No. PD-1095-12

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

THE STATE OF TEXAS, APPELLANT
V.
ANTHONY GRANVILLE, APPELLEE.

On Discretionary Review from No. 07-11-00415-CR
in the Seventh Court of Appeals

On Appeal from Trial Court Cause No. 25299
in the 278th District Court of Walker County, Texas

BRIEF OF AMICI CURIAE TEXAS CIVIL RIGHTS PROJECT ELECTRONIC FRONTIER FOUNDATION ELECTRONIC FRONTIER FOUNDATION OF AUSTIN AMERICAN CIVIL LIBERTIES UNION OF TEXAS

Amy C. Eikel
State Bar No. 00787421
KING & SPALDING LLP
1100 Louisiana, Suite 4000
Houston, Texas 77002
Telephone: (713) 751-3200
Facsimile: (713) 751-3290

Counsel for Amici Curiae TCRP, EFF, EFF-Austin, and ACLU of Texas

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES **PAGE(S)**

OTHER AUTHORITIES **PAGE(S)**

INTEREST OF AMICI CURIAE

The **Texas Civil Rights Project ("TCRP")** is a non-profit public interest law organization with a membership base of approximately 3,000 Texans. TCRP has always had a strong interest in ensuring that individuals' civil rights and liberties under the Bill of Rights of the Texas and United States Constitutions are not abridged or modified, whether through legislation, improper enforcement, or judicial action. TCRP has appeared as amicus curiae or represented individuals in litigation involving privacy rights and Fourth Amendment rights to be free from illegal search and seizure.

The **Electronic Frontier Foundation ("EFF")** is a non-profit, member-supported civil liberties organization based in San Francisco, California, that works to protect rights in the digital world. More than 900 Texas residents are current donors of EFF, and 4,426 Texans are subscribed to the EFF mailing list. EFF's interest in this case arises from its ongoing efforts to encourage the government and the courts to recognize the threats that new technologies pose to civil liberties and personal privacy.

Electronic Frontier Foundation Austin ("EFF-Austin") is a Texas non-profit that advocates the establishment and protection of digital rights and defense of the wealth of digital information, innovation, and technology. EFF-Austin's interest in this case is related to the organization's current focus on the potential for surveillance in the digital era, and the extent to which technologies for surveillance have evolved ahead of the laws that would protect innocent citizens.

The American Civil Liberties Union of Texas ("ACLU of Texas") is a non-profit, non-partisan organization with over 11,000 members around the state dedicated to the principles of liberty and equality embodied in the Constitution and

this nation's civil rights laws. Throughout its 75-year history, the ACLU of Texas has been involved in protecting the privacy rights of Texans against unwarranted intrusion by the government. The ACLU of Texas advocates for law enforcement policies and practices that both respect the Fourth Amendment's traditional limits on government power, and also meet the privacy challenges that modern technology presents.

Amici believe that warrantless searches of electronic storage devices threaten to render meaningless the Fourth Amendment's prohibition against unreasonable search and seizure. Amici urge the Court to hold that law enforcement officers must have a warrant supported by probable cause to search a portable digital device seized upon arrest and incarceration.

SOURCE OF FEES

No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

ISSUE PRESENTED

Did the Court of Appeals correctly affirm the trial court's suppression of evidence obtained from a warrantless search of the data on Appellee's cell phone because the warrantless search violated his rights under the United States and Texas Constitutions?

> (a) Is a warrant required for an officer to perform an investigatory search of the contents of a jailed person's cell phone after the phone's owner was required to relinquish possession of the phone as part of the booking process?

(b) Does a person being held in jail retain a reasonable expectation of privacy in the contents of his inventoried and stored cell phone, such that a search warrant is required to seize the cell phone and examine its contents?

STATEMENT OF FACTS

On November 4, 2010, at about 7:15 a.m., Appellee Anthony Granville, a high school student in Huntsville, Texas, was arrested near the Huntsville High School loading dock for Disruption of School Transportation, a Class C misdemeanor, and was transported to the Walker County Jail. CR 16; RR 18, 21-22, 30.[1] Granville was booked into the jail, and his personal effects, including his cell phone, were taken from him and secured in the jail property room. CR 16. Granville powered the phone off before it was placed into inventory. RR 24; CR 17.[2] Several hours later, around 10 a.m., a Huntsville police officer, not the same officer as the one who arrested Granville, arrived at the jail and asked jail staff to retrieve Granville's cell phone from the jail property room, for the stated purpose of investigating whether Granville had committed Improper Photography, a completely separate criminal offense from the one for which Granville had been arrested and jailed. CR 17; RR 22-23, 26-29.

The trial court below made findings of fact that the officer had sufficient time to obtain a search warrant for the contents of Granville's cell phone, and that no exigent circumstances existed that would have necessitated circumventing the search warrant requirement. CR 17-18: RR 8. However, the officer did not seek a warrant, but took possession of Granville's phone by signing it out of the jail

[1] The clerk's record in this case is cited as "CR" and the reporter's record is cited as "RR."

[2] The trial court concluded that Granville demonstrated a subjective expectation of privacy in the contents of his phone. CR 19; *see also State v. Granville*, 373 S.W.3d 218, 224 (Tex. App.—Amarillo 2012) ("Evidence of the phone being off . . . evinces some precautionary measure being taken to secure the data from curious eyes.").

property room, turned on the phone, and searched through the phone's contents until he found the photograph that he was looking for. CR 17; RR 22-25. Although, at the time the phone was searched, the officer did not have probable cause to believe that Granville had committed another offense, Granville was subsequently indicted for Improper Photography, a felony, on the basis of the photograph found in the warrantless search. CR 18; 373 S.W.3d at 221.

The trial court granted Granville's motion to suppress the photograph obtained in the warrantless search of the cell phone (CR 6-9), and the court entered findings of fact and conclusions of law. CR 10, 16-19. The state appealed the suppression ruling to the Tenth Court of Appeals in Waco. CR 2-3. The appeal was transferred to the Seventh Court of Appeals in Amarillo, which affirmed the trial court's decision. *State v. Granville*, 373 S.W.3d 218, 222 (Tex. App.—Amarillo 2012). The state's petition for discretionary review by this Court was granted, and amici urge this Court to affirm.

SUMMARY OF THE ARGUMENT

The Fourth Amendment to the United States Constitution protects people against unreasonable searches and seizures, requiring law enforcement officers to obtain a warrant based on probable cause, subject to only a few narrow exceptions. In this case, the Seventh Court of Appeals of Texas correctly held that a law enforcement officer is not entitled to conduct a warrantless search of the stored data in a cell phone merely because its owner was required to relinquish possession of the phone as part of the booking or jailing process. *State v. Granville*, 373 S.W.3d 218, 222 (Tex. App.—Amarillo 2012).

