No. 09-1377

IN THE
Supreme Court of the United States

OHIO,
Petitioner,
v.
ANTWAUN SMITH,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Fourth Amendment allow warrantless searches incident to arrest of a second-generation cell phone, where the record is unclear about how many hours later the search occurred, where it occurred, and the limitations and capabilities of the phone?

TABLE OF CONTENTS

Page(s)

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

REASONS FOR DENYING THE PETITION 1

STATEMENT OF THE CASE 2

I. FACTUAL BACKGROUND 2

II. PROCEDURAL HISTORY 4

SUMMARY OF ARGUMENT 8

ARGUMENT 9

I. THERE IS NO CLEAR, MATURE DIVISION OF AUTHORITY ON WHETHER POLICE MAY SEARCH A CELL PHONE LIKE MR. SMITH'S INCIDENT TO ARREST WITHOUT A WARRANT 9

A. The Few Appellate Decisions Cited in the Petition Are Inapposite, Unclear, or Lacking in Analysis 9

B. The Asserted Division is New and Immature 14

II. REVIEW IN THIS CASE RISKS NOT ONLY PASSING UPON A DYING TECHNOLOGY OF LIMITED FUTURE IMPORTANCE, BUT ALSO FREEZING IN PLACE RULES THAT MAY POORLY SUIT THE SMART PHONES AND PRIVACY EXPECTATIONS OF THE FUTURE 15

III. THE RECORD IN THIS CASE IS TOO INCOMPLETE AND MURKY FOR THIS COURT TO ADDRESS THE QUESTION PRESENTED 18

A. The Search-Incident-to-Arrest Exception Is Inapplicable Because the Record Is Unclear About the Time and Place of the Search and Who Conducted It 18

B. Any Ruling by This Court May Not Affect the Ultimate Outcome of This Case 20

IV. THE DECISION BELOW IS CORRECT 21

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

Cases

California v. *Acevedo*, 500 U.S. 565 (1991) 19

Chambers v. *Maroney*, 399 U.S. 42 (1970) 11

Chimel v. *California*, 395 U.S. 752 (1969) 11, 23

City of East Liverpool v. *Columbiana Cty. Budget Comm'n*, 876 N.E.2d 575 (Ohio 2006)..... 8 n.3

City of Ontario v. *Quon*, 130 S. Ct. 2619 (2010)..... 8, 17, 18

Katz v. *United States*, 389 U.S. 347 (1967) 22

Langnes v. *Green*, 282 U.S. 531 (1931)..... 22 n.9

New York v. *Belton*, 453 U.S. 454 (1981) 5, 6, 23

Ohio v. *Robinette*, 519 U.S. 33 (1996)..... 13, 19

State v. *Boyd*, 992 A.2d 1071 (Conn. 2010) 10, 11

State v. *Nix*, No. 07122775, A138483, 2010 WL 2508919 (Or. App. June 23, 2010)..... 19 n.8

State v. *Smith*, 920 N.E.2d 949 (Ohio 2009) 5, 6, 6 n.2, 7, 23

State v. *Smith*, No. 07-CA47, 2008 WL 2861693 (Ohio Ct. App. July 25, 2008)..... 5, 22

Stoner v. *California*, 376 U.S. 483 (1964) 19, 22

Terry v. *Ohio*, 392 U.S. 1 (1968) 23

United States v. *$639,558*, 955 F.2d 712 (D.C. Cir. 1992)..... 20

United States v. *Chadwick*, 433 U.S. 1 (1977) 19, 20, 22

United States v. *Finley*, 477 F.3d 250 (5th Cir.), *cert. denied*, 549 U.S. 1353 (2007) .....*passim*

United States v. *Murphy*, 552 F.3d 405 (4th Cir.), *cert. denied*, 129 S. Ct. 2016 (2009).....12, 13, 14, 15

United States v. *Ortiz*, 84 F.3d 977 (7th Cir. 1996) 11

United States v. *Vasey*, 834 F.2d 782 (9th Cir. 1987) 20

Other Authorities

U.S. Const. amend. IV .....*passim*

Brief of Appellee, *United States* v. *Murphy*, 552 F.3d 405 (4th Cir.), *cert. denied*, 129 S. Ct. 2016 (2009) 12 n.4

GSM Arena, *Compare Motorola V3X Motorola Razr V3XX*, http://www.gsmarena.com/compare.php3?idPhone1=1120 &idPhone2=1648 13

REASONS FOR DENYING THE PETITION

This Court need not wade into the murky record here to resolve whether police may search cell phones incident to arrest, an issue on which there is no clear division of authority. Any tension involving at most one or two terse appellate precedents is new and immature. This Court should await further percolation and technological developments in smart phones instead of prematurely creating new rules.

