No. _____

IN THE

Supreme Court of the United States

Alsham M. Laster – Petitioner

vs.

State of Indiana – Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the warrantless seizure of Alsham Laster's phone, during a murder investigation, violated the Fourth Amendment when: (i) police did not have probable cause that evidence of the murder was on the phone; (ii) law enforcement failed to secure Laster's phone in a manner that was reasonably limited and tailored to the need; and (iii) the restraint was not limited in time and scope, avoiding a significant intrusion, when police took twenty-two (22) hours to obtain an approved warrant?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

Marion County Superior Court Criminal Division 20: *State of Indiana v. Alsham Laster*, No. 49D20-2111-MR-033962 (Oct. 26, 2023, sentencing order).

Indiana Court of Appeals: *Alsham M. Laster v. State of Indiana*, No. 23A-CR-2699 (Sept. 24, 2024, opinion affirming trial court).

Indiana Supreme Court: *Alsham M. Laster v. State of Indiana*, No. 23A-CR-2699 (Jan. 26, 2025, order denying transfer)

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITON FOR WRIT OF CERTIORARI

Petitioner, Alsham Laster ("Laster"), respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The memorandum decision of the Indiana Court of Appeals appears at Appendix A to the petition and is unpublished.

JURISDICTION

On September 24, 2024, the Indiana Court of Appeals affirmed the trial court's admission of evidence that Laster claimed was obtained in violation of the Fourth Amendment. A copy of that decision appears at Appendix A. On January 16, 2025, the Indiana Supreme Court denied transfer. A copy of that order appears at Appendix B. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> 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.

U.S. Const. amend IV.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

> nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend XIV, Section 1.

STATEMENT OF THE CASE

Facts Related to the Charge

The night of July 12, 2021, around 9:30 p.m., Laster called 911 after finding his live-in girlfriend, Latisha Burnett, dead in his house. App. A at 2a-3a. Laster was not home when he called 911. *Id.* at 3a. Dispatch asked Laster how he knew Burnett was dead; Laster responded that was for the medical examiner to determine. *Id.*

Officers with the Indianapolis Metropolitan Police Department ("IMPD") responded. *Id.* When officers entered Laster's home, they found Burnett lying on the floor, her head on a pillow, her arms resting on her chest, and a white sheet covering her body up to her chin. *Id.* The air conditioner was set to fifty (50) degrees. *Id.* at 4a. A box fan faced Burnett's body, and a single crumpled dryer sheet lay on the floor next to her. *Id.* at 3a-4a

Burnett's exact time of death could not be determined, but she was believed to not have "been there for days." *Id.* at 4a. Her cause of death was from multiple gunshot wounds, and the manner of death was determined to be homicide. *Id.*

Around 2:00 a.m. on July 13, 2021—just a few hours after his 911 call—Laster was brought in for questioning. App. D at 21a. Law enforcement took Laster's phone. App. D at 23a. Laster declined to speak without a lawyer. *Id.* at 23a-24a. Law enforcement held Laster for nine more hours, before releasing him at 10:53 a.m. *Id.* at 24a. They did not return his phone. *Id.*

Warrant Application

Almost a day after Laster was released, on July 14, 2021, at 8:16 a.m. Det. Pearson applied for a warrant to search Laster's phone. *Id.* at 24a; App. M at 171a. The warrant was granted in fifteen minutes. *Id.* The application indicated that an earlier application for a warrant had been denied by a different judge. *Id.*

Suppression Hearing

Laster moved to suppress the evidence discovered on his phone because it was unlawfully seized and searched under the Fourth Amendment of the U.S. Constitution and Article 1, Section 11 of the Indiana Constitution. App. D at 34a. At a hearing on the suppression motion, the State conceded there was a delay of 22-hours between the continued seizure of Laster's phone after he was released and when law enforcement secured a warrant. *Id.* at 25a-26a.

Even so, the State argued the seizure was lawful. First, it argued there was probable cause to believe there was evidence of the murder on Laster's phone. *Id.* at 26a-30a. Second, the seizure was justified to protect against any threat of destruction of evidence, especially because it is so easy to remotely erase content on phones. *Id.* In support of its probable cause argument, the State relied on the affidavits in three other warrants that were submitted and approved near the time of the seizure. *Id.* at 26a-27a. In support of its position that the warrantless seizure was reasonable, the State argued "there's some exigency that the State does have a right or a need to preserve that evidence." *Id.* at 28a. "I think that's what we have with cell phones. You can easily erase what's on a cell phone, you can erase what's on the cloud." *Id.* at 29a.

The State emphasized it did not intrude on the phone by searching it before a warrant was issued—it just seized the phone, which it is allowed to do. *Id.* at 27a. "I know Detective Pearson in hindsight would do this differently. I don't think we're saying this was strategic or anything. Our homicide detectives are under a lot of stresses as is the whole system and that's not an excuse, that's just transparency, Judge." *Id.* at 28a. The State relied on *Riley v. California* to support its seizure of the phone, and maintained there is "no temporal component to the [Fourth Amendment's] review of reasonableness." *Id.* at 29a-30a.

