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## The Constitutionality of Warrantless Cell Phone Searches: Incident to Arrest

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THE CONSTITUTIONALITY OF WARRANTLESS CELL PHONE SEARCHES  
INCIDENT TO ARREST

by

KYLIE J. BROWN

A thesis submitted in partial fulfillment of the requirements  
for the Honors in the Major Program in Legal Studies  
in the College of Health and Public Affairs  
and in The Burnett Honors College  
at the University of Central Florida  
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## **ABSTRACT**

As technology has developed, Americans have come to carry their most private information around with them in their pockets in digital form on their cell phones. A cell phone has immense storage capacity and can contain a wide variety of communicative information about its owner. In the past, there had been a disagreement among the lower courts as to whether police officers could search the contents of an arrestee's cell phone when making an arrest. The United States Supreme Court settled this disagreement in *Riley v. California*; in that case, the Court held that the warrantless search of a cell phone incident to arrest violated the Fourth Amendment to the United States Constitution. This thesis discusses case law that preceded the United States Supreme Court case *Riley v. California*, that decision, and possible ramifications of that decision.

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## I. INTRODUCTION

Prior to the Supreme Court's ruling in *Riley v. California*,<sup>1</sup> there was disagreement among the lower courts as to whether a cell phone search was part of the lawful exercise of police powers following an arrest. This disagreement was due to broad interpretations of the search incident to arrest exception to the Fourth Amendment. The United States Courts of Appeals for the Fourth, Fifth, and Seventh Circuits, as well as the California, Massachusetts, and Georgia Supreme Courts held warrantless cell phone searches should be allowed.<sup>2</sup> The United States Courts of Appeals for the First Circuit, as well as the Florida and Ohio Supreme Courts held that warrantless cell phone searches should not be allowed.<sup>3</sup>

There were three Supreme Court cases which provided precedents for the rules governing searches incident to arrest. These cases are *Chimel v. California*,<sup>4</sup> *United States v. Robinson*,<sup>5</sup> and *Arizona v. Gant*.<sup>6</sup>

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<sup>1</sup> *Riley v. California*, 134 S. Ct. 2473 (2014). This was a consolidated case. *See* notes 7-8, *infra* and accompanying text.

<sup>2</sup> *United States v. Flores – Lopez*, 670 F. 3d 803 (7th Cir. 2012); *United States v. Murphy*, 552 F. 3d 405 (4th Cir. 2009); *United States v. Finley*, 477 F.3d 250 (5th Cir. 2007); *People v. Diaz*, 51 Cal. 4th 84 (Cal. 2011); *Hawkins v. State*, 723 S.E.2d 924 (Ga. 2012); *Commonwealth v. Phifer*, 979 N.E. 2d 210 (Mass. 2012).

<sup>3</sup> *United States v. Wurie*, 728 F. 3d 1 (1st Cir. 2013); *Smallwood v. State*, 113 So. 3d 724 (Fla. 2013); *State v. Smith*, 124 Ohio St.3d 163 (Ohio 2009).

<sup>4</sup> *Chimel v. California*, 395 U.S. 752 (1969).

<sup>5</sup> *United States v. Robinson*, 414 U.S. 218 (1973).

<sup>6</sup> *Arizona v. Gant*, 556 U.S. 332 (2009).

On January 17, 2014, the United States Supreme Court granted the petition for a writ of certiorari for both *People v. Riley*<sup>7</sup> and *United States v. Wurie*<sup>8</sup> consolidated to the issue of whether warrantless cell phone searches incident to arrest were constitutional. On June 25, 2014, the United States Supreme Court issued its decision in *Riley v. California*.<sup>9</sup> The Supreme Court held that police cannot search a phone upon arrest without a search warrant.<sup>10</sup>

This decision was a shocking advancement from the Supreme Court's prior stand on privacy and technology. The revolutionary decision in *Riley v. California* provided clarity and unity between Justices which had not been present in prior Supreme Court cases regarding technology. Significant privacy cases involving technology that were decided by the Supreme Court prior to this case include *Katz v. United States*,<sup>11</sup> *Smith v. Maryland*,<sup>12</sup> *Kyllo v. United States*,<sup>13</sup> *City of Ontario, California v. Quon*,<sup>14</sup> and *United States v. Jones*.<sup>15</sup>

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<sup>7</sup> *People v. Riley*, No. D059840, 2013 WL 475242 (Cal. Dist. Ct. App. Feb. 8, 2013), *cert. granted*, 134 S. Ct. 999, *rev'd*, 134 S. Ct. 2473 (2014).

<sup>8</sup> *United States v. Wurie*, 728 F.3d 1 (1<sup>st</sup> Cir. 2013), *cert. granted*, 134 S. Ct. 999, *aff'd*, 134 S. Ct. 2473 (2014).

<sup>9</sup> *Riley v. California*, 134 S. Ct. 2473 (2014). For ease of reference, the consolidated cases will be referred to as *Riley v. California*.

<sup>10</sup> *Id.* at 2493.

<sup>11</sup> *Katz v. United States*, 389 U.S. 347 (1967).

<sup>12</sup> *Smith v. Maryland*, 442 U.S. 735 (1979).

<sup>13</sup> *Kyllo v. United States*, 533 U.S. 27 (2001).

<sup>14</sup> *City of Ontario, California v. Quon*, 130 S. Ct. 2619 (2010).

<sup>15</sup> *United States v. Jones*, 132 S. Ct. 945 (2012).

The focus of this thesis will be the Supreme Court decision in *Riley v. California*. To provide background information for the reader, the thesis will first review prior case law interpreting the Fourth Amendment and previous significant Supreme Court cases on privacy. Next, the thesis will examine the First Circuit decision in *United States v. Wurie*, and the Fourth District Court of Appeals of California decision in *People v. Riley* prior to discussing the United States Supreme Court case and the possible ramifications.



## II. CASE LAW

### A. Fourth Amendment Exception for Warrantless Search

The Fourth Amendment to the United States Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>16</sup>

The fact that the Fourth Amendment protects against unreasonable searches leads to the question of what constitutes a reasonable search. This has been determined through case law. In *Riley v. California*, the United States Supreme Court referred to its prior decisions in *Vernonia School District 47J v. Acton*,<sup>17</sup> and *Brigham City v. Stuart*.<sup>18</sup>

In the United States Supreme Court case *Vernonia School District 47J v. Acton*,<sup>19</sup> the Supreme Court stated, “[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, this Court has said that reasonableness generally requires the obtaining of a judicial warrant.”<sup>20</sup> Thus, the starting point in considering interpretation of the

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<sup>16</sup> U.S. Const. amend. IV.

