Ohio Northern University Law Review

Volume 39 | Issue 1 Article 10

2023

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Adam D. Searl

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ADAM D. SEARL*

I. INTRODUCTION

Rapid advances in technology have always been a ripe area for Fourth Amendment protection concerns.[1] As early as 1928, the Supreme Court was wrestling with how new technologies related to Fourth Amendment protections and whether communications using new technologies would be protected from invasion by police.[2] While technology has certainly changed over the past century, Fourth Amendment privacy concerns have not.[3] This struggle is perhaps most readily apparent in the current battle over warrantless cellular phone searches.[4]

Cellular phones have become an everyday part of American society.[5] By the end of 2011 there were 327.6 million mobile devices in the United States; twelve million more devices than there are people.[6] And these devices have been getting more advanced with every year.[7] Even courts authorizing the warrantless search of cellular phones are cognizant of the fact that modern cellular phones are not just a phone but are rather small, mobile computers with the all of a modern computer's capabilities.[8] In light of the voluminous amount of information that can be stored on today's

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* Acting Fiscal Officer, Extension Library District of Huron County, Ohio; Ohio Northern University College of Law, J.D., 2012; Case Western Reserve University, B.S., 2004. I wish to thank all of my friends and family for their unwavering support and for enriching my life.

1. *See* Susan W. Brenner, *The Fourth Amendment in an Era of Ubiquitous Technology*, 75 MISS L.J. 1, 1-4, 12-50 (2005).

2. *See generally, e.g.*, Olmstead v. United States, 277 U.S. 438, 455, 464-66 (1928) (holding that the Fourth and Fifth Amendments were not violated when the police wiretapped private telephone conversations without a warrant).

3. *See* Brenner, *supra* note 1, at 1-3.

4. *See* Editorial, *Cellphone Searches*, N.Y. TIMES, Dec. 26, 2009, http://www.nytimes.com/2009/12/26/opinion/26sat2.html?adxnnl=1&adxnnlx=13543074124JxSqLlk4eDjrK/Xy1povQ.

5. *See* Cecilia Kang, *Number of Cellphones Exceeds U.S. Population: CTIA Trade Group*, WASH. POST, Oct. 11, 2011, 7:54 AM, http://www.washingtonpost.com/blogs/post-tech/post/number-of-cell-phones-exceeds-us-population-ctia-trade-group/2011/10/11/gIQARNcEcL_blog.html.

6. *See id.*

7. Chris Nickson, *Advances in Mobile Phones*, A TECH. SOC'Y (last updated Jun. 23 2012), http://www.atechnologysociety.co.uk/advances-mobile-phones.html.

8. *See* United States v. Flores-Lopez, 670 F.3d 803, 804-05 (7th Cir. 2012).

devices, the privacy concerns individuals have over the ability of police officers to search cellular phones without a warrant comes as no surprise.

States are currently split over the treatment of warrantless searches of cellular phone data.[9] Some courts have held the warrantless search of cellular phones constitutional based on the search-incident-to-arrest exception to the Fourth Amendment, finding that cellular phones found on or near persons during their arrest are like any other container and may therefore be searched by police incident to a lawful arrest.[10] Other courts have held that a cellular phone cannot be properly analogized to a closed container and therefore a search incident to arrest is unlawful without first obtaining a warrant.[11] Still others have upheld the warrantless searches of cellular phones under the exigency exception to the Fourth Amendment warrant requirement.[12]

This comment proposes that the exigent circumstance exception to the Fourth Amendment warrant requirement is the most proper exception which should be used in determining the appropriateness of the warrantless search of cellular phones. In support of that proposition, this comment will first explore the history of the search-incident-to-arrest exception to the Fourth Amendment in order to set a foundation for the rules of law in that area.[13] This comment will then explore how the search-incident-to-arrest doctrine has been used to uphold the warrantless search of cellular phones and outline the arguments supporting this line of reasoning.[14] Next, select cases holding against using the search-incident-to-arrest doctrine to uphold warrantless searches will be outlined and the arguments supporting this line of reasoning will be analyzed.[15] The comment will go on to argue that courts holding against using the search-incident-to-arrest doctrine to uphold the warrantless searches of cellular phones are using the only logical line of reasoning.[16] Then, the comment outlines rules of law for the exigent circumstances exception to the Fourth Amendment. [17] Next, the comment will explore how the exigent circumstances exception has been applied to the warrantless search of cellular phones.[18] Finally, the comment will argue

9. *See* Stephanie Francis Ward, *411: Cops Can Read Txt Msgs: States Split Over Warrantless Searches Of Cellphone Data*, 97 A.B.A. J. 16, 16-17 (Apr. 2011).
10. *See Flores*, 670 F.3d at 809-810; People v. Diaz, 244 P.3d 501, 508 (Cal. 2011).
11. *See* State v. Smith, 920 N.E.2d 949, 955 (Ohio 2009).
12. *See* United States v. Parada, 289 F. Supp. 2d 1291, 1303-04 (D. Kan. 2003).
13. *See infra* Part II.A.
14. *See infra* Parts II.B-C.
15. *See infra* Part II.D.
16. *See infra* Part II.E.
17. *See infra* Part III.A.
18. *See infra* Part III.B.

that the exigent circumstances exception is the appropriate test to use regarding the warrantless search of cellular phones at or near the time of arrest, as it properly balances the expectation of privacy in cellular phone data with the need of police to prevent the imminent destruction of evidence or to prevent imminent substantial harm.[19]

II. THE SEARCH-INCIDENT-TO-ARREST EXCEPTION TO THE FOURTH AMENDMENT

A. The History of the Search-Incident-to-Arrest Doctrine.

The Fourth Amendment of the United States Constitution 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.[20]

The purpose of the Amendment is straight forward: to protect "against unreasonable searches and seizures."[21] A party is considered to have been searched for Fourth Amendment purposes if that party had a reasonable expectation of privacy and that privacy was violated.[22] A warrantless search is per se unreasonable.[23] The Supreme Court in *Katz v. United States*[24] stated that "'[o]ver and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes,'[] and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment . . . ."[25] There are only "a few specifically established and well-delineated exceptions" to the warrant requirement of the Fourth Amendment.[26] These include items in plain view,[27] probable cause and exigent circumstances,[28] and searches incident to arrest.[29]

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19. *See infra* Part III.C.
20. U.S. CONST. amend. IV.
21. *See id.*
22. Katz v. United States, 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring).
23. *Id.* at 357 (majority opinion).
24. 389 U.S. 347.
25. *Id.* at 357 (quoting United States v. Jeffers, 342 U.S. 48, 51 (1951)).
26. *Id.*
27. *See* Texas v. Brown, 460 U.S. 730, 738-39 (1983).
28. *See* Chimel v. California, 395 U.S. 752, 773 (1969) (White, J., dissenting).
29. *See* Arizona v. Gant, 556 U.S. 332, 338 (2009).

