No._____

IN THE SUPREME COURT OF THE UNITED STATES

DANNY RAY WILLIAMS, PETITIONER

V.

UNITED STATES OF AMERICA

_____

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

_____

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QUESTION PRESENTED FOR REVIEW

During a custodial interrogation, a police detective asked for the password to Danny Williams' cell phone, which had been seized incident to Williams' arrest. Williams complied and provided the password. He and the detective then looked at portions of the phone's content, but Williams specifically directed the detective not to look at other portions. After the interrogation, the detective had a full forensic search conducted on the entire phone. Over William's objection that limited consent to a manual search could not be construed as consent to a forensic search, evidence extracted during the forensic search was admitted at his trial.

The question presented is whether an officer must expressly state that he is seeking consent for a forensic, not just a manual, search of a cell phone.

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Danny Williams asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on February 12, 2021.

PARTIES TO THE PROCEEDING

The caption of the case names all the parties to the proceedings in the court below.

OPINION BELOW

The opinion of the court of appeals, reported at 836 Fed. Appx. 310 (5th Cir. 2021), is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on February 12, 2021. The court of appeals denied Williams' timely filed petition for rehearing on March 2, 2021. This petition is filed within 150 days after the denial of rehearing. *See* Supreme Court Order of March 19, 2020 (extending deadlines because of Covid-19 pandemic). The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the U.S. Constitution provides, in pertinent part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]"

STATEMENT

Petitioner Danny Williams was indicted for possessing 50 or more grams of methamphetamine with the intent to distribute it, in violation of 21 U.S.C. § 841(a), (b)(1)(A).[1] Williams went to trial on the charge, and he challenged the search of his car and his cell phone. The district court denied those challenges. The court ruled that Williams' consent to a manual search of a portion of his cell phone also

[1] The district court exercised jurisdiction under 18 U.S.C. § 3231.

authorized a forensic search of the entire cell phone. Appendix C. Evidence extracted by the forensic search was admitted against Williams at trial. Appendix D. The jury found Williams guilty and the district sentenced him to 151 months in prison.

On the night of June 7, 2019, Detective Matthew Sedillo had a man in custody at the Midland, Texas police station. The man, identified at trial only as Brad, had been arrested for being a felon in possession of a firearm. Trying to get out of trouble, Brad claimed that Danny Williams was involved with drugs. Sedillo directed Brad to call Williams. Sedillo put the conversation on speaker phone and he recorded it. Sedillo testified that Brad asked Williams to being him four zips of clear, and agreed to meet Williams at a Denny's restaurant in Midland. Sedillo told the jury that, in his experience, four zips of clear meant four ounces of methamphetamine.

Ten officers were waiting for Williams to arrive at Denny's. When Williams pulled into a parking spot, an officer blocked Williams' car from the front with his cruiser. Williams began to back up, but another officer had blocked him in that direction. The officers told Williams to get out of his car. He did.

The officers then brought out a narcotic-detecting dog. Officer William Hodges told the dog "Find it." The dog, which Hodges had on a leash, went to Williams' car and jumped into it through the open driver's side window. Officer Hodges claimed the dog jumped in the car window "of his own volition." Hodges did not pull on the leash to restrain the dog because he "was more worried about [the dog's] safety" than about the improper entry into the car. Once the dog was in the car, Hodges took advantage

of the situation, telling the dog to "check over here," by which he meant the driver's side of the car. The dog alerted.

After the dog alerted, the officers searched the car, finding four baggies, a scale, and a cell phone. Beltran turned the evidence over to Detective Sedillo. At trial, when the government attempted to introduce the baggies found in the car, Williams objected that the baggies were a product of an unreasonable search because the dog should not have been in the car. The district court overruled that objection.

Williams also sought to exclude on fourth amendment grounds evidence discovered through a warrantless forensic search of his cell phone. Detective Sedillo had turned the cell phone found in Williams' car over to Detective Jonathan McKown, who conducted a forensic download of the information stored on Williams' cell phone, including texts and photographs. At trial, texts and photographs taken from the phone were introduced through Detective Sedillo. Appendix D.