For the reasons set out in this brief, the warrantless search of Appellee Anthony Granville's mobile phone at the Walker County Jail cannot be justified under any established exception to the warrant requirement:

The "person" or "clothing" warrant exception does not apply. The search in this case cannot be classified as a delayed search of a detainee's "person" or clothing, which some courts have justified by concluding that a jailed person has no reasonable expectation of privacy in his clothing. See § I of this brief. The Seventh Court of Appeals in this case correctly held that the mere impoundment of a detainee's personal property (as opposed to clothing) upon booking into jail does not vitiate all reasonable expectation of privacy in the item confiscated. Granville retained a subjective (and objectively reasonable) expectation of privacy in the data stored in his mobile phone, even though he was incarcerated and the phone was stored in jail property.

The "incident to arrest" warrant exception does not apply. Nor can the search of Granville's phone be justified as a search incident to arrest, which allows a warrantless search (contemporaneously with an arrest) of the area immediately under an arrestee's control that could conceal a weapon, means of escape, or destructible evidence of the offense of arrest. See § II of this brief.3 The search in this case was not contemporaneous with Granville's arrest. It occurred several hours after the booking process had been completed, by a different officer than the

[3] The state has waived the "incident to arrest" argument by not presenting it to the trial court. *See* 373 S.W.3d at 221; RR 11, 28-29, 37; CR 18, ¶ 3. However, even if the issue had been preserved, the incident-to-arrest warrant exception would not apply on the facts of this case. In any event, a number of courts have rejected the incident-to-arrest warrant exception for mobile devices, holding that police officers must obtain a warrant before searching data on a mobile device, even if the device is seized in a valid arrest. *See* § II of this brief.

one who arrested Granville, and at a time when the phone was completely out of the defendant's control and secured in the jail property room. The phone posed no danger to officers, and there was no possibility that the defendant could have accessed the phone to plan an escape or destroy evidence. In addition, the evidence sought in the phone had nothing to do with the offense for which Granville had been arrested.

The "inventory search" warrant exception does not apply. Finally, the search in this case does not qualify as an inventory search of impounded property, which is conducted to secure valuable items and protect law enforcement against false claims of loss or damage. See § III of this brief. Once Granville's phone itself was inventoried by jail personnel and secured, there was no need to view or "inventory" the data stored on the phone. In addition, the officer in this case admitted that his purpose in searching Granville's phone was to investigate an alleged crime. An inventory search by definition cannot be a ruse for an investigatory search seeking evidence of a crime.

This decision could have far-reaching effect. The Court's ruling in this case thus has the potential to affect every Texan who possesses a cell phone and who might someday be arrested and jailed, even briefly, for a misdemeanor offense. Cell phones and smart phones with immense digital memories containing their users' most private information are now in the pockets of millions of Americans each day. The state contends that a pretrial detainee being held in jail has "no legitimate expectation of privacy" in his inventoried personal effects, including the data stored in personal electronic devices. If the state's argument in this case were to be accepted, any law officer, even a stranger to the arrest, would

be able to enter a jail property room with no warrant, probable cause or exigency whatsoever, power up any detainee's stored and inventoried cell phone, and freely rummage through the device, either for mere curiosity or a personal vendetta, or searching for incriminating photographs, emails, texts or other data related to any potential criminal offense. This is not the law, nor should it be.

In sum, no exception to the warrant requirement applies on these facts, and the appellate court's decision below, suppressing the evidence obtained from the warrantless search of Anthony Granville's cell phone, should be affirmed.

ARGUMENT

The Fourth Amendment to the United States Constitution, similarly to article I, § 9 of the Texas Constitution, mandates that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV. Searches conducted outside the judicial process, without prior approval by a judge or magistrate, are ***per se*** unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions. *Katz v. United States*, 389 U.S. 347, 357 (1967). As set out below, no exception to the warrant requirement applies in this case. The appellate court below correctly took into account the unique nature of modern personal electronic devices in determining that a warrant should have been obtained to search the stored electronic data in Granville's mobile phone.

"When the Fourth Amendment was drafted, 'papers and effects' obviously carried different connotations than they do today. No longer are all of our papers and effects stored solely in satchels, briefcases, cabinets, and folders. Rather, many

of them are stored digitally on hard drives, flash drives, memory cards, and discs."[4] The appellate court below noted the multi-functional capabilities of today's personal electronic devices as well as the private nature of the data kept on them, and the court compared modern cell phones to "mini-computers or laptops, capable of opening, in many respects, the world to those possessing them." *Granville*, 373 S.W.3d 223.

> In addition to seeking out information deemed important to its owner, cell phones have the capability of memorializing personal thoughts, plans, and financial data, facilitating leisure activities, pursuing personal relationships, and the like. Due to the abundance of programs or "apps" available, users also have the ability to personalize their phone; it is not farfetched to conclude that a stranger can learn much about the owner, his thought processes, family affairs, friends, religious and political beliefs, and financial matters by simply perusing through it. That such matters are intrinsically private cannot be reasonably doubted.

Id. In past eras, individuals would have kept most or all of their personal papers or sensitive information in their homes, where it would enjoy the strongest Fourth Amendment protection. But the vast majority of people around the globe now own cell phones or other mobile devices that hold tremendous amounts of sensitive personal information as well as GPS data showing a history of the phone user's movements.

"When 38-year-old James Madison worked on his first draft of the Fourth Amendment 200 years ago, he could not possibly have envisioned a time when a person would have in his pocket a device that could be used not only to communicate with other people, but to store thousands of photographs, e-mails,

[4] Bryan A. Stillwagon, Note, *Bringing an End to Warrantless Cell Phone Searches*, 42 GA. L. REV. 1165, 1194 (2008).

text messages, personal correspondence, medical records, addresses of family members and friends, plus records of recent phone calls made and received and Internet sites visited."[5]

Adoption of the state's position would allow officers to rummage at will through the vast data stored on a detainee's electronic device, even when no criminal activity is suspected, violating the phone owner's privacy and opening the door to personal vendettas and other abusive behavior such as that of police officers in Virginia who arrested a public school teacher for driving while intoxicated, rummaged through his mobile phone, and found sexually explicit photographs of the detainee and his girlfriend, which they shared with other officers and forwarded to other friends for their enjoyment. *See Newhard v. Borders*, 649 F. Supp. 2d 440 (W.D. Va. 2009).

"[T]he central concern underlying the Fourth Amendment [is] the concern about giving police officers unbridled discretion to rummage at will among a person's private effects." *Arizona v. Gant*, 556 U.S. 332, 345 (2009). Despite the immense changes in technology, this concern about unauthorized rummaging is as applicable today to the private information stored on a modern personal electronic device as it was to citizens' personal "papers" 200 years ago.

It is not surprising, therefore, that, like the Court of Appeals below, many courts have acknowledged that individuals have a reasonable expectation of privacy in the information on their cell phones.[6] *See* Appendix of Cell Phone

---

[5] H. Morely Swingle, Feature, *Smartphone Searches Incident to Arrest*, 68 J. MO. B. 36, 37 (2012).

