Article

"Can You Hear Me Now?": The Right to Counsel Prior to Execution of a Cell Phone Search Warrant

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INTRODUCTION

Every day, police officers across the country stop and arrest people for a wide variety of crimes.[1] The majority of these arrests arise from "street crimes"[2]—thefts, assaults, drug-related offenses, robberies.[3] These arrests are increasingly of persons car-

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1. *See* Erin Duffin, *USA—Number of Arrests for All Offenses 1990–2020*, STATISTA (Sept. 29, 2021), https://www.statista.com/statistics/191261/number-of-arrests-for-all-offenses-in-the-us-since-1990 [https://perma.cc/WS2J-5PE3] (showing there were 7,632,473 arrests in 2020).

2. *See Documents and Downloads,* FBI CRIME DATA EXPLORER, https://crime-data-explorer.app.cloud.gov/pages/downloads (scroll down to "Additional Datasets"; then click the dropdown on "Arrest Data – Reported Number of Arrests by Crime"; then click "Download") [https://perma.cc/9RSH-7H6W] (showing the number of reported arrests for larceny, disorderly conduct, vandalism, prostitution, and other street crimes far outnumbered arrests for white-collar crimes such as fraud and embezzlement in 2016).

3. ALISON S. BURKE, DAVID CARTER, BRIAN FEDOREK, TIFFANY MOREY, LORE RUTZ-BURRI & SHANELL SANCHEZ, INTRODUCTION TO THE AMERICAN CRIMINAL JUSTICE SYSTEM 51 (2019).

rying cell phones.[4] More and more, law enforcement[5] has begun to circumvent the adversarial process by seeking ex parte warrants—warrants issued without notice to the other party—to search these seized cell phones, despite formal charges having been brought, counsel appointed, and the lack of exigent circumstances requiring an immediate search.[6] This procedure is troubling for a variety of reasons, most importantly because it undermines the Sixth Amendment's guarantee of the "Assistance of Counsel for his defence".[7] The United States Supreme Court has defined the right to counsel under the Sixth Amendment as applying at every "critical stage" of a prosecution.[8] This Article proposes that a "post-indictment"[9] search of a seized cell phone is a "critical stage" in a prosecution, entitling a criminal defendant to the assistance of counsel prior to the execution of the search.

Cell phones are a major part of everyday life in our country.[10] Almost every American owns, uses, or carries a cell phone at all times.[11] Cell phones are used to navigate daily activities,

4. *See Mobile Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/mobile [https://perma.cc/6WQJ-SR8A] (showing that ninety-seven percent of Americans owned a cell phone in 2021, whereas in 2010, only eighty-two percent of Americans owned a cell phone).

5. In this Article, I use the term "law enforcement" broadly in reference to prosecutors, police departments, and other government-aligned investigative agencies.

6. *See infra* Part I.A.

7. U.S. CONST. amend. VI.

8. *See, e.g.*, Powell v. Alabama, 287 U.S. 45, 57 (1932) (finding defendants entitled to counsel from arraignment through trial which is "perhaps the most critical period of the proceedings"); United States v. Wade, 388 U.S. 218, 224 (1967) ("In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment to apply to 'critical' stages of the proceedings."); United States v. Ash, 413 U.S. 300, 310–13 (1973) (collecting cases demonstrating the "expansion of the counsel guarantee to trial-like confrontations").

9. For clarity's sake, I use the term "post-indictment" in this Article to match the Supreme Court's terminology. As discussed further *infra* note 105, "post-indictment" does not mean actual formal indictment by a grand jury, but rather encompasses the point at which formal charges or proceedings have begun. *See also* Kirby v. Illinois, 406 U.S. 682, 688–90 (1972) (holding that the right to counsel attaches at the initiation of formal proceedings).

10. Riley v. California, 573 U.S. 373, 385 (2014) (discussing how modern cell phones are "such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy").

11. *Mobile Fact Sheet*, *supra* note 4.

communicate with family members, conduct banking, and store medical records.[12] Advances in digital technology have led to extremely powerful "smartphones" capable not only of storing large amounts of data[13] but also of continuously tracking one's every move.[14] From location history to close associations and communications, many of the details of one's life are stored on their cell phone.[15] In recent years, the Supreme Court has made clear that the privacy interests one has in their smartphone are even more significant than those of their home—long the most sacred and private space in constitutional doctrine.[16]

Because of the widespread use of cell phones—and the privacy interests at stake—constitutional criminal procedure jurisprudence has been evolving to adapt to the new challenges that this technology presents.[17] The Supreme Court—in *Jones*,[18] *Riley*,[19] and *Carpenter*[20]—has begun to carve out new Fourth Amendment rules specific to technology. The Court has acknowledged that such modern devices contain voluminous and intimate records of one's life, requiring application of longstanding

12. *Riley*, 573 U.S. at 394 ("[A] cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record.").

13. *Id.* at 393 ("One of the most notable distinguishing features of modern cell phones is their immense storage capacity.").

14. Carpenter v. United States, 138 S. Ct. 2206, 2216 (2018) ("Much like GPS tracking of a vehicle, cell phone location information is detailed, encyclopedic, and effortlessly compiled.").

15. *Riley*, 573 U.S. at 394 (discussing the distinct types of information found on a modern cell phone).

16. *Id.* at 396–97 ("Indeed, a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is.").

17. *See id.* at 403 ("The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought.") (citation omitted).

18. *See* United States v. Jones, 565 U.S. 400, 404 (2012) ("We hold that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'") (footnote omitted).

19. *See Riley*, 573 U.S. at 401 (holding that a warrant is required prior to searching a cell phone, "even when a cell phone is seized incident to arrest").

20. *See* Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018) (declining to extend third-party doctrine to cell-site location information).

doctrinal constitutional rules to new and novel technology.[21] It is time for the Sixth Amendment to reflect and account for technological advances in modern criminal procedure as well.

Currently, the government routinely seeks ex parte warrants to search the cell phones of defendants that were seized incident to arrest. This systematically occurs even when an individual has been charged with a crime and appointed a lawyer, leading to an invasive exposure of an individual's private life without the assistance of counsel to reduce such a harm. Because of the vast amount of information that can be found about a person on their cell phone, these searches are a far greater intrusion than a search of a wallet, purse, or other item that is commonly carried every day.

I argue that, in today's society, a post-indictment search of a cell phone must not just be protected by the warrant requirement as established in *Riley*, but, tracking the Court's concern about digital privacy, additional appropriate Sixth Amendment protections must be established as well. The technological capabilities of modern cell phones demand more than the mere binary decision of whether or not probable cause exists to search the cell phone. The vast storage and tracking abilities of modern cell phones demand that the breadth and particularity of a search warrant must also be taken into account.[22] The immense privacy interests at stake and the plain language of the Constitution require that, post-indictment and after a device has been seized, a criminal defendant be provided the assistance of counsel to review and litigate the sufficiency and scope of a warrant application. At the post-indictment stage, nothing justifies an ex parte application for a search warrant and subsequent search of a cell phone. The government's ability to access and rummage through reams of personal data and information—much of which will not be relevant in a criminal prosecution—is assuredly a "critical stage" of the prosecution entitling a defendant to the assistance of counsel under the Sixth Amendment.[23]

Rooted in the plain language of the Sixth Amendment, this interpretation achieves several goals essential to our judicial system and societal interests. First, it maintains the adversarial

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21. *Id.* at 2216 ("The question we confront today is how to apply the Fourth Amendment to a new phenomenon . . . .").

22. *Riley*, 573 U.S. at 394, 396.

23. *See* Rothgery v. Gillespie County, 554 U.S. 191, 212 (2008) ("[T]he accused . . . is entitled to the presence of appointed counsel during any 'critical stage' of the . . . proceedings.").

system—the backbone of our criminal justice system—by allowing for litigation on these important issues. Second, it allows courts to develop transparent factual records on the issue of probable cause that will inform the issuance and scope of any warrant. Third, it reduces the harm of the serious privacy violations that occur when a cell phone is searched by regulating the conduct of the search. This interpretation of the "critical stage" doctrine accounts for technological advances, upholds the plain language of the Sixth Amendment, and more fully protects the rights of criminal defendants.

Indeed, in many white-collar criminal prosecutions, subjects of investigations or search warrants already enjoy many more protections, such as the use of "taint teams,"[24] or "special masters,"[25] and the ability of their lawyers to intercede after a device is seized.[26] This privilege occurs pre-indictment when the Sixth Amendment right has not attached, but is extended due to class status and financial ability.[27] The assistance of counsel will reduce the harm of law enforcement's invasive rummaging through private electronic data and the needless exposure of private information unrelated to any criminal activity. The presence and involvement of counsel will also streamline pretrial discovery, limit in limine litigation on admissibility of electronic evidence, and avoid lengthy ex post litigation in appellate courts

24. A taint team is a group of government attorneys who are not directly involved in an investigation or case who review seized materials for privileged material. *See In re* Grand Jury Subpoenas, 454 F.3d 511, 515 (6th Cir. 2006).

25. A special master is a third party appointed by the court in charge of reviewing the defendant's seized documents and devices. *See* Trump v. United States, No. 22-81294-CIV-CANNON, 2022 WL 4015755, at *9 (S.D. Fla. Sept. 5, 2022) (describing the role of a special master to review potentially privileged materials).

26. Effy Folberg, *Search Warrants for Digital Speech*, 22 YALE J.L. & TECH. 318, 387 n.326 (2020) ("For instance, when a search warrant is executed on an attorney's office, taint teams or independent search executors are often used to filter out privileged communications."); *see also* Loren E. Weiss & Gregory S. Osborne, *Taint Teams and the Attorney-Client Privilege*, A.B.A. (Dec. 2015), https://www.fitsnews.com/wp-content/uploads/2017/06/American-Bar-on-Taint-issues.pdf [https://perma.cc/N96R-87TC] (describing the use of taint teams and special masters to sort through potentially privileged material).

27. While I mention these situations, this Article does not further address them, but rather focuses specifically on post-indictment circumstances when the Sixth Amendment right to counsel is implicated.

assessing whether the "good faith" exception should apply.[28] This interpretation maintains the bright line "critical stage" rule as to when the right to counsel attaches while reflecting current technological reality in protecting the rights of criminal defendants and guiding law enforcement and the courts.

Recognition that a post-indictment cell phone search is a "critical stage" would require any search warrant application to be handled by the assigned case judge, rather than a "warrant judge," judge on duty, or another magistrate with no familiarity with the facts and posture of the case. Rather than an ex parte warrant application, the government would file a motion setting out the bases for the warrant, and the defense would have an opportunity to litigate the issue prior to the issuance of any search warrant. This approach finds support in analogous situations, including buccal swabs,[29] compelled decryption,[30] and medical records,[31] all of which reveal less personal information than the contents of an individual's cell phone.[32]

The Sixth Amendment has been the subject of a fair amount of scholarly and judicial attention. In recent years, the Sixth Amendment's Confrontation Clause has had its moment at the Supreme Court.[33] Scholars have advocated for an expanded right

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28. United States v. Leon, 468 U.S. 897, 920 (1984) (holding that exclusion of evidence is not necessary when police properly execute a search warrant previously approved by a detached magistrate despite it later being found to have been issued without legal justification so long as the officer acted with "objective good faith").

29. *See* United States v. Evans, 427 F. Supp. 3d 87, 89–91 (D.D.C. 2019) (setting out the procedural posture of the case and detailing the pleadings leading to the court's decision regarding whether the government, through a court order, can compel a defendant to provide a buccal swab).

30. *See* Orin S. Kerr, *Compelled Decryption and the Privilege Against Self-Incrimination*, 97 TEX. L. REV. 767, 768 (2019) (describing the procedure typically used in post-indictment cases to compel a defendant to provide the password to unlock a device); United States v. Apple MacPro Computer, 851 F.3d 238, 243 (3d Cir. 2017) ("[U]pon application of the Government, a Magistrate Judge issued an order pursuant to the All Writs Act requiring Doe to produce his iPhone 6 Plus, his Mac Pro computer, and his two attached external hard drives in a fully unencrypted state . . . .").

31. *See* United States v. Mills, No. 16-CR-20460, 2019 WL 76869, at *3 (E.D. Mich. Jan. 2, 2019) (examining the government's motion for subpoenas duces tecum to obtain the defendant's medical records).

32. *See* Riley v. California, 573 U.S. 373, 394, 396 (2014) (detailing breadth of information held in a cell phone).

33. *See, e.g.*, Crawford v. Washington, 541 U.S. 36, 38, 68–69 (2004) (finding that playing a recording of defendant's wife's statement for the jury violated defendant's Sixth Amendment right to confrontation); Davis v. Washington, 547

to counsel in pre-charge plea bargaining,[34] presentence interviews,[35] and pretrial services interviews.[36] This Article is the first to address an overlooked procedure at the intersection of the Fourth, Fifth, and Sixth Amendments.

Part I of this Article identifies and discusses the scope of the problem and the shortcomings of current doctrine. Part II explores the history, development, and evolution of the right to counsel. It goes on to analyze why an interpretation of "critical stage" doctrine results in a recognition that a post-indictment search of a cell phone is such a stage. Part III makes a case for how courts should recognize and adapt to this interpretation. Finally, this Article proposes statutory language that goes further to protect the privacy interests at stake.

In recent years, the Supreme Court has acknowledged advances in technology when applying existing Fourth Amendment doctrine to cell phones. It is time for the same thing to happen in the context of the Sixth Amendment. When it comes to a search of a cell phone, these two constitutional amendments are intertwined. Modern technology and law enforcement tools have enabled "an extent of surveillance that in earlier times would have been prohibitively expensive,"[37] meriting an expansion of protections afforded by each amendment. The values that the Fourth Amendment protects substantially overlap with those that the Sixth Amendment protects. The doctrinal Fourth Amendment rules acknowledging advances in technology must

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U.S. 813, 817, 829 (2006) (finding that statements made to law enforcement during a 911 call were nontestimonial and therefore not subject to the Confrontation Clause); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 307, 329 (2009) (holding that admission of certificates of state analysts identifying the material seized without requiring the analysts to testify in person violated defendant's right to confrontation).

34. *See* Pamela R. Metzger, *Beyond the Bright Line: A Contemporary Right-To-Counsel Doctrine*, 97 NW. U. L. REV. 1635, 1668 (2003) ("Pre-charge bargaining is an important aspect of effective advocacy. When the government has committed itself to prosecuting an individual and its failure to file formal charges is a mere formality, a defendant should have the right to the assistance of counsel.").

35. *Id.* at 1679 ("Commentators insist that it is 'critical' that counsel accompany her client to the presentence interview . . . .").