Williams objected that the forensic search was warrantless, was not justified by any exception to the warrant requirement, and was unreasonable. The government claimed the search was justified by consent. Williams argued that he had not consented to a forensic search. He acknowledged that, during the recorded interrogation of him by Detective Sedillo, Sedillo had said to him: "What's the passcode of your phone?" and, in response, Williams had provided the password. Williams then discussed some contacts listed in the phone, as well as some photos on

it. But Williams limited his consent, telling the detective not to look at videos contained on the phone.

The district court, however, ruled that Williams had consented to a full search of his cell phone by providing his passcode. Appendix C. Through Detective Sedillo, the government then introduced seven photographs taken from the cell phone. Five of the photographs showed large bundles of cash, one showed a bundle of cash and a Rolex watch, and one showed Williams holding a bundle of cash. Sedillo also testified that he had reviewed the call log of the phone and its texts as well as the extraction report provided by Detective McKeown after the forensic search of the phone. Over objection, Sedillo read from the extraction document text messages that McKeown had pulled off the phone. Those texts Sedillo interpreted as showing an intent to sell drugs. Appendix D.

Williams appealed. He argued, among other things, that the forensic search of his cell phone was unreasonable because it was conducted without a warrant and he had not only not consented to a forensic search of the phone, but he had also limited the consent he had given for a manual search. The Fifth Circuit assumed that William had limited his consent and that the warrantless forensic search could have been improper. Appendix A at 4. It affirmed the conviction, however, because it proclaimed that the evidence obtained from the forensic search had not been admitted at trial. Appendix. A at 4-5. Williams moved for rehearing, pointing out that it was clear from the record that text messages and photographs extracted from the phone had been

admitted against him at trial. *See* Appendix D. The Fifth Circuit refused to rehear the case. Appendix B.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THE CONSENT NECESSARY FOR A FORENSIC SEARCH OF A CELL PHONE.

The Court's decisions teach that cell phones are entitled to a high degree of Fourth Amendment protection. *Riley v. California,* 573 U.S. 373, 392-403 (2014); *Carpenter v. United States,* 138 S. Ct. 2206, 2213 (2018). The Court's decisions also teach us that a search may be justified by consent. *Schneckloth v. Bustamonte,* 412 U.S. 218, 228 (1973); *Fernandez v. California,* 571 U.S. 292, 298 (2014). The voluntariness of a person's consent to a search is measured in the totality of the circumstances, and an officer need not tell a person that he has the right to refuse consent. 412 U.S. at 226-28.

How to interpret the scope of permission granted by a person's consent has received relatively little attention from the Court. In *Florida v. Jimeno,* the Court ruled that a case-by-case approach was appropriate for determining whether a consent to a search of a car extended to containers found in the car. 500 U.S. 248, 249-52 (1991). The Court wrote that that measure of the scope of consent given is "what would the typical reasonable person have understood by the exchange between the officer and the suspect?" 500 U.S. at 251. In setting out this test, the Court stated that "the scope of a search is generally defined by its expressed object." (citing *United States v. Ross,* 456 U.S. 798 (1982)).

This test has proved workable, both legally and practically, for objects that have defined boundaries. Automobiles, for instance, have limited space and can hold a limited, relatively small number of objects. And it is well established that, because of the nature of automobiles, persons have only limited privacy expectations in them. *See, e.g. South Dakota v. Opperman,* 428 U.S. 264, 367-68 (1976); *Carroll v. United States,* 267 U.S. 132 (1927).

By contrast, cell phones hold and access immense amounts of information of all sorts, much of it deeply personal and most of it irrelevant to the matter for which the police have come into contact with the particular person. *See Riley* 573 U.S. at 393-402. Because of the amount and nature of the information cell phones hold, the Court has concluded that an individual's privacy interest in things stored on a cell phone is quite substantial. *Riley,* 573 U.S. at 403; *Carpenter,* 138 S. Ct. at 2213. Cell phones are among the technological innovations that have required the Court to consider how to "'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo v. United States,* 533 U.S. 27, 34 (2001) (considering search by thermal-imaging device); *see also United States v. Jones,* 565 U.S. 400, 406 (2012) (considering whether attaching GPS device constitutes a search). Unregulated law-enforcement entry into cell phones, like unregulated entry into homes, presents the exact danger the Fourth Amendment was adopted against–a general rummaging through a person's private life.