[6] *See, e.g., United States v. Zavala*, 541 F.3d 562, 577 (5th Cir. 2008); *United States v. Finley*, 477 F.3d 250, 259 (5th Cir. 2007); *Ohio v. Smith*, 920 N.E.2d 949, 955 (Ohio 2009); *State v. Smith*, 920 N.E.2d 949, 955 (Ohio 2009) (holding that "a person has a high expectation of

Cases, attached to this brief. A modern mobile phone is essentially a mini-computer, "the digital equivalent of its owner's home," as a Kansas court held:

> It is clear that the modern cell phone contains personal data in the same fashion as a computer; therefore, a cell phone owner's expectation of privacy does not differ from the expectation of privacy in the data stored in a computer. In our view then, unless an exception compels to the contrary, . . . a search warrant is necessary to retrieve information stored on a cell phone.

State v. Isaac, No. 101,230, 209 P.3d 765 (Table), 2009 WL 1858754, at 4 (Kan. App. Ct. June 26, 2009) (answering of arrestee's phone and searching data stored in phone during booking one hour after arrest was improper without a warrant).

I. A DETAINEE RETAINS A REASONABLE EXPECTATION OF PRIVACY IN THE DATA STORED IN A PERSONAL ELECTRONIC DEVICE, WHICH IS DISTINCT FROM A DETAINEE'S "PERSON" OR CLOTHING.

The state's position in this case attempts to cobble together several theories that would allow an exception to the warrant requirement, impermissibly combining "incident to arrest" cases, cases involving delayed searches of a jailed person's clothing after booking into jail, and cases involving institutional searches of jail cells. None of these exceptions, singly or in combination, provide a justification for the officer's failure to obtain a warrant in this case.

The state urges that a warrant is never required to search a detainee's cell phone because jailed individuals have a "complete lack of any legitimate

---

privacy in a cell phone's contents"); *State v. Isaac*, No. 101,230, 209 P.3d 765 (Table), 2009 WL 1858754, at *4 (Kan. App. Ct. June 26, 2009) (holding that "a cell phone owner's expectation of privacy does not differ from the expectation of privacy in the data stored in a computer"); *Commonwealth v. Diaz*, No. ESCR-2009-00060, 2009 WL 2963693, at *4 (Mass. Supr. Ct. Sept. 3, 2009) (holding that "an individual has a subjective expectation of privacy in the contents of his or her cellular telephone"); *Connecticut v. Boyd*, 992 A.2d 1071, 1081 n.9 (Conn. 2009) (cataloging cases in which courts have found a reasonable expectation of privacy in information stored on a cell phone); *see also* attached Appendix of Cell Phone Cases.

expectation of privacy" in any of their inventoried possessions, and that "the fact of lawful incarceration makes any search in jail both authorized and reasonable." State Br. at 5, 7, 9-17. However, as noted above, many courts have recognized that cell phone users have a reasonable expectation of privacy in the vast amounts of personal data stored in their electronic devices. In addition, the appellate court below correctly held that the mere seizure and storage of a detainee's cell phone upon his incarceration does not extinguish his legitimate expectation of privacy in the data stored in the device.

In arguing that a person in jail gives up any expectation of privacy in his person or possessions, the state cites *Hudson v. Palmer*, 468 U.S. 517 (1974). State Br. at 7. But as the Court of Appeals pointed out, *Hudson* is not on point; it held only that prisoners have no reasonable expectation of physical privacy in their ***cells.*** The "close and continual surveillance of inmates and their cells" is required to ensure institutional security. *Hudson*, 468 U.S. at 527-28. But such security interests do not apply to an inmate's personal property that is stored and secured in the jail property room.

The state also cites an "incident to arrest" case, *United States v. Robinson*, 414 U.S. 218 (1973), and a "clothing" case, *United States v. Edwards*, 415 U.S. 800 (1974), to argue that officers can search arrestees' cell phones either incident to arrest or even after booking into jail, because mobile phones can be classified as part of the arrestee's "person" and analogous to clothing. But neither of these cases is applicable here, because searches of the person or clothing are readily distinguishable from searches of electronic data stored in devices carried by the person.

In *Robinson*, the police stopped the defendant on suspicion of driving with a revoked permit, and placed him under arrest. 414 U.S. at 220. While the defendant was in custody, an officer searched him and discovered a crumpled cigarette package in his coat pocket with heroin inside. *Id*. at 222-23. The Supreme Court upheld the warrantless search, explaining that the search-incident-to-arrest exception "has historically been formulated into two distinct propositions. The first is that a search may be made of the person of the arrestee by virtue of the lawful arrest. The second is that a search may be made of the area within the control of the arrestee." *Id*. at 224. The Court concluded that the police searched and seized the package during a lawful custodial search of the defendant's person. *Id*. at 236.

In *Edwards*, the defendant was arrested and taken into custody for trying to break into a post office. 415 U.S. at 801. The police investigating the scene noticed that a window had been pried open and that there were paint chips on the windowsill and screen. *Id*. at 801-02. The police seized the defendant's clothes without a warrant the next morning while he was still in custody and examined them for evidence, discovering paint chips that matched those found at the window. *Id.* at 802. The Court upheld the search under the search-incident-to-arrest exception, reasoning that the police had probable cause to believe that the clothes themselves were evidence of the crime for which the defendant was arrested. *Id*. at 804-05. The Court was careful to reserve the possibility that a warrant might be required for officers to search "the effects" of an arrestee under other circumstances. *Id*. at 808.

In *Robinson* and *Edwards*, therefore, the searches upheld by the Supreme Court were of the arrestee's person, and did not involve a closed possession in the

hands of the police. While an arrestee may have a reduced privacy interest in his person or clothing, he retains an objectively reasonable expectation of privacy in data that is electronically stored in his phone.[7]

Even before the advent of mobile phones, courts recognized an important distinction between an arrestee's "person" and an arrestee's "possessions." *See, e.g., United States v. Monclavo-Cruz*, 662 F.2d 1285 (9th Cir. 1981) (invalidating a search of the defendant's purse without a warrant at the station house an hour after her arrest). The Ninth Circuit in *Monclavo-Cruz* interpreted the holdings in *Edwards* and *Robinson* to mean that "once a person is lawfully seized and placed under arrest, she has a reduced expectation of privacy in her person," but "possessions within an arrestee's immediate control have [F]ourth [A]mendment protection at the station house ***unless the possession can be characterized as an element of clothing***." *Id*. at 1290 (emphasis added).

While the pocketed cigarette package in *Robinson* was closely enough associated with clothing to fall within the exception, a purse seized from the defendant was not. *Id*. Likewise, a cell phone—with its tremendous capacity for storage and high likelihood of carrying vast amounts of information—is a possessory item in which a person retains a strong privacy interest, and cannot

[7] Some courts, including the Fifth Circuit, have accepted the argument that mobile phones are analogous to clothing, and have allowed warrantless searches on that basis. *See, e.g., United States v. Finley*, 477 F.3d 250 (5th Cir. 2007); *United States v. Curtis*, 635 F.3d 704 (5th Cir. 2011); *People v. Diaz*, 244 P.3d 501 (Cal. 2011) ("We hold that the cell phone was "immediately associated with [defendant's] person . . . In this regard, it was like the clothing taken from the defendant in *Edwards* and the cigarette package taken from the defendant's coat pocket in *Robinson*"); *see also* Appendix. Amici respectfully disagree with the conclusions reached in these cases, and submit that the better analysis would treat a mobile electronic device as a closed possession similar to a sealed letter or locked suitcase in the arrestee's possession, a search of which requires a warrant.

simply be considered "an element of clothing." *See United States v. LaSalle*, Cr. No. 07-00032, 2007 WL 1390820 at *6-7 (D. Hawai'i May 9, 2007) (warrantless search of mobile phone was not valid because "the phone was not an element of LaSalle's clothing"; holding that "possessions within an arrestee's immediate control have fourth amendment protection at the station house").

