination of petitioner's phone while petitioner was being booked. *See* pp. 2-3, *supra*.

2. The searches here were reasonably related to the crime of arrest

As discussed above, this Court's cases have not limited the permissible scope of examination of an object found on an arrestee's person by reference to the crime of arrest. *Robinson*, 414 U.S. at 233; *Gustafson*, 414 U.S. at 265; *Moore,* 553 U.S. at 170; *DeFillippo,* 443 U.S. at 35-36. The Court has looked to whether officers could reasonably have believed they might find evidence relevant to the crime of arrest only as an alternative justification for searches of the passenger compartment of a car, even if a recent occupant has been secured and is not within reaching distance of the compartment at the time of his arrest. *See Gant*, 556 U.S. at 343-344, 346-347. To the extent the question is relevant, however, in this case there were reasonable grounds to believe that reviewing photographs and video clips on petitioner's phone

would lead to evidence relevant to the firearms offense for which he had been arrested.

As part of his job, Detective Malinowski monitored activity involving the Lincoln Park gang, and was familiar with petitioner's "infamous reputation" in that gang. J.A. 16; Tr. 852. Malinowski also knew, based on his training and experience, that gang members often record evidence of their crimes on their phones. J.A. 20. Accordingly, he believed petitioner's phone might contain videos or photographs further linking petitioner to the firearms that had been hidden in his car. J.A. 20. In denying petitioner's motion to suppress, the trial court expressly referenced Malinowski's testimony that, in examining petitioner's phone, he was looking for evidence connecting petitioner with the guns found in the car. J.A. 23. Accordingly, there is no question that Malinowski's search was objectively justified by a reasonable likelihood that it would lead to evidence of the crime for which petitioner had been arrested.

3. A cell phone such as petitioner's presents safety, identification, and evidentiary issues at least as powerful as those relating to other items routinely seized and searched incident to arrest

Finally, even if the Court were to consider whether the general rationales underlying searches incident to arrest apply in the specific circumstances here (*but see, e.g.*, *Robinson*, 414 U.S. at 235), examination of

petitioner's phone was at least as well justified as the search of other items found on the person of an arrestee.

a. Safety and identification

First, petitioner is wrong to say (Br. 10) that "the digital contents of a smart phone are categorically incapable of threatening officer safety." On the contrary, "[m]obile devices may be rigged to detonate bombs remotely or explode themselves if a specific action is carried out on the device (e.g., receiving an incoming call, text message or pressing a specific key chord sequence, etc.)." National Institute of Standards and Technology (NIST) SP 800-001, revision 1, *Guidelines on Mobile Device Forensics (Draft); Recommendations of the National Institute of Standards and Technology* 32 (September 2013) (*NIST Draft Guidelines*).[3] Moreover, a phone (including any non-voice communication capabilities) could obviously be used, either openly or surreptitiously, to summon assistance from confederates who could interfere with an arrest and pose a direct threat to officers and the public. *Cf., e.g.*, *United States v. Barber*, 442 F.2d 517, 520-521 (3d Cir. 1971) (fifteen men assaulted two federal agents who were attempting to take arrestee to their vehicle, allowing escape); *Galatas v. United States*, 80 F.2d 15, 19-20 (8th Cir. 1935) ("Pretty Boy"

[3] *Available at* http://csrc.nist.gov/publications/drafts/800-101-rev1/draft_sp800_101_r1.pdf.

Floyd's ambush of federal agents as they transported escaped gang member back to prison). Indeed, with modern technology, an arrestee would not necessarily even need to make active use of a phone in order for confederates to use its signals to locate, track, and potentially aid him. A phone such as petitioner's on the person of an arrestee can thus pose a threat to both officer and public safety.

Petitioner argues that police may serve their interests by searching for and seizing a phone, which he concedes is permissible, but not examining the phone's "digital contents." Pet. Br. 10; *see id*. at 16-19. But without inspecting an item – including a phone – police cannot even know whether it *is* of either safety or evidentiary concern. *See, e.g.*, *Chiagles*, 237 N.Y. at 198-199 (complaining that neither defendant nor prosecutor informed court of contents of letters seized from defendant's person during arrest, so court could not determine whether police had properly retained them). Without examining a phone, police cannot tell whether it has been "weaponized," or whether officers should summon help because, for example, the arrestee contacted a confederate shortly before the arrest; arranged to meet others at or near the time and place of the arrest; or even arranged a crime that is about to occur.

Moreover, examining a phone (but not simply seizing it) may assist an arresting officer in rapidly confirming or calling into question the identity of an arrestee – a matter of immediate concern "in every criminal case," and one about which arrestees have

been known to provide false or incomplete information to officers in the field. *Maryland v. King*, 133 S.Ct. at 1971 (quoting *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt Cty.*, 542 U.S. 177, 191 (2004)). And apart from the identity of the arrestee himself, inspection may reveal links to criminal associates – including, as here, association with a dangerous criminal gang. All of these issues relate directly to officer, public, and even arrestee safety. *Cf. Florence v. Bd. of Freeholders*, 132 S. Ct. 1510, 1518-1519 (2012) ("the identification and isolation of gang members before they are admitted [into custody] protects everyone in the facility.").

