1 IN THE SUPREME COURT OF THE UNITED STATES
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3 DAVID LEON RILEY, :
4 Petitioner : No. 13-132
5 v. :
6 CALIFORNIA :
7 - - - - - - - - - - - - - - - - - - x
8 Washington, D.C.
9 Tuesday, April 29, 2014
10
11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:34 a.m.
14 APPEARANCES:
15 JEFFREY L. FISHER, ESQ., Stanford, Cal.; on behalf of
16 Petitioner.
17 EDWARD C. DUMONT, ESQ., Solicitor General,
18 San Francisco, Cal.; on behalf of Respondent.
19 MICHAEL R. DREEBEN, ESQ., Deputy Solicitor
20 General, Department of Justice, Washington, D.C.; for
21 United States, as amicus curiae, supporting
22 Respondent.
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1 P R O C E E D I N G S

2 (10:34 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument

4 first this morning in Case 13-132, Riley v. California.

5 Mr. Fisher?

6 ORAL ARGUMENT OF JEFFREY L. FISHER

7 ON BEHALF OF PETITIONER

8 MR. FISHER: Mr. Chief Justice, and may it

9 please the Court:

10 This case involves applying the core

11 protection of the Fourth Amendment to a new factual

12 circumstance. It has always been the case that an

13 occasion of an arrest did not give the police officers

14 authority to search through the private papers and the

15 drawers and bureaus and cabinets of somebody's house,

16 and that protection should not evaporate more than 200

17 years after the founding because we have the

18 technological development of smartphones that have

19 resulted in people carrying that information in their

20 pockets.

21 JUSTICE KENNEDY: Just -- just to test the

22 principle for why the police can search and seize

23 some -- some objects. Consider a gun. The arrestee has

24 a gun on his person and the police take the gun. Is

25 part of the reason for that seizure to obtain evidence

1 of the crime or is it just for the safety of the officer
2 and the safety of the community?
3 MR. FISHER: Well, what this Court said in
4 Robinson at Page 235 is the reason supporting the
5 authority for a search incident to arrest are the two
6 Chimel factors, which are gathering evidence to prevent
7 its destruction, and officer's safety. Now --
8 JUSTICE KENNEDY: What about gathering
9 evidence in order to make the case? For instance, with
10 the gun, could they take fingerprints? The -- the gun
11 is in the police station where the arrestee is being
12 booked. A, could they take fingerprints? B, could they
13 copy the serial number? C, could they see how many
14 shells were left in the chamber? They obviously have to
15 empty it for safety purposes. All for the purpose of
16 building the case, of -- of obtaining evidence?
17 MR. FISHER: Yes, of course that's done
18 every day. Once the gun is in the police -- the police
19 department's lawful possession, I think Edwards says
20 that they can do all that.
21 JUSTICE KENNEDY: So -- so if -- if the
22 proposition then, if the principle then is that some
23 objects that are obtained from the arrestee can be
24 examined in order to build the State's case, is that at
25 least a beginning premise that we can accept in your

1 case, although, obviously, there are problems of the
2 extent and intrusiveness of the search that are -- are
3 your case, but not in the gun hypothetical.
4 MR. FISHER: Well, Justice Kennedy, the
5 Court has never described that as one of the things. If
6 you want to think about this case the way you thought
7 about the automobile search in Gant, it would be a
8 beginning premise; but I think you're right, that even
9 if that were a beginning premise, it would be only that,
10 a beginning. In Footnote 9 in Edwards, this Court said
11 that any search incident to arrest still has to satisfy
12 the Fourth Amendment's general -- general
13 reasonableness.
14 JUSTICE KENNEDY: I think you're right that
15 Gant is probably the best statement in support of the
16 principle that I've -- I've suggested, and then you
17 might say, well, that's limited to automobiles --
18 MR. FISHER: Right.
19 JUSTICE KENNEDY: -- and then we're back
20 where we started.
21 MR. FISHER: Right. And there's important
22 things to understand if you want to start thinking about
23 Gant, because both in terms of its history and its
24 modern application, it's dramatically different from
25 what we have here.

1 JUSTICE ALITO: Well, Mr. Fisher, before we
2 do that, have you been accurate in what you said about
3 Robinson and about the Court's cases? In Weeks, which
4 was quoted in Robinson, the Court said: "The right,
5 always recognized under English and American law, to
6 search the person of the accused when legally arrested
7 to discover and seize the fruits or evidences of crime."
8 Is that historically inaccurate? Do you want us to
9 repudiate that?
10 MR. FISHER: No, Your Honor. What Weeks
11 said, you quoted it, fruits and instrumentalities of the
12 crime have always been something that could be seized
13 from a person. Now, Weeks, of course, as this Court
14 said in Robinson itself, was dicta. And there was that
15 historical authority to take fruits and evidence -- I'm
16 sorry -- fruits and instrumentalities of the crime.
17 JUSTICE SCALIA: Did it say
18 instrumentalities or evidence? Which did it say?
19 MR. FISHER: Weeks used --
20 JUSTICE SCALIA: Because Justice Alito said
21 evidence. You -- you changed it to instrumentality. Is
22 one of you wrong?
23 MR. FISHER: Weeks uses the word "evidence,"
24 but, Justice Scalia, because it was not at issue in that
25 case, the -- the Bishop treatise that you cited in your

1 Thornton concurrence talks about tools and
2 instrumentalities.
3 Now, I don't think we have to debate that
4 here, because even if we're in a world where the police
5 can seize some evidence and keep it and use it for the
6 prosecution simply for that reason, even if they don't
7 fear destruction, there are still very, very profound
8 problems with searching a smartphone without a warrant,
9 because even under the Robinson rule, this Court has
10 recognized, for example, when it comes to blood draws,
11 search -- something like a strip search that might occur
12 at the scene, there are limits even to the Robinson
13 rule. So it brings us --
14 JUSTICE ALITO: Well, smartphones --
15 smartphones do present difficult problems. But let me
16 ask you this: Suppose your client were an old-school
17 guy and he didn't have -- he didn't have a cell phone.
18 He had a billfold and he had photos that were important
19 to him in the billfold. He had that at the time of
20 arrest. Do you dispute the proposition that the police
21 could examine the photos in his billfold and use those
22 as evidence against him?
23 MR. FISHER: No. That's the rule of
24 Robinson, that any physical item on a arrestee can be
25 seized and inspected and then used as evidence if it's

1 useful evidence. We draw a line. --

2 JUSTICE ALITO: Yes. What is the difference

3 between looking at hardcopy photos in a billfold and

4 looking at photos that are saved in the memory of a cell

5 phone?

6 MR. FISHER: The difference is digital

7 information versus physical items. Physical items at

8 the scene can pose a safety threat and have destruction

9 possibilities that aren't present with digital evidence.

10 What is more, once you get into the digital world, you

11 have the framers' concern of general warrants and the --

12 the writs of assistance.

13 JUSTICE ALITO: Well, how does that apply --

14 how does that apply to these hardcopy photos in the

15 billfold? They don't present a threat to anybody. And

16 I don't see that there's much of a difference between --

17 the government argues there's a greater risk of the

18 destruction of digital evidence in a cell phone than --

19 than there is in the photos. So I don't quite

20 understand how -- how that applies to that situation.

21 MR. FISHER: Well, let me take those one

22 thing at a time. I take it the theory of Robinson, this

23 is the theory the government itself propounded, is that

24 any physical item, because it contained a razor blade or

25 a pin or anything, needs to be inspected to be sure.