Laster argued in response that there was no probable cause and no exigency. *Id.* at 35a-36a. He argued that the three warrants relied on by the State were overbroad, and there was no nexus between the phone and the crime. *Id.* at 34a. Further, just because he used the phone to call 911 and lived with the victim, that is not enough to establish the phone itself contained evidence of the murder—such a finding would create a slippery slope. *Id.* at 41a. He also argued that the restraint was not tailored to the need to prevent the destruction of evidence, when law enforcement did not place the phone in airplane mode or a protective baggie that prevents remote wiping. *Id.* at 35a.

The parties acknowledged there was a disagreement on whether Laster requested his phone after being released. *Id.* at 36a.

The trial court found the 22-hour delay between seizing the phone and applying for a search warrant reasonable under the Fourth Amendment. *Id.* at 43a.

> I think if the detective had sat on it for too much longer we might be in a different situation under the Fourth Amendment. But I think with the Fourth Amendment I have to look at the reasonableness of the situation and he was brought in for questioning and based upon what the detective knew at that point in time seized the phone when he was brought in.

Id.

Suppression Issue Preserved at Trial

At trial, Laster objected to the admission of the evidence obtained from his phone and any testimony surrounding the evidence based on an unlawful seizure. App. H at 97a-98a, 101a-12a. Laster was found guilty of murder by a jury. App. C at 16a.

Issue Raised on Appeal

On appeal, Laster challenged the admission of evidence from his phone under the Fourth Amendment and Article 1, § 11 of the Indiana Constitution. App. H at 83a. In addition to arguing police did not have probable cause to seize the phone, Laster argued police did not secure the phone to eliminate the threat of destruction of evidence or act diligently to obtain a warrant. *Id.* at 84a-90a. In response, the State argued the evidence was properly admitted because police lawfully seized the phone under the search incident to arrest and exigent circumstances exception to the warrant requirement. App. I at 108a-119a.

Oral argument was held on August 30, 2024. [Online Docket]. A month later, the Court of Appeals, in a memorandum decision, affirmed Laster's conviction under both the federal and state constitutions. App. A at 6a-15a. The court held the police had probable cause to believe evidence was on the phone because: (a) Laster used it to call 911, (b) he was not home when he called, (c) Burnett's body had three potential gunshot wounds and was found lying in a bedroom, (d) three bullet casings were in the trashcan, even though these were discovered after the seizure of the phone, and (e) a neighbor saw Laster coming and going from the house "around the time Burnett was killed," even though Burnett's exact time of death was never established *Id.* at 2a, 4a, 8a; App. M at 173a.

The Indiana Court of Appeals further held that exigent circumstances justified the seizure under the Fourth Amendment because there was a threat of evidence being destroyed once Laster was released, and the twenty-two-hour delay in obtaining the warrant did not make the seizure unreasonable. App. A at 9a-12a. The court made a general finding that "police secured [the phone] while applying for a warrant" and cited *Riley v. California*, 573 U.S. 373, 388-89 (2014). *Id.* at 8a.

On October 4, 2024, Laster filed a Motion to Publish in the Court of Appeals, and twelve (12) days later the court denied the motion. [Online Docket].

On November 6, 2024, Laster sought transfer in the Indiana Supreme Court. On January 22, 2025, the Indiana Supreme Court denied transfer. App. B at 17a.

REASONS FOR GRANTING PETITION

With the advancements in cell phone ("phone") technology and most citizens reliance on the device, the protection afforded by the Fourth Amendment against unreasonable government intrusion is at risk of being diluted. Cell phones are powerful and ubiquitous. Almost every American carries a handheld computer on their person. Without constant vigilance from courts around the search and seizure of cell phones, the right of the people to be secure in their persons and effects could quickly evaporate. To protect against unreasonable government intrusion, this Court should clarify the boundaries of the government's power to impede on an individual's possessory interest in his or her phone when a warrant has not been issued.

When law enforcement seizes a phone without a warrant under the exigent circumstance exception, it must secure the phone and act diligently to obtain a warrant. *See Illinois v. McArthur*, 531 U.S. 326, 332-33 (2001) (affirming the warrantless seizure of defendant's home because police seized the home in the least restrictive manner and acted diligently to obtain a warrant). For law enforcement to act diligently under the exception, the restraint must be reasonably limited and tailored to secure law enforcement needs while protecting privacy interests. *Id.* at 337.

Today, citizens hold a high privacy and possessory interest in their phones because of phones capabilities. Phones can store personal information, including medical information. Phones can also be used as keys; a device to control other devices; a translator; a tool to conduct business; a form of payment; and a means to obtain transportation.