<sup>17</sup> *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995).

<sup>18</sup> *Brigham City v. Stuart*, 547 U.S. 398 (2006).

<sup>19</sup> *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995).

<sup>20</sup> *Id.* at 653.

Fourth Amendment is that a warrant is generally required. The Court elaborated on this by stating:

As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is “reasonableness.” At least in a case such as this, where there was no clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted, whether a particular search meets the reasonableness standard “is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.”<sup>21</sup>

However, in the United States Supreme Court case *Brigham City v. Stuart*,<sup>22</sup> the Court recognized exceptions to the general rule. The Court held that a warrant is not needed for all searches. The Supreme Court stated, “because the ultimate touchstone of the Fourth Amendment is ‘reasonableness,’ the warrant requirement is subject to certain exceptions.”<sup>23</sup>

As provided in *Brigham City v. Stuart*, case law exceptions to the Fourth Amendment permit a police officer to conduct a search without first obtaining a warrant. These exceptions have been applied to a police officer bringing a suspect into custody and allow a police officer to conduct a search incident to arrest in specific situations. The three United States Supreme Court cases which set precedent for an arrest-related search are *Chimel v. California*,<sup>24</sup> *United States v.*

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<sup>21</sup> *Id* at 652.

<sup>22</sup> *Brigham City v. Stuart*, 547 U.S. 398 (2006).

<sup>23</sup> *Id.* at 403.

<sup>24</sup> *Chimel v. California*, 395 U.S. 752 (1969).

*Robinson*,<sup>25</sup> and *Arizona v. Gant*.<sup>26</sup> The Court decided the first two cases within a space of four years, but the gap between the second and third was more than thirty five years.

## **1. *Chimel v. California***

In the United States Supreme Court case *Chimel v. California*, police officers searched Ted Steven Chimel's entire three bedroom house, including the attic, garage and workshop following his arrest.<sup>27</sup> The officers went as far as to go through the contents of drawers during the search which took between 45 minutes and an hour.<sup>28</sup>

The modern search-incident-to-arrest doctrine was created in *Chimel v. California*. In *Chimel*, the United States Supreme Court stated:

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.<sup>29</sup>

This means that, in order for a search-incident-to-arrest to be constitutional, it must be meant to either protect the officer from harm or prevent evidence from being destroyed. These two reasons for allowing searches without warrants are carried forward in *Robinson* and *Gant*.

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<sup>25</sup> United States v. Robinson, 414 U.S. 218 (1973).

<sup>26</sup> Arizona v. Gant, 556 U.S. 332 (2009).

<sup>27</sup> *Chimel v. California*, 395 U.S. at 754.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 762-63.

## **2. *United States v. Robinson***

In the United States Supreme Court case *United States v. Robinson*,<sup>30</sup> the Court used the rationale from *Chimel*<sup>31</sup> to determine whether a search of an arrestee's person incident to arrest was reasonable.

In *Robinson*, a police officer stopped Wille Robinson, Jr. because the officer believed Robinson was driving with a revoked operator's permit.<sup>32</sup> During the patdown at the time of Robinson's arrest, the officer felt an object in Robinson's left breast pocket.<sup>33</sup> The officer removed the object from Robinson's pocket and discovered it was a pack of cigarettes.<sup>34</sup> However, the officer stated he still did not know what was inside the cigarette pack.<sup>35</sup> Upon looking inside the cigarette pack, he discovered it contained fourteen gelatin capsules of heroin.<sup>36</sup>

Based on the rationale used in *Chimel*, it is necessary for a police officer to search an arrestee's person in order to locate possible weapons and preserve any evidence which could be

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<sup>30</sup> *United States v. Robinson*, 414 U.S. 218 (1973).

<sup>31</sup> *Chimel v. California*, 395 U.S. 752 (1969).

<sup>32</sup> *United States v. Robinson*, 414 U.S. at 221.

<sup>33</sup> *Id.* at 222.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

destroyed.<sup>37</sup> The Supreme Court held that the search of Robinson's person and seizure of the heroin were permissible under the Fourth Amendment.<sup>38</sup> The Court stated:

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 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.<sup>39</sup>

### **3. *Arizona v. Gant***

In the United States Supreme Court case *Arizona v. Gant*,<sup>40</sup> the Court used the rationale from *Chimel*<sup>41</sup> to determine the constitutionality of searching an arrestee's vehicle incident to arrest. The search incident to arrest exception had been left open-ended prior to this decision.

In *Gant*, police officers found cocaine in a jacket pocket in the backseat of Rodney Gant's vehicle during a search following his arrest for driving with a suspended license.<sup>42</sup> Gant had been arrested, handcuffed, and placed in a patrol car prior to the beginning of the search.<sup>43</sup>

The United States Supreme Court held that the search in this case was unreasonable.<sup>44</sup> The Supreme Court stated:

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<sup>37</sup> *Id.* at 225.

<sup>38</sup> *Id.* at 236.

<sup>39</sup> *Id.* at 235.

<sup>40</sup> *Arizona v. Gant*, 556 U.S. 332 (2009).

<sup>41</sup> *Chimel v. California*, 395 U.S. 752 (1969).

<sup>42</sup> *Arizona v. Gant*, 556 U.S. at 335.

<sup>43</sup> *Id.*

Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.<sup>45</sup>

Because Gant had been secured in the back of a patrol car prior to the search, there was no way he could have reached inside the car while the search was occurring. This comes down to the arrestee having access to the contents of the vehicle.

## B. Previous Significant Supreme Court Privacy Cases

The United States Supreme Court hears only a very small number of all the cases from across the United States every year. Prior to the United States Supreme Court decision in *Riley v. California*,<sup>46</sup> very few cases had been decided on the relationship between privacy and technology. These cases included *Katz v. United States*,<sup>47</sup> *Smith v. Maryland*,<sup>48</sup> *Kyllo v. United States*,<sup>49</sup> *City of Ontario, California v. Quon*,<sup>50</sup> and *United States v. Jones*.<sup>51</sup> Many of these cases involved now outdated technology or technology that was quite different from cell phone

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<sup>44</sup> *Arizona v. Gant*, 556 U.S. at 351.