Furthermore, this case is a poor vehicle. The record is unclear about key facts on which the search-incident-to-arrest doctrine turns, such as who searched the cell phone where and when, as well as the phone's capabilities and limitations. Because the state failed to prove that the search was contemporaneous with the arrest, the search-incident-to-arrest doctrine is not squarely implicated here. And Ohio seeks review of this Fourth Amendment issue while maintaining that this Court's ruling either way will not change the outcome of this case.

In any event, the decision below is correct. As noted above, Ohio has not satisfied its burden of proving that the search-incident-to-arrest exception even applies. In addition, cell phones are not analogous to closed containers. They pose neither a danger to officers nor a significant risk of destruction of evidence once police have seized them, yet owners have much greater privacy interests in them than in cigarette packs, pill bottles, and the like. Further review is unwarranted.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

On January 21, 2007, police officers in Beavercreek, Ohio found Wendy Northern passed out in a bathroom in her home, apparently from a drug overdose. They had paramedics rush her to the hospital. Trial Tr. 37. After officers found crack cocaine in Ms. Northern's purse, *Id.* at 38, two detectives -- Molnar and Polston -- went to the hospital, arrested her, and brought her to the police department. Ms. Northern identified the respondent, Antwaun Smith, as her supplier. Trial Tr. 101; Supp. Hr'g Tr. 10.

Hoping for leniency, Ms. Northern agreed to set up a drug deal with Mr. Smith. *See* Trial Tr. 75-76. In recorded telephone calls to Mr. Smith, she arranged for him to deliver an ounce of crack cocaine to her at her home. Trial Tr. 107, 109. The detectives were not sure Mr. Smith would show up (because he repeatedly postponed his arrival), so officers drove Ms. Northern to the county jail. *Id.* at 114-15; Supp. Hr'g Tr. 15-16.

En route, she received a call from Mr. Smith, saying that he had arrived at her house. Trial Tr. 116. When the police arrived, they saw Mr. Smith and two passengers in an SUV in the driveway. *Id.* at 179. The officers ordered all three to get out of the SUV, and they arrested Mr. Smith at about 6:30 p.m. *Id.* at 124, 229-30. A pat-down

of Mr. Smith's outer garments found $2500 in cash, a small baggie of marijuana, and a Motorola Razr cell phone, but no cocaine. *See id.* at 305. Officers then took Mr. Smith to the police station.

Sometime between about 7:30 and 8:00 p.m., Detective Molnar found two baggies of crack cocaine in the snow near the driver's-side door of the SUV. *Id.* at 310, 330-31. *But cf. id.* at 228, 232 (indicating that the baggies had not been found until at least 7:56 p.m.). After that, Detectives Molnar and Polston remained on the scene until about 8:30 or 9:00 p.m. *Id.* at 330-31. Neither detective could state with certainty whether either of them searched Mr. Smith's cell phone during this time. Supp. Hr'g Tr. 33, 63-64.

Ohio acknowledges that the record is unclear as to who eventually searched Mr. Smith's cell phone, or when. Pet. 15. The murky record merely indicates that one of those two detectives searched it at some point before about 10:35 p.m., when it was booked into evidence. Ex. 15. Detective Polston testified that he recalled a search at some point at the police station, Supp. Hr'g Tr. 33, suggesting that it most likely occurred towards the tail end of the four-plus hours following the arrest.

At some point during this four-hour period, either Detective Molnar or Detective Polston rummaged through photographs stored in Mr. Smith's cell phone, as well as its call log. Supp. Hr'g Tr. 33, 64.

The log showed a call to Ms. Northern's phone and a call from her phone to his. *Id*; Trial Tr. 130-32. The police took photographs of the call log. Trial Tr. 126.

Mr. Smith did not consent to the search, and the police neither sought nor obtained a warrant. At the suppression hearing, neither detective testified that he believed exigent circumstances were present, nor did either one offer any explanation for not seeking a warrant.

