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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner : No. 13-212

v. :

BRIMA WURIE :

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Washington, D.C.

Tuesday, April 29, 2014

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:36 a.m.

APPEARANCES:

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of Petitioner.

JUDITH H. MIZNER, Assistant Federal Public Defender, Boston, Mass.; on behalf of Respondent.

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1 P R O C E E D I N G S

2 (11:36 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 next in Case 13-212, United States v. Wurie.

5 Welcome back.

6 (Laughter.)

7 ORAL ARGUMENT OF MICHAEL R. DREEBEN

8 ON BEHALF OF PETITIONER

9 MR. DREEBEN: Thank you, Mr. Chief Justice,  
10 and may it please the Court:

11 The facts of this case, United States v.  
12 Wurie, I think, illustrate why any categorical rule that  
13 would preclude searches of cell phones incident to  
14 arrest would be inconsistent with historical practice  
15 and detrimental to law enforcement.

16 This is a case where what the officers did  
17 was see a phone ringing. On the outside screen, the  
18 caller was identified as "my house." The officers  
19 opened up the phone, pressed one button to see that the  
20 call came in from "my house" and pressed another to see  
21 what the phone number was. That's all they did.

22 That kind of a search serves valid,  
23 time-honored functions in the search situation of  
24 helping to ascertain the identity of the offender. This  
25 was a crucial fact because a few minutes later, Wurie

1    lied about where he lived, which was relevant to the  
2    police ultimately obtaining a warrant to search his  
3    house. They didn't know where he was. They would not  
4    be able to --

5            JUSTICE SOTOMAYOR:            I'm not -- I'm not so  
6    sure. If he was at the precinct, they could have gotten  
7    a warrant, and once he lied about his arrest, they would  
8    have known he wasn't living there and would have gotten  
9    a warrant.

10           MR. DREEBEN:            Justice Sotomayor, you could  
11   almost always say in search-incident-to-arrest cases  
12   that the police could have gotten a warrant. It's --  
13   I'm not talking about cases where somebody is carrying a  
14   gun and the police take the gun off them and -- and they  
15   secure it that way. But in all of the other cases that  
16   you could imagine that involve searches for evidence,  
17   letters, which occur in the historical cases; billfolds,  
18   which have been discussed here, once the officer has it,  
19   you could say the officer shouldn't be able to look in  
20   it because that could be done under a warrant. There's  
21   no time constraint. There's no destruction of evidence  
22   constraint.

23            Here, in fact, there actually is a  
24   destruction-of-evidence threat with respect to the  
25   general category of cell phones, and that's what this

1 Court has been asked to look at, the general category,  
2 cell phones and smartphones.

3 We discussed earlier the threat of remote  
4 wiping and whether airplane mode is an effective counter  
5 to that. There is the other threat that I think is even  
6 more critical to law enforcement today, and that is  
7 encryption. Because if the phone turns off and becomes  
8 encrypted, officers can go to the magistrate and ask for  
9 a warrant, but it may be months or years or never if  
10 they can break through the encryption and actually  
11 obtain the evidence.

12 So to the extent that the traditional  
13 destruction-of-evidence rationale justified the search  
14 of a cell phone or justified the search of traditional  
15 items, it applies even more strongly with respect to  
16 cell phones than it does with most of the items that  
17 might be seized from a person.

18 So Wurie, I think --

19 JUSTICE SOTOMAYOR: Please tell me about  
20 encryption, because I know people can encrypt, but I  
21 thought they had to do that when they put the  
22 information in the phone.

23 MR. DREEBEN: No. As best I understand it,  
24 Justice Sotomayor, many smartphones today are equipped  
25 with built-in encryption. Apple has hardware encryption

1 and software encryption. Samsung and HTC and other  
2 brands are quickly following with strong encryption.  
3 The encryption is deployed in a way that if you don't  
4 have the key, the data that's on the phone is useless.  
5 The key is often stored in memory and it's accessible  
6 only when you can get into the phone.

7 Now, if the phone is on and functioning  
8 because the person has been arrested while they are, for  
9 example, making a phone call, you can get access to the  
10 phone and you can attempt to get information from the  
11 phone without the encryption key being an obstacle. But  
12 if the encryption is deployed, that can sometimes be an  
13 insuperable barrier even to the manufacturer.

14 JUSTICE SOTOMAYOR: I'm not sure how on the  
15 scene the police are going to look at everything in a  
16 cell phone anyway. They've got to be doing something to  
17 save it. If the encryption can be --

18 MR. DREEBEN: Well, no. The -- the evidence  
19 is -- the information on the phone is encrypted -- this  
20 is my understanding, Justice Sotomayor -- but the phone  
21 itself has the key to decrypt it because the user  
22 obviously wants to get access to the information.

23 JUSTICE BREYER: I mean, you have a problem.  
24 Apparently, neither you nor I actually have this on  
25 their phone, as far as I know. So I'm imagining

1 something. Maybe you have it. There is some kind of  
2 system that once it goes "bzzz," you never can get the  
3 stuff again except after eight months, and when this  
4 "bzzz" happens, is it happens at least ten minutes after  
5 the arrest and not before, so the policeman would have  
6 time to look at it. But the -- by the time you get to  
7 the stationhouse, the "bzzz" has already happened, so  
8 now nobody else can. Maybe there is such a thing. I've  
9 never heard of it before this minute or before the  
10 briefs. Well, why wouldn't -- you see I'm similarly  
11 incredulous about it from my tone of voice because I  
12 don't see why somebody who wanted to "bzzz" actually to  
13 keep the police away wouldn't do it after 30 seconds.

14 MR. DREEBEN: So if you have an iPhone,  
15 Justice Breyer, and I don't know what kind of phone that  
16 you have --

17 JUSTICE BREYER: I don't either because I  
18 can never get into it because of the password.

19 (Laughter.)

20 MR. DREEBEN: It's encrypted. And that's  
21 the problem. The phones are set up to protect the data  
22 and I think this is something also revealing about --

23 JUSTICE BREYER: My point is, somebody who  
24 really wants to go to all that trouble will surely have  
25 it turn off after 30 seconds and the policeman won't be

1 able to look at it either.

2 MR. DREEBEN: Not all criminals are so  
3 clever that they manage --

4 JUSTICE BREYER: Yeah. Well, but the dim  
5 criminal who is thinking about the magistrate at the  
6 station but not thinking about the policeman. I mean,  
7 you see what I'm doing with my questions?

8 MR. DREEBEN: I think --

9 JUSTICE BREYER: I'm casting a little cold  
10 water on this as a rationale.

11 MR. DREEBEN: Yeah. And I -- my response to  
12 you is that having tried to ascertain the empirical  
13 reality of this problem, it is greatly feared by law  
14 enforcement. We've documented that by the numerous  
15 studies, the National Institute of Standards and  
16 Technology study that talks about the grave concerns  
17 that encryption's raised. It's not the biggest problem  
18 if you get the phone in an active state and you can  
19 begin to look through it. It does have unpredictable  
20 capabilities of becoming encrypted if it's turned off or  
21 if certain apps are deployed on it. And for that  
22 reason --

23 JUSTICE SOTOMAYOR: But you have to keep the  
24 phone going anyway till you can get to a place where you  
25 do something with it.



