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David Leon Riley v. State of California and United States of America v. Brima Wurie: Brief of Amici Curiae Criminal Law Professors in Support of Petitioner Riley and Respondent Wurie

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Nos. 13-132 & 13-212

IN THE
Supreme Court of the United States

DAVID LEON RILEY,
Petitioner,

v.

STATE OF CALIFORNIA,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,

v.

BRIMA WURIE,
Respondent.

**On Writs of Certiorari to the
California Court of Appeal, Fourth District and
the United States Court of Appeals
for the First Circuit**

**BRIEF OF AMICI CURIAE CRIMINAL LAW
PROFESSORS IN SUPPORT OF PETITIONER
RILEY AND RESPONDENT WURIE**

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INTEREST OF *AMICI CURIAE*

Amici are criminal procedure professors who teach, study, and write about the Fourth Amendment.¹ *Amici* believe this case presents fundamental issues about how the Fourth Amendment will be interpreted in thousands of cases for decades to come. *Amici* are of the view that search incident to arrest precedent created in a non-digital world cannot be logically applied to cell phones and other mobile electronic devices.

The lead amicus, Adam M. Gershowitz, is a Professor of Law at William & Mary Law School. He has written numerous law review articles analyzing courts' approaches to searching cell phones incident to arrest, including: *The iPhone Meets the Fourth Amendment*, 56 UCLA L. REV. 27 (2008); *Password Protected? Can a Password Save Your Cell Phone from a Search Incident to Arrest?*, 96 IOWA L. REV. 1125 (2011); *Texting While Driving Meets the Fourth Amendment: Detering Both Texting and Warrantless Cell Phone Searches*, 54 ARIZ. L. REV. 577 (2012); *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 (2013).

A list of the other *Amici* who reviewed and join in this brief is included in the attached Appendix.

¹ No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The Court should not apply search incident to arrest precedent created in a world of typewriters and carbon paper to digital devices capable of storing a warehouse full of documents, pictures, and GPS location data. Cell phones carry a lesser risk of destruction of evidence and a greater risk of government intrusion on privacy than the limited technologies on which the search incident to arrest doctrine is based. Rather than allowing warrantless searches of cell phones incident to arrest, the Court should encourage law enforcement officers to place cell phones in Faraday envelopes or aluminum foil to prevent the remote wiping of data from the phone while officers seek a warrant.

A Faraday envelope is simply an aluminum-lined container that isolates its contents from outside signals. Law enforcement agencies can purchase Faraday envelopes for only a few dollars. In the alternative, at a cost of only pennies, police can prevent remote wiping by simply wrapping cell phones in a sheet of aluminum foil purchased from a grocery store. Because police departments would only have to equip a small fraction of officers with Faraday envelopes or aluminum foil, the cost would be minimal.

Forbidding warrantless cell phone *searches*, while allowing cell phone *seizures*, incident to arrest is preferable to applying the *Arizona v. Gant*, 556 U.S. 332 (2009) “reasonable to believe” formulation to cell phones. Because of the enormous amount of data held on cell phones, it would be reasonable for police to believe evidence of numerous minor crimes might be held on a cell phone. The *Gant* formulation

would therefore fail to offer meaningful privacy protection.

ARGUMENT

I. FARADAY BAGS PREVENT REMOTE CELL PHONE DATA WIPING, ARE INEXPENSIVE, AND ARE ALREADY WIDELY USED BY LAW ENFORCEMENT.

The Court should not apply search incident to arrest precedent created in a world of typewriters and carbon paper to digital devices capable of storing a warehouse full of documents, pictures, and GPS location data. The search incident to arrest doctrine enunciated in *Chimel v. California*, 395 U.S. 752 (1969) and *U.S. v. Robinson*, 414 U.S. 218 (1973) would fail to afford sufficient privacy protection to private data and would encourage police to unnecessarily rummage through, *inter alia*, reams of text messages, emails, internet browsing history, photographs, and GPS location datalocation information, and myriad other forms of data stored in cell phones. *See* Adam M. Gershowitz, *The iPhone Meets the Fourth Amendment*, 56 UCLA L. REV. 27, 44 (2008).

The government interest in preventing destruction of evidence is inapplicable to cell phones because there is a simple solution that can protect private cell phone data while eliminating the risk of remote destruction of evidence: The Court should adopt a rule in which police officers who conduct a lawful arrest are permitted to seize cell phones without a warrant, and then protect evidence on the phones by placing them in a Faraday envelope or wrapping them in aluminum foil while applying for a search warrant.

