No. 13-132

In the Supreme Court of the United States

DAVID LEON RILEY, *Petitioner,*

v.

STATE OF CALIFORNIA, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH DISTRICT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

After petitioner's lawful arrest for possession of loaded firearms, officers twice examined the contents of his cell phone, on his person at the time of his arrest, for evidence linking him to the firearms. The first examination, a cursory one of text entries, occurred at the scene of the arrest; the second, which included viewing photographs and videos, occurred a couple of hours later at the police station.

The question presented is:

Whether the officers' searches of the cell phone seized incident to petitioner's arrest were lawful under the Fourth Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

STATEMENT OF THE CASE

Petitioner Riley is a member of a Blood gang called "Lincoln Park." On August 2, 2009, he and two fellow gang members armed themselves with handguns and parked petitioner's red Oldsmobile in San Diego's Skyline neighborhood, claimed by the rival Crips gang. When a Crips gang member drove by, petitioner and his cohorts fired several shots at him, causing him to crash. Petitioner and his cohorts drove off, and then hid petitioner's red Oldsmobile under a car cover a few miles away.

About three weeks later, San Diego police officers stopped petitioner, driving a different car, because the car's registration tags were expired. After discovering that petitioner was also driving with a suspended driver's license, the officers impounded the car and conducted an inventory search pursuant to standard police procedures. They found, hidden in the engine compartment, two loaded firearms. The officers arrested petitioner for carrying the concealed and loaded firearms.

In a search of petitioner at the arrest scene, one of the officers observed that he was wearing and possessed certain items indicating Lincoln Park gang membership: a green bandana in his pocket, and a keychain with a small pair of Converse red and green tennis shoes. The officer cursorily examined petitioner's cell phone[1], seized from his person at the time of arrest, and saw that all of the entries starting with a "k" were preceded by a "c." For Blood gang

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[1] Petitioner asserts that his cell phone was a "Samsung Instinct M800 'smartphone'." See Pet. At 2. However, the record does not specify the type of cell phone found on petitioner.

members, such nomenclature is used to signify "Crip Killer."

At the police station about two hours later, a gang detective, aware that gang members often take pictures or videos of themselves with firearms, looked through petitioner's cell phone again. Looking for further evidence connecting petitioner to the firearms discovered in the car, the detective instead found some video clips of young men engaged in street boxing, a common gang initiation. In the video clips, the detective could hear petitioner saying, "Get brackin', Blood," and "Get him blood. Brack and Blood on Lincoln." In addition, petitioner's red Oldsmobile was visible in one of the videos. The detective also found on the cell phone photographs depicting petitioner and others making gang signs, including the hand sign for the letter "L."

Later, the police learned that petitioner's cell phone records—obtained through means unchallenged in this case—showed that his phone had been used near the location of, and around the same time as the August 2nd shooting. Those records also showed that the phone had been used about a half hour later near the location where the police in the meantime had found petitioner's Oldsmobile. Finally, the two handguns found in petitioner's engine compartment matched the guns used in the drive-by shooting.

The State charged petitioner with shooting at an occupied vehicle, attempted murder, and assault with a semiautomatic firearm.[2] The State further alleged, for sentence-enhancing purposes, that the

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[2] Petitioner was separately charged with carrying a concealed firearm in a vehicle, carrying a loaded firearm, and receiving stolen property. He pled guilty to these charges and was sentenced to four years in state prison.

charged offenses had been gang-related and had involved the use of firearms.

Prior to his trial, petitioner moved to suppress the evidence found on his cell phone as invalid searches incident to arrest. After an evidentiary hearing, the trial judge denied the motion.

The judge ruled that, because the cell phone was on petitioner's person at the time of his arrest, the police were entitled to conduct a warrantless "search incident to arrest" under *United States* v. *Robinson,* 414 U.S. 218 (1973), and *United States* v. *Edwards,* 415 U.S. 800 (1974). The judge further noted that the detective had testified that, in his experience, gang members take photographs of themselves and their crimes, and that the detective had expected to find such photographs on petitioner's cell phone. As the judge explained, this established that the searches of petitioner's cell phone were conducted for investigative purposes relating to the crime for which petitioner had been arrested. The trial judge added that her ruling comported with the analysis endorsed by the California Court of Appeal in *People* v. *Diaz,* a case pending at that time for further review before the California Supreme Court.