1 And so you have a categorical rule because of the ad hoc
2 nature of arrests that police don't have to distinguish
3 physical items one from the other.
4 JUSTICE KENNEDY: Well, but the -- but in
5 the wallet -- we'll just stick with Justice Alito's
6 hypothetical -- they find a business card or something
7 which shows a car rental service. Can they turn the
8 card over and read it? They're not looking for a pin or
9 an explosive. They're trying to read what's on the
10 card. Can they do that?
11 MR. FISHER: I think they can, if nothing
12 else, under plain view once it's in their hand, Justice
13 Kennedy. But I really don't want to fight --
14 JUSTICE KENNEDY: No, they turn -- they turn
15 the card over.
16 MR. FISHER: I think that is fine under the
17 categorical rule. I think what you have in Robinson is
18 a categorical rule that obviates these exact difficult
19 case-by-case determinations. You can make an argument,
20 and if I needed to, if it were a diary case or a
21 billfold case, you might be able to make an argument,
22 but I think the Court wisely decided under Robinson that
23 we need a categorical rule that's easily administrable
24 in the field.
25 Now, when you have digital evidence, the

1 categorical rule, we submit, cuts exactly in the
2 opposite direction. Because digital information -- even
3 the notion of flipping through photos in a smartphone
4 implicates vast amounts of information, not just the
5 photos themselves, but the GPS locational data that's
6 linked in with it, all kinds of other information that
7 is intrinsically intertwined in smartphones.
8 CHIEF JUSTICE ROBERTS: Including
9 information that is specifically designed to be made
10 public. I mean, what about something like Facebook or a
11 Twitter account? There's no real -- there's no -- any
12 privacy interest in a Facebook account is at least
13 diminished because the point is you want these things to
14 be public and seen widely.
15 MR. FISHER: Well, Mr. Chief Justice --
16 CHIEF JUSTICE ROBERTS: So I guess my
17 question would be: Could you have a rule that the
18 police are entitled to search those apps that, in fact,
19 don't have an air of privacy about them?
20 MR. FISHER: I think that would be
21 extraordinarily difficult to administer that rule. And
22 let me tell you why. Because most of the information on
23 smartphones is private. Much of it is just, like the
24 photos in this case, just kept on somebody's phone and
25 not shared with anybody. Even a Facebook account is a

1 limited universe of people who have access to it.
2 You're right that --
3 CHIEF JUSTICE ROBERTS: More -- more or less
4 limited. I mean, you know, maybe it's 20 people; maybe
5 it's a hundred people. But it's certainly not private
6 in the sense that many of the other applications are.
7 MR. FISHER: I think it's fair to say you
8 have a sliding scale and there's some stuff on a phone
9 that might be posted on the Internet, for example. The
10 difficulty with that case, if you wanted to address it
11 in a future case, would be the intertwined nature of
12 information on a phone. So looking at those photos in a
13 smartphone account will be linked to the contacts inside
14 the phone; it will be linked to GPS information inside
15 the phone. All of this information is intertwined and I
16 think you'd have a difficult administrability problem if
17 you wanted to create some sort of rule like that.
18 Now, remember, the government might try to
19 deal with that problem differently by saying information
20 in the cloud, so to speak, is not accessible to
21 officers. We submit that just further would compound
22 the difficulty of applying a rule in this circumstance.
23 JUSTICE ALITO: But do you think in this
24 case we have to decide whether all the information that
25 may be available in a smartphone can be examined by the

1 police when the owner of the phone is arrested or can we
2 just focus on the particular evidence that was admitted
3 in your client's trial?
4 MR. FISHER: Well, the way you've phrased
5 the question, I think that's what -- that's the first
6 cut at this, is looking at the particular pieces of
7 evidence here, which are photos and videos. But we
8 don't think you can write an opinion that would
9 distinguish those from anything else on a -- almost
10 anything else on a smartphone. I mean, the State's
11 argument here is that those are not, quote,
12 "fundamentally different" from other things that people
13 would carry around.
14 JUSTICE KENNEDY: Do you think you could
15 have obtained a warrant -- or that the police could have
16 obtained a warrant in this case?
17 MR. FISHER: In all likelihood, yes, Justice
18 Kennedy.
19 JUSTICE KENNEDY: All right.
20 MR. FISHER: They had plenty of time to do
21 so.
22 JUSTICE KENNEDY: Well, then the evidence
23 that's seizable under the warrant is -- is reasonable,
24 and Justice Alito points out the fact that some of this
25 evidence is -- is reasonable. If there's a -- there's a

1 limitation with reference to the way the police behaved,
2 as Justice Alito points out, it's limited just to this
3 evidence.
4 MR. FISHER: Well, let me say a couple
5 important things about the warrant requirement and
6 return to Justice Alito's question. This Court has said
7 time and again that the mere fact the police could have
8 gotten a warrant but didn't does not excuse a Fourth
9 Amendment violation. Let me say a couple things about
10 the warrant requirement and then return to Justice
11 Alito.
12 JUSTICE KENNEDY: Well, but it -- it just
13 goes to the fact that this -- that this is searchable
14 under Fourth Amendment standards.
15 MR. FISHER: With a warrant, Justice
16 Kennedy. And let me talk about why a warrant is so
17 important. First of all, it interposes a neutral
18 observer in between the citizen and the police officer.
19 Perhaps more importantly, it does two very big things.
20 One is it can trigger the Fourth Amendment's
21 particularity requirement so that the magistrate can
22 say: This is what you can look at and what didn't.
23 Remember, in this case the prosecution ultimately
24 introduced photos and videos, but that's not what the
25 detective testified to at trial as to the scope of his

1 search. He said, at JA-11, we looked at a whole lot of
2 stuff on the phone and that's just what, in his words,
3 "caught his eye."
4 JUSTICE GINSBURG: So how -- how would it
5 work with a magistrate? You recognize -- you just told
6 Justice Kennedy -- that a warrant could be obtained. A
7 warrant for what? What would the police have to show?
8 And let's take your very case. So they -- they have
9 seized, which is proper, seized the phone, they've
10 secured it, and now they want to search it. So they
11 apply for a warrant. And what would the warrant have to
12 say?
13 MR. FISHER: We give an example of a warrant
14 in the footnote in our reply brief. I believe it's
15 footnote 3, Justice Ginsburg. And there are many more
16 available on the web from States that already require
17 warrants. What they do is they say -- the police
18 officer testifies, perhaps somewhat like he testified
19 here at the suppression hearing, I suspected this fellow
20 was in a gang and -- and I believe gang members keep
21 certain kinds of things on their phone, this is the kind
22 of crime that we're investigating, and therefore these
23 particular files within the phone are likely to obtain
24 evidence. And then what happens is the warrants say
25 with particularity: Here's the things you can look at;

1 here's what you can't. More importantly, Justice
2 Ginsburg, a warrant requirement --
3 JUSTICE SCALIA: Well, I thought you say
4 that's very -- you've told us that that's -- that's hard
5 to figure out, what you can and what you can't. But
6 it's easy for a magistrate, but -- but impossible for
7 a -- for an arresting officer?
8 MR. FISHER: I think much easier for a
9 magistrate at some remove than an officer under the --
10 under the stresses in the field. Now, Justice Scalia --
11 JUSTICE SCALIA: Well, but --
12 MR. FISCHER: -- I agree, it's not going to
13 be perfect. And so let's look at what happens under our
14 world --
15 CHIEF JUSTICE ROBERTS: If I could just --
16 MR. FISHER: Yes.
17 CHIEF JUSTICE ROBERTS: -- on the same lines
18 as -- as Justice Scalia. The point you make elsewhere
19 in your brief and argument is that the cell phone or
20 the -- the smartphone has everything.
21 MR. FISHER: Right.
22 CHIEF JUSTICE ROBERTS: It's got the
23 person's whole life. Well, if you're arresting somebody
24 on the grounds of suspicion that he's a gang member and
25 you have evidence to support that, what part of the

1 smartphone is not likely to have pertinent evidence?
2 What application is not? I mean, here you've got
3 pictures, you've got videos, you've got calls. I just
4 -- I guess it's similar to what other issues have been
5 raised. I don't know what a magistrate is supposed to
6 put in the warrant.
7 MR. FISHER: I would say his banking app,
8 his online dating app --
9 CHIEF JUSTICE ROBERTS: You don't think his
10 banking app -- his banking app is going to say on this
11 day he deposited $10,000 into his account, and then
12 that's going to coincide with a particular drug deal.
13 MR. FISHER: Well, Mr. Chief Justice, those
14 arguments can be made on an app-by-app basis. But what
15 happens is -- this is the benefit of our rule as opposed
16 to the government's. What the government says is let
17 the officer look and then have a back-end hearing where
18 you just suppress all the stuff that he wasn't supposed
19 to look at once you apply particularity requirements.
20 Under our rule, once the officer has the
21 warrant, Leon kicks in and so you don't have to have all
22 these hearings in district courts, because once an
23 officer does a proper search according to the corners of
24 a warrant, you don't have to have the kind of
25 suppression here.