In any event, the line between seizing an object from the person of an arrestee and examining it to determine its significance is not one the Court has drawn in the past, nor one it should draw now. Officers who seize a gun from an arrestee, for example, need not obtain a warrant before examining it to determine whether it is loaded, or with what type of ammunition, or whether there is a readable serial number or other identifying information, or to perform ballistics testing, or to make any other evidentiary examination. Officers who search an arrestee and find packages of what appear to be illegal drugs need not obtain a warrant before testing them to confirm or refute that suspicion. The ordinary and sensible principle is, instead, that "[h]aving in the course of a lawful search come upon" an item, officers "are entitled to inspect it." *Robinson*, 414 U.S. at 236; *see also Edwards,* 415 U.S. at 806. As Justice Cardozo

put a similar point for the New York Court of Appeals, "the law would be flouted and derided if, defeating its own ends, it drew too fine a point, after sanctioning the search, between the things to be retained and the things to be returned." *Chiagles,* 237 N.Y. at 197. And without examination, one cannot even know which is which.

b. Preservation of evidence

A cell phone is also at least as subject to the potential destruction of important evidence as other items routinely subject to seizure and search incident to an arrest. If anything, the case for seizure and prompt inspection for purposes of evidentiary preservation is stronger for a modern cell phone than for more traditional items such as the cigarette packages in *Robinson* and *Gustafson*, the clothes in *Edwards*, or a wallet, diary, address book, letter, account book, or the like.

1. To begin with, the information on a phone is readily susceptible to alteration or erasure by an arrestee. With a few hand motions, the entire contents of a device might be deleted, or rendered inaccessible with a password or encryption that could be difficult or impossible to defeat.

Moreover, even if the phone has been removed from the arrestee's immediate reach, the data on the phone, or the ability to gain access to or use the data, may remain at risk. On some phones, for example, new incoming calls or messages might replace old data. *United States v. Parada*, 289 F. Supp. 2d 1291,

1304-1305 (D. Kan. 2003). In addition, phones often have limited battery life, and a loss of power may result in a loss of content. As the National Institute of Standards and Technology (NIST) notes, "[i]f user data resides in battery-dependent volatile memory, expiration of the battery would be disastrous." NIST SP 800-001, *Guidelines on Cell Phone Forensics; Recommendations of the National Institute of Standards and Technology* 34 (May 2007) (*NIST Guidelines*).[4] And some data may have to be reviewed quickly or lose its investigative or evidentiary usefulness. *See, e.g.*, *United States v. Flores-Lopez*, 670 F.3d 803, 810 (2012) (if conspirators buy prepaid "SIM" cards and replace them frequently, an "officer who seizes one of the cell phones will have only a short interval within which to discover the phone numbers of the other conspirators").

A phone may also be protected with mechanisms such as a password. A phone that is password-protected may lock automatically, often after a relatively short period, if not in active use. If an arrestee was using a phone at the time of arrest, or had recently used it, arresting officers have no way of knowing if the mere passage of a short period of time will cause a lock to activate, thereby blocking access without entry of a password. Depending on the type of phone, such a lock could effectively thwart law enforcement efforts to view the contents of the phone at

[4] *Available at* http://csrc.nist.gov/publications/nistpubs/800-101/SP800-101.pdf.

any later time – even with a warrant. While some protection mechanisms can be bypassed, others likely cannot, or cannot without resources far beyond the reach of any ordinary criminal investigation.

The data on a phone may also be subject to automatic or remote destruction. Users can, for example, program some phones to self-erase after a certain number of failed access attempts. Gershowitz, *Password Protected? Can a Password Save Your Cell Phone from a Search Incident to Arrest?*, 96 Iowa L. Rev. 1125, 1154 (2011). Applications such as Snapchat, Wickr, and Tiger Text are specifically designed to erase data after a certain period of time. Gershowitz, *Seizing a Cell Phone Incident to Arrest: Data Extraction Devices, Faraday Bags, or Aluminum Foil as a Solution to the Warrantless Cell Phone Search Problem*, 22 Wm. & Mary Bill Rts. J. 601, 608 (2013). And "remote wipe" applications – typically marketed as a means of protecting data in the case a phone is lost or stolen – can allow anyone with proper codes and wireless access to the device to erase the contents of the phone. *E.g.*, Wallen, *Five Apps to Wipe Data from your Android Phone*, TECH REPUBLIC, Feb. 22, 2012; *see also* Apple iCloud, Find my iPhone, iPad, and Mac.[5] "[R]emote-wiping capability is available on all major cell-phone platforms; if the phone's manufacturer doesn't offer it, it can be

