

No. 11-1792

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

**UNITED STATES OF AMERICA,
APPELLEE**

v.

**BRIMA WURIE,
DEFENDANT-APPELLANT**

**ON APPEAL FROM A JUDGMENT IN A CRIMINAL CASE,
ENTERED IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

BRIEF FOR THE UNITED STATES

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STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over the case because the indictment charged the defendant, Brima Wurie, with an offense against the United States. 18 U.S.C. §3231. The Judgment in a Criminal Case was docketed on June 30, 2011 [D.82], and Wurie filed a timely notice of appeal on July 7, 2011. [D.83].¹ This Court has jurisdiction over Wurie’s appeal from his conviction pursuant to 28 U.S.C. §1291 and of his sentence pursuant to 18 U.S.C. §3742(a).

STATEMENT OF ISSUES

1. The district court did not err when it denied Wurie’s motion to suppress evidence obtained from the warrantless search of his cell phone seized from his person incident to his lawful arrest.

2. Wurie’s challenge to the classification of his prior Massachusetts convictions for assault and battery with a dangerous weapon, assault and battery on a police officer, resisting arrest, and larceny from the person as armed career criminal predicates is foreclosed by First Circuit precedent.

¹Citations are as follows. The district court docket is cited as “D.” The presentence investigation report (“PSR”) is cited as “PSR ¶.” The defendant’s brief is cited as “Br.”; his addendum as “Add.”; and his appendix as “App.”

STATEMENT OF THE CASE

On March 27, 2008, a federal grand jury in the District of Massachusetts returned a three-count indictment charging Wurie with being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. §922(g)(1) (Count One); distribution of five grams or more of cocaine base within 1,000 feet of a school, in violation of 21 U.S.C. §§841(a)(1), 841(b)(1)(B)(iii) and 860 (Count Two); and possession of 50 grams or more of cocaine base with intent to distribute, in violation of 21 U.S.C. §§841(a)(1) and 841(b)(1)(A)(iii) (Count Three). [D.1; App.16-24].²

On September 4, 2008, Wurie filed a motion to suppress all evidence obtained as a result of the warrantless search of his cell phone incident to his arrest, which the government opposed. [D.17, 18, 21; App.25-81]. The district court (Stearns, J., presiding) held a motion hearing on January 20, 2009. [D.63; App.95]. On May 4, 2009, the court denied Wurie's motion to suppress in a written *Memorandum and Order on Defendant's Motion to Suppress Evidence*. [D.27; Add.1-13]; *United States v. Wurie*, 612 F. Supp. 2d 104 (D. Mass. 2009).

A four-day jury trial commenced on February 22, 2010, and on February 25, 2010, the jury found Wurie guilty of all three counts. [D.46]. The district court

²The indictment was amended on February 25, 2010, to remove the school zone violation from Count Two. [D.45; App.100].

sentenced Wurie on June 29, 2011, to concurrent terms of 262 months in prison on Counts One and Three and 240 months in prison on Count Two, to be followed by five years of supervised release. [D.82; Add.14-19].

STATEMENT OF FACTS

The facts are set forth as the district court found them in its order denying Wurie's motion to suppress. *United States v. Hart*, 674 F.3d 33, 36 (1st Cir.), *petition for cert. filed* (June 13, 2012) (No. 11-10863).

Early in the evening of September 5, 2007, Sergeant Detective Paul Murphy of the Boston Police Department ("BPD") was driving past the Lil' Peach convenience store on Dorchester Avenue in South Boston. [App.50; D.21 (Affidavit of Paul W. Murphy, Jr.)]. He saw a man, later identified as Fred Wade, standing outside Lil' Peach, talking on a cell phone and watching cars drive by. [*Id.*]. About five minutes later, Murphy saw a 2007 white Nissan Altima pull into the parking lot and stop near Wade. [*Id.*]. The car's driver and sole occupant was later identified as the defendant, Brima Wurie. [*Id.*]. Murphy watched Wade get into the Altima with Wurie and then followed the car as it drove slowly up Dorchester Avenue for about 150 yards, made a u-turn, and stopped in the middle of the street across from Lil' Peach. [App.51]. Wade got out of the car, crossed the street, and entered Lil' Peach; Wurie drove away. [*Id.*].

Based on his 22 years of training and experience, Murphy suspected that he had witnessed a drug deal between Wurie and Wade. [App.51]. According to Murphy, drug dealers in South Boston often deliver drugs by car after negotiating price, quantity, and meeting location with the potential buyer by phone; the buyer goes to the agreed-upon location, the dealer picks him up in a car, and the two drive together for a short distance while they quickly complete the transaction inside the car. [*Id.*]. Indeed, Murphy had arrested several dozens of drug dealers who employed this particular method of selling drugs. [*Id.*].

Murphy alerted the other members of his squad to the make, model, and license plate of Wurie's car. [App.51-52]. Once BPD Officer Christopher Boyle arrived on the scene, Murphy and Boyle entered Lil' Peach and encountered Wade, finding two plastic bags of crack cocaine in his pocket. [App.52]. Murphy suspected that each bag held an "8-ball" (3.5 grams) of crack. [*Id.*]. After Wade received *Miranda*³ warnings, he admitted that he bought the drugs from "B," the driver of the Altima, and had purchased crack cocaine from "B" several times, usually in South Boston but sometimes in Dorchester. [*Id.*]. Wade added that "B"

³*Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966) (requiring, for use of suspect's statements against him in criminal proceeding, that suspect be given warning of Fifth Amendment rights prior to custodial interrogation).

lives in South Boston and sells large amounts of crack cocaine in amounts no smaller than an “8-ball.” [*Id.*].

Murphy contacted BPD Officer Steven Smigliani, who had been following Wurie’s car, and told him that Wade admitted buying crack from Wurie. [App.52]. After Wurie parked the Altima near the intersection of Dorchester Avenue and Silver Street and exited the car, Smigliani arrested him for distribution of crack cocaine and read him *Miranda* warnings. [*Id.*]. Smigliani discovered that the Altima Wurie was driving was a rental car. [*Id.*]. Wurie was taken immediately to the Area C-6 police station, approximately one-half mile away from where he was arrested. [App.53, 78 (Affidavit of Robert England)]. Upon his arrival at the station, Wurie was searched incident to his arrest, and two cell phones, a set of keys, and \$1,275 cash were taken from him and inventoried. [App.53, 55, 79].

Approximately five to ten minutes after arriving at the station, and prior to booking Wurie, BPD Officers Robert England and Kevin Jones noticed that one of the cell phones taken from Wurie, a gray Verizon LG cell phone, was repeatedly receiving calls from a number identified on the external caller ID screen on the front of the phone as “my house.” [App.53, 79]. The officers were able to see this information in plain view without opening the phone. [App.79]. About five minutes after the phone began ringing, England and Jones opened it and saw a

photo of a young black female holding a baby as the phone's "wallpaper." [*Id.*]. By pressing one button on the phone, the officers accessed the phone's call log showing the incoming calls from "my house." [*Id.*]. From there, by pressing another button, the officers determined that the "my house" caller ID reference was for the phone number "617-315-7384." [*Id.*]. The officers did not search the phone's "contacts" or access any other information contained within Wurie's phone. [App.80].

Officer Jones typed "617-315-7384" into the internet website "Anywho" (www.anywho.com), and the number came back listed to "Manny Cristal" at 315 Silver Street in Boston – the same street near which Wurie parked his car before his arrest. [App.79].

Sergeant Detective Murphy gave Wurie a fresh set of *Miranda* warnings, and asked him about his whereabouts earlier that evening. [App.53]. Wurie said that he lived at 51 Speedwell Street in Dorchester and that he had been in South Boston "cruising around." [*Id.*]. He denied stopping at Lil' Peach, giving anyone a ride, speaking with anyone in South Boston that day, or selling crack cocaine. [*Id.*]. Based on Murphy's observations earlier in the day, information from Wade, the large amount of cash and two cell phones seized from Wurie, and the fact that Wurie was driving a rental car, Murphy determined that Wurie was a drug dealer.