1 And there's one other very important thing
2 that goes into a warrant which might have been glossed
3 over too quickly in the briefs. It's not just what can
4 be looked at; it's how it can be kept. The retention of
5 information raises extraordinary Fourth Amendment
6 concerns. My understanding in California is, at least
7 for some crimes, it's not just that they're downloading
8 the information and looking at it for the crime of
9 arrest, but they're keeping this information in
10 databases, ever-growing databases of every cell phone
11 that they've ever seized.
12 CHIEF JUSTICE ROBERTS: What if you have a
13 device that doesn't have the broad information that a
14 smartphone has, but only a very limited, like a Fitbit
15 that tells you how many steps you've taken, and the
16 defendant says, I've been in my house all afternoon, and
17 they want to check and see if he's walked 4 miles. It's
18 not his whole life, which is a big part of your
19 objection. Is that something they can look at?
20 MR. FISHER: I think probably not. And I
21 think this is the way the categorical rule in Robinson,
22 where it sweeps in the kind of hypotheticals we were
23 talking about in one direction. I think a categorical
24 rule in the other direction for digital information
25 would sweep in the Fitbit. I mean, obviously, I don't

1 have to win that argument today, but I think that's how
2 you would approach that question.
3 Remember, the Fitbit -- and this is true
4 even more so of smartphones -- tells you just the kind
5 of information the Court was very concerned about in
6 Kyllo. It tells you -- modern smartphones work the
7 inside of people's house. They work the appliances
8 and -- and they have cameras. They also monitor the
9 inside of people's bodies.
10 JUSTICE ALITO: What if the phone in this
11 case was an old-fashioned flip-phone? So it had the
12 capacity to take pictures, but a much more limited
13 memory. Would it -- would it be a different case?
14 MR. FISHER: Well, I think you may want to
15 -- that will be part of your conversation in the next
16 case perhaps. I think the easiest way to decide the
17 case right now in 2014 is simply say: Digital evidence
18 kept on modern cell phones are different than physical
19 items. I don't think it's really worth going back in
20 time to the most rudimentary device and having that
21 argument.
22 JUSTICE ALITO: What if the person had on
23 his person a compact disk with photos saved on that?
24 MR. FISHER: I think that might be the same
25 kind of case as you have now. Remember, the -- the

1 phone in this case had a removable memory card, as many
2 still do, which by the way we were going to talk about
3 the destruction of evidence. That's one answer to the
4 destruction of evidence problem. It couldn't possibly
5 have arisen with respect to the evidence at issue
6 because it was on a removable memory card that couldn't
7 be erased remotely or password protected.
8 Now, we've given lots of arguments in the
9 brief that explain why the government's arguments as to
10 wiping simply don't stand up. And --
11 JUSTICE SOTOMAYOR: Mr. Fisher, would you --
12 an earlier question, you didn't finish the answer. You
13 were describing a difference between the downloading by
14 police into databases that they keep forever. What
15 happens with materials that are returned pursuant to a
16 search warrant? Are they precluded from doing that?
17 MR. FISHER: No.
18 JUSTICE SOTOMAYOR: I wasn't sure I
19 understood your --
20 MR. FISHER: Right. So I take it that the
21 ordinary rule is if the police lawfully seize evidence
22 in the physical world, if it's a -- if it's a physical
23 item, it might at some point have to be returned to the
24 owner of it. But if it's something that can be made a
25 photocopy of or a photo, it remains in police files as

1 lawfully obtained information they can use indefinitely
2 into the future.
3 You have real problems, however, when you
4 apply that typical rule to digital information, because
5 now -- again, what I understand -- and the government
6 itself -- the Federal Government in Footnote 3 of its
7 reply brief in Wurie acknowledges that it's keeping in
8 an ever-growing Federal database at least some of the
9 information seized from smartphones.
10 JUSTICE SOTOMAYOR: I'm sorry. I don't know
11 that you've answered my question.
12 MR. FISHER: I'm sorry. Maybe I didn't
13 understand it.
14 JUSTICE SOTOMAYOR: Which -- can they do the
15 same thing once a search warrant is --
16 MR. FISHER: Oh. No. Well, not
17 necessarily, because the beauty of a search warrant is
18 it can delineate retention rules. It can say here's --
19 here's how long you're allowed to keep the information,
20 here's who's allowed to look at it and who's not. And
21 it can --
22 JUSTICE SOTOMAYOR: Frankly, I have to tell
23 you, I don't ever remember a prosecutor coming to me
24 with that kind of delineation.
25 MR. FISHER: Well, I think that, Justice

1 Sotomayor, that is what is starting to now happen in the
2 digital world, because we just have new and different
3 concerns that had arisen -- than had arisen in the past.
4 JUSTICE KAGAN: Mr. Fisher, would there be
5 exigencies that would allow police to look at cell
6 phones? And if so, what would those exigencies be?
7 MR. FISHER: Absolutely. There -- there
8 would be times at the scene where exigencies would allow
9 it. First of all, the two officer safety arguments the
10 other side makes about a hypothetical bomb or a
11 confederate ambush, as this Court already recognized in
12 Chadwick, would give exigent circumstances. The concern
13 about remote wiping we think, and as the experts have
14 described in the amicus brief filed by EPIC and many
15 others, we don't think would ever arise -- give rise to
16 a situation where that was a legitimate concern, but in
17 a very odd world, yes.
18 JUSTICE SCALIA: I don't understand your
19 first exigent circumstances. When there is a bomb, but
20 you can't -- you don't know whether there's a bomb until
21 you look in the phone. Whether -- whether his
22 associates are on the way to, you know, to kill the
23 officer and -- and release their confederate, you don't
24 know until you look into the phone. So how -- you know,
25 how can that possibly be an exigent circumstance?

1 MR. FISHER: Well, I think surrounding facts
2 and circumstances -- in Footnote 9 in Chadwick, what the
3 Court said, dealing with a locked briefcase where you'd
4 have the same problem, Justice Scalia, surrounding facts
5 and circumstances might indicate.
6 There's a hypothetical, I believe it's on
7 page 1 of the amicus brief filed by the State
8 investigative agencies, that I think gives a classic
9 textbook example of how exigent circumstances might
10 apply.
11 JUSTICE SCALIA: It seems to me it would
12 almost never -- you would never be able to say, you
13 know, surrounding circumstances give me reason to
14 suspect that there's a bomb in the phone.
15 MR. FISHER: No. I --
16 JUSTICE SCALIA: Give me reason to suspect
17 that his confederates are on the way.
18 MR. FISHER: I think you're right that
19 that's going to be an extraordinarily rare circumstance.
20 All I'm saying is if you had that extraordinarily rare
21 circumstance, you would not need to get a warrant.
22 JUSTICE KENNEDY: There -- there is not much
23 authority that I could find, if the lawyer is arrested
24 and -- and they want to read his whole briefcase or you
25 want to read a year's diary. And you cite -- I think

1 it's page 7 of your brief -- the Learned Hand 1916 case.
2 Is that about the best discussion you -- you can find?
3 I didn't find anything much different.
4 MR. FISHER: Justice Kennedy, we looked high
5 and low as well --
6 JUSTICE KENNEDY: Right.
7 MR. FISHER: -- and did not find cases
8 involving briefcases full of documents. And there's
9 only one or two stray mentions of a diary. Judge
10 Friendly also mentions the diary situation.
11 JUSTICE KENNEDY: Because it's important if
12 we're going to try to formulate some standard which
13 limits the extent of the search, and that's one of --
14 that's one of the problems in this case. If -- if say
15 we rule for the government in its case, maybe it's not
16 quite fair to ask you, but if we rule for the government
17 in its case in Wurie, in the Federal case --
18 MR. FISHER: Yes.
19 JUSTICE KENNEDY: -- and there's no -- it's
20 not an exigent circumstances, is there some standard
21 where we could draw the line which would still result in
22 a judgment in -- in your favor? Maybe that's not quite
23 a fair question. You're not -- you're not answering --
24 you're not arguing the -- the government's case.
25 MR. FISHER: I don't want to tread on both

1 lawyers in that case, but certainly in my case, we have
2 an exploratory search where not even the State has
3 contended the amount of information looked at is
4 equivalent to what somebody could have carried around in
5 the old days.
6 Can I say something?
7 CHIEF JUSTICE ROBERTS: I'm going to say
8 something first.
9 MR. FISHER: Okay.
10 (Laughter.)
11 CHIEF JUSTICE ROBERTS: If -- if the phone
12 rings, can the police answer it?
13 MR. FISHER: There are cases on that,
14 Mr. Chief Justice. Obviously, this Court hasn't
15 addressed them. All the cases we've found are cases
16 where the police already had a warrant in hand and
17 they've been held that, yes, the police officers can
18 answer the phone in that circumstance. Unquestionably,
19 the police officers could look at the screen.
20 JUSTICE SCALIA: Excuse me. A warrant for
21 what? A warrant for examining the phone?
22 MR. FISHER: For somebody's arrest.
23 JUSTICE SCALIA: For somebody's arrest.
24 Well, how does that extend to your ability to answer his
25 phone?