36. *See* Cole Press, *A New "Critical Stage"? Federal Pretrial Services Interviews Meet the Sixth Amendment*, 25 BERKELEY J. CRIM. L. 49, 59 (2020) ("The potential repercussions of pretrial services interviews on credibility determinations and sentencing make pretrial services interviews a new 'critical stage' . . . .").

37. United States v. Garcia, 474 F.3d 994, 998 (7th Cir. 2007).

be accompanied by similar changes to how courts analyze and interpret the Sixth Amendment and require that a post-indictment search of a cell phone is treated as a "critical stage."

I. LAW ENFORCEMENT EXPLOITATION AND LACK OF RECOURSE

Law enforcement regards cell phones, and the data they contain, as a fruitful source of evidence in criminal prosecutions. Across the country, law enforcement seizes hundreds of thousands of cell phones each year.[38] In 2020, in New York City alone, over fifty-five thousand cell phones were seized by the New York Police Department.[39]

Upon its seizure, law enforcement secures a cell phone by turning it off or placing it in a "Faraday bag"[40] to ensure that evidence cannot be deleted remotely.[41] The seized and secured cell phone then remains in the possession, custody, and control of law enforcement pending the execution of a search warrant.[42] Following the prescriptions of *Riley*, prosecutors obtain warrants and search these seized cell phones.[43] Such searches can occur

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38. *See* Logan Koepke, Emma Weil, Urmila Janardan, Tinuola Dada & Harlan Yu, *Mass Extraction: The Widespread Power of U.S. Law Enforcement to Search Mobile Phones*, UPTURN 4 (Oct. 20, 2020), https://www.upturn.org/static/reports/2020/mass-extraction/files/Upturn%20-%20Mass%20Extraction.pdf [https://perma.cc/453L-4HZW] ("Every day, law enforcement agencies across the country search thousands of cellphones, typically incident to arrest.").

39. *Local Law 131—Seized Property Data Report*, N.Y.C. POLICE DEP'T, https://www1.nyc.gov/site/nypd/stats/reports-analysis/seized-property.page (click "Attachment C 2020") [https://perma.cc/Q26W-673M].

40. Adam M. Gershowitz, *Seizing a Cell Phone Incident to Arrest: Data Extraction Devices, Faraday Bags, or Aluminum Foil as a Solution to the Warrantless Cell Phone Search Problem*, 22 WM. & MARY BILL RTS. J. 601, 607 (2013) ("Companies already manufacture Faraday bags designed specifically for law enforcement to hold cell phones and prevent remote wiping. Once placed into a Faraday bag, the phone can no longer communicate with the outside world and thus cannot be remotely wiped by a conspirator.").

41. Riley v. California, 573 U.S. 373, 390 (2014) ("Remote wiping can be fully prevented by disconnecting a phone from the network . . . . [I]f they are concerned about encryption or other potential problems, they can leave a phone powered on and place it in an enclosure [a Faraday bag] that isolates the phone from radio waves.").

42. *See* United States v. Morton, 984 F.3d 421, 424 (5th Cir. 2021), *overruled on other grounds by* United States v. Morton, 46 F.4th 331, 340 (5th Cir. 2022) (en banc).

43. *See, e.g.*, *id.*; Burns v. United States, 235 A.3d 758, 766 (D.C. 2020) (describing detective's search warrant application for cell phones).

days or weeks,[44] if not months,[45] after the initial arrest and seizure. Regularly, these proceedings occur ex parte despite an accused being charged with a crime and represented by counsel.[46]

A. "A WINDOW INTO THE SOUL"

To gain access to a modern cell phone, law enforcement agencies use mobile device forensic tools (MDFTs) to bypass security and encryption to access the data stored on the phone.[47] "[MDFTs] are designed to extract the maximum amount of information possible."[48] Upon access, law enforcement can extract or download the entirety of the data on the cell phone, including deleted files.[49] The extraction results in a report that allows law enforcement to review a broad amount of information about a person, including web searches, application access, locations, contacts, photographs, text messages, and social media accounts and activity.[50] It is not uncommon for these extraction reports to

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44. *See Burns*, 235 A.3d at 767 (describing that nine days passed between seizure of plaintiff's cell phones and law enforcement applying for a search warrant).

45. *See, e.g.*, United States v. Pratt, 915 F.3d 266, 273 (4th Cir. 2019) (finding a thirty-one-day delay in obtaining a search warrant for plaintiff's cell phone unreasonable under the Fourth Amendment); United States v. Smith, 967 F.3d 198, 206 (2d Cir. 2020) (finding a month-long delay in seeking a search warrant for an electronic device "is not presumptively reasonable"); *In re* Application for Search Warrant, 527 F. Supp. 3d 179, 187–88 (D. Conn. 2020) (finding that, while "the seizures themselves were reasonable," the fifty-one-day "delay in seeking authorization for a federal search of the [devices] was unreasonable"); United States v. Wilkins, 538 F. Supp. 3d 49, 95 (D.D.C. 2021) (finding a fifteen-month delay in obtaining a search warrant to be a violation of the Fourth Amendment).

46. *See, e.g.*, United States v. Wei Seng Phua, No. 2:14-CR-00249-APG, 2015 WL 1281603, at *1 (D. Nev. Mar. 20, 2015) (denying ex parte search warrants); United States v. Shipley, No. CR1601061TUCRMJR, 2017 WL 8897147, at *5–6 (D. Ariz. June 29, 2017), *report and recommendation adopted*, No. CR1601061001TUCRMJR, 2017 WL 3432371 (D. Ariz. Aug. 10, 2017) (recommending denial of motion to suppress challenging cell phone search on ex parte search grounds).

47. Koepke et al., *supra* note 38, at 6.

48. *Id.* at 10.

49. *Id.*; *see also* Orin S. Kerr, *Executing Warrants for Digital Evidence: The Case for Use Restrictions on Nonresponsive Data*, 48 TEX. TECH L. REV. 1, 7–9 (2015) (describing the "electronic search stage" of a phone extraction).

50. Koepke et al., *supra* note 38, at 16.

be thousands of pages long.[51] These searches provide law enforcement with a trove of data about an individual, more so than a manual search of the same cell phone. The use of an MDFT allows law enforcement to view deleted files, geolocation data, application metadata,[52] and other detailed information that would not be accessible to—or at least more difficult, costly, and time intensive to access—anyone manually searching a cell phone.[53] In the case of mobile applications, "users [routinely remain] logged in by default," allowing "anyone who has access to the phone" to view the contents of each application, where they otherwise would need a separate search warrant.[54] Experts have referred to the search of a modern cell as "a window into the soul."[55]

By obtaining these warrants through an ex parte process, even though formal proceedings have begun, law enforcement circumvents both the letter and the spirit of the adversarial system and ignores the Sixth Amendment's counsel guarantee,[56] while technically complying with the Fourth Amendment's warrant requirement. Consider the standard ex parte warrant scenario. First, a police officer arrests a suspect in a crime and seizes their cell phone. The cell phone is immediately secured as evidence—to ensure no one can access, tamper with, or delete any data—regardless of whether the phone is linked to any aspect of the alleged crime.[57] The suspect is then booked, charged

51. For example, in a recent criminal proceeding litigated by the Author involving a relatively straightforward investigation, the United States Attorney's Office produced an extraction report that was ninety-six thousand pages long.

52. Metadata is "[t]he generic term used to describe the structural information of a file that contains data *about* the file, as opposed to describing the content of a file." The Sedona Conference, *The Sedona Conference Glossary: E-Discovery & Digital Information Management (Fourth Edition)*, 15 SEDONA CONF. J. 305, 339 (2014) (emphasis added).

53. Koepke et al., *supra* note 38, at 25.

54. Brief for Electronic Information Privacy Center as Amicus Curiae at 13, State v. Andrews, 234 A.3d 1254 (N.J. 2020) (No. 82209).

55. C.M. Adams, *Digital Forensics: Window into the Soul*, FORENSIC MAG. (June 10, 2019), https://www.forensicmag.com/518341-Digital-Forensics-Window-Into-the-Soul [https://perma.cc/83LJ-T2U4].

56. U.S. CONST. amend. VI ("[T]he accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.").

57. Some scholars refer to capturing data or devices not responsive to the original warrant as an "overseizure." *See, e.g.*, Kerr, *supra* note 49, at 26. While not addressed in this Article, the appropriateness of "overseizure" in terms of

with a crime, and appears in court with an attorney. After the initiation of formal proceedings, the prosecutor then goes to a judicial officer ex parte to obtain a warrant to search the contents of the phone for potential evidence. Oftentimes, the judge that reviews the warrant application is not the judge assigned to the case and has no familiarity with the facts or evidence outside of what is contained in the four corners of the affidavit in support of a search warrant. There is no opposing view or adversarial challenge to the government's assertions, depriving the court of the creation of a robust factual record to determine whether the seized device has a nexus to the alleged crime,[58] whether probable cause exists to search the device at all, or the scope and breadth of any warrant as to the particular places to be searched on the cell phone.[59]

Law enforcement action seeking potential evidence from a defendant's cell phone will simultaneously raise Fourth, Fifth, and Sixth Amendment issues.[60] First, at a minimum, the Fourth Amendment requires that the government obtain a search warrant in order to search the contents of a cell phone.[61] However, this gives rise to numerous additional considerations. For instance, what sort of restrictions, whether ex ante or ex post, can be placed on the government's execution of any warrant for a cell

electronic data is an interesting doctrinal question that has yet to fully be addressed by the courts. *Cf., e.g.*, United States v. Griffith, 867 F.3d 1265, 1276 (D.C. Cir. 2017) ("[I]t is no answer to confer a blanket authorization to search for and seize all electronic devices. . . . [A] warrant should have limited the scope of permissible seizure to devices owned by [defendant], or devices linked to the shooting.").

58. *Griffith*, 867 F.3d at 1271 ("There must, of course, be a nexus . . . between the item to be seized and criminal behavior.") (internal quotation marks omitted) (citing Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 307 (1967)).

59. *See, e.g.*, Burns v. United States, 235 A.3d 758, 767 (D.C. 2020) (finding warrants authorizing unlimited review of cell phones for any evidence, despite probable cause for "only three narrow and discrete items of data," were overbroad, lacked particularity, and were invalid).

60. Fifth Amendment due process issues are largely outside of the scope of this Article; however, they will be briefly discussed by analogy.

61. Riley v. California, 573 U.S. 373, 386 (2014) (holding that "officers must generally secure a warrant before conducting such a search [of data on cell phones]").

phone?[62] Can a warrant judge require inventories[63] or search protocols[64] as part of the approval for a search warrant? In the post-*Riley* years, there has been a substantial amount of legal debate by scholars[65] and analysis by courts[66] on this question. This has resulted in new Fourth Amendment rules and procedures regarding searches of cell phones.[67] Next, how can law enforcement gain access to a device? Can they compel a criminal

62. *See generally* Orin S. Kerr, *Ex Ante Regulation of Computer Search and Seizure*, 96 VA. L. REV. 1241, 1244–45 (2010) (discussing restriction types used for digital search warrants: (1) "conditions limiting the seizure of computer hardware from the physical place where the warrant is executed"; (2) "conditions restricting the time period before seized computers are electronically searched"; (3) "restrictions on how the computers are searched to limit access to evidence outside the warrant"; and (4) "conditions on when the seized hardware must be returned").

63. *See* Laurent Sacharoff, *The Fourth Amendment Inventory as a Check on Digital Searches*, 105 IOWA L. REV. 1643, 1647–48 (2020) (stating that officers "must prepare an inventory of all the physical items they seize, and return that inventory to the court and provide it to the individual. Unfortunately, when applying this requirement to the electronic world, courts have required agents simply inventory the device seized, not individual files viewed or copied").

64. *See In re* Search of Apple iPhone, IMEI 013888003738427, 31 F. Supp. 3d 159, 166 (D.D.C. 2014) (finding that law enforcement should "make clear in its applications that the non-relevant data will be deleted from any system images" and include "such a statement in a search protocol."); *In re* Search of 3817 W. West End, 321 F. Supp. 2d 953, 962 (N.D. Ill. 2004) (requiring a search protocol "in order to supply particularity to [the government's] search and seizure of contents of the computers"). *See generally* Emily Berman, *Digital Searches, the Fourth Amendment, and the Magistrates' Revolt*, 68 EMORY L.J. 49, 64 (2018) ("The most frequent ground for denying applications was a lack of sufficiently detailed search protocols.").

65. *See generally* Kerr, *supra* note 62; Paul Ohm, *Massive Hard Drives, General Warrants, and the Power of Magistrate Judges*, 97 VA. L. REV. BRIEF 1, 2–10 (2011).

66. *See, e.g.*, United States v. Grubbs, 547 U.S. 90, 97–99 (2006) (debating whether the Fourth Amendment's "particularity requirement . . . include[s] the conditions precedent to execution of the warrant"); United States v. Comprehensive Drug Testing, Inc., 621 F.3d 1162, 1170 (9th Cir. 2010) (en banc) (per curiam), *overruled in part on other grounds as recognized by* Demaree v. Pederson, 887 F.3d 870, 876 (9th Cir. 2018) (per curiam) ("The point . . . is to maintain the privacy of materials that are intermingled with seizable materials, and to avoid turning a limited search for particular information into a general search of office file systems and computer databases.").

67. *See, e.g.*, *Grubbs*, 547 U.S. at 99 ("[T]he Fourth Amendment does not require that the triggering condition for an anticipatory search warrant be set forth in the warrant itself."); *Comprehensive Drug Testing, Inc.*, 621 F.3d at 1177 (acknowledging society's transition to electronic records poses more of a threat of overseizure and thus, "[t]his calls for greater vigilance on the part of

defendant to provide a password or their biometric information to unlock or otherwise unencrypt a cell phone?[68] Finally, the search of a cell phone after formal proceedings have begun raises a Sixth Amendment question: whether the right "to have the Assistance of Counsel"[69] entitles a criminal defendant to litigate the issuance and breadth of a search of their cell phone prior to the execution of a warrant.

This Sixth Amendment question has not been addressed or debated like other questions, despite the answer implicating doctrinal constitutional principles for other legal protections. When law enforcement has arrested and charged someone with a crime, the *Riley* rule requiring a search warrant is now intertwined with the adversarial process and the right to counsel. When a defendant has been formally charged with a crime and the government seeks an ex parte search warrant for their seized cell phone, judges are confronted with both constitutional law doctrines in one warrant application.

The Sixth Amendment right to counsel in all prosecutions has been whittled down from its broad ideals.[70] As one scholar put it, "The rhetoric of the Sixth Amendment is grand; the reality is grim."[71] At the same time, however, Fourth Amendment doctrine has been extended to address new technology. As this Article will explain, the Supreme Court has correctly calibrated

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judicial officers in striking the right balance between the government's interest in law enforcement and the right of individuals to be free from unreasonable searches and seizures").