These capabilities exacerbate the threat of destruction of evidence. Content on a phone can be remotely wiped or encrypted if the network signal is not disrupted. *Riley v. California*, 573 U.S. 373, 388 (2014).

These developments in technology have created a need for clear jurisprudence on the boundaries of the government's power to limit an individual's possessory and privacy interest in their phone, pending approval of a search warrant—based on a claim of destruction of evidence. To prevent abuse to the exception this Court should address the steps law enforcement must make when securing a phone, and what the Constitution demands of law enforcement when a search warrant for a phone that has already been seized is denied.

By granting this petition, this Court will have the opportunity to address:

(1) Whether law enforcement, when securing a phone under the threat of destruction exception to the warrant requirement, must confiscate a phone and eliminate any threat of remote wiping to comply with the demands of the Fourth Amendment;

(2) Whether failure to fully secure the phone diminishes the government's need to immediately seize the property without a warrant, rendering the restraint unreasonable under the Fourth Amendment;

(3) Whether law enforcement's continued seizure of a phone after the denial of a search warrant, and submission of another warrant to a different judge, renders the restraint unreasonable under the Fourth Amendment; and

(4) Whether an unjustified twenty-two-hour delay in obtaining a search warrant for a phone seized without a warrant is unreasonable under the Fourth Amendment?

I. The warrantless seizure of Laster's phone violated the Fourth Amendment of the United States Constitution.

> The heart of the Fourth Amendment . . . is a severe requirement of specific justification for any intrusion upon protected personal security, coupled with a highly developed system of **judicial controls to enforce** upon the agents of the **State the commands of the Constitution**.

Terry v. Ohio, 392 U.S. 1, 11 (1968) (emphasis added).

Phones are such a "pervasive and [an] insistent part of daily life" that an alien could mistake one for an appendage. *Riley*, 573 U.S. at 385. Phones hold a significant value for humans across the world. For some, a phone is an obsession, something that must always be on their person's. *See United States v. Babcock*, 924 F.3d 1180, 1191 (11th Cir. 2019) (recognizing the attention most citizens give their phones); *Riley*, 573 U.S. 373 at 394-95 (discussing research that shows how important phones are to Americans).

These pocket-sized computers hold "the sum of an individual's private life" including "photographs, picture messages, text messages, Internet browsing history, a calendar, a thousand-entry phonebook" and more. *Riley*, 573 U.S. at 394; 18 U.S.C. § 1030(e). As phone technology has advanced, so has their utility. Not only can a phone store personal information, but it can be used as a key, a map, and form of payment.[1] These multivariate uses vest citizens

[1] Apple Pay, Apple, https://www.apple.com/apple-pay/ (last visited March 22, 2025); Google Pay, Google, https://pay.google.com/about/pay-in-store/ (last visited March 22, 2025); MyBuick Mobile App, Buick https://www.buick.com/explore/connectivity/mybuick-app (last visited March 25, 2025); Phone as a Key, Ford https://www.ford.com/support/how-tos/fordpass/phone-as-a-key/what-is-phone-as-a-key-in-fordpass/ (last visited March 22, 2025).

with a high privacy and possessory interest in their phones (similar to a home), requiring law enforcement-related concerns be significantly high to justify a warrantless intrusion.

The Fourth Amendment requires the government to obtain a warrant based on probable cause to seize or search a person or their property. U.S. Const. amend. IV. However, exceptions exist. Exigent circumstances permit a warrantless seizure or search when there is a "specially pressing or urgent law enforcement need"—an emergency. *McArthur*, 531 U.S. at 331. To determine whether such an emergency exists, this Court considers the totality of circumstances. *Missouri v. McNeely*, 569 U.S. 141, 149 (2013).

When determining whether an exception applies, courts must be "watchful for the constitutional rights of the citizen, and [protect] against any stealthy encroachments thereon." *Coolidge v. New Hampshire*, 403 U.S. 443, 454 (1971).

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance.
>
> . . .
>
> The exceptions are 'jealously and carefully drawn, and there must be 'a showing by those who seek exemption * * * that the exigencies of the situation made that course imperative. '(T)he burden is on those seeking the exemption to show the need for it.' In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won—by legal and constitutional means in England, and by

> revolution on this continent—a right of personal security against arbitrary intrusions by official power. **If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important**.

Id. at 454-54 (emphasis added) (cleaned up).

This Court has rejected a per se rule of unreasonableness under the exigent circumstance exception. Instead, it has adopted a balancing test that balances the "privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable" under the exigent circumstance exception. *McArthur*, 531 U.S. at 331. The balancing test weighs law enforcement's need to seize with the invasion the seizure imposes on the citizen. *Terry*, 392 U.S. at 21. Courts must consider whether the "restraint at issue was tailored to th[e] need, being limited in time and scope, and avoiding significant intrusion." *McArthur*, 531 U.S. at 331 (citation omitted).