<sup>45</sup> *Id.*

<sup>46</sup> *Riley v. California*, 134 S. Ct. 2473.

<sup>47</sup> *Katz v. United States*, 389 U.S. 347 (1967).

<sup>48</sup> *Smith v. Maryland*, 442 U.S. 735 (1979).

<sup>49</sup> *Kyllo v. United States*, 533 U.S. 27 (2001).

<sup>50</sup> *City of Ontario, California v. Quon*, 130 S. Ct. 2619 (2010).

<sup>51</sup> *United States v. Jones*, 132 S. Ct. 945 (2012).

searches. These cases made it extremely difficult to predict how the Supreme Court would rule in *Riley v. California*.

### **1. *Katz v. United States***

In *Katz v. United States*,<sup>52</sup> the United States Supreme Court stated that, “the Fourth Amendment protects people, not places.”<sup>53</sup> In this case, the FBI attached an electronic listening device to the outside of a phone booth and recorded the conversations that occurred inside.<sup>54</sup> The government argued that because there was no physical trespass into the area occupied by Katz no violation to the Fourth Amendment occurred; however, the Supreme Court did not agree.

The concurring opinion in *Katz* created the two prong test, which has since become the test used to tell if a warrantless search is constitutional. This test states, “there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”<sup>55</sup>

### **2. *Smith v. Maryland***

In the United States Supreme Court case, *Smith v. Maryland*,<sup>56</sup> the police requested that a pen register be installed at the phone company’s central office to record the telephone numbers

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<sup>52</sup> *Katz v. United States*, 389 U.S. 347 (1967).

<sup>53</sup> *Id.* at 351.

<sup>54</sup> *Id.* at 348.

<sup>55</sup> *Id.* at 361 (Harlan, J., concurring).

<sup>56</sup> *Smith v. Maryland*, 442 U.S. 735 (1979).

dialed from the petitioner's home.<sup>57</sup> In *Smith*, the court held that the search was constitutional because the pen register had extremely limited capabilities. Because the police were only accessing the numbers dialed from the phone rather than communicative information, it was not reasonable for the petitioner to believe this information was private because it was socially accepted that the telephone company had access to this information.<sup>58</sup>

### 3. *Kyllo v. United States*

In the United States Supreme Court case, *Kyllo v. United States*,<sup>59</sup> police used a thermal imager to scan Danny Kyllo's home in order to detect the heat from lights used to grow marijuana. The police found that the roof over the garage and wall of the petitioner's home was relatively hot in comparison to the rest of the house and the other homes in the triplex.<sup>60</sup> The Court was concerned with the lack of limits on the powers of technology to shrink citizen's constitutional right to privacy.<sup>61</sup>

The United States Supreme Court held that, "[w]here . . . the Government uses a device that is not in general public use, to explore details of a private home that would previously have been unknowable without physical intrusion, the surveillance is a Fourth Amendment 'search,' and is presumptively unreasonable without a warrant."<sup>62</sup> The Court considered the use of a

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<sup>57</sup> *Id.* at 737.

<sup>58</sup> *Id.* at 745.

<sup>59</sup> *Kyllo v. United States*, 533 U.S. 27 (2001).

<sup>60</sup> *Id.* at 30.

<sup>61</sup> *Id.* at 34.

<sup>62</sup> *Id.* at 27.



thermal imager, which only showed the temperature of the outside of the house in comparison with the other homes in the triplex, to violate the petitioner’s Fourth Amendment right. In *Kyllo*, although the officers remained on a public street, they “engaged in more than naked-eye surveillance of a home.”<sup>63</sup>

#### **4. *City of Ontario, California v. Quon***

In the United States Supreme Court case *City of Ontario, California v. Quon*,<sup>64</sup> the city issued pagers with texting capabilities to members of the Special Weapons and Tactics (SWAT) Team for work related use.<sup>65</sup> Each pager was allotted a set number of characters to send or receive each month.<sup>66</sup> Jeff Quon worked for the Ontario Police Department as a police sergeant and SWAT Team member.<sup>67</sup> Quon exceeded the allotted number of characters for several months until the Lieutenant in charge of the pagers decided to request the transcripts of the officers’ text messages in order to determine whether the character limit was too low or if the employees were using the pagers for personal messages.<sup>68</sup> The Lieutenant discovered many of the messages sent and received on Quon’s pager were not work related, and some were sexually

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<sup>63</sup> *Id.* at 33.

<sup>64</sup> *City of Ontario, California v. Quon*, 560 U.S. 746 (2010).

<sup>65</sup> *Id.* at 750-51.

<sup>66</sup> *Id.* at 750.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 752.

explicit.<sup>69</sup> Quon was allegedly disciplined for using his pager for personal messages while on duty.<sup>70</sup>

Quon filed suit against the City of Ontario, California, alleging his Fourth Amendment rights were violated by the police department obtaining and examining the transcripts of his text messages.<sup>71</sup> The United States Supreme Court held, “[b]ecause the search was motivated by a legitimate work-related purpose, and because it was not excessive in scope, the search was reasonable.”<sup>72</sup>

## ***5. United States v. Jones***

In the United States Supreme Court case *United States v. Jones*,<sup>73</sup> the FBI attached a GPS device to the undercarriage of Antoine Jones’ Jeep Grand Cherokee because they suspected him of trafficking narcotics. The respondent’s location was tracked by satellite within 50 to 100 feet for 28 days.<sup>74</sup> The Court held that, “the government’s installation of a GPS device on a target’s vehicle, and its use of that device to monitor that vehicle’s movements, constitutes a search.”<sup>75</sup> In

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<sup>69</sup> *Id.* at 753.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 764.

<sup>73</sup> *United States v. Jones*, 132 S. Ct. 945 (2012).

<sup>74</sup> *Id.* at 947.

<sup>75</sup> *Id.* at 949.

