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Cell Phone Searches After *Riley*: Establishing Probable Cause and Applying Search Warrant Exceptions

Erica L. Danielsen*

Introduction

Advancements in cell phone technology, use, and ownership continue to rapidly increase. Cell phones have a substantial impact on modern day society which likewise creates a substantial impact on the law. In 2014, the United States Supreme Court addressed the issue of individuals' personal privacy concerns in their cell phones. In *Riley v. California*¹ the Supreme Court handed down a landmark decision, holding that when law enforcement officers seize a cell phone incident to a lawful arrest, they must first obtain a warrant prior to searching the phone.² This comment addresses the *Riley* decision, its specific application under Fourth Amendment³ analysis, and warrant requirement exceptions which could undermine the *Riley* holding.

Part I of this note discusses the Fourth Amendment's protection against unreasonable search and seizures and its probable cause requirement.⁴ The Fourth Amendment's text remains the same since its enactment. However, interpretation of the Fourth Amendment continues to evolve in order to stay current with society.⁵ Interpretation of the Fourth Amendment

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1. *Riley v. California*, 134 S. Ct. 2473 (2014).

2. *Id.* at 2495.

3. U.S. CONST. amend. IV.

4. *Id.*

5. See generally Barry Friedman & Orin Kerr, *The Fourth Amendment, CONSTITUTION* CTR., <http://constitutioncenter.org/interactive-constitution/amendments/amendment-iv> (last visited Apr. 5, 2016).

also varies based on state constitutional law since states can provide its citizens with greater protection than the United States Constitution.⁶ This is why the United States Supreme Court, federal district courts, and state courts have all undergone thorough Fourth Amendment analyses when applying the true meaning of the Fourth Amendment to the advanced issue of cell phone searches.

At first, *Riley's* groundbreaking holding seems like a bright-line rule for law enforcement and courts to follow. However, the decision left open areas for additional legal analysis. For example, how does the *Riley* decision effect the issue of establishing probable cause? Part II of this note addresses the Fourth Amendment's probable cause requirement. Specifically, this note discusses how the *Riley* decision lacks guidance to determine what is sufficient to establish probable cause to obtain a warrant to search a cell phone. Under United States constitutional law, courts apply a totality of the circumstances approach to determine if probable cause exists.⁷ However, some states, like New York, reject the totality of the circumstances approach and apply a strict *Aguilar-Spinelli*⁸ analysis to determine probable cause.⁹

Since the *Riley* decision did not specifically state what facts and circumstances are sufficient, this leads to disparate results throughout the states because warrants are issued on the basis of which probable cause analysis the jurisdiction adheres to. *Riley's* bright-line rule becomes diminished because states applying the *Aguilar-Spinelli* test require more information and reliability than a state which merely applies the totality of the circumstances.

In addition to probable cause, a warrant application must state the "things to be seized."¹⁰ The *Riley* decision fails to address what should be stated in a warrant application to meet

6. See, e.g., N.Y. CONST. art. I, § 12 *cf.* U.S. CONST. amend. IV. (New York adds greater protection for unreasonable interception of telephone and telegraph communications.)

7. See *Illinois v. Gates*, 462 U.S. 213 (1983).

8. See *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969).

9. *People v. Griminger*, 524 N.E.2d 409 (N.Y. 1988).

10. U.S. CONST. amend IV.

the “things to be seized” requirement. How specific does a police officer need to be when he drafts his warrant application in order to adequately describe what he intends to locate on the cell phone?

The rule that law enforcement now need to obtain a warrant prior to searching a cell phone inevitably led to further legal analysis. The Court in *Riley* stated that exigent circumstances may justify a warrantless search, however, the Court provided only limited examples of the types of situations this may entail.¹¹ Part III of this note addresses Fourth Amendment warrant requirement exceptions and provides examples of judicial responses to those exceptions thus far. Common warrant exceptions include searches incident to lawful arrests¹² and exigent circumstances, such as preventing the imminent destruction of evidence, pursuing a fleeing suspect, and rendering emergency aid.¹³

Finally, this note concludes with an overall summary and proposed solutions to the Fourth Amendment and cell phone searches in regard to the issues stated above.

I. Discussion of the Fourth Amendment

“The United States Constitution establishes America’s national government, fundamental laws, and guarantees certain basic rights to its citizens.”¹⁴ The Constitution ensures that United States citizens enjoy the rights, privileges, and protections which this country affords. When the Framers drafted the Fourth Amendment, they were concerned about “general warrants” and “writs of assistance” which allowed unrestrained searches of people and their homes without any cause to believe the person committed an offense.¹⁵ These

11. *Riley v. California*, 134 S. Ct. 2473, 2494 (2014) (providing examples such as “[A] suspect texting an accomplice who, it is feared, is preparing to detonate a bomb, or a child abductor who may have information about the child’s location on his cell phone.”).

12. *Id.* at 2484-85 (holding the search incident to arrest exception does not apply to cell phone searches).

13. *See generally* *Kentucky v. King*, 563 U.S. 452 (2011).

14. *The U.S. Constitution*, HISTORY, <http://www.history.com/topics/constitution> (last visited Apr. 5, 2016).

15. *Riley*, 134 S. Ct. at 2494; Friedman & Kerr, *supra* note 5.

general warrants basically allowed the government to enter an individual's home and conduct a full-blown search. The Framers designed the Fourth Amendment with the intent to protect citizens from these highly intrusive general warrants.¹⁶ Specifically, the Fourth Amendment provides:

The right of *the people* to be secure in their persons, houses, papers, and effects, against *unreasonable searches and seizures*, shall not be violated, and *no Warrants shall issue, but upon probable cause*, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹⁷

As with the vast majority of law, courts interpret statutory text through case law. For instance, the Fourth Amendment protects “the people” which “refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”¹⁸ Additionally, cases interpreting “unreasonable” provide examples of governmental action deemed both reasonable and unreasonable based on the circumstances of each case.¹⁹

General warrants are clearly recognized as a “search” for Fourth Amendment purposes. However, when conducting a Fourth Amendment analysis today, courts must follow Justice Harlan’s determination of a “search” based on his concurrence in *Katz v. United States*.²⁰ To conduct this analysis, a court must make a twofold determination. First, a court must determine whether the person exhibits an actual, subjective, expectation of

16. *Id.*

17. US CONST. amend. IV (emphasis added).

18. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

19. *See United States v. Rabinowitz*, 339 U.S. 56, 63 (1950) (“What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are ‘unreasonable’ searches and, regrettably, in our discipline we have no ready litmuspaper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case.”).

20. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

privacy and, second, whether that expectation of privacy is one that society is prepared to recognize as reasonable.²¹ The Framers likely did not consider advances in technology, such as the modern cell phone, and therefore, the actual, subjective, expectation of privacy at the time of the framing was significantly different than the current expectation of privacy an individual has in a cell phone. This is why the United States judicial system is obligated to continue to interpret and adapt the Fourth Amendment to conform to the advancements in society.

Privacy concerns also develop through case law. Courts address privacy interests in everything from cigarette packs to cell phones.²² In *United States v. Robinson*, pursuant to a lawful arrest, a police officer searched a defendant and found a crumpled cigarette pack in his pocket.²³ The officer opened the cigarette pack and found heroin inside.²⁴ In *Robinson*, the United States Supreme Court held, that pursuant to a lawful arrest, an officer may search an individual and all containers on his person.²⁵ Based on the *Robinson* search incident to arrest exception, the People in *Riley* argued that an officer can search a cell phone as a “container” similar to *Robinson’s* cigarette pack.²⁶ However, the difference is that “modern cell phones...implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse[.]”²⁷

Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee’s person. The term “cell phone” is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called

21. *Id.*

22. *See generally* *United States v. Robinson*, 414 U.S. 218 (1973); *Riley v. California*, 134 S. Ct. 2473 (2014).

23. *Robinson*, 414 U.S. at 223.

24. *Id.*

25. *Id.* at 218.

26. *Riley*, 134 S. Ct. at 2478.

27. *Id.* at 2488-89.

cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers.²⁸

A cigarette pack does not contain the private intimacies of an individual's life in the same way a cell phone does. Therefore, by acknowledging the storage capacity of a cell phone, a person's actual, subjective expectation of privacy is extremely great.

However, individuals do not have an expectation of privacy in another person's cell phone. Certain courts hold that text messages do not compare to telephone conversations or letters, even though under both state and federal constitutions, the contents of letters and phone conversations carry a constitutionally protected privacy interest.²⁹ Once an individual sends a text message from their phone to a recipient's phone, courts are no longer concerned with any privacy interest a defendant had in any digital copies of the sent text messages.³⁰

The Fourth Amendment also includes the terms "persons, houses, papers, and effects."³¹ A cell phone falls within the "effects" category. Individuals use cell phones to access and store more information than a person could ever physically carry on their person, in their home, or in their papers or effects. For example, if the police access the contents of a cell phone, not only can they observe call logs, which show the people the individual communicates with, but they can also see the person's pictures and videos, depicting family, friendship, and romantic relationships, text message chains, internet access including health and medical information, bank records, financial documents, email correspondence, consisting of personal and work related information, and applications that describe the person's most intimate characteristics, details, and events of daily life.³² Most people cannot and do not physically carry

28. *Id.* at 2489.

29. *State v. Carle*, 337 P.3d 904, 907, 911 (Or. Ct. App. 2014).

30. *Id.* at 908. *See also State v. Tentoni*, 871 N.W.2d 285 (Wis. Ct. App. 2015).

31. U.S. CONST. amend. IV.

32. Chuck Jones, *What Do People Use Their Cell Phones For Beside Phone Calls?*, FORBES (Nov. 29, 2012, 12:07 PM), <http://www.forbes.com/sites/chuckjones/2012/11/29/what-do-people-use-their-cell-phones-for-beside-phone-calls/>.

around every piece of mail they receive, every picture they take, or every book or article they read, “[a]nd if they did, they would have to drag behind them a trunk of the sort held to require a search warrant in *Chadwick*...”³³ Although no one physically carries around every document concerning their life, people now access all this information within seconds in the palm of their hand.

The immense storage capacity of a cell phone shows that an individual carrying the phone has an actual, subjective, expectation of privacy in its contents.³⁴ The fact that nearly two-thirds of Americans own a smart phone shows that society recognizes this expectation of privacy as reasonable.³⁵ An officer who observes the contents of a person’s cell phone without a warrant conducts a “search” within the meaning of the Fourth Amendment. Therefore, *Riley* provides this “search” with Fourth Amendment protection.³⁶

II. Probable Cause Under the Fourth Amendment

Two important cases discuss how to determine whether probable cause exists for a magistrate to issue a search warrant. These two cases provide different tests for a judiciary to use when determining probable cause. The tests are commonly referred to as the *Aguilar-Spinelli*³⁷ test and the *Gates* totality of the circumstances test.³⁸ The United States Supreme Court

33. *United States v. Chadwick*, 433 U.S. 1 (1977) (holding that a locked piece of luggage requires a search warrant).

34. *See Katz v. United States*, 389 U.S. 347 (1967).

35. Aaron Smith, *U.S. Smartphone Use in 2015*, PEW RESEARCH CTR. (Apr. 1, 2015), <http://www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015/>. *See Katz*, 389 U.S. 347.

36. It is important to mention that this note discusses a physical search of the contents of an individual’s cell phone and does not discuss the separate issue and circuit split of whether obtaining cell site location information requires a warrant. *See generally* Orin Kerr, *Fourth Circuit Adopts Mosaic Theory, Holds that Obtaining “Extended” Cell-Cite Records Requires a Warrant*, WASH. POST (Aug. 5, 2015), <https://www.washingtonpost.com/news/voikh-conspiracy/wp/2015/08/05/fourth-circuit-adopts-mosaic-theory-holds-that-obtaining-extended-cell-site-records-requires-a-warrant/>.

37. *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969).

