IN THE SUPREME COURT OF FLORIDA

CEDRIC TYRONE SMALLWOOD,

Petitioner,

v. CASE NO. SC11-1130

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

BARBARA J. BUSHARIS
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 71780
301 S. MONROE ST., SUITE 401
TALLAHASSEE, FLORIDA 32301
(850) 606-8500
barbara.busharis@flpd2.com
ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

This Court accepted discretionary review of *Smallwood v. State*, 61 So. 3d 448 (Fla. 1st DCA 2011) based on the First District Court of Appeal's certification of the following question as being of great public importance:

> Does the holding in *United States v. Robinson*, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (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?

The Record on Appeal contains five volumes, and references to the record will begin with the volume number in roman numerals, followed by the appropriate page number, e.g. (R. I, 21).

STATEMENT OF THE CASE

Cedric Tyrone Smallwood was charged with armed robbery and possession of a firearm by a convicted felon by Information dated March 3, 2008. (R. I, 13-14.) Proceedings were held in the Circuit Court for the Fourth Judicial Circuit, Duval County. Preliminary hearings, including a hearing on Defendant's Motion to Suppress Cell Phone Images, took place before Judge Mark H. Mahon, who ruled that photographs the arresting officer had observed during a warrantless search of Mr. Smallwood's cell phone would be admissible because the photographs were viewed shortly after Mr. Smallwood was placed under arrest. (R. I, 49-51; R. II, 211-213; R. II, 242.) Defendant's trial and sentencing were conducted by Acting Judge Russell L. Healey; at trial Mr. Smallwood requested that the trial court revisit the earlier rulings in light of the decision in *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), and that request was denied. (R. IV, 123-124.) Mr. Smallwood was convicted armed robbery and possession of a firearm by a convicted felon, and sentenced to a total of 65 years in prison. (R. I, 119-120.)

STATEMENT OF FACTS

The issue of the cell phone images on Mr. Smallwood's phone first arose as his case was going to trial on March 11, 2009. (R. II, 194.) The assistant state attorney told the court that the arresting officer had informed him just the day before that the officer had conducted a search of the Defendant's cell phone incident to the Defendant's arrest, and that the phone contained photos of the Defendant, his girlfriend, substantial amounts of cash, and firearms. (R. II, 195.) The state immediately informed defense counsel and asked the arresting officer to prepare a search warrant for the phone. (R. II, 195.) When the warrant was issued, the state attorney viewed the pictures and decided that they were relevant to the case. (R. II, 196.)

In response to an oral motion to suppress, the state argued the cell phone could be searched without a warrant incident to the Defendant's arrest. (R. II, 198-202.) The defense argued that the arrest and the robbery were separated in time and place, so that there was no "freshness, hot chase, no kind of close nexus...." (R. II, 206.) The defense also argued that in previous cases upholding the warrantless search of data on a phone, the phone itself had been used in the crime, for example, to arrange a drug transaction. (R. II, 207.) The defense further

argued that cell phone users have a reasonable expectation of privacy in the information that is stored on their phones. (R. II, 207-208.)

The trial court analogized the phone to a locked box in a defendant's vehicle at the time of an arrest, and ruled that the search of the cell phone was permissible. (R. II, 212-213.)

On April 14, 2009, following a continuance, the court heard additional argument on the issue. The court did not hear any testimony, but heard a statement from the deposition of Officer Brown that had been taken after the previous hearing: "He says, I looked on it because I was looking to see if he took any pictures of — that would relate to the crime, that he knew people sometimes do that." (R. II, 227-228.) The defense again argued that Mr. Smallwood had an expectation of privacy relating to the photos. (R. II, 227.) The defense also argued that none of the established exceptions to the warrant requirement were present in this case. (R. II, 228-230.) The state maintained its position that the search of the camera had been a lawful search incident to arrest. (R. II, 235.) The court again denied the motion to suppress. (R. II, 242.)