[5] Wallen, *supra*, is available at http://www.techrepublic.com/blog/five-apps/five-apps-to-wipe-data-from-your-android-phone/; Information on the Apple application is at http://www.apple.com/icloud/find-my-iphone.html (last visited Mar. 31, 2014).

bought from a mobile-security company." *Flores-Lopez*, 670 F.3d at 808. Thus, even if a phone is removed from the possession of an arrestee, either the arrestee or a confederate, with access to a computer or other phone and wireless connection to the seized device, could destroy data on the device after the arrest. Indeed, with foresight, an arrestee could program some phones to erase all user data if the phone's geo-location system determines that it has either left or entered a predetermined geographical area – such as, for example, the area around a local police station. *NIST Draft Guidelines* 3.

2. Petitioner seeks to deflect these concerns by arguing that officers could take various steps to preserve data while they seek a warrant. Pet. Br. 20-24. These might include using another device to copy the phone's contents, or taking some step designed to stop it from receiving or sending signals – turning it off, removing a data card, accessing the phone only for purposes of placing it in "airplane mode," placing it in a "Faraday enclosure," wrapping it in aluminum foil, or using a radio jamming system. *Id*. at 22-24; *see, e.g*., Gershowitz, *supra*, 22 Wm. & Mary Bill Rts. J. 601; Scientific Working Group on Digital Evidence, *SWGDE Best Practices for Mobile Phone Forensics, Version 2.0*, at 3 (Feb. 11, 2013) (*SWGDE Best Practices*).[6]

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[6] *Available at* https://www.swgde.org/documents/Current%20Documents/2013-02-11%20SWGDE%20Best%20Practices%20for%20Mobile%20Phone%20Examinations%20V2-0.

Of course, the question in this case is whether the search that was conducted was reasonable – not whether the police might also have served their purposes through some other, arguably less-intrusive means. *See, e.g.*, *Illinois v. Lafayette*, 462 U.S. 640, 647-648 (1983); *Edwards*, 415 U.S. at 807 ("[i]t was no answer to say that the police could have obtained a search warrant, for the Court held the test to be, not whether it was reasonable to procure a search warrant, but whether the search itself was reasonable, which it was" (describing *Cooper v. California*, 386 U.S. 58, 62 (1967)). But even on their own terms, petitioner's arguments do not justify prohibiting a prompt examination of a phone's contents when arresting officers conclude that is the best way to proceed.

First, petitioner's arguments depend on current technology. Particularly in the present context, that is not a sound basis for framing Fourth Amendment rules. "New families of mobile phones are typically manufactured every three (3) to six (6) months. Many of these phones are closed operating systems and proprietary interfaces making it difficult for the forensic extraction of digital evidence." *SWGDE Best Practices* 3. Given the wide variety of phone manufacturers and operating systems and the rapid pace of change, petitioner's arguments can provide no basis for confidence that arresting officers will be able to maintain the status quo with respect to phone data.

Second, none of these measures can reliably meet the legitimate needs served by the decisions that arresting officers may make, under particular circumstances, to proceed with a prompt examination of a phone's contents. *See, e.g.*, *NIST Guidelines* 34.

Data extraction devices, for example, are both too cumbersome and too expensive for the Constitution to require that they be carried by every officer who is likely to find a cell phone while making an arrest – or even that they be available at every local station house.[7] Moreover, even sophisticated devices may well be unable to retrieve data from a modern phone if a password lock or encryption system has been allowed to engage.

Attempts to block signals in or out of the phone have similar shortcomings. Placing a phone in "airplane mode," for example, sounds simple, but in any given situation it may or may not be possible, depending on the phone; may or may not block all signals on a given phone; and in any event requires officers to interact with the phone, which may or may not be familiar to them, and which they may or may not

[7] For instance, the Cellebrite UFED Touch Ultimate, a mobile forensic tool allowing data acquisition from more than 8,000 mobile devices, starts at $10,000, which does not include the cost of annual updates. SC Magazine, Cellebrite UFED Touch Ultimate, http://www.scmagazine.com/cellebrite-ufed-touch-ultimate/review/3870/ (last visited Apr. 1, 2014).

want to access immediately, depending on the particular circumstances of an arrest. Likewise, Faraday bags or other enclosures are hardly the panacea that petitioner suggests. Although they are less expensive than data extraction devices, it remains both unrealistic and inappropriate to argue that the Constitution requires every potential arresting officer to carry one or more Faraday bags at all times or risk losing potentially significant evidence. *See Flores-Lopez*, 670 F.3d at 810.

