WITH *LOVE*, TEXAS PROTECTS YOUR TEXT MESSAGES

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I. INTRODUCTION

On December 7, 2016, the Texas Court of Criminal Appeals reversed a murder conviction against Albert Leslie Love Jr. because the State violated his Fourth Amendment rights.[1] The day after the reversal, the headlines of newspapers stated, "Text messages save Albert Leslie Love Jr. from death row."[2] Text messages played an important role in the State's case against Love for the murders of Keenan Hubert and Tyus Sneed.[3] The State's theory behind Love's motivation for the crime was revenge and gang-related enmity.[4] In order to prove Love's motivation at the trial, the State introduced thirty-seven pages of Love's text messages that the State gathered without a warrant based on probable cause to search.[5] The Texas Court of Criminal Appeals reversed Love's conviction because it held that the State violated his Fourth Amendment rights by not using a warrant based on probable cause to obtain his text messages from his cell phone provider.[6]

Love decided an important issue for Texas that still goes unaddressed by the Supreme Court of the United States and most states: whether a warrant based on probable cause is required for the State to obtain an individual's text

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[1] Love v. State, No. AP-77,024, 2016 Tex. Crim. App. LEXIS 1445, at *1 (Tex. Crim. App. Dec. 7, 2016).

[2] *Text Messages Save Albert Leslie Love Jr from Death Row*, NEWS.COM.AU (Dec. 8, 2016) http://www.news.com.au/world/north-america/text-messages-save-albert-leslie-love-jr-from-death-row/news-story/cfd8b157b9d0dcc7ef5a4ee53a341f27.

[3] *Love*, 2016 Tex. Crim. App. LEXIS 1445, at *33.

[4] *Id.* at *3.

[5] *Id.* at *4.

[6] *Id.* at *36.

messages.[7] This issue covers several layers of the law and modern technology. Today, American smart phone users send and receive five times as many text messages compared to the number of phone calls.[8] Do Americans expect the Constitution to protect the information they convey through this commonly used and convenient means of communication?

This article is about how the Texas Court of Criminal Appeals reached its decision in *Love* and the history of the Fourth Amendment that contributed to that conclusion. Part I of this article will address the judicial precedent surrounding the Fourth Amendment, both in federal courts and Texas state courts. It will address to what extent the U.S. Supreme Court has limited the search of digital content without a warrant. This will be followed by a look into *State v. Granville*, showing how Texas has recently dealt with the search of digital contents on an individual's phone. Part II will address the specific privacy interest issues in *Love* and Texas's reasoning for expanding Fourth Amendment protections of digital contents. *Love* has effectively started the expansion of protecting digital contents from governmental intrusion, as storing personal information in the digital format has become a convenient, and often necessary, means of functioning in today's world.

II. THE FOURTH AMENDMENT AND DIGITAL CONTENTS

A. History of the Fourth Amendment

Approved by Congress in 1789,[9] the text of the Fourth Amendment states:

> 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.[10]

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[7] *Id.* at *16.

[8] Corilyn Shropshire, *Americans Prefer Texting to Talking, Report Says*, CHICAGO TRIBUNE (Mar. 26, 2015), http://www.chicagotribune.com/business/ct-americans-texting-00327-biz-20150326-story.html.

[9] Congress approved the Fourth Amendment in response to the frustrations of "England's overuse of customs searches in prerevolutionary America, as well as concern over freedom of press and association." Lauren Elena Smith, *Jonesing for a Test: Fourth Amendment Privacy in the Wake of* United States v. Jones, 28 BERKELEY TECH. L.J. 1003, 1006 (2013).

[10] U.S. CONST. amend. IV (emphasis added).

The goal of this section is to examine how the Fourth Amendment transitioned from protecting only certain places (such as homes) to protecting digital contents of a cell phone, and to what extent.