*Jones*, the Court stated that the respondent's car was one of his "effects" protected under the Fourth Amendment.<sup>76</sup>

Despite the Supreme Court justices agreeing in the opinion, there was disagreement over what constituted the unconstitutional search: the attachment of the GPS device or the long term monitoring. The majority opinion held that the attachment of a GPS device to a car was the violation of Jones's rights; Justices Alito and Sotomayor concurred.<sup>77</sup> Justice Alito concurred that Jones' rights were violated by the monitoring of his movements rather than through the physical trespass to his vehicle.<sup>78</sup> Justice, Ginsburg, Justice Breyer, and Justice Kagan joined Justice Alito in concurring in the judgment.<sup>79</sup> Justice Alito stated:

This case requires us to apply the Fourth Amendment's prohibition of unreasonable searches and seizures to a 21st-century surveillance technique, the use of a Global Positioning System (GPS) device to monitor a vehicle's movements for an extended period of time. Ironically, the Court has chosen to decide this case based on 18th-century tort law.<sup>80</sup>

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 945.

<sup>78</sup> *Id.* at 958 (Alito, J., concurring).

<sup>79</sup> *Id.* at 957 (Alito, J., concurring).

<sup>80</sup> *Id.* at 958 (Alito, J., concurring).

### III. LOWER COURT DECISION IN *WURIE* AND *RILEY*

The Supreme Court case, *Riley v. California*,<sup>81</sup> consolidates two cases; *People v. Riley*<sup>82</sup> and *United States v. Wurie*.<sup>83</sup> *People v. Riley* was decided in the Fourth District Court of Appeals of California. *United States v. Wurie* was decided in the First Circuit of the United States Court of Appeals. The two courts reached opposite holdings on the issue of whether or not cell phones could be searched incident to arrest. The facts in each case differed in the type information retrieved from the phone, the type of phone that was searched, and the location of the phone at the time of the arrest.

#### A. *United States v. Wurie*

In *United States v. Wurie*, the defendant was arrested because he was suspected of being involved in a drug sale.<sup>84</sup> Upon arrest, the officers took two cell phones from the defendant. One of the cell phones received repeated phone calls from a number programmed as “my house” as read from the external screen on the phone. The officers opened the phone and observed that the phone’s wallpaper was a picture of a young woman with baby.<sup>85</sup> The officers then looked up the

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<sup>81</sup> *Riley v. California*, 134 S. Ct. 2473 (2014).

<sup>82</sup> *People v. Riley*, No. D059840, 2013 WL 475242 (Cal. Dist. Ct. App. Feb. 8, 2013), *cert. granted*, 134 S. Ct. 999, *rev’d*, 134 S. Ct. 2473 (2014).

<sup>83</sup> *United States v. Wurie*, 728 F.3d 1 (1<sup>st</sup> Cir. 2013), *cert. granted*, 134 S. Ct. 999, *aff’d*, 134 S. Ct. 2473 (2014).

<sup>84</sup> *United States v. Wurie*, 728 F.3d at 1.

<sup>85</sup> *Id.* at 2.

address of the phone number programmed as home and went to that address. They could see a woman inside who looked like the woman on the phone's wallpaper and a baby. They then got a warrant and seized drugs and a firearm from the residence.<sup>86</sup>

The First Circuit Court held that the search incident to arrest exception recognized in *Chimel*, *Robinson*, and *Gant*, did not allow warrantless cell phone searches. It stated, “the search-incident-to-arrest exception does not authorize the warrantless search of a cell phone seized from an arrestee’s person, because the government has not convinced us that such a search is ever necessary to protect arresting officers or preserve destructible evidence.”<sup>87</sup> The court reasoned that it could not justify a warrantless cell phone search based on previous cases regarding a search incident to arrest because “the officer who conducted the search in *Robinson* had no way of knowing what he might find in the cigarette pack, which therefore posed a safety risk. The officers who searched Wurie’s phone, on the other hand, knew exactly what they would find therein: data.”<sup>88</sup> The court stated:

In our view . . . what distinguishes a warrantless search of the data within a modern cell phone from the inspection of an arrestee’s cigarette pack or the examination of his clothing is not just the nature of the item searched, but the nature and scope of the search itself.<sup>89</sup>

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 13.

<sup>88</sup> *Id.* at 10.

<sup>89</sup> *Id.* at 9.

### B. *People v. Riley*

In *People v. Riley*, three gang members standing near the defendant's Oldsmobile shot at a car as it drove through an intersection.<sup>90</sup> Later that month, the defendant was driving his Lexus when he was stopped by the police. The vehicle was impounded because the defendant was driving with a suspended license; it is departmental policy for an inventory search to be conducted at impound.<sup>91</sup> Upon searching the arrestee and vehicle, the officers found the gun used in the shooting and seized the defendant's cell phone. In addition to the initial search of the cell phone at the scene, a detective who specialized in gangs examined the phone hours later at the police station.<sup>92</sup> The cell phone contained picture and videos showing the defendant's gang affiliation.<sup>93</sup> The cell phone records showed his phone was used near the scene of the shooting at around the same time, and near the location where police found his Oldsmobile 30 minutes after the shooting.<sup>94</sup>

In this case, the appellate court held that the warrantless cell phone search was allowed, relying on the California Supreme Court decision in *People v. Diaz* which held that the Fourth Amendment allows police officers to search cell phones incident to arrest without a warrant, as long as the cell phone is immediately associated with the arrestee's person.<sup>95</sup> The court in *Riley*

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<sup>90</sup> *People v. Riley*, No. D059840, 2013 WL 475242 (Cal. Dist. Ct. App. Feb. 8, 2013), *cert. granted*, 134 S. Ct. 999, *rev'd*, 134 S. Ct. 2473 (2014).

<sup>91</sup> *Id.* at \*2.

<sup>92</sup> *Id.* at \*3.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *People v. Diaz*, 244 P.3d 501, 505 (Cal. 2011).

stated that “a delayed search of an item immediately associated with the arrestee’s person may be justified as incident to a lawful custodial arrest without consideration as to whether an exigency for the search exists.”<sup>96</sup>

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<sup>96</sup> *People v. Riley*, 2013 WL 475242 at \*4. There was question as to whether the cell phone was immediately associated with Riley’s person. Some evidence showed the phone had been removed from the defendant’s pocket and was on the seat of the car at the time the arrest occurred. However, due to the phone’s location being a question of fact rather than a question of law, the appellate court could not rule on this.