That danger is at its greatest with cell phones when law enforcement conducts a forensic search of the phone, an operation in which a law enforcement investigatory

computer extracts and roots through information stored on the handheld computer that is a cell phone. *Cf. Riley,* 573 U.S. at 387-88, 393-401 (discussing vast data stored on phone). A forensic search is a substantially greater intrusion than a manual search of the phone by an officer. The ordinary, reasonable person recognizes this, and thus the question arises should the law require a law enforcement officer to make an explicit request to conduct a forensic search officer before it can be held that a person consented to a forensic search. That is, should an officer be required to state expressly that the object of the search request is the phone's operating system and stored data, not merely those aspects of the phone that can be observed by a manual search of the phone. This case presents an opportunity to answer the question.

The question goes to the heart of the Fourth Amendment. The amendment reflects the founders "response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity." *Carpenter,* 138 S. Ct. at 2213 (quoting *Riley,* 573 U.S. at 403). To prevent unrestrained rummaging, the founders required that searches be reasonable and that search warrants issue only upon a showing of probable cause made under oath to a neutral magistrate. U.S. CONST. amend. IV; *Groh v. Ramirez,* 540 U.S. 551, 557 (2004) (describing warrant requirement). While a warrant is not infrequently required for a search to be valid, reasonableness is the "ultimate touchtone" of the validity of a search. *Brigham City. Utah v. Stuart,* 547 U.S. 398, 403 (2006).

Riley set a general rule that, to be reasonable, searches of cell phones must be conducted pursuant to warrants. 573 U.S. at 401. But it acknowledged that a warrant might not always be required. The Court stated that, on occasion, particular circumstances might justify a warrantless search of a particular phone. *Riley,* 573 U.S. at 401-02. Consent by the owner of the object to be searched is a long-established exception to the requirements that a search be conducted pursuant to a warrant and not be unreasonable. *See, e.g., Fernandez v. California,* 571 U.S. 292, 298 (2014). As the Court has explained, consent searches can provide benefits to both law enforcement officers and individuals. For law enforcement officers "[c]onsent searches are part of the standard investigatory techniques" that constitute "permissible and wholly legitimate aspect[s] of effective police activity." *Fernandez,* 571 U.S. at 298 (quoting *Schneckloth,* 412 U.S. at 228, 231-32). For both officers and individuals, consent searches can be a quick and efficient method to dispel suspicion. *Fernandez,* 571 U.S. at 298; *Schneckloth,* 412 U.S. at 228.

The interests the Court has identified in its consent cases show the potential for convenience and reasonableness that consent searches provide. Of course, that potential is not always realized, and in some instances, the balance may tip so far in favor of the interests of law enforcement that reasonableness analysis requires new guidelines for police conduct. This case is such an instance. To allow an officer who has obtained consent to a manual search of a cell phone to conduct a later forensic search based on that consent is to allow an officer to invade protected private interests that the person asked for consent has not been advised are the object of the

requested search. *Cf. Riley,* 573 U.S. at 393-401 (discussing privacy interests in phone); *Jimeno,* 500 U.S. at 249-52 (setting out expressed-object test).

Requiring an express request for a forensic search of a cell phone protects the significant privacy interests involved, while still allowing forensic searches that are agreed to when the type of search requested is made clear. Requiring an express request for a forensic search of a cell phone would accord with the law that one has greater protected privacy interests in a cell phone than in an automobile. *Compare Riley,* 573 U.S. at 393-403 with *New York v. Class,* 475 U.S. 106, 112-13 (1986). It would also better accord with the rationales underlying consent searches: that they are informed and that they are of potential benefit to both sides.

