



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

Mark R. Herring  
Attorney General

900 East Main Street  
Richmond, Virginia 23219  
804-786-2071  
FAX 804-786-1991  
Virginia Relay Services  
800-828-1120  
7-1-1

February 6, 2015

The Honorable David L. Bulova  
Member, House of Delegates  
General Assembly Building, Room 405  
Richmond, Virginia 23219

Dear Delegate Bulova:

I am responding to your request for an official advisory Opinion in accordance with § 2.2-505 of the *Code of Virginia*.

## Issue Presented

You ask what effect, if any, the U.S. Supreme Court's opinion in *Riley v. California*<sup>1</sup> has on the ability of a law enforcement officer to conduct a warrantless search of a driver's cell phone during a traffic stop when the officer believes the driver was operating a motor vehicle in violation of § 46.2-1078.1 of the *Code of Virginia*, which prohibits texting or e-mailing messaging via handheld device while driving.

## Background

In 2013, the Virginia General Assembly enacted a statute prohibiting, as a primary offense, a driver from using a handheld device to communicate via text message or email while operating a moving motor vehicle on the highways of the Commonwealth.<sup>2</sup> Specifically, a driver is prohibited from "manually enter[ing] multiple letters or text in the device as a means of communicating with another person" or "read[ing] any email or text message transmitted to the device or stored within the device," with the exception of a name or number stored on the device or caller identification information.<sup>3</sup>

The case you reference, *Riley*, involved two separate cases where officers arrested defendants on firearms and drug distribution charges and searched their cell phones incident to their arrest in order to find further evidence of the crimes.<sup>4</sup> The officers discovered evidence on the phones that subsequently was used in the defendants' trials, which resulted in convictions of the offenses.<sup>5</sup> The U.S. Supreme Court specifically addressed whether a law enforcement officer "may, without a warrant, search digital

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<sup>1</sup> *Riley v. California*, 134 S. Ct. 2473 (2014).

<sup>2</sup> See 2013 Va. Acts cc. 752, 790.

<sup>3</sup> VA. CODE ANN. § 46.2-1078.1(A)(1)-(2) (2014).

<sup>4</sup> *Id.* at 2480-82.

<sup>5</sup> *Id.*

information on a cell phone seized from an individual who has been arrested.”<sup>6</sup> In a unanimous decision, the Court held that “a warrant is generally required before such a search, even when a cell phone is seized incident to arrest”<sup>7</sup> and thus reversed the conviction of one defendant and upheld the lower appellate court’s reversal of the other.

### **Applicable Law and Discussion**

The Fourth Amendment to the United States Constitution provides the following protections against unlawful search and seizure:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants 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.

For Fourth Amendment protections to attach, a person must have a reasonable expectation of privacy in the property that is to be searched.<sup>8</sup> Because a person clearly has a reasonable expectation of privacy in the data contained on his cell phone,<sup>9</sup> it is protected from unreasonable searches.

In evaluating the validity of particular searches, the Supreme Court of the United States has determined that “the ultimate touchstone of the Fourth Amendment is ‘reasonableness.’”<sup>10</sup> As the Court articulated in *Riley*, its

cases have determined that “[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant.” Such a warrant ensures that the inferences to support a search are “drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.” In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement.<sup>11</sup>

Although the Supreme Court long has recognized a search conducted incident to lawful arrest as an exception to the warrant requirement,<sup>12</sup> determining the scope of the exception requires “‘assessing on the one hand, the degree to which [a search] intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of governmental interests.’”<sup>13</sup>

In evaluating the warrantless cell phone searches before it, the *Riley* Court contrasted the search of data contained on an individual’s cell phone from the traditional searches of physical items the Court

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<sup>6</sup> *Riley*, 134 S. Ct. at 2480.

<sup>7</sup> *Id.* at 2493.

<sup>8</sup> *See* *United States v. Jones*, 132 S. Ct. 945, 950 (2012) (citing *Katz v. United States*, 389 U.S. 347, 351 (1967) (Fourth Amendment violation occurs when government official violates a person’s reasonable expectation of privacy)).

<sup>9</sup> *See Riley*, 134 S. Ct. at 2488-89 (“Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of cigarette pack, a wallet, or a purse.”).

<sup>10</sup> *Id.* at 2482 (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)) (internal quotation marks omitted).

<sup>11</sup> *Id.* (internal citations omitted).

<sup>12</sup> *Id.* at 2482-83.