68. *See* Kerr, *supra* note 30, at 795 ("A suspect may have biometric access set up on his phone, such that investigators can use the suspect's thumbprint to unlock the phone without raising any Fifth Amendment issues."); David Rassoul Rangaviz, *Compelled Decryption & State Constitutional Protection Against Self-Incrimination*, 57 AM. CRIM. L. REV. 157, 193 (2020) ("Biometric decryption would thus fall within the reinvigorated scope of constitutional protection because it has the exact same result as entering the passcode: it unlocks the phone and discloses its contents."); Laurent Sacharoff, *Unlocking the Fifth Amendment: Passwords and Encrypted Devices*, 87 FORDHAM L. REV. 203, 216 (2018) ("If a suspect must surrender her password in the face of government compulsion, law enforcement will immediately obtain access to the entirety of her online life. Thus, much hinges on whether the government can compel this password under the Fifth Amendment.").

69. U.S. CONST. amend. VI.

70. *See, e.g.*, United States v. Wade, 388 U.S. 218, 219 (1967) (overruling lower court because "the lineup in the absence of the accused's counsel violated his Sixth Amendment right to counsel").

71. Metzger, *supra* note 34, at 1636.

Fourth Amendment protections for the current technological reality but, as yet, has failed to consider how the Sixth Amendment is implicated. This failure has deprived criminal defendants of the rights provided by the plain text of the Sixth Amendment: "to have the Assistance of Counsel" in all criminal prosecutions.[72]

B. Current Doctrinal Shortfall

In today's technologically advanced world, the Fourth Amendment alone is not enough to protect defendants from the vast privacy intrusions of a cell phone search.[73] The expansive power of the government to search through and expose the contents of a modern cell phone has exceeded the protections afforded by the Fourth Amendment. Some scholars have gone so far as to argue that search warrants are solely governed by the Fourth Amendment and cannot be interfered with outside of the warrant requirement.[74] That argument relies on *United States v. Grubbs*[75] as support for the claim that the Constitution does not allow for ex ante litigation over the basis for a search warrant.[76]

First, and most fundamentally, while *Grubbs* may foreclose a Fourth Amendment right to litigate a search warrant prior to its execution, it does not address the Sixth Amendment's guarantee to counsel.[77] The Supreme Court has avoided creating a hierarchy of constitutional rights.[78] No constitutional right has

72. U.S. CONST. amend. VI.

73. *See* Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 838 (2004) (describing Fourth Amendment's basis in property law and the resultant shortcomings).

74. *See generally* Kerr, *supra* note 62, at 1246 (arguing ex ante restrictions are unconstitutional).

75. 547 U.S. 90 (2006).

76. *Id.* at 99 ("The Constitution protects property owners not by giving them license to engage the police in a debate over the basis for the warrant, but by interposing, *ex ante*, the 'deliberate, impartial judgment of a judicial officer' . . . and by providing, *ex post*, a right to suppress evidence improperly obtained . . . .") (citing Wong Sun v. United States, 371 U.S. 471, 481–82 (1963)).

77. *Id.* at 98 ("The Fourth Amendment does not require that the warrant set forth the magistrate's basis for finding probable cause, even though probable cause is the precondition to the valid exercise of executive power. Much less does it require description of a triggering condition.") (internal quotation marks omitted).

78. *See, e.g.*, Neb. Press Ass'n v. Stuart, 427 U.S. 539 (1976) (declining to choose whether the First Amendment's right to a free press superseded the

been held to be more important than another.[79] Even assuming in arguendo that the Fourth Amendment may not allow for an ex ante procedural limit on a search warrant,[80] the Sixth Amendment right to assistance of counsel cannot simply be discarded.

1. Lack of Adversariness

Despite the *Riley* rule requiring a warrant to search a cell phone seized incident to arrest, criminal defendants are still subjected to overbroad searches and privacy intrusions. This is seen in the growing body of case law finding judicially-approved search warrants lacking probable cause, being overbroad, or not establishing proper particularity.[81] Even at the deferential

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Sixth Amendment’s right to a fair trial when they conflicted in a criminal prosecution on the issue of whether adverse media publicity could lead to an unfair trial).

79. *Id.* at 561 (“The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other.”).

80. Kerr, *supra* note 62, at 1247 (“The widely-accepted goal of Fourth Amendment protection is to require reasonable police practices. To accomplish that goal, judges ‘must balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.’”) (citing United States v. Place, 462 U.S. 696, 703 (1983)).

81. *See, e.g.*, Commonwealth v. Perkins, 82 N.E.3d 1024, 1036 (Mass. 2017) (“The affidavit here did not contain sufficient particularized information to justify a search of the defendants [sic] apartment for drug-related records, proceeds, and paraphernalia.”); State v. Mansor, 381 P.3d 930, 943 (Or. Ct. App. 2016) (“We conclude that the warrant in this case was impermissibly overbroad, rendering the warranted search of the contents of defendant’s computers unlawful . . . .”); Wheeler v. State, 135 A.3d 282, 305 (Del. 2016) (holding that when law enforcement have “a more precise description of the alleged criminal activity . . . such information should be included in the instrument [warrant] and the search and seizure should be appropriately narrowed to the relevant time period so as to mitigate the potential for unconstitutional exploratory rummaging”); State v. Baldwin, 614 S.W.3d 411, 418 (Tex. Crim. App. 2020) (finding that when criminal nexus for car search is tenuous, “[e]xtending that nexus to include Baldwin’s cellphone based on nothing more than a recitation that it is common for people to communicate their plans via text messaging, phone calls, or other communication applications would be extending the reach of probable cause too far.”); United States v. Caesar, 2 F.4th 160, 171 (3d Cir. 2021) (“[P]robable cause is a ‘fluid concept,’ turning on ‘the factual and practical considerations of everyday life,’ which requires only a ‘fair probability that contraband or evidence of a crime will be found in a particular place.’”) (citing Illinois v. Gates, 462 U.S. 213, 231–32 (1983)); *see also* Burns v. United States, 235 A.3d 758, 775 (D.C. 2020) (“Templates are, of course, fine to use as a starting point. . . . But

standard afforded upon appellate review,[82] judges are erring by allowing for unconstitutionally expansive and invasive searches of cell phones.[83] Judges reviewing warrants are also constrained to the evidence that is contained within the four corners of the affidavit in support of a search warrant.[84] That is, judges are reliant solely on the version of events offered by the government. This is especially problematic because, prior to obtaining and executing a search warrant, the government is under no obligation to include exculpatory information or information undermining probable cause in a warrant affidavit.[85]

The Sixth Amendment was developed by the Framers in direct response to their suspicion of government power.[86] The right

they must be tailored to the facts of each case.") (internal quotation marks omitted) (citing United States v. Winn, 79 F. Supp. 3d 904, 919 (S.D. Ill. 2015)); United States v. Morales, 77 M.J. 567, 575 (A. Ct. Crim. App. 2017) (holding that "the government's search authorization r[an] afoul of the probable cause and particularity requirements of the Fourth Amendment" when it authorized a search and seizure of "all" of plaintiff's cell phones and hard drives, even in military context); Buckham v. State, 185 A.3d 1, 17 (Del. 2018) ("[M]any of the allegations in the warrant application are too vague and too general to connect his cell phone to the shooting."); Commonwealth v. Broom, 52 N.E.3d 81, 90 (Mass. 2016) (holding that a search warrant was overbroad because the "affidavit points to no 'particularized evidence' suggesting that the contents of the defendant's cellular telephone . . . were likely to contain information linking the defendant to the victim or relating to the victim's killing") (citation omitted); State v. Henderson, 854 N.W.2d 616, 631 (Neb. 2014) ("[T]he warrants as issued were too broad to meet the particularity requirement of the Fourth Amendment."); People v. Thompson, 178 A.D.3d 457, 458 (N.Y. App. Div. 2019) ("The information available to the warrant-issuing court did not support a reasonable belief that evidence of the crimes specified in the warrant would be found in all of the locations within defendant's cell phone to which the warrant authorized access . . . .") (internal quotation marks omitted).

82. *Gates*, 462 U.S. at 236 (reaffirming that appellate courts should afford the decision of the issuing judge "great deference").

83. *See supra* note 81 and accompanying cases.

84. U.S. CONST. amend. IV ("[N]o warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."); FED. R. CRIM. P. 41(d)(1) ("After receiving an affidavit or other information, a magistrate judge . . . must issue the warrant if there is probable cause to search for and seize a person or property . . . .").

85. The only available remedy in this situation would be a *Franks* motion, where the burden is on the defendant to show a "deliberate falsity," not just an omission. Franks v. Delaware, 438 U.S. 154, 171 (1978). However, as discussed *supra* Part B, such typical Fourth Amendment remedies are insufficient to address the harm of an invasive search of a cell phone.

86. *See* Crawford v. Washington, 541 U.S. 36, 67 (2004) ("[The Framers]

to the assistance of counsel is no exception and is a clear refutation by the Framers of entrusting judges completely in a criminal case.[87] Of course, having the assistance of counsel is meaningless unless counsel can be heard.[88]

When assessing a search warrant application for probable cause and particularity, the reviewing judge undoubtedly tries hard to do their job and be impartial. However, criminal defendants are not the most popular participants in our legal system or society. The rights of criminal defendants are too often sacrificed when placed against the pressures of personal policy choices, judicial efficiency, and deference to law enforcement aims. With the assistance of counsel, a defendant can put forth evidence that would be relevant to probable cause or the scope of any such warrant and allow the judicial officer to make a truly informed decision. That is the foundational principle of our adversarial system as envisioned by the Framers.[89]

In the midst of a criminal prosecution, adversarial testing of the government's assertions in support of a search warrant application ensures society's interests in truth and fairness are met.[90] When making a decision that subjects a represented criminal defendant to the severe privacy intrusion of a search of their

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knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people . . . .").

87. In this way, the Sixth Amendment is the ultimate example of a "process limit." *See* Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576, 579 (2014). Each of the rights guaranteed in the Sixth Amendment serves to raise the cost to the government when it seeks a criminal conviction. Speedy public trials, confrontation of witnesses, and the assistance of counsel each make it more difficult for the government to convict a defendant and take away their liberty.

88. *See* United States v. Cronic, 466 U.S. 648, 654 (1984) ("[T]he core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the . . . prosecutor . . . . If no actual 'Assistance' 'for' the accused's 'defence' is provided, then the constitutional guarantee has been violated.") (first quoting United States v. Ash, 413 U.S. 300, 309 (1973); and then quoting U.S. CONST. amend. VI).

89. *See* Herring v. N.Y., 422 U.S. 853, 862 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.").

90. *See* Polk County. v. Dodson, 454 U.S. 312, 318 (1981) ("The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness.").

cell phone, judicial officers should have more than just the government's partisan recitation of the facts. "[T]ruth," Lord Eldon said, "is best discovered by powerful statements on both sides of the question."[91]

2. That Bell Cannot Be Un-Rung

The vast majority of criminal cases resolve by plea agreement, never reaching a motions hearing or trial.[92] This means that when the government uses its immense power to gain access to a defendant's cell phone and review private information there may never be an opportunity to litigate to protect one's privacy rights. The possible airing of one's private affairs and intimate thoughts at a public trial is a powerful incentive to plead guilty. Plea negotiations are about power. Giving law enforcement such vast, unchecked power results in innocent persons pleading guilty as a result of the coercion of the system. According to the National Registry of Exonerations, of 161 exonerations in 2021, forty-eight were cases where someone pleaded guilty to a crime they did not commit.[93]

Even assuming a case reaches the motions phase, or a trial, by the time any such suppression motion and litigation has taken place, the intimate details contained in the cell phone will already have been exposed to the government's rummaging and scrutiny. Suppression after the search will stop the government from using evidence against a criminal defendant in that specific trial but does not offer a true vindication of their privacy rights. Such a remedy does not address the thrust of the intrusion or protect a defendant from the privacy violation at issue.

Even the most narrowly tailored search warrant will result in non-responsive data being exposed to law enforcement review and preservation. Once that data has been scrutinized by law enforcement, that bell cannot be un-rung. Upon access to a cell phone, law enforcement will have the opportunity to record or

91. *Cronic*, 466 U.S. at 655 n.13 (quoting Lord Eldon).

92. In finding that plea negotiations are a critical stage entitling a defendant to the assistance of counsel, the Court observed "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." Missouri v. Frye, 566 U.S. 134, 143 (2012); *see also* Lafler v. Cooper, 566 U.S. 156, 170 (2012) ("[C]riminal justice today is for the most part a system of pleas, not a system of trials.").

93. *2021 Annual Report*, THE NAT'L REGISTRY OF EXONERATIONS (Apr. 12, 2022), https://www.law.umich.edu/special/exoneration/Documents/NRE%20Annual%20Report%202021.pdf [https://perma.cc/6UHU-UB4S].

preserve the information they see, creating the potential for continuing knowledge of the intimate details of an individual's life.[94] In this way, technological data is different than other, more traditional items seized and subsequently suppressed under the Fourth Amendment.

For instance, if a buccal swab containing a suspect's DNA is seized and analyzed, but then is later suppressed under the Fourth Amendment, the DNA profile that was developed can simply be deleted from the database. Even to an analyst who has viewed a DNA profile and is comparing it to other evidence, the suspect's profile itself does not mean anything. The profile is a string of letters indicating a position on the loci but nothing else.[95] No information about what medical conditions a suspect has can be determined from that profile alone. And once it has been suppressed as a matter of law and deleted from a database, no one can access it to further sequence, analyze, or use against a criminal defendant. Digital data is different. By simply viewing the contents of a cell phone, the reviewer could gain knowledge of what medication someone is taking, the arguments they are having with their spouse, the doctor's appointment in their calendar, and their innermost musings jotted down in their notes app. A person can be surveilled based on the information that is reviewed, and their associates found and harassed. Even if the seized data is deleted and the device returned, any notes, investigative reports, recordings, and other preservation or recollection of what was viewed remains with law enforcement. While this concern will necessarily be ameliorated by the limits of human memory, the information reviewed cannot be just simply be deleted from the minds of law enforcement officers. Such a result is "inimical to democratic society,"[96] and without more procedural protections, the remedies available under the Fourth Amendment are not enough.

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94. Courts remain split on whether law enforcement can retain seized data after the resolution of a case. *See* Orin S. Kerr, *Fourth Amendment Seizures of Computer Data*, 119 YALE L.J. 700, 706–09, 723 (2010) (discussing Fourth Amendment seizures in the context of computer data).

95. *See* JOHN M. BUTLER, FORENSIC DNA TYPING: BIOLOGY, TECHNOLOGY, AND GENETICS OF STR MARKERS 253 (2d ed. 2005) (providing a sample DNA profile).