The Ninth Circuit's decision in *Monclavo-Cruz* was also based on the Supreme Court's decision in *United States v. Chadwick,*[8] which invalidated a search of a closed and locked container belonging to an arrestee. In *Chadwick*, federal officers arrested the defendants and seized from their car trunk a locked footlocker, which the officers had probable cause to believe contained drugs. *Chadwick*, 433 U.S. at 4. Approximately an hour and a half after the arrest, the agents opened and searched the footlocker without a warrant while the defendants were in custody and the officers had exclusive control over the container. *Id*. at 4-5. The Supreme Court found the search unconstitutional, explaining:

> Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest.

Id. at 15.

The Seventh Court of Appeals of Texas in this case drew the same distinctions that *Monclavo-Cruz* recognized between an arrestee's "person" or clothing, on one hand, and his closed possessions, on the other. The Seventh Court noted the "obvious difference" between cell phones and clothes. *See Granville*, 373

[8] 433 U.S. 1 (1977), *abrogated on other grounds, California v. Acevedo*, 500 U.S. 565 (1982).

S.W.3d at 226. Similarly, this Court has held that arrestees "do retain some level of privacy in the ***personal effects or belongings*** taken from them incident to arrest," but has permitted searches of a jailed person's ***clothing*** without a warrant after noting that the arrestee did not show "a genuine intention of an expectation of privacy" in his clothing, and that "society would not deem such an expectation objectively reasonable under these circumstances." *Oles v. State*, 993 S.W.2d 103, 108 (Tex. Crim. App. 1999) (emphasis added) (citing *United States v. Edwards*, 415 U.S. 800, 806-09 (1974) (allowing warrantless search of jailee's clothing)); *see also Threadgill v. State*, 146 S.W.3d 654, 660-61 (Tex. Crim. App. 2004) (following *Oles*; holding that warrantless search of jailed defendant's clothing was valid and reasonable "[i]n the absence of any evidence that the appellant harbored a subjective expectation of privacy in his clothing that was in police custody or any evidence that society would deem such belief reasonable").

The state would take the narrow exception allowing warrantless searches of a detainee's clothing and extend it without analysis to all personal property of a detainee, including all data stored in personal electronic devices. State Br. at 7. But as the Court of Appeals correctly stated: "A cell phone is not a pair of pants." *Granville*, 373 S.W.3d at 227.

Because a person's subjective and objective expectation of privacy in the electronic data stored on a mobile devices is many times greater than any expectation of privacy a person has with regard to his outer clothing, the warrantless search of the mobile phone in this case cannot be justified as a search of a detainee's "person" or clothing as contemplated in *Edwards, Oles* and *Threadgill*. In this case, Granville showed a subjective expectation of privacy in

the contents of his phone by powering the phone off, which the appellate court compared to "a closed door." *Id*. at 224. The appellate court correctly held that "society would recognize his continued, and reasonable, privacy interest in the instrument despite his temporary detention." *Id*. at 225.

II. RULINGS INVOLVING CELL PHONE SEARCHES INCIDENT TO ARREST ARE NOT APPLICABLE TO THIS CASE.

As stated above, the state cites "incident-to-arrest" cases in an attempt to justify the search of Granville's phone. *See* State Br. at 7, 9-10 (citing *United States v. Robinson*, 414 U.S. 218 (1973)); State Br. at 16-17 (citing *California v. Diaz*, 244 P.3d 501 (2011)); State Br. at 18 (citing *United States v. Finley*, 477 F.3d 250 (5th Cir. 2007); *United States v. Curtis*, 635 F.3d 704 (5th Cir. 2011)). However, in the trial court below, the prosecutor did not try to justify the search of Granville's phone as a search incident to an arrest, and in fact represented to the trial court that "we are not arguing this is a search incident to arrest." RR 11, 28-29, 37. The trial court concluded that the seizure of Granville's phone "was not accomplished as a search incident to arrest," (CR 18, ¶ 3), and the appellate court found that the state waived any incident to arrest argument by not preserving it in the trial court. *Granville*, 373 S.W.3d at 221.

Even if the state had not waived the incident to arrest issue, any search-incident-to-arrest warrant exception would not apply on these facts. A search is not "incident to arrest" when it is not contemporaneous with the arrest, or when officer safety, evidence destruction or other exigencies are not concerns. *See, e.g., United States v. Yockey*, No. CR09-4023-MWB, 2009 WL 2400973, at *3 (N.D. Iowa Aug. 3, 2009) (warrantless search of phone could not be justified as incident to the arrest because it occurred "after the defendant had been arrested, delivered to the

custody of the jail, and booked," and officer booking arrestee into jail "did not have the right to rummage through the phone's memory looking for evidence of a crime"); *see also United States v. Wall*, No. 08-60016-CR, 2008 WL 5381412 (S.D. Fla. Dec. 22, 2008) (search of arrestee's text messages during booking improper without warrant):

> The search of the cell phone cannot be justified as a search incident to lawful arrest. First, Agent Mitchell accessed the text messages when Wall was being booked at the stationhouse. Thus, it was not contemporaneous with the arrest. . . . Also, the justification for this exception to the warrant requirement is the need for officer safety and to preserve evidence. The content of a text message on a cell phone presents no danger of physical harm to the arresting officers or others. Further, searching through information stored on a cell phone is analogous to a search of a sealed letter, which requires a warrant. [*citing United States v. Jacobsen*, 466 U.S. 109, 114 (1984)].
>
> . . . . Regarding the potential for destruction of evidence . . . the Government failed to bear its burden of proving any exigent circumstances surrounding the search for the text messages. Once Wall was in the custody of police officers, and the phones were removed from his possession, he could no longer exercise any control over them. Thus, the threat that messages would be destroyed was extinguished once law enforcement gained sole custody over the phones.

Wall, 2008 WL 5381412, at *3-4 (citations omitted); *see also State v. Isaac*, No. 101,230, 209 P.3d 765 (Table), 2009 WL 1858754, at *4 (Kan. App. Ct. June 26, 2009) (answering of arrestee's phone and searching data stored in phone during booking was improper without a warrant; search was not justified as incident to the arrest because it occurred one hour after the arrest, and no exigency existed because the officers could have sought a search warrant).

The Supreme Court has long held that the purpose for the search-incident-to-arrest exception is rooted in exigency: most notably, the need for officer protection

and the need to ensure that evidence is not destroyed by the arrestee. *Arizona v. Gant*, 556 U.S. 332, 335-45 (2009); *Chimel v. California*, 395 U.S. 752, 753 (1969); s*ee also United States v. Rabinowitz*, 339 U.S. 56, 72 (1950) (Frankfurter, J., dissenting) (discussing the history of the search-incident-to-arrest exception). Searches incident to arrest should be confined to these stated purposes, and "must not be a ruse for a general rummaging in order to discover incriminating evidence." *United States v. Feldman*, 788 F.2d 544, 553 (9th Cir. 1986).