"Different interests are implicated by a seizure than by a search. A seizure affects only the person's possessory interests; a search affects a person's privacy interests." *Segura v. United States*, 468 U.S. 796, 806 (1984). However, the balancing test imposed by this Court for warrantless seizures still balances the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable.[2] *See McArthur*, 531 U.S. at 332 (balancing the privacy related concerns despite the issue involving the seizure of property). Because a seizure is less

[2] The Seventh Circuit has interpreted the balancing test as considering the individual's possessory interest when a seizure is involved, not the individual's privacy interest as stated in *McArthur*. *See United States v. Burgard*, 675 F.3d 1029, 1033 (7th. Cir. 2012) (stating "[o]n the individual person's side of this balance, the critical question relates to any possessory interest in the seized object").

intrusive, this Court has held a warrantless seizure of property that is based on probable cause and seized for the time necessary to secure a warrant is reasonable. *Id.* at 334-35; *Segura*, 468 U.S. at 806. Such a holding is predicated on the restraint being reasonably limited and tailored to meet the need and law enforcement's act of diligence in obtaining a warrant, making the restraint limited in time and scope. *McArthur*, 531 U.S. at 332-33; *Williams v. State*, 204 N.E.3d 279, 287 (Ind. Ct. App. 2023) (*citing Riley*, 573 U.S. at 388, 390); *Segura*, 468 U.S. at 806.

A seizure that is reasonable at its inception can become unreasonable because of its duration. *Segura*, 468 U.S. at 812. How long is too long is a fact sensitive inquiry, and there is no bright line rule. *Burgard*, 675 F.3d at 1033. Instead, a court must apply the balancing test discussed in *McArthur*.

In *McArthur* this Court held that a two-hour seizure of McArthur's home, while law enforcement obtained a warrant, was reasonable. 531 U.S. at 332-33, 337. This Court considered four (4) things when determining whether the two-hour seizure was reasonable. First, the police had probable cause to believe the home contained evidence of a crime (drugs). *Id.* at 332. Second, the police had reason to believe the evidence could be destroyed if McArthur was granted unsupervised access to the home. *Id.* Third, the police made reasonable efforts to reconcile their needs with the demands of personal privacy. *Id.* The police imposed a significantly less restrictive restraint than they would have if they prevented McArthur's access altogether. *Id.* Fourth, the police imposed the restraint for a limited period, two hours. *Id.*

This Court reasoned that temporarily preventing a person's entrance into their home is less intrusive than police's entry into the home "to make a warrantless arrest or conduct a

search." *Id.* at 336. The restraint utilized by police was the focal point of this Court's holding, concluding that "[police] imposed a restraint that was both limited and tailored reasonably to secure law enforcement needs while protecting privacy interests. In our view, the restraint met the Fourth Amendment's demands." *Id.* at 337.

The requirement that the restraint be reasonably limited and tailored is a critical component to the application of the exception because a seizure that is reasonable at its inception can become unreasonable because of its duration. *Segura.*, 468 U.S. at 812. Because everything believed to be evidence, is at threat of being destroyed. Thus, a bare threat of destruction can temporarily circumvent the demands of the warrant requirement if nothing more is demanded of law enforcement. To prevent this outcome, any warrantless seizure "must be 'strictly circumscribed' to ameliorate the exigency at issue" for the duration of the seizure. *Alexander v. City of Syracuse*, No. 21-3075(L), 22-103(C), 2025 WL 810247, at *10 (2d Cir. March 14, 2025) (quoting *Chamberlain Estate of Chamberlain v. City of White Plains*, 960 F.3d 100, 106 (2d Cir. 2020)).

Homes "are sacred in Fourth Amendment terms" because of the high possessory and privacy interest the property holds. C*ompare Segura*, 468 U.S. at 810 (explaining the home is sacred under the Fourth Amendment because of the occupant's possessory and privacy interest in the premises). Phones should be as sacred, too. They have great utility and the capacity to store immense amounts of sensitive and personal information. *United States v. Mitchell*, 565 F.3d 1347, 1352 (11th Cir. 2009) (equating a computer hard drive to the digital equivalent of the owner's home), *Riley*, 573 U.S. at 393 (recognizing cell phones are minicomputers with an immense storage capacity).

Advancement in technology now allows content on phones to be erased remotely. *Riley*, 573 U.S. at 390-91(recognizing the threat of remote wiping). This advancement creates a need to delineate what the Fourth Amendment demands to "secure" a phone under the exception to make the restraint reasonably limited and tailored to the need, when a physical threat is not the only threat that exists.[3] *See Carpenter v. United States*, 585 U.S. 296, 305 (2018) (explaining "[a]s technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes, this Court has sought to 'assure [ ] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'"). Further, there is a need for clear guidance from this Court on the government's authority to continue to seize a phone when a search warrant is denied, given the property's high privacy and possessory interest.

This case provides this Court the opportunity to (1) probe the boundaries of the government's power to limit an individual's high possessory, and privacy, interest in their phone pending the approval of a search warrant, and (2) resolve, what seems to be, a split among federal courts as to whether there is a temporal component to the determination of reasonableness under the Fourth Amendment.