First, Fourth Amendment rights are implicated when there is a search or a seizure, as the text of the Amendment suggests.[11] The difficulty lies in determining what actions fall under "search" and what actions do not. This matter raised frequent litigation after *Wolf v. Colorado*, which held that the Fourth Amendment applies to the states, and it still continues today.[12] Generally, courts agree that the Fourth Amendment protects people from searches that penetrate into a privacy interest that demands protection.[13]

Second, the Fourth Amendment protects certain privacy interests from unreasonable searches or seizures.[14] The line between reasonable and unreasonable is thin, and a heavily litigated topic.[15] The text of the Fourth Amendment is clear that a search conducted pursuant to a warrant based on probable cause is reasonable, and thus constitutional.[16] A warrant is typically obtained through a judge, after proving that there is sufficient evidence that indicates probable cause to suspect that an individual has committed a crime.[17]

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[11] *See id.*

[12] 338 U.S. 25, 33 (1948); *see Search and Seizure – The Fourth Amendment: Origins, Texts, and History*, LAW.JRANK.ORG, (last visited Dec. 1, 2017), http://law.jrank.org/pages/2014/Search-Seizure-Fourth-Amendment-origins-text-history.html. At its inception, the Fourth Amendment was limited to the federal government. *Id.* The Fourth Amendment applied to the states after *Wolf*, in which the Supreme Court held that the Fourth Amendment was part of the liberty protected by the Fourteenth Amendment's Due Process Clause against infringement by state and local police. *Id.* This brought massive changes to police functions at the local level, yet the Fourth Amendment still only applied to what were viewed as characteristically private places. *Id.*

[13] *E.g.*, *Wolf*, 338 U.S. at 33.

[14] U.S. CONST. amend. IV.

[15] Kimmelman v. Morrison, 477 U.S. 365, 373 (1986); *see* United States v. Leon, 468 U.S. 897, 913 (1984).

[16] *See Search and Seizure – The Fourth Amendment: Origins, Texts, and History*, *supra* note 12.

[17] Beyond a warrant, there are certain exceptions where a search or seizure is also considered reasonable. One of the most widely used exceptions lies within *Terry v. Ohio*. 392 U.S. 1, 29 (1968). Under *Terry*, a policeman may search an individual when there is a confrontation on the streets and there is no time to retrieve a warrant. *Id.* However, the Terry Doctrine also limits the extent of the search that can take place in such confrontations. *Id.*

1. When Are Fourth Amendment Rights Implicated?

As stated earlier, an individual's Fourth Amendment rights are implicated when there is a search or seizure that penetrates into a privacy interest that demands protection. To understand the evolution of Fourth Amendment protections, it is important to start with *Olmstead v. United States*.[18] In *Olmstead*, the U.S. Supreme Court held that there must be a physical intrusion for there to be a violation of privacy rights protected by the Fourth Amendment.[19] This was known as the Trespass Doctrine, in which Fourth Amendment protections translated into protection of an area, rather than protection of an individual.[20] Almost forty years later, the Court faced the question of the Trespass Doctrine's validity in the landmark decision of *Katz v. United States*.[21]

In *Katz*, the State relied on evidence from the defendant's telephone conversations to convict him of transmitting wagering information over the telephone.[22] The Federal Bureau of Investigation acquired the evidence by attaching an electronic device outside of the public telephone booth from which the defendant made the phone calls.[23] The Ninth Circuit affirmed the admission of this evidence at trial as not against the defendant's Fourth Amendment rights because "there was no physical entrance into the area occupied by" the defendant.[24] The lower courts effectively applied the Trespass Doctrine from *Olmstead* to allow the use of the evidence acquired through the listening device planted outside of the phone booth until the question reached the U.S. Supreme Court.[25]

The issue brought in front of the Court was whether the telephone booth the calls were made from was a constitutionally protected area, with the defendant arguing that it was and the State arguing that it was not.[26] The Court in *Katz* disregarded this issue completely, as it believed that it was "misleading" to assert that the Fourth Amendment protected an "area"

[18] 277 U.S. 438 (1928).

[19] *Id.* at 466.

[20] Note, *From Private Places to Personal Privacy: A Post-*Katz *Study of Fourth Amendment Protection*, 43 N.Y.U. L. REV. 968, 972 (1968).

[21] 389 U.S. 347, 350 (1967).

[22] *Id.* at 348.

[23] *Id.*

[24] *Id.* at 348–49.

[25] *Id.* at 348; *see, e.g.*, United States v. Borgese, 235 F. Supp. 286, 289, 293–95 (S.D.N.Y. 1964).