In any event, Faraday devices do not reliably block all incoming signals. *NIST Guidelines* 34; *NIST Draft Guidelines* 32 ("The majority of test cases proved that the shielding devices tested did not prevent network communication in all cases. . . ."). They do not prevent a password or encryption system from activating and blocking further access. And they can quickly drain a phone battery, causing the phone to turn itself off and further risking permanent loss of the ability to retrieve data. *NIST Guidelines* 38 ("Because communications are blocked, the handset continues increasing its signal strength up to the maximum as it continually attempts to make contact. This activity significantly shortens battery life."); *SWGDE Best Practices* 3 ("Blocking [radio frequency] signals will drain the battery, may be expensive, [is] not always successful and may result in the alteration of mobile phone data."). If power is drained from the phone then volatile memory, which is used for dynamic storage, could be permanently lost. *NIST*

Guidelines 43. And when a phone is powered back on, more difficult encryption or blocking mechanisms may have been engaged. *SWGDE Best Practices* 4 ("Many mobile phones may lose data or initiate additional security measures once discharged or shut down."); *NIST Draft Guidelines* 31.

Citing California guidelines, petitioner maintains that police departments across the country have been using Faraday bags for several years. Pet. Br. 23. He fails to mention, however, that those guidelines expressly caution about the power-draining consequences of that approach. Cal. Dep't of Justice, Bureau of Forensic Servs., Physical Evidence Bulletin: Digital Evidence Collection – Mobile Devices 3 (2011) ("If you place a powered 'ON' cellular phone in a Faraday bag, the device should be examined as soon as possible because the battery will drain during this period, and will turn off."; in such circumstances, officer must "[d]ocument any data that is transmitted to the device (i.e., incoming calls, text messages, etc.) during seizure, and record all information present on the screen.").[8]

In any event, the point is not that police use of Faraday bags or similar measures is never appropriate. Clearly it may be. The point is that the Constitution does not require officers in the field to

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[8] *Available at* https://oag.ca.gov/sites/all/files/pdfs/cci/reference/peb_18.pdf.

choose one of those methods of proceeding whenever they find a cell phone on the person of a suspect during an arrest. Instead, one potential method of proceeding that will always be *reasonable* – and thus constitutionally permissible – for officers who discover an unlocked phone is to conduct their own prompt search. From the Fourth Amendment perspective, that approach is at least as well justified in the case of personal cell phones as it has been in previous cases involving other types of personal property.

II. The Technological Advances That Petitioner Highlights Do Not Warrant The Adoption Of Special Rules For Cell Phones In This Case

Fundamentally, petitioner argues that the development of modern cell phones is an "innovation [that] gives law enforcement the ability to obtain personal information formerly beyond its reach," requiring a change in the Fourth Amendment rules previously applicable to searches of items seized from an individual's person during the course of a lawful custodial arrest. Pet. Br. 13-14; *see id*. at 24-37. The Constitution's protections, he insists, "should not evaporate . . . simply because . . . information can now be reduced to electronic charges in a computer chip and carried in one's pocket." *Id*. at 12.

California recognizes the remarkable and rapidly continuing advance of communication, data storage,

and networking technologies, and the privacy concerns that these developments raise or sharpen in many situations. Indeed, California has been a leader on privacy issues, such as seeking to protect personal information from improper acquisition, disclosure, or other misuse – either by the cyber-criminals who have developed in tandem with the new technologies, or by commercial service providers or other third parties to whom individuals may disclose information, sometimes without a full appreciation of the possible consequences, in the course of using attractive new technologies.[9]

Here, however, petitioner's concerns are misplaced. As discussed above, where an individual is properly arrested, the law has long recognized that the arrest itself both entails and justifies a substantial invasion of the individual's privacy – not

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[9] *See, e.g.*, https://oag.ca.gov/privacy/privacy-laws (citing California's Constitutional and legislative privacy protections); *People v. Bollaert*, No. CD252338 (Cal. Super. Ct. Dec. 10, 2013) (prosecution of operator of website that published explicit photographs without authorization and extorted payment from victims for removal); California Department of Justice, *Privacy on the Go: Recommendations for the Mobile Ecosystem* (Jan. 2013), *available at* https://oag.ca.gov/sites/all/files/pdfs/privacy/privacy_on_the_go.pdf (providing recommendations to assist mobile application developers and others in considering privacy in the application and implementation of applications); Joint Statement of Principles between California Attorney General and six mobile apps market companies (2012), *available at* http://oag.ca.gov/system/files/attachments/press_releases/Apps_signed_agreement_0.pdf#xml=http://search.doj.ca.gov:8004/AGSearch/isysquery/d9cc7c59-4be4-4128-83c3-e93ef6dcc821/1/hilite.

necessarily as against the world, but as against those responsible for the investigation of crime. Contrary to petitioner's submission, the photographs and video clips found on petitioner's phone when he was arrested are not fundamentally different from, or more sensitive than, other types of personal information long carried by individuals in non-digital forms. The question is not whether petitioner should receive *less* Fourth Amendment protection because he carried his information in digital instead of paper form, but rather whether he should receive *more*. At least on the facts of this case, neither changes in the way that information may be stored nor the resulting increase in the volume of information that an individual may choose to carry justifies any alteration in the legal standards long applicable to custodial arrests. The facts here reveal only sound, traditional police work, albeit involving a modern technology. They provide no basis for any change in the law.