38. *Illinois v. Gates*, 462 U.S. 213 (1983).

initially set out a probable cause standard requiring that (1) an affidavit for a search warrant must set forth underlying circumstances necessary to enable a magistrate independently to judge on the validity of an informant's conclusion and that (2) affiant-officers must support their claim that their informant was credible or his information reliable, so that the probative value of the report can be assessed.³⁹ Under the *Aguilar-Spinelli* test:

[T]he constitutional requirement of probable cause can be satisfied by hearsay information...First, the application [must] set forth any of the 'underlying circumstances' necessary to enable the magistrate independently to judge of the validity of the informant's conclusion...Second, the affiant-officers [must] attempt to support their claim that their informant [is] "credible" or his information 'reliable.'⁴⁰

Fourteen years later, the United States Supreme Court significantly broadened the *Aguilar-Spinelli* test and adopted a totality of the circumstances approach.⁴¹ In contrast, under *Gates*, "a totality-of-the-circumstances analysis...permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip..."⁴²

Although the totality of the circumstances approach is more lenient, encompassing a wide range of possibilities to satisfy probable cause, not all states follow the *Gates* decision. New York, for example, continues to apply a strict *Aguilar-Spinelli* test to determine whether there is probable cause to issue a search warrant.⁴³ States that hold true to the *Aguilar-Spinelli* determination provide its citizens with greater protection under state constitutional law, statutory provisions, and case law.

39. *Spinelli*, 393 U.S. 410.

40. *Id.* at 412-13.

41. *Gates*, 462 U.S. at 230.

42. *Id.* at 233.

43. *People v. Griminger*, 524 N.E.2d 409 (N.Y. 1988).

Under either probable cause analysis, the *Riley* decision still did not address the type of facts sufficient to establish probable cause. Is it enough for an officer to observe an individual talking on a cell phone prior to the officer observing criminal activity? Can a reliable informant call the cell phone proving the phone is used for criminal activity? What if an officer observes, in plain view, a text message on the cell phone screen mentioning criminal activity? These are a few circumstances law enforcement will include in their search warrant applications to try and establish probable cause. Depending on whether a state enforces *Aguilar-Spinelli* or *Gates*, the determination of probable cause and the neutral and detached magistrate's decision to sign a warrant will vary.

A. *Judicial Response to the Probable Cause Issue*

Prior to the *Riley* decision, New York already addressed the issue of whether to require a warrant to search a cell phone. The *Riley* decision came down in 2014, however, New York courts have issued search warrants for cell phone in years prior. In a case from 2011, a police officer stopped a car based on reasonable suspicion that a drug transaction occurred.⁴⁴ The officer seized the defendant's cell phone, and while the case was pending, obtained a search warrant to retrieve information from the phone.⁴⁵

However, even if courts issued warrants prior to *Riley*, the question remains: what information do police include in search warrant applications to establish probable cause? An analysis begins by providing an example of a circumstance which clearly does not establish probable cause under either *Aguilar-Spinelli* or *Gates*. An officer fails to establish the requisite probable cause if the officer conducts an unlawful search of a cell phone, observes incriminating evidence, and then uses that incriminating evidence in his search warrant application.⁴⁶

In *People v. Martinez* the police arrested the defendant, seized his phone, looked through it without a warrant, and found

44. *People v. McNair*, 926 N.Y.S.2d 101, 102 (App. Div. 2011).

45. *Id.*

46. *See People v. Martinez*, 993 N.Y.S.2d 304 (App. Div. 2014).

two photos depicting a pistol resembling a pistol recovered in a crime.⁴⁷ Thereafter, the same officer filed a search warrant affidavit specifically seeking to search photographs, among other things on the phone, stating there was reasonable cause to believe that evidence concerning the defendant's possession of a firearm existed on the phone.⁴⁸ This is a clear Fourth Amendment violation emphasizing that an officer cannot use information obtained from an unlawful search to establish probable cause.

In *United States v. Gyamfi*, a police officer established probable cause to search a cell phone, the court issued a valid warrant, and the officer conducted a lawful search.⁴⁹ An identified victim reported to police that people robbed him at gunpoint.⁵⁰ After the robbery, the defendants contacted the victim on the victim's cell phone instructing the victim to do as he was told or else he would be killed.⁵¹ The defendants demanded the victim cash checks at various banks.⁵² The victim showed the police the text messages from the defendants and the police observed the defendants' phone numbers repeatedly calling on the victim's phone screen.⁵³ Eventually, the police arrested the defendants and seized their cell phones.⁵⁴ The court found the officers established probable cause and issued a warrant to search the defendants' cell phones.⁵⁵ The court stated:

The affidavits underlying the warrants set forth in detail the facts leading up to defendant's arrests. The affidavits also described the manner in which cellular phones were believed to have been used during the commission of the alleged crimes. In particular, the affidavits stated that

47. *Id.* at 305.

48. *Id.* at 306.

49. *United States v. Gyamfi*, No. 14 Cr. 157(PAC), 2014 WL 4435428, at *1-2 (S.D.N.Y. Sept. 9, 2014).

50. *Id.* at *1.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Gyamfi*, 2014 WL 4435428 *2.

[the victim] received repeated telephone calls from the phone number and that defendant Ayayee later received repeated telephone calls from that same number. The issuing judge could therefore conclude that a fair probability existed that the defendants used their phones during the commission of the crimes and that, as a result, their phones contained evidence of the crimes. Furthermore, the warrants clearly identified the crimes for which the search was being undertaken and set forth the categories of information to be searched.⁵⁶

However, in a separate case out of Kings County, New York, police officers obtained a warrant to search a cell phone with less correlation between the cell phone and the alleged crime.⁵⁷ In *People v. Watkins*, an officer observed a vehicle driving without its headlights on.⁵⁸ The officer stopped the vehicle, frisked the defendant, and retrieved a loaded firearm from the defendant's waistband.⁵⁹ The defendant informed the officer he was recording the interaction on his iPhone.⁶⁰ The officer eventually turned off the recording and seized the phone incident to the defendant's arrest.⁶¹ Subsequent to the arrest, the officer applied for a search warrant to obtain data from the cell phone relating to possession of the firearm.⁶² The officer appeared in person before a judge and submitted a sworn affidavit regarding his first-hand observations of the defendant using the cell phone during the arrest and included that the defendant told the officer he recorded the interaction.⁶³

The court in *Watkins* found a sufficient correlation between the cell phone and the crime of possessing a firearm.⁶⁴ The facts

56. *Id.* at *3.