1. Chimel v. California

The search-incident-to-arrest exception to the warrant requirement was well articulated by the United States Supreme Court in *Chimel v. California.*[30] In *Chimel*, police officers, armed with only an arrest warrant, were allowed entry into Chimel's house by his wife.[31] Upon Chimel's arrival he was arrested, and although he denied the arresting officers' request to search the premises, they searched the entire house, where they found evidence that was ultimately used to secure a conviction.[32]

In discussing the search-incident-to-arrest principle, the Court stated that "it is reasonable for the arresting officer to search the person arrested in order to remove any weapons the latter might seek to use in order to resist arrest or effect his escape."[33] The court then explained the permissible reasons for searches by stating that "[i]n addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction."[34] Therefore, police are permitted to search both the arrestee and the area within the arrestee's immediate control, pursuant to a lawful arrest.[35] This rule is justified "by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime . . . ."[36]

2. United States v. Robinson

The search-incident-to-arrest doctrine was then expanded in *United States v. Robinson*.[37] In *Robinson*, Robinson was stopped and lawfully arrested for a traffic violation.[38] The officer "then began to search [the] respondent."[39] During the pat-down search, the officer felt an object in the pocket of a heavy coat Robinson was wearing at the time, but could not tell what the object was.[40] The officer then reached in and pulled out the object, which turned out to be a crumpled cigarette pack.[41] As the officer felt the

30. 395 U.S. 752 (1969).
31. *Id.* at 753.
32. *Id.* at 753-54.
33. *Id.* at 762-763.
34. *Id.* at 763.
35. *Chimel*, 395 U.S. at 763.
36. *Id.* at 764 (quoting Preston v. United States, 376 U.S. 364, 367 (1964)).
37. 414 U.S. 218 (1973).
38. *Id.* at 220-21.
39. *Id.* at 221-22.
40. *Id.* at 222-23.
41. *Id.* at 223.

package, he could tell that it contained something that was not cigarettes.[42] The officer then proceeded to open the pack of cigarettes where he found fourteen gelatin capsules of heroin, which were then seized and admitted at trial, which resulted in Robinson's conviction.[43]

The Supreme Court set out to determine whether this search was reasonable in light of the Fourth Amendment, even though the officer was not in fear for his safety, nor was he searching for any particular evidence.[44] The Court ultimately held that the search was constitutional.[45] In coming to this decision, the Court stated that "[i]t is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement . . . but is also a 'reasonable' search under that Amendment."[46] This gives police the authority to fully search an individual and any items found on the individual, regardless of concerns for officer safety or the need to search for any specific evidence.[47]

3. New York v. Belton

While the above cases were concerned primarily with a search of the person, there are several cases involving the so called "automobile" exception regarding searches incident to arrest.[48] In *New York v. Belton*,[49] the Court held that when the occupant of a vehicle is subjected to a lawful arrest, a search incident to his arrest includes the passenger compartment of the vehicle in which the arrestee is riding.[50] In *Belton*, an officer pulled over a speeding vehicle and, after approaching the vehicle, smelled burnt marijuana.[51] The officer asked the four passengers to step out of the car, and at this time he picked up an envelope from the floor that contained marijuana.[52] The officer then placed the four occupants under arrest and proceeded to search the passenger compartment of the car where he found a black leather jacket belonging to Belton that contained cocaine in one of the pockets.[53] The evidence was admitted at trial and Belton was convicted.[54]

42. *Robinson*, 414 U.S. at 223.
43. *Id.*
44. *Id.* at 224, 236.
45. *Id.* at 236-37.
46. *Id.* at 235.
47. *See Robinson*, 414 U.S. at 234-35.
48. *See generally* James L. Buchwalter, Annotation, *Application of Fourth Amendment to Automobile Searches-Supreme Court Cases*, 47 A.L.R. FED. 2d 197 (2010).
49. 453 U.S. 454 (1981).
50. *Id.* at 462.
51. *Id.* at 455.
52. *Id.* at 456.
53. *Id.*

The Court ultimately concluded that the passenger compartment and the jacket found inside the compartment were "'within the arrestee's immediate control' within the meaning of . . . *Chimel* . . . ."[55] Since the compartment was within the arrestee's immediate control, even though the arrestee was outside of the vehicle at the time, the police could search the passenger compartment, without violating Fourth Amendment protections, for weapons and for evidence that might be easily destroyed if either were within reach of the arrestee.[56] The Court went on to say:

> It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach. Such a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have.[57]

Footnote four of the opinion then sets out the Court's definition of container:

> "Container" here denotes any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like. Our holding encompasses only the interior of the passenger compartment of an automobile and does not encompass the trunk.[58]

4. Arizona v. Gant

More recently, the Court specifically restricted the broad power given to police in *Belton* with its decision in *Arizona v. Gant*.[59] "Gant was arrested for driving on a suspended license, handcuffed, and locked in a patrol car before officers searched his car and found cocaine in a jacket pocket."[60]

54. *Belton*, 453 U.S. at 462-63.
55. *Id.* at 462.
56. *Id.* at 456, 463.
57. *Id.* at 460-61.
58. *Id.* at 460 n.4.
59. *Gant*, 556 U.S. 332; *see Belton*, 453 U.S. at 460-61.
60. *Gant*, 556 U.S. at 332.

The evidence was admitted at trial and Gant was convicted on two drug counts.[61] In this case, the Court ultimately held:

> Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of the arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.[62]

In reaching this decision, the Court explained that the *Chimel* decision delineated *Belton*'s scope.[63] "Under *Chimel*, police may search incident to arrest only the space within an arrestee's 'immediate control,' meaning 'the area from within which he might gain possession of a weapon or destructible evidence.'"[64] The Court explained that "the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy."[65] The Court went on to say that "[i]f there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply."[66]

The Court applied *Chimel* to *Belton* and held "*Belton* does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle."[67] Furthermore, the Court found "that circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle."[68] In its final thoughts on *Belton*, the Court admitted "[w]e now know that articles inside the passenger compartment are rarely 'within the area into which an arrestee might reach,' and blind adherence to *Belton*'s faulty assumption would authorize myriad unconstitutional searches."[69]

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61. *Id.* at 337.
62. *Id.* at 351.
63. *Id.* at 335 (citing *Chimel*, 395 U.S. at 763).
64. *Id.* (quoting *Chimel*, 395 U.S. at 763).
65. *Gant*, 556 U.S. at 339 (citing *Chimel*, 395 U.S. at 763).
66. *Id.* (citing *Preston*, 376 U.S. at 367-68).
67. *Id.* at 335.
68. *Id.*
69. *Id.* at 350-51 (quoting *Belton*, 453 U.S. at 460).

5. United States v. Edwards

There are also cases that deal with the ability to search an arrestee's property after the arrestee has been detained for a substantial period of time.[70] In *United States v. Edwards*,[71] the Court was asked "whether the Fourth Amendment should be extended to exclude from evidence certain clothing taken from respondent Edwards while he was in custody at the city jail approximately 10 hours after his arrest."[72] The Court noted that *Chimel* and *Robinson* authorized police to make searches incident to custodial arrests.[73] Furthermore, the Court stated that "[i]t is also plain that searches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention."[74] Because the police were authorized to do a search of the arrestee's clothing at the time of arrest, the Court concluded that the police could also search the arrestee's clothes even ten hours after arrest.[75]

6. United States v. Chadwick

The holding in *Edwards* was narrowed significantly by *United States v. Chadwick*.[76] In *Chadwick*, federal narcotics agents, without obtaining a warrant, searched a locked footlocker incident to arrest, ninety minutes after the arrest.[77] The footlocker had previously been in the trunk of the arrestee's car, but was relocated to an area in a federal building prior to the search.[78] The *Chadwick* Court held the search unlawful because

> [o]nce law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest.[79]

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70. *See generally* United States v. Chadwick, 433 U.S. 1 (1977); United States v. Edwards, 415 U.S. 800 (1974).
71. 415 U.S. 800 (1974).
72. *Id.* at 801.
73. *Id.* at 802 (citing United States v. Robinson, 414 U.S. 218; Chimel v. California, 395 U.S. at 755; Weeks v. United States, 232 U.S. 383, 392 (1914)).
74. *Edwards*, 415 U.S. at 803.
75. *Id.* at 801, 803, 807-08.
76. *See Chadwick*, 433 U.S. 1; *Edwards*, 415 U.S. 800.
77. *Chadwick*, 433 U.S. at 3-5.
78. *Id.* at 4.
79. *Id.* at 15.