[26] *Katz*, 389 U.S. at 351.

instead of a person.[27] The Court asserted that "the Fourth Amendment protects people, not places."[28] In light of this clarification, the Court ruled that the defendant was protected by the Fourth Amendment when he stepped inside the phone booth and closed the door behind him in order to exclude the public from his conversations.[29] The Court stated that the Trespass Doctrine, which required physical intrusion to trigger Fourth Amendment protections, "can no longer be regarded as controlling."[30] Modern technology's ability to intercept an individual's surroundings without physical intrusion made the application of the Trespass Doctrine inconvenient and often absurd, as it was more about protecting an area rather than a person.[31]

Justice Harlan's concurring opinion in *Katz* went even further than the majority by elaborating on the test that is used to determine whether an individual has a privacy interest that demands protection by the Fourth Amendment.[32] This test that "emerged from prior decisions," has a twofold requirement.[33] First, that the person exhibit "an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable."[34] A person who voluntarily relinquishes their personal information does not have a subjective expectation of privacy.[35] The expectation must also be reasonable in light of the circumstance the individual is in.[36]

Two narcotics dealers making an illegal transaction in a desolate corner of a park in the middle of the night have an expectation of privacy, as in they expect their activities to be hidden from the public eye.[37] But their activities will most likely not fulfill the second requirement to trigger Fourth Amendment protections because society is not willing to recognize the expectation as reasonable in light of the circumstances.[38] Even though they

[27] *Id.*

[28] *Id.*

[29] *Id.* at 352.

[30] *Id.* at 353.

[31] Note, *supra* note 20, at 973.

[32] 389 U.S. at 361 (Harlan, J., concurring); Note, *supra* note 20, at 982.

[33] *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

[34] *Id.*

[35] Note, *supra* note 20, at 982–83.

[36] *Id.* at 983.

[37] *Id.*

[38] *Id.*

are acting in a seemingly isolated area, a patrolman may illuminate their spot with a flashlight and discover their activities.[39] On the other hand, two individuals who are whispering to each other while in a public place also have a subjective expectation of privacy because their conversation is not meant to naturally reach the public.[40] If their conversation is picked up through a pre-planted microphone, society is more likely to recognize that their expectation of privacy was reasonable and shield that conversation with Fourth Amendment protections.[41] Even though *Katz* explicitly overruled the idea that privacy interests are attached to a certain place or area, the twofold analysis can still lead to the idea that what individuals do inside the privacy of four walls is protected because of the privacy that is attached to the individual, not the place.[42] Such privacy is more often than not recognized by society as reasonable, and thus it implicates Fourth Amendment protections.

In *Smith v. Maryland*, the U.S. Supreme Court used the twofold analysis from *Katz* to assert that an individual does not have a reasonable expectation of privacy on information revealed to a third party.[43] This is known as the Third Party Doctrine.[44] In *Smith*, the police requested the defendant's phone company to install a pen register at the defendant's home and office, which would pick up the numbers the defendant dialed.[45] The police arrested the defendant because the pen register disclosed that he was making calls to Patricia McDonough, a woman who was recently robbed and receiving threatening calls from the robber.[46] The police did not acquire a warrant to request the phone company to install the pen register, but relied on the information revealed by the pen register to acquire a warrant to search the defendant's home.[47]

Using the twofold analysis from *Katz*, the Court in *Smith* stated that the defendant did not have a legitimate expectation of privacy in the numbers he dialed because he was aware that the phone company would be using those

[39] *Id.*

[40] *Id.* at 985.

[41] *Id.*

[42] *Id.* at 984.

[43] 442 U.S. 735, 745–46 (1979).

[44] United States v. Graham, 824 F.3d 421, 425 (4th Cir. 2016) (citing *Smith*, 442 U.S. at 743–44).

[45] 442 U.S. at 737.

[46] *Id.*

[47] *Id.*

numbers to connect his phone calls.[48] The Court drew a distinction between pen registers and listening devices, the surveillance method used in *Katz*.[49] Whereas pen registers only pick up the numbers dialed, listening devices actually pick up contents of the communication.[50] The numbers dialed are the "means of establishing communication," but not the communication itself.[51] Furthermore, the Court reasoned that phone companies regularly use pen registers "for the purpose of checking billing operations, detecting fraud and preventing violations of law."[52] In short, the Court believed that the defendant did not have a subjective expectation of privacy in the numbers he dialed because he willingly conveyed the non-content-based information to the phone company.[53]

The Court in *Smith* also reasoned that the defendant's expectation of privacy in the numbers he dialed is not one that the society is willing to recognize as reasonable.[54] The Court justified this by reaching back to its previous decisions, in which it had consistently held that there is no reasonable expectation of privacy in information voluntarily conveyed to a third party.[55] In a dissenting opinion to *Smith*, Justice Marshall questioned this approach to the Third Party Doctrine because individuals who convey information to third parties, like phone companies, realistically have no other alternative.[56] When individuals voluntarily turn over information to a third party, they are then assuming "the risk of disclosure to the government."[57] But the majority in *Smith* did not consider this factor in deciding the case.[58]

Similar to information conveyed to a third party, information open to public observation is not subject to protection by the Fourth Amendment because an expectation of privacy in such a circumstance is not reasonable under the twofold analysis of *Katz*.[59] But in *Bond v. United States*, the U.S. Supreme Court expanded Fourth Amendment protections by limiting the use

[48] *Id.* at 742.