<sup>13</sup> *Id.* at 2484 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

typically considers.<sup>14</sup> With respect to privacy concerns, the Court noted that, in contrast to other physical objects, by virtue of the vast amounts of information modern cell phones can hold, a person's entire life may be contained within his phone's digital content<sup>15</sup> and, therefore, a search of the latter constitutes an invasion of privacy that may exceed even "the most exhaustive search" of one's house.<sup>16</sup> With respect to governmental interests, the Court found that, while a law enforcement officer is free to conduct a physical search of a cell phone to ensure that it cannot be used as a weapon, a more extensive search of the data stored on the phone is unnecessary to ensure officer safety because "data on the phone can endanger no one."<sup>17</sup> Similarly, the Court found that the need to preserve evidence is insufficient to justify a data search when compared to the heightened privacy concerns, for "once law enforcement officers have secured a cell phone, there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone."<sup>18</sup>

In sum, the Court held that the traditional concerns underlying the warrant exception for searching an arrestee and the area within his immediate control – officer safety and evidence preservation – do not exist in the context of cell phones so as to justify a blanket rule allowing for their warrantless search,<sup>19</sup> and therefore, the Court instead established a rule prohibiting the warrantless search of a cell phone incident to arrest absent some other case-specific exception to the warrant requirement.<sup>20</sup>

Your inquiry focuses on what effect, if any, this general prohibition against the warrantless searches of cell phones has on a law enforcement officer's ability to search a handheld device of a driver the officer believes is operating a motor vehicle in violation of § 46.2-1078.1. Specifically, you ask whether *Riley* prohibits an officer who has stopped a driver under a suspicion of texting while driving from conducting a warrantless search of the driver's cell phone for evidence of the driver's text messaging activity. The scenario you present differs slightly from those considered in *Riley*: while *Riley* involved searches incident to arrest, your fact pattern concerns traffic stops made without a resulting arrest.

Justification for a warrantless search incident to arrest is based, in part, on the reduced privacy interest of the defendant once he has been arrested.<sup>21</sup> As a general rule, an officer may stop a car based simply on a reasonable and articulable suspicion that a crime has occurred,<sup>22</sup> but an arrest requires probable cause. Thus, for traffic stops where the driver has not been arrested, his privacy interests remain

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<sup>14</sup> See *id.* at 2484-85, 2488-91.

<sup>15</sup> *Id.* at 2489-91

<sup>16</sup> *Id.* at 2491.

<sup>17</sup> *Id.* at 2485.

<sup>18</sup> *Id.* at 2486. With respect to other potential tampering issues, the Court suggested that officers could disconnect the phone from its cellular network by turning it off, removing the battery, or placing the phone in a device, typically known as a Faraday bag, that isolates it from radio waves, thus providing him with time to obtain a search warrant before searching the phone. *Id.* at 2487-88.

<sup>19</sup> *Id.* at 2484-85. In weighing the competing interests, *Riley* also specifically rejects the contention that an officer may limit his search to only that area of the cell phone where he believes evidence of the crime may be located, such as, in the case presented, searching only the text messages of the individual. *Id.* at 2492. The Court reasoned that an officer cannot be sure of what evidence will be found where on a cell phone. *Id.*

<sup>20</sup> *Id.* at 2495 ("Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple – get a warrant.").

<sup>21</sup> *Id.* at 2488.

<sup>22</sup> See *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

fully intact, and the need for a warrant to search the contents of his phone is greater. The Supreme Court has “restricted broad searches resulting from minor crimes such as traffic violations,”<sup>23</sup> and, as the *Riley* Court notes, searches of vehicles and the person are not justified for mere citations issued during traffic stops.<sup>24</sup> It follows, then, that if the Fourth Amendment prohibits a warrantless search of a cell phone upon arrest when there is a lower expectation of privacy, it also must proscribe a warrantless search initiated from a traffic stop or otherwise based on the lower standard of reasonable suspicion.

Moreover, in refusing to extend a general warrant exception to cell phone data searches, the Court contemplated a situation similar to the one you propose – an officer conducting a warrantless search of a cell phone for evidence of an individual’s texting activity during an investigation of reckless driving.<sup>25</sup> Although the Court previously had recognized a separate, independent basis for permitting a warrantless search of a vehicle’s passenger compartment upon a reasonable belief that evidence of the crime of arrest was present,<sup>26</sup> the *Riley* Court clarified that this alternative exception is limited to the context of vehicle searches<sup>27</sup> and expressly declined to apply the precedent to officers looking for evidence on cell phones. The Court determined that such an extension would run afoul of the Fourth Amendment’s privacy protections, for warrantless searches of cell phones “would in effect give ‘police officers unbridled discretion to rummage at will among a person’s private effects’” and provide access to a “virtually unlimited” amount of “potential pertinent information.”<sup>28</sup>

I therefore conclude, based on the rationale relied upon in *Riley*, that the Constitution of the United States prohibits a warrantless search of a cell phone, or any other handheld device capable of sending and receiving text and email communications, initiated from a traffic stop.