[App.53-54]. Murphy also suspected that, based on the amount of crack cocaine found on Wade and Wade's account of the quantity of drugs Wurie typically sold in individual transactions, Wurie kept his main supply at his residence or a "stash house." [App.54]. Finally, based on a number of factors, Murphy believed Wurie was lying about living in Dorchester: (1) drug dealers typically store their drug supply and related materials at home and so often take steps to hide where they live; (2) Wade said Wurie lived in South Boston; and (3) the phone number labeled as "my house" on Wurie's phone was associated with an address on Silver Street in South Boston near the intersection where Wurie had parked his car before he was arrested. [App.54].

Accordingly, Murphy and several members of the BPD Drug Control Unit investigated the Silver Street residence associated with the "my house" phone number. [App.55]. There, the officers found a mailbox with the names "Cristal" and "Wurie," and saw through the window a young black woman, who looked to be the same woman whose picture appeared on Wurie's cell phone "wallpaper," talking on the phone inside the first-floor apartment. [*Id.*]. Using Wurie's keys, which they had seized incident to his arrest, the officers entered the common area of the apartment building. [*Id.*]. None of the keys opened the doorway to the second floor, but one of the keys fit the lock to the first-floor apartment. [*Id.*]. The

officers withdrew the key and knocked on the door. The woman they had seen through the window answered, and the officers asked her to step outside into the hallway. [*Id.*]. The woman said she knew Wurie, he occasionally stayed at the apartment, and was there the night before and earlier that day. [App.55-56]. The officers smelled burning marijuana wafting from the apartment, and, based on their suspicion that criminal activity was occurring inside, entered the apartment to “freeze it” pending a search warrant. [App.56].

A search warrant was obtained and executed, and officers seized from the Silver Street apartment, among other things, over 215 grams of crack cocaine; four bags of marijuana; a .9mm firearm and multiple rounds of ammunition; photographs and personal papers of Wurie; two cell phones; drug paraphernalia; and \$250 cash. [App.56, 67-69 (search warrant and return)]. Wurie was subsequently indicted on federal charges of being a felon in possession of a firearm and ammunition and of distribution and possession with intent to distribute cocaine base. [D.1; App.16-24].

Evidence obtained pursuant to the search warrant for the Silver Street apartment was admitted at trial. The jury found Wurie guilty on all three counts. [D.46].

SUMMARY OF ARGUMENT

The district court correctly denied Wurie's motion to suppress evidence obtained from the warrantless search of his cell phone incident to his lawful arrest. Relying on established Supreme Court precedent permitting a thorough search of the person and items immediately associated with the person pursuant to his lawful arrest, the district court correctly concluded that Wurie's cell phone was indistinguishable from other kinds of personal possessions, like a cigarette package, wallet, pager, or address book, that fall within the search incident to arrest exception to the Fourth Amendment's warrant requirement. Thus, the cursory search of Wurie's cell phone to learn the number associated with "my house," which the officers reasonably believed would lead them to the location of Wurie's drug stash and other relevant evidence of his drug dealing, required no additional justification beyond the fact of his lawful arrest and was reasonable under the Fourth Amendment.

Wurie's counter-arguments, which are contrary to established precedent, are unavailing. Wurie first argues that cell phones, which may contain or provide access to large quantities of private information, implicate a heightened expectation of privacy and therefore require different treatment under the Fourth Amendment than conventional personal containers. A cell phone, however, is not

materially different from a pager, wallet, or address book – all may be carried on the person, all may contain private information, and yet all may be searched without a warrant incident to arrest because the fact of the lawful arrest defeats the individual’s privacy expectation in the item. To the extent that a cell phone contains quantitatively or qualitatively more private information than conventional containers, the Fourth Amendment’s reasonableness requirement protects against any hypothetical invasion of privacy beyond what is permitted under the search incident to arrest exception. Thus, as all of the federal appellate courts to have addressed the issue have held, cell phones are properly considered items immediately associated with the person subject to a warrantless search incident to arrest and do not require different treatment under the Fourth Amendment.

Alternatively, Wurie argues that cell phones should be considered items within the arrestee’s immediate control, not items immediately associated with his person, requiring some additional justification, such as officer safety or preservation of evidence, for their warrantless search. Wurie’s argument, which seems to distinguish the physical object of the cell phone, which is typically (and in this case was) carried on the person, from the contents of the cell phone, finds no support in Supreme Court or federal appellate case law. The fact of the lawful arrest provides the authority for a warrantless search of the person and items found

on the person, and a cell phone and its contents, just like a wallet and its contents, fall within that established exception. Thus, the warrantless search of Wurie's cell phone required no additional justification.

Finally, Wurie's challenge to his designation as an armed career criminal is bootless. This Court's binding precedents hold that the Massachusetts crimes of assault and battery with a dangerous weapon, assault and battery on a police officer, resisting arrest, and larceny from the person all are categorically violent felonies under the Armed Career Criminal Act, and Wurie does not present any controlling, subsequently-announced authority that would call into question the law-of-the-circuit doctrine. Thus, Wurie was properly sentenced as an armed career criminal.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR WHEN IT DENIED WURIE'S MOTION TO SUPPRESS EVIDENCE OBTAINED FROM THE WARRANTLESS SEARCH OF HIS CELL PHONE SEIZED FROM HIS PERSON INCIDENT TO HIS LAWFUL ARREST.

The district court correctly recognized that the limited search of Wurie's cell phone in this case was indistinguishable from the search of other items found on an arrestee's person and was therefore permissible under established search incident to arrest case law. Wurie's claim that cell phones should be treated differently under the Fourth Amendment because of the quantity and quality of private

information they may contain runs counter to established precedent and must be rejected.

A. Procedural background

Wurie moved to suppress the evidence seized from the Silver Street apartment, arguing that the warrantless search of his cell phone and the officer's use of information gleaned from that search to obtain a search warrant for the Silver Street apartment was unconstitutional. [App.87, 94-96].⁴ At a motion hearing on January 20, 2009, the parties agreed that the essential facts were not in dispute and that an evidentiary hearing was unnecessary. [App.95]. The court invited Wurie to provide further briefing related to the search of the cell phone incident to arrest and the derivative use of information obtained therefrom, but Wurie did not submit a supplemental brief to the court. [App.95-96].

On May 4, 2009, the district court denied Wurie's motion to suppress in a written memorandum and order. [D.27; Add.1-13]; *Wurie*, 612 F. Supp. 2d 104.

⁴Wurie also asserted two additional arguments: that he was arrested without probable cause and therefore his keys and cell phone were seized illegally; and that the use of his keys to enter the Silver Street apartment amounted to an illegal search. [D.17; App.25-27]. The district court rejected those arguments, finding that Wurie's arrest was lawful because it was based on probable cause to believe that he had sold crack cocaine to Wade on September 5, 2007; that the seizure of Wurie's keys and cell phones from his person was permissible incident to his lawful arrest; and that the use of his keys to enter the common area of the Silver Street apartment was not a search. [Add.6-8, 11]. Wurie does not challenge those findings on appeal.

Because the facts were undisputed, the court relied on the facts set forth in the search warrant application and affidavits of BPD Sergeant Detective Murphy and Officer England. [Add.2].

Having established that the officers had lawfully seized Wurie's cell phone, the court held that the warrantless search of the phone to obtain the phone number associated with "my house," which the officers saw in plain view, was a "limited and reasonable" search incident to arrest. [Add.10-11]. The court noted that neither the Supreme Court nor this Court had directly considered the issue, but found that "[d]ecisions of district courts and Courts of Appeals (often analogizing cell phones to the earlier pager technology) trend heavily in favor of finding that the search incident to arrest or exigent circumstances exceptions apply to searches of the contents of cell phones." [Add.8-9]. The court reasoned that:

The officers, having seen the "my house" notation on Wurie's caller identification screen, reasonably believed that the stored phone number would lead them to the location of Wurie's suspected drug stash. I see no principled basis for distinguishing a warrantless search of a cell phone from the search of other types of personal containers found on a defendant's person that fall within

the *Edwards*⁵-*Lafayette*⁶ exceptions to the Fourth Amendment's reasonableness requirements.