[49] *Id.* at 741.

[50] *Id.*

[51] *Id.*

[52] *Id.* at 742 (quoting United States. v. N.Y. Tel. Co., 434 U.S. 159, 174–75 (1977)).

[53] *Id.*

[54] *Id.* at 745.

[55] *Id.* at 743–44.

[56] *Id.* at 750 (Marshall, J., dissenting).

[57] *Id.* at 749.

[58] *See id.* at 736–46 (majority opinion).

[59] 389 U.S. 347, 351 (1967).

of public exposure as a reason to nullify the expectation of privacy.[60] In *Bond*, the defendant was traveling on a Greyhound bus when a border patrol agent squeezed his luggage to discover a brick-like object, to later discover through a search based on probable cause that it was a block of methamphetamine.[61]

Using the twofold analysis of *Katz*, the Court in *Bond* held that the defendant had an actual expectation of privacy in the searched bag because he chose to use an opaque bag and placed it right above his head on the bus.[62] The central issue in the case was whether society was willing to accept his expectation of privacy as reasonable as individuals should expect their bags to be handled by many when placed among other bags in a public transport.[63] The Court distinguished between bags being handled in the course of travel and bags being felt in an exploratory manner, the latter of which society does recognize as a reasonable expectation of privacy.[64] The Court held that the defendant was protected from physically invasive inspections of his luggage while traveling on public transportation.[65] *Bond* demonstrated that people may shed a certain level of their expectation of privacy while in the presence of others, but only to the extent necessary to function in society.[66] The government cannot use public exposure as a justification for excessive intrusion.

Next, in *United States v. Jones*, the government once again tried to use public exposure as a justification for conducting a four-week long surveillance of the defendant's whereabouts by attaching a GPS unit to his vehicle.[67] Straying away from the twofold analysis of *Katz* to determine whether there was a reasonable expectation of privacy, the Court relied on the Trespass Doctrine to hold that the government violated the defendant's Fourth Amendment protections by physically intruding onto his vehicle to attach a monitoring device.[68] In a concurring opinion, Justice Sotomayor reached the same conclusion as the majority, but criticized the use of the Trespass Doctrine.[69] She criticized the use of the Trespass Doctrine because

[60] *See* 529 U.S. 334, 338–39 (2000).

[61] *Id.* at 336.

[62] *Id.* at 338.

[63] *Id.*

[64] *Id.* at 338–39.

[65] *Id.* at 339.

[66] *See id.* at 338–39.

[67] 565 U.S. 400, 406 (2012).

[68] *Id.* at 406–07.

[69] *Id.* at 413–14 (Sotomayor, J., concurring).

today's technology does not require law enforcement officers to physically intrude upon an individual's property to conduct the same type of surveillance that took place in *Jones*.[70] Thus, analyzing this case using the twofold requirements of a reasonable expectation of privacy from *Katz* would have left a better precedent for the courts to follow because it could be applied irrespective of the presence of physical intrusion.

By avoiding the twofold analysis of *Katz* and only addressing the Trespass Doctrine, the Court in *Jones* also avoided the question of exposure to the public or a third party, and how much of it should be protected. Justice Sotomayor was highly critical of the existing Third Party Doctrine because individuals do not expect their information to be made public when they provide it to banks or phone companies for the limited purpose of utilizing their services.[71] Voluntary information conveyed to a third party can be categorized in two groups: information passively exposed to the public's observance, and information conveyed to a third party with the active knowledge that the third party will collect and use it.[72] Based on the current law, there is no reasonable expectation of privacy in either of those two types of information.[73] If the Court chose to address Justice Sotomayor's concerns, it would probably create an exception to the Third Party Doctrine where information revealed to a third party for the limited purpose of acquiring a service would still retain a reasonable privacy interest. This would greatly expand Fourth Amendment protections and would at least partially overrule the Court in *Smith*, which held that an individual has no reasonable expectation of privacy in numbers conveyed to his phone company.[74] According to Justice Sotomayor's opinion, this would be a desirable development as "people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."[75]

2. When is a Search Reasonable?

Based on the cases about the implication of Fourth Amendment protections, the issue of whether a reasonable expectation of privacy exists

[70] *Id.* at 417.