The Court emphasized this principle in *Arizona v. Gant* when it struck down the warrantless search of an arrestee's jacket pocket inside a car after he was in custody and no longer able to access the interior of his vehicle. In *Gant*, the police arrested the defendant for driving with a suspended license. 556 U.S. at 335. While he was in custody and handcuffed in the back of a patrol vehicle, the officers searched the inside of his car without a warrant and found cocaine in the pocket of a jacket on the back seat. *Id*. The Court explained: "If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and ***the rule does not apply***." *Id.* at 339 (emphasis added).

> A rule that gives police the power to conduct [a search incident to arrest] whenever an individual is caught committing a traffic offense, when there is no basis for believing that evidence of the offense might be found in the vehicle, creates a serious and reoccurring threat to the privacy of countless individuals. Indeed, the character of that threat implicates the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person's private effects.

Id. at 345. The Court's reasoning in *Gant* flows logically from *Chimel v. California*, 395 U.S. 752, 753 (1969), which invalidated the search of a

defendant's entire home incident to a lawful arrest. The Court found the search unconstitutional, determining that the police may search an area incident to arrest only if the space is within an arrestee's "immediate control"—specifically, "the area from within which he might gain possession of a weapon or destructible evidence." *Id*. at 763. The Court noted that the rule "grows out of the inherent necessities of the situation at the time of arrest." *Id*. at 759 (quoting *Trupiano v. United States*, 334 U.S. 699, 705, 708 (1948)). The Court concluded, therefore, that there is no justification "for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself." *Chimel*, 395 U.S. at 763.

Courts around the nation are divided on whether to allow warrantless "incident to arrest" searches of mobile phones and other electronic devices. *See* Appendix. Faced with constantly changing and expanding technology, courts across the nation have struggled to fit first pagers, and then cell phones and increasingly more complex devices, within existing Fourth Amendment jurisprudence. As a result, the development of coherent case law on when law officers may search the contents of cell phones without a warrant has lagged behind the rapid advances in the capabilities of personal electronic devices. Some courts have allowed searches of electronic devices incident to arrest, analogizing to case law dealing with wallets, papers, or other "containers" found in an arrestee's pockets. *See, e.g.*, *United States v. Finley*, 477 F.3d 250 (5th Cir. 2007); *United States v. Curtis*, 635 F.3d 704 (5th Cir. 2011); *California v. Diaz*, 244 P.3d 501

(2011); *Smallwood v. Florida*, 61 So.2d 448 (Fla. Ct. App. 2011); *United States v. Wurie*, 612 F. Supp. 2d 104 (D. Mass. 2009); *see also* Appendix.

However, a growing number of courts, like the court of appeals below, 373 S.W.3d at 226-27, are concluding that data stored in electronic devices is not validly subject to warrantless search, even incident to arrest. *See, e.g., Ohio v. Smith*, 920 N.E.2d 949 (Ohio 2009) (officer's warrantless search of arrestee's cell phone during booking into jail was improper).

> [Cell phones'] ability to store large amounts of private data gives their users a reasonable and justifiable expectation of a higher level of privacy in the information they contain. Once the cell phone is in police custody, the state has satisfied its immediate interest in collecting and preserving evidence and can take preventive steps to ensure that the data found on the phone are neither lost nor erased. But because a person has a high expectation of privacy in a cell phone's contents, police must then obtain a warrant before intruding into the phone's contents. . . . We therefore hold that because a cell phone is not a closed container, and because an individual has a privacy interest in the contents of a cell phone that goes beyond the privacy interest in an address book or pager, ***an officer may not conduct a search of a cell phone's contents incident to a lawful arrest without first obtaining a warrant***.

Smith, 920 N.E.2d at 955 (emphasis added). In this case, Granville's phone was searched not during booking but after booking had already been completed, making the search in this case even harder to justify. Other courts that have rejected the search incident to arrest warrant exception include *Schlossberg v. Solesbee*, 844 F. Supp. 2d 1165, 1170 (D. Ore. 2012); *State v. Barajas*, 817 N.W.2d 204, 216-17 (Minn. Ct. App. 2012); *State of Wisconsin v. Carroll*, 778 N.W.2d 1, 12 (Wis. 2010); *United States v. Quintana*, 594 F. Supp. 2d 1291, 1299 (M.D. Fla. 2009); *United States v. McGhee*, No. 8:09CR31, 2009 WL 2424104, at

*2-3 (D. Neb. July 21, 2009); *United States v. Park*, No. CR-05-375-SI, 2007 WL 1521573 (N.D. Cal. May 23, 2007); *see also* Appendix.

The Court should follow the persuasive reasoning in these cases, which take into account the unique nature of personal electronic devices in determining how the Fourth Amendment should be applied to them, and conclude that searches of data in electronic devices cannot be justified as a search incident to arrest. A recently published article by Orin S. Kerr, a law professor at the George Washington University Law School, explained why the nature of modern cell phones requires an adjustment in the *Robinson* rule that traditionally allowed officers to search containers found in an arrestee's pockets:

> *Robinson* made sense in its day. In 1973, a search of a person incident to arrest might include a search for a weapon or a search through a person's pockets. Those pockets might contain keys, a wallet, cigarettes, or a small amount of narcotics. But the "full search" contemplated by *Robinson* was necessarily a brief search. People can carry only a limited amount of physical property on their persons. As a result, *Robinson* allowed a full search but also a narrow one. . . .
>
> [N]ow that people regularly carry cell phones, the *Robinson* rule allows a search much more vast that it allowed in 1973. Searching a person no longer means just searching pockets for wallets or cigarettes. It now means searching through computers that can contain millions of pages worth of personal information. Such searches can take days or weeks when conducted in a computer lab by a trained forensic analyst. Thanks to changing technology and its widespread adoption, searching a person meant one thing in 1973 and means something quite different today. . . .
>
> The difference between searches of a person in 1973 and searches of a person today points to the need for a new rule. When the police search physical evidence, the *Robinson* rule should still apply. The facts of physical searches remain the same as they have been. But when officers want to search digital storage devices such as cell phones,

> they should have to follow a different rule that limits their power to engage in invasive computer searches.

Orin S. Kerr, *Foreword: Accounting For Technological Change*, 36 HARV. J. LAW & PUBLIC POLICY 403 (March 16, 2013).

The outcome of this case should be similar to *Park*, which rejected law enforcement officers' use of the search-incident-to-arrest doctrine to search several suspects' cell phones for telephone numbers during the booking process approximately an hour and a half after the suspects' arrests. The *Park* decision held that the government did not meet its burden to establish an exception to the warrant requirement that would justify the "surreptitious and investigatory" searches. *Id*. at *1. Specifically, it found that cell phones should be considered "possessions within an arrestee's immediate control"—in which an arrestee has an undiminished expectation of privacy and which receive full Fourth Amendment protection at the police station—rather than part of "the person," such as clothing, in which there is a reduced expectation of privacy after arrest. *Id*. at *6 (*citing Chadwick*, 433 U.S. at 16 n.10).