[Add.10-11 (internal citations omitted)]. The court thus concluded that neither the search nor seizure of Wurie's cell phone transgressed the Fourth Amendment and denied Wurie's motion to suppress. [Add.12].

B. Standard of review

This Court reviews the district court's denial of a motion to suppress under a bifurcated standard, meaning that findings of fact are reviewed for clear error and legal conclusions are reviewed *de novo*. *United States v. Kearney*, 672 F.3d 81, 88-89 (1st Cir. 2012).

⁵*United States v. Edwards*, 415 U.S. 800, 802-03 (1974) (upholding search of clothing worn by the defendant at time of his arrest that was conducted the next day based on the "prevailing rule" that searches incident to lawful arrests are an exception to the Fourth Amendment's warrant requirement, as they are "justified by the reasonableness of searching for weapons, instruments of escape, and evidence of crime," and holding that "[i]t is also plain that searches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention").

⁶*Illinois v. Lafayette*, 462 U.S. 640, 648 (1983) (upholding booking search of defendant's shoulder bag, stating: "it is not 'unreasonable' for police, as part of the routine procedure incident to incarcerating an arrested person, to search any container or article in his possession, in accordance with established inventory procedures").

C. The search incident to arrest exception to the Fourth Amendment’s warrant requirement authorizes a full search of the arrestee and items immediately associated with his person, including cell phones, pursuant to his lawful arrest.

Wurie contends that, as applied to electronic storage devices such as cell phones, the search incident to arrest doctrine requires a warrantless search of a phone seized from the arrestee’s person to be based on the need to disarm or prevent the destruction of evidence. [Br.28-31]. That contention, however, fails to appreciate settled Supreme Court authority holding that searches of an arrestee and items immediately associated with the arrestee require no additional justification beyond the lawful custodial arrest itself, and is contrary to the prevailing view of the federal circuit courts to have addressed the issue that cell phones do not require different treatment under the Fourth Amendment than other items carried on the person.

A search incident to a lawful arrest is an established exception to the warrant requirement of the Fourth Amendment. *Arizona v. Gant*, 556 U.S. 332, 338 (2009). The exception permits a search of both the person (and items found on the person) and the area within his immediate control. *United States v. Robinson*, 414 U.S. 218, 224 (1973). This case involves a search of the person, which, unlike a search of the area within the arrestee’s control, “has been regarded as settled from its first enunciation.” *Id.* at 224-25 (explaining that, while there have been many “differing

interpretations as to the extent of the area which may be searched,” “no doubt has been expressed as to the unqualified authority of the arresting authority to search the person of the arrestee”). The “unqualified authority” to conduct a full search of a person incident to arrest “is not only an exception to the warrant requirement of the Fourth Amendment, but is also a ‘reasonable’ search under that Amendment.” *Id.* at 230, 235.

The search incident to arrest exception “derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations.” *Gant*, 556 U.S. at 338 (citing *Robinson*, 414 U.S. at 230-34, and *Chimel v. California*, 395 U.S. 752, 763 (1969)). Yet, “[t]he authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect.” *Robinson*, 414 U.S. at 235 (rejecting suggestion “that there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest”). Rather, since the lawful arrest of a person based upon probable cause is a reasonable intrusion under the Fourth Amendment, “a search incident to the arrest requires no additional justification. It is the fact of

the lawful arrest which establishes the authority to search[.]” *Id.*; *United States v. Sheehan*, 583 F.2d 30, 32 (1st Cir. 1978) (“[T]he Supreme Court has made it increasingly clear that a lawful arrest justifies a special latitude of both search and seizure of things found on the arrestee’s person.”).

The broad grant of authority to conduct a full warrantless search of the arrestee’s person, including all items immediately associated with the arrestee’s person, is justified by the “reduced expectations of privacy caused by the arrest.” *United States v. Chadwick*, 433 U.S. 1, 16 n.10 (1977), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565, 578-79 (1991); *United States v. Edwards*, 415 U.S. 800, 808-09 (1974) (“While the legal arrest of a person should not destroy the privacy of his premises, it does – for at least a reasonable time and to a reasonable extent – take his own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence.”) (quoting *United States v. DeLeo*, 422 F.2d 487, 493 (1st Cir. 1970)). Unlike a search of possessions within an arrestee’s reaching area, which must be justified by a need to remove weapons or destructible evidence, a search of the arrestee’s person and items found on his person “requires no additional justification.” *Robinson*, 414 U.S. at 235; *Chadwick*, 433 U.S. at 16 n.10 (distinguishing searches “of the person” incident to arrest, which are justified by reduced expectations of privacy caused by the arrest,

from searches “of possessions within an arrestee’s immediate control,” which are not). The authority to search the person exists whether or not the police have reason to believe the arrestee has on his person either evidence or weapons. *Robinson*, 414 U.S. at 235.

Thus, the Supreme Court in *Robinson* upheld the search of a cigarette package found in the arrestee’s pocket at the time of his arrest, stating that, “[h]aving in the course of a lawful search come upon the crumpled package of cigarettes, [the officer] was entitled to inspect it; and when his inspection revealed the heroin capsules [located within], he was entitled to seize them as ‘fruits, instrumentalities, or contraband’ probative of criminal conduct.” 414 U.S. at 236 (quoting *Harris v. United States*, 331 U.S. 145, 154-55 (1947)). The Court explained that, “[s]ince it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that [the officer] did not indicate any subjective fear of the respondent or that he did not himself suspect that respondent was armed” or possessed contraband. *Robinson*, 414 U.S. at 236.

Edwards reaffirmed the broad authority to search a person and his personal effects incident to arrest. There, the Court upheld the warrantless examination of the defendant’s clothes for evidence of the crime for which he was arrested as a valid search incident to arrest, even though the clothes were seized and searched

approximately 10 hours after the defendant was arrested and placed in a jail cell. 415 U.S. at 804-05. The Court cited *Robinson* for the proposition that a warrantless search of the arrestee's person incident to arrest is, without further justification, reasonable under the Fourth Amendment and stated, "[i]t is also plain that searches and seizures that could be made on the spot at the time of arrest may be legally conducted later when the accused arrives at the place of detention." *Edwards*, 415 U.S. at 803. That the officers seized and searched the clothes the defendant was wearing at the time of his arrest some hours later, rather than immediately, was of no constitutional significance; rather, the Court explained, "[t]his was and is a normal incident of custodial arrest, and reasonable delay in effectuating it does not change the fact that [the defendant] was no more imposed upon than he could have been at the time and place of the arrest or immediately upon arrival at the place of detention." *Id.* at 805.

This Court and other courts of appeals have consistently applied *Robinson* and *Edwards* to uphold the warrantless search of a variety of personal items seized from the arrestee's person at the time of his arrest, such as pagers, wallets, purses, address books, and briefcases. *See, e.g., United States v. Ortiz*, 84 F.3d 977, 984 (7th Cir. 1996) (pager); *United States v. Rodriguez*, 995 F.2d 776, 778 (7th Cir. 1993) (wallet); *United States v. Uricoechea-Casallas*, 946 F.2d 162, 166 (1st Cir.