Despite its unusual name, a Faraday envelope is a very simple and very common item. A “Faraday bag’ or ‘Faraday cage’ [is] essentially an aluminum-foil wrap or some equivalent, which isolates the cell phone from the phone network and from Bluetooth and wireless Internet signals.” *U.S. v. Flores-Lopez*, 670 F.3d 803, 809 (7th Cir. 2012) (internal marks omitted). Faraday cages are omnipresent in American households. They are used in microwave ovens to keep the microwaves inside the oven and in coaxial cables to keep radiowaves from interfering with cable transmission. *See id.* (citation omitted). In laymen’s terms, once a cell phone is placed inside of a Faraday bag or envelope, the phone can no longer communicate with the outside world and thus cannot be remotely wiped by a conspirator.

Numerous law enforcement agencies already use Faraday bags.² The United States Department of

² *See U.S. v. Smith*, 715 F.3d 1110, 1114 (8th Cir. 2013) (“Special Agent Jackson [of the FBI office in St. Louis] then placed the four cell phones and the laptop in a ‘Faraday’ bag to prevent remote access so the phone could not be remotely wiped.”); *U.S. v. Mayo*, No. 2:13-CR-48, 2013 WL 5945802, at *11 & n.9 (D. Vt. Nov. 6, 2013) (noting the practice of Vermont State Police to place cell phones in Faraday enclosures); Karl Dunnagan & Amber Schroader, *Dialing for Evidence*, 2 LAW OFFICER MAGAZINE 46, 49 (Jan./Feb. 2006), available at <http://www.lawofficer.com/article/technology-and-communications/dialing-evidence> (explaining, in an article by a Los Angeles County Sheriff’s deputy, that “[t]o remove a handset from the network, use a Faraday bag, such as Pareben’s Wireless StrongHold bag”); Noah Shactman, *Fighting Crime with Cellphones’ Clues*, N.Y. TIMES, May 3, 2006, http://www.nytimes.com/2006/05/03/technology/techspecial3/03cops.html?_r=0 (noting that “when Detective Reiber [of the Boise, Idaho Police Department] arrives on the scene, he places the phone in a ‘Faraday bag,’ a container made of triwoven

Justice and other law enforcement agencies have made Faraday bag use part of their policies and procedures.³ And local law enforcement agencies have encouraged their use.⁴ In addition to police

copper, nickel, and silver that keeps the phone from making or receiving calls”).

³ See NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, ELECTRONIC CRIME SCENE INVESTIGATION: A GUIDE FOR FIRST RESPONDERS 14 (2d ed. 2008), <https://www.ncjrs.gov/pdffiles1/nij/219941.pdf> (“First responders should also have radio frequency-shielding material such as faraday isolation bags or aluminum foil to wrap cell phones . . . [to] prevent[] the phones from receiving a call, text message, or other communications signal that may alter the evidence.”); *Legal Update Sept. 2013*, WEEKLY RAP UP (Monroe Cnty. Sheriff’s Office, Stock Island, Fla.), Sept. 2013, at 1, https://www.keysso.net/employees/weekly_rap_up/2013/09132013.pdf (“When you seize a phone . . . you can ensure that “it cannot send or receive data . . . [by using] a ‘faraday’ bag.”); Chenda Ngak, *LulzSec Takes on Arizona Law Enforcement*, CBS NEWS (Aug. 29, 2011, 3:18 PM), <http://www.cbsnews.com/news/lulzsec-takes-on-arizona-law-enforcement/> (discussing internal Arizona memo instructing that “[l]aw enforcement seizing iPhones as potential evidence are recommended to protect the phone from wireless signals . . . through the use of a faraday bag”).

⁴ *E.g.*, Lt. John Bennett, *Don’t Forget the Cell Phone*, CYBER FORENSICS DIV. NEWSLETTER (Armstrong Atl. State Univ. Police, Savannah, Ga.), July/Aug. 2013, at 3, <http://www.armstrong.edu/images/police/cfdnewsletter.pdf> (“You can disconnect the phone from the network by placing the phone in a Faraday device The phone can [also] be placed in a copper mesh bag, wrapped in aluminum foil (3-5 times), or simply sealed in a paint can. Keep a roll of aluminum foil in your vehicle for quick and easy access once the device is in possession.”); Graham Kuzia, *Handling Cell Phones and Their Digital Evidence*, POLICE (Apr. 18, 2013), <http://www.policemag.com/blog/technology/story/2013/04/cell-phone-seizures.aspx> (noting in article by North Carolina police

officers and departments that have specifically acknowledged using Faraday bags, other agencies have recommended that approach.⁵ Indeed, at least one state has promulgated a regulation encouraging the use of Faraday bags by law enforcement. W. VA. CODE ST. R. § 149-7-6.4.6.3.F.1(a) (instructing law enforcement officers that “[w]ireless mobile devices should be removed from the wireless networks . . . [by] removing the battery or placing the cellular telephone in a Faraday bag/container or wrap[ping] the device in three layers of aluminum foil . . .”).

Faraday bags come in a variety of forms ranging from moderately priced to very inexpensive. On the higher end, and selling for \$58, are bags that are equipped with a clear window so that law enforcement can manipulate and examine the phone while protecting it from remote wiping.⁶

officer that police should place cell phones in a “Faraday bag, aluminum foil, or signal-blocking container . . . [to] prevent a third party from connecting to the phone and being able to alter what’s on it”).