Critical to the *Park* decision was the fact that "[i]ndividuals can store highly personal information on their cell phones, and can record their most private thoughts and conversations on their cell phones through email and text, voice and instant messages." *Id*. at *8. Furthermore, the court noted that the searches went "far beyond the original rationales for searches incident to arrest, which were to remove weapons to ensure the safety of officers and bystanders, and the need to prevent concealment or destruction of evidence." *Id*. at *8.

Like the defendants in *Park*, Granville was in police custody when the officer searched his cell phone approximately three hours after his arrest. CR 16-

17; RR 18-30. At the time of the search, Granville was in a jail cell and posed no danger to any member of law enforcement, nor any threat of destroying evidence. The search was not related to Granville's alleged disruption of school transportation, which was the office of arrest. Rather, the police officer accessed Granville's cell phone solely to search for evidence of a separate unrelated crime, and in fact found the photograph he was looking for.

Like the search in *Park*, the warrantless search of the defendant's cell phone here was a fishing expedition for incriminating evidence, and had nothing to do with preserving evidence of the offense of arrest, or protecting officer safety. The search was unconstitutional, and could not be justified as being incident to Granville's arrest, even if the state had preserved that issue.

III. A WARRANTLESS SEARCH OF DATA ON A DETAINEE'S PHONE DURING OR AFTER THE BOOKING PROCESS CANNOT BE JUSTIFIED AS AN INVENTORY SEARCH.

Finally, the search of Granville's phone does not qualify as an inventory search or "booking search." The inventory search exception allows warrantless searches of impounded property "to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger." *Florida v. Wells* 495 U.S. 1, 4 (1990). Once Granville's phone itself was inventoried by jail personnel and secured, there was no need to view or "inventory" the data stored on the phone. In addition, the officer in this case admitted that his purpose in searching Granville's phone was to investigate an alleged crime. CR 17; RR 22-23, 26-29. An inventory search by definition "must be designed to produce an inventory," and thus "must

not be a ruse for a general rummaging in order to discover incriminating evidence." *Florida v. Wells* 495 U.S. at 4.

Numerous courts have held that warrantless searches of arrestees' mobile phones could not be justified as inventory searches. *See, e.g., United States v. Flores*, 122 F. Supp. 2d 491 (S.D.N.Y. 2000) (officers could seize and inventory cell phone and calendar book found in arrestee's vehicle, but could not later come back and do a "purely investigatory" search of their contents without a warrant). "[N]either a calendar book nor a cellular telephone is a 'container' that has 'contents' that need to be inventoried for safekeeping in the traditional sense of these terms. . . . Once the purposes of the inventory have been met, a subsequent, purely investigatory search is improper." *Flores*, 122 F. Supp. 2d at 494-95.

Similarly, another federal district court held that an officer booking an arrestee into jail "did not have the right to rummage through the phone's memory looking for evidence of a crime" under a pretext of conducing an inventory search:

> Yockey had been arrested for driving with a suspended driver's license and taken to the jail. The jail was justified in removing his personal property from him before he was placed in the jail population. The jail also was justified in conducting an inventory of the property to document what was taken from him. However, the purpose behind these actions was not advanced by "general rummaging" through the cell phone's memory. . . . There simply was no need to search the cell phone's memory to accomplish the purposes of the inventory search.

United States v. Yockey, No. CR09-4023-MWB, 2009 WL 2400973, at *3 (N.D. Iowa Aug. 3, 2009); *see also United States v. Chappell*, No. 09-139, 2010 WL 1131474 (D. Minn. Jan. 12, 2010) (searching arrestee's cell phone during booking not justified as inventory search):

> [I]t is clear that Officer Broen's only motivation in reviewing the contents of the phone was to gather as much information for his investigation as possible without first obtaining a warrant. . . . Therefore, this Court finds that the search of the cellular phone seized from Defendant's person and conducted during his June 20, 2007 booking was nothing more than a general rummaging and the asserted inventory justification for that warrantless search is a pretext. For this reason, this Court concludes that the Bloomington Police Department violated Defendant's Fourth Amendment rights by searching the contents of his cellular phone during his June 20, 2007 booking.

Chappell, 2010 WL 1131474, at *15. A federal district court in Florida also held that a warrantless search of an arrestee's text messages during booking was not justified as an inventory search. *United States v. Wall*, No. 08-60016-CR, 2008 WL 5381412 (S.D. Fla. Dec. 22, 2008):

> [T]he search of text messages does not constitute an inventory search. The purpose of an inventory search is to document all property in an arrested person's possession to protect property from theft and the police from lawsuits based on lost or stolen property. This of course includes cell phones. However, there is no need to document the phone numbers, photos, text messages, or other data stored in the memory of a cell phone to properly inventory the person's possessions because the threat of theft concerns the cell phone itself, not the electronic information stored on it. . . . Therefore, the search exceeded the scope of an inventory search and entered the territory of general rummaging.

Wall, 2008 WL 5381412, at *3-4 (citations omitted); *see also Commonwealth v. Diaz*, No. ESCR-2009-00060, 2009 WL 2963693 (Mass. Supr. Ct. Sept. 3, 2009) (officer's answering of arrestee's ringing phone during booking was an improper search and not justified as incident to the arrest):

> Once Diaz was in custody at the police station, the officers possessed the authority to seize his cellular telephone pursuant to a routine inventory search of his person. That authority, however, did not so clearly extend to the manipulation of the cellular telephone. . . . Given

> that most cellular telephones must be opened or activated in some manner before they may be accessed, an individual has a subjective expectation of privacy in the contents of his or her cellular telephone. . . . The Lynn police, therefore, intruded into an area in which society recognizes a reasonable expectation of privacy. Because Diaz's cellular telephone was constitutionally protected, seizing the phone and then answering a call during booking implicated his rights under the Fourth Amendment . . . .

Diaz, 2009 WL 2963693, at *4.

A New York trial court held that even when probable cause exists that an arrestee's phone will contain evidence of the offense of arrest, a warrant is still required to search the phone. *See People v. McGee*, No. 2006NY047717, 841 N.Y.S.2d 827 (Table), 2007 WL 1947624 (N.Y. City Crim. Ct. June 29, 2007) (officer should have gotten a warrant before searching arrestee's cell phone during jail inventory process). Although the arresting officer in the *McGee* case witnessed the defendant taking photos of a woman's buttocks with his cell phone, and the officer's "observations provided probable cause to support the issuance of a search warrant for the images on defendant's phone," the investigatory search of the phone's images at the station house was improper without a warrant. *McGee*, 2007 WL 1947624 at *5-6.

In sum, the Court should follow the persuasive reasoning in cases that take into account the unique nature of personal electronic devices in determining how the Fourth Amendment should be applied to them, and have held that searches of data in electronic devices cannot be justified as an inventory search, a search incident to arrest, or as a search of the detainee's person or clothing.