A. The Information Taken From Petitioner's Phone Is Not Fundamentally Different From That Found In Other Searches Incident To Arrest

Much of petitioner's argument proceeds from his assertion that information found on cell phones – such as "text, photo, and video files," calendars, contact lists, bank or health records, or business information (*see* Pet. Br. 27) – is fundamentally different from the sort of information that police might have discovered in previous searches of individuals during

arrests. There is, however, little basis for that contention in the facts of this case or of others that have come before the courts.

1. Although this Court has considered only a few factual scenarios in articulating the Fourth Amendment standards for searches of the person incident to arrest, the lower courts have been applying those standards for many years. The searches approved in these cases have often involved items containing sensitive personal information fundamentally *similar* to that now carried on phones, such as wallets or purses, diaries, papers, address books, and pagers.

Arrest searches often include, for example, wallets and their contents. *See, e.g.*, *United States v. Rodriguez*, 995 F.2d 776, 778 (7th Cir. 1993) ("the search of Rodriguez's wallet and the photocopying of the contents of the address book were permissible as a search incident to arrest"); *United States v. McEachern*, 675 F.2d 618, 622 (4th Cir. 1982); *United States v. Watson*, 669 F.2d 1374, 1383-1384 (11th Cir. 1982) (wallet and papers within); *United States. v. Passaro*, 624 F.2d 938, 944 (9th Cir. 1980); *United States v. Ziller,* 623 F.2d 562, 563 (9th Cir. 1980); *United States v. Castro,* 596 F.2d 674, 677 (5th Cir. 1979) (wallet and folded piece of paper inside wallet containing list of locations to deliver marijuana). In appropriate circumstances, purses or hand luggage have likewise been subject to search. *See Draper v. United States,* 358 U.S. 307, 310 (1959) (noting that items were seized both from arrestee's hand and from a bag he was carrying); *State v. Byrd,* 178 Wash.2d

611, 310 P.3d 793, 797-798 (2013) (purse was "'immediately associated' with [arrestee's] person"); *State v. MacDicken,* 319 P.3d 31, 34 (2014) (laptop bag carried on person and rolling duffel bag "immediately associated" with arrestee); *Curd v. City Court of Judsonia, Arkansas*, 141 F.3d 839, 844 (8th Cir. 1998). All these items can contain papers and other personal information similar to the information often carried on phones.

Likewise, papers found in the pockets of an arrestee may be examined by an officer as part of a search incident to arrest. *United States v. McFarland, II*, 633 F.2d 427, 429 (5th Cir. 1980); *Chiagles*, 237 N.Y. at 197-199. This includes an address book, diary, or photograph found on the arrestee's person. *United States v. Diaz-Lizaraza*, 981 F.2d 1216, 1220, 1223-1224 (11th Cir. 1993) (wallet and address book, including loose papers); *United States v. Holzman*, 871 F.2d 1496, 1504-1505 (9th Cir. 1989), *overruled on other grounds, Horton v. California,* 496 U.S. 128 (1990); *United States v. Smith*, 565 F.2d 292, 294 (4th Cir. 1977) (address book in pocket of arrestee's coat); *United States v. Frankenberry*, 387 F.2d 337 (2d Cir. 1967) (diary); *cf. People v. Custer,* 465 Mich. 319, 324-325, 334-338 (2001) (photographs obtained during pat-down search). And since the early 1990s, courts have applied the same principles to digital information stored in personal electronic devices such as pagers. *See, e.g.*, *United States v. Ortiz,* 84 F.3d 977 (7th Cir. 1996); *United States v. Lynch,* 908 F. Supp. 284, 288-289 (D.V.I. 1995) ("Since a search of the

'person' has been held to include a person's wallet or address book, we find that a search of Thomas' pager was a search of his 'person' and thus was valid[.]").

Thus, *Robinson* and *Edwards* have been applied to uphold searches of personal items seized from arrestees containing just the sorts of personal information that many individuals now store and carry on their phones – identification, contact information for associates, photographs, papers relating to business (including criminal business), and recent communications. Of course, these searches invade important personal privacy interests. They have been upheld, however, because they occur in the context of valid arrests.

Cell phones represent an evolution in the means individuals use to carry information on their persons, and in the amount they can easily carry at one time. But information such as the photographs and video clips involved in this case is not different in kind from what the law has dealt with for many years.