1 MR. FISHER: No, I'm sorry, Mr. Justice
2 Scalia. I think also in -- to -- to effectuate an
3 arrest and -- and an immediate search of the area.
4 Now, certainly you could look at the caller
5 ID coming through because that would be in plain view.
6 But if I can return to Justice Kennedy's question about
7 the diary. Because there's a couple of important
8 aspects to that I hope to be able to draw out.
9 The reason I think that you don't find diary
10 cases when you look for them is because people hardly
11 ever carry a diary outside the home with them. It was
12 kept in a private drawer in the bedroom or wherever it
13 might be kept, and in the highly, highly unusual
14 circumstance where somebody did, you might have a hard
15 case.
16 This is an -- this is the opposite world.
17 The modern reality of smartphones is that it is an
18 indispensable item for everyday life of a modern
19 professional and, indeed, most anyone. You can't leave
20 the house without it and be -- consider yourself to be
21 responsible and safe. And so you take -- to take a
22 world where the police might try to say, we can get the
23 stray diary because of the importance of the categorical
24 rule under Robinson and try to apply that into a world
25 where everybody has everything with them at all times --

1 JUSTICE KENNEDY: Well, including the
2 criminals who are more dangerous, more sophisticated,
3 more -- more elusive with cell phones. That's the --
4 that's the other side of this.
5 MR. FISHER: Well, Justice Kennedy, the
6 Fourth Amendment has -- has a balance already built in
7 in that respect. We're not saying they can't look at
8 digital information. We're just saying that when they
9 seize it, they can freeze the contents and then go get a
10 warrant and search what they're allowed to search and
11 keep it under the rules of that warrant.
12 CHIEF JUSTICE ROBERTS: Is it significant
13 in -- in this case that the information was not
14 protected by a password?
15 MR. FISHER: No, I don't think either
16 side --
17 CHIEF JUSTICE ROBERTS: That doesn't -- that
18 doesn't affect the expectation of privacy?
19 MR. FISHER: If the other side were making
20 an argument that this wasn't even a search, then I think
21 that might be an argument they would deploy. But I
22 think, and I don't want to speak for the government, but
23 I think that they also agree that password protection
24 doesn't matter. And it certainly doesn't matter under
25 their argument as to what information they get. I mean,

1 their position is if we seize a corporate executive's
2 smartphone at the scene that is locked and protected
3 under password, if we can get that information out back
4 at our lab, we get it all and we don't have to ask for a
5 warrant and we can keep it as long as we want.
6 CHIEF JUSTICE ROBERTS: No. I know they
7 argue that it doesn't matter, but I'm just wondering if
8 your position is weakened by the fact that the
9 individual did not seek the greater protection of a
10 password.
11 MR. FISHER: No, I don't think so. People
12 don't lock their homes, they don't lock their
13 briefcases. Simply having it inside the smartphone
14 protected on the person is enough to trigger the Fourth
15 Amendment, and I think to sustain the arguments I've
16 advanced.
17 If I could reserve the rest of my time.
18 CHIEF JUSTICE ROBERTS: Thank you, counsel.
19 Mr. Dumont.
20 ORAL ARGUMENT OF EDWARD C. DUMONT
21 ON BEHALF OF RESPONDENT
22 MR. DUMONT: Thank you, Mr. Chief Justice,
23 and may it please the Court:
24 As Mr. Fisher has said, if Mr. Riley had
25 been carrying physical photographs in his pocket at the

1 time of his arrest, there's no dispute that arresting
2 officers could have looked at those photographs to see
3 whether they contained evidence of crime. Now, what
4 would have been reasonable in that situation does not
5 become constitutionally unreasonable simply because
6 Mr. Riley instead carried his photographs in digital
7 form on a smartphone. The shifted digital format does
8 not make the photographs any less his papers or
9 effects --
10 JUSTICE SOTOMAYOR: Counsel, in one of our
11 Court decisions in the past, a series of justices
12 asked -- or noted that many of our rules were based on
13 practical considerations. Practically speaking, a
14 person can only carry so much on their person. That is
15 different because carrying a billfold of photographs is
16 a billfold of photographs. It's, you know, anywhere
17 from one to five generally and not much more. But now
18 we're talking about potentially thousands, because with
19 digital cameras people take endless photos and it spans
20 their entire life.
21 You don't see a difference between the two
22 things? What -- what has now become impractical. A GPS
23 can follow people in a way that prior following by
24 police officers in cars didn't permit.
25 MR. DUMONT: We certainly see a distinction,

1 and we certainly see the possibility that in some cases
2 there could potentially be a constitutional difference.
3 What we don't see is that in this case -- on the facts
4 of this case or anything like it, like the ordinary
5 case, there is a constitutional difference from those
6 phenomenon. The theory --
7 JUSTICE SOTOMAYOR: By the way --
8 MR. DUMONT: The theory, even if I'm
9 carrying only five photographs or if I'm carrying two
10 letters as was the case in the Chiagles case, for
11 instance, that Judge Cardozo decided in the '20s, they
12 are likely to be very personal, very private
13 photographs. So I'm not sure that the expansion of
14 volume increases the invasion of privacy.
15 JUSTICE KAGAN: Mr. Dumont, on your argument
16 and on the government's -- the Solicitor General's
17 principal argument, too, a person can be arrested for
18 anything. A person can be arrested for driving without
19 a seat belt. And the police could take that phone and
20 could look at every single e-mail that person has
21 written, including work e-mails, including e-mails to
22 family members, very intimate communications, could look
23 at all that person's bank records, could look at all
24 that person's medical data, could look at that person's
25 calendar, could look at that person's GPS and find out

1 every place that person had been recently because that
2 person was arrested for driving without a seat belt.
3 Now, that strikes me as a very different
4 kind of world than the kind of world that you were
5 describing where somebody has pictures of their family
6 in a billfold. Doesn't it strike you that way?
7 MR. DUMONT: I think the answer that one can
8 always think of marginal cases where there might be
9 concern. It is not the core case, it is not the
10 typical --
11 JUSTICE KAGAN: I don't know why this is a
12 marginal case.
13 MR. DUMONT: It is not the --
14 JUSTICE KAGAN: Your argument and the
15 Solicitor General's principal argument applies to any
16 arrest. And it applies to everything on a cell phone.
17 People carry their entire lives on cell phones. That's
18 not a marginal case. That's the world we live in, isn't
19 it?
20 MR. DUMONT: We hear that repeatedly. The
21 facts of this case are not somebody's entire life on a
22 cell phone. This cell phone had a handful of contacts.
23 I don't think it's in the record, but what we understand
24 is there were 250-some odd contacts, there were about 59
25 photos and there were perhaps 42 videos that ranged from

1 30 to 45 seconds. Maybe a minute each.

2 JUSTICE GINSBURG: The Court is to make a

3 rule not for this particular case, but for this category

4 of cases. And I think what Justice Kagan pointed out is

5 very nervous concern. That is, take an offense like

6 failing to buckle up, even driving under the influence,

7 not gang crimes, which is what we have in this case.

8 It's your rule, then, that the cell phone is fair game

9 no matter what the crime, no matter how relatively

10 unimportant the crime. Is it all misdemeanors, all

11 misdemeanors and that opens the world to the police.