⁵ See, e.g., VA. DEP’T OF FORENSIC SCIS., EVIDENCE HANDLING & LAB. CAPABILITIES GUIDE III-6 (Sept. 2012), <http://www.dfs.virginia.gov/wp-content/uploads/2013/07/EvidenceGuide.pdf> (recommending that cell phones be placed into a “shielded bag” such as the Faraday bag manufactured by Paraben Corporation); BUREAU OF FORENSIC SERVS., CAL. DEP’T OF JUSTICE, PHYSICAL EVIDENCE BULLETIN: DIGITAL EVIDENCE COLLECTION—MOBILE DEVICES 3 (Dec. 2011), http://oag.ca.gov/sites/all/files/pdfs/cci/reference/peb_18.pdf (recommending that mobile phones be placed “in a Faraday bag or similar material (e.g. arson cans, aluminum foil wraps, etc.)”).

⁶ See, e.g., *Black Hole Faraday Bag—RF Signal Isolation for Forensics, Standard Window Size*, AMAZON, <http://www.amazon.com/Black-Hole-Faraday-Bag-isolation/dp/>

Police can purchase much cheaper Faraday envelopes—metallic-lined envelopes that have pre-printed chain-of-custody labels on the outside—for only \$6.95 each, or at a lower price if purchased in bulk.⁷ Even these simpler and cheaper Faraday envelopes can “dramatically reduce or completely eliminate any risk of remotely disturbing a cell phone’s internal memory.” Charles E. MacLean, *But, Your Honor, A Cell Phone is Not a Cigarette Pack: An Immodest Call for a Return to the Chimel Justifications for Cell Phone Memory Searches Incident to Lawful Arrest*, 6 FED. CTS. L. REV. 41, 54 (2012).

If police departments lack the funding for even the \$6.95 Faraday envelope, they can have officers create their own Faraday envelopes for mere pennies by using aluminum foil sold in grocery stores. The essential ingredient in any Faraday device is the aluminum that blocks any signal from reaching the phone. Police need only a small amount of aluminum foil—a tiny fraction of an ordinary roll—to wrap the phone, immobilize it, and prevent the destruction of evidence. *See* Adam M. 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*

B0091WILY0/ (last visited Mar. 4, 2014) (noting that the bag was “designed for law enforcement digital forensics”).

⁷ *See Paraben’s Single-Use Stronghold Bags*, PARABEN, CORP., <http://www.paraben.com/single-use-stronghold.html> (last visited Mar. 4, 2014). The Faraday envelopes are manufactured by a company specializing in computer forensic software. *See About Paraben*, PARABEN, CORP., <http://www.paraben.com/about.html> (last visited Mar. 4, 2014).

Problem, 22 WM. & MARY BILL RTS. J. 601, 609 (2013). Given that Walmart sells 150 square feet of brand-name aluminum foil for less than \$6, and given that about a foot of aluminum foil is sufficient to wrap a cell phone multiple times, the cost for police to create a Faraday enclosure using aluminum foil is about four cents.

Faraday bags, Faraday envelopes, or simple aluminum foil render the only rationale for the search incident to arrest doctrine that could possibly apply to cell phones inapplicable by preventing the destruction of evidence.⁸ *See Chimel*, 395 U.S. at 763. Because Faraday devices or aluminum foil work effectively and cheaply, this Court should adopt a rule allowing only a seizure of the cell phone incident to arrest while the police apply for a search warrant.

II. FORBIDDING WARRANTLESS SEARCHES WHILE ALLOWING SEIZURES PROTECTS THE BALANCE OF INTERESTS BETWEEN THE GOVERNMENT AND CITIZENS.

A. Use of Faraday Envelopes or Aluminum Foil to Preserve Cell Phone Data Would Impose No Burden on Law Enforcement.

1. There is no practical limitation on law enforcement officers' ability to carry Faraday bags or foil to wrap cell phones, and the Court's precedents

⁸ The other rationale for the search incident to arrest doctrine—protecting officer safety—is not plausibly implicated in most cell phone searches. Moreover, to the extent a cell phone search would be necessary to protect against a danger to officers, the warrantless search could be justified under the general exigency exception. *See, e.g., Warden v. Hayden*, 387 U.S. 294 (1967).

support allowing warrantless cell phone seizures to preserve evidence.

First, from a financial standpoint, Faraday devices are very inexpensive. Top-of-the-line Faraday bags that can also be used for forensic evaluation cost only \$58. Simpler Faraday envelopes can be purchased for only \$6.95. And a sheet of aluminum foil costs only pennies. *See supra* at pp. 7-8.