Under this holding, the police would, however, still be able to search property that was "immediately associated with the person."[80]

7. Summary of Search-Incident-to-Arrest Caselaw

In summary, the Supreme Court has held that police may conduct searches of a person and anything within the person's immediate control incident to a lawful arrest for weapons and destructible evidence.[81] This search of the person includes packages or containers located on the person.[82] In terms of automobiles, the search-incident-to-arrest doctrine gives police the power to search vehicle compartments and any containers located in the compartment,[83] but only if it is possible for the arrestee to reach into the area which law enforcement officials seek to search.[84] Also, regarding searches conducted after a substantial amount of time has passed since the arrest, the Court has held that only those items immediately associated with the person may be searched.[85]

B. The Search-Incident-to-Arrest Doctrine as Applied to the Warrantless Search of Cellular Phones

1. United States v. Finley

There are many cases that permit the warrantless search of cellular phones based on the search-incident-to-arrest doctrine.[86] Perhaps one of the most cited cases is *United States v. Finley*.[87] In *Finley*, police set up a controlled purchase of methamphetamine from Mark Brown using a cooperating source.[88] Brown agreed to meet the source at a designated truck stop and asked Finley to drive him to the truck stop.[89] After Brown made the sale, Finley drove away from the truck stop and was subsequently

80. *See id.*

81. United States v. Johnson, 846 F.2d 279, 282 (5th Cir. 1988); *see also Belton*, 453 U.S. at 460-61 (holding that a search of containers within an arrestee's reach is permissible); *Robinson*, 414 U.S. at 223-24 (upholding the search of a closed cigarette pack that was located on the arrestee's person); *Chimel*, 395 U.S. at 763.

82. *Robinson*, 414 U.S. at 223-24, 235.

83. *Belton*, 453 U.S. at 462-63.

84. *Gant*, 556 U.S. at 339 (citing *Preston*, 376 U.S. at 367-68).

85. *Chadwick*, 433 U.S. at 15.

86. *See e.g.*, United States v. Curtis, 635 F.3d 704 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 191 (2011); United States v. Murphy, 552 F.3d 405 (4th Cir. 2009), *cert. denied*, 129 S. Ct. 2016 (2009); United States v. Carroll, F. Supp. 2d 1290 (N.D. Ga. 2008); United States v. Mercado-Nava, 486 F. Supp. 2d 1271 (D. Kan. 2007).

87. 477 F.3d 250 (5th Cir. 2007), *cert. denied*, 549 U.S. 1353 (2007).

88. *Id.* at 253.

89. *Id.*

pulled over and then arrested three to five miles from the truck stop.[90] Subsequent to the arrest, police searched Finley's person and located a cellular phone in his pocket.[91] Finley and Brown were then transported to Brown's residence and questioned.[92] During questioning, Finley's phone was given to another agent, "who searched through the phone's call records and text messages."[93] Evidence of the call records and text messages was admitted at trial, and Finley was ultimately convicted.[94]

The Fifth Circuit Court of Appeals ultimately held that the search of the cellular phone was lawful in light of the Fourth Amendment.[95] The court first noted that *Robinson* allowed for a full search of a person incident to a lawful custodial arrest.[96] Additionally, the court also noted that *Robinson* authorized not only a search for weapons, but also a search for evidence of the arrestee's crime without any further justification.[97] *Belton* was relied on for the proposition of law that the scope of a search incident to arrest extends to containers found on the arrestee's person.[98] As this was a search of Finley's person pursuant to a lawful arrest, and due to the fact that Finley had conceded that a cellular phone was a closed container, the court found that the agent's search of Finley's phone was a permissible search of a closed container pursuant to a lawful custodial arrest.[99] In addition, the court found that, as outlined in *Chadwick*, a cellular phone did not fit into the category of "'property not immediately associated with [his] person' because it was on his person at the time of his arrest" and was therefore subject to search at the police station.[100] Furthermore, the court stated that, pursuant to *Edwards*, "[i]n general, as long as the administrative processes incident to the arrest and custody have not been completed, a search of the effects seized from the defendant's person is still incident to the defendant's arrest."[101]

90. *Id.* at 253-54.
91. *Id.* at 254.
92. United States v. Finley, 477 F.3d at 254.
93. *Id.*
94. *Id.* at 253, 255.
95. *Id.* at 259-60.
96. *Id.* at 259 (citing *Robinson*, 414 U.S. at 235).
97. *Finley*, 477 F.3d at 259-60 (citing *Robinson*, 414 U.S. at 233-34).
98. *Id.* at 260 (citing *Belton*, 453 U.S. at 460-61; *Robinson*, 414 U.S. at 223-24; *Johnson*, 846 F.2d at 282).
99. *Id.*
100. *Id.* at 260 n.7 (quoting *Chadwick*, 433 U.S. at 15).
101. *Id.* (citing *Edwards*, 415 U.S. at 804; United States v. Ruigomez, 702 F.2d 61, 66 (5th Cir. 1983)).

2. People v. Diaz

The Supreme Court of California also tackled the issue of warrantless cellular phone searches in *People v. Diaz*.[102] In *Diaz*, a sheriff's deputy witnessed Diaz making a controlled sale of ecstasy.[103] Immediately after the sale, the deputy stopped Diaz's car and arrested him.[104] Diaz had a cellular phone on him that was searched by the deputy after Diaz had been transported to the sheriff's department and questioned.[105] The search was conducted approximately ninety minutes after arrest.[106] The information contained in the cellular phone was subsequently admitted at trial, and Diaz was convicted.[107]

The court first cited *Robinson* for the proposition of law that the police can conduct a full search of an arrestee's person whether or not there is reason to believe that there are weapons or evidence present.[108] The court then distinguished the case from *Chadwick*, holding that, unlike the trunk in *Chadwick*, the cellular phone was an item that was immediately associated with Diaz.[109] "Because the cell phone was immediately associated with the defendant's person, [the sheriff's deputy] was 'entitled to inspect' its content without a warrant at the sheriff's station 90 minutes after defendant's arrest, whether or not an exigency existed."[110]

Diaz argued that the cellular phone was not analogous to the cigarette pack in *Robinson*.[111] First, the defendant argued that cellular phones are not generally worn on the person, but are more often kept near their owners, such as in a purse.[112] Secondly, cellular phones contain amounts of information that are not found in conventional items immediately associated with a person, such as a cigarette pack.[113] In her dissent, Judge Werdegar endorsed Diaz's second assertion and argued that all cellular phones should be exempt from the search-incident-to-arrest exception due to the amount of information stored in them.[114]

102. *Diaz*, 244 P.3d at 502 .
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Diaz*, 244 P.3d at 502-03.
108. *Id.* at 503 (citing *Robinson*, 414 U.S. at 224).
109. *Id.* at 505 (citing *Chadwick*, 433 U.S. at 15).
110. *Id.* at 506 (citing *Robinson*, 414 U.S. at 236).
111. *Id.*
112. *Diaz*, 244 P.3d at 506.
113. *Id.*
114. *Id.* at 516-17 (Werdegar, J. dissenting).

The court, however, was not persuaded by Diaz's arguments.[115] The court once again cited *Chadwick* and found that a cellular phone is immediately associated with the person, regardless of the fact that it is in a purse or otherwise close to the individual.[116] Additionally, the court did not accept the assertion that the search-incident-to-arrest exception depends at all on the character of the seized items.[117] The court did not feel that the sheer quantity of personal information that can be stored in a cellular phone should determine how the cellular phone is treated.[118] The court also noted that such a distinction may cause problems in the future, asking "[h]ow would a court faced with a similar argument as to another type of item determine whether the item's storage capacity is constitutionally significant?"[119]

Diaz also argued that the cellular phone itself is distinct from the contents of the phone.[120] The data in a cellular phone is not like a piece of paper found inside of a pocket or heroin pills inside of a cigarette pack, but is instead non-physical data.[121] He asserted that the loss of privacy that justifies a warrantless search of a person should not also justify the search of the phone.[122] The court was again not persuaded, and cited *Chadwick* when stating that the loss of privacy upon arrest includes personal property of the arrestee.[123] The court held that there was no legal basis for distinguishing the content of the phone from the phone itself.[124] The court therefore ultimately held that the warrantless search of Diaz's cellular phone was valid.[125]

3. Summary of the Search-Incident-to-Arrest Exception as Applied to Cellular Phones

There are therefore two distinct situations in which courts have upheld warrantless searches of cellular phones incident to arrest.[126] The first is the primary argument set forth in *Finley*, providing that police may search an arrestee's cellular phone that was found on the arrestee at or near the time of arrest, because a cellular phone is analogous to the cigarette pack found in

115. *Id.* at 509 (majority opinion).
116. *Id.* at 506 (citing Chadwick, 433 U.S. at 15, 16 n.10 (1977)).
117. *Diaz*, 244 P.3d at 506-07.
118. *Id.* at 508.
119. *Id.*
120. *Id.* at 509.
121. *Id.*
122. *Diaz*, 244 P.3d at 509.
123. *Id.* (citing Chadwick, 433 U.S. at 15).
124. *Id.* at 511.
125. *Id.*
126. *See infra* notes 127-29 and accompanying text.

