IN THE

SUPREME COURT OF FLORIDA

CEDRIC TYRONE SMALLWOOD, Petitioner, v. STATE OF FLORIDA, Respondent.	Case No. SC11-1130

AMICUS BRIEF OF THE
FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
IN SUPPORT OF THE PETITIONER

SONYA RUDENSTINE
204 West University Avenue, Suite 5
Gainesville, Florida 32601
(352) 374-0604
FL Bar No. 711950

MICHAEL UFFERMAN
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 222-2340
FL Bar No. 114227

Amicus Committee Co-chairs
Florida Association of Criminal Defense Lawyers

A. TABLE OF CONTENTS

Page

B. TABLE OF CITATIONS

Page

1. Cases

2. Other Authority

C. PRELIMINARY STATEMENT

This brief is being filed by the Florida Association of Criminal Defense Lawyers ("FACDL") in support of the Petitioner, Cedric Tyrone Smallwood. FACDL is a statewide organization representing over 1700 members, all of whom are criminal defense practitioners.

D. SUMMARY OF ARGUMENT

The search of Petitioner Smallwood's cell phone violated the Fourth Amendment. In *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710 (2009), the United States Supreme Court reaffirmed that the purpose of the search-incident-to arrest doctrine is officer safety and evidence preservation. FACDL submits that there is a reasonable and justifiable expectation of a higher level of privacy in the information contained on cell phones. Accordingly, pursuant to *Gant* and the high expectation of privacy in a cell phone's contents, a warrantless search of a cell phone is only permissible if it is conducted for the purpose of officer safety or evidence preservation. Neither of these purposes justified the search of Petitioner Smallwood's cell phone and therefore the warrantless search of his cell phone was unconstitutional.

E. ARGUMENT AND CITATIONS OF AUTHORITY

The search of Petitioner Smallwood's cell phone violated the Fourth Amendment.

The First District certified the question in the instant case[1] because the district court acknowledged "the unique qualities of a cell phone which, like a computer, may contain a large amount of sensitive personal information." *Smallwood v. State*, 61 So. 3d 448, 448 (Fla. 1st DCA 2011). Yet, the First District affirmed the denial of Petitioner Smallwood's motion to suppress because the First District felt that it was constrained by the holding in *United States v. Robinson*, 414 U.S. 218 (1973). Specifically, the First District concluded that "[t]he Supreme Court has clearly and repeatedly found that anything found on an arrestee or within an arrestee's immediate control may be searched and inspected upon arrest." *Smallwood*, 61 So. 3d at 460. As explained below, FACDL submits that (1) consideration of the United States Supreme Court's recent opinion in *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710 (2009),

---

[1] The First District certified the following question to this Court:

> DOES THE HOLDING IN *UNITED STATES V. ROBINSON*, 414 U.S. 218 (1973), ALLOW A POLICE OFFICER TO SEARCH THROUGH PHOTOGRAPHS CONTAINED WITHIN A CELL PHONE WHICH IS ON AN ARRESTEE'S PERSON AT THE TIME OF A VALID ARREST, NOTWITHSTANDING THAT THERE IS NO REASONABLE BELIEF THAT THE CELL PHONE CONTAINS EVIDENCE OF ANY CRIME?

Smallwood v. State, 61 So. 3d 448, 462 (Fla. 1st DCA 2011).

combined with (2) the reasonable and justifiable expectation of a higher level of privacy in the information contained on cell phones establish that the search of Petitioner Smallwood's cell phone violated the Fourth Amendment.