1           MR. DREEBEN:           A lot of these searches occur,  
2 Justice Sotomayor, at the side of the road where the  
3 officer opens -- in the Riley case, the officer opened  
4 the phone right on the heels of the arrest and he  
5 immediately saw evidence that the individual was a gang  
6 member, something that he hadn't had personal knowledge  
7 of before, because every letter K was preceded by a C,  
8 which indicated to him it meant Crip killer, which  
9 indicated he was a member of the Bloods gang. So it's a  
10 very common thing for officers to take advantage of the  
11 information that's on a phone just the way that they  
12 would take advantage of the information that's on a  
13 person to find out who they are dealing with.

14           And I think it was asked in the Riley  
15 argument whether there were instances in which phones  
16 have been used to trigger dangers. And there are  
17 instances in which people have used their cell phones  
18 right before an arrest to call in a posse of their  
19 accomplices to basically attack the police. And by  
20 looking at the cell phone quickly, if it's available to  
21 the -- to the officers, they can look quickly and see if  
22 there was a text sent in the last five minutes or a  
23 phone call that might actually protect their safety,  
24 which is another one of the traditional justifications  
25 of search incident to arrest.

1           That this is a categorical exception, as the  
2 Court recognized twice last term, both in Maryland v.  
3 King decision and in the McNeely decision, the Court  
4 recognized that search incident to arrest was a  
5 categorical exception to the normal warrant requirement.

6           JUSTICE GINSBURG:           Mr. Dreeben, something  
7 that you said about the encryption. What -- what is the  
8 experience of the police? Isn't it so that most cell  
9 phones when they're found on a person are not open,  
10 that -- that they are locked?

11           MR. DREEBEN:           Justice Ginsburg, I would not  
12 be able to answer a question about what condition most  
13 cell phones are found in. The fact that this issue has  
14 arisen repeatedly in cases across the country indicates  
15 that at least in a significant number of cases, the  
16 phones are not locked and the officers are able to  
17 obtain access to the information.

18           Now, if they are not able to obtain access  
19 to the information, I want to tie this back to things  
20 that could give the Court some comfort if the Court were  
21 concerned about the possibility for police searching too  
22 much evidence in cell phones that's not relevant to the  
23 crime for which the person is arrested or his identity.

24           Now, we talked earlier about the crime of  
25 arrest limitation, which I think would screen out a

1 great many, not all, minor crimes. The Court has, at  
2 least in the Welsh v. Wisconsin case, talking about  
3 exigent circumstances justifying an entry into the home,  
4 distinguished between serious and minor crimes. That's  
5 another possible line that the Court could explore. I'm  
6 not as much in favor of that one because I do think that  
7 the officers have an interest in determining, no matter  
8 who they have arrested, who that person is, because the  
9 person could pose an unknown threat even if they are  
10 stopped only for a traffic violation. Ascertaining  
11 their identity through their cell phone is a useful way  
12 to do that.

13 There are also potential duration limits on  
14 a search incident to arrest. As its name indicates,  
15 it's incident to the arrest, and this Court's decisions  
16 have described the lowering or reduction of expectation  
17 of privacy of an arrestee as occurring for a reasonable  
18 time and to a reasonable extent after the arrest, then  
19 other Fourth Amendment doctrines kick in. So to the  
20 extent that most of these searches are going to occur  
21 either at the scene of the arrest --

22 JUSTICE SOTOMAYOR: Once we put in that  
23 limit, you'll just download the phone at the station and  
24 everything, their medical records, their tax returns,  
25 even when they're not relevant to the crime, will be

1 part of your database.

2 MR. DREEBEN: Okay. Well, that - that is my  
3 last potential limiting principle. This Court need not  
4 consider in this case the consequences of downloading  
5 the entire contents of a cellphone to a UFED, a  
6 universal forensic extraction device which the briefs  
7 have talked about. That didn't happen in either of  
8 these cases. These cases involve manual searches of the  
9 information that's available to the user of the phone.

10 Once the information has been captured into  
11 an electronic database separately in an extraction  
12 device, there is at least an argument that at that point  
13 the evidence is preserved and potentially the warrant  
14 requirement would have a different application, at least  
15 if the search of that forensic database was going to go  
16 beyond ascertaining identity and verifying officer  
17 safety considerations.

18 The Court does not need to examine that in  
19 this case. It may well be that expectations of privacy  
20 do not exist as to information that the user himself can  
21 quickly access on a phone, the kind of thing the police  
22 are likely to look at when they make an arrest because  
23 they are interested in developing evidence that relates  
24 to the crime, protecting their safety and ascertaining  
25 identity. They are not really interested in going

1 through all an arrestee's medical records and  
2 photographs and so forth.

3 JUSTICE SOTOMAYOR: Your brief suggested a  
4 limitation with respect to access to the iCloud.

5 MR. DREEBEN: Yes.

6 JUSTICE SOTOMAYOR: Could you tell me how  
7 you tell the difference?

8 MR. DREEBEN: Well, I think that would be  
9 something that officers would have to develop protocols  
10 based on changing technology to address. We do not  
11 claim here the authority to use the phone to access data  
12 that is not on the phone, in the cloud, and it may well  
13 be that in the future more information will migrate to  
14 the cloud, less will be on the phone, and that may shift  
15 what the officers can actually do.

16 JUSTICE KAGAN: But I thought the whole  
17 ideas of smartphones, Mr. Dreeben, and increasingly so,  
18 was that even the user doesn't know what what's on the  
19 cloud or not.

20 MR. DREEBEN: So to the extent that that is  
21 true, Justice Kagan, law enforcement officers, to ensure  
22 they're complying with the Fourth Amendment, would have  
23 to take the phone off the network. And that is best  
24 practices. It's discussed in all of the forensic  
25 manuals that we cited to the Court. You want to take

1 the phone off the network to avoid the remote wiping  
2 problem, to avoid corruption of data through new data  
3 coming in. It's sound forensic practice to do that and  
4 it also serves what we think is a limiting principle.  
5 Again, the Court doesn't have to decide that limiting  
6 principle in this case. There's no claim that any cloud  
7 data was accessed in this case. We're only saying that  
8 the search-incident-to-arrest doctrine serves a valuable  
9 function, serves a particularly valuable function with  
10 cellphones, because they are so commonly used as the  
11 medium of the commission of crimes. They are carrying  
12 the same kind of information that the individual  
13 previously would have carried in paper and it seems  
14 somehow a little odd to say that because information has  
15 migrated from paper onto a smartphone that the officers  
16 have a critical need to obtain --

17 JUSTICE KENNEDY: I don't think it's odd to  
18 say that we're living in a -- in a new world. Justice  
19 Kagan's questions point out the fact that someone  
20 arrested for a minor crime has their whole existence  
21 exposed on this little device. From your argument, you  
22 want us just to adopt a categorical rule, it's in the  
23 custody of the police, they can search it. Do you have  
24 -- do you have any limiting principles that we should  
25 considerate at all as a fallback position?

1 MR. DREEBEN: Yes, Justice Kennedy, I do.  
2 The first one that I think has been discussed in both  
3 arguments and Justice Scalia has brought it up as well,  
4 is that the evidence to be searched, unless there's some  
5 exigency, should be relevant to the crime of arrest and  
6 the Court can articulate that in a way that would  
7 prevent roving searches or speculative searches.