A. Law enforcement did not have probable cause to seize the phone without a warrant.

As an initial matter, Laster maintains law enforcement did not have probable cause to support the seizure of his phone.

[3] Undersigned counsel has failed to find through research any case directly addressing this issue post-*Riley*.

A determination of probable cause is subject to an objective standard that is based on "a man of reasonable caution belief" and consideration of the facts available to the officer **at the time of the seizure**. *Terry*, 392 U.S. at 21-22 (emphasis added). The probable cause standard requires that there is a "substantial chance" evidence of criminal activity exists. *Babcock*, 924 F.3d at 1192 (citing to *Illinois v. Gates*, 462 U.S. 213, 243 n. 13 (1983)).

Laster's phone was seized at the time he came in for questioning at 2:00 a.m. on July 13, 2021. At that time, law enforcement knew: (a) Laster used his phone to call 911 and report finding Burnett's body in his home; (b) he was not home when he made the call; and (c) a neighbor saw Laster coming and going from the home several hours before his call to 911, ultimately putting a bag in the trunk of Burnett's car and leaving.[4] App. D at 23a, 26a; App. M at 185a-87a, 205a-06a.

These facts standing alone do not lend a man of reasonable caution to believe Laster's phone contained evidence of Burnett's murder. Police only knew that Laster used his phone to call 911 and had the phone on his person when he came in for questioning. There is nothing to deduce that evidence of the crime was likely on Laster's phone. If police were concerned with preserving location data, that information could be obtained in a less intrusive manner through Laster's phone records, which police had a search warrant for. App. M at 193a-203a. Further, the denial of law enforcement's original search warrant application for the phone,

[4] The Court of Appeals erroneously considered the fact that three bullet casings were found in the trashcan in the bedroom to hold there was probable cause to support the seizure of the phone. App. A at 8a. However, based on the warrant application affidavits submitted around the time of the seizure of the phone, that fact was not known to law enforcement at the time the phone was seized. App. M at 185a-87a, 205a-06a.

which included the facts known to law enforcement at the time of the seizure, supports this conclusion: police did not have probable cause to seize Laster's phone. App. M at 172a-73a.

B. The exigent circumstances exception to the warrant requirement requires more than a bare claim by law enforcement that a threat of destruction of evidence exists to justify a warrantless seizure.

Even if probable cause existed to support the warrantless seizure, the restraint was not limited and tailored to the need to eliminate the threat of destruction, and it was not limited in time and scope to avoid significant intrusion, making the warrantless seizure unreasonable. This Court's precedent in *Riley* and *McArthur* supports this conclusion.

i. The restraint was not limited and tailored to the need because law enforcement did not eliminate the threat of remote destruction when it seized the phone.

Typically, the threat of destruction of evidence exception stems from the physical threat of the owner destroying evidence if law enforcement does not immediately take physical control of the property. However, today, the threat of destruction to evidence on a phone not only comes from the owner having physical access to the device, but remote access. *Riley*, 573 U.S. at 390-91; *see United States v. Strong*, 85 M.J. 58, 65 (C.A.A.F. Aug. 22, 2024) (explaining it is no longer enough to simply take possession of a cell phone to protect the data. Instead, law enforcement must "take additional steps to protect [the data] from unauthorized remote manipulation or destruction . . .").

This Court first addressed the legitimacy of remote wiping in *Riley*. There the government relied on the threat of remote wiping as a justification to search the phone without a warrant. *Riley*, 573 U.S. at 388-89. This Court countered the government's concern by noting

"law enforcement is not without specific means to address the threat. Remote wiping can be fully prevented by disconnecting a phone from the network." *Id.* at 390.

Having acknowledged the possibility of remote wiping, courts must clarify what, if any, effect such technology has on the interpretation of the Fourth Amendment. *See* Loretta H. Rush & Marie F. Miller, *A Constellation of Constitutions: Discovering & Embracing State Constitutions as Guardians of Civil Liberties*, 82 Alb. L. Rev. 1353, 1380 (2019) (noting "advancements in science and technology prompt questions about how constitutional provisions apply to previously unknown realities."); *Carpenter*, 685 U.S. at 305, 309-313 (applying the Fourth Amendment to a new technological phenomenon). To satisfy the demands of the Fourth Amendment, law enforcement should be required to eliminate both the physical and remote threat in order to make the restraint reasonably limited and tailored to the need. *McArthur*, 531 U.S. at 337; *Riley*, 573 U.S. at 390-91.