Petitioner's first trial ended with a deadlocked jury. By the time of his re-trial, the California Supreme Court had decided *People* v. *Diaz,* 51 Cal.4th 84, 93, 244 P.3d 501 (2011). There the state supreme court held that the search of the text-message folder of Diaz's cell phone was a valid search incident to a custodial arrest. *Id.* at 502.[3] The state supreme court explained that the question was

[3] Two of the seven state supreme justices dissented on the ground that cell phones are qualitatively different than other items that may be found on an arrestee's person and are therefore entitled to greater protection.

controlled by this Court's decisions in *United States* v. *Robinson,* 414 U.S. 218, *United States* v. *Edwards,* 415 U.S. 800, and *United States* v. *Chadwick,* 433 U.S. 1 (1977):

> Under these decisions, the key question in this case is whether defendant's cell phone was "personal property . . . immediately associated with [his] person" (*Chadwick, supra*, 433 U.S. at p. 15) 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. If it was not, then the search, because it was "'remote in time [and] place from the arrest,'" "cannot be justified as incident to that arrest" unless an "exigency exist[ed]." [Footnote omitted.] (*Chadwick, supra,* at p. 15.)

Id. at 505.

Applying these precedents, the California Supreme Court determined that Diaz's cell phone was an item "immediately associated with the person of the arrestee" because the cell phone was an item of personal property on his person at the time of his lawful arrest and during the administrative processing at the police station. *People* v. *Diaz, supra,* 244 P.3d at 505-06. Accordingly, the state court concluded, petitioner's cell phone was properly subject to a warrantless station-house search. *Id.* at 511.

Before petitioner's second trial, the trial judge revisited her earlier rulings. The judge concluded that *Diaz* supported the ruling that the searches of the cell phone had been lawful incident to petitioner's arrest. So the judge again ruled the cell phone evidence admissible.

In addition to the evidence of petitioner's possession of the same guns used in the shooting, his cell phone records, and items on his person indicating a connection with a street gang, the jury at petitioner's re-trial heard recordings of several jailhouse calls made by petitioner a few days after his arrest, offered as incriminating himself in the shooting. In one, 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?" The woman told petitioner that it only had gun charges and a charge of driving without a license. 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."

In another phone call a couple of days later, petitioner said, "like no way that that shit, it's gonna come back to me like no matter what, the ballistics, it's gonna show . . ." In a different phone call, petitioner talked about getting bailed out because he knew what was going to "hit eventually." During some of the recorded telephone calls, further, petitioner used terminology that was common with gang members.

The jury found petitioner guilty as charged. The judge sentenced him to 15 years to life in state prison.

Petitioner appealed, challenging, among other things the trial judge's ruling on the suppression motion. In an unpublished decision, the California Court of Appeal affirmed the judgment in its entirety. The court of appeal concluded that "*Diaz* controls the present case" and held that the searches of the cell phone were lawful under the Fourth

Amendment as a searches incident petitioner's arrest because the cell phone "was 'immediately associated' with his 'person' when he was stopped." *People* v. *Riley*, 2013 WL 475242.

The California Supreme Court denied petitioner's petition for review without comment or citation.

REASONS CERTIORARI SHOULD BE DENIED

I. The California Court's Decision Comports With This Court's Fourth Amendment Precedents

This case involves a straightforward application of bedrock Fourth Amendment principles that have long governed the search of the person of the arrestee, notwithstanding the modern context involving a cell phone. The California courts in this case correctly applied this Court's precedents in concluding that the warrantless searches of petitioner's cell phone, on his person at the time of his arrest, was lawful.

Here, in upholding the searches of petitioner's cell phone, the California Court of Appeal was bound by the California Supreme Court's decision in *People* v. *Diaz*, which in turn was controlled by this Court's decisions in *United States* v. *Robinson,* 414 U.S. 218, *United States* v. *Edwards,* 415 U.S. 800, and *United States* v. *Chadwick,* 433 U.S. 1. Together, this Court's precedent stands for the principle that, while the Fourth Amendment prohibits the warrantless delayed search of items that merely had been "within the arrestee's immediate control," the search-incident-to-arrest exception to the search warrant requirement permits a delayed warrantless search of the person of the arrestee and of the personal property "immediately associated with the person of

the arrestee." In applying that principle, the California Court of Appeal correctly found that petitioner's cell phone was an item "immediately associated with the person of the arrestee," because the cell phone was an item of personal property on petitioner's person at the time of his lawful arrest. Accordingly, the California Court of Appeal correctly concluded that petitioner's cell phone was properly subject to the warrantless searches incident to lawful arrest.