57. *People v. Watkins*, 994 N.Y.S.2d 816 (Sup. Ct. 2014).

58. *Id.* at 817.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 818.

63. *Watkins*, 994 N.Y.S.2d at 818.

64. *Id.*

formed the basis of the officer's belief that evidence of possession of a firearm could be recovered from the defendant's iPhone and that probable cause existed to issue the warrant.⁶⁵

B. *Analysis and Solution to the Probable Cause Issue*

In *Gyamfi*, there is a clear correlation between the defendants using the cell phone to call and text the victim and the crimes the defendants committed. However, an officer obtaining a search warrant with limited correlation between the phone and crime is concerning to the privacy rights of all individuals. In *Watkins*, the officer presented facts to a neutral and detached magistrate that the defendant used a phone at the time of arrest and that the defendant informed the officer he recorded the interaction. However, *Watkins* likely recorded the interaction between him and the officer for his own safety. *Watkins* did not record himself committing a crime. Therefore, the court should not have issued a warrant based simply on the fact the defendant recorded the interaction with the officer.

The court decided *Watkins* under New York law which applies *Aguilar-Spinelli* to probable cause determinations. Accepting for a moment that the officer met the first prong of the *Aguilar-Spinelli* test, reliable and credible informant, the additional prong concerning the underlying circumstances of the officer's knowledge is unsettling. If the defendant recorded his interaction with the officer for his own protection and thereafter the officer used that same information against him, then how is an individual supposed to protect his own interests? The officer did not have information that the defendant used the cell phone in furtherance of criminal activity.

Society should be extremely hesitant to accept that just because a person uses his phone at the time of arrest that it could mean he will lose his expectation of privacy in his cell phone. It is common for citizens to record interactions with police officers and it is within their right to do so.⁶⁶ A citizen's

65. *Id.*

66. Caitlin Nolan & Thomas Tracy, *NYPD Cops Receive Memo Reminding Them They Can Be Filmed While On Duty*, DAILY NEWS (Aug. 10, 2014, 1:17 AM), <http://www.nydailynews.com/new-york/nypd-cops-told-memo-filmed-article-1.1898379> ("Members of the public are legally allowed to record police

right to record an officer on their cell phone should not be subsequently used against them to obtain a search warrant.

C. *What Constitutes the Things to be Seized as Listed in a Search Warrant Affidavit*

The Fourth Amendment requires a warrant specifically contain “the things to be seized.”⁶⁷ The issue that arises is what exactly must an officer state in a warrant application to meet the “things to be seized” requirement.⁶⁸ Will general statements such as pictures, call logs, or text messages satisfy the requirement or must these “things” be narrowly described down to certain images, specific applications, or a specific date range? Additionally, even if the warrant contains specific “things,” such as evidence of a gun, how can the officer search for this without scrolling through other information in the process? It is highly likely that an officer will scroll through hundreds of photographs, many of which will have nothing to do with the warrant. This broadens the search for evidence of criminality.

D. *Judicial Response to the Things to Be Seized*

In *People v. Watkins*, the judge found the officer’s warrant application established probable cause based on the belief that the cell phone contained evidence of possession of a firearm.⁶⁹ The court stated:

In our modern society, as the abilities of applications contained in cellular phones evolve, a warrant must be drafted with sufficient breadth to search the data of a cellular telephone to determine which application or file is of evidentiary value. Indeed, multiple applications could have been running at the same time,

interactions...Intentional interference such as blocking or obstructing cameras or ordering the person to cease constitutes censorship and also violates the First Amendment.”).

67. U.S. CONST. amend. IV.

68. *Id.*

69. *Watkins*, 994 N.Y.S.2d 818.

including a telephone call or video call. Thus, just as with a search warrant for a home, while the scope of the warrant may be properly limited, had the police uncovered other acts of criminality, such evidence would fall under the scope of the search warrant.

...Rather, a search warrant that allows an inspection of the entire cellular telephone is appropriate to determine what, if any, applications and files pertain to the subject of the observed criminality.⁷⁰

The search warrant in *Watkins* authorized officers to download all data on the phone in order to locate the specific applications and files related to possession of the loaded firearm.⁷¹ The court held the warrant was not overbroad, since it was limited to audio, video, and information related to the firearm recovered.⁷² However, it is unsettling that this is not overbroad. The court allowed officers to download all data from the phone in order to determine which applications and files to search.⁷³

In contrast, another court held a search warrant for a cell phone was overbroad, in violation of the Fourth Amendment, where the warrant failed to state with particularity the items to be seized.⁷⁴ The warrant in *United States v. Winn* authorized the seizure of “any and all files that constituted evidence of disorderly conduct which...essentially invited police to conduct an illegal general search” of the cell phone.⁷⁵ The “any and all files” language expanded the warrant to the type of general search the Fourth Amendment specifically protects against.⁷⁶ In *Winn* the detective used the following template in his warrant application:

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *See* *United States v. Winn*, 79 F. Supp. 3d 904 (S.D. Ill. 2015).

75. *Id.* at 918.

76. *Id.* at 922.