Such a requirement is necessary to prevent a bare claim from circumventing the demands and restraints of the Fourth Amendment. For example, if the owner of the phone is not detained while law enforcement is in possession of the phone, and the phone has not been secured in a manner that eliminates the threat of remote wiping, the threat of destruction persists. The owner, or any person with the required credentials, can log into the account associated with the phone and erase the phone's contents.[5] Thus, law enforcement's failure to

[5] Apple, *Erase a device in Find Devices on iCloud.com*, https://support.apple.com/guide/icloud/erase-a-device-mmfc0ef36f/icloud (last visited March 31, 2025); Samsung, *How do I use Find My Mobile to remotely wipe my Samsung Galaxy S6 edge plus*, https://www.samsung.com/za/support/mobile-devices/how-do-i-use-find-my-mobile-to-remotely-wipe-my-samsung-galaxy-s6-edge-plus/ (last visited March 31, 2025.

take appropriate steps to eliminate all manners of threat, weakens law enforcement's claim that an emergency exists, allowing it to act outside the confines of the warrant requirement.

When police seized Laster's phone without a warrant because it believed the phone contained evidence of the murder, police did nothing to eliminate the threat of remote wiping. App. D at 35a. Laster was released from questioning twenty-two hours before police eventually obtained a warrant to search the phone. *Id.* at 25a. It was not until police had obtained a warrant that they took steps to eliminate the threat of remote wiping. App. A at 15a; App. K at 44a. This failure to eliminate the claimed threat relied on to escape the warrant requirement shows the restraint was not tailored to the need. *See* App. A at 15a (finding the police's inaction of eliminating the remote threat cuts against its need being significant). That in conjunction with a twenty-two-hour delay in obtaining an approved warrant, makes the warrantless seizure of Laster's phone unreasonable.

ii. The twenty-two-hour warrantless seizure was not limited in time and scope because law enforcement did not act diligently considering the totality of circumstances.

For the restraint to be limited in time and scope, law enforcement must act diligently to obtain a warrant. *McArthur*, 531 U.S. at 951-52. Failure to act diligently to obtain a warrant naturally cuts against law enforcement's emergency need and can make the intrusion unreasonable. *Segura*, 468 U.S. at 812; *United States v. Place*, 462 U.S. 696, 711-10 (1983) (holding a 90-minunte delay unreasonable when the seizure is only based on reasonable suspicion). Whether an emergency existed is based on the totality of circumstances. *McNeely*, 569 U.S. at 149 (citing to *McArthur*, 531 U.S. at 331). The test is a "finely tuned approach" that requires an evaluation of each case based own on its own facts and circumstances. *Id.* at 150. Because

no per se rule of unreasonableness exists, this Court "balance[s] the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable." *Id.*

There is limited case law from appellate courts addressing the warrantless seizure of a phone under the exception and the temporal demands of the Fourth Amendment. This case law has only recently begun to develop, and federal circuits are split as to the requirement of a temporal analysis under the exception.

The Fourth Circuit has held a month delay by the FBI before submitting a warrant is unreasonable when the FBI's resources were not overwhelmed. *United States v. Pratt*, 915 F.3d 266, 272-73 (4th Cir. 2019). The Sixth Circuit has held a four (4) hour delay in obtaining a warrant for the seized phone was brief and justified under the exception. *United States v.* Williams, 998 F.3d 716, 727, 739 (6th Cir. 2021).

The Eleventh Circuit, however, did not consider whether a two-day delay in obtaining a warrant for a seized phone was "diligent" when it held the seizure was reasonable. *United States v. Babcock*, 924 F.3d 1180, 1194-95 (11th Cir. 2019). The court reasoned because law enforcement had probable cause to believe evidence of the crime was on the phone and the suspect posed a threat to destroying the evidence if it was not immediately seized, the seizure was reasonable. *Id.* at 1194. The court found "that's all the exigent-circumstances doctrine requires." *Id.* at 1195. The Eight and Tenth Circuit seem to follow suit, finding the exception only requires probable cause and a legitimate threat without addressing whether the delay was reasonable. *United States v. Shrum*, 59 F.4th 968, 972-73 (8th Cir. 2023); *Andersen v. DelCore*, 79 F.4th 1153, 1166-67 (10th Cir. 2023).

Guidance from this Court is needed to clarify that the Fourth Amendment's reasonableness determination does have a temporal component, and it requires courts to determine whether the delay was reasonable—did police act diligently to obtain a warrant.

When determining whether police acted diligently, courts consider whether owners voluntary or involuntarily relinquished their property. The type of relinquishment dictates the degree of the owner's possessory interest. *Pratt*, 915 F.3d at 272-73 (citing to *Riley*, 573 U.S. at 134)); *United States v. Sparks*, 806 F.3d 1323, 1348-49 (11th Cir. 2015), overruled on other grounds *United States v. Ross*, 963 F.3d 1056 (11th Cir. 2020). In voluntary relinquishment cases, the defendant's possessory interest has been considered low, allowing a longer delay in obtaining a warrant. *See State v. Val Leeuwen*, 397 U.S. 249, 253 (1970) (explaining the only interest at stake of being invaded by the twenty-six-hour seizure of the mailed packages was the defendant's privacy interest and that interest was not disturbed until a warrant was obtained). However, if the defendant involuntarily relinquished the property, the possessory interest is high. In such a case, a seizure as short as ninety (90) minutes can be considered unreasonable. *See United States v. Place*, 462 U.S. 696, 708 (1983) (finding the ninety-minute seizure of the defendant's luggage unreasonable because the seizure interfered with defendant's high possessory interest). But a seizure of two hours can be reasonable if police impose a less restrictive restraint while a warrant is being sought. *See McArthur*, 531 U.S. at 332 (finding a two-hour warrantless seizure of the defendant's home reasonable because the seizure was limited in time and scope—police still allowed the defendant to access his home under supervision of the police).