Defendant's trial began on April 22, 2009. (R. IV, 116.) With the exception of the cell phone images, most of the evidence at trial was admitted by stipulation and without objection. (R. IV, 119-120.)

An employee of the Price Right Food Store in Duval County described being robbed by a man holding a gun on the morning of January 24, 2008. (R. IV, 159-175.) Although the man wore a mask, the employee believed he recognized him and said as much to the 911 operator who took the employee's call after the man left. (R. IV, 179-183.) The employee identified the many as the Defendant and stated that he recognized the Defendant's voice. (R. IV, 184-185.) He also identified a pair of gloves as the gloves the individual wore during the robbery. (R. IV, 190.)

A regular customer of the Price Right Food Store named Keith Seay testified that he went to the store on the morning of January 24, 2008. (R. IV, 241-243.) On the way, he encountered an individual he knew as "Dooley" coming through a nearby park. (R. IV, 244-245.) "Dooley" was wearing gloves, a dark jacket, and dark pants. (R. IV, 246.) As Mr. Seay continued walking to he store he turned once and looked back towards "Dooley," and noticed that "Dooley" was no longer wearing gloves. (R. IV, 247-248.) There was a trash can along the path where the

two had passed each other. (R. IV, 248.) "Dooley" was not wearing a mask when Mr. Seay saw him, and was not carrying anything. (R. IV, 261.) When Mr. Seay got to the store, the employee told him that "Dooley" had just robbed him. (R. IV, 249 & 258-259.) A pair of gloves was later located in a trash can in the park; the gloves were photographed and taken into evidence. (R. IV, 277-279.)

Officer Ike Brown, a patrol officer with the Jacksonville County Sheriff's Office, responded to the store, where he learned that one of the witnesses had given the name "Dooley" as a suspect. (R. IV, 282-284.) Officer Brown recognized the nickname "Dooley" as an individual he knew; he did not know the individual's legal name at the time, but learned it by speaking with "Dooley's" mother, and identified the Defendant as "Dooley." (R. IV, 285-286.)

Approximately two weeks later, after missing several other appointments to meet, the Defendant met with Officer Brown in a Popeye's Chicken restaurant and was promptly arrested. (R. IV, 287-288, 295.)

Mr. Smallwood was placed in handcuffs inside the store and taken out to Officer Brown's car, where he was patted down. (R. IV, 288, 295.) When he patted the Defendant down, he found a cell phone in the Defendant's pants pocket. (R. IV, 288 & 292.) He looked "in" the phone, he said, for the following two

reasons: “One, to see if it was the same one he had been calling me from, and to see if, in fact, did he have any pictures or anything that might be evidence to the crime.” (R. IV, 288.)

Officer Brown did not claim that he had any particular reason for believing evidence of a crime might be found on the phone:

> Q: In your training and experience with Jacksonville Sheriff's Officer – with the Sheriff's Office, is it unusual for a suspect, any suspect to take photos or have videos of them that are of evidentiary value?
>
> A: No, it's not unusual.
>
> Q: In going through the phone, did you find anything to be of evidentiary value?
>
> A: Yes, ma'am, I did.
>
> Q: And what did you find in that phone?
>
> A: I found several photos in the phone, photos of Mr. Smallwood holding large amounts of cash, there was a gun, jewelry, stuff like that.

(R. IV, 288-289.)

Officer Brown then identified the photos he had viewed on the phone. They included a photo of money and a gun; a photo of Mr. Smallwood's girlfriend; and a photo of Mr. Smallwood. (R. IV, 290-292.) Scrolling through the phone, Officer Brown stated that the photos had all been taken within a few days following the robbery. (R. IV, 290-292.)

The jury returned a verdict of guilty on the robbery charge, finding that Mr. Smallwood had actually possessed a firearm during the crime. (R. V, 453-454.) The jury heard a stipulation that Mr. Smallwood had a previous felony conviction and was charged on the elements of possession of a firearm by a convicted felon. (R. V, 455-458.) The jury returned a verdict of guilty on that charge as well, with another finding of actual possession. (R. V, 461-462.)