96. *See* United States v. Jones, 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring) (quoting United States v. Cuevas-Perez, 640 F.3d 272, 285 (7th Cir. 2011) (Flaum, J., concurring)).

II. THE PAST, PRESENT, AND FUTURE OF THE RIGHT TO COUNSEL

The Sixth Amendment to the United States Constitution reads, in part, "[i]n all criminal prosecutions the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."[97] The "core purpose" of this guarantee was to ensure that an accused did not have to face the "intricacies of the law" and risk loss of life or liberty in the adversarial system without an advocate to protect their rights.[98] This Section considers the threshold Sixth Amendment question: is a search of a defendant's cell phone, seized incident to arrest, a critical stage of a prosecution? I argue that it is. When someone has been formally charged and their device seized, they are entitled to the assistance of counsel to challenge any application for a search warrant.

In this Section, I set out the historical right to the assistance of counsel, discuss the evolution of the right, and lay out an approach to assure the right to counsel is maintained in modern criminal procedure. In discussing three prominent Supreme Court decisions analyzing the right to counsel, I make the point that each decision presents an analogous situation to that of a post-indictment cell phone search.

A. When "All Prosecutions" Does Not Mean "All Prosecutions"

To the criminal defendant, the most important constitutional right is the Sixth Amendment right to the assistance of counsel.[99] Despite the plain language guaranteeing that right in all criminal prosecutions, the right has been pruned back by the Supreme Court. In *Powell v. Alabama*, the Supreme Court began to shape the current right to counsel doctrine in holding that a

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97. U.S. CONST. amend. VI.

98. *See* United States v. Ash, 413 U.S. 300, 309 (1973) (citing Powell v. Alabama, 287 U.S. 45, 60 (1932)).

99. *See* Lakeside v. Oregon, 435 U.S. 333, 341 (1978) ("In an adversary system of criminal justice, there is no right more essential than the right to the assistance of counsel."); Strickland v. Washington, 466 U.S. 668, 685 (1984) ("The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results."); JAMES J. TOMKOVICZ, THE RIGHT TO THE ASSISTANCE OF COUNSEL 128 (2002) ("Without a lawyer, it is quite unlikely that an accused will be able to enjoy the advantages of the other enumerated rights.") (internal quotation marks omitted).

criminal defendant is entitled to counsel at any "critical" period in the formal proceedings against them.[100] The Court recognized that the time from arraignment to the beginning of trial is when it is most critical to have the assistance of counsel.[101] In doing so, the Court found that such deprivation of counsel would violate the Due Process Clause.[102] The rule formulated by the Court is that the right to assistance of counsel only attaches at a "critical stage" of a criminal prosecution.[103]

This bright-line rule has two parts. First, adversarial criminal proceedings must have begun.[104] The Court has used the term "post-indictment" in its analysis but has made it clear that the right to assistance of counsel is not dependent on an actual indictment.[105] This can mean a formal charge by indictment or information, or a formal proceeding such as an arraignment or preliminary hearing.[106] Simply put, the government must have committed itself to prosecute for the right to assistance of counsel to attach.[107] Second, the right to counsel applies to proceedings that are "trial-like" in nature.[108] The right to counsel is not limited only to the trial itself, but rather applies at any stage where a defendant would be confronted by vast prosecutorial powers and the intricacies of substantive and procedural criminal law.[109]

B. The Evolution of a "Critical Stage"

Following the decision in *Powell* and continuing through the 1970s, the Court continued to shape the right to counsel doctrine, defining what is and is not a critical stage, in a line of cases

100. *Powell*, 287 U.S. at 57–58.

101. *Id.* at 57

102. *Id.* at 71.

103. *See id.* at 57–58, 71.

104. Metzger, *supra* note 34, at 1651.

105. *See* Kirby v. Illinois, 406 U.S. 682, 688–90 (1972) (holding that the right to counsel attaches at the imposition of formal charges).

106. *See* Metzger, *supra* note 34, at 1651 n.105 (collecting cases analyzing at what point the Sixth Amendment right to counsel attaches).

107. *See id.*

108. *Id.* at 1651–52.

109. United States v. Gouveia, 467 U.S. 180, 188–89 (1984) (first quoting United States v. Ash, 413 U.S. 300, 310 (1973); and then quoting Johnson v. Zerbst, 304 U.S. 458, 462–63 (1938)); *see* Powell v. Alabama, 287 U.S. 45, 59–60 (1932) (discussing due process right to assistance of counsel in criminal prosecutions).

involving a variety of scenarios, including arraignments,[110] lineup identification procedures,[111] interrogations,[112] guilty pleas, photographic lineups,[113] and pre-trial discovery.[114] When the Court has found that a particular proceeding is not a critical stage, it has done so exclusively by analyzing whether formal proceedings have begun. This is true in *Gilbert*, where law enforcement obtained handwriting samples from the defendant before his presentment in court.[115] The same conclusion was reached in *Ash*, where the Court distinguished a photographic lineup identification procedure from the live lineup considered in *Wade*.[116]

More important to the analysis in this Article are the situations where the Court has found there to be a critical stage entitling one to the assistance of counsel. These cases present analogous scenarios to post-arrest cell phone searches. This Part reviews three separate foundational decisions by the Court defining a "critical stage" in a prosecution.

1. *United States v. Massiah*—Post-Indictment Interrogation

In 1964, the Supreme Court defined the contours of a critical stage in *Massiah v. United States*.[117] Winston Massiah was a merchant seaman who the government learned would be transporting illegal narcotics aboard his ship returning from South America.[118] Upon docking, the ship was searched, narcotics were found, and Massiah was arrested.[119] Massiah was arraigned, retained counsel, and twice indicted.[120] Unbeknownst to Massiah,

110. Hamilton v. Alabama, 368 U.S. 52 (1961) (holding that arraignment is a critical stage in a proceeding, at which certain defenses such as insanity must be plead, and that what happens there may affect the outcome of the case).

111. United States v. Wade, 388 U.S. 218, 227–39 (1967).

112. Massiah v. United States, 377 U.S. 201, 203–07 (1964); Brewer v. Williams, 430 U.S. 387, 399–401 (1977).

113. *Ash*, 413 U.S. at 316–22 (comparing potential for prejudice in administering a live lineup versus a photographic lineup).

114. Gilbert v. California, 388 U.S. 263, 267 (1967).

115. *Id.*

116. *Ash*, 413 U.S. at 316–22.

117. *See Massiah*, 377 U.S. at 204–07.

118. *Id.* at 202.

119. *Id.*

120. *Id.* (noting that a few months after his initial arrest, indictment, and appointment of counsel, a subsequent indictment was returned against Massiah for the same substantive offenses, but including a new co-defendant, Colson, and additional conspiracy charges).

an alleged co-conspirator had agreed to act as a cooperating witness on behalf of the government.[121] The government agents and the co-conspirator devised a scheme where the co-conspirator would go and speak with Massiah, while law enforcement listened in via a radio device.[122] Incriminating statements made by Massiah were introduced at trial after he sought to exclude those statements on the grounds that they were obtained in violation of his Sixth Amendment right to the assistance of counsel.[123]

Echoing the rationale from *Powell* that the right to counsel is constitutionally required during the "critical" time from arraignment to trial, the Court held that Massiah was deprived of his Sixth Amendment right to counsel.[124] The Court reached this conclusion while explicitly acknowledging the federal government's "proper" investigation into Massiah after he had been indicted.[125] But, in noting that the government is allowed to continue to investigate a criminal case post-charging, the Court established that any such investigation does not take precedence over the Sixth Amendment rights of a defendant.[126]

2. *United States v. Wade*—Post-Indictment Lineup Procedure

Three years after *Massiah,* in *United States v. Wade*, the Supreme Court considered whether a defendant could be presented at a post-indictment lineup identification procedure without the

121. *Id.*

122. *Id.* at 202–03.

123. *Id.* at 203–04. Massiah also challenged the admission of the statements as a violation of his Fourth Amendment rights, however, the Court did not address that contention. *Id. Massiah* is an interesting example due to the interplay between the Fourth, Fifth, and Sixth Amendments. Since the *Massiah* Court resolved the case on other grounds, it did not reach the Fourth Amendment contention. *Id.* Two years later, in *Miranda v. Arizona*, the Court did not analyze the Fourth Amendment issue either. 384 U.S. 436 (1966). Arguably, the government actions in Massiah would not pass *Miranda* muster if decided today.

124. *Massiah*, 377 U.S. at 205 (quoting Powell v. Alabama, 287 U.S. 45, 57 (1932)) ("[D]uring perhaps the most critical period of the proceedings . . . from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation [are] vitally important, the defendants . . . [are] as much entitled to such aid [of counsel].").

125. *Id.* at 207.

126. *Id.*

assistance of his attorney.[127] *Wade* was the first case after *Gideon v. Wainwright*,[128] to continue the Court's expansion of Sixth Amendment protections in "all prosecutions."[129]

Billy Joe Wade was accused of a bank robbery in Texas for which he was indicted, arraigned, and provided appointed counsel.[130] More than two weeks after his arraignment, an FBI officer arranged for Wade to be presented to two witnesses as part of a lineup where he was required to dress like the perpetrator and repeat the perpetrator's words along the lines of "put the money in the bag."[131] Wade's attorney was not notified, so was not present for the lineup.[132]

The Court started its analysis by acknowledging that the Sixth Amendment's right to counsel guarantee is much different from when the Framers originally considered it.[133] The Court observed that at the time the Framers developed the Sixth Amendment "there were no organized police forces as we know them today" and a criminal defendant was expected to face off against the prosecutor at trial by themselves.[134] Focusing on the increased complexity of 1960s law enforcement techniques[135] and explicitly acknowledging the "realities of modern criminal prosecution," the Court held that a post-indictment lineup is a critical stage entitling a defendant to the assistance of counsel.[136]

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127. United States v. Wade, 388 U.S. 218, 219–20 (1967).

128. 372 U.S. 335 (1963) (finding the right to counsel to be a fundamental right).

129. *Wade*, 388 U.S. at 225.

130. *Id.* at 220.

131. *Id.*

132. *Id.*

133. *Id.* at 224.

134. *Id.*

135. *Id.* (contrasting the "machinery" of law enforcement that existed at the time versus what was available during the era of the Framers).

136. *Id.* at 224, 236–37. The procedure in *Wade* is another example of the interplay between constitutional rights in criminal procedure. The lineup arguably implicates unduly suggestive identification procedures prohibited by the Fifth Amendment. *See* Stovall v. Denno, 388 U.S. 293, 302 (1967) (recognizing that an identification procedure may violate due process if it is "unnecessarily suggestive and conducive to irreparable mistaken identification"). Even though the lineup could have been excluded as a Fourth Amendment violation, or under the Fifth Amendment due process clause, the post-indictment posture of the case required an additional layer of protection from the Sixth Amendment.

3. *Estelle v. Smith*—Post-Indictment Compelled Psychiatric Evaluations

In 1981, the Court further defined the right to counsel in *Estelle v. Smith*.[137] In a homicide case in which prosecutors were seeking the death penalty, the government arranged for a psychiatric interview of the defendant after being "informally ordered" by the judge.[138] At the time the evaluation was ordered, the defense had not put Smith's mental state at issue by raising competency or insanity.[139] The interview was supposed to only pertain to the defendant's competency to stand trial.[140] The prosecution arranged for an expert witness to interview the defendant without notifying his attorney of the scope of the interview.[141] The doctor's interview went well beyond competency and into the issue of future dangerousness, exceeding its purported scope.[142] Emphasizing the complicated technical aspects of a psychiatric evaluation, the Court held that a pre-trial psychiatric interview was a critical stage of a prosecution, entitling a defendant to the assistance of counsel.[143] Without the assistance of an attorney to discuss the psychiatric examination, its scope, and otherwise enjoy "the guiding hand of counsel," the Court held that the psychiatric interview without the assistance of counsel was a violation of the Sixth Amendment requiring a death penalty sentence to be vacated.[144]

C. A Modern Interpretation

Today, the amount and type of sensitive data that the modern smart phone contains reveals more than one's DNA. To many people, a search of their cell phone would feel much more intrusive and revealing than the taking of bodily fluid or other biometric information. With the proliferation of facial recognition

137. 451 U.S. 454 (1981).
138. *Id.* at 456–57.
139. *Id.* at 457 n.1.
140. *Id.*
141. *Id.* at 470–71.
142. *Id.*
143. *Id.*
144. *Id.* at 471 (citing Powell v. Alabama, 287 U.S. 45, 69 (1932)).

technology,[145] smart home devices,[146] and direct-to-consumer genetic testing—where individuals *voluntarily* submit their DNA and other biometrics to corporations[147]—many have become comfortable with willingly or incidentally sharing intimate personal information with third parties. This, in turn, has resulted in an increased opportunity for law enforcement to access, monitor, and use this personal data. Nevertheless, such acceptance of giving corporations the ability to access and track our personal data is a far cry from allowing law enforcement to read our text messages and emails, look through our photographs, review our web searches, see our financial transactions, and access our social media applications regardless of their nexus to any specific allegations of wrongdoing.

The ever-frequent searches of cell phones make the decision whether to issue a search warrant, and the scope and breadth of any such warrant, increasingly important in modern criminal procedure. The prospect of having the contents of one's digital life rummaged through by the state makes post-indictment cell phone searches a "critical stage" requiring the assistance of counsel.[148]

Allowing the government to proceed ex parte and unchallenged at this stage runs the risk of sealing the accused's fate pre-trial and reducing any subsequent trial to a mere formality.[149] Depriving one the assistance of counsel and the ability to challenge an invasive search of a cell phone "may be more damaging than denial of counsel during the trial itself."[150]

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145. Andrew Guthrie Ferguson, *Facial Recognition and the Fourth Amendment*, 105 MINN. L. REV. 1105, 1115–27 (2021).

146. Andrew Guthrie Ferguson, *The "Smart" Fourth Amendment*, 102 CORNELL L. REV. 547, 558 (2017).

147. *See* Natalie Ram, *Genetic Privacy After* Carpenter, 105 VA. L. REV. 1357, 1359–65 (2019) (detailing the widespread use of consumer genetic services, and law enforcement's use of them in investigating crimes); James W. Hazel & Christopher Slobogin, *"A World of Difference"? Law Enforcement, Genetic Data, and the Fourth Amendment*, 70 DUKE L.J. 705, 729 (2021) (describing that twenty-six million people have voluntarily submitted their DNA to various direct to consumer genetic testing companies, some of which allow law enforcement access to DNA profiles).

148. *See* Massiah v. United States, 377 U.S. 201, 201 (1964).