### III. SUPREME COURT DECISION IN *WURIE* AND *RILEY*

On January 17, 2014, the United States Supreme Court granted the petition for a writ of certiorari for both *People v. Riley*<sup>97</sup> and *United States v. Wurie*<sup>98</sup> consolidated to the issue of whether warrantless cell phone searches incident to arrest were constitutional. The Supreme Court stated, “[t]hese two cases raise a common question: whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested.”<sup>99</sup>

The United States Supreme Court issued its unanimous decision in *Riley v. California* on June 25, 2014. Chief Justice Roberts delivered the opinion of the Court,<sup>100</sup> and Justice Alito concurred in part and concurred in the judgment.<sup>101</sup> The United States Supreme Court held that a cell phone search incident to arrest was not constitutional for several reasons.<sup>102</sup>

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<sup>97</sup> *People v. Riley*, No. D059840, 2013 WL 475242 (Cal. Dist. Ct. App. Feb. 8, 2013), *cert. granted*, 134 S. Ct. 999 (2014).

<sup>98</sup> *United States v. Wurie*, 728 F.3d 1 (1<sup>st</sup> Cir. 2013), *cert. granted*, 134 S. Ct. 999 (2014).

<sup>99</sup> *Riley v. California*, 134 S. Ct. 2437, 2480.

<sup>100</sup> *Id.* at 2480.

<sup>101</sup> *Id.* at 2495 (Alito, J., concurring).

<sup>102</sup> *Riley v. California*, 134 S. Ct. at 2482-95.



### A. Majority Opinion

The United States Supreme Court described a smart phone as “a cell phone with a broad range of other functions based on advanced computing capability, large storage capacity, and internet connectivity.”<sup>103</sup> In regards to the technological advances in the capabilities of a cell phone, the Court stated:

Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person. The term “cell phone” is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers.<sup>104</sup>

The Supreme Court even went so far as to describe a cell phone as “such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy.”<sup>105</sup>

The immense storage capacity of a cell phone alone was enough to make the Supreme Court question the constitutionality of warrantless cell phone searches.<sup>106</sup> In the past, the search of an arrestee's person incident to arrest was limited to the items the arrestee could physically carry.<sup>107</sup> However, with the modern developments of cell phones the amount of information an

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<sup>103</sup> *Id.* at 2480.

<sup>104</sup> *Id.* at 2489.

<sup>105</sup> *Id.* at 2484.

<sup>106</sup> *Id.* at 2489.

<sup>107</sup> *Id.*

arrestee could have on the arrestee's person is virtually limitless. When considering the storage capacity of a cell phone, the Court stated:

The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier.<sup>108</sup>

In addition to considering the quantitative amount of data stored in a cell phone, the Supreme Court also considered the qualitative content of the information. The Court stated, “[a]lthough the data stored on a cell phone is distinguished from physical records by quantity alone, certain types of data are also qualitatively different.”<sup>109</sup> The Court continued by considering the specific types of qualitative information that could be gathered through the warrantless search of a cell phone. First, an arrestee's internet browsing history on an internet enabled cell phone reveals private interests and concerns.<sup>110</sup> Also, Mobile application software, or “apps,” provide a wide range tools which can be used in all aspects of a person's life.<sup>111</sup> The Supreme Court stated, “[t]he average smart phone user has installed 33 apps, which together can form a revealing montage of the user's life.”<sup>112</sup> Finally, many cell phones record historic location

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 2490.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

information as a standard feature.<sup>113</sup> The Court compared this type of tracking to the GPS monitoring in *Jones*.<sup>114</sup> Like a GPS tracking device, cell phones can “reconstruct someone’s specific movements down to the minute, not only around town but also within a particular building.”<sup>115</sup>

In regard to the previously established search incident to arrest exceptions created to ensure the police officers’ safety and prevent destruction of evidence while making an arrest, the Supreme Court stated, “[w]hile Robinson’s categorical rule strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to digital content on cell phones.”<sup>116</sup> There is no comparable risk of harm to officers or destruction of evidence when the search is of digital data.<sup>117</sup> Because the search of a cell phone provides a police officer with such a vast amount of personal information, “[a] search of the information on a cell phone bears little resemblance to the type of brief physical search considered in *Robinson*.”<sup>118</sup>

The United States Supreme Court stated, “[w]e therefore decline to extend *Robinson* to searches of data on cell phones, and hold instead that officers must generally secure a warrant before conducting such a search.”<sup>119</sup>

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 2484.

<sup>117</sup> *Id.* at 2485.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

Law enforcement remains free to examine the physical cell phone to make sure it is not hiding a weapon; however, “[d]igital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee’s escape.”<sup>120</sup> The Court stated that, “[o]nce any officer has secured a phone and eliminated any potential physical threats, however, data on the phone can endanger no one.”<sup>121</sup>

An argument made in the case was that the ability to search a cell phone could keep a police officer safe in indirect ways.<sup>122</sup> For example, an officer would have a warning when others were on the way to meet the arrestee. However, the Court stated that, “neither the United States nor California offers evidence to suggest their concerns are based on actual experience.”<sup>123</sup> Also, this proposed consideration broadens *Chimel* which was concerned with the arrestee himself accessing a weapon.<sup>124</sup>

In regards to preventing the destruction of evidence, the United States Supreme Court stated, “once law enforcement officers have secured a cell phone, there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone.”<sup>125</sup> However, this may still leave the data vulnerable to remote wiping or data encryption.<sup>126</sup>

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 2486.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

As with the rationale of preventing harm to police officers, “these broader concerns about the loss of evidence are distinct from *Chimel*’s focus on a defendant who responds to arrest by trying to conceal or destroy evidence within his reach.”<sup>127</sup> In the case of remote wiping, the destruction of evidence is typically done by a third party who is not even present at the time of the arrest.<sup>128</sup> In the case of data encryption, the destruction of evidence is done by the ordinary operation of the phone’s security features.<sup>129</sup> There was also little evidence to show either problem is a prevalent issue or that the ability to conduct a warrantless search would make a difference.<sup>130</sup> The Court continued to point out that there were numerous measures that could be taken to prevent the destruction of evidence without conducting a warrantless search, and that in the event an officer truly was presented with a now or never situation to retrieve information the office could then rely exigent circumstances to search the phone immediately.<sup>131</sup>

[A] cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is.<sup>132</sup>

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 2486-87.