Sentencing took place on May 4, 2009. (R. II, 245.) Defense counsel stressed Mr. Smallwood's age and lack of significant prior convictions, and asked for a sentence near the minimum mandatory sentence of 54.75 months, as calculated by the sentencing guidelines. (R. I, 124-125; R. II, 249.)

The court stated that the minimum mandatory sentence "made no sense" and added that he had been surprised the jury took so long to convict, especially in light of the photographs that had been taken from the cell phone. (R. II, 252-253.) Mr. Smallwood was sentenced to a prison term of 15 years, with a three-year minimum mandatory sentence, for possession of a firearm by a convicted felon; and to a consecutive term of 50 years, with a ten year minimum mandatory sentence, for armed robbery. (R. II, 255.)

The First District Court of Appeal affirmed Mr. Smallwood's convictions and sentence on April 29, 2011, holding that the search of Mr. Smallwood's cell phone was a valid search incident to arrest. The court certified the following question as being of great public importance: Does *United States v. Robinson*, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (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?

SUMMARY OF THE ARGUMENT

The certified question should be answered in the negative. When there is no reason to believe that a cell phone contains evidence of a crime, it is an unreasonable intrusion for a police officer to search through photographs stored on the phone at the time of a valid arrest.

The "search incident to arrest" exception to the warrant requirement is grounded in concerns for officer safety and the preservation of evidence. These twin foundations of the exception were set out in *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969), and reaffirmed in *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).

The holding of *United States v. Robinson*, 414 U.S. 218, 234, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973), that a search "of the person" incident to arrest allows a full search of the person, does not justify searching a cell phone merely because it is found on or near a suspect's physical person. *Robinson* explains that a full search of the person is reasonable at the time of arrest, but other cases, including *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) , make clear that other types of searches must be analyzed on their own unique facts. Put

differently, the fact that a search takes place when a person is arrested weighs heavily in determining whether the search was reasonable, but an arrest is not an open door to every aspect of a suspect's private life.

Many courts analyzing the search and seizure of cell phones or similar devices have focused on whether the phones are "containers." This places inappropriate emphasis on superficial similarities between information stored on cell phones and earlier, non-digital information storage. The proper analysis is not how a cell phone is like a purse or planner, but whether the need for information stored on a phone outweighs the invasion of privacy the search entails. When there is no reason to believe the cell phone contains evidence of a particular crime, the breadth of information potentially available, and thus the breadth of the invasion of privacy, a search of the phone is unreasonable and thus unconstitutional.

ARGUMENT

I. SEARCHING IMAGES ON A CELL PHONE WHEN THERE IS NO REASONABLE BELIEF THAT THE CELL PHONE CONTAINS EVIDENCE OF A CRIME EXCEEDS THE PERMISSIBLE SCOPE OF A SEARCH INCIDENT TO ARREST.

Standard of review:

Under Article I, section 12 of the Florida Constitution, the right to be free of unreasonable searches and seizures is to be construed "in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." This appeal presents the legal issue of the scope of the decision in *United States v. Robinson*, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973), and whether that decision controls in cases involving the search incident to arrest of a suspect's cell phone.

Argument:

This case presents the issue of whether a valid arrest allows the police to mine the data on the arrestee's phone in the hope of obtaining incriminating evidence, even when the police have no reason to believe evidence will actually be found.

The First District Court of Appeal noted its concern that "giving officers unbridled discretion to rummage through at will the entire contents of one's cell phone even where there is no basis for believing evidence of the crime of arrest will be found on the phone, creates a serious and recurring threat to the privacy of countless individuals." *Smallwood v. State*, 61 So. 3d 448, 462 (Fla. 1st DCA 2011). The appellate court held it was constrained, however, by the holding in *United States v. Robinson*, 414 U.S. 218, 234, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973), that containers on the person of an arrested citizen can be searched without any additional justification other than the fact of arrest. *See Smallwood*, 61 So. 3d at 448. As explained below, while *Robinson* may permit the seizure of a cell phone found on the person, this Court is not required to read it so broadly as to encompass a wide-ranging intrusion into all of the data stored on a phone that has been seized.