Robinson or a closed container as delineated by *Belton*.[127] The second line of reasoning regards searching a cellular phone a substantial time after the arrestee has been detained and the cellular phone has been transferred into police custody.[128] Here, courts have held that the cellular phone may be searched, as it is an item immediately associated with the person, analogous to a person's clothes, rather than an item within a person's control, such as a piece of luggage.[129]

C. A Case Discussing the Search-Incident-to-Arrest Exception, but Upholding the Search on Different Grounds

The United States Court of Appeals for the Seventh Circuit also weighed in on the matter in *United States v. Flores-Lopez*,[130] a recent 2012 decision.[131] Flores-Lopez was arrested outside of a garage for the distribution of methamphetamine.[132] A cellular phone was found on his person and two cellular phones were recovered from the defendant's truck.[133] Officers searched each cellular phone at the scene for its telephone number, which the police later used to subpoena three months of the call history of each phone.[134] This evidence was admitted at trial, and Flores-Lopez was convicted.[135]

In reaching its decision, the court relied on *Belton* for the proposition that a container is "any object capable of holding another object"[136] and on "a fair literal reading" of *Robinson* as giving police the authority to search the person of an arrestee even if there is no suspicion that the container holds weapons or contrabands.[137] The court acknowledged, however, that "[t]he potential invasion of privacy in a search of a cell phone is greater than in a search of a 'container' in a conventional sense . . . a modern cell phone is a computer . . . not just another purse or address book."[138] The court also acknowledged that, pursuant to *Gant*, the automobile exception

127. *Finley*, 477 F.3d at 259-60 (citing *Belton*, 453 U.S. at 460-61; *Robinson*, 414 U.S. at 223-24; *Johnson*, 846 F.2d at 282).

128. *See, e.g.*, *Finley*, 477 F.3d at 260 n.7 (quoting *Chadwick*, 433 U.S. at 15; *Edwards*, 415 U.S. at 804); *Diaz*, 244 P.3d at 505-06 (quoting *Chadwick*, 433 U.S. at 15; *Robinson*, 414 U.S. at 236).

129. *Finley*, 477 F.3d at 260 n.7 (quoting *Chadwick*, 433 U.S. at 15; *Edwards*, 415 U.S. at 804); *Diaz*, 244 P.3d at 505-06 (quoting *Chadwick*, 433 U.S. at 15; *Robinson*, 414 U.S. at 236).

130. 670 F.3d 803 (7th Cir. 2012).

131. *See id.* at 804.

132. *Id.*

133. *Id.*

134. *Id.*

135. United States v. Flores-Lopez, 670 F.3d at 804.

136. *Id.* at 805 (quoting *Belton*, 453 U.S. at 560).

137. *Id.* (referencing *Robinson*, 414 U.S. at 236).

138. *Id.* (quotations added by the court) (internal parenthesis omitted).

was unavailable in this case because Flores-Lopez was already detained and away from the vehicle prior to the search.[139]

However, the court furthered the proposition that "a minimally invasive search may be lawful in the absence of a warrant, even if the usual reasons for excusing the failure to obtain a warrant are absent . . . ."[140] This proposition was gleaned from *United States v. Concepcion*,[141] a case in which the court upheld police using keys discovered on an arrestee to identify whether the keys opened a specific apartment.[142] The court in *Concepcion* held that, "[b]ecause the agents are entitled to learn a suspect's address without probable cause, the use of the key to accomplish that objective did not violate the [F]ourth [A]mendment."[143] The Seventh Circuit Court used this proposition to find:

> So opening the diary found on the suspect whom the police have arrested, to verify his name and address and discover whether the diary contains information relevant to the crime for which he has been arrested, clearly is permissible; and what happened in this case was similar but even less intrusive, since a cell phone's phone number can be found without searching the phone's contents, unless the phone is password-protected—and on some cell phones even if it is.[144]

The court also reasoned that

> [T]he phone company knows a phone's number as soon as the call is connected to the telephone network; and obtaining that information from the phone company isn't a search because by subscribing to the telephone service the user of the phone is deemed to surrender any privacy interest he may have had in his phone number.[145]

The court held that in the present case, since police could obtain the information about phone number of the phone without a warrant due to the minimally intrusive nature of the search, the police were likewise authorized to search the cellular phone in order to acquire its number without a

139. *Id.* at 806 (citing *Gant*, 556 U.S. at 343).

140. *Flores-Lopez*, 670 F.3d at 807 (citing United States v. Concepcion, 942 F.2d 1170, 1172-73 (7th Cir. 1991)).

141. 942 F.2d 1170.

142. *See id.*; *Concepcion*, 942 F.2d at 1172-73.

143. *Concepcion*, 942 F.2d at 1173.

144. *Flores-Lopez*, 670 F.3d at 807.

145. *Id.* (citing Smith v. Maryland, 442 U.S. 735, 742-43 (1979)).

warrant.[146] The court entertained the possible justification the police had in preventing a remote wipe of the phone's data, but the court declined to determine the weight of this argument, because the search in this instance was so limited.[147] The search of the cellular phone was therefore upheld.[148]

At first glance, this case may appear to allow the search of cellular phones incident to arrest.[149] However, a closer reading of the case shows that the court allowed the search of the phone based on the fact that police could have accessed the information gained, namely the number of the phone, through other means without a warrant, because of the insubstantial privacy interest the arrestee had in the phone number itself.[150] Since this was possible, police did not need a warrant to search the cellular phone for this information at the time of arrest.[151] The case was therefore not decided based on the search-incident-to-arrest exception, but rather the exception initially laid down in *Smith v. Maryland*,[152] which provides that a warrant is not needed to gather information that a person transmits to a telephone company because there is no longer an expectation of privacy in the numbers dialed.[153]

D. Cases Invalidating Warrantless Searches of Cellular Phones Based on the Search-Incident-to-Arrest Exception.

In contrast to the cases outlined in the previous section, there are several cases in which courts have declined to uphold the warrantless search of cellular phones using the search-incident-to-arrest exception.[154]

1. United States v. Park

In *United States v. Park*,[155] officers detained Park and his co-defendants pending service of a search warrant.[156] After the warrant was executed Park and the other defendants were arrested.[157] They were transferred to the police station for booking, and the calls and contact list of their cellular

146. *Id.*
147. *Id.* at 807-10.
148. *Id.* at 810.
149. *See Flores-Lopez*, 670 F.3d at 810.
150. *Id.* at 807 (citing *Smith*, 442 U.S. at 742-73).
151. *Id.* (referencing *Smith*, 442 U.S. at 742-43).
152. 442 U.S. 735.
153. *See Smith*, 442 U.S. at 738, 742-43.
154. *See generally* United States v. Park, 2007 U.S. Dist. LEXIS 40596 (N.D. Cal. May 23, 2007); State v. Smith, 920 N.E.2d 949 (Ohio 2009).
155. 2007 U.S. Dist. LEXIS 40596 (N.D. Cal. May 23, 2007).
156. *Id.* at *3-4.
157. *Id.* at *4.

phones were searched at least an hour and a half after the initial arrests.[158] The "[d]efendants move[d] to suppress the warrantless search and seizure of their cellular phones."[159] The government argued that the searches were lawful searches incident to arrest.[160]