IV. CONCLUSION: A CELL PHONE IS NOT A PAIR OF PANTS.

As the Seventh Court of Appeals correctly concluded, this case does not involve a warrantless search incident to arrest, or a search undertaken due to exigent circumstances. "Nor do we deal with property found in a jail cell." *Granville*, 373 S.W.3d 227. "Rather, we consider a warrantless search, by a stranger to an arrest, of a cell phone taken as part of an inventory," a purely investigatory search seeking "evidence of a crime distinct from that underlying the owner's arrest." *Id.*

"Nothing in those circumstances or the others mentioned herein nullify Granville's reasonable expectation of privacy in the phone searched. Nothing in them allowed the officer to act without a warrant. While assaults upon the Fourth Amendment and article I, § 9 of the United States and Texas Constitutions regularly occur, the one rebuffed by the trial court here is sustained. A cell phone is not a pair of pants." *Id.*

The appellate court's decision was correct and should be affirmed.

PRAYER

Amici Curiae TCRP, EFF, EFF-Austin, and ACLU of Texas urge this Court to affirm the decision of the Court of Appeals below, and uphold the trial court's suppression of the evidence obtained in violation of Appellee Anthony Granville's constitutional rights to be free from unreasonable searches and seizures under both the Constitution of the United States and the Constitution of the State of Texas.

Respectfully submitted,

By _____

Amy C. Eikel
State Bar No. 00787421
KING & SPALDING LLP
1100 Louisiana, Suite 4000
Houston, Texas 77002
Telephone: (713) 751-3200
Facsimile: (713) 751-3290

Counsel for Amici Curiae TCRP, EFF, EFF-Austin, and ACLU of Texas

CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), I certify that the word count of this brief does not exceed the limit of 15,000 words.

_____

Amy C. Eikel

CERTIFICATE OF FILING AND SERVICE

On April 1, 2013, the original and eleven copies of this Brief of Amici Curiae were sent to the Clerk of the Texas Court of Criminal Appeals via overnight courier to:

Abel Acosta, Clerk of the Court
Court of Criminal Appeals
Supreme Court Building
201 West 14th Street, Room 106
Austin, Texas 78701

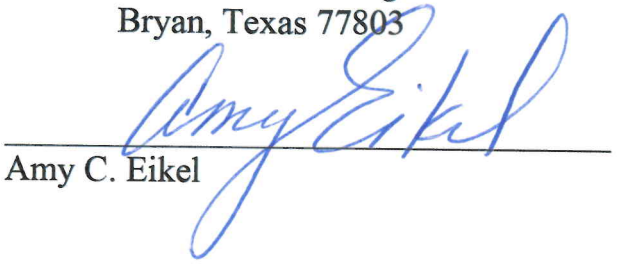
Pursuant to Texas Rule of Appellate Procedure 11(d), I certify that on April 1, 2013, the foregoing Brief of Amici Curiae was served by U.S. mail on the counsel for the parties, as follows:

John R. Messinger
State Prosecuting Attorney
P.O. Box 13046
Austin, Texas 78711

David P. Weeks
Criminal District Attorney
Walker County, Texas
1036 11th Street
Huntsville, Texas 77340

Attorney for Appellee
J. Paxton Adams
1113 Twelfth Street
Huntsville, Texas 77340

Attorney for Appellee
Shane Phelps
400 North Washington
Bryan, Texas 77803



Amy C. Eikel

APPENDIX OF CELL PHONE CASES

The following Appendix contains a sampling of cases—in alphabetical order by jurisdiction—which have ruled on what circumstances can constitutionally justify a police search of data contained in a mobile phone or other electronic device belonging to an arrestee or detainee.

- *Gracie v. State*, 92 So.3d 806 (Ala. Crim. App. 2011) (police validly searched cell phone incident to arrest for robbery in order to determine whether the arrestee had an accomplice in the robbery).

- *U.S. v. Santillan*, 571 F. Supp. 2d 1093 (D. Ariz. 2008) (search of cell phone valid incident to drug arrest and due to exigency).

- *People v. Diaz*, 244 P.3d 501 (Cal. 2011) (search of cell phone valid as incident to arrest).

- *In re Alfredo C.*, No. B225715, 2011 WL 4582325 (Cal. App. Oct. 5, 2011) (under *Diaz*, police were permitted to search digital camera found on arrestee's person).

- *People v. Nottoli*, 199 Cal.App.4th 531 (Cal. App. 2011) (under *Gant* and *Diaz*, it was permissible to search cell phone incident to drug arrest, because evidence of the offense of arrest was likely to be found on phone).

- *United States v. Park*, No. CR-05-375-SI, 2007 WL 1521573 (N.D. Cal. May 23, 2007) (rejecting search of cell phone incident to arrest during booking process 90 minutes after arrest; holding that cell phones should be considered "possessions within an arrestee's immediate control" in which an arrestee has an undiminished expectation of privacy and which receive full Fourth Amendment protection at the police station).

- *U.S. v. Hill*, No. CR-10-261, 2011 WL 90130 (N. D. Cal. Jan. 10, 2011) (search of cell phone found on person of arrestee was valid incident to arrest under *Robinson* and *Diaz*).

- *People v. Taylor*, No. 09CA2681, __ P.3d __, 2012 WL 2045754 (Colo. App. June 7, 2012) (search of cell phone's call history permitted incident to drug arrest).

- *Connecticut v. Boyd*, 992 A.2d 1071 (Conn. 2009) (search of cell phone was valid under automobile exception; police reasonably believed that cell phone contained evidence of drug activity).

- *Smallwood v. Florida*, 61 So.2d 448 (Fla. Ct. App. 2011) (court upheld search of cell phone incident to arrest under *Robinson*, but expressed "great concern" about "giving officers unbridled discretion to rummage at will the entire contents of one's cell phone," and certified the question).

- *United States v. Quintana*, 594 F. Supp.2d 1291 (M.D. Fla. 2009) (search of photos on cell phone not valid as incident to arrest for driving with a suspended license; trooper was merely rummaging for information of unrelated crime; search had nothing to do with officer safety or preservation of evidence of crime of arrest).

- *U.S. v. Gomez*, 807 F. Supp. 2d 1134 (S. D. Fla. 2011) (holding that the Fourth Amendment permits police to conduct an abbreviated search of relevant, arrest-related evidence on an arrestee's cell phone at the scene of the arrest, when evidence of the crime of arrest is likely to be found on the phone).

- *United States v. Wall*, No. 08-60016-CR, 2008 WL 5381412 (S.D. Fla. Dec. 22, 2008) (warrantless search of arrestee's text messages during booking was "general rummaging" and improper; search was not justified as a search incident to an arrest, as an inventory search, or by exigent circumstances).

- *Hawkins v. State*, 307 Ga. App. 253 (2010) (police may search cell phone incident to drug arrest for evidence of the offense of arrest).

- *U.S. v. Zamora*, No. 1:05CR250, 2006 WL 418390 (N. D. Ga. Feb. 21, 2006) (search of cell phone was permitted incident to arrest).

- *U.S. v. McCray*, No. CR408-231, 2009 WL 29607 (S. D. Ga. Jan. 5, 2009) (brief search of cell phone at time of arrest for evidence of the offense of arrest was permitted).