1. *Gant.*

A search incident to lawful arrest is one of the "few specifically established and well-delineated exceptions" to the warrant requirement of the Fourth Amendment. *Katz v. United States*, 389 U.S. 347, 357 (1967). In *Gant*, the United States Supreme Court further clarified the purpose of the search-incident-to arrest exception. In *Gant*, officers arrested the defendant for driving with a suspended license, handcuffed him, and locked him in the back of a patrol car. *See Gant*, 556 U.S. at –, 129 S. Ct. at 1715. Thereafter, the officers searched the defendant's car and found cocaine in the pocket of a jacket located on the back seat of the defendant's car. *See id.* The United States Supreme Court noted that the search-incident-to arrest exception "derives from interests in officer safety and evidence preservation." *Gant*, 556 U.S. at –, 129 S. Ct. at 1716. Therefore, "[i]f 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.* The United States Supreme Court also held that "circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe

evidence relevant to the crime of arrest might be found in the vehicle.'" *Id.* at –, 129 S. Ct. at 1719 (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring in judgment)). Because the defendant in *Gant* was securely in custody at the time of the search and because there was no evidentiary basis for the search, the United States Supreme Court ruled that the search was invalid. *See id.*

2. There is a reasonable and justifiable expectation of a higher level of privacy in the information contained on cell phones.

In his brief, Petitioner Smallwood cited and relied upon the opinion of the Ohio Supreme Court in *State v. Smith*, 920 N.E.2d 949 (Ohio 2009). In *Smith*, the defendant was arrested for drug-related crimes. Pursuant to a search incident to his arrest, law enforcement officials discovered a cell phone on the defendant's person. Law enforcement officials subsequently searched the cell phone and discovered call records, phone numbers, and photographs. In concluding that the search of the cell phone was unconstitutional, the Ohio Supreme Court reasoned:

> Given the continuing rapid advancements in cell phone technology, we acknowledge that there are legitimate concerns regarding the effect of allowing warrantless searches of cell phones, especially so-called smart phones, which allow for high-speed Internet access and are capable of storing tremendous amounts of private data.[FN5] While it is apparent from the record that Smith's cell phone could not be called a smart phone with advanced technological capability, it is clear from the record that Smith's cell phone had phone, text messaging, and camera capabilities. While the dissent argues that Smith's phone is merely a "conventional one," we note that in today's advanced technological age many "standard" cell phones include a variety of features above and beyond the ability to

> place phone calls. Indeed, like Smith's phone, many cell phones give users the ability to send text messages and take pictures. Other modern "standard" cell phones can also store and transfer data and allow users to connect to the Internet. Because basic cell phones in today's world have a wide variety of possible functions, it would not be helpful to create a rule that requires officers to discern the capabilities of a cell phone before acting accordingly.
>
> "Modern understandings of the Fourth Amendment recognize that it serves to protect an individual's subjective expectation of privacy if that expectation is reasonable and justifiable." *State v. Buzzard*, 860 N.E.2d 1006, 1009 (Ohio 2007) (citing *Rakas v. Illinois*, 439 U.S. 128, 143 (1978), and *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). Given their unique nature as multifunctional tools, cell phones defy easy categorization. On one hand, they contain digital address books very much akin to traditional address books carried on the person, which are entitled to a lower expectation of privacy in a search incident to an arrest. On the other hand, they have the ability to transmit large amounts of data in various forms, likening them to laptop computers, which are entitled to a higher expectation of privacy.
>
> But cell phones are neither address books nor laptop computers. They are more intricate and multifunctional than traditional address books, yet they are still, in essence, phones, and thus they are distinguishable from laptop computers. Although cell phones cannot be equated with laptop computers, *their 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. . . . [B]ecause 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*.
>
> [FN5: For detailed discussion of the capabilities of modern cell phones and potential Fourth Amendment concerns, see generally [Adam M.] Gershowitz, *The iPhone Meets the Fourth Amendment*, 56 UCLA L. Rev. 27 (2008), and [Bryan Andrew] Stillwagon, Note, *Bringing an End to Warrantless Cell Phone Searches*, 42 Ga. L. Rev. 1165 (2008).]

Smith, 920 N.E.2d at 954-55 (emphasis added). FACDL requests the Court to adopt

the well-reasoned analysis of the Ohio Supreme Court in *Smith*.[2] Consistent with *Smith*, an individual has a privacy interest in the contents of a cell phone such that a law enforcement officer must obtain a warrant before intruding into the phone's contents.