Much like the courts in *Diaz* and *Finley*, the court here was asked to determine whether a phone was an item immediately associated with a person, as outlined in *Edwards* and *Chadwick*.[161] Unlike *Diaz* and *Finley* however, the court in *Park* ultimately held that "for the purposes of Fourth Amendment analysis cellular phones should be considered 'possessions within an arrestee's immediate control' and not part of 'the person.'"[162] The court found a cellular phone to be more analogous to the trunk in *Chadwick*, rather than the set of the arrestee's clothes in *Edwards*.[163] The court continued that "[t]his is so because modern cellular phones have the capacity for storing immense amounts of private information."[164] The court found that "[t]he searches at issue here go far beyond the original rationales for searches incident to arrest, which were to remove weapons to ensure the safety of officers and bystanders, and the need to prevent concealment or destruction of evidence."[165] Acknowledging that *Chimel*'s reach had been extended in other cases, the court went on to say:

> absent guidance to the contrary from the Ninth[] Circuit or the Supreme Court, this Court is unwilling to further extend this doctrine to authorize the warrantless search of the contents of a cellular phone—and to effectively permit the warrantless search of a wide range of electronic storage devices—as a "search incident to arrest."[166]

The court ultimately concluded that:

> due to the quantity and quality of information that can be stored on a cellular phone, a cellular phone should not be characterized as an

158. *Id.* at *5-13.
159. *Id.* at *14.
160. *Park*, 2007 U.S. Dist. LEXIS 40596, at *14.
161. *See Finley*, 477 F.3d at 260 n.7 (quoting *Chadwick*, 433 U.S. 15; *Edwards*, 415 U.S. at 804); *Park*, 2007 U.S. Dist. LEXIS 40596, at *15-17 (citing *Edwards*, 415 U.S. at 805; quoting *Chadwick*, 433 U.S. at 15-16); *Diaz*, 244 P.3d at 505.
162. *See Finley*, 477 F.3d at 260 n.7 (quoting *Chadwick*, 433 U.S. at 15; *Edwards*, 415 U.S. at 804); *Park*, 2007 U.S. Dist. LEXIS 40596, at *21 (quoting *Chadwick*, 433 U.S. at 16 n.10); *Diaz*, 244 P.3d at 505.
163. *See Park*, 2007 U.S. Dist. LEXIS 40596, at *18-22.
164. *Id.* at *21.
165. *Id.* at *24 (citing *Chimel*, 395 U.S. 752).
166. *Id.* at *24-25 (referencing *Chimel*, 395 U.S. 752).

> element of an individual's clothing or person, but rather, as a 'possession[] within an arrestee's immediate control [that has] [F]ourth [A]mendment protection at the station house.[167]

2. State v. Smith

In *State v. Smith*,[168] the Ohio Supreme Court found that cellular phones are not subject to a warrantless search incident to arrest.[169] Smith was arrested after making a drug delivery to an informant's house.[170] Smith was searched, and a cellular phone was found on his person.[171] At some later point, the police searched the phone.[172] Smith moved to suppress the evidence of the search at trial, but the motion with regard to call logs found during the search was denied, and Smith was ultimately convicted.[173]

In reaching its decision, the court specifically disagreed with the assumption in *Finley* that cellular phones are analogous to a closed container.[174] The court instead agreed with the reasoning in *Park*, that modern cellular phones are more like computers, in which there is a significant privacy interest.[175] The court stated "[o]bjects falling under the banner of 'closed container' have traditionally been physical objects capable of holding other physical objects."[176] Indeed, in *Belton*, the Supreme Court defined a container as "any object capable of holding another object."[177] As a cellular phone does not contain physical objects, but instead contains vast amounts of electronic data, the Ohio Supreme Court held that "a cell phone is not a closed container for purposes of a Fourth Amendment analysis."[178] The court went on to say that "[o]nce the cell phone is in police custody, the state has satisfied its immediate interest in collecting and preserving evidence and can take preventive steps to ensure that the data found on the phone are neither lost nor erased."[179] The court ultimately held that

> because a cell phone is not a closed container, and because an individual has a privacy interest in the contents of a cell phone that

167. *Id.* at *26 (quoting United States v. Monclavo-Cruz, 662 F.2d 1285, 1291 (9th Cir. 1981)).
168. 920 N.E.2d 949 (Ohio 2009).
169. *Id.* at 956.
170. *Id.* at 950.
171. *Id.*
172. *Id.*
173. *Smith*, 920 N.E.2d at 951.
174. *Id.* at 953-54 (citing *Finely*, 477 F.3d at 260).
175. *Id.* (citing *Park*, 2007 U.S. Dist. LEXIS 40596).
176. *Id.* at 954.
177. *Id.* (quoting *Belton*, 453 U.S. at 460 n.4).
178. *Smith*, 920 N.E.2d at 954.
179. *Id.* at 955.

> goes beyond the privacy interest in an address book or pager, an officer may not conduct a search of a cell phone's contents incident to a lawful arrest without first obtaining a warrant.[180]

The court concluded by stating that unless a search is necessary for the safety of law-enforcement officers or there is an exigent circumstance, the warrantless search of a cellular phone is prohibited by the Fourth Amendment.[181]

3. Summary of Cases Denying the Application of Search-Incident-to-Arrest Exception as Applied to Cellular Phones

There are two separate arguments for denying the warrantless search of cellular phones incident to arrest.[182] The *Park* case involves the search of a cellular phone after a substantial period of time has lapsed, much like in *Diaz*.[183] *Park*, however, held that cellular phones are not items immediately associated with the person, and may therefore not be searched once the cellular phone has been removed to the exclusive control of the police.[184] The second line of reasoning regards the search of phones at or near the time of arrest.[185] Unlike the court in *Finley*, the *Smith* court held that cellular phones are not closed containers for Fourth Amendment purposes, and therefore may not be searched incident to arrest.[186]

E. Why the Warrantless Search of Cellular Phones Should Not Be Upheld Under the Search-Incident-to-Arrest Exception

The warrantless search of cellular phones should not be upheld under a search-incident-to-arrest exception because the arguments in favor of using this exception further assumptions that are nothing more than legal fictions—that cellular phones are closed containers and that they are items that are immediately associated with the person of an arrestee.[187] These

180. *Id.*
181. *See id.* at 956.
182. *See Park*, 2007 U.S. Dist. LEXIS 40596, at *21, *25-26; *Smith*, 920 N.E.2d at 952, 955.
183. *See Park*, 2007 U.S. Dist. LEXIS 40596, at *21; *Diaz*, 244 P.3d at 502.
184. *Park*, 2007 U.S. Dist. LEXIS 40596, at *21, *25-26.
185. *See Smith*, 920 N.E.2d at 952.
186. *Id.* at 954-55.
187. *See Finley*, 477 F.3d at 259-60; *Park*, 2007 U.S. Dist. LEXIS 40596, at *32; *Diaz*, 244 P.3d at 505-06.

legal fictions have arisen because of a gross mischaracterization of the nature of cellular phones.[188]

1. Cellular Phones are Not Items Immediately Associated with the Person

In order to validate the warrantless search of the cellular phone in *Diaz*, a search that occurred an hour and a half after the initial arrest, the Supreme Court of California had to find that cellular phones are of the same character as the arrestee's own clothing or a wallet.[189] Such a characterization is patently absurd. The court in *Park* was absolutely correct in its assertion that a cellular phone is much more analogous to the trunk found in *Chadwick*, than to the arrestee's clothing that had been searched in *Edwards*.[190] The court noted "[t]his is so because modern cellular phones have the capacity for storing immense amounts of private information."[191] Indeed, the iPhone 5 manufactured by Apple comes in a 64 Gigabyte model.[192] The Amazon Kindle DX, an e-book reader, offers 4 Gigabytes of internal memory.[193] Amazon claims it can hold up to 3,500 books.[194] A phone with 64 Gigabytes of internal memory would therefore be able to hold somewhere in the vicinity of 56,000 books.[195] There is not a wallet in the world, nor any other item that has traditionally been immediately associated with the person, that can hold so much information.[196] Cellular phones are items within the person's control, the same as if the person were carrying luggage.[197] Just because the digital age has allowed us to shrink a

188. *See Finley*, 477 F.3d at 259-60; *Park*, 2007 U.S. Dist. LEXIS 40596, at *32; *Diaz*, 244 P.3d at 505-06 (holding that cell phones are closed containers for Fourth Amendment purposes and that they are objects that are immediately associated with an arrestee's person).