Nevertheless, I note that a law enforcement officer retains several options to further investigate whether a driver was in violation of § 46.2-1078.1. First, the officer may attempt to obtain the driver’s consent to a search of the handheld device.<sup>29</sup> Second, the officer can seize the driver’s handheld device to secure it in anticipation of obtaining a search warrant.<sup>30</sup> Finally, as noted in *Riley*, an officer may be able

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<sup>23</sup> *Riley*, 134 S. Ct. at 2492.

<sup>24</sup> *Id.* at 2485 (citing *Knowles v. Iowa*, 525 U.S. 113, 119 (1998)).

<sup>25</sup> *Id.* at 2492.

<sup>26</sup> *Id.* at 2485 (explaining part of the Court’s prior holding in *Arizona v. Gant*, 556 U.S. 332 (2009)).

<sup>27</sup> *Id.* at 2485, 2492.

<sup>28</sup> *Id.* at 2492 (quoting *Gant*, 556 U.S. at 345). The Court admonished: “It would be a particularly inexperienced or unimaginative law enforcement officer who could not come up with several reasons to suppose evidence of just about any crime could be found on a cell phone.” *Id.*

<sup>29</sup> *See Katz*, 389 U.S. at 358 n.22 (“A search to which an individual consents meets Fourth Amendment requirements.”). As long as the consent is freely and voluntarily given, the resulting search will be valid. *See Schneekloth v. Bustamonte*, 412 U.S. 218, 228 (1973).

<sup>30</sup> *See Riley*, 134 S. Ct. at 2488. The warrantless seizure also must satisfy constitutional principles. A reviewing court will consider several factors to determine whether such a seizure comports with Fourth Amendment requirements. *See Illinois v. McArthur*, 531 U.S. 326, 332 (2001). These factors include whether the officer has probable cause to believe the driver’s handheld device contains evidence of the crime being investigated; whether the officer has a reasonable fear that such evidence would be destroyed or tampered with but for the warrantless seizure; whether the officer balances the Commonwealth’s interest in preserving evidence with the privacy rights of the driver by, for instance, merely seizing the handheld device without detaining the driver; and whether the officer employs the warrantless seizure for limited period of time. *Id.* Assuming the officer’s investigation can satisfy these four requirements, his warrantless seizure of a driver’s handheld device in anticipation of obtaining a search warrant would alleviate any Fourth Amendment concerns.

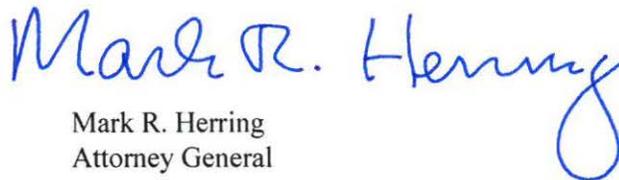
to rely on a case-specific exception to the warrant requirement based on exigent circumstances. Such an exception may apply in an “extreme” case that would allow officers encountering a true emergency to conduct a warrantless search of a cell phone.<sup>31</sup> Although these exceptions are available outside the context of a search incident to arrest,<sup>32</sup> the exigent circumstances exception applies only in situations in which “there is a compelling need for official action and no time to secure a warrant.”<sup>33</sup>

### Conclusion

Accordingly, it is my opinion that, under *Riley*, a law enforcement officer’s warrantless search of a driver’s cell phone or other handheld device in order to determine whether the driver had been operating a motor vehicle in violation of § 46.2-1078.1 of the *Code of Virginia* would violate the Fourth Amendment of the U.S. Constitution.

With kindest regards, I am

Very truly yours,



Mark R. Herring  
Attorney General

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<sup>31</sup> *Riley*, 134 S. Ct. at 2494. As examples, the *Riley* Court suggested scenarios involving an imminent need to prevent the destruction of evidence, to pursue a fleeing suspect, or to assist a person who is seriously injured or threatened by imminent injury. *Id.* The Court more specifically mentioned that the exception would apply in circumstances where a suspect is texting an accomplice who may be preparing to detonate an explosive or where a child abductor may have information about the child’s whereabouts on his cellular telephone. *Id.*

<sup>32</sup> See *Kentucky v. King*, 131 S. Ct. 1849 (2011) (warrantless search justified to protect person from injury); *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (warrantless search justified to prevent imminent destruction of evidence and pursue fleeing suspect).

<sup>33</sup> *Missouri v. McNeely*, 133 S. Ct. 1552, 1559 (2013) (quoting *Michigan v. Tyler*, 436 U.S. 499, 509 (1978)). Whether exigent circumstances would exist in a particular case is a fact-specific determination beyond the scope of this Opinion.