149. Maine v. Moulton, 474 U.S. 159, 170 (1985) (citing United States v. Wade, 388 U.S. 218, 224 (1967)).

150. *Id.*

1. Crystallization of Adversariness

The first step is determining when formal proceedings have begun for Sixth Amendment purposes. In some situations, this is straightforward, as once someone has been presented in criminal court, or otherwise made a first appearance in front of a judicial officer, the adverse positions of the government and defense have solidified.[151]

After an arrest, an individual must be presented to a judicial officer, without undue delay, within forty-eight hours.[152] This requirement of a prompt first appearance is a check on the government's power and a means to ensure that constitutional rights—such as the right to counsel—are effectuated.[153] As a practical matter, there will almost always be a delay of, at minimum, a few hours in order for an arrestee to be processed, possibly interrogated, and transported to court. During that time, the prosecuting authority also determines whether to formally charge the arrested person with a crime, and, if so, what charges to bring. In forty-three states and the District of Columbia, statutes codify the right to appointed counsel at a first appearance.[154] Although the procedures and terminology differ between jurisdictions, the statutes ensure that criminal defendants' constitutional rights are protected from the onset of a criminal prosecution.[155] In practice, counsel is appointed well before court has begun and often before the government has finalized the formal charging paperwork.[156] Once counsel has been appointed, the positions of the defense and prosecution have crystallized.[157]

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151. *Id.* (citing United States v. Gouveia, 467 U.S. 180, 189 (1984)).

152. County of Riverside v. McLaughlin, 500 U.S. 44, 57 (1991).

153. Pamela R. Metzger & Janet C. Hoeffel, *Criminal (Dis)Appearance*, 88 GEO. WASH. L. REV. 392, 397 (2020).

154. John P. Gross, *The Right to Counsel but Not the Presence of Counsel: A Survey of State Criminal Procedures for Pre-Trial Release*, 69 FLA L. REV. 831, 840 (2017) (highlighting the Supreme Court's discussion of a statistic from an amicus brief in Rothgery v. Gillespie County, 554 U.S. 191, 203–04 (2008), stating "that not only the Federal Government, including the District of Columbia, but 43 States take the first step toward appointing counsel 'before, at, or just after initial appearance'").

155. *See generally id.* at 841–50 (2017) (describing differing state procedures of initial appearances and appointment of counsel).

156. FED. R. CRIM. P. 44(a) ("A defendant who is unable to obtain counsel is entitled to have counsel appointed to represent the defendant at every stage of the proceeding from the initial appearance through appeal, unless the defendant waives this right.").

157. In this Article, I do not propose a new bright-line test earlier than "post-

For instance, consider whether, under the facts of *Estelle v. Smith*,[158] the prosecution would be allowed to arrange for the same psychiatric interview after a suspect's arrest, as long as there was a delay in formal charges being brought, even if the delay was purposefully engineered by the government. The answer must be no. It would create an absurd result, not to mention implicate due process concerns, to allow the prosecution to arrange for the same psychiatric evaluation of a defendant in the minutes or hours before they formally file charging papers to circumvent the accused's right to assistance of counsel. A psychiatric evaluation is an important and invasive procedure, as is the search of a cell phone.[159] These matters should not be undertaken lightly and should be afforded the highest levels of procedural protection.

Of course, in keeping with the Court's current bright-line rules in defining a critical stage, it would not make sense to leave it to courts to parse out exactly when a prosecutor made the decision to charge or was still in the decision-making process. Such a rule would result in an untenable fact-finding mission for courts that would require testimony from a prosecutor about the deliberative process. A court should not be left to determine whether a criminal proceeding has formally started in the minutes between when a prosecutorial decision has been made and the filing of the actual paperwork. Nor should courts have to parse whether a criminal proceeding has formally started when charges are filed but an individual has not yet physically been presented before a judge. For the ease of courts, and to avoid an additional layer of fact-finding, the rule should apply as soon as an individual is placed under arrest and a device seized. If law enforcement subsequently decides that further investigation is necessary and they decline prosecution, they will

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indictment" as laid out in the Supreme Court's cases. However, I do note that the government should not be allowed to take advantage of any gamesmanship or created delay of their own making to circumvent the Sixth Amendment and adversarial system and conduct critical proceedings at which an individual otherwise would have the assistance of counsel. *See generally*, John D. King, *Gamesmanship and Criminal Process*, 58 AM. CRIM. L. REV. 47, 47 (2020) (arguing that "prosecutorial gamesmanship poses a different and more acute danger to the legitimacy of the criminal adjudication system than does such behavior by defense lawyers").

158. *See* discussion *supra* Part II.B.3.

159. *See* Estelle v. Smith, 451 U.S. 454, 471 (1981) (finding that determinations regarding a psychiatric evaluation constitute an "important issue" requiring "the guiding hand of counsel").

only be required to comply with existing Fourth Amendment law to justify further seizure of the cell phone and any other search they may seek to assist their investigation.

2. A Privacy Invasion of the Most Critical Sort

The next step is establishing that the application for a search warrant and subsequent search of a cell phone is a "trial-like" proceeding.[160] Under *Powell v. Alabama*, the right to assistance of counsel is not limited to participation in a trial itself, but rather is available "at every stage of the proceedings against [a defendant]."[161] Such proceedings require the assistance of counsel, whether formal or informal, inside or outside the courtroom.[162] The Court has focused on these types of proceedings where "the results might well settle the accused's fate and reduce the trial itself to a mere formality."[163]

The Court's analysis and reasoning in *Wade* are instructive here.[164] There, the Court recognized the "realities of modern criminal prosecution" are important in determining what is a "critical stage."[165] The *Wade* Court focused on two factors:[166] the potential for substantial prejudice to a defendant,[167] and whether the assistance of counsel would help to avoid that prejudice.[168]

A criminal defendant's case and the ability to defend themself at trial is substantially prejudiced by the government's ability to dig into and scrutinize the contents of their cell phone without being challenged. Given the powerful search and analysis capabilities employed by law enforcement, a search of a suspect's phone may well result in reams of evidence against them, not to mention nonresponsive and embarrassing information. Any evidence may well be damning, resulting in the prospect of a distortedly one-sided trial, discouraging any trial at all, and extinguishing the hope for transparency.

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160. *See supra* Part II.B.2.

161. Powell v. Alabama, 287 U.S. 45, 68–69 (1932).

162. United States v. Wade, 388 U.S. 218, 226–27 (1967).

163. *Id.* at 224.

164. *Id.*

165. *Id.*

166. *Id.* at 227.

167. *Id.* ("It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help to avoid that prejudice.").

168. *Id.*

For example, in many criminal prosecutions, direct evidence of the accused's mens rea is not readily available. The prosecution may not be able to present evidence of an accused drug dealer's intent to possess with the intention to distribute, or an accused murderer's malice aforethought. In these situations, the prosecution would have to rely solely on circumstantial evidence.[169] However, following a search of an accused's cell phone, the prosecution would be privy to the innermost thoughts of an accused, even those that they did not express publicly. For instance, the web searches of an accused for "ways to package drugs for sale" or "how many grams in an ounce" would undoubtedly be persuasive evidence at trial that an accused did in fact possess a controlled substance with the intent to distribute it. The harm comes when the government has accessed this type of information and then is able to use it nefariously and out of context at trial. The search for "grams in an ounce" could have been made in reference to baking a recipe. This harm is compounded when a broad warrant is used and the search result is from years before the allegations at issue. A defendant is then faced with having to give up the burden of proof and their Fifth Amendment

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169. *See e.g.*, MODEL FED. JURY INSTRUCTION ¶ 5.01 (2021):

> In deciding whether or not the Government has met its burden of proof, you may consider both direct evidence and circumstantial evidence.
>
> Direct evidence is evidence that proves a disputed fact directly. For example, when a witness testifies to what he or she saw, heard or observed, that is called direct evidence.
>
> Circumstantial evidence is evidence that tends to prove a disputed fact by proof of other facts. To give a simple example, suppose that when you came into the courthouse today the sun was shining and it was a nice day, but the courtroom blinds were drawn and you could not look outside. Then later, as you were sitting here, someone walked in with a dripping wet umbrella and, soon after, somebody else walked in with a dripping wet raincoat. Now, on our assumed facts, you cannot look outside of the courtroom and you cannot see whether or not it is raining. So you have no direct evidence of that fact. But, on the combination of the facts about the umbrella and the raincoat, it would be reasonable for you to infer that it had begun to rain.
>
> That is all there is to circumstantial evidence. Using your reason and experience, you infer from established facts the existence or the nonexistence of some other fact. Please note, however, that it is not a matter of speculation or guess: it is a matter of logical inference.
>
> The law makes no distinction between direct and circumstantial evidence. Circumstantial evidence is of no less value than direct evidence, and you may consider either or both, and may give them such weight as you conclude is warranted.

rights to testify and explain. An accused facing the admission of that damning evidence—essentially a confession—from a search of their cell phone might very well rethink what would essentially be the mere formality of going to trial in the face of that evidence.

In our adversarial criminal justice system, the presence or involvement of counsel in a proceeding is "vital."[170] The *Wade* Court explicitly embraced the idea that present and involved defense counsel are integral to our entire system.[171] The Court went even further and acknowledged that the involvement of counsel at a critical stage may even assist the procedure by preventing suggestive or otherwise tainted identifications from occurring in the first place.[172] This is the same principle embraced in *Powell*, where the Court recognized that the presence of counsel prevents harm by allowing skilled counsel to review an indictment to ensure compliance with the law.[173]

A post-arrest and device seizure search of a cell phone is more than a mere investigative step. While the cell phone may be a source of additional information to be used at trial, the government has already investigated and gathered enough evidence to bring criminal charges against a defendant. Unlike the precharging photographic lineup in *United States v. Ash*,[174] a post-arrest cell phone search is performed not to decide whether there is enough evidence to charge a suspect with a crime, but rather to gather enough evidence to sustain those charges at a future trial.[175] This stage in the proceedings is ripe for error, and courts should allow the assistance of counsel in order to minimize this

170. *Wade*, 388 U.S. at 238.

171. *Id.*

172. *Id.* ("In our view counsel can hardly impede legitimate law enforcement; on the contrary, for the reasons expressed, law enforcement may be assisted by preventing the infiltration of taint in the prosecution's identification evidence.").

173. Powell v. Alabama, 287 U.S. 45, 68–69 (1932); *see also* Metzger, *supra* note 34, at 1643 ("Counsel would mitigate those risks by reviewing the indictment, requiring strict compliance with the law, and generally holding the prosecution to its burden.").

174. 413 U.S. 300, 322 (1973).

175. With searches of digital devices, the privacy harms are substantially more prejudicial than other government takings, and thus cannot be adequately addressed by existing remedies such as suppression or exclusion of evidence. *See supra* Part I.B.2; Erica Hashimoto, *Motivating Constitutional Compliance*, 68 FLA. L. REV. 1001, 1026 (2016) (arguing that the Court has focused its constitutional remedies analysis almost exclusively on the exclusionary rule, which has enabled intentional constitutional errors).

risk.[176] The Sixth Amendment assistance of counsel guarantee is meant to act as a counterweight to state action in a criminal prosecution, reducing the risk of government overreach.[177] Courts should apply the Sixth Amendment in that manner, acknowledging that a post-arrest search of a cell phone is a critical stage and ensuring that a criminal defendant has the assistance of counsel at that stage.

The purpose of the Sixth Amendment right to assistance of counsel is to provide the accused with an advocate who has the skill and knowledge to navigate the complicated legal procedures in a criminal prosecution.[178] It is an obvious truth that an accused does not have the technical knowledge to negotiate the intricacies of Fourth Amendment law and protect themselves from the invasive reach of the government.[179] The Sixth Amendment evolved from English common law, when counsel was not necessary because expert knowledge of the law was not required.[180] Today's Sixth Amendment jurisprudence needs to evolve similarly, given the complexities involved with cell phone searches, the breadth of technological advances, and the sheer amount of privacy invasion.[181]

Applying the Court's practical approach in *Powell* and *Wade*, it is clear that post-charging cell phone search warrants are a "critical stage" in a criminal prosecution. Much like *Powell's* focus on ensuring that an accused is provided the "guiding hand of counsel" in navigating the complexities of the legal system, allowing a defendant to have the assistance of the attorney already assigned to them when navigating the search of their

176. *Wade*, 388 U.S. at 227 (discussing the importance of counsel pre-trial to help protect against prejudice to other basic rights to a fair trial later in the proceedings).

177. *Id.*; *see also* Carpenter v. United States, 138 S. Ct. 2206, 2214 (2018) (citing approvingly United States v. Di Re, 332 U.S. 581, 595 (1948), arguing that a central aim of the Founders was to put obstacles in the way of over-permeating police surveillance).

178. *See Powell*, 287 U.S. at 69 (explaining the importance of the right to be heard *by counsel* because many individuals are unprepared to represent themselves at a hearing).

179. *Wade*, 388 U.S. at n.7.

180. United States v. Ash, 413 U.S. 300, 309 n.7 (1973) (examining origins of Sixth Amendment in English common law).

181. The power of law enforcement to search a cell phone will necessarily have First Amendment implications given the nature of the information contained on it. *See generally* Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 123–28 (2007).

cell phone would reduce prejudice. Counsel would be able to review the warrant application, make further arguments regarding probable cause, and litigate strict compliance with the Fourth Amendment's particularity requirements. Even if there is no challenge to the determination of probable cause to conduct a search, an attorney's technical and legal knowledge would be invaluable in assisting the court in ensuring that the warrant is narrowly tailored and avoids any over-seizure of private information that falls outside the warrant.

A search warrant for a cell phone involves more than a question as to whether probable cause of evidence of a crime exists on a device at all.[182] The Fourth Amendment also requires particularity as to the places to be searched.[183] Because digital memory is capable of stretching back years, the particularity requirement becomes especially complex in searches of cell phones.[184] There must be particularity not just as to what phone to be searched, but also what type of files and for what timeframe. Such complicated decisions require a defendant to have the assistance of an attorney as they involve knowledge as to what the law allows, what other evidence exists, and how that impacts the legal issues.[185] A lay person does not have the legal knowledge, skill, or expertise to object to a search warrant, much less the scope, breadth, or particularity of one. These questions

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182. Although it is not the subject of this article, there are interesting Fourth Amendment issues regarding probable cause to access a device. The proliferation of cell phones in society presents an interesting slippery slope consideration of how to enforce particularity requirements given statistically almost every arrest will result in the seizure of a cell phone.

183. U.S. CONST. amend. IV ("[A]nd no warrants shall issue, but upon probable cause . . . and particularly describing the place to be searched, and the persons or things to be seized."); *see also* Burns v. United States, 235 A.3d 758, 771 (D.C. 2020) (detailing the particularity requirement of the Fourth Amendment).