8 JUSTICE KENNEDY: Well, that -- that was for  
9 an expired license.

10 MR. DREEBEN: So I don't think it's  
11 necessarily --

12 JUSTICE KENNEDY: -- or is it the guns that  
13 were under the hood in the other case?

14 MR. DREEBEN: In the Riley case, the guns  
15 were under the hood and the arresting officers found a  
16 green bandana and some red and white Converse shoes, I  
17 believe.

18 JUSTICE KENNEDY: The crime of arrest was  
19 the expired license.

20 MR. DREEBEN: No. The crime of arrest was  
21 the firearms in Riley. It was only after they found --

22 JUSTICE KENNEDY: That's correct, after the  
23 stop, yes.

24 MR. DREEBEN: -- the firearms in the impound  
25 search did they actually conduct the arrest. And at

1 that point the ultimate search that occurred was because  
2 there was a known propensity of gang members to document  
3 their use of firearms in pictures. And so that's what  
4 the arresting officer was looking for. It's no  
5 different than what he would have looked for on the  
6 arrestee's person in his wallet. So it wasn't the kind  
7 of cloud-based search, search into health records. It  
8 was a scope-focused search.

9 So I think that there are limiting  
10 principles, Justice Kennedy, that you referred to. One  
11 is when the officer is looking for crime of  
12 arrest-related material and there is evidence that can  
13 be plausibly said is crime of arrest-related material on  
14 the phone, he can look for that.

15 The Court could couple that, if it wasn't  
16 satisfied that that was a sufficient limitation, with a  
17 scope-based limit which would say that you can't look  
18 everywhere on the phone where there's no realistic  
19 chance that there's going to be evidence related to the  
20 crime of arrest. You can't just rove through the phone.  
21 You need to keep a scope focus. And that can be  
22 enforced and would be enforced by defendants, I can  
23 assure you, through post hac litigation and suppression.  
24 And the police would have to conform their conduct to  
25 the constraints of the Fourth Amendment in conducting



1 the search.

2 JUSTICE GINSBURG: What scope? You can look  
3 at e-mails but not something else? What would the scope  
4 limitation be?

5 MR. DREEBEN: It would depend on the crime.  
6 So if you were looking for evidence related to the crime  
7 of possession of child pornography, you could certainly  
8 go through photographs. If you were looking for another  
9 crime, potentially drug trafficking, you would look for  
10 things like drug ledgers, recent contacts, lists of  
11 customers and not necessarily in videos.

12 CHIEF JUSTICE ROBERTS: It's very hard to  
13 see how that limit would be applied. You can see and  
14 the police would be able to articulate why almost every  
15 application, every entry on a cellphone would reasonably  
16 be anticipated to have evidence of a particular crime.  
17 Obviously e-mails, obviously call logs. Even, you know,  
18 Facebook. If it's a weapons crime, maybe they've got  
19 pictures of themselves with guns. I mean, I have  
20 trouble imagining what application, what entry police  
21 could not say it's reasonably likely that there would be  
22 evidence of the crime.

23 MR. DREEBEN: So, Mr. Chief Justice, to the  
24 extent that you think that's an inevitable  
25 generalization and there is a certain way of looking at

1 it in which that's correct, then the interposition of a  
2 warrant requirement would do nothing because the warrant  
3 would say, search the cell phone for evidence related to  
4 drug trafficking and then the phone would be searched in  
5 exactly that manner.

6 JUSTICE BREYER: The point of a warrant is  
7 that a person who is not involved and is objective  
8 listens to what the policeman is saying, knowing that  
9 sometimes, like me or any other human being, a policeman  
10 can get a little carried away. So if, in fact, he does  
11 show the warrant, that there is this basis, you issue  
12 the warrant. Many, many -- and if he doesn't you don't.  
13 It isn't because they're difficult legal questions.  
14 It's just you want that third dispassionate mind to  
15 review what the facts are.

16 Now, if that's a purpose of having a  
17 warrant, how long does it take to get a warrant in the  
18 mine run of these cases? Is it not a matter of hours in  
19 most places?

20 MR. DREEBEN: It may be in some places and  
21 not in others.

22 JUSTICE BREYER: In some places I'm sure  
23 it's difficult. But I'm saying most places, major  
24 cities, et cetera, my guess was -- and I want to be  
25 corrected if I'm wrong -- it's a matter of a few hours

1 and you could do it more quickly if you needed to. Am I  
2 right about that?

3 MR. DREEBEN: I don't know that you are,  
4 Justice Breyer.

5 JUSTICE BREYER: Well, you are in a  
6 department that keeps track pretty much. You're much  
7 more expert than I. And therefore I would like your  
8 best guess on the mine run of things of a range of time  
9 to get a warrant.

10 MR. DREEBEN: So, Justice Breyer, it varies  
11 considerably in the 50 States and the Federal Government  
12 depending on where you are, the availability of  
13 magistrates, the complexity of the case. I would  
14 differentiate this from the McNeely case, where the  
15 Court was pretty confident that you could get a warrant  
16 quickly. The reason that the Court could be pretty  
17 confident about that is drunk driving is a very simple  
18 crime, and the officer has very simple observations in  
19 order to validate it and there are forms that can be  
20 prepared to get a warrant.

21 With the great -- we're talking now about  
22 every crime for which people are arrested.

23 JUSTICE BREYER: I see your point. I see  
24 your point.

25 MR. DREEBEN: And the facts are going to be

1 more complicated.

2 JUSTICE BREYER: Assume a range. The  
3 question I'm trying to get to is this. What, from what  
4 you've said is the harm in saying, yes, you need a  
5 warrant, but remember, there are exigent circumstances?  
6 So where is someone -- the bell rings on the phone.  
7 Depending on the kind of crime, it may be pretty  
8 important to let the policeman answer to find out where  
9 it's coming from, because it may be other people on the  
10 gang who are coming with weapons. Or alternatively, if  
11 you're right on the technology, it may be someone about  
12 to push a buzzer that will erase the information.

13 So remember we have the exigent  
14 circumstances. If your view of the technology is right,  
15 they will perhaps be used with common sense and caution.  
16 But you don't need a special rule other than the rule,  
17 get a warrant. How will that hurt?

18 MR. DREEBEN: That is a special rule for the  
19 search incident to arrest content. It's -- we've  
20 discussed a variety of special rules, but that rule  
21 completely compromises the interests in search incident  
22 to arrest, because they have always assumed that the  
23 interest in police discovering evidence that could help  
24 them in the prosecution, that could protect their  
25 safety, and that would avoid destruction is paramount

1 given the reduced expectations of privacy of the  
2 arrestee.

3 JUSTICE BREYER: Can you work with exigent  
4 circumstances --

5 MR. DREEBEN: No. And this is why I -- I  
6 hope that I can make this clear, because the encryption  
7 problem is what makes it impossible for the police to be  
8 confident that you can take the time to go and get a  
9 warrant and you won't lose the data forever. Encryption  
10 kicks in when the phone is turned to a setting that  
11 automatically will occur on most modern cell phones that  
12 turns the phone off and then the phone's contents become  
13 encrypted and that's when you need the password to open  
14 it up. And if you don't have that password, you're not  
15 going to be able to do it. And law enforcement's  
16 forensic labs aren't going to be able to get around it  
17 in -- except with extraordinary efforts and  
18 extraordinary time.