Second, there would be no logistical burden on most law enforcement officers. Having a few small Faraday envelopes or a few sheets of aluminum foil in a squad car is not a significant burden. Indeed, a square foot of aluminum foil is lightweight and can be folded small enough to fit easily into a pocket or glove compartment. Moreover, few law enforcement officers would need to carry the Faraday envelope or aluminum foil with them. Even though the DEA, FBI, and local police officers working in drug or gang units might need immediate access to Faraday envelopes or aluminum foil, the average officer on the street is unlikely to encounter a situation in which it is essential to immediately preserve cell phone data.⁹ Thus, the Faraday envelopes and

⁹ A sizeable number of cell phone searches are conducted by a relatively small number of specialized law enforcement agencies. *See, e.g., U.S. v. Finley*, 477 F.3d 250 (5th Cir. 2007) (joint operation involving DEA); *U.S. v. Stephens*, No. 13-200004, 2013 WL 5409907 (W.D. Tenn. Sept. 25, 2013) (Organized Crime Unit of local police department); *U.S. v. Saldago*, No. 1:09-CR-454, 2010 WL 3062440 (N.D. Ga. June 12, 2010) (DEA agents); *U.S. v. LaSalle*, No. 07-00032, 2007 WL 1390820 (D. Haw. May 9, 2007) (DEA agent); *U.S. v. Brookes*, No. CRIM2004-0154, 2005 WL 1940124 (D. V.I. June 16, 2005) (DEA agents); *U.S. v. Cote*, No. 03CR271, 2005 WL 1323343 (N.D. Ill. May 26, 2005) (FBI agents); *U.S. v. Parada*, 289 F. Supp.2d 1291 (D. Kan. 2003) (DEA agents); *Wisconsin v.*

aluminum foil can be kept at the police station or in the officers' cruiser.

In its petition for certiorari in *U.S. v. Wurie*, the United States implicitly conceded that warrantless cell phone searches incident to arrest are a concern only in narcotics trafficking cases. Under the section heading, "The Question Presented Is Recurring And Important," the United States focused exclusively on the need for law enforcement officers to preserve evidence in complicated drug trafficking conspiracies. *See* Petition for Writ of Certiorari at *24-25, *U.S. v. Wurie*, No. 13-212 (Aug. 15, 2013), 2013 WL 4404658.

When specialized officers—such as DEA or FBI agents—conduct planned operations to interrupt a drug trafficking conspiracy, it makes sense that they carry Faraday envelopes or aluminum foil in their police cruisers so that they can prevent remote wiping by conspirators.

Most ordinary police officers on the street are not foiling complicated drug-trafficking operations. Ordinary police officers doing routine police work can bring cell phones to the police station where the phones can be placed in a Faraday envelopes or aluminum foil with no logistical difficulty.

Indeed, numerous cell phone search cases decided over the last five years demonstrate that it is already very common for police officers to bring cell phones to the station *prior to* searching them. *See, e.g., U.S. v. Wurie*, 728 F.3d 1, 2 (1st Cir. 2013) (explaining that phone was not searched until ten to

Carroll, 778 N.W.2d 1 (Wis. 2010) (drug task force agent).

fifteen minutes after being taken to the police station).¹⁰ Faraday envelopes and aluminum foil can thus be stored at the station, and the Seventh Circuit’s concern that disallowing warrantless cell phone searches would place a “burden on the police of having to traipse about with Faraday bags” is misplaced. *See Flores-Lopez*, 670 F.3d at 810.

¹⁰ *See also U.S. v. Murphy*, 552 F.3d 405 (4th Cir. 2009) (seized cell phones were brought to Virginia State Police headquarters and later turned over to the DEA); *U.S. v. Gholston*, No. 13-20187, 2014 WL 279609 (E.D. Mich. Jan. 27, 2014) (FBI agent seized cell phone and then submitted an application for a warrant); *U.S. v. Dixon*, No. 1-12-CR-205, 2013 WL 4718934 (N.D. Ga. Sept. 3, 2013) (ATF agent searched phone at office); *U.S. v. Nyuon*, No. CR.12-40017-01, 2013 WL 943635 (D.S.D. Mar. 11, 2013) (drug task force officer searched cell phone at station); *U.S. v. Dimarco*, No. 12CR205, 2013 WL 444764 (S.D.N.Y. Feb. 5, 2013) (search of cell phone at station six hours after arrest); *U.S. v. Wall*, No. 08-60016, 2008 WL 5381412 (S.D. Fla. Dec. 22, 2008) (DEA agents searched cell phone at station); *U.S. v. Rocha*, No. 06-40057-01, 2008 WL 4498950 (D. Kan. Oct. 2, 2008) (search by DEA task force agent at station); *U.S. v. James*, No. 1:06CR134, 2008 WL 1925032 (E.D. Mo. Apr. 29, 2008) (search “several days after the cell phone was seized” under the automobile exception); *U.S. v. Park*, No. CR05-375, 2007 WL 1521573 (N.D. Cal. May 23, 2007) (phones were taken to police station and “placed into envelopes for safe keeping”); *California v. Diaz*, 244 P.3d 501 (Cal. 2011) (search of cell phone 90 minutes after arrestee brought to police station); *Connecticut v. Boyd*, 992 A.2d 1071 (Conn. 2010) (search of cell phone “[l]ater that night” at the police station); *Ohio v. Smith*, 920 N.E.2d 949 (Ohio 2009) (explaining that search of cell phone likely occurred at police station); *Gracie v. Alabama*, 92 So.3d 806 (Ala. Crim. App. 2011) (search of cell phone at station); *Oregon v. Nix*, 237 P.3d 842 (Or. Ct. App. 2009) (cell phone transported to police station so that it could be analyzed by an agent specially trained in cell phones).