1991) (wallet); *United States v. Holzman*, 871 F.2d 1496, 1504-5 (9th Cir. 1989) (address book), *overruled on other grounds by Horton v. California*, 496 U.S. 128 (1990); *United States v. Burnette*, 698 F.2d 1038, 1049 (9th Cir. 1983) (purse); *Sheehan*, 583 F.2d at 32 (wallet); *United States v. Eatherton*, 519 F.2d 603, 610-11 (1st Cir. 1975) (briefcase). And all of the federal courts of appeals to have considered whether a cell phone removed from the arrestee's person may be searched without a warrant incident to that arrest have concluded that, under *Robinson*, *Edwards*, and the authorities just cited, the cell phone search is permissible. *United States v. Flores-Lopez*, 670 F.3d 803, 809-10 (7th Cir. 2012); *United States v. Curtis*, 635 F.3d 704, 712 (5th Cir.), *cert. denied*, 132 S. Ct. 191 (2011); *Silvan v. Briggs*, 309 F. App'x 216, 225 (10th Cir. 2009) (unpublished); *United States v. Murphy*, 552 F.3d 405, 411 (4th Cir. 2009); *United States v. Finley*, 477 F.3d 250, 259-60 (5th Cir. 2007).⁷

⁷A number of decisions from state high courts and federal district courts have likewise held that warrantless searches of cell phones incident to arrest are permissible. *See, e.g., Hawkins v. State*, 290 Ga. 785, 786, 723 S.E.2d 924, 925 (2012) (citing *Wurie*, 612 F. Supp. 2d at 109, approvingly); *People v. Diaz*, 51 Cal. 4th 84, 101, 244 P.3d 501, 511, *cert. denied*, 132 S. Ct. 94 (2011); *United States v. Slaton*, Crim. No. 5:11-131, 2012 WL 2374241, at *8-9 (E.D.Ky. June 22, 2012) (slip copy); *United States v. Gomez*, 807 F. Supp. 2d 1134, 1145 (S.D. Fla. 2011); *United States v. Rodriguez-Gomez*, No. 1:10-CR-103-2-CAP-GGB, 2010 WL 5524891, at *2 (N.D.Ga. Nov. 15, 2010) (unpublished); *United States v. Hill*, No. CR 10-00261 JSW, 2011 WL 90130, at *4-8 (N.D. Cal. Jan. 10, 2011) (unpublished). In the face of this authority, *Wurie*'s heavy reliance on one decision from the Supreme Court of Ohio and one unpublished decision from the Northern District of California is unavailing.

In *Finley*, the Fifth Circuit upheld the warrantless search of a cell phone seized from the defendant's pocket at the time of his arrest, relying on *Robinson* for the proposition that “[p]olice officers are not constrained to search only for weapons or instruments of escape on the arrestee’s person; they may also, without any additional justification, look for evidence of the arrestee’s crime on his person in order to preserve it for use at trial.” 477 F.3d at 259-60. The court also explained that, since the “permissible scope of a search incident to lawful arrest extends to containers found on the arrestee’s person,” the officers were permitted to search the defendant’s cell phone, which was a container found on his person pursuant to his arrest, and the call records and text messages retrieved from his phone were admissible against him. *Id.* at 260. *See also Curtis*, 635 F.3d at 712 (relying on *Finley* to uphold warrantless search of cell phone incident to arrest); *Silvan*, 309 F. App’x at 225 (same).

Similarly, in *Murphy*, the Fourth Circuit, relying on *Finley* and two unpublished Fourth Circuit decisions, upheld the warrantless search of a cell phone

[Br.25-28 (citing *State v. Smith*, 124 Ohio St.3d 163, 168, 920 N.E.2d 949, 954 (2009) (finding cell phone seized from the defendant’s person not a “container” because “modern cell phones are capable of storing a wealth of digitized information wholly unlike any physical object found within a closed container”), *cert. denied*, 131 S. Ct. 102 (2010); Br.31-34 (citing *United States v. Park*, No. CR 05-375 SI, 2007 WL 1521573, at *8 (N.D. Cal. May 23, 2007) (unpublished) (stating, in dicta, that cell phones should not be considered part of the person because of the quantity and quality of private information stored within)).

seized from the defendant at the time of his arrest. 552 F.3d at 411 (citing *United States v. Young*, 278 F. App'x 242, 245-46 (4th Cir. 2008) (unpublished), and *United States v. Hunter*, No. 96-4259, 1998 WL 887289, at *3 (4th Cir. Oct. 29, 1998) (unpublished)). The court held that “officers may retrieve text messages and other information from cell phones and pagers seized incident to an arrest” because “the need for the preservation of evidence justifies the retrieval of call records and text messages from a cell phone or pager without a warrant.” *Murphy*, 552 F.3d at 411. In so holding, the court rejected the defendant’s argument that police must ascertain a phone’s storage capacity prior to conducting the warrantless search (because, according to the defendant, phones with larger storage capacities implicate heightened expectations of privacy and thus require a search warrant, while phones with limited storage capacity may be searched without a warrant due to the volatile nature of information stored), calling such a rule “unworkable and unreasonable.” *Id.*

Most recently, in *Flores-Lopez*, the Seventh Circuit also upheld the warrantless search of a cell phone seized from the defendant’s person at the time of his arrest. 670 F.3d at 809-10. The court acknowledged that *Robinson* allows for warrantless searches of the person and containers found on the person incident to arrest without further justification, but opined that modern cell phones, which

“contain, or provide ready access to, a vast body of personal data,” are unlike “conventional containers” such as address books or diaries and therefore the “potential invasion of privacy in the search of a cell phone is greater than in a search of a ‘container’ in a conventional sense[.]” *Id.* at 805. Nevertheless, the court stated that it was “not even clear that we need a rule of law specific to cell phones.” *Id.* at 807. Because the search incident to arrest exception permits officers to open a pocket diary found on the arrestee’s person to copy the owner’s address or to leaf through a pocket address book to obtain phone numbers without a warrant, officers also may perform a warrantless search of a cell phone to obtain similar information without offending the Fourth Amendment. *Id.* at 807, 809-10. Thus, since the actual search of the defendant’s cell phone was limited to looking in the phone to obtain the phone’s number, it was akin to the search of a conventional container like the cigarette pack in *Robinson* and required no additional justification. *Id.* at 809-810.

D. The limited search of Wurie’s cell phone was a valid search incident to his lawful custodial arrest.

These cases compel the conclusion that the search of Wurie’s cell phone, which was limited to obtaining information typically found in conventional containers carried on the person, falls squarely within the broad search incident to arrest authority established by *Robinson* and *Edwards*. Because Wurie was

lawfully arrested and the cell phone seized from him was property immediately associated with his person, the officers' limited, warrantless inspection of it – the pressing of two buttons to obtain the phone number associated with the “my house” caller identification seen in plain view on the outside of the phone when it rang – was a valid and reasonable search incident to arrest.

Having permissibly removed the cell phone from Wurie's person at the time of his arrest, the officers were entitled to conduct a “limited and reasonable” [Add.10] search of its call history. *Robinson*, 414 U.S. at 236; *Uricoechea-Casallas*, 946 F.2d at 166 (where defendant was lawfully arrested, agents had “ample justification” to search defendant, examine his wallet, and seize contraband found within). The officers' cursory inspection of the phone's call log to identify the number associated with the incoming calls from “my house” did not exceed the bounds of reasonableness. *See Flores-Lopez*, 670 F.3d at 810 (“Looking in a cell phone for just the cell phone's number does not exceed what decisions like *Robinson* . . . allow.”).

Thus, when a cursory search of Wurie's phone produced a phone number believed to be associated with his house, which the officers suspected contained his drug stash and other evidence of drug dealing, the police were entitled to use the phone number to further their investigation of Wurie's illegal drug trafficking

activities. *See Robinson*, 414 U.S. at 236 (“when his inspection [of the cigarette package] revealed the heroin capsules, he was entitled to seize them as ‘fruits, instrumentalities, or contraband’ probative of criminal conduct”) (citation omitted). *See also Edwards*, 415 U.S. at 806 (incident to custodial arrest, police are entitled to “take, examine, and preserve” personal effects of defendant in his immediate possession, including clothing, for use as evidence); *Sheehan*, 583 F.2d at 32 (upholding search of the defendant’s wallet seized from his person pursuant to lawful arrest that revealed papers listing names and numbers, the further investigation of which linked the defendant to a person involved in bank robbery).