19 So we're not talking about the difference  
20 here between two minutes to get the warrant and looking  
21 at the information. It may be months if you don't take  
22 advantage of looking at it.

23 JUSTICE SOTOMAYOR: How do you stop it from  
24 going off?

25 MR. DREEBEN: Now, it -- I think that one of

1 the interesting things that Petitioner did in the Riley  
2 case was append to the back of his brief a couple of  
3 pictures of Apple's iPhone 5 on how you could go into  
4 the phone, if the phone is configured in the way that it  
5 was in the pictures that he took, and disable the auto  
6 lock feature. What Petitioner did not do was provide  
7 similar information for the 500 or so other phones that  
8 are on the market and that will be on the market in the  
9 coming years so that police officers will be equipped  
10 with a manual that will probably be as thick as the New  
11 York City telephone book with the various procedures  
12 that are needed to prevent any phone from going into an  
13 encryption mode and becoming inaccessible. They don't  
14 know that at the time they seize the phone, Justice  
15 Breyer, and that's why exigent circumstances, unless  
16 it's done as a categorical rule, because I did not know  
17 whether this phone would encrypt, I searched it, unless  
18 you do that, then you are basically putting the officers  
19 at the mercy of technology, which will increasingly be  
20 able to defeat their ability to conduct the kind of  
21 routine searches that they have always conducted in the  
22 past.

23 CHIEF JUSTICE ROBERTS: Well, they've got  
24 their own technological front in this battle, too, and  
25 that's -- I mean, to the extent there are flaws in the

1 Faraday bag, I wouldn't be surprised if that's not  
2 improved over the next months or years or whatever.

3 MR. DREEBEN: Mr. Chief Justice, it's an  
4 arms race between the forensic capabilities of law  
5 enforcement labs and the abilities of cell phone  
6 manufacturers and criminals to devise technologies that  
7 will thwart them. And they will leapfrog each other at  
8 times and there may be periods when law enforcement has  
9 the advantage and there may be period where -- periods  
10 where those people who want to protect against  
11 revelation of data on the phone will succeed.

12 And my only point here is that it would not  
13 be a wise rule for this Court to announce, based on  
14 today's technology and reasonable projections of  
15 technology, that the police will just easily be able to  
16 go and get a warrant, because my experience from the  
17 people that I had spoken with is that a lot of phones  
18 are arriving at the lab in a locked and encrypted state  
19 and it's very tough to deal with that. And if the Court  
20 does have concerns, as many members of the Court have  
21 expressed, about applying, lock stock and barrel, the  
22 traditional Robinson rule, there are weigh stations and  
23 compromise positions.

24 This case, I think, as California pointed  
25 out, both this case and Riley, don't really involve

1 totally unpacking somebody's life from their smartphone.  
2 And I'm not suggesting that the Court should resolve  
3 these cases by announcing a rule that's just limited to  
4 the facts of the cases. But if the Court is looking to  
5 preserve some areas for protection, we've talked about  
6 limiting the justification for a search, limiting the  
7 scope of a search, limiting the duration of a search,  
8 and limiting the intensity in the sense of confining it  
9 to what can be found manually on the phone.

10 JUSTICE BREYER: Do you -- do you see what I  
11 was trying to do with the word "exigency?" I was trying  
12 to figure out if that's a way of dealing with the  
13 unknown here, which is your problem. That if, in fact,  
14 technology is such that the policeman, it's really true  
15 if he has five minutes to search, he can get this  
16 valuable evidence and if the technology is such that it  
17 doesn't even give him five minutes, or if it's such that  
18 it gives him four or five hours, or if it's such that he  
19 can press a button, or if it's the opposite and they can  
20 just cough and encrypt it, well, all that will be fed  
21 into the word "exigency," which we wouldn't have to  
22 decide now, but rather, you could make your arguments  
23 about the real exigency for preventing the destruction  
24 later in the context of -- of what turns out to be the  
25 technology of the time. That's what was going on.



1           MR. DREEBEN:           Justice Breyer, the reason why  
2 Robinson adopted a categorical rule is it concluded that  
3 such case-by-case adjudication for officers in the field  
4 is completely infeasible. And when balancing the  
5 important law enforcement interests against the reduced  
6 expectations of privacy, Robinson struck a categorical  
7 balance. Reverting to an exigent circumstances analysis  
8 here would destabilize all of the law under Robinson.

9           JUSTICE SOTOMAYOR:       How about a plain view  
10 analysis? Turn on the phone, see if there's been a  
11 telephone call within a reasonable amount of time of the  
12 arrest or -- or any message that was sent at the time of  
13 arrest. That's sort of a plain view situation. It  
14 would take care of your person with the picture of him  
15 or herself with guns. It would take care of the call to  
16 the confederate. It would take care of the -- of the  
17 imminent destruction of the phone.

18           MR. DREEBEN:           So, Justice Sotomayor, I'm not  
19 entirely sure how to articulate that principle, but if  
20 it fits within the crime of arrest plus identity  
21 principle, then I think it would be a reasonable  
22 fallback position.

23           If I could reserve the balance of my time.

24           CHIEF JUSTICE ROBERTS:       Thank you, counsel.

25           Ms. Mizner.

1 ORAL ARGUMENT OF JUDITH H. MIZNER

2 ON BEHALF OF THE RESPONDENT

3 MS. MIZNER: Mr. Chief Justice, and may it  
4 please the Court:

5 I'd like to first talk about the encryption  
6 that we've been discussing. It's not an issue in this  
7 case. It was not an issue in Riley. It was not  
8 litigated below. And the government has just now said  
9 that there are a lot of phones arriving at a lab in a  
10 locked state, but do we know whether they're in a locked  
11 state because they were locked at the time that they  
12 were seized or did they lock subsequently?

13 The number of password-protected phones that  
14 are open at the time of arrest is pure speculation. And  
15 if they're not open at the time of arrest, the  
16 government's argument about locking is irrelevant. The  
17 number of password-protected phones that would be  
18 inaccessible at a later time is also an unknown and --  
19 and speculative quantity.

20 There are devices that can break passwords.  
21 Technology advances on both fronts. The government has  
22 capabilities of breaking the more typical passwords, the  
23 four-digit or letter passwords within 15 minutes. There  
24 are -- you can obtain assistance from manufacturers in  
25 obtaining the passwords and ability to --

1 CHIEF JUSTICE ROBERTS: We've -- we've kind  
2 of gotten far afield, which I'm sure is not -- may not  
3 be fair to Mr. Fisher or Mr. Dumont, we're talking about  
4 their case, but in your case why isn't the information  
5 in plain view? It says, "my house, my home." They look  
6 at it, that's what they see. They don't have to open  
7 anything.

8 MS. MIZNER: They saw the words "my house."  
9 They did have to open the phone and access the log to --

10 CHIEF JUSTICE ROBERTS: Sure. But I'm  
11 saying do you have -- you have no objection to the "my  
12 house"?

13 MS. MIZNER: The "my house" words were in  
14 plain view. And under this Court's doctrine, that's  
15 not --

16 CHIEF JUSTICE ROBERTS: I assume that that's  
17 -- it says "my house" because he's done something with  
18 the particular number. If he didn't, it would be the  
19 number itself that would show up, right?