12 MR. DUMONT: It is true that the Court

13 typically and properly, in this area, draws categorical

14 lines and that is what the Court said in Robinson it was

15 doing. Now, it also is true the Court has repeatedly

16 said that those lines are drawn based on the generality

17 of cases. They are not drawn based on the marginal case

18 where the hypothetical potential problematic -- and this

19 case is in the heartland. It's a violent crime.

20 JUSTICE KAGAN: Well, Mr. Dumont, I guess

21 what I'm trying to suggest to you is that you call it

22 marginal, but, in fact, most people now do carry their

23 lives on cell phones, and that will only grow every

24 single year as, you know, young people take over the

25 world.

1 (Laughter.)

2 JUSTICE KAGAN: I mean, that's not a

3 marginal case. That's what -- they're computers. They

4 have as much computing capacity as -- as laptops did

5 five years ago. And -- and everybody under a certain

6 age, let's say under 40, has everything on them.

7 MR. DUMONT: I think you need to look at the

8 generality of cases. And in the generality of cases,

9 first of all, you will not be dealing with minor crimes.

10 You'll be dealing with serious crimes. And second,

11 you'll be dealing with police who are -- undo their job

12 by booking --

13 JUSTICE KENNEDY: Are you saying we're just

14 resting on the discretion of the officer? Because if

15 that's so, then that leads to the next question. Well,

16 if that's so, then we'll get a warrant.

17 MR. DUMONT: I'm saying that you're -- you

18 are trying to draw lines that can be applied by the

19 officer in the field and often when there's not time to

20 get a warrant either because there's a need to know the

21 information now or because --

22 JUSTICE KENNEDY: Well, let's leave -- let's

23 leave exigent circumstances out of it. That -- that's

24 an easy case. You're not arguing for exigent

25 circumstances here.

1 MR. DUMONT: What I'd say is that -- to go
2 back to Justice Scalia's point -- our argument is that
3 the same things that Mr. Fisher concedes, the same
4 interests that Mr. Fisher, I think, concedes justify the
5 search of the person and the seizure of the phone, which
6 are the exigent circumstances type arguments. In other
7 words, they are the need to protect officer safety and
8 the need to preserve evidence. And the fact is you
9 don't know with a phone. The officer doesn't know with
10 a phone whether there's a safety concern or whether
11 there's an evidentiary concern without looking at the
12 phone.
13 CHIEF JUSTICE ROBERTS: Have there ever
14 been -- is there any basis for the generality that
15 there's a safety concern? Do you have a case where the
16 -- certainly not where the phone exploded, but when the
17 phone was used to trigger a device or anything like
18 that?
19 MR. DUMONT: We don't have a specific case.
20 What I can point you to --
21 CHIEF JUSTICE ROBERTS: Do you have a
22 general case?
23 MR. DUMONT: Well, I can point you to,
24 here's a case from California. I don't think it's cited
25 in the briefs. It's called Natoli. There's one where

1 there's a late night arrest. It -- it starts with a
2 speeding ticket, and it -- off the highway late at
3 night. It develops that, you know, maybe there's more
4 going on and the person looks to be under the influence.
5 Taken out of the car. Then it looks like there might be
6 a gun. The officer looks at the cell phone. The first
7 thing he sees when he turns the phone on is a picture of
8 what appears to be the driver standing with two assault
9 rifles, arms akimbo like this, posing with his assault
10 rifles. Now, I would say that that changes the
11 situational awareness of the officer in that situation
12 and provides valuable information that was necessary at
13 the time and could not have been gotten later at the
14 station house.
15 CHIEF JUSTICE ROBERTS: What does that have
16 to do with my question about a bomb?
17 MR. DUMONT: I'm merely saying that it has
18 to do with safety. So no, I can't point you to a case
19 where they stopped Timothy McVeigh, looked at his phone
20 and saw some notes about bomb making. I can't give you
21 that case.
22 JUSTICE SOTOMAYOR: I would assume you need
23 to operate the phone to set off the bomb, so that once
24 the police have the phone the bomb is not going to be
25 set off.

1 MR. DUMONT: That is true. It's also true
2 of all the objects in all the Court's prior cases. In
3 other words, once in Robinson the police had secured the
4 cigarette pack, there was no question, whether there was
5 a razor blade in it or just heroin --
6 JUSTICE SOTOMAYOR: Could I just ask you --
7 MR. DUMONT: -- that neither the evidence --
8 the evidence was not going to be destroyed and the
9 weapon was not going to be used.
10 JUSTICE SOTOMAYOR: Could I ask you a
11 question about the extent of your theory? We're talking
12 about smartphones, which are minicomputers. But your
13 theory would apply to iPads, computers, anything that's,
14 for example, sitting next to a person in a car, at their
15 desk if they are arrested at their desk, anywhere if
16 they are carrying it in their hand because you see a lot
17 of people carrying the iPad or something comparable, a
18 tablet of some sort. Your theory would permit a search
19 of all of those things.
20 MR. DUMONT: Our theory extends to objects
21 that are on the person or immediately associated with,
22 for instance in a purse. It doesn't necessarily extend
23 to things that are sitting nearby. The Court has drawn
24 a clear line there. It's --
25 JUSTICE GINSBURG: Well, how would you?

1 What is the rule? You're saying on the person. Suppose
2 it's in the car in a holder or suppose it's in the
3 passenger's seat? Are you saying that's -- you don't
4 want to express an opinion about that? You only want to
5 talk about what's in somebody's pocket?
6 MR. DUMONT: I'll say I think the Court has
7 drawn different rules for that situation. If it's on
8 the car seat and if the person's been removed from the
9 car, then under Gant if there's reason to think there
10 might be evidence of the crime of arrest on the phone
11 they can search it and if there's not they can't.
12 That's the rule the Court drew, but it's a different
13 rule Under Robinson.
14 JUSTICE KAGAN: Well, suppose I'm carrying
15 my laptop in my backpack.
16 MR. DUMONT: And if your backpack is on your
17 back when you're arrested, yes, we think that's -- we
18 think that's included.
19 So let me go back to this volume question,
20 because there are two things about a cell phone that
21 might justify some sort of a special rule. There's the
22 volume question and then there's the connectivity and
23 networking question.
24 Now, as to the volume question, first of all
25 we don't clearly have it here, but I concede that we

1 could have it in other cases. And what they seem to be
2 really concerned about is the idea that if you have
3 enough information of enough different kinds on this
4 device and the police spend enough time looking at it,
5 they could build the kind of near-remarkable portrait
6 that some of the Justices alluded to in Gant, or, sorry,
7 in Jones, that -- that really would be qualitatively
8 different from what has ever been done before.
9 Now, there are differences from Jones. That
10 was government surveillance and this is some choice the
11 person has made to keep a certain amount of information
12 on a phone and then to have it in his pocket. We think
13 there's a possibility you could get to that kind of
14 qualitatively different search, but it is miles away
15 from this kind of case and from the heartland case.
16 JUSTICE BREYER: So there are three
17 possibilities: Possibility one, smartphone, no, get a
18 warrant, unless exigent circumstances. Possibility two,
19 yes, it's just like a piece of paper that you find in
20 his pocket. Or possibility three, sometimes yes,
21 sometimes no. All right, which of those three is yours?
22 MR. DUMONT: Our possibility -- our position
23 is that the core information like this -- that is
24 contacts, photographs --
25 JUSTICE BREYER: No, no, I mean of my three

1 choices. I mean, call the first choice never except
2 exigent without a warrant; always, you don't need a
3 warrant; or three, somewhere in between. Which of the
4 three choices is yours?
5 MR. DUMONT: It's in between with an
6 explanation.
7 JUSTICE BREYER: In between. Okay. Now
8 we're in between. Then I get to my follow up question.
9 MR. DUMONT: The explanation --
10 JUSTICE BREYER: My follow up question is,
11 please tell me what your in-between rule is?
12 MR. DUMONT: Right. And my in-between rule
13 with the explanation is that for information that is of
14 the same sort that police have always been able to seize
15 from the person, that includes diaries, letters, all
16 other kinds of evidence, purely evidentiary,
17 photographs, address books, for evidence of that same
18 sort, the same rule should apply.
19 JUSTICE KAGAN: Well, I don't understand
20 that, Mr. Dumont. Everything --
21 MR. DUMONT: The digital format should not
22 make a difference, and I would leave for --I would leave
23 for a different day -- sorry, but the last explanation
24 to this is I would leave for another case --
25 JUSTICE KAGAN: Mr. Dumont --