Given this authority, the district court correctly concluded that it could “see no principled basis for distinguishing a warrantless search of a cell phone from the search of other types of personal containers found on a defendant’s person that fall within the *Edwards-Lafayette* exceptions to the Fourth Amendment’s reasonableness requirements.” [Add.11].

E. Wurie’s cell phone was an item or “container” immediately associated with his person and was therefore properly searched incident to his lawful custodial arrest.

Wurie strives to avoid the conclusion compelled by *Robinson*, *Edwards*, and unanimous federal circuit court precedent – that the warrantless search of a cell phone seized from the person incident to a lawful arrest is constitutional – but his

effort is unavailing. He first argues that modern cell phones, which are capable of storing and accessing vast amounts of personal data, are not like conventional containers that may be searched without a warrant incident to arrest, but are instead “*sui generis*” and therefore require different treatment under the Fourth Amendment. [Br.27-31]. Alternatively, Wurie argues that, under established search incident to arrest jurisprudence, a cell phone is not “property immediately associated with the person,” like the cigarette package in *Robinson*, but is instead “property within the arrestee’s immediate control,” like the locked footlocker in *Chadwick*, and therefore the search required additional justification. [Br.31-34]. Both arguments fail.

1. Cell phones are similar to other personal items or “containers” carried on the person and therefore do not require different treatment under the Fourth Amendment.

This Court should reject Wurie’s invitation to create a new rule applicable to searches of cell phones incident to arrest. Notwithstanding a cell phone’s ability to store or access large amounts of private data, it is a discrete, portable object that is typically carried on the person. In that regard, a cell phone is indistinguishable from any other personal item or “container” found on the person, such as a pager, wallet, address book, or purse; those items also may contain highly personal and intimate details of an individual’s life, but do not receive enhanced privacy

protection under the Fourth Amendment. Established search incident to arrest precedent makes clear that the fact of a lawful arrest defeats an individual's privacy interest in his person and possessions found on his person, at least for a limited time and to a limited extent, thus permitting a warrantless search incident to the arrest without the need for further justification. And, as discussed above, the federal appellate courts have consistently applied this principle to searches of cell phones seized from the arrestee's person. *See Flores-Lopez*, 670 F.3d at 809-10; *Curtis*, 635 F.3d at 712; *Silvan*, 309 F. App'x at 225; *Murphy*, 552 F.3d at 411; *Finley*, 477 F.3d at 259-60.

Although acknowledging this precedent, Wurie insists that a cell phone is distinguishable from a conventional container subject to the search incident to arrest exception because, while it may be carried on the person, it is "essentially a portable computer in which individuals maintain a high privacy interest." [Br.29]. According to Wurie, "whether one's privacy interest in a container is reduced by the fact of the arrest . . . depends on what is stored in it, and not merely its physical size or proximity to the body." [Br.33-34]. That argument, however, contravenes the well-settled principle that an individual's expectation of privacy in his person and the items he is carrying on his person is reduced by the fact of a lawful custodial arrest. In the case of a search of a person – as opposed to a search of his

reaching area – no inquiry need be made into the nature of, or privacy interest in, the item searched, and no justification need be offered beyond the fact of the lawful arrest to permit the warrantless search of items found in the arrestee’s hands or pockets. *Robinson*, 414 U.S. at 235-36; *Edwards*, 415 U.S. at 808-09; *Chadwick*, 433 U.S. at 16 n.10.

None of the Supreme Court cases discussing the search incident to arrest exception for items immediately associated with the person have required that a case-by-case analysis must be made regarding the nature of the item seized. Nor have the lower courts, in applying the search incident to arrest exception to items seized from the person, found it necessary to delve into such specifics as whether the wallet seized contained only a driver’s license and \$20 cash or was overflowing with receipts, pictures, business cards, private notes, and credit cards; or whether the address book seized was small and listed only a few names and numbers or was large and contained the names, numbers, addresses, birthdays, and personal notes about every person the arrestee had ever known. The balancing of an individual’s privacy interest in the item seized from his person based on what is contained within it against law enforcement’s need to preserve evidence or ensure officer safety is simply not part of the search incident to arrest exception as applied to searches of the person and the property in his immediate possession. *See Diaz*, 51

Cal. 4th at 96, 244 P.3d at 507 (under relevant Supreme Court precedent, “there is no legal basis for holding that the scope of a permissible warrantless search of an arrestee’s person, including items immediately associated with the arrestee’s person, depends on the nature or character of those items”). *See also Eatherton*, 519 F.2d at 610 (relying on *Robinson* and *Edwards* to reject defendant’s argument that court must consider his privacy interests in his briefcase, which was removed from his person incident to his arrest, in assessing whether a warrant was required for its search and stating that, “[w]hile a briefcase may be a different order of container from a cigarette box, it is not easy to rest a principled articulation of the reach of the Fourth Amendment upon the distinction.”).⁸ Accordingly, Wurie’s attempt to distinguish cell phones from other items or “containers” found on the person based on the individual’s relative privacy interest in each falls short.

The rationale for allowing law enforcement to search items like pagers, wallets, and address books incident to arrest without a warrant and without further inquiry into the nature of the item seized applies equally to cell phones. Critically,

⁸The Supreme Court has also made clear, in the motor vehicle context, that whether a container may be searched without a warrant does not depend on the character of the container: “[A] constitutional distinction between ‘worthy’ and ‘unworthy’ containers would be improper. Even though such a distinction perhaps could evolve in a series of cases in which paper bags, locked trunks, lunch buckets, and orange crates were placed on one side of the line or the other, the central purpose of the Fourth Amendment forecloses such a distinction.” *United States v. Ross*, 456 U.S. 798, 822 (1982) (footnote omitted).

cell phones are not all alike – not all are “smart” phones capable of accessing the internet through portals like internet search engines or applications that access specific websites. Some phones have external caller ID screens that list the full name, number, and other contact information associated with the caller, while some, like Wurie’s, list only the name designated by the phone’s user to identify the caller.⁹ Moreover, cell phones have varying levels of storage capacity, so some phones are capable of storing large amounts of data while others can store only a limited amount. It would therefore be impractical, if not impossible, for law enforcement, on the spot at the time of arrest, to ascertain the unique features of the particular phone seized from the arrestee prior to determining whether a warrantless search is permissible.

The better rule, which is consistent with the principle articulated in *Edwards*, *Robinson*, and cases applying that principle to a wide variety of items immediately associated with the person (including cell phones) is to categorically permit warrantless searches of cell phones found on the person incident to arrest, provided that the search conforms to the Fourth Amendment’s core reasonableness

⁹Wurie has never suggested, nor could he, that he had a legitimate privacy interest in the information (in this case, the “my house” caller ID) that the officers observed on the outside screen of his phone, which had been legally seized and reduced to police custody when the information was seen. *See Horton v. California*, 496 U.S. 128, 133 (1990) (where evidence is already in plain view, neither its observation nor seizure involves any violation of privacy).

requirement. Faithful adherence to the reasonableness requirement will prevent any potential abuse of the search incident to arrest exception in cases involving cell phone searches, just as it does in cases involving searches of the person and other items found thereon. *Robinson*, 414 U.S. at 235-36 (upholding warrantless search of cigarette pack only after noting that the search “partook of none of the extreme or patently abusive characteristics” that had previously been held unconstitutional); *Edwards*, 415 U.S. at 808 n.9 (“Holding the Warrant Clause inapplicable to the circumstances present here does not leave law enforcement officials subject to no restraints. This type of police conduct ‘must [still] be tested by the Fourth Amendment’s general proscription against unreasonable searches and seizures.’”) (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). See also *Swain v. Spinney*, 117 F.3d 1, 6 (1st Cir. 1997) (recognizing that a general search of the person is permissible under *Robinson* and *Edwards*, but finding that a more invasive strip or body cavity search requires independent evaluation for reasonableness).