- *U.S. v. Lisbon*, 835 F. Supp. 2d 1329 (N. D. Ga. 2011) (police were justified in *seizing* cell phones during warrant search of house; there was no claim that the data in the phones was searched).

- *U.S. v. Rodriguez-Gomez*, No. 1:10-CR-103-2, 2010 WL 5524891 (N. D. Ga. June 12, 2010) (search of cell phone was permitted incident to arrest).

- *U.S. v. Rodriguez-Alejandro*, 664 F. Supp. 2d 1320 (N. D. Ga. 2009) (search of cell phones incident to drug arrests and at the time and place of arrests was justified).

- *U.S. v. Salgado*, No. 1:09-CR-454, 2010 WL 3062440 (N. D. Ga. June 12, 2010) (search of cell phone incident to drug arrest was permitted to preserve evidence of offense of arrest).

- *U.S. v. Cole*, No. 1:09CR412, 2010 WL 3210963 (N. D. Ga. Aug. 11, 2010) (police search of cell phone's recent calls and contact phone numbers was valid under automobile warrant exception).

- *United States v. LaSalle*, Cr. No. 07-00032, 2007 WL 1390820 (D. Hawai'i May 9, 2007) (warrantless search of mobile phone was not valid because "the phone was not an element of LaSalle's clothing"; holding that "possessions within an arrestee's immediate control have fourth amendment protection at the station house").

- *Brown v. City of Fort Wayne*, 752 F. Supp. 2d 925 (N. D. Ind. 2010) (search of cell phone was permitted incident to arrest).

- *U.S. v. Lottie*, No. 3:07-cr-51-AS, 2007 WL 4722439 (N. D. Ind. Oct. 12, 2007) (search of recent calls on cell phone incident to drug arrest was justified due to exigency).

- *United States v. Yockey*, No. CR09-4023-MWB, 2009 WL 2400973 (N.D. Iowa Aug. 3, 2009) (officer booking arrestee into jail "did not have the right to rummage through the phone's memory looking for evidence of a crime" under the pretext of an inventory search, and search could not be justified as incident to the arrest, because it occurred "after the defendant had been arrested, delivered to the custody of the jail, and booked").

- *State v. Isaac*, No. 101,230, 209 P.3d 765, 2009 WL 1858754 (Kan. App. Ct. June 26, 2009) (holding that "a cell phone owner's expectation of privacy does not differ from the expectation of privacy in the data stored in a computer," so searching data stored in phone during booking one hour after arrest was improper without a warrant).

- *State v. James*, 288 P.3d 504 (Kan. App. 2012) (police validly searched texts in arrestee's cell phone incident to drug arrest).

- *U.S. v. Fierros-Alavarez*, 547 F. Supp. 2d 1206 (D. Kan. 2008) (police search of call directory and stored phone numbers in arrestee's cell phone was permitted 12 hours after drug-related arrest

- *U.S. v. Par*ada, 289 F. Supp. 2d 1291 (D. Kan. 2003) (exigent circumstances justified officer's warrantless retrieval of phone numbers from cell phone incident to drug arrest).

- *U.S. v. Dennis*, No. CR07-008, 2007 WL 3400500 (E. D. Ky. Nov. 13, 2007) (search of cell phone justified incident to drug arrest).

- *U.S. v. Slaton*, No. 5:11-131, 2012 WL 2374241 (E. D. Ky. June 22, 2012) (search of cell phone at time and place of arrest was valid as incident to arrest).

- *United States v. Curry*, No. 07-100-P-H, 2008 WL 219966 (D. Me. Jan. 23, 2008) (search of cell phone during booking was valid incident to arrest).

- *Com. v. Berry*, 463 Mass. 800 (Mass. 2012) (search of cell phone, limited to recent call list, was permissible incident to drug arrest).

- *Com. v. Phifer* 463 Mass. 790 (Mass. 2012) (warrantless search of cell phone during booking was permissible as incident to drug arrest).

- *Commonwealth v. Diaz*, No. ESCR-2009-60, 2009 WL 2963693 (Mass. Supr. Ct. Sept. 3, 2009) (officer's answering of arrestee's ringing phone during booking was an improper search and not justified as incident to the arrest).

- *United States v. Wurie*, 612 F. Supp. 2d 104 (D. Mass. 2009) (search of cell phone incident to arrest, for evidence of crime of arrest, was reasonable).

- *U.S. v. Martin*, No. 07-20605, 2012 WL 6764800 (E. D. Mich. Nov. 9, 2012) (search of cell phone permitted incident to drug arrest).

- *State v. Barajas*, 817 N.W.2d 204 (Minn. App. 2012) (search of phone found on immigration arrestee's kitchen counter was improper without a warrant; no evidence of crime of arrest was likely to be on phone, and arrestee had an expectation of privacy in the phone's contents).

- *State v. Cooper*, No. A12-1027, 2013 WL 264430 (Minn. App. Jan. 14, 2013) (search of drug arrestee's cell phone was not permitted under *Gant*; photo of child pornography found on phone suppressed).

- *United States v. Chappell*, No. 09-139, 2010 WL 1131474 (D. Minn. Jan. 12, 2010) (warrantless search of cell phone seized from arrestee's person during booking was "general rummaging"; asserted inventory justification was pretext).

- *U.S. v. Deans*, 549 F. Supp. 2d 1085 (D. Minn. 2008) (search of data in cell phone *Belton* incident to arrest, permitted under automobile warrant exception).

- *U.S. v. Lujan*, No. 2:11CR11, 2012 WL 2861546 (N. D. Miss. July 11, 2012) (police downloading of data from defendant's cell phone during traffic stop was not permitted without a warrant).

- *U.S. v. James*, No. 1:06CR134, 2008 WL 1925032 (E. D. Mo. April 29, 2008) (search of cell phone valid under automobile exception because evidence of the crime of arrest was likely to be found on phone).

- *U.S. v. Stringer*, No. 10-05038-1, 2011 WL 3847026 (W. D. Mo. July 20, 2011) (search of cell phone and digital camera permitted under automobile exception).

- *United States v. McGhee*, No. 8:09CR31, 2009 WL 2424104 (D. Neb. July 21, 2009) (warrantless search of cell phone not justified incident to arrest if no evidence of the crime of arrest is likely to be found on it and there is not safety issue; citing *Gant*, *Chimel*)

- *People v. McGee*, No. 2006NY047717, 841 N.Y.S.2d 827, 2007 WL 1947624 (N.Y. City Crim. Ct. June 29, 2007) (even when probable cause exists that an arrestee's phone will contain evidence of the offense of arrest, investigatory search of the phone's images at the station house was improper without a warrant).

- *United States v. Flores*, 122 F. Supp.2d 491 (S.D.N.Y. 2000) (officers could seize and inventory cell phone and calendar book found in arrestee's vehicle, but could not later come back and do a "purely investigatory" search of their contents without a warrant).

- *U.S. v. DiMarco*, No. 12-CR-205, slip copy, 2013 WL 444764 (S.D.N.Y. Feb. 5, 2013) ("rummaging" search of cell phone six hours after arrest was not valid; no exigency or safety issue existed).