II. PROCEDURAL HISTORY

1. A Greene County grand jury indicted Mr. Smith, charging him with trafficking in and possession of cocaine, evidence tampering, and possessing criminal tools. He pleaded not guilty to all charges.

Before trial, Mr. Smith moved to suppress the fruits of the warrantless search conducted on the night of his arrest, including the contents of his cell phone. The trial court agreed that he had a reasonable expectation of privacy in his cell phone's contents. It nevertheless denied the motion, relying on *United States* v. *Finley*, 477 F.3d 250 (5th Cir. 2007), *cert. denied*, 549 U.S. 1353 (2007), the only case it found relevant. Pet. App. 50a, 55a-57a. The court excluded the photographs, however, as irrelevant to the crimes charged.

The jury convicted Mr. Smith on all counts, and the trial court sentenced him to twelve years' imprisonment and a $10,000 fine. *Id.*

at 44a, 46a-47a.

2. Mr. Smith timely appealed the trial court's denial of his suppression motion, arguing that there had been no exigent circumstances to justify the warrantless search. The Ohio Court of Appeals affirmed. *Id.* at 21a, No. 07-CA47, 2008 WL 2861693 (Ohio Ct. App. July 25, 2008). Though the majority agreed that a cell phone search incident to arrest implicates serious privacy concerns, it likewise relied on *Finley*. Pet. App. at 31-36a. The dissenting judge viewed the search as a violation of Mr. Smith's reasonable expectations of privacy. She also considered the search not contemporaneous with, and thus not incident to, the arrest, so that it should not have been allowed under that exception to the warrant requirement. *Id.* at 41a-42a.

3. Mr. Smith again timely appealed, arguing that the warrantless cell phone search violated the Fourth Amendment. The Supreme Court of Ohio agreed and reversed. *Id.* at 1a, 920 N.E.2d 949.[1]

a. First, the Ohio Supreme Court rejected the trial court's characterization of the cell phone as a closed container. It noted that under *New York* v. *Belton*, 453 U.S. 454 (1981), a searchable "container" is "'any object capable of holding another object,'" Pet. App. 10a, 920 N.E.2d at 954 (quoting 453 U.S. at 460). Items traditionally

[1] Ohio argued in the alternative that the admission of the evidence did not prejudice Mr. Smith in light of the overwhelming evidence against him. Merit Br. of Appellee-State of Ohio 7-8. The Ohio Supreme Court did not discuss or rule upon this contention.

falling under *Belton* thus have been "physical objects capable of holding other physical objects." *Id.* The court also observed that cell phones like Mr. Smith's do not even resemble the pagers and computer memo books that some federal courts have likened to closed containers. *Id.* at 10a, 920 N.E.2d at 954. Rather, such "modern cell phones are capable of storing a wealth of digitized information wholly unlike any physical object found within a closed container." Pet. App. 10a-11a, 920 N.E.2d at 954.

b. The Ohio Supreme Court held that these phones' capacity 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." Pet. App. 12a, 920 N.E.2d at 955.[2] The traditional justifications for warrantless searches incident to arrest, "officer safety and the preservation of evidence," are not present in a cell phone search such as the one at issue here. *Id.* at 13a, 920 N.E.2d at 95. Police satisfy their interest in preserving evidence simply by taking custody of the phone. Once they do so, "police must then obtain a warrant before intruding into the phone's contents." *Id.* at 12a-13a, 920 N.E.2d at 954. The court also rejected Ohio's argument that exigent circumstances justified this warrantless search, because Ohio

[2] The court noted some of the functions Mr. Smith's phone could perform, such as sending text messages and taking and storing photographs. *See* Pet. App. 11a, 920 N.E.2d at 954.

had neither raised the argument below nor introduced any evidence to support it. *Id.* at 13a-14a, 920 N.E.2d at 955.

In sum, the court held 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." *Id.* at 13a, 920 N.E.2d at 955. Accordingly, the cell phone evidence admitted by the trial court should have been excluded. The court reversed and remanded the case to the trial court for further proceedings consistent with its opinion. *Id.* at 15a, 920 N.E.2d at 956.

c. The dissenting justices would have upheld the search, by analogy to searches of address books, because the evidence introduced at trial came from the phone's address book and call log. *Id.* at 18a, 920 N.E.2d at 957. The dissent did not mention the intrusion that occurred when the officers rummaged through Mr. Smith's photographs, or that Ohio sought to introduce them into evidence.

d. The Supreme Court of Ohio denied Ohio's motion for reconsideration, without opinion. Pet. App. 59a.[3] Ohio's petition for certiorari followed.