When a person is stopped and asked to consent to a search of his car, he may, like the officers benefit from hastening the process and dispelling (or attempting to dispel) the particular suspicion the officers hold. *Fernandez,* 571 U.S. at 298. That's not true with forensic cell phone searches. Forensic cell phone searches are not made to dispel suspicion and they are not done quickly. Forensic cell phone searches are done to root around deeply and lengthily to see what may be found that could inculpate the phone's owner. *Riley* observed "it is 'a totally different thing to search a man's pocket and use against him what they contain, from ransacking his house for everything that may incriminate him.'" 573 U.S. at 396 (quoting *United States v. Kirschenblatt,* 16 F.2d 202, 203 (2d Cir. 1926)). The same difference of magnitude exists between asking to look at a phone and scouring the phone's computer with another computer.

When one is asked to assent to a search of one's person or one's car, the scope of the request is readily understood: the officer wishes to do a patdown or to look inside the car and its containers. *Cf. Jimeno,* 500 U.S. at 249-52. When asked if the officer can look at one's cell phone, one does not reasonably understand that request as permission to conduct, at another location and at another time, a mechanical, forensic search of the phone's content and hardware. This follows logically from the Court's firm rejection in *Riley* of the idea that a search of a cell phone was like a search of a container, 573 U.S. at 393, and from the Court's implication in *Jimeno* that the object of the search must be understandable, 500 U.S. at 249-52. A reasonable person not informed that the officer is requesting permission to conduct a forensic search at a different time and location has no reason to preemptively object to the possibility of such a search. *Cf.* 4 Wayne R. LaFave, Search and Seizure § 8.1(c) (consent should be construed narrowly when circumstances show reason for failure to limit consent or object to search); *see also United States v. Cotton,* 722 F.3d 271, 277 n.19 (5th Cir. 2013) (same). When a forensic search is not expressed as the object of the search request, the circumstances provide ample reason why a person would not limit his consent, and, of course, a person cannot object to a forensic cell phone search that occurs outside his presence and knowledge.

Tools to conduct forensic cell phone searches are among the new technological realities that call "for a new balancing of law enforcement and privacy interests." *Riley,* 573 U.S. at 407 (Alito, J., concurring in part and concurring in the judgment). The balance to be struck may be new, but the goal is not. A "central aim of the

Framers was 'to place obstacles in the way of a too permeating police surveillance.'" *Carpenter,* 138 S. Ct. at 2214 (quoting *United States v. Di Re,* 332 U.S. 581, 595 (1948)). An invasive police presence undermines the "'the privacies of life'" and leaves them vulnerable to 'arbitrary power.'" *Carpenter,* 138 S. Ct. at 2214 (quoting *Boyd v. United States,* 116 U.S. 616, 630 (1886)). A rule that permits warrantless forensic searches of cell phones by "consent" even when the object of the search–the computer memory and hard drive of the phone–has never been expressed fails to protect the privacies of life. It grants to police too much power to surveil and rummage. Part of the new balancing that cell phone technology calls for is deciding whether measuring the scope of a consent to a search of a cell phone requires a stricter standard than that applied by *Jimeno* to consensual car searches.

This case presents a good vehicle for the Court to decide the question presented. Williams had been arrested and was at the police station being questioned when the detective asked for the passcode to his phone. Williams provided the passcode. He and the detective manually looked through the phone and discussed some of its contents. Williams, however, specifically forbade even a manual search of the videos on his phone.

Despite this clear limit on even a manual search, the detective never asked for permission to conduct a forensic search. He took it upon himself to have such a search done after the interrogation concluded. At trial, the government argued, and the district court concluded, that Williams' actions manifested consent to a forensic search. This broad view of consent in the cell phone context tips the balance to the

government to search cell phones as it sees fit. This is most clearly demonstrated by the fact that the forensic search would inevitably discover the videos that Williams had specifically exclude from a manual search. It is difficult to reconcile this broad construal of consent with the Court's teachings about cell phones, or with the scope-of-consent statements in *Jimeno.* The Court should take this opportunity to clarify whether a law enforcement officer who wishes to conduct a forensic search of a cell phone must expressly state that fact to the phone's owner when seeking consent to search.

Conclusion

FOR THESE REASONS, Petitioner asks that this Honorable Court grant a writ of certiorari and review the judgment of the court of appeals.

/s/ PHILIP J. LYNCH
Counsel of Record for Petitioner

DATED: April 26, 2021.