20 MS. MIZNER: Yes. And that's part --

21 CHIEF JUSTICE ROBERTS: And so that would  
22 also be in plain view?

23 MS. MIZNER: The number was not in plain  
24 view.

25 CHIEF JUSTICE ROBERTS: No, no. But I mean,

1 in a -- in a case in which the user had not coded the  
2 particular number, the number would show up, I think,  
3 right?

4 MS. MIZNER: Yes. And --

5 CHIEF JUSTICE ROBERTS: And that would be --

6 MS. MIZNER: And the number would be in  
7 plain view.

8 CHIEF JUSTICE ROBERTS: Okay.

9 MS. MIZNER: But what makes the -- the  
10 privacy interest and the associational interest in  
11 simply the call logs, which the government has talked  
12 about in Mr. Wurie's case, is that it does contain more  
13 than simply the numbers dialed. You have the  
14 associational information that's created by the user.  
15 In this case, it was linking my house to a particular  
16 number.

17 It can go well beyond that. You can link  
18 names and nicknames to -- and places to a number. You  
19 can link e-mails to a name and a number. You can link a  
20 relationship to a name and a number. Doctor, shrink,  
21 mom, dad. You can link a photograph to a number. You  
22 can link your number -- you can link it to text  
23 messages. You can link it to other numbers.

24 So you can provide pattern -- and also  
25 patterns of calling that provide additional

1 associational data and could indicate the closeness of a  
2 relationship. How often calls were made, when are they  
3 made, what's the time of the call, when did it start or  
4 stop, the length of the call. You can link notes,  
5 either general or about a particular phone call.

6 CHIEF JUSTICE ROBERTS: What do you think,  
7 if the phone rings, can the police answer it?

8 MS. MIZNER: The cases that have addressed  
9 answering the phone have been in the context of search  
10 warrants for houses where, as the police are searching  
11 the house, the phone has been ringing. And the courts  
12 have said that -- lower courts have said that where  
13 answering the phone can be viewed as being within the  
14 scope of the search warrant, it is permissible for the  
15 police to answer the phone.

16 CHIEF JUSTICE ROBERTS: Well, what about  
17 this case where there isn't a search warrant?

18 MS. MIZNER: They didn't answer the phone.

19 CHIEF JUSTICE ROBERTS: The number's in  
20 plain view. I mean, is answering the phone -- can you  
21 do it or not? You know what number is calling. Is it  
22 like someone -- you're conducting a search on the house  
23 and somebody knocks on the door? You can open the door,  
24 right?

25 MS. MIZNER: Yes. And they perhaps could

1 have answered the phone in this case, but they didn't.

2 JUSTICE KENNEDY: No, but what is your  
3 position? What is the rule you want us to adopt in  
4 response to the Chief Justice's question?

5 MS. MIZNER: I would say that they could  
6 answer the phone.

7 JUSTICE SOTOMAYOR: Under what theory? I  
8 don't disagree with you. I just want to know what would  
9 be your theory, and what's the limitation?

10 MS. MIZNER: Well, in the sense it's -- it's  
11 plain hearing. It is a -- an analogue of plain view.  
12 There is nothing particularly private about the ringing.  
13 And if you -- the policeman can answer the phone. It  
14 doesn't mean that the person on the other end has to  
15 respond. It's --

16 JUSTICE SOTOMAYOR: I was thinking in terms  
17 of reasonable expectation of privacy. Most people don't  
18 pick up other people's phones to answer them unless the  
19 phone is lost. And then you pray the person who found  
20 it answers it.

21 (Laughter.)

22 MS. MIZNER: And perhaps this would be  
23 analogous to -- to that. So the --

24 CHIEF JUSTICE ROBERTS: So do you think --  
25 it's got nothing to do with plain hearing. I'm not

1 saying they can't -- obviously they can hear the ring.  
2 I'm just -- it's a big, different step to answer it.

3 MS. MIZNER: If the police have seized the  
4 phone and they can secure it, pending application for a  
5 warrant to engage in a search of its contents, then  
6 answering the phone could be viewed as part of -- of  
7 securing.

8 JUSTICE ALITO: Does the owner of a cell  
9 phone have a reasonable expectation of privacy in the  
10 call log?

11 MS. MIZNER: Yes. I believe for the  
12 associational data and reasons that I have just  
13 articulated, that there is an expectation of privacy in  
14 the call log.

15 JUSTICE ALITO: But the cell phone company  
16 has all that information, doesn't it?

17 MS. MIZNER: No. The cell phone company  
18 has --

19 JUSTICE ALITO: Has the numbers.

20 MS. MIZNER: -- Has the numbers, but it does  
21 not have --

22 JUSTICE ALITO: All right. Does the -- does  
23 the owner have a reasonable expectation of privacy in a  
24 list of the numbers called?

25 MS. MIZNER: Not in the list of the numbers

1 alone, but the call log is not limited to that list of  
2 numbers. And your phone bill may not necessarily  
3 include, depending on the kind of plan you have, may not  
4 include information about the length of the call or --

5 JUSTICE ALITO: The cell phone company won't  
6 have information about the length of the call?

7 MS. MIZNER: I think it would depend on --  
8 whether they keep that information, it would depend on  
9 what kind of plan you have.

10 JUSTICE ALITO: Well, what are we dealing  
11 with here? I know everybody wants to talk about global  
12 issues, but what -- what are the -- what information are  
13 we talking about in this case? We have my home, which  
14 you said is in plain view, my house, and then you have  
15 the call log.

16 What else do we have?

17 MS. MIZNER: That is all that was accessed.  
18 We're talking about the phone number that allowed the  
19 police to get to a particular premises.

20 JUSTICE ALITO: Well, if the call log, the  
21 numbers called, is not covered by a reasonable  
22 expectation of privacy, and my house is not covered by a  
23 reasonable expectation of privacy, then where is the  
24 search?

25 MS. MIZNER: It -- the search is in opening



1 the phone itself, which is covered by a reasonable  
2 expectation of privacy.

3 CHIEF JUSTICE ROBERTS: No, they could --

4 JUSTICE ALITO: And you could do that and  
5 look for a razor blade?

6 MS. MIZNER: You could -- you are then --

7 JUSTICE ALITO: Flip open the old style  
8 flip-phone to see if there's something inside?

9 MS. MIZNER: Yes, you could examine it, but  
10 that is not going to get you the phone number. You had  
11 to push -- the officer here had to push a button in  
12 order to get access to the call logs. There were two  
13 buttons that --

14 JUSTICE ALITO: See the recent -- but what  
15 is -- where is -- what is the reason -- by pushing the  
16 button, you get information that you just told me is not  
17 covered by a reasonable expectation of privacy.

18 MS. MIZNER: No, Justice Alito, I believe I  
19 said that the information is covered by a reasonable  
20 expectation of privacy because there is associational  
21 information that is inputted by the owner of the phone.

22 JUSTICE ALITO: Yes, but was any of that  
23 used here?

24 MS. MIZNER: It was the link between my  
25 house and the -- and the number, yes, that -- that got

1 them to the premises.

2 JUSTICE ALITO: Well, they saw the number --  
3 they saw the phone rang at a particular time, and then  
4 if you look at the call log, you can see what call came  
5 in at that particular time. And then you know where the  
6 call came from that registered as my house.

7 MS. MIZNER: But you wouldn't know that it  
8 was my house absent the information that the owner of  
9 the phone had put in.