[A]ny or all files contained on said cell phone and its SIM Card or SD Card to include but not limited to the calendar, phonebook, contacts, SMS messages, MMS messages, emails, pictures, videos, images, ringtones, audio files, all call logs, installed application data, GPS information, WIFI information, internet history and usage, any system files on phone, SIM Card, or SD Card, or any data contained in the cell phone, SIM Card or SD Card to include deleted space.⁷⁷

Since the *Winn* warrant application stated “any and all files”⁷⁸ and the police used standard template language, the court held it failed to establish the “things to be seized”⁷⁹ requirement.⁸⁰ Therefore, a warrant application cannot contain general boilerplate language but rather must be specifically tailored to the facts of each case.⁸¹

Additionally, in *United States v. Vega-Cervantes* a search warrant authorized officers to look for:

- (a) lists of customers and related identifying information;
- (b) types, amounts, and prices of drugs trafficked as well as dates, places, and amounts of specific transactions;
- (c) any information related to sources of drugs (including names, addresses, phone numbers, or any other identifying information);
- (d) any information recording schedule or travel;
- (e) all bank records, checks, credit card bills, account information, and other financial records; and
- (f) any and all communications with co-conspirators, including but not limited to voice

77. *Id.* at 911.

78. *See id.* at 918.

79. U.S. CONST. amend. IV.

80. *See Winn*, 79 F. Supp. 3d at 922.

81. *See generally id.*

calls, text messages, and pin-to-pin messages.⁸²

The court in *Vega-Cervantes* held the items to be seized and the search conducted was valid since the defendant failed to support his argument that the Government “copied and saved all the contents from his BlackBerry.”⁸³ The court stated that the items the defendant “identified as being seized appear[d] to fall within the scope of the search authorized by the warrant” and, therefore, he “failed to satisfy his burden to show that the search of his BlackBerry amounted to a ‘flagrant disregard’ of the warrant’s terms.”⁸⁴

E. *Analysis and Solution to the Things to be Seized*

Allowing law enforcement to download all data from a cell phone should exceed permissible governmental action. In *Watkins*, the court issued a search warrant based on facts that the defendant recorded his interaction with the officer. Since the officer based his warrant affidavit on this fact, the warrant, if issued at all, should be limited to audio and video data on the date and at the time of the interaction only. The officer failed to state additional facts for a neutral and detached magistrate to reasonably believe that additional evidence of criminality was stored elsewhere on the phone. The only potentially relevant evidence was the recorded interaction between the defendant and the officer. If a court allows law enforcement to download all data in order to locate specific applications, which may or may not contain criminal activity, this only broadens the permissible scope of the warrant.

In comparison, the *Winn* court correctly held that using standard boilerplate language in cell phone warrant applications is insufficient. The officer in *Winn* attempted to gain access to all information on the cell phone rather than specific evidence related to the case. Issuing a search warrant in *Winn* would have increased the officer’s chances of obtaining

82. *United States v. Vega-Cervantes*, No. 1:14-CR-234-WSD, 2015 WL 4877657, at *18-19 (N.D. Ga. Aug. 13, 2015).

83. *Id.* at *19.

84. *Id.*

incriminating evidence unrelated to the case. The judicial process to obtain a warrant cannot function as a way for law enforcement to gain unlimited access to the intimate private details of an individual's life. Without sufficient facts of what an officer is looking for and the location on the phone where that information may be stored, the "place to be searched" and "things to be seized" requirement is not met and the warrant should not be issued. Allowing wide range to conduct a cell phone search brings the Fourth Amendment analysis back full circle to the general warrants the Fourth Amendment protects against.

III. Exceptions to the Warrant Requirement

Although the Fourth Amendment specifically provides for a warrant requirement, over the years courts develop many exceptions to the general rule. Exceptions include searches incident to arrest, exigent circumstances, consent, plain view, the automobile exception, inevitable discovery, and good faith. The Court in *Riley* stated the search incident to arrest exception does not apply to cell phone searches.⁸⁵ However, *Riley* left open the possibility for other case specific exceptions to apply depending on the circumstances.

Exigent circumstances may justify a warrantless search of a cell phone.⁸⁶ When the exigencies of a situation make law enforcement needs so compelling that a warrantless search is objectively reasonable under the Fourth Amendment, the exigency exception may apply.⁸⁷ Exigencies include rendering emergency aid to an individual, hot pursuit of a fleeing suspect, preventing the imminent destruction of evidence, and the safety of law enforcement officers or other individuals.⁸⁸ However, the police cannot create the exigent circumstance.⁸⁹ The *Riley* decision provides specific examples of exigent circumstances which may apply to a cell phone search, such as "a suspect texting an accomplice who, it is feared, is preparing to detonate

85. *See generally* *Riley v. California*, 134 S. Ct. 2473 (2014).

86. *Id.* at 2494.

87. *See generally* *Kentucky v. King*, 563 U.S. 452 (2011).

88. *Id.* at 460.

89. *Id.* at 461.

a bomb, or a child abductor who may have information about the child's location on his cell phone."⁹⁰ However, the *Riley* decision only mentions these few extreme scenarios which may override the warrant requirement in certain fact specific cases. One can imply that since *Riley* provided such extreme examples, only in rare cases will exigent circumstances justify a warrantless search of a cell phone.

Other exceptions may also apply, including the voluntary consent of the owner of the cell phone. If a police officer attempts to justify a search based on consent, the question becomes "whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, [and] is a question of fact to be determined from the totality of all the circumstances."⁹¹ However, consent leads to the unfortunate circumstance when an individual does not realize he has a right to refuse consent. If an individual does not know they have a right to refuse a request to search their cell phone, then any incriminating evidence found in the cell phone, due to the individual's lack of knowledge, can be used against them.

Subsequent to the *Riley* decision, courts also addressed plain view, the automobile exception, inevitable discovery, and good faith. Some of these arguments have been successful while some have not. However, this does not mean certain exceptions will never be successful. A warrantless search of a cell phone may fall into various exceptions with the right facts.