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[3] In seeking reconsideration, Ohio argued for the first time, in the alternative, that the good-faith exception to the exclusionary rule should save the fruits of the search even if the search was unconstitutional. *Cf.* Pet. 22-24 (renewing

SUMMARY OF ARGUMENT

There is no clear, mature division of authority calling for this Court's review. Most of the decisions cited by Ohio are trial-court decisions, involved a pager rather than a cell phone, or involved the automobile-search doctrine rather than a search incident to arrest. One or two appellate precedents are terse and factually unclear; at most they create a new, immature tension that may resolve itself. This Court should hesitate to rule on the evanescent technology of conventional cell phones, and instead await smart phone case law. As this Court recognized just a few months ago in *City of Ontario* v. *Quon*, 130 S. Ct. 2619 (2010), courts should be slow to intervene in applying the Fourth Amendment to new communication technologies. More percolation is needed, to allow more time for technologies and expectations of privacy to evolve. It would be premature for the Court to wade into the merits until lower courts have considered all aspects of the issues and furnished appropriate guidance.

Moreover, this case suffers from grave vehicle problems. The record is foggy about how close in time and place the search was to the arrest, key facts in analyzing searches incident to arrest. Thus, Ohio

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this argument). The Ohio Supreme Court did not rule on this argument, presumably because Ohio had not raised or briefed the issue in a timely manner. *See City of East Liverpool* v. *Columbiana Cty. Budget Comm'n*, 876 N.E.2d 575, 575 (Ohio 2006) (argument not made in a party's briefs until a motion for reconsideration in the Supreme Court is "deemed to be abandoned" (internal quotation marks omitted)).

has failed to carry its burden of proving that the search was contemporaneous with the arrest, so the question presented is not squarely implicated. The record does not even reflect the model and capabilities of the cell phone at issue. Ohio also claims that admitting the fruits of the search made no difference, so it contends that any ruling would not influence the ultimate outcome.

Finally, the decision below is correct. Warrants are presumptively required for searches. The justifications for searches incident to arrest, to protect officer safety and prevent destruction of evidence, do not apply to cell phones. Cell phones are not analogous to closed containers and involve much stronger reasonable expectations of privacy. There is no need for this Court to intervene.

ARGUMENT

I. THERE IS NO CLEAR, MATURE DIVISION OF AUTHORITY ON WHETHER POLICE MAY SEARCH A CELL PHONE LIKE MR. SMITH'S INCIDENT TO ARREST WITHOUT A WARRANT

A. The Few Appellate Decisions Cited in the Petition Are Inapposite, Unclear, or Lacking in Analysis

Whether police may search a cell phone without a warrant, incident to a lawful arrest, is a novel issue. Few appellate courts, federal or state, have even addressed the question. Most of the cases cited by Ohio are federal district court decisions that have not yet reached the courts of appeals (Pet. 9-11, 16-18), but presumably soon

will. The few appellate precedents are either factually distinguishable or lack factual detail and legal analysis. Once considerably more cases reach the appellate courts, those courts may reach consistent conclusions on their own, without the need for this Court's intervention.

1. Two of the four appellate decisions cited by Ohio are completely inapposite. One did not involve the search-incident-to-arrest doctrine; the other did not concern a cell phone.

State v. *Boyd*, 992 A.2d 1071 (Conn. 2010) (cited at Pet. 9, 11), did not involve the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement. That exception is based on the need to protect officers from dangerous weapons and to prevent arrestees from concealing or destroying evidence. *Chimel* v. *California*, 395 U.S. 752, 763 (1969). In *Boyd*, the Connecticut Supreme Court based its approval of a cell phone search on the entirely distinct *automobile* exception to the warrant requirement. 992 A.2d at 1088-90. That exception is based on an automobile's mobility and other factors unique to automobiles, and it does not require that searches be conducted contemporaneously with arrests. *See, e.g.*, *Chambers* v. *Maroney*, 399 U.S. 42, 47-52 (1970) (upholding automobile search even though it occurred too long after arrest to qualify as a search incident to arrest). *Boyd* is therefore inapposite.