3. Based on the spirit of *Gant* and the high expectation of privacy in a cell phone's contents, a warrantless search of a cell phone is only permissible if it is conducted for the purpose of officer safety or evidence preservation.

In light of the United States Supreme Court's reaffirmation in *Gant* that the search-incident-to arrest exception "derives from interests in officer safety and evidence preservation," *Gant*, 556 U.S. at –, 129 S. Ct. at 1716, and pursuant to the high expectation of privacy in a cell phone's contents, a warrantless search of a cell phone is only permissible if it is conducted for the purpose of officer safety or evidence preservation. Several courts in other jurisdictions have reached this conclusion.

For example, in *United States v. Quintana*, 594 F. Supp. 2d 1291 (M.D. Fla. 2009), the defendant's cell phone was seized from his pocket incident to the defendant's arrest for driving with a suspended license. The law enforcement officer who seized the phone looked through the digital photo album on the phone. The Honorable Elizabeth A. Jenkins concluded that the search of the cell phone was

[2] The United States Supreme Court denied the State of Ohio's petition for writ of certiorari in *Smith*. *See Ohio v. Smith*, 131 S. Ct. 102 (2010).

unconstitutional:

> Here, rather than seeking to preserve evidence that Defendant was driving with a suspended license, Garcia was rummaging for information related to the odor of marijuana emanating from the vehicle. Where a defendant is arrested for drug-related activity, police may be justified in searching the contents of a cell phone for evidence related to the crime of arrest, even if the presence of such evidence is improbable. In this case, however, Defendant was arrested for driving with a suspended license. The search of the contents of Defendant's cell phone had nothing to do with officer safety or the preservation of evidence related to the crime of arrest. This type of search is not justified by the twin rationales of *Chimel* [*v. California*, 395 U.S. 752 (1969),] and pushes the search-incident-to-arrest doctrine beyond its limits. *See Thornton*, 541 U.S. at 624 (O'Connor, J., concurring in part); *see also Evans v. Stephens*, 407 F.3d 1272, 1297 (11th Cir. 2005) (finding strip search for drugs incident to arrest for driving under the influence unlawful where officer "did [not] have any reason to believe that the strip search would reveal relevant evidence"); *State v. Smith*, No. 07−CA−47, 2008 WL 2861693, at *8 (Ohio 2d DCA July 25, 2008) (affirming trial court's decision in drug case to admit cell phone's call records but suppress incriminating photos found in the phone because there was no reasonable suspicion that the photo album would contain such evidence).
>
> Accordingly, the information obtained pursuant to Garcia's search of the cell phone photo album should be suppressed.

Quintana, 594 F. Supp. 2d at 1300-01 (footnote omitted).[3]

Similarly, in *United States v. Park*, No. CR 05-375 SI, 2007 WL 1521573 at *8-9 (N.D. Cal. May 23, 2007), the federal judge concluded:

> [F]or purposes of Fourth Amendment analysis cellular phones should be considered "possessions within an arrestee's immediate control" and not part of "the person." [*United States v.*] *Chadwick*, 433 U.S. [1,] 16 n. 10

[3] In *Quintana*, the Honorable Steven D. Merryday adopted Magistrate Judge Jenkins's report and recommendation. *See Quintana*, 594 F. Supp. 2d at 1294.

[(1977)]. This is so because modern cellular phones have the capacity for storing immense amounts of private information. Unlike pagers or address books, modern cell phones record incoming and outgoing calls, and can also contain address books, calendars, voice and text messages, email, video and pictures. Individuals 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.