189. *See Diaz*, 244 P.3d at 505-06.

190. *See Park*, 2007 U.S. Dist. LEXIS 40596, at *17-18, *21, *25-26 (quoting *Chadwick*, 433 U.S. at 16 n.10; referencing *Edwards*, 415 U.S. 800; *Robinson*, 414 U.S. 218).

191. *Id.* at *21.

192. *Compare Specifications Between iPhone Models*, APPLE, http://www.apple.com/iphone/compare-iphones/ (last visited Oct. 13, 2012) [hereinafter *iPhone Models*].

193. *Kindle DX, Free 3G, 9.7" E Ink Display, 3G Works Globally*, AMAZON.COM, http://www.amazon.com/Kindle-DX-Wireless-Reader-3G-Global/dp/B002GYWHSQ (last visited Oct. 13, 2012) [hereinafter *Kindle DX*].

194. *Id.*

195. (64/4)*3500=56,000. *Compare iPhone Models*, *supra* note 192, *with Kindle DX*, *supra* note 193 (because an Apple iPhone 5 contains 64 Gigabytes of internal memory and a Kindle DX, with one quarter of the internal memory of the iPhone 5, claims to hold 3,500 books).

196. *See iPhone Models*, *supra* note 192 (noting that no person could carry 56,000 books at one time, nor could he fit them in his wallet).

197. *See Park*, 2007 U.S. Dist. LEXIS 40596, at *16, *21 (quoting *Chadwick*, 433 U.S. at 15, 16 n.10).

library down to the size of a wallet, does not mean that it is not still a library.[198]

2. Cellular Phones are Not Closed Containers

In the same vein, the Ohio Supreme Court in *Smith* correctly pointed out that cellular phones are not closed containers.[199] In order to find that the warrantless search of the arrestee's cellular phone was valid in *Finley*, the Fifth Circuit based its holding on the assumption that a cellular phone was likened to the pack of cigarettes discovered during the search in *Robinson*.[200] *Belton*, however, defined a container as "any object capable of holding another object."[201] The *Smith* court wisely observes that most "[o]bjects falling under the banner of 'closed container' have traditionally been physical objects capable of holding other physical objects."[202] The court acknowledged that other courts had found pagers to be closed containers, but found that these courts had failed to consider *Belton*.[203] Additionally, the court noted that modern cellular phones bear little resemblance to pagers of the early 1990s.[204] "Even the more basic models of modern cell phones are capable of storing a wealth of digitized information wholly unlike any physical object found within a closed container."[205]

Modern cellular phones are, in fact, other than their size, indistinguishable from modern laptop computers.[206] An excellent example of this is the Motorola "Laptop Dock" for its ATRIX 4G cellular phone.[207] The Laptop Dock allows owners of the ATRIX to plug the cellular phone into a port on the back of a laptop case, including a touch pad, screen, and full keyboard.[208] With this device, users could do away with two separate devices and use the ATRIX as both their cellular phone and their laptop

198. *Kindle DX*, *supra* note 193 (referring to a Kindle DX user's collection of up to 3,500 books as a "library").

199. *See Smith*, 920 N.E.2d at 954.

200. *See Finley*, 477 F.3d at 260 (citing *Robinson*, 414 U.S. at 223-24).

201. *Belton*, 453 U.S. at 460 n.4.

202. *Smith*, 920 N.E.2d at 954.

203. *Id.*

204. *Id.* at 953-54.

205. *Id.* at 954.

206. *See e.g.*, *iPhone Models*, *supra* note 192; *see also* Byron Kish, Note, *Cellphone Searches: Works Like a Computer, Protected Like a Pager?*, 60 CATH. U. L. REV. 445, 466, 470-71 (2011).

207. *See User's Guide*, MOTOROLA LAPTOP DOCK 1, 3-4 (2010), *available at* http://www.motorola.com/staticfiles/Support/USEN/Mobile%20Phones%20Accessories/Lapdock_Atrix/US-EN/Documents/ StaticFiles/ATRIX_Lapdock_UG_68014732001A.pdf.

208. *Id.*

computer, using the Laptop Dock to search the internet, view and edit all of their documents, view photos, and play games.[209]

A Washington appellate court tackled the issue of whether a laptop computer could be included in a search incident to arrest.[210] The appellant, Larry Washington, was arrested and searched incident to arrest.[211] During the search, police discovered a laptop computer in his bag.[212] The officer, suspecting that the laptop was stolen, took it to the police station and had it searched without a warrant.[213] The court held that "[t]he subsequent search of the computer's files . . . did not fall under any of the exceptions to the warrant requirement."[214] The court determined that "the police were not authorized to discount Washington's claim of ownership and circumvent the warrant requirement simply because they had probable cause to believe the computer was stolen."[215] Based on this, the court decided "that although the computer was discovered pursuant to a proper search incident to a lawful arrest, and although the police had probable cause to believe the computer was stolen, they were not authorized to conduct a search of the computer's files without a warrant."[216]

Indeed, even the *Flores-Lopez* court, which upheld the warrantless search of the arrestee's cellular phone, succinctly made the following observation about modern cellular phones:

> A modern cell phone is in one aspect a diary writ large. Even when used primarily for business it is quite likely to contain, or provide ready access to, a vast body of personal data. The potential invasion of privacy in a search of a cell phone is greater than in a search of a "container" in a conventional sense even when the conventional container is a purse that contains an address book (itself a container) and photos. Judges are becoming aware that a computer (and remember that a modern cell phone is a computer) is not just another purse or address book.[217]

The court went on to note that "[a]n iPhone application called iCam allows you to access your home computer's webcam so that you can survey the

209. *See generally User's Guide*, *supra* note 207.
210. *See* State v. Washington, 110 Wash. App. 1012, *1 (Wash. Ct. App. 2002).
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.* at *3.
215. *Washington*, 110 Wash.App. 1012 at *3.
216. *Id.* *1.
217. *Flores-Lopez*, 670 F.3d at 805.

inside of your home while you're a thousand miles away."[218] While it is true that the government in *Flores-Lopez* was pushing for the search of cellular phones under the search-incident-to-arrest exception, the court actually upheld the search because only the cellular phone's number was obtained.[219] As stated in *Smith v. Maryland*, if information is available to police without a warrant from a different source, such as a telephone company, then police are able to use the source on hand, such as a cellular phone, to get that same information.[220]

3. The Search-Incident-to-Arrest Exception is Inappropriate

As today's cellular phones are nothing more than extremely portable computers that can also be used to make phone calls, a feature likewise available on any laptop, they simply should not be subject to searches incident to arrest, whether on site or later at the police station.[221] Under a search incident to arrest, police should only be able to physically secure the cellular phone so that it cannot be physically destroyed by the arrestee, and no more. That is the bright-line rule of law that would clear the muddy waters currently surrounding this issue.

4. The Possibility of Other Exceptions Validating Warrantless Searches

That is not to say that cellular phones can never be searched. Indeed, the exception outlined in *Flores-Lopez* flows logically from the *Smith* line of cases.[222] Police should be able to search the call logs of cellular phones without a warrant, as there is no privacy interest in the numbers and this is therefore not a search for Fourth Amendment purposes.[223] Beyond that, however, police should not be allowed to search the contents of a cellular phone, absent another exception to the Fourth Amendment, such as the exigent circumstances exception discussed below.[224]

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218. *Id.* at 806 (citing *iCam - Webcam Video Streaming*, ITUNES, http://itunes.apple.com/us/app/icam-webcam-video-streaming/id296273730?mt=8 (last visited Feb. 6, 2012)).