<sup>131</sup> *Id.* at 2487.

<sup>132</sup> *Id.* at 2491.

The privacy interests at stake are further complicated by the fact that much of the data found in cell phones is not stored on the device itself but in a remote location.<sup>133</sup> In comparison with *Robinson*, “[t]reating a cell phone as a container whose contents may be searched incident to an arrest is a bit strained as an initial matter.”<sup>134</sup> However, the Court continued, “but the analogy crumbles entirely when a cell phone is used to access data located elsewhere, at the tap of a screen.”<sup>135</sup> The Supreme Court stated, “[t]he possibility that a search might extend well beyond papers and effects in the physical proximity of an arrestee is yet another reason that the privacy interests here dwarf those in *Robinson*.”<sup>136</sup>

It is historically recognized through case law that “the warrant requirement is ‘an important working part of our machinery of government.’”<sup>137</sup> The Supreme Court stated, “[o]ur holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest.”<sup>138</sup> Despite this denial of the search incident to arrest exception, “other case-specific exceptions may still justify a warrantless search of a particular phone.”<sup>139</sup>

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 2493.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 2494.

With the many capabilities of modern cell phones, “[w]ith all they contain and all they may reveal, they hold for many Americans ‘the privacies of life.’”<sup>140</sup> The Supreme Court stated:

The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.<sup>141</sup>

### B. Concurring Opinion

In the concurring opinion, Justice Alito stated, “I agree with the Court that law enforcement officers, in conducting a lawful search incident to arrest, must generally obtain a warrant before searching information stored or accessible on a cell phone.”<sup>142</sup> However, he wrote separately to address two points.

Justice Alito’s first point was that he was “not convinced at this time the ancient rule on searches incident to arrest is based exclusively (or even primarily) on the need to protect the safety of arresting officers and the need to prevent the destruction of evidence.”<sup>143</sup> The rule was not created until over a century after the Fourth Amendment was adopted.<sup>144</sup> While he agreed that cell phones should not be searched without a warrant incident to arrest, he did not feel the

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<sup>140</sup> *Id.* at 2494-95.

<sup>141</sup> *Id.* at 2495.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

Court should based this decision on the rationale in *Chimel*.<sup>145</sup> He stated, “I think it is a mistake to allow that reasoning to affect cases like these that concern the search of the person of arrestees.”<sup>146</sup> *Chimel* involved the lawfulness of searching the scene of an arrest, not the items on an arrestee’s person at the time of the arrest.<sup>147</sup> Once the items are taken away from the arrestee incident to arrest, the concerns in *Chimel* are eliminated and therefore, the rationale is inapplicable.<sup>148</sup>

Justice Alito continued by pointing out that this decision is likely to lead to anomalies.<sup>149</sup> He illustrated this anomaly by pointing out that if two defendants are arrested, and the first defendant has his phone bill in his pocket while the second has his cell phone in his pocket, both of which contain the record of incriminating phone calls, only the defendant with the physical record would have the information seized and examined without a warrant.<sup>150</sup> However, Justice Alito stated he did not see a workable alternative.<sup>151</sup>

His second point was that he would reconsider the decision if Congress or a state legislature were to “enact legislation that draws reasonable distinctions based on categories of information or perhaps other variables.”<sup>152</sup> Following the Supreme Court decision in *Katz*,

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<sup>145</sup> *Id.* at 2496 (Alito, J., concurring).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 2497 (Alito, J., concurring).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*



Congress reacted by enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968.<sup>153</sup> Electronic surveillance has since been primarily governed by the act rather than the Supreme Court decision.<sup>154</sup>

Legislators are in a better position to assess the legitimate needs of law enforcement and the privacy interests of cell phone owners.<sup>155</sup> Justice Alito stated:

[I]t would be very unfortunate if privacy protection in the 21st century were left primarily to the federal courts using the blunt instrument of the Fourth Amendment. Legislatures, elected by the people, are in a better position than we are to assess and respond to the changes that have already occurred and those that almost certainly will take place in the future.<sup>156</sup>

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 2497-98 (Alito, J., concurring).

## IV. REASONING AND ANALYSIS

### A. Cell Phone Use

According to a survey done by the Pew Research Center,<sup>157</sup> ninety-one percent of all Americans owned a cell phone in 2013.<sup>158</sup> Sixty-one percent of those cell phones are Smart Phones.<sup>159</sup> Modern cell phones have advanced to do much more than simply make telephone calls. Society has reached a point where virtually a person's entire life is likely to be on their cell phone. Common Smart Phone capabilities include texting, accessing the internet, sending or receiving emails, taking photographs, downloading apps, navigating, and scheduling.

The same survey by the Pew Research Center showed that eighty-one percent of all cell phone owners use their phones to send or receive text messages and fifty-two percent of Americans use their phones to send or receive emails.<sup>160</sup> During a search incident to arrest, these communications would provide officers with documentation of all written communications made by the arrestee. With such a large portion of Americans' communication occurring digitally, police officers would have access to an immense amount of private information while searching a cell phone.

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<sup>157</sup> The Pew Research Center's research was referenced in *Riley v. California*, 134 S. Ct. 2473, 2491 (2014).

<sup>158</sup> Maeve Duggan, *Cell Phone Activities 2013*, PEW RESEARCH CENTER, September 19, 2013, <http://www.pewinternet.org/2013/09/19/cell-phone-activities-2013/>.

<sup>159</sup> Aaron Smith, *Smartphone Ownership 2013*, PEW RESEARCH CENTER, June 5, 2013, <http://www.pewinternet.org/2013/06/05/smartphone-ownership-2013/>.

<sup>160</sup> *Id.*

Sixty three percent of all Americans use their cell phone to access the internet.<sup>161</sup> In fact, accessing the internet via cell phones has become so popular, thirty-four percent of people who use their cell phones to access the internet say they typically use their cell phone to access the internet over other any other device such as a laptop, desktop or tablet.<sup>162</sup> This statistic increases greatly in young adults; half of all internet users between eighteen and twenty nine years old primarily use the internet on their cell phone.<sup>163</sup> Cell phones keep an internet history, which would provide police officers with the search and browsing history. For people who conduct most of their internet use on their cell phone, this would provide police officers with a great deal of personal information.