The Seventh Circuit recognized the importance of the reasonableness requirement to searches of cell phones incident to arrest in *Flores-Lopez*. There, the court opined that cell phones are different from other “conventional containers” typically found on the person that are, without further justification, subject to search incident to arrest. 670 F.3d at 805. Even so, the court found no reason to

create a new rule of law applicable to cell phone searches because the search incident to arrest exception, as developed over time and limited by the Fourth Amendment's reasonableness requirement, adequately protects against impermissibly invasive searches. *Id.* at 809-10. The court reasoned that, if the search incident to arrest exception permits officers to "open a pocket diary to copy the owner's address, they should be entitled to turn on a cell phone to learn its number"; similarly, if officers may "leaf through a pocket address book . . . they should be entitled to read the address book on a cell phone." *Id.* at 807 (internal citations omitted). However, if officers are "forbidden to peruse love letters recognized as such found wedged between the pages of the address book, they should be forbidden to read love letters in the file of the cell phone." *Id.* Thus, provided the search of the cell phone is "no more invasive than, say, a frisk, or the search of a conventional container, such as Robinson's cigarette pack, in which heroin was found," it is permissible under the search incident to arrest exception. *Id.* at 809-10.

For all of these reasons, Wurie's claim that cell phones must be treated differently under the Fourth Amendment than other items or "containers" found on an arrestee's person at the time of the arrest must be rejected. A cell phone is not materially different from a pager, wallet, address book, or purse – all may contain

personal information, yet all may be searched without a warrant incident to arrest because the fact of the arrest defeats the individual's otherwise legitimate privacy expectation in the item. And to the extent that a cell phone contains quantitatively or qualitatively more private information than "conventional containers," the Fourth Amendment's reasonableness requirement protects against any hypothetical invasion of privacy beyond what is permitted under the search incident to arrest exception. Cell phones are therefore properly considered items or "containers" immediately associated with the person subject to a warrantless search incident to arrest and do not require categorically different treatment under the Fourth Amendment.

2. Wurie's cell phone was seized from his person, not his reaching area; thus, its limited, warrantless search required no additional justification.

Wurie argues in the alternative that, even if a cell phone is considered a "container," it is not a container "immediately associated with the person" because, "despite the fact that they are carried on the person, [cell phones] are not typical effects which courts have contemplated in allowing inspection of items on the person upon arrest, [given] their ability to store or provide portals to vast amounts of private data." [Br.36]. He claims, rather, that if the Court does not create a new rule for cell phones, it should consider a cell phone to be more like the footlocker

in *Chadwick* than the cigarette package in *Robinson*, requiring additional justification – such as the need to ensure officer safety or prevent the destruction of evidence – for its search. [Br.31, 36]. That argument also falls short.

Wurie’s argument that cell phones are not items immediately associated with the person is premised, like his argument that cell phones are not conventional containers, on the fact that cell phones may “provide ready access to the most intimate details of an individual’s life.” [Br.34]. He asserts that, “[w]ith increased networking capabilities (the ‘cloud’¹⁰) increasing apace, it is not an exaggeration to say that cell phones and similar devices as a class give ready access to a person’s entire digital biography . . . from digital devices no bigger than the cigarette package in Robinson’s shirt pocket some forty years ago.” [Br.29-30]. Wurie’s argument seems to be drawing a distinction between the cell phone, as a physical

¹⁰In layman’s terms, the “cloud” refers to data, resources, and applications hosted and run on remote servers connected to the internet. “Cloud computing” allows individual users to access a wide range of information (such as YouTube videos, Facebook profiles, web-based email accounts, or search engine results) stored on remote servers via an internet connection, and to store and backup personal data on remote servers, either instead of or in addition to storing such information on a personal electronic device or personal computer’s hard drive. *See, e.g., Elec. Privacy Info. Ctr. v. Nat’l Sec. Agency*, 678 F.3d 926, 929 n.1 (D.C. Cir. 2012) (noting that “Gmail is a ‘cloud-based’ email program, meaning the data and applications of the user reside on remote computer servers operated by Google”). *See also* <http://www.20thingsilearned.com/en-US/cloud-computing/1> (Google’s explanation of “cloud computing”).

object, and its contents, but that distinction finds no support in Supreme Court or federal appellate court case law.

As an initial matter, the record in this case does not provide a basis for finding that Wurie's cell phone possessed the sort of "increased networking capabilities" that his argument relies on. The only description of Wurie's phone in the record is that it was a "gray Verizon LG" cell phone that, in the course of the search, was "opened," suggesting it was a flip-style cell phone; also, his use of a personal photograph as the phone's "wallpaper" suggests that the phone was capable of taking pictures. However, there is no evidence that it was capable of accessing the internet, or of sending or receiving email or text messages; nor is there evidence that Wurie subscribed to a service plan that permitted such activities even if the phone were capable.

But even accepting as true Wurie's assertion that modern cell phones have the "ability to store or provide portals to vast amounts of private data" [Br.36], it does not provide a basis for finding that a cell phone seized from an arrestee's person is "not immediately associated with the person" and therefore requires additional justification for a warrantless search. The physical object of the cell phone, if carried on the person, like Wurie's cell phone was in this case, is an item immediately associated with the person, just like a cigarette pack, pager, wallet, or

address book. And to the extent that Wurie frets about the danger of allowing a warrantless search of a cell phone, which may contain a person's "entire digital biography," the Fourth Amendment's reasonableness requirement safeguards against any potential (and in this case, entirely speculative) invasion of privacy beyond the scope of the search incident to arrest exception.¹¹ Accordingly, there is no reason to treat a cell phone and its contents separately in determining whether the search incident to arrest exception applies in a given case. This case, a warrantless search of a cell phone seized from the person pursuant to a lawful arrest, is plainly controlled by *Robinson* and *Edwards*, and thus no additional justification was required.¹²

¹¹As discussed above, this case implicates none of the invasion of privacy concerns Wurie warns against: the search of his cell phone was limited to ascertaining the number associated with the incoming calls identified as "my house" on the phone's outer screen, and there was no probing into the intimate details of Wurie's life or attempt to access his private information.

¹²Although no additional justification was required, the officers here arguably were justified in searching the phone to prevent the destruction or concealment of evidence. Cell phones, like pagers, have a finite storage capacity (which varies from phone to phone) and therefore numbers stored on the incoming call log may be overwritten as new calls come in. *See Murphy*, 552 F.3d at 411 (finding no reason to assume that information stored on cell phones with larger storage capacities is any less volatile than information stored on phones with smaller storage capacities); *Ortiz*, 84 F.3d at 984 ("Because of the finite nature of a pager's electronic memory, incoming pages may destroy currently stored telephone numbers in a pager's memory."). After it was seized from him, Wurie's phone received multiple calls from "my house," which might have overwritten older calls – calls which might have linked him to Wade or other drug customers or suppliers – on his phone's call log. Moreover, there

3. Wurie's reliance on *Gant* is unavailing.

Wurie interprets *Gant* as limiting the broad authority to search incident to arrest established in *Robinson* and *Edwards* [Br.36], but that interpretation is unsound. In *Gant*, the Supreme Court held that a search of a motor vehicle incident to the lawful arrest of a recent occupant is permitted only “when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search” or when “it is reasonable to believe the vehicle contains evidence of the offense of arrest.” 556 U.S. at 343, 346. Wurie asserts that *Gant* affirmed “the continuing vitality of *Chimel* as the touchstone of search incident to arrest analysis” and therefore contends that *Gant* requires all searches incident to arrest to be justified by the need to ensure officer safety or prevent the destruction of evidence. [Br.28]. Wurie's interpretation of and reliance on *Gant* is misplaced.

existed a possibility, albeit remote, that the phone could have been “wiped” of its information, by someone else with remote access to the phone or by a pre-programmed security application, before the officers were able to obtain the number associated with “my house.” See *Flores-Lopez*, 670 F.3d at 807-8 (discussing possibility of remote wiping). Even had the officers been able to obtain the number for “my house” and other possibly incriminating numbers via a subpoena of the phone's service provider, the delay involved may have jeopardized the officers' ability to locate and secure relevant evidence. For example, Wurie's failure to answer the incoming calls from “my house” or to return home after the drug deal with Wade might have alerted others to the fact of his arrest, causing them to move or destroy evidence; it was therefore critical for the officers to act quickly.