219. *See Flores-Lopez*, 670 F.3d at 805, 810.

220. *Id.* at 807 (citing *Smith*, 442 U.S. at 742-43).

221. *See, e.g.*, *Skype Click to Call: Call Numbers Instantly, Anywhere on the Web, with Just One Click*, SKYPE, http://www.skype.com/intl/en-us/get-skype/on-your-computer/click-to-call/windows/ (last visited Dec. 16, 2012).

222. *See Flores-Lopez*, 670 F.3d at 806-07 (citing *Smith*, 442 U.S. at 742-43).

223. *See id.*; *Smith*, 442 U.S. at 742, 745-46.

224. *See infra* Parts III.A-C.

III. THE EXIGENT CIRCUMSTANCES EXCEPTION TO THE FOURTH AMENDMENT

A. How the Exigent Circumstances Exception Works

The court in *United States v. Porter*[225] explained, "Among the recognized exceptions to the general warrant requirement is the existence of exigent circumstances. Exigent circumstances arise where 'law enforcement officers confront a compelling necessity for immediate action that w[ould] not brook the delay of obtaining a warrant.'"[226]

In *United States v. Cephas*,[227] the Fourth Circuit Court of Appeals stated:

> an exception to the warrant requirement is made when certain exigent circumstances exist. For example, where police officers (1) have probable cause to believe that evidence of illegal activity is present and (2) reasonably believe that evidence may be destroyed or removed before they could obtain a warrant, exigent circumstances justify a warrantless entry.[228]

In *United States v. Brock*,[229] the Ninth Circuit Court of Appeals noted, "[t]he need for the search must be readily apparent to the police and so strong that it outweighs the important . . . protections provided by the warrant requirement."[230] Furthermore, "[t]he question of whether exigent circumstances exist is largely a factual one."[231] Some of the factors considered when deciding if the exigent circumstance exception to the warrant requirement is available are:

> '(1) The degree of urgency involved and the amount of time necessary to obtain a warrant, (2) reasonable belief that the contraband is about to be removed, (3) the possibility of danger to police officers guarding the site of the contraband while a search warrant is sought, (4) information indicating the possessors of the

225. 288 F. Supp. 2d 716 (W.D. Va. 2003).

226. United States v. Porter, 288 F. Supp. 2d 716, 719 (W.D. Va. 2003) (quoting United States v. Wiggins, 192 F. Supp. 2d 493, 498 (E.D. Va. 2002)).

227. 54 F.3d 488 (4th Cir. 2001).

228. *Id.* at 494-95 (citing United States v. Turner, 650 F. 2d 526, 528 (4th Cir. 1981)).

229. 667 F.2d 1311 (9th Cir. 1982).

230. *Id.* at 1318 (citing United States v. Gardner, 672 F.2d 906, 909 (9th Cir. 1980)).

231. *Id.* (citing United States v. Williams, 630 F.2d 1322, 1327 (9th Cir. 1980); United States v. Flickinger, 573 F.2d 1349, 1356-57 (9th Cir.), *cert. denied*, 439 U.S. 836, (1978)).

> contraband are aware that the police are on their trail, and (5) the ready destructibility of the contraband . . . .'[232]

B. The Exigent Circumstances Test as Applied to Cellular Phones

In *United States v. Parada*,[233] during the drug search of a vehicle with probable cause, officers discovered a cellular phone belonging to Parada and subsequently searched the memory of the cellular phone without a warrant.[234] In discussing the issue of the search of the cellular phone, the court stated:

> [T]he evidence indicated that exigent circumstances justified the retrieval of the phone numbers. Because a cell phone has limited memory to store numbers, the agent recorded the numbers in the event that subsequent incoming calls effected the deletion or overwriting of the earlier stored numbers. This can occur whether the phone is turned on or off, so it is irrelevant whether the defendant or the officers turned on the phone. The Court concludes that under these circumstances, the agent had the authority to immediately search or retrieve, as a matter of exigency, the cell phone's memory of stored numbers of incoming phone calls, in order to prevent the destruction of this evidence.[235]

The court, therefore, found that, under the facts of this case, the risk of losing evidence that officers reasonably believed could be destroyed prior to obtaining a warrant justified the warrantless search of the cellular phone's information.[236]

C. Why the Exigent Circumstances Exception is the Appropriate Framework for the Warrantless Search of Cellular Phones

The exigent circumstances exception is the proper exception to apply to the warrantless search of cellular phones because it appropriately balances the arrestee's privacy interests in their phone with the police's need to search for evidence that might otherwise be destroyed.[237]

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232. United States v. Bingham, 270 F. Supp. 2d 665, 669 n.2 (W.D. Pa. 2003) (quoting United States v. Rubin, 474 F.2d 262, 268-69 (3d Cir. 1973)).

233. 289 F.Supp. 2d 1291(D. Kan. 2003).

234. *See id.* at 1296-97.

235. *Id.* at 1303-04.

236. *See id.*

237. *See id.*

The test, as applied to cellular phones, should be as follows: in order to search the contents of a cellular phone, police must show, first, that they had probable cause to believe that evidence of illegal activity is present in the content of the cellular phone.[238] Second, the police must show that they had a reasonable belief that the evidence in the phone may be destroyed or removed before they could obtain a warrant to search the phone.[239]

The first prong of the test safeguards a suspect from the police searching cellular phones subject to any arrest.[240] It would permit the police to search a phone only if they could show probable cause for believing evidence of illegal activity is present on the phone.[241] According to the court in *United States v. Fladten*:[242] "Probable cause exists when, given the totality of the circumstances, a reasonable person could believe there is a fair probability that contraband or evidence of a crime would be found in a particular place."[243] Held to this standard, it would likely not be lawful for police to search the contents of an arrestee's phone subject to an arrest for an assault or a traffic violation.[244] However, in certain drug cases, such as where there is evidence of distribution, it is possible that, given the totality of the circumstances, a reasonable person could believe that there is a fair probability that evidence of the drug trafficking would be available on the phone.[245] A simple drug possession arrest, however, may or may not achieve that same level of fair probability.[246] Crimes involving co-conspirators would also be an example where evidence of the crime would likely be found on the phone.

The second prong is a safeguard against the police circumventing the warrant requirement without the necessity for immediate action.[247] If police believed that a house contained evidence of a crime, they would still have to get a warrant to enter it, absent a need for immediate action.[248] Just because police have probable cause to believe that a cellular phone contains evidence of illegal activity does not mean that they do not have to obtain a warrant to search it.[249] Only in cases where the police could point to the facts that gave them a reasonable belief that the evidence in the phone may

238. *See* United States v. Cephas, 254 F.3d 488, 494-95 (4th Cir. 2001).
239. *See id.* at 494-95 (citing United States v. Turner, 650 F.2d 526, 528 (4th Cir. 1981)).
240. *See id.* at 494-96.
241. *See id.*
242. 230 F.3d 1083 (8th Cir. 2000).
243. *Id.* at 1085 (citing Illinois v. Gates, 462 U.S. 213, 238 (1983)).
244. *See id.* at 1085-86.
245. *See generally* United States v. Brock, 667 F.2d at 1314-15, 1317-18.
246. *See generally Smith*, 920 N.E.2d at 950-51.
247. *See Cephas*, 254 F.3d at 494-96.
248. *See Porter*, 288 F. Supp. 2d at 719.
249. *See Flores-Lopez*, 670 F.3d at 804-06.

be destroyed or removed before could they could obtain a warrant would they be able to search the cellular phone without a warrant.[250] For instance, the court in *Parada* found that, because of the character of the phone in that case, police had an immediate need to search the call records of the phone before they were deleted.[251]

The *Parada* decision would likely not stand in today's courts based on the character of modern cellular phones.[252] It is unlikely that any modern phone would not automatically store the call information for hundreds of the last calls made. In addition, a search such as this could easily be conducted under the exception outlined in *Flores-Lopez*, allowing for the search of a phone's call log because of its minimally intrusive nature, analogous to the pen register used in *Smith v. Maryland*.[253]