Finally, if an officer is not near the police station, she can request backup from another police officer who has a Faraday envelope or aluminum foil in his patrol car. *See, e.g., U.S. v. Curry*, No. 07-100, 2008 WL 219966, at *2-3 (D. Me. Jan. 23, 2008) (explaining how DEA agent seized cell phones until another officer brought an evidence storage bag to the scene).

In sum, even though it might be wise for specialized groups of law enforcement agents—such as DEA and FBI agents—to be equipped with Faraday envelopes or aluminum foil, the vast majority of police officers would not have to carry either item. The cost and logistical difficulty of Faraday envelopes or aluminum foil is therefore minimal.

2. There is ample precedent to support a rule that police can seize cell phones and place them in Faraday envelopes, but not conduct searches of the devices without a warrant. In at least three contexts—seizure of individuals, seizure of evidence, and searches of automobiles—the Court has encouraged police to conduct warrantless seizures in order to prevent destruction of evidence so that officers can obtain a warrant before searching.

Seizure of Individuals: The Court has encouraged law enforcement to immobilize individuals who might destroy evidence inside of a home while the officers apply for a warrant. In *Illinois v. MacArthur*, 531 U.S. 326 (2001), the Court approved the warrantless seizure of an individual to prevent him from entering his home and destroying evidence while the police waited for a magistrate to issue a warrant.

There, police had probable cause to believe MacArthur had marijuana in his house, but they lacked a warrant to enter. *See id.* at 328. Rather than entering and searching without a warrant, the officers restricted MacArthur's movements and prevented him from entering the residence unsupervised for a period of two hours while they applied for a warrant. *See id.* at 329. MacArthur moved to suppress the marijuana and related contraband on the ground that the police had seized him unlawfully. *See id.* The Court rejected MacArthur's challenge to the seizure, concluding that the police acted reasonably by taking a far less invasive action than a warrantless search. *See also Segura v. U.S.*, 468 U.S. 796 (1984) (despite splitting on legality of a search, the majority and minority both recognized that it would have been far less invasive for police to seal the residence from the outside without a warrant, than to search without a warrant).

Seizure of Evidence: The Court has likewise approved of warrantless seizure of tangible items while the police procure a warrant to search them. In *U.S. v. Place*, 462 U.S. 696 (1983), police had reasonable suspicion that a traveler who had just landed at LaGuardia Airport had drugs in his suitcases. When Place refused to consent to a search of the luggage, officers seized the suitcases and took them across town to Kennedy Airport where a drug-sniffing dog alerted that drugs were in at least one of the suitcases. Place moved to suppress on the grounds that the police could not seize his luggage without a warrant. Although the Court ultimately concluded that the detention of the luggage was too lengthy to comply with *Terry v. Ohio*, 392 U.S. 1

(1968),¹¹ the Court recognized that it was permissible for police to seize the luggage to pursue further investigation but not search it without a warrant. Once again, the Court recognized that there are varying levels of intrusiveness and that a seizure of items such as luggage is less invasive than warrantless searching. *See id.* at 705-06. *See also U.S. v. Chadwick*, 433 U.S. 1, 15 n.8 (1977) (finding warrantless search of a footlocker unconstitutional, and noting that “[a] search of the interior was therefore a far greater intrusion into Fourth Amendment values than the impoundment of the footlocker”).

Containers in Automobiles: For a short time, the Court required police with probable cause for a specific container in an automobile to seize the container, but not search it without a warrant. Even though the Court ultimately abandoned this rule, it did so because of peculiarities in the automobile context that would not be present with respect to cell phones.

In *Arkansas v. Sanders*, 442 U.S. 753 (1979), officers had probable cause to believe that a suitcase placed in the trunk of a taxi contained marijuana. The police thus had probable cause for a container in a vehicle, but not the vehicle itself. The Court refused to uphold a warrantless search of the suitcase, concluding that the police should have seized the suitcase without a warrant but procured a search warrant before opening it. The Court focused

¹¹ The duration problem would not be present in the cell phone context because the searches would be incident to arrest, rather than under the more limited *Terry* doctrine at issue in *Place*.

on the privacy associated with luggage and explained that “luggage is a common repository for one’s personal effects, and therefore is inevitably associated with the expectation of privacy.” *Id.* at 762.