[71] *Id.* at 418 (citing Smith v. Maryland., 442 U.S. 735, 749 (1979) (Marshall, J., dissenting)).

[72] Smith, *supra* note 9, at 1009.

[73] *Id.* at 1011 (quoting United States v. Miller, 425 U.S. 435, 442 (1976)).

[74] *Smith*, 442 U.S. at 745–46.

[75] *Jones*, 565 U.S. at 417 (Sotomayor, J., concurring).

turns a great deal on its exposure to the public or a third party.[76] As demonstrated in cases such as *Jones*, judges have started to identify information that may be exposed yet still be protected by the Fourth Amendment because an individual should be able to move in society without shedding their constitutional protections at every interaction with another individual or entity.[77]

After determining that a search implicates the Fourth Amendment, courts must then determine whether the search is reasonable.[78] This step ensures that an individual's Fourth Amendment rights were not violated. The simplest and most common way to ensure that a search is reasonable is by the law enforcement officer obtaining a warrant based on probable cause before conducting the search.[79] The text of the Fourth Amendment itself describes a search based on a warrant as constitutional.[80]

There are certain circumstances where law enforcement officers have to interact with people without a warrant, but there are limitations to how far those interactions can go before becoming an unreasonable search. *Riley v. California* is a consolidated case of two defendants who were subjects to such unreasonable searches.[81] The Court held that the searches conducted in *Riley* implicated the Fourth Amendment, but the issue turned on whether those searches were reasonable in light of the Fourth Amendment.[82]

The first defendant in *Riley* was stopped by a police officer in a routine traffic stop and arrested.[83] The arresting officer went on to search the defendant's phone in the same occurrence and suspected gang-related activities based on the phone's contents.[84] A detective specializing in gangs further examined the phone, also without a warrant based on probable cause.[85] On the other hand, the second defendant was arrested after a police

[76] *See id.* (citing *Smith*, 442 U.S. at 743; *Miller*, 425 U.S. at 443).

[77] *See* Stephen E. Henderson, *Learning from All Fifty States: How to Apply the Fourth Amendment and its State Analogs to Protect Third Party Information from Unreasonable Search*, 55 CATH. U. L. REV. 373, 376 (2006).

[78] *See* Terry v. Ohio, 392 U.S. 1, 16, 19–20 (1968).

[79] *See* Riley v. California, 134 S. Ct. 2473, 2482 (2014).

[80] *See* U.S. CONST. amend. IV.

[81] 134 S. Ct. at 2480.

[82] *Id.* at 2482.

[83] *Id.* at 2480.

[84] *Id.* This was a search incident to arrest, limited by the Terry Doctrine discussed in *supra* note 17.

[85] *Id.*

officer observed him conducting an apparent drug sale.[86] After taking him into custody, the police officer searched through the defendant's cell phone and found a phone number labeled "my house."[87] The officer determined the location of this number and retrieved a warrant to search the location.[88] After discovering drugs and ammunition at the location, the defendant was charged with drugs and firearms offenses.[89]

The question in front of the *Riley* Court was whether the trial court should have excluded all the evidence that was gathered as a result of the initial warrantless searches.[90] Favoring the expansion of Fourth Amendment protections in the digital context, the Court held that police officers generally may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested.[91]

It is worth noting that the holding in *Riley* only applies to the narrow circumstance of a search incident to an arrest.[92] A search incident to arrest, without probable cause, is a necessary means to ensure the safety of an officer and prevent evidence destruction.[93] Because of the narrow objective of the search, the area of the search is also limited to the arrestee's immediate control.[94] The Court did not find that the search of digital information incident to an arrest is a necessary means to further the governmental interests elaborated in *Chimel v. California*.[95] Even though *Riley* greatly expanded the protection of an individual's digital contents, it did not address the vast possibility of warrantless searches of digital content that are not incident to an arrest. But the Court in *Riley* emphasized that "[t]he storage capacity of cell phones has several interrelated consequences for privacy."[96] The Court expressed concerns about how much unnecessary and private information law enforcement officers can potentially learn through a search of a cell phone.[97]

[86] *Id.* at 2481.