184. The Court, in *Riley v. California*, discussed at length a cell phone with a capacity of sixteen gigabytes. 573 U.S. 373, 374 (2014). The iPhone 13 Pro currently for sale today has a maximum capacity of one terabyte. *Compare iPhone Models*, APPLE INC., https://www.apple.com/iphone/compare/?modelList=iphone13,iphone13pro [https://perma.cc/P4MX-BTBN]. This is over six times the storage capacity considered in *Riley*, where the Court pointed out the concern that the data on a phone can go back to the purchase of the device. 573 U.S. at 394.

185. *See generally* United States v. Wade, 388 U.S. 218, 218 (1967) ("The Sixth Amendment guarantees an accused the right to counsel not only at his trial but at any critical confrontation by the prosecution at pretrial proceedings where the results might well determine his fate and where the absence of counsel might derogate from his right to a fair trial.").

are ones that courts across the country are struggling to address. It would be unfair to deprive a criminal defendant charged with a crime of the right to counsel to address the same questions—especially when counsel has already been appointed and is available to do so.

The conclusion I reach here is bolstered by the Supreme Court's approach in recent years to other Sixth Amendment rights.[186] In opinion after opinion, when analyzing Sixth Amendment rights, whether to confront witnesses or to be tried by a jury, the Court has framed its decisions in an originalist reading of the Constitution.[187] In applying such an originalist framework, the Court substantially altered Sixth Amendment doctrine.[188] In *Crawford v. Washington*, the Court considered whether statements made during an alleged accomplice's interrogation and admitted at trial without cross-examination violated the Confrontation Clause.[189] In holding that it was a violation, the Court emphasized that the Sixth Amendment right to confrontation is unequivocal.[190] The Court rejected the government's argument that it should be up to judges to assess reliability of a statement prior to admission at trial, and instead insisted that courts apply the categorical constitutional rule that is contained in the text of the Sixth Amendment.[191]

In a later Confrontation Clause case, *Melendez-Diaz v. Massachusetts*, the Court had to consider how the Framers would apply the Sixth Amendment to forensic science evidence.[192] The case involved the admission of laboratory reports of forensic examinations that were entered into evidence without the authors being subjected to cross-examination.[193] Of course, modern forensic science is another example of a technological change the Founders could never have imagined. In this way, the opinion and reasoning in *Melendez-Diaz* is a useful analogy to the cell

186. *See e.g.*, Blakely v. Washington, 542 U.S. 296, 303–04 (2004) (affirming the implication of Apprendi v. New Jersey, 530 U.S. 466 (2000), that a criminal defendant's Sixth Amendment right to a jury trial is violated when a court issues an excessive sentence based on facts that were never found by a jury).

187. Erica J. Hashimoto, *An Originalist Argument for a Sixth Amendment Right to Competent Counsel*, 99 IOWA L. REV. 1999, 2000–01 (2014).

188. *Id.*

189. 541 U.S. 36, 68–69 (2004).

190. *Id.*

191. *Id.* at 67.

192. 557 U.S. 305, 319 (2009).

193. *Id.* at 308–09.

phone searches in this Article. In its opinion, the Court—using an originalist approach—applied a strict rule to a new technology in criminal procedure.[194] The Court applied its reasoning in *Crawford* to hold that the author of any report is a witness against a defendant and therefore entitles the defendant the right to cross-examine them just as any other witness.[195]

Similar to the Confrontation Clause, the Supreme Court took an originalist approach when assessing the importance of the Sixth Amendment right to a jury trial.[196] In *Apprendi v. New Jersey*, the Court created a bright-line rule that any aggravating factor "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[197] *Apprendi* involved a New Jersey statute authorizing an enhanced penalty if the defendant picked his victim on the "basis of racial animus."[198] In its decision, the Court relied on the Framers' intent and the longstanding common-law jurisprudence that any accusation against a defendant must be "confirmed by the unanimous suffrage of twelve of [his] equals and neighbours."[199] Similar to cell phones, hate crime statutes were not a part of the criminal justice system at the nation's founding.[200] However, using an originalist interpretation, Justice Scalia, in his concurrence, argued that the Founders were not prepared to leave the criminal justice system to the state.[201] He highlighted the importance of a jury trial in the creation of the Constitution, stating, "the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights."[202]

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194. *See* Jeffrey L. Fisher, *Originalism as an Anchor for the Sixth Amendment*, 34 HARV. J. L. & PUB. POL'Y 53, 61–62 (2011) (arguing that originalism is necessary in criminal procedure to ensure bright line rules to protect criminal defendants).

195. *Melendez-Diaz*, 557 U.S. at 307, 329.

196. *See* Jeffrey L. Fisher, *A* Blakely *Primer: Drawing the Line in* Crawford *and* Blakely, 28 CHAMPION 18 (2004) (discussing cases that concern themselves with the Sixth Amendment in the context of the Confrontation Clause and jury trial's role in sentencing guidelines).

197. 530 U.S. 466, 490 (2000).

198. *Id.* at 469.

199. *Id.* at 477.

200. *See Hate Crimes Timeline*, THE HRC FOUND., https://www.hrc.org/resources/hate-crimes-timeline [https://perma.cc/XT65-9KXL] (overview of hate crime legislation history, beginning with 1989 as the year the U.S. House passed the Hate Crimes Statistics Act, and 1990 as the year the U.S. Senate passed the same act.).

201. *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring).

202. *Id.*

Just as the right to confrontation is not limited to only some witnesses against a defendant,[203] the right to assistance should not be narrowed—contrary to the very text of the Sixth Amendment—to exclude a search of a cell phone after formal proceedings have begun. The Court's originalist treatment of Sixth Amendment rights requires that we read the "text and structure"[204] of the Sixth Amendment to truly mean "[i]n all criminal prosecutions."[205] Such a treatment compels an interpretation that a post-indictment cell phone search is a critical stage entitling a defendant to the assistance of counsel.

III. IMPLEMENTATION BY COURTS AND LEGISLATURES

While a finding that a post-charging device search entitles a criminal defendant to the assistance of counsel under the Sixth Amendment "critical stage" analysis might superficially appear to be an extreme ask for a court, the doctrinal rules of criminal procedure have been steadily evolving as society has developed and adopted new technologies.[206] New Fourth Amendment rules have been outlined in recent years, including changes to the third-party doctrine,[207] location-based tracking,[208] and even cell phone searches themselves.[209] Such readjustments have been addressed in legal scholarship by Professor Kerr's theory of equilibrium adjustment.[210] Professor Kerr argues that "[w]hen new tools and new practices threaten to expand or contract police

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203. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 315–17 (2009).

204. Ramos v. Louisiana, 140 S. Ct. 1390, 1395 (2020) (discussing the text of the Sixth Amendment in analyzing the right to an impartial jury).

205. U.S. CONST. amend. VI.

206. In recent years, much scholarship has focused on the Fourth Amendment and technological change, but has also expanded to the Fifth Amendment and forensic evidence. *See* David S. Han, *Constitutional Rights and Technological Change*, 54 U.C. DAVIS L. REV. 71, 73–77 (2020); Kerr, *supra* note 62; Erin Murphy, *The Mismatch Between Twenty-First-Century Forensic Evidence and our Antiquated Criminal Justice System*, 87 S. CAL. L. REV. 633, 634–36 (2014); Adam M. Gershowitz, *The Post-*Riley *Search Warrant: Search Protocols and Particularity in Cell Phone Searches*, 69 VAND. L. REV. 585, 597–600 (2016); Matthew Tokson, *The Emerging Principles of Fourth Amendment Privacy*, 88 GEO. WASH. L. REV. 1, 54–56 (2020); Laurent Sacharoff, *supra* note 68, 214–20.

207. Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018).

208. United States v. Jones, 565 U.S. 400, 404 (2012).

209. Riley v. California, 573 U.S. 373, 392–93 (2014).

210. Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 480 (2011).

power in a significant way, courts adjust the level of Fourth Amendment protection to try and restore the prior equilibrium."[211] Indeed, the Court's extension of the critical stage doctrine to include pre-trial proceedings in *Wade* was itself an example of equilibrium adjustment.[212] The Constitution does not prioritize or hold certain rights as more important than others.[213] The Court's recent concern regarding technological advances and government intrusion is easily applicable to the Sixth Amendment context, as I argue here. As useful cell phones searches are to law enforcement, they threaten societal privacy interests and the constitutional guarantees of fairness in criminal prosecutions.

This Article does not ask courts to abandon the bright line "critical stage" rule altogether, but instead to recognize a new critical stage that acknowledges new technology. It should be noted that the narrow solution proposed in this Article is meant to apply only to post-arrest and charging of an individual where the government is seeking a search warrant for a cell phone that has already been seized. That is when formal proceedings have begun, and the device is secured. A recognition of the right to counsel at this stage will ensure that a criminal defendant has an advocate to advise and assist them with the complex procedural implications of any warrant prior to law enforcement accessing their entire digital lives.[214]

As currently applied, criminal defendants are deprived of the assistance of counsel prior to the entirety of their intimate private lives being exposed to governmental scrutiny. By not allowing counsel to be heard on the issuance or scope of a warrant courts allow the government to circumvent our adversarial system.

211. *Id.*

212. United States v. Wade, 388 U.S. 218, 235–37 (1967).

213. Neb. Press Ass'n. v. Stuart, 427 U.S. 539, 561 (1976).

214. Whether through judicial interpretation or legislative action, recognizing post-indictment cell phone searches as a "critical stage" entitling a defendant to counsel serves as a "process limit" on law enforcement power. *See* Primus, *supra* note 87 (defining a "process limit" as a "consequential force" that constrains power by keeping substantive outcomes within reach, but raising the cost of any action, especially one that may give rise to substantial opposition).

The Sixth Amendment's right to counsel guarantee, including the critical stage test, has not historically been static.[215] Rather, it has evolved along with the societal and historical norms of fairness and process.[216] The early states embraced a transition away from the English system, which had explicitly banned the assistance of counsel.[217] Then, in passing the 1791 Bill of Rights, the Framers moved to allow for counsel in federal prosecutions, but only if the accused hired their own counsel.[218] Finally, in the 1970s, the Supreme Court developed the "critical stage" doctrine as we understand it now.[219] At both the state and the federal level, the modern right to assistance of counsel was the product of reforms.[220]

Just as "seismic shifts in digital technology" have been acknowledged in changing Fourth Amendment doctrine, those same technological changes affect Sixth Amendment doctrine.[221] Modern prosecutions and criminal procedures do not resemble those that were contemplated at the time the current Sixth Amendment doctrine was developed. The realities of modern technology require that, where Fourth Amendment and Sixth Amendment concerns intersect, we must be consistent in how doctrines are applied. The Court in *Wade* was right; the presence of defense counsel can only assist these proceedings in ensuring that any taint or error is avoided.[222] The concerns about technology and the extreme risk of privacy violations that cell phones present mean that courts should expand Sixth Amendment protections to protect against those potential harms. In prior "critical stage" cases, the Court has stressed that it views the right to counsel through a historical lens, allowing it to evolve and expand to address the dangers present at the moment.[223]

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215. *See* Metzger, *supra* note 34, at 1637–41 (summarizing the expansion of the right to counsel in state and federal systems).

216. *Id.*

217. *Id.* at 1637–38.

218. *Id.* at 1640.

219. *Id.* at 1636.

220. *Id.* at 1640–41.

221. Carpenter v. United States, 138 S. Ct. 2206, 2218 (2018).

222. United States v. Wade, 388 U.S. 218, 236–38 (1967) (discussing the importance of defense counsel's presence at post-indictment proceedings).

223. United States v. Ash, 413 U.S. 300, 311 (1973) ("The Court consistently has applied a historical interpretation of the guarantee, and has expanded the constitutional right to counsel only when new contexts appear presenting the same dangers that gave birth initially to the right itself.").

Acknowledging the same privacy concerns the Supreme Court has already highlighted regarding technological change in the Fourth Amendment context, courts should follow the history and purpose of the Sixth Amendment to hold that, once a person has been arrested and their device seized, any search of their cell phone—even pursuant to a warrant—is a critical stage entitling them to the assistance of counsel. The question, then, is: what form does such assistance look like?

This Part outlines how courts can ensure that a criminal defendant is provided the assistance of counsel prior to execution of a cell phone search warrant. By informing counsel of a search warrant application for their client’s cell phone, counsel has the opportunity to argue that probable cause of evidence of a crime does not exist on the seized device or limit the scope of the warrant given the particular facts of the case.

A. Embracing Adversariness to Vindicate Rights

Our criminal legal system is an adversarial one.[224] The system depends on the two parties litigating contested issues in front of a neutral judicial officer. The presumption is that every piece of a criminal proceeding will happen in open court, absent some other overriding interest. To seek a warrant on an ex parte basis after the appointment of counsel and assertion of rights, or to search a cell phone that has been seized and is in no danger of being tampered with constitutes a violation of this basic principle of adversariness. This fundamental tenet is rooted in multiple amendments to the Constitution. The First Amendment, for example, strongly favors openness in criminal proceedings.[225] Adversarial testing is the means through which the public interest in truth and fairness is advanced.[226] Our system of justice disfavors ex parte communications, which run contrary to our adversarial trial system.[227] “The adversarial process plays an in-

224. Herring v. New York, 422 U.S. 853, 858 (1975) (discussing the right to counsel and the adversarial system as allowing the defense to “participate fully and fairly in the adversary factfinding process”).

225. United States v. Wecht, 484 F.3d 194, 210 (3d Cir. 2007) (“[T]he process by which the government investigates and prosecutes its citizens is an important matter of public concern.”).

226. Polk County v. Dodson, 454 U.S. 312, 318 (1981).

227. *See generally* Roberta K. Flowers, *An Unholy Alliance: The Ex Parte Relationship Between the Judge and the Prosecutor*, 79 NEB. L. REV. 251, 275–

dispensable role in our system of justice because a debate between adversaries is often essential to the truth-seeking function of trials. . . . If judges engage in ex parte conversations with the parties or outside experts, the adversary process is not allowed to function properly and there is an increased risk of an incorrect result."[228]

In the context of a search warrant, the Supreme Court has identified an exception to this rule when a person might destroy or conceal the evidence at issue.[229] As the Supreme Court noted, search warrant applications are *typically* made ex parte "since the subject of the search cannot be tipped off to the application for a warrant *lest he destroy or remove evidence*. . . . The presearch proceeding will frequently be marked by haste, because of the understandable desire to act *before the evidence disappears* . . . ."[230] If the primary reasons for search warrant applications being made ex parte are fear of destruction or loss of evidence, it follows that a search warrant application for evidence that cannot be destroyed or lost—as it is already protected by being in the government's possession—should be conducted in the typical, adversarial manner. Said differently, a warrant for a person's cell phone—after the phone has been seized and is in the government's control—is not a "typical" warrant situation.

