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

REPLY BRIEF FOR PETITIONER

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The State "acknowledges that there is a growing conflict concerning whether the Fourth Amendment permits law enforcement officers to search the contents of a cell phone incident to arrest." BIO 12. The issue also arises on a daily basis across the country. *See* Pet. 14. Hence, the importance of resolving the conflict this Term is evident – as the *amici* in this case and the Solicitor General in *United States v. Wurie*, No. 13-212, also recognize. That leaves the State to argue in its brief in opposition only (1) that this case is an unsuitable vehicle for resolving the conflict; and (2) that the holding below is correct on the merits. Neither of these arguments, however, provides any reason to deny review – or to grant certiorari in *Wurie* in lieu of this case.

I. This Case Is An Excellent Vehicle For Considering The Question Presented.

None of the State's quibbles about this case as a vehicle for resolving the question presented withstands scrutiny.

1. The State first asserts without argument that the fact that this case involved two separate searches – one at the scene of the arrest and a second by a different officer several hours later at the police station – makes this case a poor vehicle. BIO 12. But as petitioner has already explained, the two searches in this case actually make this case an ideal vehicle for supplying comprehensive guidance on how the search-incident-to-arrest doctrine applies to cell phones. In particular, the two searches in this case would allow this Court to address the crosscurrents in its doctrine concerning how close in time and space

a search must be to an arrest to be properly incident to that arrest. *See* Pet. 20-21.

2. The State next contends that the record is "vague regarding what exactly the officers did with the cell phone, and how they accessed the information on the cell phone." BIO 12. But the record is settled on the facts that matter. There is no doubt that the arresting officer searched through the phone's text messages folder at the scene of the arrest. Pet. 3; BIO 12. It also is clear that the detective specializing in gang investigations later searched through "a lot of stuff" on the phone at the police station while "looking for evidence." Pet. 3 (quoting detective's testimony at Tr. 176, 193). At a minimum, that second search involved the phone's folders containing photos and videos. *Id.*; BIO 12. These undisputed facts are more than enough to show that this case involves a wide-ranging and intrusive examination of the digital contents of a smartphone – exactly the kind of search that, for all of the reasons petitioner and *amici* have explained, provides the best setting for considering the question presented.[1]

3. Although the State never argued below that any Fourth Amendment violation was harmless, it

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[1] The State asserts that "the record does not specify the type of cell phone found on petitioner." BIO 1 n.1. But given that the State itself provided petitioner during discovery with a document entitled "phone examination report properties" noting that the phone was a "Samsung" "SPH-M800 Instinct," it is impossible to dispute – and the State does not actually do so – that petitioner has accurately described the smartphone at issue. *See* Pet. 2.

now advances such a contention for the first time. BIO 10-11. This contention provides no impediment to review because this Court's practice at the merits stage when a state contends that a constitutional criminal procedure error was harmless is to resolve the constitutional claim and then to "allow[] state courts initially to assess the effect of erroneously admitted evidence in light of substantive state criminal law." *Lilly v. Virginia,* 527 U.S. 116, 139 (1999); *see also, e.g.*, *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2719 n.11 (2011).

At any rate, the State's harmless-error argument is unpersuasive. The State's case was entirely circumstantial and petitioner's first trial (which was based on the same evidence as the second trial) ended in a hung jury, *see* Pet. 4, so every marginal piece of evidence the State offered was critical. And the text entries, photos, and videos gleaned from petitioner's phone were especially critical. The State thus stressed the photos and videos in its closing argument as pieces of the evidentiary "puzzle" supposedly linking petitioner to the shootings. Tr. 1161. Indeed, that evidence is what caused petitioner first to become a suspect in this case and also led to other evidence that might be considered upon full briefing on remand to be fruit of the poisonous tree. Pet. 3; BIO 1-2; *see generally Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (fruit of poisonous tree doctrine).

What is more, the prosecution relied heavily on the photos and videos at trial in its effort to prove that petitioner committed the crimes here for the benefit of a gang. The gang aggravating factor enhanced petitioner's sentence from a maximum of

seven years to a minimum of fifteen, thus making the evidence highly consequential for that reason alone. *See* Pet. 5. Moreover, purported gang evidence naturally has a powerful effect on a jury's broader deliberations, particularly in a circumstantial case.

4. Finally, the State suggests that *Wurie* is a better candidate for certiorari than this case because *Wurie* involved "a more basic kind of cell phone." BIO 13. But, as several *amici* in this case have already explained, just the opposite is true. This case is the superior one because it involves the smartphone technology most prevalent today (and that will be the industry standard for years to come), while *Wurie* involves a virtually defunct "flip phone" device. *See* Br. for Center for Democracy & Technology and Electronic Frontier Foundation at 11-13; Br. for NACDL 11-12. It should go without saying that this Court's resources are better spent deciding a case concerning current reality than one involving a relic of the past.

