

No. 20-_____

In the
Supreme Court of the United States

JERRY WILTZ,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition for a Writ of Certiorari to the
Texas Court of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the present case, a man's cell phone was searched without a warrant and the trial court ruled that the phone was abandoned and that the Defendant had lost standing to assert his Fourth Amendment rights to the phone. The questions presented are:

1. Without evidence of intentional abandonment, can a person abandon their privacy right to an item just by leaving it behind?
2. Does the doctrine of abandonment from Texas law conflict with the dicta of *Riley* and present a conflict for this Court's review?
3. Does the doctrine of abandonment conflict with other jurisdictions' consideration of the same issue?
4. Can a cell phone really be abandoned if its privacy interest is equal to that of a house?

PARTIES TO THE PROCEEDINGS

Petitioner

- Petitioner, Jerry Wiltz, was defendant in the trial court and Appellant in the 14th Court of Appeals in Houston and Appellant in the Texas Court of Criminal Appeals.

Respondent

- Respondent, the State of Texas, through the Harris County District Attorney's Office was the prosecution in the trial court and Appellee in the 14th Court of Appeals and Appellee in the Court of Criminal Appeals.

LIST OF PROCEEDINGS

Court of Criminal Appeals of Texas

Tr. Ct. No. 1514086

Jerry Wiltz v. The State of Texas

Date of Final Order: October 21, 2020

Date of Rehearing Denial: November 25, 2020

State of Texas, Fourteenth Court of Appeals

No. 14-18-00718-CR

Jerry Wiltz, *Appellant*, v.

The State of Texas, *Appellee*

Date of Final Judgment: February 27, 2020

230th District Court Harris County, Texas

Case No. 151408601010

State ID No.: TX50524692

Incident NO/TRN: 9171982787A00I

State of Texas v. Jerry Wiltz

Date of Judgment of Conviction: August 2, 2018

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PETITION FOR A WRIT OF CERTIORARI

Jerry Wiltz, petitioner, respectfully petitions for a writ of certiorari to review the judgment of the Court of Criminal Appeals of Texas in this case.



OPINIONS BELOW

The opinion of the Texas Fourteenth Court of Appeals is published at 595 S.W.3d 930 and included in the appendix at App.18a. The order of the Texas Court of Criminal Appeals denying review included at App.1a. The dissenting opinion of Justice Walker of the Texas Court of Criminal Appeals is published at 609 S.W.3d 543 and included in the appendix at App.3a.



JURISDICTION

The Judgment of the Court of Criminal Appeals was issued on October 21, 2020. (App.1a) A subsequent motion for rehearing was denied on November 25, 2020. (App.41a) This honorable court has jurisdiction over this case pursuant to 28 U.S.C. § 1257(a).



CONSTITUTIONAL PROVISION INVOLVED

U.S. Const., amend. IV

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.



STATEMENT OF THE CASE

On or about June 13, 2016, two robberies were reported in Houston, Texas. One occurred at 13137 Willow Chase Drive and the other occurred at 19211 North Freeway. The police did not know who the suspects were and no identifications were made until over 48 hours later.

During routine patrol on or about June 15, 2016, Harris County Sheriff's Office Deputy Castellanos allegedly viewed a grey Chevy Tahoe fail to stop at the designated stopping point at a red light on FM 1960 and thus conducted a routine traffic stop. The deputy claimed to smell "an odor of marijuana emitting from the vehicle" upon approaching the driver side of the Tahoe. The deputy ordered the driver of the Tahoe out of the vehicle and immediately placed him in handcuffs. With the driver standing outside the vehicle with no access to his cell phone, the deputy

proceeded to walk around the Tahoe to seize and detain the passenger.

Upon reaching the passenger side, the passenger, armed with a pistol, opened the door, jumped out, and proceeded to flee. Immediately thereafter the deputy pursued the fleeing sole, armed passenger. During this process, the already handcuffed driver ran the opposite direction of the armed passenger and the deputy. After giving chase and eventually detaining and securing the armed passenger in the patrol car, the deputy reviewed the patrol car video in an effort to determine the location of the handcuffed driver. After additional officers arrived on-scene but before a tow truck arrived, the deputy searched the Tahoe and located Petitioner's cellular telephone. Then the deputy searched Petitioner's cellular telephone without a properly executed search warrant. During the pendency of the prosecution of Petitioner, counsel filed numerous motions addressing the issues with the search of this cell phone by the deputy.