The Court ultimately overruled *Sanders* in *California v. Acevedo*, 500 U.S. 565 (1991) for two reasons. First, requiring containers to be seized but not searched without a warrant was too confusing for police who had to make quick decisions in the automobile context. *See Acevedo*, 500 U.S. at 576. The rule in *Sanders*—that police had to obtain a warrant when they had probable cause solely for a container that happened to be in a vehicle—caused confusion given that the automobile exception allows police to search anything in a vehicle when they have probable cause for the vehicle itself. *See U.S. v. Ross*, 456 U.S. 798 (1981). Second, this confusion came with negligible benefit because, as the Court recognized in *Sanders* and reiterated in *Acevedo*, “Since the police . . . have probable cause to seize the property, we can assume that a warrant will be routinely forthcoming. . . .” *Acevedo*, 500 U.S. at 575 (quoting *Sanders*, 442 U.S. at 70). In short, the rule that police had to seize, but not search a container in a vehicle, was difficult to apply with respect to automobiles and added little privacy protection.¹²

¹² Notably, the *Acevedo* Court did not disturb the rule that outside of the automobile context police could seize a container but would not be permitted to search it without a warrant. *See Cynthia Lee, Package Bombs, Footlockers, and Laptops: What the Disappearing Container Doctrine Can Tell Us About the Fourth Amendment*, 100 J. CRIM. L. & CRIMINOLOGY 1403, 1441 (2010).

Neither of these problems would be present in the cell phone context. First, a rule that police can seize a cell phone incident to arrest but not search the phone without a warrant is perfectly clear. Following a lawful arrest, officers will know that they may seize a cell phone and place it in a Faraday envelope, but that they cannot search it without a warrant. There is no room for ambiguity.

Second, unlike in *Sanders*, a bright-line rule allowing warrantless seizures—but not searches—of cell phones incident to arrest would be very protective of privacy. When police seize a cell phone following an arrest, a warrant will not “be routinely forthcoming.” *Acevedo*, 500 U.S. at 575 (quoting *Sanders*, 442 U.S. at 70). Even though there may be probable cause for an arrest, that would not usually mean there would be probable cause to believe an arrestee’s cell phone contains evidence of a crime. Additionally, even if there were probable cause that some application on the phone might contain evidence, a magistrate could conclude that there is only probable cause for particular applications on the phone—for instance, the text messages—and therefore authorize a search only of that application. *See* Gershowitz, *Seizing a Cell Phone Incident to Arrest*, *supra*, at 611 (noting that magistrates are free to issue warrants that limit which applications and functions police can search). Requiring police to procure a warrant will therefore limit the search to locations on the phone where evidence is likely to be, rather than allowing general rummaging through text messages, email, photos, internet browsing history, and other private data that also happens to be on the phone.

B. The Court Should Not Apply *Arizona v. Gant*'s "Reasonable To Believe" Standard To Cell Phones.

This Court should reject the conclusion of a few lower courts and scholars that the *Arizona v. Gant*, 556 U.S. 332, 343 (2009), "reasonable to believe" formulation should be applied to cell phone searches incident to arrest because it would allow widespread warrantless searches following arrests for minor offenses. The *Gant* standard would not impose a meaningful limitation on law enforcement because it could be reasonable for police to believe evidence of numerous minor offenses might be found on the phone.

In *Gant*, the Court narrowed *New York v. Belton*, 453 U.S. 454 (1981) by permitting searches of vehicles incident to arrest only when the arrestee is unsecured or when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Gant*, 556 U.S. at 343 (quoting *U.S. v. Thornton*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring)).

In narrowing the search incident to arrest doctrine, the *Gant* Court recognized the need to prevent wide-ranging searches following arrests for minor offenses. The Court explained that there was a widespread privacy risk in allowing container searches:

[S]earches [under the old rule in *Belton*] authorize police officers to search not just the passenger compartment but every purse, briefcase, or other container within that space. A rule that gives police the power to conduct such a search whenever an individual is

caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals. Indeed, the character of that threat implicates the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person's private effects.

Id. at 345.

A few courts and scholars have maintained that applying the *Gant* “reasonable to believe” formulation to cell phone searches would protect against invasive searches following arrests for minor offenses. *See, e.g., U.S. v. McGhee*, No. 8:09CR31, 2009 WL 2424104, at *3 (D. Neb. July 21, 2009); Orin S. Kerr, *Foreword: Accounting for Technological Change*, 36 HARV. J.L. & PUB. POL’Y 403, 406-07 (2013). This is not correct.