1 MR. DUMONT: -- the question of whether the
2 volume --
3 CHIEF JUSTICE ROBERTS: I'm sorry. Justice
4 Kagan has a question.
5 JUSTICE KAGAN: Mr. Dumont, I guess I just
6 don't understand. You said if it could be. I mean,
7 everything could be reduced to a piece of paper. All
8 your bank records, you could have them on you. All your
9 medical records, you could just happen to have them on
10 you. I mean, that would be so of absolutely everything,
11 wouldn't it?
12 MR. DUMONT: The bank records, of course,
13 the police can get from the bank because they're the
14 bank's records, right, with a subpoena, not with -- not
15 with a search warrant. So to the extent that a lot of
16 people --
17 JUSTICE KAGAN: Well, I think that the
18 notion that you could get them legally in some other way
19 has never justified an illegal search otherwise.
20 MR. DUMONT: No, but I think it goes to the
21 question of how sensitive is this information that we're
22 being told is now routinely stored on --
23 JUSTICE BREYER: Your rule is sometimes. So
24 I say: Sometimes; what's that? And you say if it is
25 the kind of thing that the police could have searched

1 for if it wasn't on the computer, then they can search
2 for it on the computer. Now, since they can search for
3 everything in your pockets before when it isn't the
4 computer, then why isn't yours everything? I mean, by
5 the way, they don't know whether a call is or is not
6 going to turn out to be evidence when it's in your trash
7 box if that's, or wherever you put it, I don't know.
8 They don't know that 'til they read it.
9 So I guess what you're saying is I thought
10 it was category two, sometimes, but really it's category
11 three, always. Now, why am I wrong?
12 JUSTICE SCALIA: I think he inverted two and
13 three, but --
14 JUSTICE BREYER: That gives you time to
15 think.
16 MR. DUMONT: If the police are looking for
17 -- have a legitimate investigative purpose, they're
18 looking at the information on the -- to see whether
19 there is evidence of the crime of arrest or of another
20 crime, it seems to us that they should, at a minimum, be
21 able to look at the same kind of information they could
22 have looked at in any other previous context, the
23 address book, the contacts, the phone numbers.
24 CHIEF JUSTICE ROBERTS: So but that's a
25 significant concession on your part, isn't it, because

1 the smartphones carry a lot of information that would
2 not have been the sort of thing police could look at
3 before. GPS tracking information, the police could
4 never have gotten that before. So you are saying that
5 is protected?
6 MR. DUMONT: I'm not saying it's protected.
7 I'm saying I think it raises a different set of issues.
8 JUSTICE KENNEDY: It seems to me that in
9 order to try to give some answer to Justice Kagan's
10 concerns that maybe the distinction ought to be between
11 serious and nonserious offenses -- offenses. I don't
12 think that exists in our jurisprudence. Correct me if
13 I'm wrong.
14 MR. DUMONT: I think that's correct. The
15 Court has previously declined to draw that line. Now,
16 another --
17 JUSTICE BREYER: By the way, GPS
18 information, I don't want to admit it, but my wife might
19 put a little note in my pocket". Steven, remember, turn
20 right at the third stoplight, proceed three blocks
21 forward. Of course you could have looked at information
22 that showed where you had been and where you were going
23 as long as it was on paper. Now it's in a GPS. So how
24 does your rule help?
25 CHIEF JUSTICE ROBERTS: The GPS would see if

1 he did, in fact, turn right at the thing or had gone
2 somewhere else.
3 MR. DUMONT: I think the -- again, we can
4 conceive of situations in which the amount of
5 information and the kind of search would lead to a
6 qualitatively different result. We think that it --
7 JUSTICE ALITO: You could amend your answer
8 and it's -- the answers are for you, not for us. But
9 you could amend your answer to say not just anything
10 that somebody could have had. The person could have had
11 a diary that records every place the person has ever
12 gone in the last year, it's theoretically possible. But
13 you could say something that has a realistic analogue in
14 the predigital era. We have a similar -- a problem here
15 that's similar to the problem in the Jones GPS case.
16 You have a rule of law that was established in the
17 predigital era and now you have to apply it in the
18 digital era or you're asked to apply it in the digital
19 era where the technology changes a lot of things. But
20 if there is a close analogue in the digital era to
21 something that would have been allowed in the predigital
22 era, that may be a different story.
23 MR. DUMONT: We certainly think that's right
24 and we think that that covers, you know, the information
25 that was at issue here, the photographs, the short

1 videos. It certainly covers address information,
2 contact information, messages, text messages.
3 JUSTICE SCALIA: But you're not willing to
4 limit -- you're not willing to limit your position to
5 searches that either are in order to protect the officer
6 or in order to preserve evidence or, number three, in
7 order to find evidence of the crime of arrest. You're
8 not willing to limit it that way? You would say
9 whatever is on the person, you can -- you can search.
10 MR. DUMONT: We think of the available
11 limits that is by far the best historically based and
12 the most plausible one. So to say that -- and because
13 the cases, the old cases, you pointed out that --
14 JUSTICE SCALIA: But that gets you into the
15 arrest for, you know, for not wearing a seat belt, and
16 it seems absurd that you should be able to search that
17 person's iPhone. You should be able to search that
18 person's iPhone. And you can avoid that if you -- if
19 you say, look, at the vast majority of cases, this is
20 not going to be a problem, unless the officer can
21 reasonably be looking for evidence of the crime of
22 arrest. That will cover the bad cases, but it won't
23 cover the -- you know, the seat belt arrest.
24 MR. DUMONT: We think that that could be a
25 perfectly reasonable ruling, and there's precedent in

1 the Court, obviously, for that rule. There's two things
2 we would say about that. First, it ought to be an
3 objective standard in line with all of this Court's
4 Fourth Amendment jurisprudence. It shouldn't depend on
5 what exactly was written down on the -- on the booking
6 sheet. It should be was there probable cause to arrest
7 or what crimes was there probable cause to arrest for,
8 and it also should include a plain view concept --
9 JUSTICE BREYER: Or how -- there's an
10 analogue with photos. The arrested person has photos,
11 pre-digital age. Of course you can look at them. On
12 the phone there are photos. Absolutely analogous,
13 except there are 10,000. It's indeed his entire life
14 history in photos.
15 MR. DUMONT: All right.
16 JUSTICE BREYER: On your rule, can the
17 policeman look at the photos by analogue or not, because
18 there are 10,000. Okay? What's the answer?
19 MR. DUMONT: In theory, yes, the police can
20 look. In practice --
21 JUSTICE BREYER: What we have is, by the
22 way -- you understand where I'm going. I think there
23 are very, very few things that you cannot find in
24 analogue to in pre-digital age searches. And the
25 problem in almost all instances is quantity and how far

1 afield you're likely to be going. Why is that your
2 rule?
3 MR. DUMONT: The fundamental doctrinal
4 basis, rational basis of the Robinson rule, I think, is
5 that the fact that arrests -- this is what Justice
6 Powell said and Justice -- well, the fact of the arrest
7 necessarily and legitimately largely abates the privacy
8 interest of the individual and his person and anything
9 he or she has chosen to carry on the person.
10 Now, modern technology makes it possible for
11 people to choose to carry a great deal of information.
12 But that doesn't change the fact that the reasonable
13 expectation, if a person is subject to custodial arrest,
14 is that the police will search the person and look at
15 things that they find --
16 JUSTICE KAGAN: Mr. Dumont, is -- are you
17 saying, essentially, that nobody has any expectation of
18 privacy, or that somebody has a dramatically reduced
19 expectation of privacy in anything that the person
20 actually wants to keep on them at all times? In other
21 words, one has to keep one's cell phone at home to have
22 an expectation of privacy in it?
23 MR. DUMONT: No, we're not saying that at
24 all. But what we are saying is that people do make
25 choices, and those choices have consequences. And the