This Court noted in its decision in *Jenkins v. State*, 978 So. 2d 116, 126 (Fla. 2008) that "a search incident to arrest is still subject to a standard of reasonableness." A public "strip search," for example, is not a reasonable search incident to arrest. *See id.* at 126-127 (citations omitted). This principle is consistent with the United States Supreme Court's pronouncement in *Robinson* that

"It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." 414 U.S. at 235. To the extent there is any tension in these authorities when applied to the warrantless search of data on a cell phone, it arises in the context of whether looking at the data is a search of the person.

The U.S. Supreme Court, and this Court in *Jenkins*, recognized the importance of context in determining what constitutes a reasonable search: "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) (analyzing the strip search of inmates in a federal detention center based on less than probable cause) (cited in *Jenkins*, 978 So. 2d at 126).

In *Robinson*, the Supreme Court reversed a decision of the Court of Appeals for the District of Columbia Circuit that had invalidated the search of a crumpled pack of cigarettes found in the defendant's coat pocket after the defendant was arrested for driving with a revoked license. 414 U.S. at 223-224. Based on the rationale for allowing a search incident to arrest set forth in *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed.2d 685 (1969) — the need to preserve evidence, and the need to disarm suspects for the safety of arresting officers – the appellate court had held that the search should have been limited to a protective "frisk" of the defendant's clothing to remove any weapons that might have been located there. 414 U.S. at 227. Because there was no further evidence of the crime of arrest (driving with a revoked license) to be found on the defendant's person, there was no reason to extend the search further. *Id.* The court of appeals, in essence, would have limited the search of the defendant to what would be permissible in a *Terry* stop based on less than probable cause. *See id.* (citing *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968)).

The *Robinson* Court thus decided that a permissible search of the "person" during a search incident to arrest extended beyond a protective frisk, and instead encompassed a "full search of the person." *Id.* at 235. This was broad enough to

encompass a crumpled pack of cigarettes, found in a pocket of the defendant's coat, that was found to contain heroin. *Id.*

If a full search of the person does not automatically encompass strip searches, however, then it follows logically that a full search of the person does not automatically include anything a defendant may have on, or near, his person. *See Jenkins*, 978 So. 2d at 126-127 (explaining that the search of the defendant was not a strip search, but a limited search in which officers looked into the defendant's clothing while he remained fully dressed). In other words, the possibility of an unreasonable search still exists, even when a search is incident to arrest. The reasonableness of a particular search must be based on factors unique to that search, rather than on a reflexive determination that it occurred when a defendant was arrested. While *Robinson* is the Supreme Court case that speaks most directly to searches of the person, nothing in *Robinson* requires treating a sophisticated electronic device, capable of storing data such as messages, lists, contact information, photographs, and even websites, like a crumpled pack of cigarettes.

The issue of suppressing cell phone data has had different results in numerous jurisdictions. Some courts have taken the approach that a cell phone is a "container" on the defendant's person, and can thus be searched incident to arrest

without restriction. These cases often rely on *New York v. Belton*, 453 U.S. 454, 460-61, 101 S. Ct. 2860, 69 L. Ed.2d 768 (1981) for its holding that a "container" within the passenger compartment of a car can be searched when its occupants are arrested. *See, e.g.*, *United States v. Deans*, 549 F. Supp. 2d 1085, 1093-94 (D. Minn. 2008) (holding a cell phone was a container that could be seized, and its electronic contents); *see also Hawkins v. State*, 704 S.E.2d 886, 891-92 (Ga. App. 2010) (holding that a cell phone was a container, but noting that the search of its contents should be limited).