A. *Judicial Responses to Warrant Requirement Exceptions*

1. Exigent Circumstances

In *United States v. Camou*, the court addressed and rejected various exceptions for a warrantless search of a cell phone.⁹² In *Camou* a border patrol agent stopped a truck at a checkpoint in California, arrested the defendant when he found an undocumented immigrant in the truck, and then seized and ultimately searched the defendant's cell phone without a

90. *Id.*

91. *Schneekloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

92. *United States v. Camou*, 773 F.3d 932 (9th Cir. 2014).

warrant.⁹³ The agent claimed that he looked for evidence in the phone for known smuggling organizations but did not assert the search was necessary to prevent the destruction of evidence or to ensure his or anyone else's safety.⁹⁴ During the search the agent reviewed call logs, videos, and photographs where he found images of child pornography.⁹⁵

The government argued that "the volatile nature of call logs and other cell phone information" that existed due to the passing of time presented an exigent circumstance.⁹⁶ The court in *Camou* held that since the agent conducted the search one hour and twenty minutes after the arrest, an "imminent" "now or never situation" did not exist in order for the exigency exception to apply.⁹⁷ Additionally, even if an exigency justified a search to prevent losing data, the search was overbroad as it went beyond contacts and call logs and included a search of hundreds of photographs and videos.⁹⁸

Interestingly though, the *Camou* court did not address the border exception to the warrant requirement:

[T]he basis for the border search exception is "[t]he Government's interest in preventing the entry of unwanted persons and effects." Because of the strength of this interest, "[r]outine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant." However, this is not an exemption from the Fourth Amendment, but merely an acknowledgement that a wide range of suspicionless searches are "reasonable simply by virtue of the fact that they occur at the border."⁹⁹

93. *Id.* at 935-36.

94. *Id.* at 936.

95. *Id.*

96. *Id.* at 940.

97. *Camou*, 773 F.3d at 941.

98. *Id.*

99. *United States v. Saboonchi*, 48 F. Supp. 3d 815, 817-18 (D. Md. 2014) (internal quotations and citations omitted).

Although *Camou* did not address the border exception, the court in *Saboonchi* denied a defendant's motion to suppress the fruits of a warrantless search of his smartphone since *Riley's* holding also did not address the border search exception.¹⁰⁰

2. Consent

The Fourth and Fourteenth Amendments require that when an individual is not in custody, the individual's consent to search must be "voluntarily given, and not the product of duress or coercion, express or implied."¹⁰¹ In *People v. Weissman*, a New York court addressed the issue of consent to conduct a warrantless search of a cell phone by a court officer.¹⁰² In *Weissman*, a court officer believed spectators, while observing a jury trial, took a picture of him, in violation of court rules.¹⁰³ The court officer instructed the spectators to come over to him and show him the pictures on their phones.¹⁰⁴ He then asked them to scroll through to make sure there were no pictures of him and as they did the officer noticed a picture of a witness who testified the previous day.¹⁰⁵ Since voluntariness is a question of fact determined from all the circumstances, the court in *Weissman* held that a reasonable person, free of any wrongdoing, would not have felt free to ignore the officer's direction to come over and show the officer his phone and, therefore, did not give voluntary consent.¹⁰⁶

In contrast, in *United States v. Garden*, police officers showed a copy of a warrant to a defendant in order to search his residence, as well as all computers, computer files, and file storage devices, to locate evidence of child pornography.¹⁰⁷ The officers subsequently asked the defendant, "[i]s it okay if our

100. *Id.* at 815.

101. *Schlekneth v. Bustamonte*, 412 U.S. 218, 248 (1973).

102. *See generally* *People v. Weissman*, 997 N.Y.S.2d 602 (Sup. Ct. 2014).

103. *Id.* at 607.

104. *Id.*

105. *Id.* at 607-08.

106. *Id.* at 613.

107. *United States v. Garden*, No. 4:14CR3072, 2015 WL 6039174, at *9 (D. Neb. June 29, 2015) report and recommendation adopted in part, No. 4:14CR3072, 2015 WL 6039377 (D. Neb. Oct. 15, 2015).

guys search your phone, too?”¹⁰⁸ The court in that case found the defendant validly consented to the search, never recanted his consent, and therefore, under the totality of the circumstances, reasonable officers would have believed the defendant understood the officers intent to look at all data within the defendant’s cellphone for evidence of child pornography.¹⁰⁹

3. Plain View

Another exception, known as plain view, may arise when an officer lawfully searches an individual’s cell phone or lawfully seizes the cell phone and obtains a warrant but then observes incriminating evidence not specifically stated in the warrant. In order for the plain view doctrine to apply, a police officer must lawfully be in the place where an incriminating item is seen, the item must be in plain view, and the item’s incriminating character must be immediately apparent.¹¹⁰

In *Sinclair v. State*, a police officer physically opened a flip phone to turn it off and the court held this was not an unlawful cell phone search under *Riley*.¹¹¹ When the officer flipped open the phone, he observed a screen saver photograph in plain view.¹¹² The officer immediately recognized the screen saver image as a stolen item.¹¹³ The court held this was not an unlawful search and denied suppression of the image under a plain view theory.¹¹⁴

Another court also found it reasonable, under a plain view theory, for the government to remove the back cover of a cell phone without a warrant.¹¹⁵ A cell phone’s serial number is “not the type of ‘sensitive personal information’ requiring a search warrant under *Riley*; instead it is part of the “‘physical aspects of a phone’ that officers are still permitted to inspect without

108. *Id.*

109. *Id.*

110. *Horton v. California*, 496 U.S. 128, 136 (1990).

111. *Sinclair v. State*, 118 A.3d 872, 888-89 (Md. 2015).

112. *Id.* at 888-89.

113. *Id.*

114. *Id.*

115. *United States v. Lowe*, No. 2:14-CR-00004-JAD-VCF, 2014 WL 5106053, at *3, *11, 12 (D. Nev. Oct. 10, 2014).

fear of triggering greater privacy interests.”¹¹⁶ Similarly, removing the battery to view identifying information printed by the manufacturer or seller to obtain search warrants is a “minimally intrusive examination [and] does not implicate the privacy interests at issue in *Riley*...”¹¹⁷

4. Automobile Exception

When an officer makes a “lawful custodial arrest of an occupant of an automobile, [the officer] may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.”¹¹⁸ The officer may also examine the contents of any open or closed containers found within the passenger compartment of the vehicle.¹¹⁹ In *Camou*, the government sought to justify the warrantless cell phone search based on this automobile exception to the warrant requirement.¹²⁰ However, *Riley* specifically addressed whether a cell phone is a “container” for purposes of the automobile exception:

Treating a cell phone as a container whose contents may be searched incident to an arrest is a bit strained as an initial matter. But the analogy crumbles entirely when a cell phone is used to access data located elsewhere, at the tap of a screen.¹²¹

Therefore, the *Camou* court, following *Riley*, held that cell phones are not containers and officers may not search the phone under the automobile exception.¹²²

116. *Id. Cf. Arizona v. Hicks*, 480 U.S. 321 (1987) (moving stereo equipment to locate serial numbers constituted a “search,” which had to be supported by probable cause, even though the officer was lawfully present where the equipment was located.)