Contrary to Wurie's assertion, *Gant* does not call into question "the continued validity of applying *Robinson* and *Edwards* to all personal effects." [Br.23]. *Gant* not only dealt with "circumstances unique to the vehicle context," namely, the inherent mobility of vehicles, 556 U.S. at 343, but addressed only the proper scope of searches of the arrestee's reaching area, not searches of the arrestee's person and possessions found on his person. *Id.* at 339. Indeed, *Gant* mentioned searches of the arrestee's person only to acknowledge that they, along with searches of the area "within [the arrestee's] immediate control," were held permissible in *Chimel*, and then explained that *Chimel* "construed that phrase ['within the arrestee's immediate control'] to mean the area from within which [the arrestee] might gain possession of a weapon or destructible evidence." *Id.* (quoting *Chimel*, 395 U.S. at 763). The remainder of the Court's opinion, and its holding, focused exclusively on the meaning of "within [the arrestee's] immediate control" in the context of a motor vehicle search incident to arrest. *Id.* at 339-51.

Thus, given the absence of any meaningful discussion in *Gant* of searches of the arrestee's person, and the narrow focus of the Supreme Court's holding to motor vehicle searches, this Court should, as other courts of appeals have done, reject Wurie's invitation to read *Gant* as limiting *Robinson* and *Edwards* in the context of searches of the person incident to arrest. *See Flores-Lopez*, 670 F.3d at

806 (acknowledging *Gant*, but finding that, “in this case the arrest, and the search of the cell phone found on the defendant’s person, took place after he parked and left the vehicle, so any special rules applicable to searches when police stop a vehicle and arrest an occupant are inapplicable”); *United States v. Brewer*, 624 F.3d 900, 906 (8th Cir. 2010) (declining to apply *Gant* to search of an arrestee’s person), *cert. denied*, 131 S. Ct. 1805 (2011). *See also Agostini v. Felton*, 521 U.S. 203, 237 (1997) (“We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that ‘if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.’”) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)); *United States v. Symonevich*, – F.3d –, 2012 WL 3083491, at *4 n.4 (1st Cir. July 31, 2012) (“As a general proposition, an argument that the Supreme Court has implicitly overruled one of its earlier decisions is suspect.”) (citing *Agostini v. Felton*); *United States v. Robinson*, 241 F.3d 115, 121 (1st Cir. 2001) (rejecting argument that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), extends to all sentence-enhancing facts: “We do

not believe that the [Supreme] Court would have set in motion such a sea change in the law of sentencing without explicitly addressing the issue.”).

In any event, even if *Gant* had some relevance to this case, it would support upholding the search of Wurie’s cell phone incident to his arrest because the officers had reason to believe that the phone contained evidence relevant to the crime for which Wurie was arrested. 556 U.S. at 343 (concluding that law enforcement may search the passenger compartment of a vehicle incident to arrest “when it is ‘reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle’”) (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004)).

Here, Sergeant Detective Murphy knew that drug dealers often arrange drug deals by cell phone and limit the quantity of drugs they carry to each individual deal, storing their larger supply at their home or stash house. [App.51, 53-54]. Thus, once Wurie was arrested for selling two 8-balls of crack cocaine to Wade, whom Murphy saw talking on his cell phone just before he got into Wurie’s car, the officers had reason to believe that Wurie’s cell phone contained incriminating evidence relevant to the drug deal they had just witnessed. And once the officers saw incoming calls from “my house” on Wurie’s phone, they had reason to believe, in light of all the other evidence, that the number associated with Wurie’s

house would lead them to his drug stash or other evidence relevant to his drug dealing (for example, cellular telephone records, drug ledgers, or drug paraphernalia). Accordingly, the limited, warrantless search of Wurie's cell phone to obtain the phone number associated with "my house" was a permissible search incident to Wurie's arrest for selling drugs.¹³

¹³Putting aside Wurie's novel arguments that the Court must create a new rule applicable to searches of cell phones incident to arrest and should extend *Gant's* holding beyond the motor vehicle context, suppression would be inappropriate here given the good faith exception to the exclusionary rule. *Herring v. United States*, 555 U.S. 135 (2009); *United States v. Leon*, 468 U.S. 897 (1984). Although the government did not raise *Herring* or *Leon* below, this Court may affirm a district court's suppression ruling on any ground made manifest by the record. *See, e.g., United States v. Camacho*, 661 F.3d 718, 732 (1st Cir. 2011). This Court and at least three other courts of appeals have applied the good faith exception to arguments similar to those presented here, apparently without the district court having passed on the issue below. *See United States v. Grupee*, 682 F.3d 143, 148 (1st Cir. 2012) (applying good faith exception where this Court's precedent permitted limited disclosure of drug dog qualifications in search warrant); *United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009) (applying good faith exception where circuit precedent prior to *Gant* permitted search of motor vehicle while defendant was secured in patrol car during search); *United States v. Davis*, 598 F.3d 1259, 1265-1268 (11th Cir. 2010) (same), *aff'd*, 131 S. Ct. 2419 (2011); *Curtis*, 635 F.3d at 713-714 (applying good faith exception where circuit precedent permitted search of cell phone's text messages incident to arrest). The officers' conduct in this case – a cursory search of a cell phone seized from Wurie's person incident to a lawful custodial arrest – was consistent with and objectively reasonable under established Supreme Court and appellate court precedent; thus, their conduct cannot be considered a "deliberate, reckless, or grossly negligent" violation of the Fourth Amendment, and suppression would be an inappropriate remedy. *Cf. Davis v. United States*, 131 S. Ct. 2419, 2428 (2011) (refusing to suppress evidence obtained from officers' search of vehicle incident to arrest where search followed then-binding circuit precedent, which *Gant* later held unconstitutional, "to the letter").

II. WURIE’S CHALLENGE TO THE CLASSIFICATION OF HIS PRIOR MASSACHUSETTS CONVICTIONS FOR ASSAULT AND BATTERY WITH A DANGEROUS WEAPON, ASSAULT AND BATTERY ON A POLICE OFFICER, RESISTING ARREST, AND LARCENY FROM THE PERSON AS ARMED CAREER CRIMINAL PREDICATES IS FORECLOSED BY FIRST CIRCUIT PRECEDENT.

Wurie claims that his prior Massachusetts convictions for assault and battery with a dangerous weapon (“ABDW”), assault and battery on a police officer (“ABPO”), resisting arrest, and larceny from the person are not categorically violent felonies within the meaning of the Armed Career Criminal Act (“ACCA”), and thus, because the record contains no *Shepard*-approved¹⁴ documentation to support a finding that his offenses were in fact violent ones, the district court erred in sentencing him as an armed career criminal. [Br.39-52]. Wurie acknowledges, as

Finally, it should be noted that, even if the Court were to reverse the district court’s order denying Wurie’s motion to suppress, which it should not, his conviction on Count Two, which charged him with distributing crack cocaine to Wade, remains valid. Proof of Wurie’s guilt on the distribution charge was not based on evidence obtained from the search of his cell phone, but on the testimony of the officers who witnessed the transaction and questioned Wade afterward, and on the crack cocaine recovered from Wade’s person immediately after his contact with Wurie.

¹⁴*Shepard v. United States*, 544 U.S. 13, 23-26 (2005) (restricting information a sentencing court may rely upon to determine whether a defendant’s prior conviction qualifies as a “violent felony” under the ACCA to the “records of the convicting court,” including “the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information”).

he must, that his claim is foreclosed by this Court's precedents, but raises the issue to preserve it for further review. [Br.14].