1. On November 28, 2017, Petitioner's trial counsel filed a motion to suppress the search of the cell phone and a general motion to suppress.
2. On April 9, 2018, Respondents obtained a search warrant for the cell phone that had already been searched by the deputy.
3. On May 23, 2018, Petitioner's trial counsel along with Petitioner appeared in court for the motion to suppress hearing concerning the search of the cell phone. Unbeknownst to Petitioner's trial counsel, Respondents had already obtained the above-mentioned search warrant.

4. On May 30, 2018, the Court summarily denied the motion to suppress and Petitioner's trial counsel appeared in Court to hear the ruling and address the search warrant that had been filed by the State.
5. On July 23, 2018, Petitioner's trial counsel filed a motion to reconsider the motion to suppress.
6. On July 30, 2018, the Court denied Petitioner's motion to reconsider.
7. A jury found Petitioner guilty of both counts of aggravated robbery on August 7, 2018.
8. An appeal followed. The Fourteenth Court of Appeals affirmed the conviction on February 27, 2020.
9. The Court of Criminal Appeals denied a petition for review, but a dissenting opinion was filed by Justice Walker. A motion for rehearing was filed and also denied on November 25, 2020.
10. This final appeal followed.



REASONS FOR GRANTING THE PETITION

During a police encounter, a man gets away from the police without being apprehended. He leaves his keys behind. Did he abandon those keys within the traditional meaning of the word? What are the police allowed to do with those keys? Could they use the man's keys to search his home without a search warrant? If the man abandoned the keys, did he also abandon the contents of his home?

This analogy is a road map for understanding the issue and sub-issues in this case. The underlying facts of this case did not involve keys; they involved a smartphone. However, for many of us, smartphones are keys to our digital lives.

Smartphones can hold libraries worth of private data and can act as conduits for private data stored remotely. One author states that a gigabyte can store approximately 500,000 typed, double spaced pages of text. *See* Alan Simpson & Todd Meister, ALAN SIMPSON'S WINDOWS VISTA BIBLE 1012 (2007). One group of computer scientists found that, in 2017, the average smartphone stored 11.04 gigabytes of data. R. Scott Hiller et al, *Using Aggregate Market Data to Estimate Patent Value* (April 25, 2017), <http://faculty.fairfield.edu/rhiller/Research/Smartphones.pdf>. Therefore, it is conceivable that the average smartphone could hold in excess of five million typed pages of information, not including remote data that it can access.

I. ABANDONMENT DOCTRINE IN TEXAS

Despite this reality, many Texas courts have held that a person abandons the data contained in his cell phone when he abandons his cell phone. *See e.g. Edwards v. State*, 497 S.W.3d 147 (Tex. App.–Houston [1st Dist.] 2016). However, the Supreme Court of the United States handed down an opinion that changed everything: *Riley v. California*, 573 U.S. 373 (2014). Since *Riley* impacted the Fourth Amendment’s application to cell phones, Texas courts must reconsider holdings that are in conflict with *Riley*.

Our system of federalism is both a blessing and a curse. It is a blessing because, in a theoretical vacuum, constitutional jurisprudence should be uniform among the states. Federalism is a curse when the states’ constitutional interpretations depart from each other or federal jurisprudence. The result from this departure is not just confusion: people go to prison.

There is an even larger systemic concern. Fourth Amendment jurisprudence is like a slice of Swiss cheese. It was whole once, but cases have continually carved out exceptions to its protections. This thin, hole-filled protection still has to protect every United States citizen. How can eroding away the Fourth Amendment a little further be justified?

When a person leaves behind a cell phone, is the person intentionally abandoning his privacy expectation in the data contained on that phone? Petitioner acknowledges that many courts have held that yes, leaving behind your cell phone means leaving behind your fourth amendment rights and expectations of privacy in the data stored in that cell phone. However, that abandonment doctrine should be imposed more

selectively and logically. Without evidence of intentional abandonment, how can a person lose the rights to that person's phone? Post *Riley*, however, in consideration of the heightened protection cell phones deserve, it is time for courts to rethink this position and, at least one court has. Furthermore, can abandonment really apply to cell phones when they are just like a house?

In *State v. Granville*, 423 S.W.3d 399 (Tex. Crim. App. 2014), whose judgment was upheld by the Court of Criminal Appeals, the holding was that a warrantless search of a cell phone by an officer after an arrest of the defendant was conducted in violation of the Fourth Amendment. This proposition is quite simple. So long as the government has the Defendant in custody then he still has standing to assert his Fourth Amendment rights. If the Defendant is not in custody then the police can rummage through his belongings without warrants and without a care for the Fourth Amendment. The abandonment doctrine decimates Fourth Amendment protections for something which deserves more protection: our private lives on our cell phones. In essence, according to current law, a person must be arrested and maintain care, custody, and control over their cell phone to assert their expectation of privacy in its contents. If they walk away or run away from it, then they have somehow abandoned it even absent evidence showing intentional abandonment.