In *Robinson,* 414 U.S. 218, the defendant was lawfully arrested and, upon his arrest, the arresting officer searched the defendant's pocket, extracted a cigarette package, and found heroin inside the package. *Id.* at 220-23. This Court upheld the search as a valid search incident to arrest. Id. at 236. It explained that, incident to a lawful custodial arrest, an officer has the authority to conduct "a full search of the person [of the arrestee]." *Id.* at 235. This authority, the Court explained, does not depend on whether the officer has reason to believe the arrestee has on his person either evidence or a weapon. Rather, it is the fact of arrest alone that justifies the search.

> 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 arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that 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.; see *Thornton* v. *United States,* 541 U.S. 615, 631-32 (2004) (Scalia, J., concurring). Thus, under

Robinson, a full search of the person of the arrestee is justified by virtue of the lawful arrest.

One year later, in *United States* v. *Edwards,* 415 U.S. 800, this Court once again addressed the lawful scope of the search of an arrestee and recognized that a valid search incident to arrest need not always be contemporaneous with the arrest. In *Edwards,* the defendant was lawfully arrested late one night for attempting to break into a post office. *Id.* at 801. He was transported to jail and placed in a cell. *Id.* Ten hours later, police had the defendant change into new clothing, holding on to his old clothing as evidence because they believed it might contain paint chips from the window through which he had tried to enter the post office. *Id.* at 801-02.

This Court upheld the warrantless search and seizure of the defendant's clothing under the search-incident-to-arrest exception to the search warrant requirement. *United States* v. *Edwards,* 415 U.S. at 802-09. The Court explained 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. The Court noted that this question had been settled by its prior decision in *Abel* v. *United States,* 362 U.S. 217 (1960). *Id.* at 803. The Court explained:

> [O]nce 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.

Edwards at 807. Thus, under *Edwards,* the person of the arrestee and the property in his possession at the detention facility are properly subject to a warrantless station-house search.

Subsequently, in *United States* v. *Chadwick,* 433 U.S. 1, this Court revisited the exception to the requirement that a search incident to arrest be contemporaneous with the arrest and specified that the exception applied to the person of the arrestee and personal property "immediately associated with the person of the arrestee." Applying this principle, the Court invalidated a search where officers had seized a 200-pound, double-locked footlocker during the defendant's arrest and then had searched the footlocker without a warrant an hour and a half later. *Id.* at 4-5. But the Court distinguished such searches of possessions within the arrestee's control from searches of the arrestee's person and items "immediately associated with the person of the arrestee. Although distinguishing it, this Court thus reaffirmed the search of an arrestee's person under *Edwards. Id.* at 16 n.10. Most recently, in *Maryland* v. *King,* 133 S.Ct. 1958 (2013), this Court re-affirmed that the "constitutionality of a search incident to an arrest does not depend on whether there is any indication that the person arrested possesses weapons or evidence." *Id.* at 1971 (citation omitted). In doing so, it reaffirmed the core holding of *Robinso*n by reiterating that "[t]he fact of a lawful arrest, standing alone, authorizes a search." *Id.* at 1971 (citation omitted). In *King,* this Court upheld the warrantless DNA testing of persons arrested for serious crimes, relying on the government's important interest in identifying an arrestee, including verifying his name and determining his criminal history, and the arrestee's diminished

expectation of privacy in his person. *King* at 1971, 1978.

These precedents validate the warrantless searches of petitioner's cell phone. It was an item of personal property on his person at the time of his lawful arrest. Like the clothing taken from the defendant in *Edwards,* petitioner's cell phone was an item "immediately associated with the person of the arrestee."

II. Granting Certiorari Will Not Affect The Result, As Any Error In Admitting The Cell Phone Evidence Was Harmless Anyway.

Further, the result in this case would stand regardless of whether or how this Court might resolve the question presented in the petition. Even if the evidence taken from petitioner's cell phone had been excluded, he still would have been found guilty of the charged offenses because there was ample independent evidence supporting the guilty verdict and sentence-enhancement findings. That is, the alleged error was harmless beyond a reasonable doubt. See *Arizona* v. *Fulminante*, 499 U.S. 279, 306-07 (1991).

Strong evidence, other than that found in the cell phone, linked petitioner to the drive-by shooting. The day after the shooting, San Diego police officers found the hidden red Oldsmobile. The car was registered to petitioner and a traffic citation in petitioner's name was inside the car. Petitioner's girlfriend, moreover, lived down the street from the scene of the shooting. In addition, unchallenged cell phone records confirmed that petitioner's cell phone had been used in the vicinity of the shooting on the date and near the time of the shooting, and that it then used about a half hour later where the

Oldsmobile was parked. Even more, ballistics tests revealed that the two firearms found in engine compartment of petitioner's car were used during the drive-by shooting. Petitioner's DNA was found on one of these guns. Finally, petitioner's recorded jailhouse calls confirmed his involvement in the shooting.