A. Sentencing proceedings

The Probation Office determined that Wurie was an armed career criminal subject to a mandatory minimum sentence of 15 years, *see* 18 U.S.C. §924(e)(1), and an advisory Guidelines sentencing range ("GSR") of 262 to 327 months. [PSR ¶¶51-52, 70, 126-127]. The GSR was based on a total offense level ("TOL") of 34 and a criminal history category ("CHC") of VI. [PSR ¶¶52-54, 70].¹⁵ Pursuant to the ACCA, a defendant is designated an armed career criminal if he has at least three prior felony convictions for either a violent felony or a serious drug offense. 18 U.S.C. §924(e)(1). The PSR deemed five of Wurie's prior Massachusetts felony convictions to be ACC predicates:

- a 1996 conviction for assault and battery with a dangerous weapon (knife) [PSR ¶58];
- a 1997 conviction for larceny from the person [PSR ¶62];
- a 2000 conviction for assault and battery on a police officer [PSR ¶63];
- a 2000 conviction for resisting arrest [PSR ¶63]; and

¹⁵Had Wurie not qualified as an armed career criminal or career offender, his GSR would have been 210 to 262 months, based on a TOL of 32 and a CHC of VI. [PSR ¶¶36-46, 65-68].

- a 2002 conviction for assault and battery with a dangerous weapon (motor vehicle) [PSR ¶64].

[PSR ¶70].

Wurie objected to his ACCA designation, arguing that, although this Court's precedents held otherwise, none of his prior convictions was categorically a "violent felony." [PSR Add. at pp.43-45 (Def. Obj. #2)]. He also argued that the PSR's descriptions of his offenses were not based on *Shepard*-approved documentation and there was insufficient evidence to establish that his crimes were ACCA predicate offenses. [PSR Add. at pp.43-45 (Def. Obj. #2)]. Both the Probation Office and the government responded to Wurie's objection by citing recent First Circuit cases holding each of his five prior convictions to be categorically "violent felonies" under the ACCA. [PSR Add. at pp.45-46; D.79; App.254-263].

At the sentencing hearing on June 29, 2011, Wurie did not renew his objection to his ACCA designation, but argued for a variant sentence of 150 months, based on "the principle of diminishing returns" for prison sentences longer than 10 years and "rough proportionality" of sentences "between the longest prior sentence for crimes of a similar gravity and the sentence imposed." [App.273-275]. The government recommended a sentence of 262 months, the low end of the 262 to 327-month GSR, based primarily on Wurie's lengthy and violent criminal history.

[App.266-271]. The district court accepted the government's recommendation, stating that "the Guideline range is a reasonable one and I see no need to depart from it," and sentenced Wurie to 262 months in prison, to be followed by five years of supervised release. [App.276].

B. Standard of review

This Court reviews *de novo* whether Wurie's prior convictions qualify as ACCA predicates. *United States v. Luna*, 649 F.3d 91, 106 (1st Cir.), *cert. denied*, 132 S. Ct. 861 (2011).

C. Wurie was properly sentenced as an armed career criminal.

This Court has held that each of Wurie's challenged prior convictions is categorically a violent felony under the ACCA (or a crime of violence under the career offender guideline),¹⁶ and the district court therefore did not err when it sentenced Wurie as an armed career criminal.

First, this Court held in *Hart*, 674 F.3d at 42, that the Massachusetts crime of ABDW is categorically a violent felony under the ACCA, thereby reaffirming its earlier decision in *United States v. Glover*, 558 F.3d 71 (1st Cir. 2009). In so doing, the Court expressly rejected the argument now advanced by Wurie, that the

¹⁶*United States v. Dancy*, 640 F.3d 455, 466 n.9 (1st Cir.) (noting terms "crime of violence" under the Guidelines and "violent felony" under the ACCA are "nearly identical in meaning, so that decisions construing one term inform the construction of the other"), *cert. denied*, 132 S. Ct. 564 (2011).

reasoning of *Johnson v. United States*, 130 S. Ct. 1265 (2010), and *United States v. Holloway*, 630 F.3d 252 (1st Cir. 2011), required reversal of *Glover. Hart*, 674 F.3d at 42. Wurie does not explain why *Hart*, which he does not address, should be revisited.

Second, this Court held in *Dancy*, 640 F.3d at 470, that the Massachusetts crime of ABPO is categorically a violent felony under the residual clause of the ACCA. Wurie acknowledges *Dancy*, but argues that it was wrongly decided and should be reconsidered. [Br.44]. Under the law-of-the-circuit doctrine, however, this Court is bound by prior panel decisions unless the previous holding is “contradicted by controlling authority, subsequently announced (say, a decision of the authoring court *en banc*, a Supreme Court opinion directly on point, or a legislative overruling),” or in “those relatively rare instances in which authority that postdates the original decision, although not directly controlling, nevertheless offers a sound reason for believing that the former panel, in light of fresh developments, would change its collective mind.” *United States v. Pires*, 642 F.3d 1, 9 (1st Cir. 2011) (internal quotations omitted). Neither exception is applicable in this case. Wurie asserts only that “Massachusetts case law contemplates the offense can be committed in a reckless fashion,” [Br.44 (citing *Commonwealth v. Correia*, 50 Mass. App. Ct. 455, 456-57, 737 N.E.2d 1264, 1266 (2000))], but that authority

is neither controlling nor subsequently-announced as required by the exceptions to the law-of-the-circuit doctrine. *See, e.g., Pires*, 642 F.3d at 9-10; *United States v. Troy*, 618 F.3d 27, 36 (1st Cir. 2010). Thus, *Dancy* forecloses Wurie's ABPO predicate challenge.

Third, this Court has repeatedly held that a Massachusetts conviction for resisting arrest is categorically a violent felony under the ACCA and a crime of violence under the Guidelines. *United States v. Curet*, 670 F.3d 296, 308 n.12 (1st Cir.), *cert. denied*, 132 S. Ct. 2728 (2012); *United States v. Weekes*, 611 F.3d 68 (1st Cir. 2010), *cert. denied*, 131 S. Ct. 3021 (2011); *United States v. Almenas*, 553 F.3d 27 (1st Cir. 2009). Wurie argues that *Weekes* and *Almenas* were wrongly decided and must be reconsidered. [Br.46-47]. Wurie, however, does not cite to any decision announced after *Curet* or *Weekes* that would call those decisions into question under the law-of-the-circuit doctrine; accordingly, *Curet*, *Weekes*, and *Almenas* foreclose Wurie's resisting arrest predicate challenge.

Finally, this Court held in *United States v. Rodriguez*, 659 F.3d 117, 119 (1st Cir. 2011), that a Massachusetts conviction for larceny from the person is categorically a violent felony under the ACCA, thereby reaffirming its earlier decision in *United States v. De Jesus*, 984 F.2d 21 (1st Cir. 1993). Wurie contends that *Rodriguez* was wrongly decided, but again offers no controlling, subsequently-

decided authority that would require reconsideration of *Rodriguez* under the law of the circuit doctrine.

Because this Court's binding precedents hold that all of Wurie's prior Massachusetts convictions are categorically ACCA predicates, the district court did not err in sentencing him as an armed career criminal.

CONCLUSION

For these reasons, the government respectfully requests that the Court affirm the judgment.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH
Rule 32(a)**

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/s/ Kelly Begg Lawrence
AUSA Kelly Begg Lawrence
Dated: August 9, 2012

CERTIFICATE OF SERVICE

I, Kelly Begg Lawrence, Assistant U.S. Attorney, hereby certify that on August 9, 2012, I electronically served a copy of the foregoing document on the following registered participant of the CM/ECF system: Ian Gold, Esq., Federal Public Defender Office, 51 Sleeper Street, 5th Floor, Boston, MA 02210.

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KELLY BEGG LAWRENCE