In contrast, the supreme court of Ohio rejected the "container" approach in *Ohio v. Smith*, 920 N.E. 2d 949 (Oh. 2009). The court in *Smith* pointed out that the *Belton* court had defined "container" as "any object capable of holding another object." *Id.* at 954 (citing *Belton*, 453 U.S. at 460 n.4). It then held specifically that a cell phone, which contains digitized information rather than physical objects, is not a container. *Id.*

The federal courts within Florida have also taken varying approaches to the issue, with emphasis on the connection between the phone and the reason the suspect was arrested rather than on whether a cell phone is a "container." In *United States v. Quintana*, 594 F. Supp. 2d 1291, 1299 (M.D. Fla. 2009), a federal

district court focused on the twin rationales for allowing a search incident to arrest, and concluded that police exceeded the scope of a permissible search by looking at photos on the defendant's phone; the defendant had been stopped for speeding, and was then arrested for driving with a suspended license.

Without analyzing the phone as a "container," the court recognized authority from other federal circuits and districts that had allowed cell phones to be searched at the time of an arrest. *See id.* (citing inter alia *United States v. Finley*, 477 F.3d 250 (5th Cir. 2007)). The *Quintana* court distinguished these cases on the basis that phones or pagers involved had some kind of direct nexus with the crime for which the defendants had been arrested (typically, drug transaction). *Id.*

More recently, without citing *Quintana*, another federal district court decided that a search of the call log on a suspect's phone was justified when the defendant was arrested for smuggling cocaine. *See United States v. Gomez*, ___ F. Supp. 2d ___, 2011 WL 3841071 (S.D. Fla. Aug. 31, 2011). The court in *Gomez* emphasized that the phone was seized because it was within "reaching distance" of the defendant when he was arrested, and the agents who then searched the call log had probable cause to believe that evidence of drug smuggling would be revealed in the call log. *Id.* at *8 (acknowledging that "an extremely intrusive search

incident to arrest may also be limited by the reasonableness component of the Fourth Amendment").

To date the First District Court of Appeal has addressed the issue twice: once in the instant case, and once in *Fawdry v. State*, 36 Fla. L. Weekly D1037 (Fla. 1st DCA May 13, 2011). Although the decision in *Smallwood* focused on the fact that the cell phone was found on the defendant's person, see 61 So. 3d at 461, the decision in *Fawdry* went a step further and explicitly described the phone as a container:

> Although it may be true that a digital file itself is "wholly unlike any physical object found within a closed container," the information found within it is likely no different than information found within a printed physical copy of a digital file. Indeed, before the innovations made available in current cell phone technology, the information contained within digital files would have been contained in tangible copies and carried in closed containers. Digital files and programs on cell phones have merely served as replacements for personal effects like address books, calendar books, photo albums, and file folders previously carried in a tangible form. Viewed in this light, the cell phone merely acts as a case (i.e. closed container) containing these personal effects. When in tangible form, the aforementioned personal effects could clearly be searched incident to arrest if found in a case carried on the suspect's person or in a vehicle which the suspect occupied.

36 Fla. L. Weekly at D1038.

The flaw in the "container" approach is that it does not adequately take into account the breadth of the potential intrusion into a suspect's private life that technology has made possible in a very short period of time. *See Smallwood*, 61 So. 3d at 461. The analysis has focused too heavily on whether discrete types of information can exist in both print and digital form, and not heavily enough on the scope of the intrusion.