Any contrary holding could have far-ranging consequences. At the hearing, the government asserted that, although the officers here limited their searches to the phones' address books, the officers could have searched any information-such as emails or messages-stored in the cell phones. In addition, in recognition of the fact that the line between cell phones and personal computers has grown increasingly blurry, the government also asserted that officers could lawfully seize and search an arrestee's laptop computer as a warrantless search incident to arrest. As other courts have observed, "the information contained in a laptop and in electronic storage devices renders a search of their contents substantially more intrusive than a search of the contents of a lunchbox or other tangible object. A laptop and its storage devices have the potential to contain vast amounts of information. People keep all types of personal information on computers, including diaries, personal letters, medical information, photos and financial records." *United States v. Arnold*, 454 F. Supp. 2d 999, 1004 (C.D. Cal. 2006).

The searches at issue here go 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. *See generally Chimel v. California*, 395 U.S. 752 (1969). Inspector Martinovich stated that he initiated the searches because "evidence of marijuana trafficking and/or cultivation might be found in each of the cellular telephones." Martinovich Decl. ¶ 6. *Officers did not search the phones out of a concern for officer safety, or to prevent the concealment or destruction of evidence. Instead, the purpose was purely investigatory. Once the officers lawfully seized defendants' cellular phones, officers could have sought a warrant to search the contents of the cellular phones.*

. . . .

For the reasons stated *supra*, due to the quantity and quality of information that can be stored on a cellular phone, a cellular phone

> should not be characterized as an element of individual's clothing or person, but rather as a "possession[ ] within an arrestee's immediate control [that has] fourth amendment protection at the station house." [*United States v.*] *Monclavo-Cruz*, 662 F.2d [1285,] 1291 [(9th Cir. 1981)].

(Emphasis added) (footnotes omitted).

In *United States v. McGhee*, No. 8:09CR31, 2009 WL 2424104 (D. Neb. July 21, 2009), the federal judge suppressed evidence found after law enforcement officials searched a cell phone found on the defendant's person incident to his arrest.[4] Relying on *Gant*, the federal judge concluded that the search did not satisfy the officer safety/evidence perseveration purposes of the search-incident-to arrest doctrine:

> [O]n April 21, 2009, the United States Supreme Court held law enforcement may search a vehicle incident to a lawful arrest only when "it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Gant*, 129 S. Ct. at 1719. The government contends the *Gant* opinion has no applicability to the instant case. In contrast, McGhee argues *Gant* highlights the reasons why officers lacked justification to search the contents of the cell phone without a warrant.
>
> Officers making an arrest on an outstanding warrant may conduct a search of the arrestee incident to that arrest. *United States v. Thomas*, 524 F.3d 855, 859 (8th Cir. 2008). "There is ample justification . . . for a search of the arrestee's person and the area 'within his immediate control' – construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Chimel v. California*, 395 U.S. 752, 763 (1969). However, as noted by the *Gant* opinion, "[i]f there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for

[4] "McGhee was searched pursuant to the arrest and Sergeant Long took possession of a cell phone removed from McGhee's person." *McGhee*, 2009 WL 2424104 at *2.

> the search-incident-to-arrest exception are absent and the rule does not apply." *Gant*, 129 S. Ct. at 1716.
>
> In this case, McGhee was arrested pursuant to an arrest warrant based on a conspiracy to distribute drugs and for distribution of drugs during March 2008. The arrest took place in January 2009. Under these circumstances, it was not reasonable for the officers to believe a search of McGhee's cell phone would produce evidence related to the crime for which he was arrested. Moreover, although McGhee had the cell phone within his immediate control, the cell phone did not present a risk of harm to the officers. Additionally, no evidence suggests the cell phone appeared to be or to conceal contraband or other destructible evidence. Therefore, the officers were not justified in conducting a warrantless search of McGhee's cell phone as incident to his arrest. There is no evidence before the court regarding the circumstances of McGhee's arrest which would otherwise justify the warrantless search of the cell phone.