The Seventh Circuit's decision in *United States* v. *Ortiz*, 84 F.3d 977 (7th Cir. 1996) (cited at Pet. 9, 11, 16, 20), upheld the warrantless search of a pager, not a cell phone. The court's reasoning depended on several peculiarities of 1990's-era pagers, including the likelihood that new pages would displace old ones because of limited storage capacity, and that turning off power or touching a button would wipe out a pager's memory. *Id.* at 984. Those concerns are far weaker for Mr. Smith's cell phone or for most cell phones, which have much more memory than pagers and retain information even when powered off. In addition, Mr. Smith's cell phone, like other newer cell phones and unlike pagers, stores more than just phone numbers. Stored data, such as text messages and photographs, implicate greater concerns about invasion of privacy. Thus, *Ortiz* is also inapposite.

2. Only two federal appellate precedents (and no decisions from other state supreme courts) have applied the search-incident-to-arrest exception to cell phone searches. It appears, however, that the phones at issue there were more primitive, earlier-generation phones than the one in this case.

In a short, two-paragraph discussion, the Fifth Circuit in *Finley* treated an unspecified type of cell phone as a closed "container" that the police could search to preserve evidence. 477 F.3d at 259-60; Pet. 15-16. Last year, the Fourth Circuit agreed with the Fifth, relying on

Finley without any independent analysis. *United States* v. *Murphy*, 552 F.3d 405, 411-12 (4th Cir.), *cert. denied*, 129 S. Ct. 2016 (2009); Pet. 16.

Neither *Finley* nor *Murphy* provides enough factual detail to indicate a clear conflict with the decision below. Neither decision described the type or model of cell phone involved, or its memory, battery life, or technological capabilities. Neither provided specifics of what functions the cell phones could perform, or details about the searches.[4] Since the facts of Fourth Amendment cases are so critical in determining the reasonableness of a search or seizure, *Ohio* v. *Robinette*, 519 U.S. 33, 39 (1996), the skeletal outlines of these cases' facts make it impossible to conclude that they are inconsistent with the decision below.

3. To the extent that one can ascertain the facts of *Finley* and *Murphy*, the cell phones and searches in those cases appear to have differed in critical respects from those in this case. The phones in *Finley* and *Murphy* appear to have been basic, first-generation phones that just made, received, and logged calls and text messages. The

[4] "Because [Murphy's] argument [that he enjoyed a heightened privacy interest in his cell phone] was not raised below in the Motion to Suppress, at the hearing, or in any objection to the Magistrate's Report and Recommendation, specific details concerning the type or nature of the phone are, as he points out, not included in the record." Br. of Appellee at 25 n.8, *Murphy*, 552 F.3d 405. The record in *Murphy* was also unclear about whether police had seized the phone from Murphy's person or from his car. *Id.* at 24-25.

opinions merely state that the agent in *Finley* "searched through the phone's call records and text messages," 477 F.3d at 254, and that in *Murphy* an agent "identified several text messages." 552 F.3d at 409.

Mr. Smith's phone, by contrast, has dozens of megabytes of memory and several hundred hours of standby battery life. It allows users not only to talk, text, and store phone numbers, but also to take and store photographs. GSM Arena, *Compare Motorola V3X Motorola Razr V3XX*, http://www.gsmarena.com/compare.php3? idPhone1=1120 &idPhone2=1648.[5] The police in this case in fact rummaged through the photographs.

The degree of privacy attached to the information on these different types of phones necessarily would differ. The privacy interests in *Finley* and *Murphy* most likely would be less than Mr. Smith's privacy interest in the more extensive data on his phone. Thus, the Ohio Supreme Court's differing conclusion, on the facts of this case and this particular phone, does not establish a conflict.

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[5] While the model of Mr. Smith's phone and this technical information are not in the record, at oral argument before the Ohio Supreme Court the prosecutor represented that the cell phone was a Motorola Razr. Though we cannot know the exact version, the photograph of Exhibit 7 appears to match photographs of the Motorola Razr V3x or V3xx, which were the most recent versions of the Razr being sold in 2006. The technical aspects of a particular cell phone, such as what functions it can perform and what searching it might reveal, are highly relevant to its owner's privacy interests and the reasonableness of a search. Counsel is providing this extra-record information on these points because Ohio did not develop a record containing any of this information, making this case an especially poor vehicle for the Court's review.