117. *United States v. Vega-Cervantes*, No. 1:14-CR-234-WSD, 2015 WL 4877657, at *15 (N.D. Ga. Aug. 13, 2015).

118. *New York v. Belton*, 453 U.S. 454, 460 (1981).

119. *Id.* at 461.

120. *See United States v. Camou*, 773 F.3d 932, 941-43 (9th Cir. 2014).

121. *Id.* at 942 (citing *Riley*, 134 S. Ct. at 2491).

122. *Id.* at 943.

It is interesting to mention a distinction here to New York State law. The United States Supreme Court, under *New York v. Belton*, allows police officers to search the entire passenger compartment of a vehicle, including any open or closed containers therein, incident to arresting a passenger of the vehicle.¹²³ This holding is based on the “grabbable area” rationale established in *Chimel*.¹²⁴ In *Chimel*, the police searched the “grabbable area” consisting of a room where they arrested the defendant.¹²⁵ The grabbable area did not include a full blown search of the defendant’s entire house.¹²⁶ The *Chimel* theory emphasizes that a defendant can reach within his or her “grabbable area” for a weapon or to destroy evidence.¹²⁷ However, after the United States Supreme Court reversed and remanded the *Belton* case, the New York Court of Appeals declined to follow the *Chimel* grabbable area rationale for automobile searches under New York State law.¹²⁸ New York State law allows police officers to conduct a *Belton* search of the passenger compartment and any containers therein, not based on a grabbable area theory, but rather based on the automobile exception alone.¹²⁹ This requires the police to establish probable cause that evidence of criminality is located in the vehicle.¹³⁰

5. Abandonment

When a person abandons an item, he generally loses any expectation of privacy he otherwise had in the item. In *State v. Samalia*, the police pulled over the defendant and when the officer approached the vehicle, the defendant fled, leaving his cell phone in the car.¹³¹ The court held that the suspect’s hasty flight under the circumstances was sufficient evidence of an

123. *Belton*, 453 U.S. at 460.

124. *See generally* *Chimel v. California*, 395 U.S. 752 (1969).

125. *Id.* at 763.

126. *Id.* at 760, 763.

127. *Id.* at 762-63, 768.

128. *See generally* *People v. Belton*, 432 N.E.2d 745 (N.Y. 1982).

129. *Id.* at 746.

130. *Id.* at 748.

131. *State v. Samalia*, 344 P.3d 722, 724 (Wash. Ct. App. 2015) *review granted*, 355 P.3d 1152 (Wash. 2015).

intent to abandon the vehicle.¹³² Since the defendant abandoned the vehicle, the court stated *Riley* did not apply because the cell phone was also abandoned rather than seized incident to arrest.¹³³ The search of the cell phone fell in both the abandonment and exigency exception to pursue a fleeing suspect and therefore the court did not require the officer to obtain a warrant.¹³⁴

6. Inevitable Discovery

The exclusionary rule does not apply if a court determines law enforcement would have discovered the evidence by otherwise lawful means.¹³⁵ In *United States v. Lewis*, police officers used information they obtained during a warrantless search of a cell phone in their warrant application to search a hotel room.¹³⁶ The court held that the “comment in the warrant application that the warrantless search of the defendant’s cell phones uncovered text messages consistent with large-scale distribution of controlled substances was cumulative to other information in the affidavit.”¹³⁷ There was more than enough evidence in the affidavit to establish probable cause even without the evidence from the cell phone and therefore the constitutional violation was harmless error.¹³⁸

However, this argument does not allow police officers to bypass the warrant requirement simply because they may have probable cause to obtain a warrant. Law enforcement could always disregard the warrant requirement if courts admit evidence obtained without a warrant just because the officers can establish probable cause.¹³⁹ Therefore, the argument that an officer searched a cell phone without a warrant simply because he had probable cause and could have obtained a

132. *Id.* at 725.

133. *Id.* at 726.

134. *Id.*

135. *U.S. v. Camou*, 773 F.3d 932, 943 (9th Cir. 2014) (citing *Nix v. Williams*, 467 U.S. 431, 444 (1984)).

136. *United States v. Lewis*, 615 F. App'x 332, 337 (6th Cir. 2015).

137. *Id.* at 337-38.

138. *Id.* at 338.

139. *Camou*, 773 F.3d at 943 (citing *United States v. Mejia*, 69 F.3d 309, 320 (9th Cir. 1995)).

warrant is invalid to establish inevitable discovery.

7. Good Faith

As a final example of a warrant exception, the court in *Camou* rejected an argument of good faith.¹⁴⁰ The government argued that at the time of the search, *Riley* had not been decided and therefore the officer relied in good faith on then existing law that he could search the cell phone incident to arrest.¹⁴¹ The good faith doctrine arises out of *United States v. Leon*, where the Court admitted evidence found by police officers while conducting a search based on reasonable reliance that the search warrant was valid.¹⁴² While the search warrant was ultimately determined to be invalid, the Court did not exclude any evidence obtained from the execution of the invalid search warrant.¹⁴³

In *Davis v. United States*, the Court determined that when an officer conducts a search based on objectively reasonable reliance on binding precedent at the time, the exclusionary rule does not apply.¹⁴⁴ This argument rests on the belief that if an officer acts in good faith, disallowing the evidence does not prevent illegal conduct by law enforcement.¹⁴⁵ Even though the officer in *Camou* relied on good faith that a search incident to arrest allowed for a search of the cell phone, the court still held that the search was invalid because it occurred one hour and twenty minutes after arrest, clearly not contemporaneous to arrest.¹⁴⁶

Additionally, where an investigator sought a warrant to search photographs on a phone for evidence of an alleged sexual assault and the investigator testified he believed he acted under the warrant when he powered up the phone and searched its

140. *Id.* at 944-45.