[87] *Id.*

[88] *Id.*

[89] *Id.* at 2481–82.

[90] *See id.* at 2480.

[91] *Id.* at 2485.

[92] *See id.* at 2493.

[93] *Id.* at 2483 (citing Chimel v. California, 395 U.S. 752, 762–63 (1969)).

[94] *Id.*

[95] *Id.* at 2484–85; *see also Chimel*, 395 U.S. at 762–63.

[96] 134 S. Ct. at 2489.

[97] *See id.*

B. Texas Expands Fourth Amendment Protections for Digital Contents

In *State v. Granville*, the Texas Court of Criminal Appeals held that the defendant had a reasonable expectation of privacy in the contents of his cell phone that was temporarily stored in a jail property room following his arrest.[98] With this holding, the *Granville* court distinguished the contents of a cell phone from a pair of pants or a bag of groceries, in which the defendant would lose his privacy interest once it was submitted to the jail property room.[99] This indicated an approach towards digital content that is analogous to the one taken in *Riley*. The Court in *Riley* emphasized the importance of the storage capacity of a cell phone, and the *Granville* court also treated such digital content differently, as it has the capability to reveal much more about an individual than other physical effects.[100] The *Granville* court pointed out that when the Fourth Amendment was adopted in the eighteenth century, the term "papers and effects" had a different connotation.[101] Instead of physical effects, people now store their most private information in digital formats, and such information demands Fourth Amendment protections just as physical effects do.[102]

A cell phone user may lose his expectation of privacy in certain "circumstances, such as if he abandons his cell phone, lends it to others to use, or gives his consent to its search."[103] However, an individual required to turn over their cell phone incident to an arrest does not fall into any of those three categories, nor does the circumstance fall under a search incident to an arrest.[104] When items are seized from a defendant as an incident to arrest, Texas has previously held that the defendant has a higher burden to prove that he or she has retained a privacy interest in that item.[105] Based on the court's approach in *Granville*, contents of a phone are so private that it fulfills this burden despite the phone being in the custody of the law enforcement. Consequently, law enforcement officers may not dive into an evidence-

[98] 423 S.W.3d 399, 417 (Tex. Crim. App. 2014).

[99] *Id.* at 402, 417.

[100] *Compare* 134 S. Ct. at 2489, *with* 423 S.W.3d at 417.

[101] 423 S.W.3d at 405; *see also* U.S. CONST. amend. IV.

[102] *See Granville*, 423 S.W.3d at 405.

[103] *Id.* at 409 (citing United States v. Powell, 732 F.3d 361, 374–75 (5th Cir. 2013); United States v. Lopez-Cruz, 730 F.3d 803, 808–11 (9th Cir. 2013)).

[104] *Id.* at 409, 409–10 n.30.

[105] *See* Oles v. State, 993 S.W.2d 103, 110 (Tex. Crim. App. 1999).

gathering search merely because they are in possession of an arrestee or detainee's cell phone.[106]

Granville was decided while *Riley* was pending on a slightly different, but similar issue.[107] Both of the rulings came out within months of each other, and the opinion in *Granville* falls in line with what the U.S. Supreme Court decided in *Riley*. While *Riley* held that law enforcement officers may not search the digital content of an individual's cell phone in a search incident to arrest, *Granville* went slightly further and held that law enforcement officers may not search a cell phone that is in the jail property room.[108] Both the courts took a similar approach in protecting digital content in a circumstance where an individual is in some form of police custody. The courts reasoned that a phone's digital content today may reveal more about an individual than is really relevant for the investigation.[109] The individual preserves their privacy interest in the content of their cell phone until a warrant is issued or some other exigent circumstance justifies a search into the digital content of their cell phone.[110] Because of the sensitive nature of a phone's content, the exigent circumstance justifying a warrantless search of the phone should be very narrow and specific.[111]

III. *LOVE V. STATE*

The Texas Court of Criminal Appeals decided *Love v. State* on December 7, 2016, giving an opinion highly indicative of the approach the law will take on the constitutional protection of digital contents in the future.[112]

On March 28, 2011, Keenan Hubert, Tyus Sneed, Marion Bible, and Deontrae Majors were attacked by a rain of bullets while sitting in Majors' car.[113] While Bible and Majors escaped the car alive, Hubert and Sneed were killed, both shot with eight bullets each.[114] Testimony given at the trial described a heavy-set man carrying a long gun being present at the location

[106] *Granville*, 423 S.W.3d at 412.