10 JUSTICE ALITO: Why -- why is that  
11 something -- and maybe I don't understand the facts.  
12 If -- if a phone rang right now and you look at the call  
13 log and you see what call came in at 12:13, and you know  
14 that the call came from my house, and you see the number  
15 from -- of the call that came in at 12:13, wouldn't you  
16 know that that was the number from my house?

17 MS. MIZNER: But you wouldn't know from the  
18 call log alone without information input by the phone  
19 owner on that log that it was my house once they get the  
20 number.

21 CHIEF JUSTICE ROBERTS: Well, if it  
22 wasn't -- if it wasn't input, you would have the number  
23 itself in plain view.

24 MS. MIZNER: Yes. But you would then -- you  
25 could go to some kind of reverse directory to get an

1 address. But you have no -- what is the reason to  
2 believe that that number --

3 CHIEF JUSTICE ROBERTS: You wouldn't know it  
4 was the house.

5 MS. MIZNER: -- has anything to do with the  
6 defendant's house.

7 JUSTICE KENNEDY: Can -- can -- can the  
8 police search the person's wallet and find an -- an  
9 index card with a number, my house? Can he do that --

10 MS. MIZNER: I believe --

11 JUSTICE KENNEDY: -- and use the information  
12 obtained?

13 MS. MIZNER: I believe that the police can  
14 examine the contents of a --

15 JUSTICE KENNEDY: Examine the contents of  
16 the wallet but not read it? I -- I don't understand the  
17 issue.

18 MS. MIZNER: And --

19 JUSTICE KENNEDY: Is -- may the police or  
20 may not the police examine a wallet, find the number  
21 that says my house, and act on that information to  
22 investigate the crime? Yes or no?

23 MS. MIZNER: This Court has not addressed  
24 the reading of information examined in -- in -- in  
25 searching for incident to arrest.

1 JUSTICE KENNEDY: Well, it seems to me that  
2 it's fairly clear that it's part of the contents that  
3 are seized, that are on -- in the possession of the  
4 arrestee, and that the police can act on it.

5 MS. MIZNER: Well, under the justifications  
6 of Chimel and -- which were reiterated in -- in Robinson  
7 and in Gant and McNeely, the justifications are officer  
8 safety and evidence preservation. It doesn't -- which  
9 does not necessarily encompass reading.

10 But to address the case of the cell phone, I  
11 don't think you have to resolve whether it's appropriate  
12 to read paper documents that you come across in  
13 examining a paper or not.

14 CHIEF JUSTICE ROBERTS: No, but the point is  
15 the only -- the only information they got and used was  
16 the phone number and address of his house, right?  
17 And -- and that it was his house, right?

18 MS. MIZNER: But that --

19 CHIEF JUSTICE ROBERTS: That's on your  
20 driver's license, isn't it? So -- and --

21 MS. MIZNER: Your residence is, but this was  
22 not -- then they needed his driver's license, which they  
23 had.

24 CHIEF JUSTICE ROBERTS: So I guess I'm just  
25 trying to see what greater invasion of privacy there was

1 in this case than the police looking at your driver's  
2 license when you're carrying it around in your wallet.

3 MS. MIZNER: Because my house may not  
4 necessarily be the house in which you reside. You may  
5 have chosen to attach that description --

6 CHIEF JUSTICE ROBERTS: So the problem here  
7 was that he called -- he indicated that a number was his  
8 house, and it might not have been his house?

9 MS. MIZNER: The problem is that the police  
10 searched his phone in order to associate information  
11 contained in the phone with what they were able to  
12 observe in plain view.

13 JUSTICE BREYER: There had to be two  
14 buttons, two buttons.

15 MS. MIZNER: Yes.

16 JUSTICE BREYER: Now, was there a claim made  
17 in this case that exigent circumstances, destruction of  
18 evidence, or officer safety justified the search?

19 MS. MIZNER: No.

20 JUSTICE BREYER: No? Okay.

21 So I guess if there is a rule that says you  
22 can search phones, then you could do it. After all, you  
23 might search a phone and come up with an advertisement  
24 for a Walt Disney movie, which is perfectly public.

25 But if the rule is you can't search phones,

1 then you win, even though in this case they came up with  
2 something that was -- is -- is that right or not?

3 MS. MIZNER: Yes. So --

4 JUSTICE BREYER: I mean, if, in fact, you  
5 can search the phone thoroughly for everything in the  
6 person's life, they might have come up with something  
7 when he was six years old, there is, in fact, a picture  
8 of an elephant at the zoo. Totally public.

9 But it would still fall within the rule,  
10 which what I thought one of the things we're arguing  
11 about in this case.

12 MS. MIZNER: Yes, Justice Breyer, and we  
13 believe that the seize-and-secure rule that we are  
14 proposing meets the needs of law enforcement by allowing  
15 them to maintain custody of the --

16 JUSTICE BREYER: All right. Well, what is  
17 your argument for the proposition, look, when you search  
18 a phone, sometimes what you come up with is perfectly  
19 public information; sometimes what you come up with is  
20 private information. Now, you want to say the absolute  
21 rule should be no.

22 But what's your argument, rather than trying  
23 to say sometimes if you get the private information, no;  
24 but if you get the public information, yes, et cetera?

25 MS. MIZNER: Because everything is so

1 intermingled on a cell phone or a tablet or a computer,  
2 you don't know what you're going to be getting when you  
3 push those buttons and start rummaging through the  
4 digital contents of the phone.

5 JUSTICE ALITO: In determining whether the  
6 examination of information on a cell phone is --  
7 constitutes a search, what do you think we -- we are  
8 doing? Are we trying to -- to -- are we answering an  
9 empirical question, what is the reasonable expectation  
10 of privacy of a -- of a person in 2014 who has a cell  
11 phone in his or her -- on his or her person? Or are we  
12 legislating what we think is a good privacy rule?

13 MS. MIZNER: I think the Court is  
14 determining whether or not in 2014 an individual has a  
15 reasonable expectation of privacy against government  
16 intrusion into a device that carries around an  
17 increasingly large percentage of somebody's personal and  
18 private information.

19 JUSTICE ALITO: All right. Well, a lot of  
20 that -- part of that is the person must act -- people  
21 must actually have that expectation. That must be the  
22 expectation of people at large in 2014, that they think  
23 that everything that's on their cell phones is private,  
24 or they think some of the information on the cell phones  
25 is private, or they think nothing on the cell phone is

1 private. Where do you think we should look to answer  
2 that question about what people in 2014 think about that  
3 question?

4 MS. MIZNER: I think from the fact that  
5 people carry them with them in -- in a pocket or in a  
6 purse, that that exhibits an expectation of privacy.  
7 You don't expect people to be rummaging through your  
8 pockets or -- or through the items you're carrying.

9 JUSTICE ALITO: But why is that so? Cell  
10 phones are different. I'm not going to say for a --  
11 suggest for a second that there are like things that  
12 existed in the pre-digital area. But in the pre-digital  
13 era, presumably people didn't have a reasonable  
14 expectation of privacy in papers, letters, things like  
15 that that they had, of photos in a billfold, numbers,  
16 addresses, things that they might -- they might be  
17 carrying on their persons.