The First District in *Smallwood* characterized Mr. Smallwood's argument as seeking "a heightened level of protection for cell phones based on the vast storage capacity of a cell phone to hold personal data and not simply the personal nature of the data." *Id.* However, this expresses a false dichotomy between quantity and quality. In light of the balancing test in *Wolfish*, which weighs the need for the search against the particular invasion of rights it causes, the search of a cell phone is especially invasive not just because it allows access to a large quantity of information, but because the phone creates a single entry point for data and information that simply does not exist when the information is carried in print form. In other words, the possibility that a suspect might have a single intimate photograph in his pocket, or even a handful of photographs, when he is arrested, does not justify looking through all of the files on his cell phone because, in

addition to storing the intimate photograph in digital form, the same phone could conceivably reveal to whom the suspect has spoken, what websites he has visited, what online entertainment he prefers, and where he does his banking in addition.

Moreover, the analysis of reasonableness must take into account the Supreme Court's most recent analysis of the search-incident-to-arrest exception in *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).

In *Gant*, the Supreme Court reaffirmed that searches incident to arrest are exceptions to the warrant requirement and, thus, must be carefully limited. 129 S. Ct. at 1716. The Court also reaffirmed the original rationale for allowing searches incident to arrest: officer safety and evidence preservation. *Id.* (discussing *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969)).

In *Gant*, the Court also concluded that Belton had been read too broadly, in some of cases, to allow searches of the interior of an automobile and any containers located within it any time an occupant of the automobile was arrested. Id. at 1719-1720. The Court noted that the holding from *Belton* had "generated a great deal of uncertainty," *id.* at 1721, and pointed out that at least eight states had declined to read *Belton* so broadly, *id.* n.8. The result in *Gant* was the invalidation of a search that had taken place after a car's occupant was already handcuffed and

removed from the car. 129 S. Ct. at 1719 (holding that "the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search").

The significance of *Gant* for Mr. Smallwood's case is not in an analogy between a container found in a car and a cell phone, but in the Supreme Court's reaffirmation of the *Chimel* rationale as a limitation on warrantless searches incident to arrest. This is, moreover, consistent with the emphasis on reasonableness found in *Wolfish*. Read together, these cases justify analyzing cell phone searches based on the particular nature of the intrusion those searches cause.

Mr. Smallwood has not argued that police cannot seize cell phones when suspects are arrested. However, once a suspect is in handcuffs and his cell phone is seized, whether that takes place outside his car or at a fast food restaurant, the two justifications for conducting a warrantless search of the phone evaporate. Moreover, given the nature and the potential scope of an intrusion into the data that may be stored on a cell phone, mining that data should require more than a generalized hope of finding additional evidence.

It is undisputed that the arresting officer in this case had no reason to believe the phone had been used in the commission of any crime, including the crime for which Mr. Smallwood was arrested. Officer Brown testified that he looked at data on the phone to verify that it was the phone the Defendant had used to speak with Officer Brown (R. IV, 288), and that it was "not unusual" for suspects to have photos of evidentiary value on their cell phones. (R. IV, 288-289.) This general assertion is insufficient reason to seize data that is indisputably private.

CONCLUSION

The Fourth Amendment preserves "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures..." U.S. Const., Amend. IV. This protects not just a person's body or home, but also his possessions, against unreasonable searches. When contemplating the search of a cell phone, with all the potential it creates for a wide-ranging intrusion into numerous aspects of an individual's private life, the foundational principle of reasonableness requires that there be some reason, other than the fact of arrest, for the police to access the phone's contents. For all the foregoing reasons, Mr. Smallwood requests that this Court answer the certified question in the negative, and that his case be remanded for further proceedings.

CERTIFICATES OF SERVICE AND FONT SIZE

I hereby certify that a copy of the foregoing has been furnished by U.S. Mail to Christine Guard, Assistant Attorney General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050, this ____ day of September, 2011. I hereby certify that this brief has been prepared using Times New Roman 14 point font.

Respectfully submitted,
NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

BARBARA J. BUSHARIS
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 71780
LEON COUNTY COURTHOUSE
301 S. MONROE ST., SUITE 401
TALLAHASSEE, FLORIDA 32301
(850) 606-8500
barbara.busharis@flpd2.com

ATTORNEY FOR APPELLANT