The same survey also found that sixty-five percent of Smart Phone users use their phones to get turn-by-turn navigation or directions while driving.<sup>164</sup> Forty-nine percent of all cell phone users use their phones to look up direction, recommendations, and other location related information.<sup>165</sup> In addition to this, most phones record location at all times. According to the 2013 Mobile Consumer Habit survey,<sup>166</sup> seventy two percent of adults in the United States who

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<sup>161</sup> Maeve Duggan & Aaron Smith, *Cell Internet Use 2013*, PEW RESEARCH CENTER, September 16, 2013, <http://www.pewinternet.org/2013/09/16/cell-internet-use-2013/>.

<sup>162</sup> *Id.*

<sup>163</sup> Lee Rainie & Susannah Fox, *Just-in-time Information through Mobile Connections*, PEW RESEARCH CENTER, May 7, 2012, <http://www.pewinternet.org/2012/05/07/just-in-time-information-through-mobile-connections/>

<sup>164</sup> Duggan & Smith, *Supra* note 161.

<sup>165</sup> Duggan, *Supra* note 158.

<sup>166</sup> The 2013 Mobile Consumer Habit survey done for Jumio was referenced in *Riley v. California*, 134 S. Ct. 2473 at 2490 (2014).

own smart phones keep their phone within five feet of them the majority of the time.<sup>167</sup> This provides police officers with a GPS location device for nearly every person in the United States; cell phones have become the modern equivalent of the tracking device used in *Jones*.

Despite the fact that over half of all Americans now have Smart Phones, only eighteen percent of Americans sixty five years or older are Smart Phone owners.<sup>168</sup> Seventy-seven percent do own a cell phone, but these are primarily basic cell phone devices.<sup>169</sup> These numbers are dramatically contrasted by the fact that seventy-nine percent of Americans between the ages of eighteen and twenty-four years old, and eighty-one percent of Americans between the ages of twenty-five and thirty-four years old are Smart Phone owners.<sup>170</sup>

There is a striking difference between the uses of cell phones through the different generations. Ninety-seven percent of Americans between the ages of eighteen and twenty-nine years old, and ninety-four percent between thirty and forty-nine years old send or receive text messages.<sup>171</sup> These statistics begin to drop with only seventy-five percent of Americans between fifty and sixty-four years old sending or receiving text messages, but drop drastically with only

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<sup>167</sup> Jumio, *Americans Can't Put Down Their Smart Phones Even During Sex*, July 11, 2013, <https://www.jumio.com/2013/07/americans-cant-put-down-their-smartphones-even-during-sex/>

<sup>168</sup> Aaron Smith, *Older Adults and Technology Use*, PEW RESEARCH CENTER, April 3, 2014, <http://www.pewinternet.org/2014/04/03/older-adults-and-technology-use/>

<sup>169</sup> *Id.*

<sup>170</sup> Smith, *Supra* note 159.

<sup>171</sup> Duggan, *Supra* note 158.

thirty-five percent of Americans sixty-five years and older sending or receiving text messages.<sup>172</sup>

Similar drops in use occur with every other studied common cell phone use.<sup>173</sup>

The United States Supreme Court Justices range in age from fifty-four to eighty-one years old.<sup>174</sup> However, in comparison with previous Supreme Court decisions, *Riley* shows a much better grasp on the relationship of technology and privacy.

### B. Comparison to Prior Supreme Court Cases

The United States Supreme Court's unanimous decision in *Riley* showed clarity that had not yet been seen in a United States Supreme Court case regarding the relationship between the Fourth Amendment and technology. While the decision was a shocking advancement from previous Supreme Court privacy cases, strands of reasoning from prior cases can be pieced together in the reasoning of *Riley*.

Over the past few decades, technology has progressed rapidly. Modern cell phones combine many different types of technology into one handheld device. There has been a vast increase in technological capabilities since many of the previous Supreme Court cases involving technology and privacy. The concurring opinion in *Katz v. United States*, which involved surveillance of a phone booth, created the two prong test. In applying the second prong to *Riley*,

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> Supreme Court of the United States, <http://www.supremecourt.gov/about/biographies.aspx> (last visited Oct. 22, 2014). Justice Kagan: 54 years old; Chief Justice Roberts: 59 years old; Justice Sotomayor: 60 years old; Justice Alito: 64 years old; Justice Thomas: 66 years old; Justice Breyer: 76 years old; Justice Kennedy: 78 years old; Justice Scalia: 78 years old; Justice Ginsburg: 81 years old.

society would not agree that the warrantless search of a cell phone incident to arrest was reasonable. Cell phones are such a common item in the United States; Americans would not find it reasonable to give police officers the right to virtually go through life without a warrant to justify the search. In *Smith*, which was decided in 1979, the United States Supreme Court held that it was constitutional to install a pen register because the device records such a small amount of information. A pen register is a device that simply records the telephone numbers dials from a particular phone; a Smart Phone contains much more communicative information. Even more recent Supreme Court cases like *Quon*, which was decided in 2010, involve technology that is long out of date. The United States Supreme Court was already concerned with the lack of limitations on the powers of technology to limit constitutional rights when the Court decided *Kyllo* in 2011. The decision held that warrantless searches using technology unavailable to the general public were unconstitutional; however, this led to the question of what would happen when the technology became readily available. While most Americans have a cell phone now, twenty years ago they were far from readily available. Finally, the splintered decision in *Jones* was reached just two years ago. The clarity in the United States Supreme Court's decision in *Riley* shows great improvement in the Justices' understanding of the relationship between privacy and technology.