18 MS. MIZNER: You --

19 JUSTICE ALITO: So how do we determine what  
20 the -- what the new expectation of privacy is now?

21 MS. MIZNER: I think people did have an  
22 expectation of privacy in those items until --

23 JUSTICE ALITO: Then why was it not a search  
24 when -- when you -- you searched the pocket of somebody  
25 who was arrested and you found the address of someplace?



1 MS. MIZNER: I believe it is a search,  
2 Justice Alito. It's a question of whether it is a  
3 search that has been justified by an exception to the  
4 warrant requirement, the -- the scope -- or the  
5 permissible scope of the search incident to arrest.  
6 It's still a search.

7 JUSTICE ALITO: All right. What was the --  
8 why -- how do we determine whether something has --  
9 somebody has a reasonable expectation of privacy in any  
10 category of information that is contained on a cell  
11 phone?

12 MS. MIZNER: Because of the  
13 interconnectivity of the data, I don't think you can say  
14 a person has a reasonable expectation of privacy in this  
15 app, but not that app, because you don't know what is  
16 linked to any other part of the cell phone. So the rule  
17 that provides the security that the Fourth Amendment is  
18 intended to give an individual would be to say --

19 JUSTICE SOTOMAYOR: Are -- are you -- I --  
20 I -- I'm assuming that what you're saying -- you just  
21 said it a minute ago -- the Fourth Amendment, the  
22 searches incident to arrest are an exception to the  
23 Fourth Amendment?

24 MS. MIZNER: Yes, Justice Sotomayor.

25 JUSTICE SOTOMAYOR: And is it your position,

1 I -- I'm assuming this is what this argument's been  
2 about, which is whether we're going to extend that  
3 exception of -- the exception of searches incident to  
4 arrest to a new category, cell phones --

5 MS. MIZNER: Whether --

6 JUSTICE SOTOMAYOR: -- which are different  
7 than the traditional item.

8 MS. MIZNER: Whether the scope of a  
9 justifiable search incident to arrest is going to  
10 include a search of -- of the cell phone.

11 JUSTICE SCALIA: Why do you say they are an  
12 exception to the Fourth Amendment? They just don't  
13 violate the Fourth Amendment. I mean, the Fourth  
14 Amendment covers certain things and it doesn't cover  
15 other things. The things that it doesn't cover are  
16 not -- not -- not exceptions. They're just things not  
17 covered.

18 MS. MIZNER: Well, this Court has espoused a  
19 warrant presumption and has said -- has classified the  
20 search-incident-to-arrest exigent circumstances as  
21 exceptions to the warrant requirements saying that the  
22 preference is for a warrant to be obtained, and under  
23 certain well-defined circumstances, we are going to say  
24 that you may not.

25 JUSTICE SCALIA: Well, but that -- that

1 presumption is -- is simply not -- you don't believe  
2 that presumption, do you?

3 MS. MIZNER: I do.

4 JUSTICE SCALIA: There are many more  
5 searches conducted without a warrant than with a warrant  
6 I -- I bet. I mean, any automobile search, any  
7 inventory search, any -- any search of -- of businesses.  
8 All sorts of searches are conducted without a warrant.

9 But you still believe that a warrant is the  
10 rule and everything else is the exception. I think it  
11 may be the opposite, actually.

12 JUSTICE SOTOMAYOR: Unless the exceptions  
13 have swallowed the rule.

14 MS. MIZNER: In the exceptions, viewing the  
15 search-incident-to-arrest exception as having per -- as  
16 having limited parameters as the First Circuit did --

17 JUSTICE KENNEDY: The -- the question is  
18 whether it's an unreasonable search, and the warrant  
19 clause follows much later. The question is: Is this an  
20 unreasonable search?

21 MS. MIZNER: But this Court has --

22 JUSTICE KENNEDY: That's what the  
23 Constitution provides.

24 MS. MIZNER: This Court has said in many  
25 instances that a search not conducted pursuant to a

1 warrant is unreasonable unless it falls within one of  
2 the well-defined exceptions that this Court has  
3 recognized to the warrant requirement. But --

4 JUSTICE KENNEDY: Well, it's a search that's  
5 reasonable. That's not necessarily an exception.

6 MS. MIZNER: But in terms of reasonableness,  
7 this Court is balancing the intrusion against the  
8 individual's interest in privacy --

9 JUSTICE ALITO: Yeah, and that's the --

10 MS. MIZNER: -- a traditional balancing  
11 test, and we suggest that -- that balance here supports  
12 the seize and secure rule that we are advocating.

13 JUSTICE ALITO: No. I understand that. But  
14 that -- that's the question that I was asking before.  
15 Is it a reasonable search or seizure? All right. So  
16 you have to balance the privacy interest versus the law  
17 enforcement interest.

18 And how do -- how do we find out what the  
19 privacy interests are -- what the privacy expectations  
20 are, which go into that balance with respect to cell  
21 phones in 2014?

22 MS. MIZNER: Well, on --

23 JUSTICE ALITO: Does it matter? You think  
24 it doesn't matter? Maybe people feel very strongly  
25 every single thing that's in the cell phone is -- is

1 private, or maybe they don't. Maybe they think some  
2 things are private; some things are not private.

3 MS. MIZNER: I think that by virtue of the  
4 fact that you carry them around in a generally enclosed  
5 container, a pocket, a purse, a briefcase, that that  
6 exhibits -- that is an indication that people expect  
7 that the cell phone -- that the information contained on  
8 their cell phone is private.

9 CHIEF JUSTICE ROBERTS: Well, as opposed to  
10 what? Carrying it around somewhere other than your  
11 pocket? I mean, do -- do you think there's a difference  
12 if it's attached to someone's belt and everybody can see  
13 it or if it's in a pocket?

14 MS. MIZNER: No. I believe that because you  
15 are carrying it with you, it is -- it's not something  
16 that you are exhibiting to the public. You're not  
17 exhibiting the contents of the phone to the public.

18 CHIEF JUSTICE ROBERTS: Surely it's more  
19 private if it's locked in your car or kept in your  
20 house.

21 MS. MIZNER: Yes.

22 CHIEF JUSTICE ROBERTS: Carrying it with you  
23 in public makes it less private.

24 MS. MIZNER: But you're not -- it may be  
25 less private, but that doesn't mean that you don't have

1 a reasonable expectation of privacy against people  
2 taking it from you and starting to intrude and -- and  
3 rummage through its contents.

4 JUSTICE GINSBURG: But then that questions  
5 the ability of the police to take the phone. I thought  
6 that that was a given, that incident to the arrest, the  
7 police could take the phone. The question is whether  
8 they can search it without a warrant.

9 MS. MIZNER: Yes, Justice Ginsburg. I was  
10 responding in terms of just a general expectation that  
11 people are not going to -- if you -- because you're  
12 carrying a phone in public, it doesn't mean that you  
13 expect that people are going to walk up and remove it  
14 from your belt or remove it from your pocket and start  
15 searching its contents.

16 JUSTICE SCALIA: Well, you could say the  
17 same thing about a cigarette pack that -- that has  
18 cocaine in it.

19 CHIEF JUSTICE ROBERTS: Or a gun.

20 JUSTICE SCALIA: Or -- or a gun.

21 MS. MIZNER: And the police may seize and  
22 examine those containers --

23 JUSTICE SCALIA: Right.

24 MS. MIZNER: -- to see whether or not.

25 JUSTICE SCALIA: And why not the phone.

1 That's exactly the question.

2 MS. MIZNER: Because --

3 JUSTICE SCALIA: Do you have a reasonable --  
4 our rule has been if you carry it on your person, you  
5 ought to know it is subject to seizure and examination,  
6 and that's been the rule.