1 consequence of carrying things on your person has always
2 been that if you are arrested, the police will be able
3 to examine that to see if it is evidence of crime.
4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Mr. Dreeben?
6 ORAL ARGUMENT OF MICHAEL R. DREEBEN
7 FOR UNITED STATES, AS AMICUS CURIAE
8 SUPPORTING RESPONDENT
9 MR. DREEBEN: Mr. Chief Justice, and may it
10 please the Court:
11 I think that it may be helpful to the Court,
12 before exploring possible alternatives to a categorical
13 Robinson rule, to at least briefly understand why there
14 is a categorical Robinson rule and how cell phones
15 implicate many of those concerns. The categorical
16 Robinson rule responded to the fact that when a person
17 is carrying something on their person and they are
18 subject to a legitimate probable cause arrest, their
19 expectations of privacy are considerably reduced. Not
20 eliminated, but considerably reduced.
21 And the government, on the other hand, has
22 several very compelling interests at the moment of
23 arrest that are vindicated by conducting a thorough
24 search of the person and the things he has. It avoids
25 the destruction of evidence. It protects officer

1 safety. And it allows the discovery of evidence that's
2 relevant to the crime of arrest to enable prosecution.
3 JUSTICE GINSBURG: But, Mr. Dreeben, if
4 the -- the understanding was, when there's time, get a
5 warrant. So here, you can seize the phone and you can
6 secure the phone, and you could go to a magistrate and
7 within an hour get permission to search. But what is
8 the reason for cutting out the magistrate here? It's
9 not -- the instrument itself is not going to be in any
10 danger because the police have taken it and they've
11 disabled it. So I don't understand why we cut the
12 warrant out of this picture.
13 MR. DREEBEN: So several answers to that,
14 Justice Ginsburg. The first is that you could probably
15 say the same thing about almost everything that is
16 seized under Robinson and Edwards. Once it's in the
17 police's hands, they can throw it in the back of the
18 patrol car in the trunk, and it would be safe and they
19 could go get a warrant. But the balance has always been
20 struck at the moment of arrest to allow the officers to
21 fulfill the compelling interests in the matters that
22 I've previously described.
23 The second, and I think very critical thing
24 about cell phones is they do differ in the amount of
25 information that a person can carry on them and the

1 amount of revelation about a person's life. That is
2 true. They also differ in that they greatly facilitate
3 criminal activity. They contain a great deal of
4 evidence, and most critically, they are subject to
5 destruction in a way that ordinary physical items are
6 not. Even if an officer has a cell phone in his hand,
7 he cannot guarantee, unless it's disconnected from the
8 network or somehow protected from the network, that
9 there won't be a remote wipe signal sent to the phone
10 that will wipe its data.
11 CHIEF JUSTICE ROBERTS: Do you have cases
12 where that has happened?
13 MR. DREEBEN: I have anecdotal reports from
14 the F.B.I. that that has happened, that they have looked
15 into the question of to what extent can you protect a
16 phone through the use of things like Faraday bags. I
17 think one of the important things to notice, if you
18 throw a phone into a Faraday bag, which is supposedly
19 going to be able to block network signals, when you open
20 it up, it has to be similarly shielded or it will pick
21 up a signal from a cell tower, and that will wipe the
22 phone. And the F.B.I. tried to build a Faraday room in
23 a building that they later discovered Verizon had put up
24 a cell tower on it, and that cell tower put out a strong
25 enough signal to go right through the Faraday room.

1 JUSTICE BREYER: We've had a couple of
2 States where this has been so, where they've had a rule
3 that you can't search, for Michigan, I think, and
4 Vermont. And are there any instance out of those States
5 where these scenarios have taken place?
6 MR. DREEBEN: I can't speak, Justice Breyer,
7 for the experience in those States.
8 JUSTICE BREYER: You don't know then. I
9 take it you don't know.
10 MR. DREEBEN: I don't have any access to the
11 information about that.
12 JUSTICE BREYER: All right. So isn't this a
13 problem that might be postponed because we have warring
14 technologies, et cetera? And is it -- you're saying now
15 we should allow searches of all cell phones because
16 there might be a technology that hasn't yet in fact been
17 used in any of the States that have this rule. That
18 sounds a little hypothetical. I'm not quite sure how to
19 handle it.
20 MR. DREEBEN: Well, I think that there is
21 clearly the technology available and growing technology
22 to wipe phones remotely. But the other critical problem
23 that comes back to Justice Ginsburg's point about
24 getting a warrant is encryption technology is
25 increasingly being deployed in cell phones. That is

1 something that clearly is on the rise. And when a phone
2 is turned off or the lock kicks in and the phone
3 encrypts, it can be almost impossible to get into it.
4 JUSTICE SOTOMAYOR: How about putting -- let
5 me stop you, because you were making that argument in
6 your brief, and I have three related questions. Okay?
7 Why can't you just put the phone on airplane
8 mode?
9 MR. DREEBEN: Can I answer that one first?
10 JUSTICE SOTOMAYOR: Yes.
11 MR. DREEBEN: First of all, it is not always
12 possible to find airplane mode on all the 500, 600
13 models of phones that are out there. The officer has a
14 lot of things to do when he arrests suspects. Say he
15 arrests five suspects in a car and they each have three
16 cell phones. Trying to find and put each one of them
17 into airplane mode and then go the further step and --
18 JUSTICE SOTOMAYOR: You're -- you're
19 confusing me, because if you haven't searched on the
20 scene, then the wipe is going to happen. If you've had
21 enough time at the precinct to put it on airplane mode,
22 the wipe hasn't happened.
23 MR. DREEBEN: Well, that's not necessarily
24 true, Justice Sotomayor.
25 JUSTICE SOTOMAYOR: I'm a little confused

1 about what this argument is. Either you do it at the
2 scene and you protect the phone --
3 MR. DREEBEN: Yes.
4 JUSTICE SOTOMAYOR: -- or you do at the
5 station, and you have enough time to get the warrant by
6 putting it on airplane mode.
7 MR. DREEBEN: Well, you don't necessarily
8 have enough time to get the warrant if you do it at the
9 scene. That -- that's certainly true. I think even --
10 JUSTICE SOTOMAYOR: I don't disagree. Put
11 it on airplane mode.
12 MR. DREEBEN: Even if you bring it back --
13 the assumption that we're going to have airplane mode
14 and that the Court should craft a constitutional rule
15 around airplane mode assumes that cell phones are not
16 going to be able to be used in airplanes in the next
17 five years and that manufacturers will continue to make
18 an easily available button for airplane mode. I don't
19 think the Court should found a constitutional ruling on
20 that assumption.
21 JUSTICE SOTOMAYOR: I -- I don't disagree
22 with you, but you're asking us for constitutional
23 principle based on technology that might or might not do
24 something in one or more cases, but not in the
25 general --

1 MR. DREEBEN: I think what I'm trying to
2 suggest, Justice Sotomayor, is the traditional
3 justifications for search-incident-to-arrest include the
4 potential for destruction of evidence. That is very
5 real today. It's Petitioner who's asking for a new
6 rule. We're asking for the application of the Robinson
7 rule, and if the Court is not willing to apply the
8 Robinson rule, then primarily, I think the best rule to
9 apply would be the --
10 JUSTICE KENNEDY: Well, but that's not --
11 that's not quite accurate. What would you do under the
12 Robinson rule with an attorney's briefcase?
13 MR. DREEBEN: The attorney's briefcase may
14 present particularized problems because of
15 attorney-client privilege.
16 JUSTICE KENNEDY: And -- and doesn't that
17 present the exact problem that every cell phone has?
18 MR. DREEBEN: No. I was referring --
19 JUSTICE KENNEDY: So I don't think that
20 quite works for you.
21 I -- I was referring --
22 JUSTICE KENNEDY: I don't think that quite
23 works for you.
24 MR. DREEBEN: I was referring to the
25 privilege rule. The lower courts that have looked at