### C. Future Application

A United States Supreme Court decision like this one is likely to have many future applications. *Riley v. California* found against the majority of the lower courts' decisions in prior

cases across the country.<sup>175</sup> Most lower courts had held that cell phone searches incident to arrest were constitutional. The decision in *Riley* changed the search policies in police departments across the country. As a result, it will become more difficult for police to gather evidence against suspects. Even the United States Supreme Court recognized that its decision would “have an impact on the ability of law enforcement to combat crime.”<sup>176</sup> However, the Court concluded, “[p]rivacy comes at a cost.”<sup>177</sup>

With technology constantly developing, both the number of devices with Smart Phone capabilities and the capabilities of typical Smart Phones are continually increasing. Many new wearable devices are being developed with Smart Phone capabilities. These devices have the capabilities of a Smart Phone, except they are attached to the user’s person at all times. This would advance the location data recorded in the device to a precise record of the wearer’s location at all times. An example of a wearable device that is gaining popularity is the Smart Watch. Many Smart Watches include fitness applications which record the user’s location, the rate at which they are moving, and their heart rate. The combination of this information could be very communicative of a suspect’s activities at the time a crime occurred. Smart Watches will also advance to include the developing capabilities of Smart Phones. One feature that is

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<sup>175</sup> Lower courts that ruled cell phone searches incident to arrest were constitutional: *United States v. Flores – Lopez*, 670 F. 3d 803 (7th Cir. 2012); *United States v. Murphy*, 552 F. 3d 405 (4th Cir. 2009); *United States v. Finley*, 477 F.3d 250 (5th Cir. 2007); *People v. Diaz*, 51 Cal. 4th 84 (Cal. 2011); *Hawkins v. State*, 723 S.E.2d 924 (Ga. 2012); *Commonwealth v. Phifer*, 979 N.E. 2d 210 (Mass. 2012). Lower courts that ruled cell phone searches incident to arrest were unconstitutional: *United States v. Wurie*, 728 F. 3d 1 (1st Cir. 2013); *Smallwood v. State*, 113 So. 3d 724 (Fla. 2013); *State v. Smith*, 124 Ohio St.3d 163 (Ohio 2009).

<sup>176</sup> *Riley v. California*, 134 S. Ct. at 2493.

<sup>177</sup> *Id.*

developing in Smart Phones that will affect the decision in *Riley v. California* is the use of biometric security. Currently some Smart Phones can be unlocked using the user's finger print; however, in the future Smart Phones could use facial recognition or voice recognition to unlock the phone. This new development could make it more difficult for police officers to unlock a phone once it has been taken from an arrestee.

In the United States Supreme Court decision, the Justices provided that if there was ever a situation where officers only had one chance to retrieve information, they may rely on exigent circumstances to retrieve the information.<sup>178</sup> The United States Supreme Court used exigent circumstances to “address some of the more extreme hypotheticals that have been suggested.”<sup>179</sup> These hypotheticals included a suspect's text messages with accomplices regarding detonating a bomb, and location information in a child abductor's phone showing the child's location.<sup>180</sup> However, two arguments brought by the petitioner were much less extreme: remote wiping and data encryption.<sup>181</sup> The Supreme Court stated there was little evidence to show this was a prevalent issue; yet this leads to the question of what happens if these now or never circumstances become the normal circumstances as technology develops.

There have already been some serious issues following the decision. With the constant development of technology, the assumption in *Riley v. California* that information can be retrieved later with a warrant may already be out of date only months after the decision was

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<sup>178</sup> *Id.* at 2478.

<sup>179</sup> *Id.* at 2494.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 2487.



released.<sup>182</sup> On September 18, 2014, Apple, Inc. announced a new privacy policy which states that the company will no longer unlock iPhones or iPads for police, even if they have a warrant.<sup>183</sup> It is still possible for police to access data stored in the iCloud with a search warrant, but iPhone users can easily prevent police from accessing their information by turning off their phone's data stream to their iCloud.<sup>184</sup> Changes in technology like this one could cause officers to always claim exigent circumstances to search a phone incident to arrest due to their inability to access the information in phones in the future.

The iCloud, and other storage services that keep information in a remote location, raises another issue with the constitutionality of cell phone searches incident to arrest. These systems connect all of a user's devices together, allowing them to access information on their tablet or laptop from their cell phone. The Court stated, "such a search would be like finding a key in a suspect's pocket and arguing that it allowed law enforcement to unlock and search a house."<sup>185</sup> However, it is difficult to tell the difference between data physically stored on the phone and data stored anywhere in the world.<sup>186</sup>

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<sup>182</sup> Laurie L. Levenson, *A Pressing Need for Access to Cellphone Data*, THE NATIONAL LAW JOURNAL, October 13, 2014, <http://www.nationallawjournal.com/home/id=1202672948245?kw=A%20Pressing%20Need%20for%20Access%20to%20Cellphone%20Data&et=editorial&bu=National%20Law%20Journal&n=20141014&src=EMC-Email&pt=Legal%20Times%20Afternoon%20Update/>.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Riley v. California*, 134 S. Ct. at 2491.

<sup>186</sup> *Id.*

While the United States Supreme Court decision is clear in its present application, it leaves many questions unanswered as to the future application. An example of one future issue with cell phone searches was brought up during the oral arguments when Justice Sotomayor asked what happens to the data once the cell phone has been searched.<sup>187</sup> There are many future ramifications which have not been touched upon in *Riley* so it will be left for future cases, and potentially legislation, to decide.

These issues lead to the second point of Justice Alito's concurring opinion; he expressed his hope that legislation will soon govern the search of cell phones incident to arrest.<sup>188</sup> He stated that Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968 following the decision in *Katz*.<sup>189</sup> Electronic surveillance is primarily governed by the Act rather than the Supreme Court decision.<sup>190</sup>

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<sup>187</sup> Jane Anne Murray, *Once the government seizes tablets of smartphones, can it use the stored information forever?*, THE NATIONAL LAW JOURNAL, October 20, 2014, <http://www.nationallawjournal.com/home/id=1202673640243?kw=The%20Never-Ending%20Search%20of%20Digital%20Data&et=editorial&bu=National%20Law%20Journal&cn=20141020&src=EMC-Email&pt=Daily%20Headlines&slreturn=20140920091726/>.

<sup>188</sup> *Riley v. California*, 134 S. Ct. at 2497 (Alito, J., concurring).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

## V. CONCLUSION

The United States Supreme Court decision in *Riley v. California* is a step in the right direction, but technology is constantly developing at a much faster rate that the Supreme Court can issue decisions. While this decision will likely be outdated in the very near future, the case showed the Supreme Court Justices have a much more advanced understanding of technology and the impact it could have on privacy in the United States than they had in previous cases on other technology-related matters. The largest impact of *Riley* could be seen broadly as a potential turning point at the beginning of a change in the United States' view on privacy.

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