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## ASKED & ANSWERED

### Andrew Bossory on Cell Phone Searches

*In the recent Riley v. California, The U.S. Supreme Court unanimously decided that a warrant is generally required before a cell phone search, and that warrants may be obtained with increasing efficiency. Ann Arbor defense attorney Andrew Bossory of Lorandos Joshi talked to The Legal News about this decision.*

**Mathis:** Did the Court make the right decision that the police generally may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested?

**Bossory:** Yes, I think the Court was right. Usually, when someone is arrested the police are permitted conduct a search “incident to arrest” without a warrant. This type of search has been justified for two primary reasons: officer safety and preservation of evidence. As the Court pointed out, neither of these goals are served by a warrantless cell phone search. First, a search of a cell phone reveals electronic data – and I think we can all agree that you cannot be physically harmed by the elec-



**Andrew Bossory**

tronic contents of a phone. Second, once a phone is in police possession the Court recognized that there is little to no chance that any evidence will be destroyed and police can take simple steps to ensure preservation.

On top of this, the Court recognized the tremendous privacy rights at stake. Today, a smart phone has enough storage capacity for a person to carry their entire life’s story with them

wherever they go, accessible at the touch of a screen. One can hardly imagine a more invasive intrusion into privacy than unfettered access to this information. I think it was the sheer volume of personal information contained on your average smart phone that the Court put its weight behind. For example, when going through your phone, the police don’t just have access to a written reminder for today’s doctor appointment—say, as if during a search of a purse or wallet—it’s access to every appointment and entry into your calendar for the last 10 years!

**Mathis:** The court concluded that 10 years ago, officers might have occasionally stumbled across a highly personal item such as a diary, but today many of the more than 90 percent of American adults who own cell phones have in their possession a digital record of nearly every aspect of their lives. What are your thoughts on using that data in your client’s defense?

**Bossory:** Using personal information or character evidence is truly a double-edged sword and  
*See ASKED, Page 2*

**ASKED:***High court notes ‘Privacy comes at a cost’*

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in most cases the defense tries to avoid it unless there is very, very good reason. I think the Court’s concern was directed more toward the fact that with a smart phone your average adult has more personal information concentrated in one place than ever before. As the Court put it, a phone is not just a phone. It’s a computer, a camera, a video recorder, a television and an internet device. It has your photographs, date book, texts, emails and browsing history. 10 years ago, the police would never discover such a trove of information in a search incident to arrest — it’s simply too much information to lug around. This practical reality justified the Court’s conclusions in earlier cases that the minimal privacy intrusion was outweighed by concerns for safety and evidence preservation. Today, the intrusion would be massive and an unchecked warrantless search would go too far into our private lives.

**Mathis:** You say this decision is ground breaking in its analysis of Fourth Amendment in the modern world of technology. Can you elaborate?

**Bossory:** I think the opinion raises the question as to how far the Court’s rationale will carry. Cell phones are not the only type of devices capable of massive storage — we have iPods, smart watches, and any number of electronic devices. A lot of people “sync” their phones with their

cars. Where is the Court going to draw the line with the type of devices that qualify for “cell phone” protection? For example, vehicle searches have always been given a lot of deference in upholding warrantless searches. Is that going to change now that cell phones can link with your car saving information like your phone directory, map/GPS services and datebooks?

**Mathis:** Have you ever had a client whose phone was searched?

**Bossory:** I have had clients whose phones have been searched by police — and the results have been both good and bad. There have been times when police have found incriminating evidence used by the government during prosecutions and, on the other hand, there have been times when our forensic examiners have uncovered evidence which thoroughly rebuts critical allegations. For example, we were recently able to demonstrate that a client never saved certain pictures on his phone, contrary to the government’s argument, that proved to be highly exculpatory evidence.

**Mathis:** Some might argue that this decision makes it harder for police to keep the bad guys off the streets. Your thoughts?

**Bossory:** Nothing about this decision makes it any harder for police to keep us safe. As the Court pointed out, all the police need to do is apply for and obtain a warrant which, with today’s technology, can be done in around 15 minutes. On top of that, the Court specifically preserved ALL

of the exceptions police have to look at a phone without a warrant — including emergency situations and real concerns over destruction of evidence. And, a police officer can still physically look at a phone to make sure there is no threat to safety — like a hidden razor. The Court did nothing to preclude police from being safe, protect the public and obtaining evidence; police simply cannot go through your most personal of information without a justifiable reason in the absence of a warrant.

**Mathis:** Is this opinion an example of a dangerous criminal getting off on a technicality?

**Bossory:** No. As the Court pointed out, “privacy comes at a cost.” We, as a nation, have decided that certain liberties are so fundamental that we bear the risks associated. If these liberties, every so often, demand that a conviction is reversed or the accused be set free, that is the choice we’ve made. But, before we leap to incredulity, let’s not forget that nothing prevents the state governments from prosecuting these petitioners again without using the evidence discovered from the warrantless search or through another exception. For example, during a re-trial, the prosecutor can certainly argue that the evidence discovered through analysis of the phones would have been inevitably discovered by other means and admissible.

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Bradley L. Thompson II, President  
Suzanne Favale, Publisher  
Julie McClellan, General Manager  
Brian Cox, Editor (bcox@legalnews.com)  
Jo Mathis, Staff Writer (jmathis@legalnews.com)  
Mary Steinmetz, Circulation Manager  
Toll-Free 1-866-857-0873  
Classified Advertising  
1-800-875-5275

2301 Platt Road, Suite 300, Ann Arbor, MI 48104  
Telephone: (734) 477-0201  
E-mail: wln.notices@legalnews.com

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