Because of the enormous quantity and wide variety of information held in cell phones, it could be reasonable for police to believe evidence of many minor crimes might be found on cell phones. Applying the *Gant* standard to cell phone searches incident to arrest would thus fail to achieve the goal of preventing police officers from having “unbridled discretion to rummage at will among a person’s private effects.” *Gant*, 556 U.S. at 345.

A few low-level offenses are illustrative.

Drunk Driving: Driving while intoxicated is one of the most common criminal offenses committed in

the United States, with nearly 1.5 million arrests annually.¹³ Many cell phones now have applications that enable users to pay their bills by using their phones.¹⁴ One application—Google Wallet—is now accepted as a method of payment in “hundreds of thousands of merchant locations in the United States.”¹⁵

Because Google Wallet and other cell phone applications can hold a receipt documenting the location where alcohol was consumed, the time a bar tab was paid, and the specific alcoholic drinks purchased, it is “reasonable to believe” evidence of the crime of drunk driving might be found on the phone.

Additionally, given the frequency with which people photograph themselves in social situations, it could also be reasonable for police to believe photographic evidence of a night of drinking might be found in the photo library of a cell phone. The *Gant* formulation would thus permit searches incident to arrest of photo galleries and any applications that may contain photos, such as Twitter, Facebook, and Instagram following a drunk driving arrest.

¹³ See CRIMINAL JUSTICE INFO. SERVS. DIV., U.S. DEP’T OF JUSTICE, TABLE 29: ESTIMATED NUMBER OF ARRESTS (2009), http://www2.fbi.gov/ucr/cius2009/data/table_29.html.

¹⁴ See Laurie Segall, *5 Pay-By-Phone Apps Tested*, CNNMONEY (Sept. 24, 2012, 9:31 AM), <http://money.cnn.com/gallery/technology/2012/09/24/mobile-payment-apps/index.html>.

¹⁵ See *Frequently Asked Questions*, GOOGLE WALLET, <http://www.google.com/wallet/faq.html> (last visited Mar. 4, 2014).

Texting While Driving: Many jurisdictions criminalize texting while driving or other types of distracted driving, such as operating a vehicle while “[m]anually entering multiple letters or text in the device as a means of communicating with another person.” N.C. GEN. STAT. ANN. § 20-137.4A; *see* Adam M. Gershowitz, *Texting While Driving Meets the Fourth Amendment: Deterring Both Texting and Warrantless Cell Phone Searches*, 54 ARIZ. L. REV. 577 (2012) (summarizing all state statutes). And even though most jurisdictions punish texting while driving and other distracted driving with only a small fine, minor traffic offenses are arrestable offenses in many jurisdictions. *See* Janet Koven Levit, *Pretextual Traffic Stops: United States v. Whren and the Death of Terry v. Ohio*, 28 LOY. U. CHI. L.J. 145, 152 nn.63-64 (1996) (minor traffic offenses are arrestable offenses in many jurisdictions). As such, police in many states are authorized to conduct a search incident to arrest following an arrest for texting while driving. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001).

If an officer arrests an individual for texting while driving, it would obviously be reasonable for the officer to believe evidence of the texting might be found on the driver’s cell phone. But the officer would not be limited to reviewing text messages. In states that forbid “manually entering multiple letters or text in the device as a means of communicating” while driving, *e.g.*, N.C. GEN. STAT. ANN. § 20-137.4A, it would be reasonable for the officer to search, at minimum, any text messages, email messages, internet browsing history, Facebook accounts, or other social media applications on the phone for

evidence that the phone was in use while driving. Under the *Gant* rationale, officers would therefore be justified in conducting wide-ranging searches of cell phones for low-level traffic offenses that carry only a small fine. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 90, § 13B (punishing texting while driving with a \$100 fine); N.J. STAT. ANN. § 39:4-97.3 (\$100 fine); N.C. GEN. STAT. ANN. § 29-137.4A (\$100 fine); R.I. GEN. LAWS § 31-22-30 (\$85 fine); TENN. CODE ANN. § 55-8-199 (fine of no more than \$50); WYO. STAT. ANN. § 346.89 (up to \$75 fine).

Low Level Drug Possession: The *Gant* formulation could also permit police to search cell phones incident to arrest following arrests for possession of a small amounts of drugs, such as marijuana.

Drug purchases are often coordinated by text message. *See, e.g., U.S. v. Aguirre*, 664 F.3d 606, 615 (5th Cir. 2011) (noting testimony of FBI agent that cell phones record evidence of the “buying and selling of drugs”); *U.S. v. Finley*, 477 F.3d 250, 254 n.2 (5th Cir. 2007) (describing incriminating text messages in search incident to arrest of cell phone). Because law enforcement is aware that texting is a way to conduct drug transactions, officers are trained to search cell phones in drug arrests. *See U.S. v. Wall*, No. 08-60016-CR, 2008 WL 5381412, at *4 (S.D. Fla. Dec. 22, 2008) (quoting testimony of drug enforcement agent that “it is his practice to search cell phones for text messages primarily because DEA’s policy allows for it and because it is common to find text messages that further the investigation”).