141. *Id.*

142. *See generally* *United States v. Leon*, 468 U.S. 897 (1984).

143. *Id.* at 922.

144. *Davis v. United States*, 565 U.S. 229, 240 (2011).

145. *Id.*

146. *U.S. v. Camou*, 773 F.3d 932, 939 (9th Cir. 2014). *Cf.* *United States v. Williams*, No. 2:14-CR-30, 2015 WL 5602617, at *10 (W.D. Pa. Sept. 23, 2015) (finding valid warrantless cell phone search which occurred a year and a half prior to the *Riley* decision).

photo library, the court followed the good faith exception.¹⁴⁷ The court held that since the investigator acted reasonably there was no reason to exclude the photographs found on the phone.¹⁴⁸

Another distinction to mention regarding New York State law is that New York declines to follow *Leon's* good faith exception. If the People are permitted to use the seized evidence, even if obtained in good faith, then the exclusionary rule's purpose is completely frustrated.¹⁴⁹ New York declines, on state constitutional grounds, to apply the *Leon* good-faith exception.¹⁵⁰ Although New York would not have applied good faith to an incident to arrest argument, it is possible that the Ninth Circuit in *Camou* may have applied this exception if the search had been contemporaneous in time to the arrest.

B. *Analysis and Solution to Warrant Requirement Exceptions*

Courts are generally not lenient in applying exceptions to the warrant requirement for a search of a cell phone. So far, the requirement to obtain a search warrant to search a cell phone is strictly enforced. Although the Court in *Riley* came down with what seems, at first, to be a bright-line rule, the decision left open the possibility of applying warrant exceptions. Sometimes it is more common to conduct a search pursuant to an exception than it is to conduct a search pursuant to a warrant based on probable cause. However, courts should not analyze these exceptions lightly and should only find exceptions in justified circumstances.

The exigent circumstances exception does not apply as easily to cell phone searches as it does in other cases. The fact that data on a cell phone does not likely pose a risk of destruction of evidence or a threat to police officers or the public makes it very hard for an officer to justify an exigent circumstance. An officer can seize the cell phone, turn it off to preserve any evidence, and obtain a warrant prior to searching through it. This is how police officers should handle the majority of

147. *Moore v. State*, 160 So. 3d 728, 734 (Miss. Ct. App. 2015).

148. *Id.*

149. *People v. Bigelow*, 488 N.E.2d 451, 458 (N.Y. 1985).

150. *Id.*

circumstances involving a cell phone. A court should only issue a warrant if an officer can establish probable cause. There should not be many circumstances which require an officer to search a phone at the time of arrest. Unless a rare exigent circumstance exists, similar to the examples stated in *Riley*,¹⁵¹ an exigent circumstance argument should fail.

Consent is likely an officer's easiest way to avoid the warrant requirement. Courts analyze consent to search a cell phone the same way as determining consent to search a person, a car, or a home. Unfortunately, issues often arise when unfortunate individuals are unaware of their right to refuse consent. In fact, police officers do not even need probable cause to ask for consent. An officer may ask an uninformed individual to see the contents of his cell phone and the unknowing individual may give voluntary consent. Then any incriminating evidence the officer sees may be used against the individual. The uninformed individual then has to challenge both the voluntariness of their consent along with the unlawful search of their cell phone. Making individuals aware of their rights is an important aspect of ensuring Fourth Amendment protection.

The automobile exception should also be an invalid exception to the warrant requirement as it relates to cell phones. Either an automobile search, incident to arrest, or an automobile search, based on additional probable cause, does not allow an officer to intrude into the data on a cell phone since *Riley* and subsequent cases hold that a cell phone is not a "container" for Fourth Amendment purposes.

Certain courts may apply a good faith exception to the warrant requirement if the search is contemporaneous in time to the arrest. Cell phone searches made prior to the *Riley* decision could include the argument that since *Riley* was not yet binding precedent, the officer reasonably relied on a search incident to arrest. Currently however, this argument fails for any search conducted outside of the timeframe between the *Belton* and *Riley* decisions.

151. *Riley v. California*, 134 S. Ct. 2473, 2494 (2014) (providing examples such as "a suspect texting an accomplice who, it is feared, is preparing to detonate a bomb, or a child abductor who may have information about the child's location on his cell phone.").

IV. Conclusion

In the United States, privacy expectations are always a major concern. These privacy concerns are now intertwined with the fact that cell phones are an important aspect of the majority of individual's daily lives. Over the past several years cell phone use significantly increased and is expected to continue to increase. This led the United States Supreme Court to rule on the privacy expectations and warrant requirements for these devices. Cell phone technology advanced from once being merely capable of dialing phone numbers to make a single voice call to transforming cell phones into hand held mini computers. Cell phones allow the owner to view all information on the internet, store all types of data such as documents, phone numbers, text messages and photographs, and provide numerous ways to communicate with one another. An individual carries more intimate details of their personal lives in his or her cell phone than they could ever physically carry in their pocket or purse. Therefore, the United States Supreme Court effectively expanded the Fourth Amendment search and seizure law to include cell phone searches.

The United States Supreme Court directly stated, “[o]ur answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.”¹⁵² Police officers and the judicial system should adhere to this bright-line rule. However, as with all of the law, it is the obligation of lawyers, on behalf of clients, the state, and the government, to seek out legal interpretations and exceptions to these judicially created bright-line rules. Individuals, law enforcement, and judges need to remember only three words, “get a warrant.”¹⁵³

152. *Riley*, 134 S. Ct. at 2495.

153. *Id.*