McGhee, 2009 WL 2424104 at *3 (footnote omitted).[5]

Finally, in *Smith*, the Ohio Supreme Court concluded that the search of the defendant's cell phone did not satisfy the officer safety/evidence perseveration purposes of the search-incident-to arrest doctrine:

> Although the dissent maintains that this case can be decided on the basis of traditional Fourth Amendment principles governing searches incident to arrest, the dissent fails to recognize that *the justifications behind allowing a search incident to arrest are officer safety and the preservation of evidence. There is no evidence that either justification*

[5] In *McGhee*, the federal judge concluded that the *seizure* of the defendant's cell phone was permissible (because it was incident to the defendant's arrest). *See McGhee*, 2009 WL 2424104 at *3 n.1. But as explained above, the federal judge concluded that the additional act of *searching* the cell phone – without a warrant – was unconstitutional (because the cell phone did not present a risk of harm to the officers and no evidence suggested that the cell phone appeared to be or to conceal contraband or other destructible evidence).

> *was present in this case. A search of the cell phone's contents was not necessary to ensure officer safety, and the state failed to present any evidence that the call records and phone numbers were subject to imminent destruction*. 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).

Based on the foregoing, FACDL submits that pursuant to *Gant* and the high expectation of privacy in a cell phone's contents, a warrantless search of a cell phone is only permissible if it is conducted for either officer safety or evidence preservation. Applying this standard to the instant case, it is clear that the search of Petitioner Smallwood's cell phone was unconstitutional. At the time of the search, a search of the cell phone's contents was not necessary to ensure officer safety. Moreover, as found by the district court, there was no reasonable belief that the cell phone contained evidence of any crime.[6] Accordingly, the search of Petitioner Smallwood's cell phone violated the Fourth Amendment.

[6] The district court specifically found that "there is nothing in particular about the crime for which appellant was arrested nor any information about this case which would have led the officer reasonably to believe the cell phone contained evidence related to the crime for which appellant was being arrested." *Smallwood*, 61 So. 3d at 448. Notably, Petitioner Smallwood was not arrested until two weeks *after* the robbery. (R. IV, 287-288, 295).

F. CONCLUSION

For all of the foregoing reasons, FACDL requests that this Court hold that a warrantless search of a cell phone seized incident to an arrest is only permissible if the search is for the purpose of officer safety or evidence preservation.

Respectfully submitted,

/s/ Sonya Rudenstine
SONYA RUDENSTINE
204 West University Avenue, Suite 5
Gainesville, Florida 32601
(352) 374-0604
FL Bar No. 711950

/s/ Michael Ufferman
MICHAEL UFFERMAN
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 222-2340
FL Bar No. 114227

Amicus Committee Co-chairs
Florida Association of Criminal Defense Lawyers

G. CERTIFICATE OF SERVICE

Undersigned counsel certify that a true and correct copy of the foregoing instrument has been furnished to:

Assistant Attorney General Christine Ann Guard
PL01, The Capitol
Tallahassee, Florida 32399-1050

Assistant Public Defender Barbara J. Busharis
301 South Monroe Street, Suite 401
Tallahassee, Florida 32301

by U.S. mail delivery this 6th day of October, 2011.

/s/ Sonya Rudenstine
SONYA RUDENSTINE
204 West University Avenue, Suite 5
Gainesville, Florida 32601
(352) 374-0604
FL Bar No. 711950

/s/ Michael Ufferman
MICHAEL UFFERMAN
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 222-2340
FL Bar No. 114227

Amicus Committee Co-chairs
Florida Association of Criminal Defense Lawyers

H. CERTIFICATE OF COMPLIANCE

Undersigned counsel certify pursuant to Florida Rule of Appellate Procedure 9.210(a)(2) that this brief complies with the type-font limitation.

/s/ Sonya Rudenstine
SONYA RUDENSTINE
204 West University Avenue, Suite 5
Gainesville, Florida 32601
(352) 374-0604
FL Bar No. 711950

/s/ Michael Ufferman
MICHAEL UFFERMAN
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 222-2340
FL Bar No. 114227

Amicus Committee Co-chairs
Florida Association of Criminal Defense Lawyers