Other circumstances that should be considered when determining whether police acted reasonably and diligently include: (i) the submission of other warrants for similarly situated evidence at an earlier moment in time; (ii) the continued seizure of the property after a search warrant is denied; and (iii) the submission of another warrant for the same property to another judge.

Theoretically, once police seize property it should immediately take steps to secure a warrant. Especially when the defendant holds a high possessory and privacy interest in the property. "After all, if the police have probable cause to seize an item in the first place, there is little reason to suppose why they cannot promptly articulate that probable cause in the form of an application to a judge for a search warrant." *United States v. Smith*, 967 F.3d 198, 207 (2d. Cir. 2020). This is evidence of acting diligent. *McArthur*, 531 U.S. 332. More pressing matters in the investigation may require police's attention first. But, if the record shows police had time to submit other warrants near the time of the seizure, its failure to submit the warrant with the others, without a good explanation, supports a lack of diligence. *Burgard*, 675 F.3d at 1033. The intrusion of the individual's possessory interest is, therefore, "less likely to be justifiable." *Id.*

Likewise, if police submit a search warrant for a phone and it is denied, any continued seizure without adequate justification (new evidence to show probable cause) is not evidence of diligence. Without a rule limiting the number of search warrant applications that can be submitted for the same property after the initial warrant application is denied, police may engage in forum shopping, which the Fourth Amendment does not condone.

Here, police did not act diligently when it took twenty-two hours to obtain a warrant because: (i) police submitted warrants for other property—including cell phone records—closer in time to when the phone was seized, and (ii) though the original warrant was denied, police continued to seize the phone and submitted another warrant to another judge.

a. Submission of other warrants near the time of the seizure indicates law enforcement did not act diligently.

Although it is true that courts do not want to discourage careful, attentive police work, the Constitution demands police act diligently when seizing property without a warrant. *Burgard*, 675 F.3d at 1034. If police neglect to seek a warrant without any good explanation for the delay, "the intrusion on [the] individual's possessory interest is less likely to be justifiable." *Id.* at 1033. The burden should fall on the State to show a "good explanation" exists. *Id.*

Here, Laster was brought in for questioning on July 13th around 2:00 a.m. App. D at 23a. His phone was seized at that time. *Id.* Around 3:50 a.m., Laster refused to speak with police without an attorney present. *Id.* An hour later, police submitted a warrant to search Burnett's car, which was granted in seven (7) minutes. App. M at 186a-88a. About three (3) hours later, police submitted a second warrant[6] to search Laster's phone records, and within five (5) minutes that warrant was granted. *Id.* at 193a-96a. Laster was subsequently released on July 14th at 10:53 a.m. App. D at 24a. The warrant granting police permission to search Laster's phone was submitted thirty (30) hours after the phone was seized, twenty-two (22) hours after Laster was released. *Id.* at 23a-24a. The State did not provide any explanation for this delay. Thus, the justification for the intrusion is weak.

[6] The warrant application reveals police previously submitted a warrant for the phone records, but it was denied by another judge. App. M at 193a.

b. The Fourth Amendment does not permit warrant shopping.

Warrant shopping is a dangerous practice that runs afoul of the Fourth Amendment and the public's confidence in the integrity of the justice system. *People v. Rivoli*, 132 Misc.2d 106, 111 (City Ct. N.Y. May 28, 1986). Yet this Court has not clarified whether the Fourth Amendment permits police to submit the same, or substantially similar, warrant application to a new judge after the initial application is denied, nor has it clarified if such a practice creates a significant intrusion.[7]

Holdings vary in the few courts across the country that have spoken on the issue. *See United States v. Pace*, 898 F.2d 1218, 1230-31 (7th Cir. 1990) (holding "[t]he Fourth Amendment on its face does not prohibit the government from seeking a second magistrate's approval to search when another magistrate denies a search warrant."); *United States v. Davis*, 346 F. Supp. 435, 442 (S.D. Ill. 1972) (holding a magistrate's denial of a search warrant is a judicial decision that is final and binding and equitably estops another magistrate from issuing a search on the same showing); *People v. Bah*, 740 N.Y.S.2d 846, 949 (N.Y. 2002) (cautioning the circumstances do not involve a prior magistrate not finding probable cause and the affiant approaching a different magistrate in hope of getting a different result, in effect judge shopping); *People v. Bilskey*, 734 N.E.2d 341, 344 (N.Y. Ct. App. 2000) (rejecting the proposition that successive warrant applications weaken Fourth Amendment protections); *In the MATTER OF the SEARCH OF ONE DIGITAL DEVICE CURRENTLY LOCATED AT 601 4TH STREET NW, WASHINGTON, DC UNDER RULE 41*, No. 24-sw-91, 2024 WL 2152740, at *5 (D.C. May 14, 2024) (mem.) (holding "when the government has presented an application