In *Edwards v. State*, 497 S.W.3d 147 (Tex. App.—Houston [1st Dist.] 2016), the 1st Court of Appeals in Houston held exactly that. A defendant left his phone sitting on the roof of a car at the scene of a robbery. He ran away and the court held that the phone was

abandoned and thus, the defendant had no expectation of privacy in that phone. That case as highlighted by Justice Walker's dissent from the Court of Criminal Appeals is distinguishable from the present case in many different ways because in that case there was evidence of intentional abandonment by the Defendant.

Abandonment is an affront to the Fourth Amendment and the dicta from *Riley*. Abandonment was classically used in situations where defendants were trying to dispose of illegal contraband; such as drugs. A person could not claim to have standing to assert their fourth amendment rights if they discarded something, but what if you left it behind without realizing it?

The Court of Appeals in this case held that abandonment means that the petitioner has no standing. They state that because he ran in the video that he intentionally relinquished his rights to the phone. However, Justice Walker discusses in his dissenting opinion from the Court of Criminal Appeals that no evidence was actually adduced of intentional abandonment and that review should have been granted to consider this important issue.

II. *RILEY V. CALIFORNIA*

In *Riley v. California*, 573 U.S. 373 (2014), the Supreme Court of the United States held that the police could not, without a warrant, search digital information on the cell phones seized from a defendant as incident to the defendant's arrest. The *Riley* court cited *Chimel v. California*, 395 U.S. 752 (1969), in its analysis. In that case, police arrested the defendant inside of his home. *Riley*, 134 S.Ct. at 2483. The police then proceeded to search the defendant's three-bedroom

house, including the attic, garage, and the content of drawers. *Id.* The *Chimel* court ruled in favor of the defendant because the search extended beyond the defendant's person and the area within the defendant's immediate control, the permissible scope of a search incident to lawful arrest. *See id.*

The circumstances in *Chimel* are analogous to the circumstances here. As mentioned previously, a smart phone is capable of storing and accessing libraries-worth of private, sensitive data. Searching a smart-phone, therefore, is very much like searching an entire house, its recesses, and its fixtures. In some respects, searching a smart phone is more invasive than the type of search in *Chimel*. *See Riley*, 134 S.Ct. at 2491.

At the time our cardinal Fourth Amendment cases were decided, smart phones did not exist. *Riley*, 134 S.Ct. at 2484. How can a "cigarette pack case" be applied to a smart phone case? A cigarette pack can contain a limited amount of information, unlike a smart phone. A cigarette pack could contain a dangerous weapon, like a razor or bullets. A smart phone cannot contain a dangerous weapon. *See Riley*, 134 S.Ct. at 2485. The figurative key to the library of sensitive, personal data poses no real risk to the police.

The *Riley* court also declined to apply *United States v. Robinson*, 414 U.S. 218 (1973), to smart-phones. *Riley*, 134 S.Ct. at 2484. *Robinson* would have permitted a search of an arrestee even absent a concern for destruction of evidence or a specific concern about officer safety. *Id.* at 2483-85; *cf. id.* at 2487-88 (carving out an exception for a true "now or never" remote-wipe situation). The figurative key to the library of sensitive, personal data poses no real risk to crime fighting in general.

Instead, the *Riley* court applied a balancing test “by assessing, on the one hand, the degree to which [the search] intrudes upon an individual’s privacy and, on the other, the degree to which [the search] is needed for the promotion of legitimate governmental interests.” *Riley*, 134 S.Ct. at 2484. The Supreme Court of the United States ultimately held that, “officers must generally secure a warrant before conducting such a search” of digital data on a cell phone. *See id.* at 2485. It remarked that, “The fact that an arrestee has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely.” *Id.* at 2488.

Admittedly, the smartphone in this case was not extracted from the Petitioner. It was searched after he left the scene of an armed officer and an armed passenger. The trial court found that the Petitioner had abandoned the smartphone. The question through the Petitioner’s analogy which must be confronted: is leaving the key to a vast library of sensitive, personal data the same as abandoning the contents of that vast library?

III. FEDERAL CASES ON ABANDONMENT

A line of cases exists — even cases decided in the age of modern smartphones — holding that cell phone data can be abandoned. *See United States v. Sparks*, 806 F.3d 1323, 1341 (11th Cir. 2015); *see also United States v. Crumble*, 878 F.3d 656, 660 (8th Cir. 2018). However, these holdings are misplaced.