4. Nor does either *Finley* or *Murphy* contain enough reasoned analysis to indicate a clear conflict with the decision below. Neither opinion grapples with the fundamental issues raised by warrantless searches of modern cell phones.

Although considered the leading case so far, *Finley* was not decided on a truly adversarial presentation of the issues. Mr. Finley did not dispute the characterization of his cell phone as a closed container. On the contrary, he argued that it should be treated as such. The Fifth Circuit therefore assumed that point; it did not need to analyze or decide it. 477 F.3d at 260.

For his part, Mr. Murphy argued that the police had to ascertain the storage capacity of each individual arrestee's cell phone to determine how private it was and whether they could search it without a warrant. The Fourth Circuit understandably rejected such a rule as impractical. *Murphy*, 552 F.3d at 411.

B. The Asserted Division is New and Immature

Even if there were any tension between the decision below and *Finley* and *Murphy*, it would be brand new and immature. The decision below was the first state high court decision to hold the search of a cell phone incident to arrest unconstitutional. It was also the first

appellate decision to reject the simplistic characterization of a cell phone as a closed container.

Other courts have not yet reacted to the Ohio Supreme Court's reasoning, either by following it or criticizing it. Neither the Fourth nor the Fifth Circuit reheard the issue *en banc* or was asked to do so. Panels of those courts or the entire court might reach different conclusions in future cases, based on different or better-developed facts, a more particularized understanding of the capabilities of current cell phones, or in light of the decision below.

Perhaps because of the issue's immaturity and the earlier cases' lack of factual detail or analytical depth, this Court denied certiorari in *Finley* and, less than a year ago, in *Murphy*. This Court should continue to await further percolation before considering this issue.

II. REVIEW IN THIS CASE RISKS NOT ONLY PASSING UPON A DYING TECHNOLOGY OF LIMITED FUTURE IMPORTANCE, BUT ALSO FREEZING IN PLACE RULES THAT MAY POORLY SUIT THE SMART PHONES AND PRIVACY EXPECTATIONS OF THE FUTURE

1. This Court should hesitate to rule on a constitutional question concerning an evanescent technology such as the cell phone here. The cell phone at issue in this case, a Motorola Razr, is a typical second-generation cell phone. Introduced in 2004, it performs more advanced functions and has a larger storage capacity than typical first-generation cell phones.

While it was cutting edge when introduced in 2004, the Razr has since been discontinued. Like other phones of its vintage, it is now a dinosaur compared to the latest generation of cell phones currently in use and on the market. Ohio acknowledges that the current generation of phones, so-called smart phones, are the wave of the future. *See* Pet. 3. As a practical matter, therefore, any ruling in the instant case may not be important far beyond the present case.

Today's smart phones, such as the Blackberry, iPhone, Droid, and many other models, are really hand-held wireless computers that also happen to be phones. Many of the newer cell phones have as much memory as desktop computers had a few years ago, and more than 500 times that of a Razr. They can perform thousands of functions ("applications", or "apps") that could hardly have been imagined just a few years ago.[6]

Many smart phone owners, especially those under 30, use the plethora of applications more than the phone-calling function. Many cell phone users keep most of their personal data on their cell phones,

[6] Users can not only make and receive calls, send and receive text messages, take pictures, and store phone numbers, but also can hold conference calls; play, identify, and transmit music; take and store thousands of high-quality pictures and full-length videos; access the internet (both e-mail and web sites); download lengthy document attachments; access GPS (global positioning systems); make credit-card purchases and charitable and political contributions; pay parking meter fees; and retrieve, store, and transmit banking information.

thus carrying all of their "papers and effects" with them in a way that they could not carry tangible documents.

While the privacy interests implicated in this case are greater than in cases involving first-generation phones, those implicated in future smart phone cases may be even greater, and the issues more complex.[7] These substantial differences could shape how courts apply Fourth Amendment precedents to searches of smart phones. As cell phones grow to hold more and more private types of searchable data, the analogy to wallet and address-book searches grows far weaker.

No appellate court has yet ruled on admitting evidence from a smart phone searched incident to arrest. Until courts articulate their reasoning and the relevant considerations for conventional phones as well as smart phones, this Court's review would be premature.