Far from being material that individuals previously "kept . . . – if it existed in tangible form at all – only in the most private recesses of their homes and offices" (Pet. Br. 11), much of the information now stored on phones is routine material that individuals have long recorded, stored in various places, and often carried on their persons in other forms for ready reference. Digital storage technology simply makes it easy for individuals to keep more of such information with them much of the time – often so that it can be

readily available for use in daily activities or to share with others, for purposes either good or ill. Thus, "'[d]igital files and programs on cell phones have merely served as replacements for personal effects like address books, calendar books, photo albums, and file folders previously carried in a tangible form.'" *Sinclair v. State*, 214 Md. App. 309, 330 n.14 (2013) (quoting *Gracie v. State*, 92 So.3d 806, 812 (Ala. Crim. App. 2011)); *see id*. ("There is little question that if the photographs [found on the defendant's cell phone] were found in a wallet at the time, they would not be suppressed."); *United States v. McAuley*, 563 F. Supp. 2d 672, 678 (W.D. Tex. 2008) (search of laptop computer at border; "The fact that a computer may take such personal information and digitize it does not alter the Court's analysis."). That development may have advantages and disadvantages, including with respect to both the preservation of privacy and the facilitation of crime. But, at least so far as the type of information involved in this and similar cases is concerned, it is not a qualitative change that demands the creation of new Fourth Amendment rules.

2. Nor is there any basis for treating petitioner's phone differently from other property seized from an arrestee simply because it might contain information that "implicates First Amendment concerns." *See* Pet. Br. 25, 31-36. That is true of any message, photograph, recording, text, contact list, or business

paper that might be seized in either digital or tangible form.[10]

Petitioner nowhere cites this Court's 1914 decision in *Weeks*, which provided the starting point for *Robinson*'s consideration of searches of objects found on the person of an arrestee. *See* 414 U.S. at 224-225. Notably, however, when *Weeks* observed that English and American law had "always recognized" an ability "to search the person of the accused when legally arrested, to discover and seize the fruits or evidence of crime," 232 U.S. at 392, it relied in part on *Dillon v. O'Brien*, 16 Cox C.C. 245, 250 (Exch. Div. Ir. 1887). That reliance confirms that there is no special rule for "private papers" of the sort petitioner suggests (*e.g.*, Pet. Br. 32).

In *Dillon,* the Irish Court of the Exchequer traced the common-law right of constables to detain as evidence property found during an arrest. Dillon was arrested in a room with co-conspirators, receiving rents from tenants and making entries in books and papers to reflect the receipts. The arresting officers also seized the books and papers, among other items. 16 Cox C.C. at 247, 248. The court considered it

[10] Arguments similar to petitioner's have been rejected in the context of border searches of laptop computers. *See United States v. Ickes*, 393 F.3d 501, 506-507 (4th Cir. 2005) (First Amendment exception to border search doctrine would be unworkable and have "staggering" implications; terrorists' communications, for example, are "inherently 'expressive' "); *United States v. Arnold*, 533 F.3d 1003, 1010 (9th Cir. 2008).

indisputable that officers making a felony arrest could "take and detain property found in [the arrestee's] possession which will form material evidence in his prosecution for that crime." *Id.* at 249. In applying the same principle to misdemeanors, the court distinguished *Entick v. Carrington*, 95 Eng. Rep. 807 (C.P.), 19 How. St. Tr. 1029 (1765), on which petitioner relies (Pet. Br. 32). It reasoned that papers were seized from Dillon not under a general warrant or on mere suspicion, "but upon an allegation of actual guilt, and a lawful apprehension of the guilty person." *Dillon*, 16 Cox C.C. at 251; *see also id*. (in *Entick*, "Lord Camden had not before his mind cases of seizure of evidences of guilt upon lawful apprehension, as distinguished from general warrants to seize all papers"); *Chiagles*, 237 N.Y. at 197 (distinguishing *Entick* as involving search to discover possible grounds for arrest, not search of person during valid arrest).

Petitioner points out (Br. 32, 34 n.11) that in *Boyd v. United States,* 116 U.S. 616, 630-634 (1886), this Court cited *Entick* and generally condemned searches for "private papers" to be used as evidence of crime. *Boyd*, however, has "not stood the test of time." *Fisher v. United States,* 425 U.S. 391, 407, 409 (1976). Even as to personal papers, there is no Fourth Amendment distinction between purely evidentiary materials and contraband or fruits or instrumentalities of crime. *Warden v. Hayden*, 387 U.S. 294, 300 (1967); *Fisher,* 425 U.S. at 409. Indeed, this Court and others have long recognized that "[t]here is no special

sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized." *Gouled v. United States,* 255 U.S. 298, 309 (1921); *see, e.g., Marron v. United States,* 275 U.S. 192, 198-199 (1927) (ledger and bill lawfully seized incident to arrest); *Hill v. California*, 401 U.S. 797, 800 & n.1, 806-807 (1971) (two pages of diary properly searched incident to arrest); *see also, e.g.*, *Chiagles*, 237 N.Y. at 196 (letters); *Welsh v. United States,* 267 F. 819, 821 (2d Cir. 1920) (letter).