The information the police retrieved from petitioner's cell phone was merely trivial and surplus evidence showing petitioner's gang involvement and thus proving the sentence-enhancing special allegation. A gang expert, with approximately 12 prior contacts with petitioner and other Lincoln Park gang members, testified at trial that petitioner was a documented Lincoln Park gang member. The expert further attested that he had seen petitioner, making gang signs, depicted in photographs (not those recovered from the cell phone) with known Lincoln Park gang members. Petitioner also had a gang moniker, "Dave Bo"; and the green bandana he was wearing at the time of his arrest further evidenced his Lincoln Park gang membership. During his recorded jailhouse calls, moreover, petitioner used terminology commonly used by gang members.

Thus, any error in admitting the photographs and videos retrieved from the cell phone was harmless beyond a reasonable doubt. Accordingly, resolution of the Question Presented would be an abstract undertaking that would not affect the judgment.

III. This Case Is A Poor Vehicle For Certiorari

Last, this case is, for other reasons, a poor candidate for certiorari.

1. First, the certiorari petition seeks to present multiple complicated issues for this Court to resolve. Petitioner asks this Court to consider whether various kinds of digital content produce different privacy concerns than others. Petitioner also asks this Court to consider the two searches of his cell phone as two separate issues. Pet. at 20.

2. Second, the record does not clearly support petitioner's suggestion that the search involved "a range of different types of digital content stored on cell phones" that are more characteristic of a modern smart phone. See Pet. at 20. The record is vague regarding what exactly the officers did with the cell phone, and how they accessed the information on the cell phone. The officers' testimony merely establishes the first search entailed looking at text entries, and the second search involved looking at photographs and videos. There is no evidence concerning whether the officers accessed any information on the cell phone such as appointment calendars, e-mail correspondence, internet-related activity, or applications—features commonly associated with a smart phone. Based on the record, the search involved no intrusion greater than the viewing of the photographs, video and text entries on the cell phone. Therefore, the record does not support petitioner's portrayal of an unfettered search through a wide range of information disclosing petitioner's personal and private affairs.

3. Respondent 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 as argued by petitioner. (Pet. at 7-13.) But, as explained above, that does not mean that granting certiorari would be warranted or necessary or useful in this particular case.

A more likely candidate for resolving the conflict may be found elsewhere. Most significant, the First Circuit in *United States* v. *Wurie*, 2013 WL 2129119 recently joined Ohio (*State* v. *Smith*, 920 N.E.2d 949, 952-955 (Ohio 2009), cert. denied, 131 S.Ct. 102 (2010)), and Florida (*Smallwood* v. *State*, 113 So.3d 724, 734-738 (Fla. 2013)), in holding that such a cell phone search violated the Fourth Amendment. *Wurie* created a split with the Fourth, Fifth, and Seventh Circuits, and also conflicts with decisions of the supreme courts of Massachusetts and Georgia—and California. See *United States* v. *Finley,* 477 F.3d 250 (5th Cir. 2007), cert. denied, 549 U.S. 1353 (2007); *United States* v. *Murphy,* 552 F.3d 405 (4th Cir. 2009), cert. denied, 129 S.Ct. 2016 (2009); *United States* v. *Flores-Lopez,* 670 F.3d 803 (7th Cir. 2012); *Hawkins* v. *State,* 723 S.E.2d 924, 925-936 (Ga. 2012); *Commonwealth* v. *Phifer*, 979 N.E.2d 210 (Mass. 2012); *Commonwealth* v. *Berry,* 979 N.E.2d 218 (Mass. 2012). And the United States government has filed a petition for writ of certiorari in *Wurie,* No. 13-212 (filed August 15, 2013). Further, as *Wurie* appears to involve a more basic kind of cell phone, certiorari review in that case would allow the Court to approach the issue in a measured way, first in the context of a settled technology—rather than in the still rapidly changing technological context of "smart phones." See *City of Ontario, Cal.* v. *Quon,* 560 U.S. 746, 130 S.Ct. 2619, 2629 (2010). Moreover, the record in *Wurie* might well be clear—in a way the record in this case is not—about exactly how and where the police accessed the challenged evidence from the phone. Those circumstances would need to be understood in order to properly gauge the defendant's reasonable expectation of privacy in resolving the Fourth Amendment issue.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted

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