2. Review in this case risks not only passing upon a dying technology of limited future importance, but freezing in place rules that may poorly suit the smart phones and privacy expectations of the future. This Court recognized as much just last Term, in *Quon*. "The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." 130 S. Ct. at 2629. The Court specifically mentioned

[7] There may also be differences based on the respective phones' ability to preserve or destroy stored data. *Compare* Pet. 3 (expressing concerns that smart phones might self-destroy or allow for remote destruction of evidence) *with id.* at 13-14 (noting that Mr. Smith's phone is not a smart phone).

individuals' privacy interests in "[c]ell phone and text message communications," *id.* at 2630, and, of course, people also enjoy privacy interests in the myriad other forms of data stored on cell phones. "Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations . . . [in electronic] communication devices." *Id.* at 2629.

III. THE RECORD IN THIS CASE IS TOO INCOMPLETE AND MURKY FOR THIS COURT TO ADDRESS THE QUESTION PRESENTED

A. The Search-Incident-to-Arrest Exception Is Inapplicable Because the Record Is Unclear About the Time and Place of the Search and Who Conducted It

The critical questions in Fourth Amendment cases are who searched what, when, why, how, and how extensively. Fourth Amendment decisions are intensely fact-specific and turn on these details. *See Robinette*, 519 U.S. at 39. Yet here, highly relevant facts are missing or unclear about when and where the phone was searched, precisely how, and even by whom. Nor is there evidence in the record about the memory, battery life, or technological capabilities of the phone at issue or the kinds of data stored on it. *See supra* p.13 n.5. If certiorari is granted, these deficiencies in the record would probably prevent the Court from reaching the question presented and lead it to

dismiss the petition as improvidently granted.[8]

These holes in the record also militate against applying the search-incident-to-arrest doctrine at all in this case. "[A] search can be incident to an arrest only if it is substantially contemporaneous with the arrest" and not "remote in time or place from the arrest." *Stoner* v. *California*, 376 U.S. 483, 486 (1964); *United States* v. *Chadwick*, 433 U.S. 1, 15 (1977) (internal quotation marks omitted), *abrogated on other grounds by California* v. *Acevedo*, 500 U.S. 565, 578-79 (1991). Ohio bears the burden of proving all elements of the search-incident-to-arrest exception, including that the search was contemporaneous with the arrest.

Ohio concedes that the record "is not entirely clear . . . whether the cell phone was first searched on scene or when the detectives returned to the police station." Pet. 15. All we know is that the search took place sometime between the 6:30 p.m. arrest and the 10:35 booking of the phone into evidence. Searches incident to arrest must occur as soon as practicable, and Ohio offers no explanation or justification for a delay of four hours.

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[8] *Cf. State* v. *Nix*, No. 07122775, A138483, 2010 WL 2508919, at *9-*10 (Or. App. June 23, 2010) ("Ultimately, on a fully developed record, there could be some merit to th[e] claim" "that cellular telephones are so special, indeed unique, . . . that they must be treated differently . . . [from] calendars, address books," and the like, but "[w]e decline to decide such substantial and complex issues on an underdeveloped record.").

Courts regularly refuse to treat searches as incident to arrest when they involve even shorter delays. *See, e.g.*, *Chadwick*, 433 U.S. at 15 (rejecting search "conducted more than an hour after federal agents had gained exclusive control of the footlocker"); *United States* v. *$639,558*, 955 F.2d 712, 716-17 & n.7 (D.C. Cir. 1992) (rejecting search conducted between 30 and 63 minutes after arrest); *United States* v. *Vasey*, 834 F.2d 782, 787-88 (9th Cir. 1987) (rejecting search 30-45 minutes after arrest).

The absence of a contemporaneous search is an independent ground supporting the decision below, which makes it unnecessary to reach the Fourth Amendment question presented.

B. Any Ruling by This Court May Not Affect the Ultimate Outcome of This Case

Resolving the question presented may well make no difference to the ultimate outcome of this case. Ohio argues that "[e]ven if this Court finds that the search of the cell phone is improper, the Defendant cannot show based upon the overwhelming evidence of guilt, that he is prejudiced" by the admission of this evidence. Pet. 4-5. Ohio views "the introduction of the evidence obtained from Smith's cellular phone [as] purely corroborative, and [as] hardly prejudicial." *Id*. at 5. This harmless-error question, however, is a question of state law which either was answered implicitly (in the negative) by the Ohio

Supreme Court or will possibly be answered by the trial court on remand. It is not a question for this Court.