1 it; this Court has not. Lower courts that have looked
2 at the question have said that if a person is arrested
3 holding a briefcase, the police can open the briefcase,
4 whether locked or unlocked, and look at its contents.
5 They can't just go through the contents for prurient
6 interest.
7 They can look, however, for evidence that's
8 relevant to criminal activity, and they do that in a way
9 that is minimally invasive of privacy. They're not just
10 doing it for the sake of doing it. They're looking for
11 evidence.
12 JUSTICE KENNEDY: Well, the tax return
13 that's on -- some -- some cell phones have tax returns,
14 so you have the tax return of the jaywalker, looking for
15 a crime.
16 MR. DREEBEN: Yes, and I -- and I -- I would
17 acknowledge, Justice Kennedy, that if the Court is
18 looking for a rule that limits the ability of police to
19 search cell phones, because cell phones are different
20 from paper items in some respects, but not all, that the
21 most reasonable rule to apply would be one that says
22 when there is reason to believe that there's evidence of
23 the crime of arrest on the phone, the officers can look
24 for that. When there is not, they can't. That will --
25 JUSTICE KAGAN: Can I ask you a question

1 about that, Mr. Dreeben, because given the variety of
2 things that these cell phones have in them, it seems as
3 though that's -- you know, it sounds good as a limiting
4 principle, but it ends up you can imagine in every case
5 that the police could really look at everything.
6 So I'll give you an example. It's sort of
7 like this case. Somebody is arrested for a gun crime
8 and now we're going to look at all the various things
9 that might be related to a gun crime. So whether he's
10 bought guns, whether -- you know, what -- what --
11 whether he's done searches for gun stores. His e-mails
12 might something say something about gun possession or
13 gun purchase. He might have photographs of him with a
14 gun. You know, the whole range of things could relate
15 to that crime, couldn't it?
16 MR. DREEBEN: Justice Kagan, I would
17 acknowledge that your reasoning is correct in certain
18 circumstances and for certain crimes. It would not be
19 the case for a jaywalking crime or a bar fight or many
20 other of the minor crimes, seat belt violations, that
21 are posited on the other side of the equation for
22 Respondent's or Petitioner's narrower approach to cell
23 phone searches.
24 But I do think that a couple of things are
25 worth thinking about. First, in a serious offense like

1 a firearms offense in this case, a drug offense in
2 Wurie, if the police didn't -- went, got a warrant, they
3 would be looking at all the same things, because the
4 only way to execute the warrant on the phone would be to
5 engage in at least a cursory search of everything on the
6 phone to see whether it related.
7 JUSTICE KAGAN: Well, they would be looking
8 at the same things, but the whole idea of a warrant is
9 that a neutral magistrate tells you that you can look at
10 those things and has an opportunity to limit it in
11 whatever way the neutral magistrate feels is
12 appropriate --
13 MR. DREEBEN: Well, I --
14 JUSTICE KAGAN: -- and that's a protection.
15 MR. DREEBEN: I -- I'm not sure that I would
16 go so far as to say the neutral magistrate can narrow
17 the warrant in any way that he sees appropriate. This
18 Court's decisions in Grubbs and Dalia say that it's not
19 appropriate for the magistrate to prescribe the manner
20 of executing the search.
21 But I think the more fundamental point, and
22 this is why I tried to start with the basic bedrock of
23 Robinson, is that there is a different balance --
24 CHIEF JUSTICE ROBERTS: Go ahead, please.
25 MR. DREEBEN: There is a different balance

1 at the moment of the arrest. At that moment society's
2 interests are at their apogee in locating evidence
3 relating to the crime of arrest and apprehending related
4 suspects, and the suspect has a highly reduced privacy
5 interest.
6 CHIEF JUSTICE ROBERTS: Thank you, counsel.
7 4 minutes, Mr. Fisher.
8 REBUTTAL ARGUMENT OF JEFFREY L. FISHER
9 ON BEHALF OF THE PETITIONER
10 MR. FISHER: Thank you.
11 I think I heard about four or five different
12 proposed rules that I want to just go through, each of
13 them, one at a time.
14 First, the State talked about a, quote,
15 "fundamentally different rule," and I think Justices
16 have already figured out what we say at page 17-18 of
17 our reply brief, which is that would sweep in virtually
18 everything on the phone.
19 To the extent it wouldn't, you'd have a
20 really difficult struggle on a case-by-case basis to
21 answer the very difficult question whether any
22 particular app had fundamentally different information
23 that existed in the nondigital world.
24 I also heard a suggestion, that, well, if a
25 laptop or a smartphone is on somebody's person, that's

1 different than if it's sitting next to them. That's not
2 correct if what the government says about its Chimel --
3 about passwords and wiping satisfies Chimel. Remember,
4 Chimel gives authority to search and seize without a
5 warrant anything in the grab area if there's a
6 destruction argument. So the person who's arrested
7 sitting at his desk at the office, reaching area from
8 his computer would be open to a full search under the
9 government's rule.
10 There was also discussion about the
11 exigencies at the scene of an arrest, needing to prevent
12 a remote wipe, preventing a password from kicking in.
13 The first thing to make sure you understand is those
14 arguments can apply only at the scene. They don't apply
15 in this case, where an officer takes the phone back to
16 the police station and 2 hours later searches through it
17 as his -- at his leisure. So all the arguments about at
18 the scene and what the officer needs to be able to do at
19 the scene can be left for another case.
20 And I think Justice Breyer is exactly right.
21 At the very best what the government has shown is that
22 there may be certain tightly limited circumstances where
23 exigent circumstances would apply.
24 And I want to say a just quick thing on the
25 password question in particular, which we didn't talk

1 about but may come up in the next argument. Pages 12 to
2 14 of our reply brief, we outline how highly unusual as
3 a factual matter it would be for a smartphone to be
4 seized while it's still unlocked and for an officer not
5 to be able to address concern at the scene that it might
6 lock later. And it's also worth noting that in a
7 footnote we attach, the government is arguing in lower
8 courts that even if it does lock, that the Fifth
9 Amendment does not give the person the opportunity to
10 refuse to divulge the password in -- in response to a
11 warrant.
12 So the password argument doesn't have any
13 play if the government wins the argument its making in
14 the lower courts.
15 Justice Kennedy, you suggested the
16 possibility of distinguishing between serious and
17 nonserious offenses. I think, with all due respect,
18 this Court's decisions in Robinson and Atwater, where
19 that issues was squarely presented, preclude that kind
20 of a -- a determination for all the reasons the
21 government argued in those cases.
22 And then finally, Justice Scalia, you, I
23 think, had mentioned a couple times the Gant principle
24 as applied to this case, evidence that you think you
25 might find on a phone. Well, there's two profound

1 problems with that. The first is, as the Court
2 recognized in Kyllo, you need to be sure to protect the
3 amount of privacy people had at the founding.
4 And as I said in my opening, the fact that
5 somebody might incidentally have an item on his person,
6 even in the rare case, diary or address book, are
7 leagues away from the kind of information people have
8 now that were stored in the home and that were
9 sacrosanct at an arrest, and that's what the thread
10 throughout history says is an arrest cannot be an
11 occasion to do that kind of a search.
12 And, Justice Kagan, you're exactly right.
13 If you run the Gant test through the world of crimes,
14 the government might be able to identify a crime here or
15 there that would be difficult to make an argument about.
16 But lots of minor crimes, like speeding, as we point out
17 in our brief, DUI, littering, all kinds of minor crimes,
18 the person can make a fairly convincing argument
19 sometimes that evidence on the phone would be relevant
20 to that crime of arrest.
21 And so I think that brings me to where I
22 want to end, which is understanding what the rule the
23 government propounds would do in terms of just ordinary
24 police work. Remember, this case starts with a traffic
25 stop for an expired license plate. It is everyday

1 police work that traffic stops are the beginning of
2 criminal investigations and a leverage point into
3 searches.
4 If you adopt a rule that says, even a Gant
5 rule, that says if you can make an argument that
6 evidence on the phone would be relevant to the crime of
7 arrest, take the suspended license, you may have an
8 e-mail from the DMV telling you you better come in and
9 renew. If that opens up every American's entire life to
10 the police department, not just at the scene but later
11 at the station house and downloaded into their computer
12 forever, I think you will fundamentally have changed the
13 nature of privacy that Americans fought for at the
14 founding of the Republic and that we've enjoyed ever
15 since.
16 CHIEF JUSTICE ROBERTS: Thank you, counsel.
17 The case is submitted.
18 (Whereupon, at 11:33 a.m., the hearing was
19 adjourned.)
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