Even if this Court wishes for some reason to pass judgment on the search of the old-fashioned flip phone in *Wurie*, it should also grant plenary review in this case. When it sought en banc review in *Wurie*, the United States acknowledged that a ruling in that case would not necessarily determine the constitutionality of the search of a modern smartphone. Specifically, the government conceded that "certain cell-phone searches might be so intrusive as to be unreasonable – just as a thorough search of a personal diary might be unreasonable in a particular case." U.S. Pet. for Rehearing En Banc at 11, *United States v. Wurie*, No. 11-1792 (1st Cir. July 16, 2013). This is because "[i]n cases involving more

intrusive searches of computer-like phones, the core Fourth Amendment requirement of reasonableness protects against unwarranted invasions of privacy, as the Supreme Court has repeatedly stated." *Id.* at 6-7. Yet the government asserted that "[t]o the extent that some cell phones may implicate more serious concerns than traditional containers, those concerns are not present in [*Wurie*], which involved a brief examination of the call log of a flip phone." *Id.* at 6.[2]

This case involves the kind of "intrusive" search of a "computer-like" phone that the government has stressed did *not* occur in *Wurie*. And petitioner concurs with the government that these distinctions may well matter. *See* Pet. 25-28. In contrast to a flip phone, the immense storage capacity and multimedia components of a smartphone render it the digital equivalent of an entire house full of personal diaries, letters, photo albums, and DVD's. *See* Br. for Center for Democracy and Technology and Electronic Frontier Foundation at 3-13; Br. for NACDL Br. 2-19. These practical capabilities may be relevant not only to any overall "reasonableness" inquiry, *see United States v. Jones*, 132 S. Ct. 945, 955-57 (2012) (Sotomayor, J., concurring); *id.* at 963 (Alito, J.,

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[2] The government's position in this Court is less clear. At one point, the government states – as in the First Circuit – that "if officers may be found to act unreasonably in violation of the Fourth Amendment by reading highly personal papers found during a search of a person incident to arrest, similar principles could apply to cell-phone searches." Pet. for Cert. in *Wurie* 17. At other points, the government seeks a "bright-line rule" authorizing any search of any kind of cell phone incident to arrest. *Id.* at 11, 16.

concurring in the judgment), but also to the question whether the searches at issue implicate the Framers' intent to prohibit the use of "general warrants," Br. for Constitutional Accountability Center at 5-20. Thus, regardless of what this Court does with the *Wurie* petition, it should grant certiorari here to ensure that it is able to deliver a ruling on the question presented that gives genuine guidance for future cases.[3]

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[3] In *Wurie* (Pet. for Cert. 26 & n.4), the Solicitor General suggests that *Wurie* is different than this case insofar as that case raises the alternative argument that "a particular search is permissible where it is reasonable to believe that evidence of the offense of arrest might be found on the phone . . . or where the search is reasonably targeted to information likely to shed light on an arrestee's identity" (internal citations and quotation marks omitted). There is nothing to this suggestion. The prosecution in either case may, if it chooses, advance such a legal argument in this Court; the Solicitor General could advance it as *amicus* in this case as well. And in either case, this Court, if it agreed with the argument, could say so in an opinion and either apply the argument to the facts of the case or remand for such an application.

If anything, the Solicitor General's professed interest in arguing in the alternative that some sort of "reasonable belief" test applies in this context underscores the need to grant certiorari in a case involving a smartphone. However such a theory might play out with respect to a simple flip phone, the vast amount of personal information stored on a smartphone raises the possibility that any exception allowing warrantless cell-phone searches based on a reasonable expectation of finding relevant evidence inside would entirely swallow a general rule prohibiting such searches.

II. The Search Here Violated The Fourth Amendment.

None of the State's arguments on the merits affords any reason to deny review.

Echoing the California Supreme Court's decision in *People v. Diaz*, 244 P.3d 501 (Cal. 2011), *cert denied*, 132 S. Ct. 94 (2011) (Pet. App. 25a-65a), the State argues that the searches of petitioner's smartphone comported with the Fourth Amendment because decisions that this Court rendered in the 1970's categorically allow the police to search "an[y] item of personal property on [an arrestee's] person at the time of his lawful arrest." BIO 10. Petitioner has already explained how this argument overreads this Court's precedent and ignores fundamental differences between the digital contents of smartphones and the ordinary physical contents of traditional containers. *See* Pet. 21-28. The State also contends that this Court's recent decision in *Maryland v. King*, 133 S. Ct. 1958 (2013), supports its categorical view of the search-incident-to-arrest doctrine. BIO 9-10. If anything, however, *King* bolsters petitioner's argument. *King* makes clear that "the ultimate measure of the constitutionality" of a search incident to arrest "is reasonableness," which includes an assessment of the "scope and manner of execution" of the search. 133 S. Ct. at 1969-70. That sort of textured and item-specific inquiry is exactly what petitioner and *amici* have explained may be decisive here. Pet. 25-28; Br. for Center for Democracy and Technology and Electronic Frontier Foundation at 9-11.

In any event, the conflict in the lower courts over the question presented renders certiorari essential

regardless of what the Constitution dictates here. Whatever this Court ultimately decides the Fourth Amendment permits police officers to do when seizing smartphones incident to arrest, the important point is that officers (and citizens, lawyers, and courts) need to know now what is allowed and what is not. This Court should grant review in this case to deliver that comprehensive guidance.

CONCLUSION

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

Respectfully submitted,

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