[107] *Id.* at 409 n.30.

[108] *Compare* Riley v. California, 134 S. Ct. 2473, 2485 (2014), *with Granville*, 423 S.W.3d at 417.

[109] *Compare Riley*, 134 S. Ct. at 2489, *with Granville*, 423 S.W.3d at 415.

[110] *Compare Riley*, 134 S. Ct. at 2493, *with Granville*, 423 S.W.3d at 417.

[111] *Compare Riley*, 134 S. Ct. at 2492, 2494, *with Granville*, 423 S.W.3d at 415–417.

[112] *See* No. AP-77,024, 2016 Tex. Crim. App. LEXIS 1445 (Tex. Crim. App. Dec. 7, 2016).

[113] *Id.* at *2.

[114] *Id.* at *2–3.

around the time of the incident.[115] Love was described as heavy-set in 2011 according to further testimony.[116] Evidence also showed that Love was attempting to purchase an AK-47 in the weeks leading up to the murder, and that the attackers most likely used an AK-47.[117]

During Love's trial, the State sought to introduce Love's cell phone records, including approximately 1,600 text messages which were to serve as critical evidence against Love.[118] Love objected to the introduction of this evidence into the trial because the entirety of his cell phone contents "(including subscriber information, call logs, location information, and text messages)" were obtained from Metro PCS, Love's cell phone provider, without a warrant based on probable cause.[119] Having no precedent to require otherwise, the trial court allowed the evidence into the trial, leading to Love's conviction.[120]

A. Why the Love Court Expanded Fourth Amendment Protections in Texas

First, the *Love* court distinguished its case from *Smith v. Maryland*, where the defendant did not have a reasonable expectation of privacy in the numbers he dialed because he was voluntarily conveying non-content-based information to a third party.[121] The court agreed with *Smith* in that "records containing personal content . . . require more protection."[122] Both *Smith* and *Love* distinguished information sent to a third party into two different categories: content and non-content.[123] Numbers dialed on a phone to transmit to the phone company are non-content based information because they do not provide any information as to what the conversation between the two parties entails, and simply calling someone is not incriminating.[124] However, information that is conveyed to a third party that provides

[115] *Id.* at *3.
[116] *Id.*
[117] *Id.*
[118] *Id.* at *4.
[119] *Id.* at *4–6.
[120] *Id.* at *4.
[121] *Id.* at *7.
[122] *Id.* at *8.
[123] *Id.*
[124] *Id.* at *7–8.

"content" is such that it provides a look into the defendant's conversations and personal life.[125]

The text messages conveyed to the cell phone provider by Love are further distinguishable from the numbers dialed on a phone because a provider actually uses the numbers dialed to connect its customer to the desired phone number.[126] On the other hand, a cell phone provider has no use for text messages relayed through its services other than storing them in its servers.[127]

Love also saw an important analogy between text messages and emails.[128] In *Warshak*, the Sixth Circuit held that the government violated the defendant's Fourth Amendment rights by coercing its Internet Service Provider to hand over approximately 27,000 emails of the defendant.[129] Like text messages, emails are sent to the receiver after being transmitted through a third party, an Internet Service Provider, and all Internet Service Providers store a record of the emails sent and received through their servers.[130] *Warshak* stated, and *Love* agreed, that an email is similar to a piece of physical mail, which is handed to the postal service to be delivered to the receiver.[131] In such a conveyance, the intermediary or any intervening party does not have the right to open or distribute the content of the mail.[132] *Love* asserted that the content of text messages is similar, in that the sender has a reasonable expectation that the messages will not be arbitrarily handed over to the government without a warrant based on probable cause.[133] It is important to note from this case that third parties play a role in almost all conveyances in modern times. The importance of protecting a defendant's privacy interest comes into play when the government invokes the Third Party Doctrine to obtain that which the defendant expected to stay private.

Last, for the purpose of this article, it is important to draw an analogy between *Love* and *Granville*, both Texas cases that expanded Fourth Amendment protections of digital content. Both go beyond the issue in *Smith* and deal with disputes regarding the government's power to access a

[125] *Id.*

[126] *Id.* at *15–16.

[127] *Id.* at *9.

[128] *Id.* at *11.

[129] United States v. Warshak, 631 F.3d 266, 274 (6th Cir. 2010).

[130] *Love*, 2016 Tex. Crim. App. LEXIS 1445, at *10–11.