An officer who arrests a suspect for possession of a small amount of marijuana may reasonably believe

the purchase was coordinated by text message or other social media communication, thus authorizing a search of the phone under the *Gant* formulation. An arrest for a small amount of marijuana could therefore permit a wide-ranging search of the phone's text messages, emails, or Facebook messages.

Because police conduct thousands of arrests for minor narcotics possession each year,¹⁶ the *Gant* formulation would authorize police to search cell phones incident to arrest following an enormous number of low-level drug possession arrests.

Any offense in which location data proves guilt: Perhaps most significantly, applying the *Gant* standard to cell phone searches incident to arrest would authorize police to search cell phones incident to arrest for any crime where a suspect's location could help to prove his guilt.

Cell phones contain an enormous amount of location data that can link an individual to minor criminal activity. Some cell phones contain a history function that documents every location where the phone has been for multiple weeks.

On iPhones with new operating systems, a police officer simply has to tap the "Settings" icon, then "Privacy," followed by "Location Services," then "System Services," and finally "Frequent Locations." The iPhone will then show the addresses where the phone has been over the last few weeks. And if the

¹⁶ See, e.g., N.Y. STATE DIV. OF CRIMINAL JUSTICE SERV., ADULT ARRESTS: 2003-2012, <http://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/Allcounties.pdf> (noting 62,115 to 83,758 misdemeanor drug arrests annually in New York City alone).

officer taps on a particular address, the iPhone will specify the exact dates and times when the phone was present at that location. *See* Dwight Silverman, *Your iPhone Knows Where You've Been, Puts It on a Map*, SEATTLE POST-INTELLIGENCER, Oct. 31, 2013, <http://blog.chron.com/techblog/2013/10/your-iphone-knows-where-youve-been-puts-it-on-a-map/>.

Older phones and less sophisticated models also contain functions or applications that include location data. The map function on many cell phones can provide law enforcement with the specific addresses where an individual has recently traveled. The Foursquare check-in application can automatically record when a phone has been near a specific business.¹⁷

In light of the vast location data stored on cell phones, it is reasonable for law enforcement to believe evidence of many minor crimes might be found on the phone. For example, following a prostitution arrest, officers might reasonably believe the cell phone could link the arrestee to an incriminating address. In an arrest for petty theft, the phone might show that the arrestee was at the store when the theft occurred. In an arrest for public intoxication or underage drinking, the phone might prove presence at a bar or on a public street.

In all of these examples—driving while intoxicated, texting while driving, minor drug possession, prostitution, petty theft, public intoxication, and underage drinking—the phones

¹⁷ *See* MG Siegler, *Check-in on Foursquare Without Taking Your Phone Out of Your Pocket*, TECHCRUNCH, Aug. 2, 2010, <http://techcrunch.com/2010/08/02/future-checkin/>.

might contain evidence that links individuals to criminal activity. The problem is not this incriminating evidence. The problem is the reams of unrelated private information—voicemail and text messages from spouses or lovers, health records, embarrassing photographs, business documents, and future travel plans—that law enforcement officers will be able to review after arresting an individual for a minor crime. See Adam M. Gershowitz, *The iPhone Meets the Fourth Amendment*, 56 UCLA L. REV. 27, 41-44 (2008) (detailing the sensitive and embarrassing information an officer can come across during a search incident to arrest of a cell phone).

Moreover, allowing searches of cell phones under the *Gant* formulation would invite abuse. It is not far-fetched to imagine a police officer, after pulling someone over and arresting him for texting while driving, to suspect that he may have committed other crimes based on his look, the location, or even the time of day. The officer could then arrest the suspect for texting while driving and rummage through any text messaging application looking for evidence of other crimes the officer has a hunch the driver may have committed.

As technology advances, the list of minor offenses that could give rise to an invasive cell phone search under the *Gant* formulation will almost certainly grow. As time and technology move forward, the *Gant* formulation will therefore provide less and less protection against general police rummaging of cell phones. Accordingly, the Court should reject the *Gant* formulation in specifying the scope of a search incident to arrest of cell phones.

* * *

A bright-line rule permitting seizures, but not searches, of cell phones incident to arrest would in no way injure law enforcement's ability to preserve evidence. Should law enforcement choose to use a Faraday envelope or aluminum foil, that approach would be both workable for the police and protective of the reams of private data stored on or accessible from cell phones. And as the Court explained in *Segura*, "a seizure affects only possessory interests, not privacy interests. Therefore, the heightened protection we accord privacy interests is simply not implicated where a seizure of premises, not a search, is at issue." 468 U.S. at 810. Thus, the rule finds the right balance between protecting the government's evidence preservation interest and the citizen's privacy interest.

CONCLUSION

For these reasons, the judgment below should be reversed in *Riley* and affirmed in *Wurie*.

Respectfully submitted,

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