The Supreme Court of Ohio in *Smith*, although ultimately holding the search of the cellular phone in that case invalid as a search incident to arrest, seemed to accept the idea that exigent circumstances could exist which would require the warrantless search of a cellular phone.[254] In *Smith* the state argued "that the search of the cell phone was proper because exigent circumstances justified the search."[255] The state's argument was similar to the one made in *Parada*, in that "cell phones store a finite number of calls in their memory and that once these records have been deleted, they cannot be recovered."[256] However, the court found that the state had failed to make any showing that exigent circumstances existed.[257] The court further noted that:

> even if one accepts the premise that the call records on Smith's phone were subject to imminent permanent deletion, the state failed to show that it would be unable to obtain call records from the cell phone service provider, which might possibly maintain such records as part of its normal operating procedures.[258]

Had the state been able to prove these matters, however, it seems likely that they could have persuaded the court to find the search lawful as an exigent circumstance.[259]

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250. *See Cephas*, 254 F.3d at 494-96.
251. *See Parada*, 289 F. Supp. 2d at 1303-04.
252. *See supra* notes 204-09 and accompanying text.
253. *See Smith*, 442 U.S. at 740-42; *Flores-Lopez*, 670 F.3d at 807.
254. *See Smith*, 920 N.E.2d at 955.
255. *Id.*
256. *Id.*; *see Parada*, 289 F. Supp. 2d at 1303-04.
257. *See Smith*, 920 N.E.2d at 955.
258. *Id.* at 955-56.
259. *See id.*

The court in *Flores-Lopez* also entertained the thought that exigent circumstances could provide for a more thorough search of a phone's contents.[260] The government in that case "emphasize[d] the danger of 'remote wiping.'"[261] The court went on to note that, "pressing a button on the cell phone that wipes its contents and at the same time sends an emergency alert to a person previously specified was not a danger in this case once the officers seized the cell phone."[262] However, "remote-wiping capability is available on all major cell-phone platforms."[263] In light of this, the court noted:

> [o]ther conspirators were involved in the distribution of methamphetamine . . . and conceivably could have learned of the arrests . . . and wiped the cell phones remotely before the government could obtain and execute a warrant and conduct a search pursuant to it for the cell phone's number; and conceivably the defendant might have had time to warn them before the cell phone was taken from him, giving them time to wipe it.[264]

The defendant in the case "argue[d] that the officers could have eliminated any possibility of remote wiping just by turning off the cell phone."[265] However, the court noted that "because 'turning off' a cell phone often just means a reduction in power—a kind of electronic hibernation," simply turning off the phone could not eliminate the possibility of remote wiping.[266] Additionally, it was noted that a Faraday cage, which is "essentially an aluminum-foil wrap" can be used to isolate the cellular phone from the phone network and Internet signals.[267] It was also noted that a copy of the cellular phone's contents could be made to preserve them, without searching through the contents.[268]

The court in *Flores-Lopez* ultimately found that they did not need to decide "what level of risk to personal safety or to the perseveration of evidence would be necessary to justify a more extensive search of a phone without a warrant" because the search in that case was found minimally intrusive on other grounds.[269] The case does, however, make it easy to

260. *See Flores-Lopez*, 670 F.3d at 810.
261. *Id.* at 807 (quotations added by the court).
262. *Id.* at 807-08 (citation omitted).
263. *Id.* at 808.
264. *Id.*
265. *Flores-Lopez*, 670 F.3d at 808.
266. *Id.* (citing United States v. Tomero, 471 F. Supp. 2d 448, 450 & n.2 (S.D.N.Y. 2007)).
267. *Id.* at 809.
268. *See id.*
269. *See id.* at 810.

envision a situation in which the exigent circumstances exception would apply to cellular phones.[270] Imagine that (1) the police have probable cause to believe evidence of illegal activity is present on the cellular phone, such as in a drug distribution arrest, (2) when there are known co-conspirators in the case, (3) if the phone was not secured in time to eliminate the possibility of the arrestee warning his co-conspirators, and (4) when the police are unable to isolate the phone from cellular and Internet signals or remove the battery from the phone. Under the exigent circumstances test, this fact pattern would give the police a reasonable belief that the evidence in the phone may be destroyed or removed before they could obtain a warrant, and the facts would therefore be sufficient to empower the police to search the phone's contents without a warrant.[271]

It is also easy to imagine exigent circumstances involving cellular phones in which a "law enforcement officer[] [is] faced with exigent circumstances such that there is a 'compelling need for official action and no time to secure a warrant.'"[272] For instance, if officers were to capture and arrest a co-conspirator in an ongoing terrorist attack, the officers would likely be permitted to search the arrestee's phone in order to locate the other co-conspirators and prevent further attacks.[273] The point remains the same though: that the exigent circumstances test provides for appropriate safeguards for the substantial privacy interests people have in their cellular phones with the need of police to still be able to search a phone's contents without a warrant in extraordinary circumstances.[274]

It could be argued that, due to the *Gant* decision holding that law enforcement officers cannot search a vehicle incident to arrest unless they can demonstrate an actual and continuing threat to their safety or a need to preserve evidence related to the crime of arrest from tampering, the search-incident-to-arrest exception also safeguards against police searching a cellular phone's content without showing the need to preserve evidence related to the crime.[275] However, *Gant* is specifically a vehicle exception to the Fourth Amendment.[276] There is no evidence at all that this rule of law would be applied to cellular phones that are located on the person, and it is doubtful that courts would extend the rule in this manner in light of

270. *See generally Flores-Lopez*, 670 F.3d 803.

271. *See, e.g.*, *Cephas*, 254 F.3d at 494-95.

272. Wengert v. State, 771 A.2d 389, 394 (Md. 2001) (quoting Michigan v. Tyler, 436 U.S. 499, 509 (1978)).

273. *See Flores-Lopez*, 670 F.3d at 810.

274. *See Cephas*, 254 F.3d at 494-96.

275. *Gant*, 556 U.S. at 351.

276. *See id.*

Robinson.[277] Regardless of whether the exception would apply or not, as argued in Part II(E) of this comment, cellular phones should not be subject to searches incident to arrest at all due to their ability to hold voluminous amounts of private information.[278]

In light of the above, the exigent circumstances exception to the Fourth Amendment is the proper framework with which to analyze the warrantless search of cellular phones.[279] In comparison to the search incident to arrest exception, it provides more protections of a person's substantial privacy interest in their cellular phone, while still allowing for the possibility of circumstances arising that lead to the necessity of a warrantless cellular phone search by law enforcement officers.[280]

IV. CONCLUSION

With the number of cellular phones now outnumbering the number of people in the United States, it comes as no surprise that more and more cellular phones are being seized at the time of arrest.[281] Some courts have validated the warrantless search of cellular phones using the search-incident-to-arrest exception to the Fourth Amendment.[282] These courts, however, fail to realize the character of modern cellular phones. Treating cellular phones like physical closed containers or like typical items found on a person, such as clothes, fails to take into account the vast amounts of personal information that modern cellular phones are able to hold. The exigent circumstances exception to the Fourth Amendment, however, properly balances people's substantial privacy interests in their cellular phones with law enforcement officer's need to search phones in circumstances where immediate action is necessary to prevent the imminent destruction of evidence or an imminent substantial harm. In the future, courts should look to this test when determining the constitutionality of warrantless searches of cellular phones at or near the time of arrest.

277. *See Robinson*, 414 U.S. at 224-36 .
278. *See supra* Part II.E.
279. *See supra* Part III.C.
280. *See supra* Parts II.E.1-4.
281. *See supra* notes 5-6 and accompanying text. *See generally* Diaz, 244 P.3d at 511.
282. *See Flores-Lopez*, 670 F.3d at 809-10; *Diaz*, 244 P.3d at 510-11.