7 MS. MIZNER: It's the scope of examination  
8 that we -- that is at issue with a cell phone. A cell  
9 phone is fundamentally different from a cigarette pack.  
10 You can open the cigarette pack, you see whether or not  
11 there is something that is subject to destruction. But  
12 whether there's --

13 JUSTICE SCALIA: And you can open the cell  
14 phone and see whatever's in it. So if you carry around  
15 a cell phone that isn't encrypted or whatever, you know,  
16 you -- you -- you get what you -- what you should have  
17 expected. That's -- that's been the rule. If you are  
18 arrested, we -- we can seize it and examine it.

19 MS. MIZNER: The question is what is the  
20 scope of a permissible examination. And when you're  
21 talking about a cigarette pack, you're looking at  
22 another physical object. You're not looking at the  
23 contents of somebody's home.

24 JUSTICE SCALIA: I understand. But you --  
25 so you're arguing for a new rule. The rule right up to

1 now has been you can -- we can seize it. We can examine  
2 it totally. If it's a book, we can read every page of  
3 the book. You want a new rule for cell phones, right?

4 MS. MIZNER: We want a rule that says that  
5 you cannot search the contents of the cell phone without  
6 a warrant.

7 JUSTICE SCALIA: At all? At all?

8 MS. MIZNER: On -- absent exigent  
9 circumstances.

10 JUSTICE GINSBURG: What would be an exigent  
11 circumstance where you could search, in your view?

12 MS. MIZNER: An exigent circumstance?

13 JUSTICE GINSBURG: You said you had -- you  
14 are arguing for a flat rule to the police, thou shalt  
15 not unless there are exigent circumstances. So what  
16 would be an exigent circumstance where the police,  
17 without getting a warrant, could search the cell phone?

18 MS. MIZNER: One would be an example of  
19 police are investigating a bombing, a upcoming -- a  
20 potential bombing, and they have information that the --  
21 that whoever is going to set off the bomb is going to --  
22 may do it with a cell phone, and he's going to be in a  
23 particular place at a particular time. You see someone  
24 approaching with a cell phone, then suggest that under  
25 those circumstances, you could --



1 CHIEF JUSTICE ROBERTS: This is kind of --

2 MS. MIZNER: -- take whatever measures you  
3 needed.

4 CHIEF JUSTICE ROBERTS: It's not a bomb, but  
5 this a different case. This is somebody in an area  
6 selling drugs where the police have told us they  
7 typically use cell phones to arrange the deals and the  
8 transfers, and this guy is caught with two cell phones.  
9 Why would he have two cell phones?

10 MS. MIZNER: Many people have more than --  
11 have multiple cell phones. I -- there was no --

12 CHIEF JUSTICE ROBERTS: Really? What is --  
13 what is your authority for the statement that many  
14 people have multiple cell phones on their person?

15 MS. MIZNER: Just observation. But --

16 JUSTICE SCALIA: You've observed different  
17 people from the people that I've observed.

18 (Laughter.)

19 MS. MIZNER: That's probably true.

20 CHIEF JUSTICE ROBERTS: Particularly since  
21 they're in their pockets, right?

22 Well, it -- does -- do you -- is it  
23 insignificant, in your view, that the cell phone was a  
24 method for which criminal transactions were typically  
25 undertaken in this area and that the fellow had two cell

1 phones rather than what I would have thought is the more  
2 normal one?

3 MS. MIZNER: Yes. I don't believe that that  
4 should be a criteria justification for searching either  
5 cell phone. The -- it may be convenient for the police  
6 to get information related to a crime by -- by searching  
7 without a warrant, but this Court has said repeatedly  
8 that convenience and efficiency don't override  
9 individual constitutional rights.

10 And sanctioning a general evidence gathering  
11 search of the entire contents of his cell phone, given  
12 the current expansive nature of those contents is an  
13 unwarranted expansion of a traditional search incident  
14 to arrest, because we are not talking about the kind of  
15 traditional containers that holds limited, finite  
16 quantities of -- of usually other objects.

17 And there is nothing -- a seize-and-secure  
18 rule protects both the individuals' expectations of  
19 privacy and security and the government's right to  
20 obtain evidence consonant with the protections of the  
21 warrant requirement, giving the neutral magistrate an  
22 opportunity to determine whether there's probable cause  
23 for the search of the cell phone and to define the  
24 limits of that search.

25 CHIEF JUSTICE ROBERTS: Mr. Dreeben, you

1 have four minutes remaining.

2 REBUTTAL ARGUMENT OF MICHAEL R. DREEBEN

3 ON BEHALF OF PETITIONER

4 MR. DREEBEN: Mr. Chief Justice, and may it  
5 please the Court:

6 A search incident to arrest has always been  
7 considered a reasonable search within the meaning of the  
8 Fourth Amendment, and I think this case illustrates why  
9 that principle well applies to a cell phone.

10 JUSTICE SOTOMAYOR: This is a very big  
11 confusion of the Fourth Amendment. The Fourth Amendment  
12 doesn't permit reasonable searches without a warrant.  
13 It says you need a warrant for -- we've created  
14 exceptions to that, but not because a search is  
15 reasonable. Virtually every search could be reasonable  
16 without a warrant. If you've watched somebody selling  
17 drugs, it's very reasonable to go into their house, but  
18 absent the exigent circumstance of the drugs  
19 disappearing, you can't. So I don't talk about  
20 reasonable searches. I talk about --

21 MR. DREEBEN: So Justice Sotomayor, the  
22 Fourth Amendment doesn't actually say you do need a  
23 warrant. It does protect the right against unreasonable  
24 seizures, and it describes what warrants must contain.

25 JUSTICE SCALIA: That's the only thing it

1 prohibits is unreasonable seizures.

2 MR. DREEBEN: That's exactly right. That's  
3 the textual prohibition. This Court has created  
4 language in its jurisprudence that prefers warrants in  
5 certain circumstances, but as the Court recognized in  
6 McNealey last term and in Maryland v. King, the search  
7 incident to arrest doctrine is a categorical exception  
8 and this case illustrates why.

9 The information that was found on the phone  
10 was very time sensitive and important to law  
11 enforcement. It helped fulfill the typical purposes,  
12 the categorical purposes of the search incident to  
13 arrest doctrine. It helped verify identity, it helped  
14 solve the crime that -- for which the individual was  
15 arrested, and it was done in a reasonable and  
16 nonintrusive manner. There was nothing about this  
17 search that exposed reams of private data to view.

18 To the extent that the data was not in a  
19 call log really subject to a reasonable expectation of  
20 privacy at all, it was discovered in a search but I  
21 think that underscores why the search was limited and  
22 reasonable. So this case really, I think, exemplifies  
23 why a categorical rule that respondent urges in this  
24 case would not be appropriate, and we submit that this  
25 Court should reverse the Court of Appeals. Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 Mr. Dreeben.

3 The case is submitted.

4 (Whereupon, at 12:34 p.m., the case in the  
5 above-entitled matter was submitted.)

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