[131] *Id.*

[132] *Id.* at *10.

[133] *Id.* at *16.

defendant's cell phone.[134] Whereas *Smith* was dealing with non-content-based information, *Love* and *Granville* dealt with content-based information that a person usually expects to keep private.[135] In *Granville*, the court held that despite arrestees and detainees typically losing an expectation of privacy after their belongings are seized and stored in a jail property room, they do not lose that expectation in the contents of their cell phones.[136] Content-based information in a digital format is thus protected by the Fourth Amendment when an individual is under governmental custody, and *Love* took the protection of digital contents further by holding that such information that is stored by a third party is also granted the same protection.[137]

Finding that the text messages were obtained without a warrant, where a warrant was required, and that the text messages were improperly admitted at trial, the court in *Love* held that it "[could not] determine beyond a reasonable doubt that the text messages did not contribute to the jury's verdict at the guilt phase."[138] Since the error was not harmless, the court ordered a new trial.[139]

IV. CONCLUSION

Love pushes Texas in a positive direction in its approach to the use of digital content which an individual expects to keep private. The lower courts in *Love* demonstrated the previous approach to digital contents, where the State had to overcome much lower hurdles to obtain very personal information stored in digital formats. *Love* will enforce a uniform procedure all across Texas when it comes to obtaining an individual's digital content conveyed through text messages and will put a lesser burden on individuals who do not expect the content of their text message conversations to be handed over to the State without any evidence justifying probable cause.

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[134] *Id.* at *8–9.

[135] *Compare* Smith v. Maryland, 442 U.S. 735, 740 (1979), with *Love*, 2016 Tex. Crim. App. LEXIS 1445, at *7–8, and State v. Granville, 423 S.W.3d 399, 402 (Tex. Crim. App. 2014).

[136] 423 S.W.3d at 417.

[137] *Love*, 2016 Tex. Crim. App. LEXIS 1445, at *12–13, 16; *Granville*, 423 S.W.3d at 417.

[138] *Love*, 2016 Tex. Crim. App. LEXIS 1445, at *36. The *Love* court also stated that Texas Code of Criminal Procedure Article 38.23 did not apply to the exclusion of Love's text messages. *Id.* at *19. Article 38.23 provides a narrow good faith exception for the State, triggered when the government acts in objective good faith reliance on a warrant issued by a neutral magistrate based upon a probable cause. *Id.* Here, there was no warrant and no probable cause, so the trial court erred in not excluding the text messages. *Id.*

[139] *Id.* at *36.

Contrary to Texas, Pennsylvania has held that individuals do not have a reasonable expectation of privacy in their text messages because they are sent to a third party that can potentially disclose this information to anyone.[140] This reasoning is dangerous because it applies the Third Party Doctrine not only to cell phone companies, but also to the recipient of the text message. By this reasoning, individuals can lose their privacy interest in any and all communication they partake in. This reasoning contradicts the purpose of the Fourth Amendment and opens the door for the government to partake in a wide variety of methods to discover an individual's most private information through a closely-affiliated third party. This risks the vast array of information that a person may relay to their affiliates without expecting that the government has the capacity to easily reach this information.

Looking ahead, more states are likely to expand the Fourth Amendment's protections of digital contents such as text messages, either through judicial precedent or legislation. Some states, like Montana, are already in the midst of legislative debate on whether to codify the requirement of a warrant based on probable cause for digital searches and seizures.[141] Considering the growing reliance on storing information in digital formats, it is likely that the U.S. Supreme Court will have to resolve this issue soon. This will ultimately address the concerns expressed by Justice Sotomayor in *Jones*.[142] The Fourth Amendment should protect an individual's digital contents from arbitrary searches by the government because the use of technology has become such a convenience, if not a necessity, to successfully function in today's world. The cost of functioning adequately in this world should not be to lose the protections granted by the Constitution.

[140] Commonwealth v. Diego, 119 A.3d 370, 376–77 (Pa. Super. Ct. 2015).

[141] Erin Loranger, *Bills to Expand Privacy Rights Generate Opposition*, MISSOULIAN (Jan. 20, 2017), http://missoulian.com/news/government-and-politics/bills-to-expand-privacy-rights-generate-opposition/article_fcba0885-67c0-5d71-b2dc-22e27f8d4ee8.html.

[142] *See* United States v. Jones, 565 U.S. 400, 413–18 (2012) (Sotomayor, J., concurring).