How can cell phone data be abandoned when our jurisprudence affords cell phone data protection in other circumstances? Examining records of a cell phone user’s physical movements constitute a search

deserving of Fourth Amendment protection. *Carpenter v. United States*, 138 S.Ct. 2206, 2220 (2018). The simple loss of a cell phone does not entail the loss of a reasonable expectation of privacy. *United States v. Small*, 944 F.3d 490 (4th Cir. 2019).

IV. ABANDONMENT IN OTHER JURISDICTIONS

Despite Texas' interpretation of the law concerning cell phones and abandonment; abandonment has had a myriad of results in different states across the union.

In *State v. KC*, the Florida Court of Appeals for the Fourth District held that a juvenile who ran away from a stolen car in which he had left his cell phone was entitled to fourth amendment protection in his cell phone. *State v. KC*, 207 So.3d 951 (Fla. 4th DCA 2016). In fact, the holding states specifically that the abandonment doctrine did not apply because the phone was password protected evidencing a privacy interest in the contents of the phone.

In Ohio, the Supreme Court of Ohio held that a police officer's warrantless search of a cell phone following a valid arrest violated the Fourth Amendment because the search of the phone's contents was not necessary to ensure officer safety and as there was no evidence that the information police were searching for was subject to imminent destruction. *State v. Smith*, 124 Ohio St. 3d 163 (2009).

In Oklahoma, the Court of Criminal Appeals of Oklahoma held in *State v. Thomas* that the trial court did not err in suppressing photos obtained in a warrantless search of a defendant's cell phone because defendant had a right to privacy in the contents of the phone. *State v. Thomas*, 2014 OK CR 12 (2014).

Nevertheless, in South Carolina, the Supreme Court held in *State v. Brown* that abandonment applied and that the Defendant did not have standing to assert his fourth amendment rights to his phone. *State v. Brown*, 776 S.E.2d 917 (S.C. Ct. App. 2015). In that case, the Defendant was charged with a burglary. He allegedly had left his cell phone behind at the scene of the burglarized home. The supreme court of South Carolina posited that because Brown had not tried to look for his phone in any way that was evidence of abandonment and his standing to assert his fourth amendment rights was denied.

These cases across this country highlight the need for a bright line rule on abandonment. Abandonment cannot just be thrown at cell phone cases because courts don't want to protect citizens' privacy rights in their cell phones. Abandonment gives the courts, without evidence, the ability to take citizens' Fourth Amendment rights from them.

V. THE POLICY OF ABANDONMENT

If abandonment was applied to other possessions such as houses or cars then law enforcement could go in those items whenever a person walks away from them. If a person leaves their house and accidentally forgets to lock it does that mean that law enforcement may enter that house? If a person leaves their car unlocked do the police get to search it? If a person leaves their phone in a coffee shop or a public place, do the police get to pick it up and search it? If a person like Jerry Wiltz runs away from people with firearms and leaves behind a phone, do the police get to pick it up and search it?

How does the abandonment doctrine affect the holding of *Riley*? It obliterates it. Abandonment posits the idea that our privacy in our possessions is not real. Abandonment allows courts to express opinions that defy logic and permit peoples' fourth amendment rights to their cell phones to be trampled. Abandonment should not be used as it has been across this country. Abandonment allows courts to say that defendants have "relinquished rights" to their property when in fact they never relinquished those rights at all.

Above all, the law must be fair. The law must apply equally to everyone for if it doesn't then the law cannot help keep order in our society. A doctrine such as abandonment insidiously rips away at the words written in *Riley*; it allows lower courts to contradict the binding precedent from this honorable court.

The dicta in *Riley* explains that a cell phone must be treated like a house. It contains thousands of pictures, documents, search history, text messages, phone calls, and much, much more. Justice Roberts explained in *Riley* that it must be protected because technology has changed. Human beings now walk around with digital houses in their pockets. How can the house that sits in your pocket be abandoned if you leave it behind unbeknownst to you?

The police should have to get a search warrant to search any phone at any time. We implore this court to see this simple argument and change the law on abandonment so that the police may not search all of our electronic devices without Fourth Amendment protections to protect our privacy. Very simply, should the abandonment doctrine be allowed to continue to pervasively eat away at the Fourth Amendment rights

this court ruled on in *Riley*? As more technology is invented and humans are able to store more and more data on their phones, tablets, or computers; the law should follow the technological advances of our society. The abandonment doctrine was created for situations wherein a person tries to abandon contraband; the classic scenario of a person dumping contraband as they try to escape the police. Abandonment was never intended for cell phones, but it has been allowed to persist. Petitioner prays that this honorable court rule that it should not. Petitioner prays that this honorable court rule that abandonment should be an exception; not the rule which allows courts to strip citizens of their privacy in their cell phones.



CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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