In an analogous situation, state courts have held that it is a due process violation to proceed on an ex parte basis when the subject of a warrant is a person's DNA.[231] These cases—and others from New York State—rely on a seminal decision, *In re Abe A.*,[232] from the highest court in New York, which held: "[I]f there is 'no exigency, . . . [then] frustration of the purpose of the application is not at risk' and, in that case, 'it is an elementary tenet of due process that the target of the application be afforded the

76 (2000) ("The courts have repeatedly condemned ex parte communications between judges and prosecutors. . . . Additionally, the courts have prohibited meeting with the sentencing judge to discuss sentencing, presenting exhibits to the court, asking law enforcement to speak directly to the judge, and submitting an order for the court's signature without sending it to opposing counsel.").

228. United States v. Wecht, 484 F.3d 194, 227 (3d Cir. 2007) (quoting *In re* Kensington Int'l Ltd., 368 F.3d 289, 310 (3d Cir. 2004)).

229. *See* Franks v. Delaware, 438 U.S. 154, 169–70 (1978).

230. *Id.* at 169 (emphasis added).

231. *See, e.g.*, People v. Fomby, 956 N.Y.S.2d 633, 634–35 (App. Div. 2012); People v. Smith, 940 N.Y.S.2d 373, 376–77 (App. Div. 2012).

232. 437 N.E.2d 265, 266 (N.Y. 1982) (describing the "stringent standard" a court must meet to order a blood sample).

opportunity to be heard in opposition before his or her constitutional right to be left alone may be infringed.'"[233] The court reached the same conclusion in *People v. Smith*, concluding that "defendant's due process rights were violated when he was not afforded an opportunity to appear before the court and contest the . . . order compelling him to submit to a buccal swab."[234] As the court in *People v. Smith* observed, any "application for an order to compel a suspect to provide a DNA sample must be made upon notice to the suspect."[235] In both *People v. Smith* and *People v. Fomby*, the court concluded that reversal was required because the due process violations required suppression of the evidence at issue.

In similar contexts, the government does not rely on, nor is it afforded the benefit of, an ex parte application and search process. Consider the recent trend of law enforcement seeking to compel a defendant to unlock or unencrypt their electronic device that has been seized.[236] The government could get a search warrant for a device and use an MDFT to unlock and search it.[237] However, the government routinely files a motion seeking a judicial order to compel a defendant to provide the password or biometric data that would unlock the device.[238] Through this pro-

233. *Fomby*, 956 N.Y.S.2d at 634 (quoting *In re Abe A.*, 437 N.E.2d at 269).

234. 940 N.Y.S.2d at 377.

235. *Id.* (citing *In re Abe A.*, 437 N.E.2d at 269).

236. *See* Kerr, *supra* 30, at 768 n.4 (listing cases that address when the government can require a suspect to decrypt their device by entering the password); Sacharoff, *supra* note 68, at 209 (discussing situations where law enforcement can obtain information despite encryption); Adam Herrera, *Biometric Passwords and the Fifth Amendment: How Technology Has Outgrown the Right to Be Free from Self-Incrimination*, UCLA L. REV. 778, 782 (2019) ("The current legal framework allows law enforcement agents to increasingly request search warrants so that they can access smart phones with biometric passwords . . . .").

237. *See supra* Part I.A (discussing MDFTs). In the case of devices with encryption on them this process is extremely time intensive and requires a "brute" unlock. *See* Koepke et al., *supra* note 38, at 27 (describing the MDFT process). Essentially, a computer repeatedly attempts different password combinations until the device is unlocked. *Id.*

238. Kerr, *supra* note 30 (describing the procedure typically used to compel a defendant to provide the password or biometric data to unlock a device); United States v. Apple MacPro Computer, 851 F.3d 238, 243 (3d Cir. 2017) ("[U]pon application of the [g]overnment, a [m]agistrate [j]udge issued an order pursuant to the All Writs Act requiring Doe to produce his iPhone 6 Plus, his Mac Pro computer, and his two attached external hard drives in a fully unencrypted state . . . .").

cedure, the motion is filed with the case judge, and defense counsel is served and has an opportunity to litigate the issue.[239] A similar procedure occurs when the government seeks a search warrant for biological material from a defendant after they have been charged.[240] Rather than seek an ex parte search warrant, the government litigates the issue as it would any other. It files a motion with the court,[241] lets the defense state a position,[242] and a judge decides on the issue.[243]

The situation is no different here. Just like bodily intrusions, the Supreme Court has held that a search of a cell phone implicates deep-rooted expectations of privacy, as cell phones are often "a digital record of nearly every aspect of their [owners'] lives—from the mundane to the intimate."[244] *Riley* acknowledged that, in contrast to a home search, "a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house.[245] A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is."[246] Much like a person's DNA, which contains highly personal information that could reveal genetic disorders, predisposition to disease, family relationships, and other private characteristics otherwise beyond the reach of the government, the modern cell phone has "immense storage capacity," holds "many distinct types of information," and may reveal private life in a manner never before possible in searches of physical spaces.[247]

239. Kerr, *supra* note 30 (stating that the issue of decryption typically arises when authorities have a search warrant for a device but cannot search it because the device is encrypted, and thus must obtain a court order).

240. *Compare Apple MacPro Computer*, 851 F.3d at 246 (upholding an order requiring the defendant to assist with execution of the search warrant by producing unencrypted devices), *with* Order Granting the Government's Motion to Compel at 3, United States v. Holston, No. 2018 CF1 018592 (D.C. Super. Ct. May 24, 2019) (compelling defendant to submit to a buccal swab).

241. *See, e.g.*, Government's Motion to Compel Defendant to Submit to Buccal Swabbing at 3, *Holston*, No. 2018 CF1 018592.

242. *See, e.g.*, Motion to Deny Government Request for Warrant for Buccal Swab at 13, *Holston*, No. 2018 CF1 018592.

243. *See, e.g.*, Order Granting Government's Motion to Compel, *supra* note 240 (granting motion for buccal swabbing).

244. Riley v. California, 573 U.S. 373, 395 (2014).

245. *Id.* at 396.

246. *Id.* at 396–97.

247. *Id.* at 393–94.

It is true, of course, that allowing for counsel to be heard on a search warrant in the manner proposed may slow down or interfere with the government's ability to gather evidence and consume judicial resources. As an initial matter, any such objection overlooks that these issues are already litigated, albeit at a different stage in the proceedings, and that these same protections are offered to some categories of criminal defendants already.

Professor Orin Kerr has previously noted that courts lag behind technological advances due to the slow process of cases working their way through trial courts and appellate review.[248] As noted above, the vast majority of criminal cases do not proceed to trial.[249] There are, however, a growing number of appellate decisions regarding searches of cell phones, reflecting an increasing amount of litigation of these issues.[250] This growing body of case law demonstrates that these issues are being litigated already in criminal cases. Allowing a criminal defendant to be heard prior to execution of a search warrant does not cost any more resources and arguably would be more efficient than at a later suppression hearing. Given the intrusiveness of a cell phone search, a pre-warrant execution procedure is the best way to vindicate the rights and equities involved.

The Supreme Court, in *Riley* and *Carpenter*, rejected this judicial and law enforcement efficiency and interference concern.[251] In *Riley*, the Court succinctly disposed of concerns about interfering with law enforcement investigations, stating, "[p]rivacy comes at a cost."[252] In *Carpenter*, the Court expanded on this principle and explicitly acknowledged that a "central aim of

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248. Kerr, *supra* note 30, at 868 (considering how cases concerning new technology used in searches may not come before a court until years after the technology has become available).

249. *See supra* Part I.B.2 ("The vast majority of criminal cases resolve by plea agreement, never reaching a motions hearing or trial.").

250. *See supra* note 81 (listing judicial decision regarding warrant deficiencies for cell phone searches).

251. *Riley*, 573 U.S. at 401 (considering costs to law enforcement to uphold privacy concerns with respect to cell phones); Carpenter v. United States, 138 S. Ct. 2206, 2214 (2018) (noting that "plac[ing] obstacles in the way of a too permeating police surveillance" was of principal concern at the time of framing the Fourth Amendment and that notion prevails with the modern use of technology).

252. *Riley*, 573 U.S. at 401 ("We cannot deny that our decision today will have an impact on the ability of law enforcement to combat crime. Cell phones have become important tools in facilitating coordination and communication among members of criminal enterprises, and can provide valuable incriminating information about dangerous criminals.").

the Framers was to 'place obstacles in the way of a too permeating police surveillance.'"[253] That is exactly what I call for in this Article. The Sixth Amendment guarantee to the assistance of counsel should be applied unequivocally in situations where the government seeks to search a cell phone after seizing a device and charging a defendant. The Framers certainly did not want to prioritize law enforcement or judicial efficiency at the expense of citizens' privacy.[254] Further, the Sixth Amendment's guarantees exist solely to protect criminal defendants from any temptation to sacrifice their rights in favor of a "just" public safety goal.[255]

In addition, there are no exigency grounds that would justify a warrantless post-arrest and device seizure search. As noted above, the search at this stage is not a mere investigative step but rather evidence gathering.[256] Once a phone has been seized, it is powered off and secured in a manner to prevent remote access or tampering.[257] Of course, if there are truly exigent circumstances, then, as in the Fourth Amendment context, the government can proceed with a search of a phone.[258] However, that is not the normal case and would add the heightened requirement that the government justify their warrantless search.[259]

253. *Carpenter*, 138 S. Ct. at 2214 (quoting United States v. Di Re, 332 U.S. 581, 595 (1948)); *cf.* Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 68 (2020) (holding that when it comes to First Amendment infringements "even in a pandemic, the constitution cannot be packed away and forgotten").

254. *See Riley*, 573 U.S. at 403 ("The fact that technology now allows an individual to carry such information in his hand does not make that information any less worthy of the protection for which the Founders fought.").

255. *See, e.g.*, United States v. Ash, 413 U.S. 300, 309 (1973) ("This historical background suggests that the core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies and the advocacy of the public prosecutor.").

256. *See supra* Part II.B (discussing Supreme Court cases where the Court found that formal proceedings, including evidence gathering, constituted a "critical stage").

257. *See supra* Part I ("Upon seizure, law enforcement secures a cell phone by turning it off or place it in a 'Faraday' bag . . . ."); *Riley*, 573 U.S. at 390–91 (detailing methods that law enforcement can use to ensure that data is not lost or deleted from a seized phone prior to a law enforcement search).

258. See *Riley*, 573 U.S. at 391 (discussing when police may rely on exigent circumstances). A usual exigent circumstance carve-out imminent harm is applicable here. *Id.*

259. *See* Katz v. United States, 389 U.S. 347, 357 (1967) ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.").

The "critical stage" constitutional protections that I argue for in this Article can easily be provided. In fact, we already allow for the assistance of counsel at this stage in many white-collar criminal prosecutions.[260] Affluent criminal defendants—even during the pre-charging stage—commonly challenge search warrants for devices seized as part of an investigation prior to their execution.[261] In a criminal case involving a journalist or attorney, federal law and United States Department of Justice policies call for an opportunity for objections to be made before the information is viewed by law enforcement.[262] In other white-collar prosecutions, not only is a suspect or subject of an investigation allowed to be heard prior to execution of a search warrant on a cell phone,[263] but there are additional protections put in place—filter teams[264] or special masters[265]—to ensure that law enforcement only gets access to material responsive to the search warrant.[266] Through these filter teams, any privileged or non-

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260. *See supra* notes 24–26 and accompanying text (describing special treatment for suspects in white-collar investigations).

261. *See* Weiss & Osborne, *supra* note 26 (arguing that white-collar defendants should challenge investigative procedures).

262. *See* 28 C.F.R. § 50.10(a)(3) (2021) ("[S]ubpoenas or court orders . . . may be used . . . only to obtain information from, or records of, members of the news media . . . after negotiations with the affected member of the news media have been pursued and appropriate notice . . . provided . . . ."); U.S. DEP'T OF JUST., JUSTICE MANUAL § 9-13.400(D)(7) (2020) ("In executing a warrant . . . , investigators should use protocols designed to minimize intrusion into potentially protected materials or newsgathering activities unrelated to the investigation . . . ."); *id.* § 9-13.420 (2020) (promulgating guidelines for searching attorney records due to the potential privileged nature of the material).

263. *See, e.g.*, *In re* Grand Jury Subpoenas, 454 F.3d 511, 514–15 (6th Cir. 2006) (describing a case in which interested parties challenged subpoenas prior to execution). Typically, lawyers move to quash search warrants and courts then allowing the issue to be litigated, the essential creation of a Sixth Amendment right. *Id.*

264. *See* Weiss & Osborne, *supra* note 26 (defining a taint team as a "walled off" government-review team, not involved in the prosecution).

265. A special master is a third party appointed by the magistrate in charge of reviewing the defendant's seized documents and devices. *Special Master*, A.B.A., https://www.americanbar.org/groups/dispute_resolution/resources/disputeresolutionprocesses/special_master [https://perma.cc/9VEQ-KX4R]. Special masters are typically provided to criminal defendants who are doctors or lawyers, especially those with clients who may have charges brought against them in the future by the government. *See id.*

266. *See supra* notes 262–65.

responsive content from a defendant's device can be purged from the prosecution team after the warrant is granted.[267]

Both special masters and taint teams are burdensome and expensive options.[268] But both serve the purpose of ensuring that nonresponsive and privileged material does not reach the hands of the prosecution.[269] In the context of cell phones, courts have advocated for the use of these filter teams because of the heightened concern of how accessible it is for the prosecution to receive privileged or third-party information from a hard drive or cell phone.[270] Allowing for the assistance of counsel prior to the execution of the warrant is a less expensive and more efficient way to achieve the same goal.[271] Assigned defense counsel not only is familiar with the facts of the case, but is arguably in a better position than a detached, neutral magistrate or the government to properly inform the scope of a warrant.[272]

It should not just be affluent criminal defendants that are entitled to this level of deference when it comes to searches of cell phones. The right to counsel doctrine dating back to *Powell*

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267. *See* U.S. DEP'T OF JUST., *supra* note 262, § 9-13.400 (discussing the special processes for obtaining information from news media); *id.* § 9-13.420 (discussing the special processes for obtaining information from attorneys).

268. *See* United States v. Black, No. 16-20032-JAR, 2016 WL 6967120, at *1–2 (D. Kan. Nov. 29, 2016) (detailing the appointment of a special master and associated costs).