Petitioner wrests cases from their contexts in analogizing the cell phone search here to one subject to special rules relating to "expressive materials." Pet. Br. 33; *see Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326-327 (1979) (specifically noting that case involved "a generalized search under authority of an invalid warrant," not a search incident to arrest). Any such rules surely cannot depend on the nature of the device or medium in which particular information may be stored. A photograph, short video, letter, list of addresses, or other material that could be properly seized from an arrestee's pocket in paper form is not imbued with special First and Fourth Amendment protection simply because it is digitized and carried on a cell phone.

B. The Circumstances Of This Case Suggest No Basis For Specially Limiting Cell Phone Searches Incident To Arrests

Other concerns that petitioner raises, apart from the basic nature of the information that may now be stored on a phone, likewise do not warrant creating any special rule to govern searches of cell phones seized from the persons of arrestees, at least on the facts of this case.

1. Petitioner argues that cell phones can store "massive amounts" of information. Pet. Br. 26; *see, e.g.*, *id*. at 26-28. But it is not clear how mere storage capacity relates to the concerns protected by either the Fourth Amendment or the rule permitting searches of items seized from the person of an arrestee. Examination of conventional items (wallets, letters, photographs, address books) can reveal private information – in particular, information that the carrier would strongly prefer to keep private from the police. Conversely, a cell phone may contain a great deal of information of no interest to the police. It is not necessarily an advantage to law enforcement that a criminal who might previously have carried one or two needles can now bring along an entire haystack. Moreover, it would be inappropriate to allow some individuals to shield themselves from standard searches because they are solvent and well-advised enough to carry evidence of their misdeeds in electronic rather than paper form. *Cf. United States v. Ross*, 456 U.S. 798, 822 (1982) (no distinction between "worthy"

and "unworthy" containers). Neither the particular form in which data is stored and carried (digital or tangible) nor the storage capacity of a particular device seems a sound basis for drawing Fourth Amendment lines.[11]

Petitioner's comparisons to general-warrant searches and police "rummag[ing]" through phones (*e.g.*, Br. 3, 26) also overstate the concerns raised by the present case. First, although the phone in this case was not password-protected, for reasons discussed above there is reason to doubt how often police will have the practical ability to access information on seized phones – at least as password and encryption technology advances, and where the phone's owner actually views the information with the degree of sensitivity that petitioner suggests. In any event, even where data is readily available for review, officers who search a phone will typically be looking first for anything that indicates an immediate safety threat, and then for any information that confirms a suspect's identity or provides useful evidence of crime. Normally they will have a particular focus, such as the crime of arrest, in mind – as Detective Malinowski did here. *See* pp. 2-3, 26-27, *supra*.

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[11] As with petitioner's other arguments, a similar contention that laptop computers "allow[ ] for the storage of personal documents in an amount equivalent to that stored in one's home" has been rejected in the context of border searches. *United States v. Arnold*, 533 F.3d at 1006.

While officers may well see other information in the course of an examination, most of it will be both of no interest to the officers and innocuous in itself. Moreover, exposure to private information that turns out to be unrelated to crime is commonplace for police officers. While it is no doubt good practice to minimize that exposure where possible, it is important to recognize that a limited review of private information by police in the course of an investigation is not equivalent to other compromises of informational privacy that can give rise to particular concerns in the digital context – theft by hackers, for example, or inadvertent or malicious disclosure of private information to the general public.[12] Where police officers review otherwise private information, even in the context of a warrantless search, they do so for a legitimate purpose; and if the information is *not* relevant to safety or to investigating or preventing crime, their use of the information ends without further disclosure. Disclosure to the police is not disclosure to the world.[13]

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[12] *See, e.g., People v. Bollaert, supra*, No. CD252338 (Cal. Super. Ct. Dec. 10, 2013); *People v. Kaiser Foundation Health Plan*, No. RG14711370 (Cal. Super. Ct. Jan. 24, 2014) (untimely notification of data breach); *People v. Citibank*, No. RG13693591 (Cal. Super. Ct. Aug. 29, 2013) (same); *People v. Blue Cross of California*, No. BC492959 (Cal. Super. Ct. Oct. 1, 2012) (public disclosure of social security numbers).

[13] Petitioner points to one case apparently involving wrongful dissemination of irrelevant private photographs obtained during a search of an arrestee's phone. Br. 37 n.12. California does not condone any such behavior. Legal rules cannot, however, be

(Continued on following page)

None of this is to deny that police inspection of a phone's contents, to the extent it is possible, impinges on important privacy interests. Here, however, as in any other case involving an object seized from an individual during an arrest, "it is the fact of custodial arrest which gives rise to the authority to search"; the arrest itself being lawful and having already substantially interfered with the individual's privacy as well as his liberty, the related search "requires no additional justification." *Robinson*, 414 U.S. at 235-236; *see also, e.g.*, *id*. at 260 (Powell, J., concurring). Indeed, even where a search extends *beyond* items found on the arrestee's person, "[t]he fact of prior lawful arrest distinguishes the arrestee from society at large, and distinguishes a search for evidence of *his* crime from general rummaging." *Thornton,* 541 U.S. at 630 (Scalia, J., concurring). The search in this case was aimed at discovering photographic evidence linking petitioner to the firearms he had been arrested for possessing. It in fact disclosed evidence of