[7] Counsel has failed to find any SCOTUS case addressing this issue.

for a search warrant to one magistrate judge and it has been denied, it cannot then present a substantially similar application for the same target property to a different magistrate judge in hope of a better outcome."); *Rivoli*, 132 Misc.2d at 111 (refusing to permit police to ignore a judge's denial of warrant and seek a more favorable judge because it "undermines the integrity of the judicial process and opens the door to all kinds of abuse. To hold otherwise approves judge shopping.").

By the State of Indiana's own concession, when a judge says you cannot search a phone, the proper remedy is to return it. App. D at 42a. After a warrant application is denied, any continued seizure of the property, coupled with the submission of another warrant to another judge, does not make the restraint limited in time and scope. Instead, it imposes a significant intrusion on the owner because it creates an opportunity for an endless seizure. After a warrant is denied, police no longer have authority to seize the property for the purpose of searching it. Police should, therefore, be required to return the property.

Further, if there is no established limit on how many times police can submit a warrant after it has been denied, then police are free to warrant shop without repercussions. This type of government malfeasance is the type of significant intrusion that motivated our Founders to pass the Fourth Amendment. Further, police have other avenues they could use to appeal the denial of such a warrant. *See In the MATTER OF the SEARCH OF ONE DIGITAL DEVICE CURRENTLY LOCATED AT 601 4TH STREET NW, WASHINGTON, DC UNDER RULE 41*, 2024 WL 2152740, at *1 n. 1 (providing Fed. R. Civ. P. 59(e) and 60 provide for motions for reconsideration and can be utilized to review denied warrants).

Here, the record shows police engaged in the practice of resubmitting another warrant to a different judge after its original application was denied, **twice**—one denial for the search of Laster's cell phone records and one for the search of his phone. App. M at 172a, 193a. The Fourth Amendment must restrain such behavior, and this Court holds the power to make that happen.

By resubmitting a search warrant to a new judge, law enforcement did not limit the restraint in time and scope as constitutionally required. Further, the behavior undercuts the reasonableness of the continued seizure.

C. The exclusionary rule is not applicable because the evidence used to obtain the approved warrant was obtained during the unlawful seizure.

Evidence obtained from an unlawful seizure "must be excluded under the fruit of the poisonous tree doctrine." *Clark v. State*, 994 N.E.2d 252, 266 (Ind. 2013) (citing *Wong Sun v. United State*, 371 U.S. 471, 485 (1963)). "This extension of the exclusionary rule bars evidence directly obtained by the illegal search or seizure as well as evidence derivatively gained as a result of information learned or leads obtained during that same search or seizure." *Id.* Under the attenuation doctrine, the exclusionary rule is not applicable when the evidence obtained from the illegal conduct has an independent source sufficient to purge the primary taint. *Wong Sun*, 371 U.S. at 488.

Under the Fourth Amendment, a three-part test is used to determine if the attenuation doctrine applies. *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975). First, courts consider the time elapsed between the illegality and the acquisition of the evidence. *Id.* Second, the presence of intervening circumstances. *Id.* Third, the purpose and flagrancy of the official misconduct. *Id.*

Here, there was a delay of 22-hours in obtaining a warrant after Laster was released. App. D at 25a. During the 22-hour gap, police tried and failed to get a search warrant. App. M 171a. The State of Indiana concedes that after the first judge denied the initial warrant application, it should have returned the phone. App. D at 41a (arguing "if a judicial officer said you can't search this phone, the remedy is to return it. We didn't intrude upon the phone. We did take it from his person without a warrant at that time."). That a search warrant was ultimately granted does not purge this taint.

Denial of the first warrant application emphasizes the illegality of the seizure. Law enforcement was told it did not have probable cause to search the phone, meaning it did not have probable cause to continue to seize the phone, either. Yet, police continued to unlawfully seize Laster's phone. During that continued seizure, law enforcement maintains it obtained additional evidence, which it provided in the warrant application that was granted. App. M at 171a. Thus, the evidence used to obtain the approved warrant was derivative of the illegal seizure.

Law enforcements flagrant misconduct here cannot support a holding that the derivative evidence came by means sufficiently distinguishable to purge the primary taint. Thus, the cell phone evidence is fruit of the poisonous tree and cannot be used to sustain Laster's conviction.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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