269. *See, e.g.*, Fern L. Kletter, *Validity of Search and Seizure Warrant, and Execution Thereof, to Disclose Records and Electronic Communications Related to Specific E-mail Address*, 15 AM. L. REPS. 7, art. 5 § 35 (2016) (listing cases that discuss the adequacy of procedures for excluding privileged information contained in emails while executing a warrant); United States v. Lebovits, No. 11-CR-134 (SJ), 2012 WL 10181099, at *17 (E.D.N.Y. Nov. 30, 2012) ("[T]he decision to use a taint team, even if not required, certainly minimized the impact of any overbreadth in the scope of the warrants."); *cf.* United States v. Carey, 172 F.3d 1268, 1270 (10th Cir. 1999) (reversing the denial of a motion to suppress when police did not obtain a warrant specified to the search of a computer).

270. *See supra* note 269 (noting cases in which courts expressed concern about data privacy).

271. *See, cf.* Rebecca Wexler, *Privacy Asymmetries: Access to Data in Criminal Defense Investigations*, 68 UCLA L. REV. 212, 222–24 (2021) (noting the many ways in which defense counsel involvement can be utilized the investigative process).

272. *See id.* (highlighting that in a prosecution only the defense has the obligation to investigate innocence and thus may discover more information about the facts of a case than even the government has knowledge of).

has always been steeped in racial and socioeconomic context.[273] By allowing individuals who, solely based on class and financial means, are able to challenge the search of a cell phone—thereby enjoying Sixth Amendment rights even pre-indictment—the racial and socioeconomic inequities in the criminal justice system are deepened. Underlying the current status quo of ex parte warrants is a pernicious assumption that those arrested for so-called "street crimes," disproportionately people of color, do not have any privileged material contained on their cell phones.[274] Of course, people of color and those of lower socioeconomic levels also use their cell phones to communicate with their lawyers or consult with their medical providers. These assumptions further divide the way constitutional protections are afforded to those of a certain race and class, while others are presumed not to be entitled to these protections.

When a criminal defendant has been arrested and his cell phone has been seized, he has no ability to destroy or conceal any information that may be contained on his cell phone.[275] There is no exigency that requires the government to proceed on an ex parte basis. Given that the defendant has already been charged and the phone secured, an ex parte procedure serves only to ensure the exclusion of the defendant from the decision-making process governing discovery in the case. At the point that the government seeks a search warrant for his cell phone, the adversarial positions have solidified and a defendant is entitled to the assistance of counsel. That right means that the government cannot circumvent counsel by seeking an ex parte warrant. The issue must be litigated in full view of our adversarial system of justice.

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273. *See* Shaun Ossei-Owusu, *The Sixth Amendment Façade: The Racial Evolution of the Right to Counsel*, 167 U. PA. L. REV. 1161, 1192–94 (2019) (describing the political context of the facts in Powell v. Alabama, 287 U.S. 45 (1932), where nine Black boys in the Depression-era South were accused of raping two white girls, rushed to trial amidst mob violence, offered minimal counsel, and sentenced to death by all white juries).

274. *See, e.g.*, Allen J. Beck, *Race and Ethnicity of Violent Crime Offenders and Arrestees, 2018*, U.S. DEP'T OF JUST., at 5 tbl. 8 (2021), https://bjs.ojp.gov/content/pub/pdf/revcoa18.pdf [https://perma.cc/QVD6-NNKR] (reporting that people of color make up a disproportionate percentage of offenders for certain crimes).

275. *See supra* Part I (noting that police secure cell phones by turning them off or placing them in a Faraday bag).

B. FLOORS, NOT CEILINGS

The discussion above squares the plain language of the Constitution with modern criminal procedure reality and proposes a framework for federal and state courts to provide a new critical stage protection for criminal defendants. Of course, that protection under the Sixth Amendment is the least amount of protection that the Constitution provides for—a floor, not a ceiling.[276] The legislative branch has the ability to extend additional protections for criminal defendants by reigning in law enforcement power.[277] A powerful example of this power is Congress's expansive statutory schemes regulating law enforcement's surveillance power, including the Electronic Communications Privacy Act of 1986.[278] By enacting statutes that codify the privacy interests that criminal defendants have in the contents of their cell phones, legislators can provide accountability, transparency, and remedies that are not readily available through constitutional interpretation in the courts.[279]

Legislators who seek to advance criminal justice reform and reign in the vast surveillance power of law enforcement should act now to codify this right to counsel rather than wait for courts to further shape and define these issues.[280] By their nature,

276. *See* Brandon L. Garrett, *Misplaced Constitutional Rights*, 100 B.U. L. REV. 2085, 2087 (2020) ("[G]overnment actors can choose to provide greater protection than the Constitution demands; the Constitution typically provides a floor, not a ceiling.").

277. *See id.* at 2087 n.5 ("[M]ore and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions . . . ." (internal quotations omitted) (quoting William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977)).

278. 18 U.S.C. §§ 2510–2523; *see* Aaron R. Cooper, *Congressional Surveillance*, 70 AM. U. L. REV. 1799, 1819–63 (2021) (examining the broad composition of statutes that make up Congress's primary vehicle for "protecting digital privacy and regulating government surveillance of digital communications and computer networks").

279. *See* Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1847–48 (2015) (arguing that to increase transparency and accountability, law enforcement should be governed by legislative authorization rather than administrative agencies that are provided exemptions from judicial review or even the rulemaking process).

280. *See, e.g.*, Orin S. Kerr, *The Effect of Legislation on Fourth Amendment Protection*, 115 MICH. L. REV. 1117, 1158–60 (2012) (discussing the benefits of both courts and legislators regulating surveillance technology through their respective lenses in order to ensure a fulsome response in a time of changing technology).

courts are not institutionally equipped to assess the public's appetite for digital privacy and recalibrate their rules and procedures to match.[281] As discussed above, because such a small number of criminal prosecutions reach trial there is limited opportunity to litigate privacy issues.[282] Even more problematic is that when privacy violations are litigated existing remedies are insufficient.[283] Even if courts are the appropriate forum to do the necessary work to protect privacy, judges may not want to if their policy priorities do not center on the rights of criminal defendants.[284]

In contrast, state and local legislatures, and to a lesser extent federal legislators, tend to be more transparent, and importantly, democratically accountable.[285] If a majority of voters disagrees with the actions of a legislator, or their exercise of authority, that person can be removed from office.[286] Rather than wait for an issue to arise in enough criminal cases in the right posture, elected legislators can identify a gap in the right to counsel or infringement on privacy and proactively take steps to expand and solidify the right to counsel as the people see fit.

Across the country, states have begun passing laws to curb law enforcement's ability to cross privacy boundaries.[287] Some of

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281. *See id.* at 1158–59 ("Traditional sources of legal authority such as text, history, and precedent cabin the range of Fourth Amendment options. The Fourth Amendment evolves over time in response to new technologies and social practices. But these changes typically happen slowly and interstitially.").

282. *See supra* Part I.B.2.

283. *See supra* Part I.B.2.

284. *See* Friedman & Ponomarenko, *supra* note 279, at 1865–67 (examining circumstances where judges are ineffective in holding law enforcement accountable when a criminal defendant "caught red-handed" would then avoid accountability).

285. *See, e.g.*, Cooper, *supra* note 278, at 1854 ("Congress is a process-heavy institution, and, more importantly a democratically accountable one.").

286. *Id.* at 1854 n.289 ("Voters can choose to remove members who exercise authority in ways they do not support.").

287. *See, e.g.*, Protecting Household Privacy Act 5 ILL. COMP. STAT. 855/10 (2022) ("[A] law enforcement agency shall not obtain household electronic data or direct the acquisition of household electronic data from a private third party."); MO. CONST. art. I, § 15 ("That the people shall be secure in their persons, papers, homes, effects, and electronic communications and data, from unreasonable searches and seizures; and no warrant to . . . access electronic data or communication, shall issue without describing the . . . data or communication to be accessed . . . ."); MICH. CONST. art. I, § 11 ("The person, houses . . . electronic data, and electronic communications of every person shall be secure from unreasonable searches and seizures. No warrant to . . . access electronic data or

these laws simply codify the requirements of *Riley*.[288] Others seek to stop law enforcement from using technological advances to increase access to one's home.[289] These laws are a helpful start, and much needed to ensure a robust privacy safeguard in society, but they do not go far enough. They do not address the sacred right to counsel, nor do they proactively address areas where judicial action has fallen short. In order to implement the core argument of this Article, I suggest that legislatures take one of two legislative steps to protect the post-indictment right to counsel and the privacy interests in the contents of a modern cell phone.

First, a legislature can pass a statute allowing for counsel earlier than at indictment or initiation of formal charges. Mississippi, not a state that is widely known as a nationwide leader for criminal justice reform, has codified a right to counsel more expansive than federal law.[290] Both the Mississippi Code and Rules of Criminal Procedure reflect the state's attachment of the right to counsel as early as when an arrest warrant is issued.[291] By codifying that the right to counsel is not dependent on when the papers are actually filed in court, legislators provide a statutory "critical stage" bright line to guide courts in an inquiry into a potential violation.

Alternatively, a legislature can also take a concrete step to secure the Sixth Amendment right to counsel by enacting a law specific to a search of a cell phone post-indictment. Doing so would implement the rhetoric and intention of the Sixth Amendment solely as it pertains to post-indictment cell phone searches.

electronic communication shall issue without describing them, nor without probable cause, supported by oath or affirmation.").

288. MICH. CONST. art. I, § 11.

289. *E.g.*, Protecting Household Privacy Act, 5 ILL. COMP. STAT. 855/10 (2022).

290. *See* MISS. CODE ANN. § 99-1-7 (2022) ("A prosecution may be commenced . . . by the issuance of a warrant, or by binding over or recognizing the offender to compel his appearance to answer the offense, as well as by indictment or affidavit."); Williamson v. State, 512 So.2d 868, 876 (Miss. 1987) (holding that the right to counsel attaches earlier under Mississippi law than under the Sixth Amendment to the U.S. Constitution); Ormond v. State, 599 So.2d 951, 956 (Miss. 1991) (defining when the right to counsel attaches under Mississippi law as the "accusatory stage" after a warrant is issued or otherwise requiring a suspect to answer the offense); MISS. R. CRIM. P. 7.1(b) (defining the right to appointed counsel under Mississippi state law).

291. *See* MISS. CODE ANN. § 99-1-7 (2022); MISS. R. CRIM. P. 7.1(b).

In New York, the legislature has taken an analogous step to codify a “critical stage,” by requiring either additional processes prior to the execution of a search warrant for DNA or for the prosecution to obtain evidence from a defendant post-indictment:[292]

> 1. Availability. After the filing of an accusatory instrument, and subject to constitutional limitations, the court may, upon motion of the prosecution showing probable cause to believe the defendant has committed the crime, a clear indication that relevant material evidence will be found, and that the method used to secure such evidence is safe and reliable, require a defendant to provide non-testimonial evidence, including to:
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> (a) Appear in a lineup;
>
> (b) Speak for identification by a witness or potential witness;
>
> (c) Be fingerprinted;
>
> (d) Pose for photographs not involving reenactment of an event;
>
> (e) Permit the taking of samples of the defendant’s blood, hair, and other materials of the defendant’s body that involves no unreasonable intrusion thereof;
>
> (f) Provide specimens of the defendant’s handwriting; and
>
> (g) Submit to a reasonable physical or medical inspection of the defendant’s body.
>
> 2. Limitations. This section shall not be construed to alter or in any way affect the issuance of a similar court order, as may be authorized by law, before the filing of an accusatory instrument, consistent with such rights as the defendant may derive from the state constitution or the United States constitution. This section shall not be construed to alter or in any way affect the administration of a chemical test where otherwise authorized. An order pursuant to this section may be denied, limited or conditioned as provided in section 245.70 of this article.

By following New York’s lead and enacting a statute that applies specifically to post-indictment evidence gathering from a defendant, a legislature would create a “critical stage” as I have proposed in this Article and create clear standards besides the base probable cause requirement from the Fourth Amendment.[293] A model provision might state:

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292. *See* N.Y. CRIM. PROC. L. § 245.40 (Consol. 2022).

293. *See, e.g.*, People v. Fomby, 956 N.Y.S.2d 633, 634 (App. Div. 2012) (finding that a search warrant requires: “(1) probable cause to believe the suspect has committed the crime, (2) a ‘clear indication’ that relevant material evidence will be found, and (3) the method used to secure it is safe and reliable . . . .”) (quoting *In re* Abe A., 437 N.E.2d 265, 266, 270 (N.Y. 1982)).

> After any arrest resulting in the seizure of a cell phone, an accused is entitled to the assistance of counsel no later than the defendant's first appearance before a judge. If the prosecution seeks a warrant to search a seized cell phone, the accused shall enjoy the assistance of counsel prior to approval of any such application by a judicial officer.

In the New York statute, the operative language is "[a]fter the filing of an accusatory instrument."[294] I argue this language should be stronger, more akin to that found in Mississippi's statute.[295] But of course, individual legislatures will have the ability to determine at what point their "critical stage" begins. Similarly, I do not propose what form any litigation over the warrant should take; that decision is properly left to the individual discretion of the courts based on the facts of each case. But as I have noted above, the assistance of counsel is meaningless unless counsel can be heard.[296] The New York courts have held that due process requires notice and the opportunity to be heard, absent an exigent circumstance.[297] Litigation over where on the phone there is probable cause to search, what type of files can be looked at, or the time frame that can be examined can all be complicated questions that may well require evidentiary hearings or witnesses.

Federal and state legislatures should take the initiative to proactively pass legislation codifying an early "critical stage" following the Supreme Court's clear indications that digital information is different.

CONCLUSION

The Sixth Amendment right to counsel was intended to ensure that criminal defendants have an advocate when the government brings its full force and might in an effort to take away

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294. N.Y. CRIM. PROC. L. § 245.40(1) (Consol. 2022).

295. *Compare id.* (stating that the Sixth Amendment right to counsel attaches after the filing of accusatory papers), *with* sources cited *supra* note 288 (describing relevant Mississippi provisions and stating that the right attaches as early as a warrant issuance or a compelled answer to a criminal charge).

296. *See* United States v. Cronic, 466 U.S. 648, 654 (1984) ("If no actual 'Assistance' 'for' the accused's 'defence' is provided, then the constitutional guarantee has been violated.").

297. *In re Abe A.*, 437 N.E.2d at 269 ("[W]hen frustration of the purpose of the application is not at risk, it is an elementary tenet of due process that the target of the application be afforded the opportunity to be heard in opposition before his or her constitutional right to be left alone may be infringed . . . .").

their liberty.[298] Technological advances have impacted modern criminal procedure and created a blind spot when it comes to ensuring that an accused has the assistance of counsel.[299] In order to honor and meet the Framer's ambitions for the Sixth Amendment, courts must embrace post-indictment applications for a search warrant as a critical stage in a prosecution—entitling a defendant to the most valuable of constitutional rights, the right to counsel.

298. *See supra* Part II (discussing the right to counsel).

299. *See supra* Part II.B (discussing the right to counsel in the wake of modern technology).