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framed to avoid any possible misconduct. *Cf. Whalen v. Roe,* 429 U.S. 589, 601-602 (1977). Nor is there any reason to think that requiring a warrant to search cell phones seized during arrests would prevent any similar misuse of information obtained during an authorized search. In contrast, existing remedies apply to the misuse of information gained by any means. *See, e.g., Catsouras v. Department of the California Highway Patrol*, 181 Cal. App. 4th 856, 863-907 (2010) (tort liability for wrongful dissemination of crime scene photographs); *Marsh v. County of San Diego*, 680 F.3d 1148 (9th Cir. 2012) (release of autopsy photograph to press without legitimate government purpose violated substantive due process).

his gang affiliation, and further linked him to a gang-related shooting that was also under investigation. It involved no unreasonable invasion of petitioner's privacy interests.

2. One aspect of modern phone technology that may be genuinely new is its heavily networked nature – that is, the potential not only for storing personal information but for sharing, changing, and accessing it remotely through interaction with other devices. Again, however, the possible Fourth Amendment implications of this development are far from clear.

One result of networking is that information stored on a phone is far more susceptible to alteration or loss than would be true with non-networked objects. As discussed above (at 43-49), this supports the continued application of current law allowing for prompt law enforcement searches. Another result is the common use of phones both to store data that is also stored in other places and to *share* data, including both text and images – sometimes publicly, or at least very widely. A third, closely related, result is the routine disclosure of information, including some that may otherwise be thought of as quite private, to a variety of intermediaries, including communications companies and other service providers. A fourth is that phones can be used not only to store data but to access or manipulate data that is primarily stored elsewhere – although the access most likely involves storing at least temporary copies of the accessed material on the phone itself.

All these aspects of evolving phone technology could have implications for the Fourth Amendment analysis of particular situations – including by altering the general social expectations that undergird at least some of that analysis. *See, e.g.*, *United States v. Jones*, 132 S. Ct. 945, 962 (2012) (Alito, J., concurring) ("Dramatic technological change may lead to periods in which popular expectations are in flux and may ultimately produce significant changes in popular attitudes."). Furthermore, the technology itself continues to evolve – rapidly, and in ways that are often hard to imagine before they occur.

All this counsels judicial caution in formulating the sort of new, categorical, technology-specific constitutional rule that petitioner seeks in this case. If there is a need for specific rules to address specific technologies, that task is best left to legislatures, which are better able "to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way." *Jones,* 132 S. Ct. at 964 (Alito, J., concurring); *see also* Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 Mich. L. Rev. 801, 850-851 (2004) ("courts should place a thumb on the scale in favor of judicial caution when technology is in flux, and should consider allowing legislatures to provide the primary rules governing law enforcement investigations involving new

technologies").[14] Courts should strive, instead, "to apply existing Fourth Amendment doctrine," asking whether "a particular case involved a degree of intrusion that a reasonable person would not have anticipated." *Jones,* 132 S. Ct. at 964 (Alito, J., concurring).

In this case, there is no question concerning government deployment of some new technology to monitor private behavior that was previously undetectable as a practical matter. *Cf. Jones,* 132 S. Ct. at 949 (attaching GPS device to monitor vehicle's movements, even through public spaces, was a "search" subject to the Fourth Amendment); *Kyllo v. United States,* 533 U.S. 27, 34 (2001) (use of thermal imaging to measure heat emanating from home was a Fourth Amendment search). The arrest here was made on wholly traditional grounds, after officers properly looked under the hood of a car and discovered dangerous weapons stashed in socks. Tr. 584-587; J.A.

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[14] Congress has, for example, extensively addressed the question of electronic communications. *See generally* 18 U.S.C. §§ 2510 *et seq*., 2701 *et seq*. This includes copies of information often found on personal phones, such as emails, texts, images, or other data that has already been disclosed to third parties providing communications services. Notably, investigators typically may obtain much of this information with administrative subpoenas or court orders, sometimes without notice to the subscriber, based on less than the showing of probable cause that petitioner would require for examination of a cell phone seized from an individual during an arrest. *See, e.g.*, *id*. § 2703; Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208, 1223 (2004).

7-9. The officers' ensuing examination of petitioner's cell phone was a conventional search, authorized by longstanding precedent. A reasonable person in petitioner's position would have anticipated at least this level of intrusion into his privacy interests based on the fact of his lawful arrest.

Indeed, the course of events in this case reflects only solid, traditional, effective police work, leading to a just conviction. The circumstances here suggest no occasion for any change in Fourth Amendment law.

CONCLUSION

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

Respectfully submitted,

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