But by taking the position that the cell phone evidence was merely corroborative, Ohio has given another reason to decline review. Whether this Court affirms or reverses the Ohio Supreme Court on the merits, thereby allowing or disallowing the cell phone evidence, Ohio claims that it would still have sufficient evidence to convict Mr. Smith. This Court's ruling therefore would not change the outcome.

IV. THE DECISION BELOW IS CORRECT

With little or no guidance from other appellate precedents, the Ohio Supreme Court thoughtfully applied traditional Fourth Amendment principles to the novel question presented by a particular version of a new and evolving technology. It carefully assessed the State's legitimate interests in officer safety and evidence preservation, as well as the arrestee's substantial privacy interest in the data stored on his cell phone. The court correctly concluded that the search was unlawful. Especially on this poor record, concerning a technology that has already been surpassed, there is no need for this Court's review.

1. The Fourth Amendment presumptively requires warrants for searches. Warrantless searches 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) (footnote omitted).

Ohio rests its argument entirely on the exception for searches incident to arrest. Pet. i, 3, 8, 11-18, 20-21, 23-25. Such searches must occur at the time of the arrest. *Stoner*, 376 U.S. at 486; *Chadwick*, 433 U.S. at 15. The search here may have occurred as much as four hours after Mr. Smith's arrest. Ohio therefore failed to satisfy its burden of proving that the search was contemporaneous with the arrest. As the dissenting judge in the Ohio Court of Appeals stated, this alone should have rendered the search-incident-to-arrest exception inapplicable. Pet. App. 41a-42a. The Ohio Supreme Court's decision is sustainable on this ground alone, regardless of any considerations unique to cell phone searches.[9]

2. The search-incident-to-arrest exception to the warrant requirement was adopted to protect officer safety by removing any weapons from arrestees, and to prevent arrestees from concealing or destroying evidence. *Chimel*, 395 U.S. at 762-63; *see also New York* v. *Belton*, 453 U.S. 454, 457 (1981). Absent highly unusual circumstances hard to imagine, a cell phone could not pose either of these dangers, certainly not once the police have seized the phone. Ohio does not

[9] Respondent, of course, may argue any ground in support of the judgment below. *Langnes* v. *Green*, 282 U.S. 531, 539 (1931).

contend that Mr. Smith's cell phone posed any danger to officer safety or that the warrantless search was needed to preserve evidence.[10] These two rationales simply do not apply to cell phone searches. And Ohio did not even argue in the lower courts that there were exigent circumstances, thereby forfeiting that argument. Pet. App. 14a, 920 N.E.2d at 955.

Absent the concerns that originally engendered the search-incident-to-arrest exception, the exception should not apply. *Cf. Terry* v. *Ohio*, 392 U.S. 1, 19 (1968) ("The scope of the [warrantless] search must be strictly tied to and justified by the circumstances which rendered its initiation permissible") (quotations and citations omitted).

3. As the Ohio Supreme Court held, the closed-container line of cases is not relevant or helpful in analyzing cell phone searches. Those cases do not reflect the realities of newer cell phones. Police interests in officer safety and evidence preservation are almost nonexistent, while individuals' reasonable expectations of privacy in the wealth of information on their phones are enormous. The decision below rightly

[10] Ohio acknowledges that the phone was not a smart phone that might have contained data-erasing software. *See* Pet. 3, 13-14. Especially after the officers secured the phone, neither Mr. Smith nor anyone other than the officers could access or erase its contents. The officers never expressed any concerns about the potential destruction of evidence; in fact, they took their time in getting around to searching the phone. And even if any data could have been erased, the officers could have gotten the call log data by subpoenaing the phone service provider without searching the cell phone at all.

respects the Fourth Amendment's concern for protecting a person's "papers and effects" from governmental intrusion.

4. The merits of this case, however, simply are not presented for this Court's review. As explained above, review of the merits would be fatally hampered by (a) the absence of a clear, complete record; (b) the lack of considered precedents from state and federal appellate courts on similar facts; (c) the inability to address particular issues because they were forfeited; and (d) the presence of alternative, independent grounds for affirming the judgment below. This Court should await an appropriate case in which to consider these novel issues.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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