

# THE FEDERAL COURTS LAW REVIEW

Volume 6, Issue 1

2012

## But, Your Honor, a Cell Phone is not a Cigarette Pack: An Immodest Call for a Return to the *Chimel* Justifications for Cell Phone Memory Searches Incident to Lawful Arrest

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I. INTRODUCTION

Although cell phones and smart phones with immense digital memories containing their users’ most private information are now in the pockets of millions of Americans each day, cell phone memories are subject to unfettered searches incident to lawful arrest in most jurisdictions. Courts upholding cell phone memory searches analogize to Supreme Court and other superior court cases affirming searches incident to lawful arrest of crumpled cigarette packs, pagers, wallets, and address books, apparently on the theory that cell phones are likewise small, carried in pockets, and can contain personal information.

Given the ubiquity of cell phones, and their users’ propensity to store vast amounts of private information on them, the time has come to distinguish cell phone memories from cigarette packs, pagers, wallets, and

address books; recognize that cell phone users have an objectively reasonable expectation of privacy in their cell phone memories; and return to the twin *Chimel v. California*<sup>1</sup> justifications for searches incident to arrest that such searches are only constitutionally permissible if they are either necessary to ensure officer safety, or necessary to safeguard evidence from destruction or loss.

This Article argues that neither *Chimel* justification pertains to cell phone memory searches incident to lawful arrest; therefore, such searches are unconstitutional without a search warrant issued by a neutral magistrate, or when some other traditional exception to the warrant requirement applies. This Article posits that since a cell phone is not like a cigarette pack, courts should simply be applying the general search incident to arrest principles from *Chimel* rather than applying strained analogies to cases permitting searches (incident to arrest) of items that are not analogous to cell phones.

## II. CELL PHONES ARE NOT LIKE CIGARETTE PACKS

The California Court of Appeals in *People v. Diaz*<sup>2</sup> (“*Diaz 1*”) and the California Supreme Court<sup>3</sup> (“*Diaz 2*”) recently upheld the search incident to lawful arrest of the digital contents (specifically, text messages) of a cell phone’s internal memory, although the phone was not seized from the defendant’s pocket until an hour after the defendant’s arrest, and was not searched until ninety minutes after the arrest when the cell phone had been long-since within the exclusive control of the arresting officers.<sup>4</sup> The *Diaz* decisions are in the strong majority<sup>5</sup> at present, but a vocal minority of

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1. *Chimel v. California*, 395 U.S. 752 (1969).
2. *People v. Diaz*, 81 Cal. Rptr. 3d 215 (Cal. Ct. App. 2008) (hereinafter “*Diaz 1*”), *aff’d*, 244 P.3d 501 (Cal. 2011).
3. *People v. Diaz*, 244 P.3d 501 (Cal. 2011) (hereinafter “*Diaz 2*”).
4. *Diaz 2*, 244 P.3d at 502-03; *Diaz 1*, 81 Cal. Rptr. 3d at 215-16.
5. *See infra* Part VI.

courts is weighing in.<sup>6</sup> Although the defendant in *Diaz 2* petitioned for certiorari,<sup>7</sup> the Supreme Court denied that petition on October 3, 2011, thus leaving divided courts across the country without any recent Supreme Court guidance specific to cell phones.<sup>8</sup>

In the absence of any more recent United States Supreme Court guidance specific to cell phones,<sup>9</sup> the *Diaz 2* court based its decision<sup>10</sup> on three opinions dating from 1973 to 1977: *Robinson*,<sup>11</sup> *Edwards*,<sup>12</sup> and *Chadwick*.<sup>13</sup> The *Diaz 2* court held, explicitly, that the cell phone in that case was more like a cigarette pack (as in *Robinson*) and less like a footlocker (as in *Chadwick*).<sup>14</sup>

A number of commentators have proposed an array of different perspectives for cell phone memory searches. A few articles have addressed cell phone searches in a mostly descriptive sense.<sup>15</sup> Others have addressed cell phone searches predominantly in a review of a single leading

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6. See, e.g., *United States v. Zavala*, 541 F.3d 562 (5th Cir. 2008); *United States v. Quintana*, 594 F. Supp. 2d 1291 (M.D. Fla. 2009); *United States v. Park*, No. CR-05-375 SI, 2007 WL 1521573 (N.D. Cal. May 23, 2007);

7. *Diaz 2*, United States Supreme Court Docket, Pet. for Writ Cert., Case Nos. 10-1231, S166600 (filed Apr. 4, 2011).

8. 132 S. Ct. 94 (2011).

9. But see *Smith v. Maryland*, 442 U.S. 735 (1979) (a cell phone data case that is inapposite here, since it involved not cell phone internal memory, but a listing of numbers dialed by that cell phone, and that was maintained by the cell service provider); *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010) (affirming search of a pager's – not a cell phone's – internal memory when the pager user was a public official, and the pager provider was a government entity with a policy providing that government equipment used by government employees was subject to search); see also Miles K. Palley, Note, *Ontario v. Quon: In Search of a Reasonable Fourth Amendment*, 26 BERKELEY TECH. L.J. 859 (2011); Joseph O. Oluwole, *Teacher Cell Phone Searches in Light of Ontario v. Quon*, 17 RICH. J.L. & TECH. 1 (2010).

10. *Diaz 2*, 244 P.3d at 503-07.

11. *United States v. Robinson*, 414 U.S. 218 (1973) (affirming seizure, incident to arrest, of the contents of a crumpled cigarette pack found at the time of the arrest in the arrestee's shirt pocket).

12. *United States v. Edwards*, 415 U.S. 800 (1974) (affirming seizure, incident to arrest, of paint chips from an arrestee's clothing ten hours after that clothing was seized upon arrest).

13. *United States v. Chadwick*, 433 U.S. 1 (1977) (affirming suppression of the contents of a locked footlocker searched ninety minutes after the arrest and seizure, since a footlocker was not personal property “immediately associated with [the arrestee's] person,” and thus was distinguishable from the seized property in *Robinson* and *Edwards*).

14. *Diaz 2*, 244 P.3d at 505-06.

15. E.g., Ashley B. Snyder, Comment, *The Fourth Amendment and Warrantless Cell Phone Searches: When is Your Cell Phone Protected?*, 46 WAKE FOREST L. REV. 155 (2011); J. Patrick Warfield, Note, *Putting a Square Peg in a Round Hold: The Search-Incident-to-Arrest Exception and Cellular Phones*, 34 AM. J. TRIAL. ADVOC. 165 (2010); Juan A. Albino, *Do Defendants Have a Privacy Interest in Their Cell Phone's Text Messages and E-mails?*, 44 REV. JURIDICA U. P.R. 383 (2009-2010); 3 Clifford S. Fishman & Anne T. McKenna, *Wiretapping & Eavesdropping: Surveillance in the Internet Age* § 28:17 (3d ed. 1995 & Supp. 2011); 1 Crim. Prac. Manual § 25:152 (Thomson West 2004 & Supp. Nov. 2011).

case.<sup>16</sup> Still others have proposed that future courts follow a particular existing court opinion.<sup>17</sup> One author proposed password protection as the gold standard of “reasonable expectation of privacy.”<sup>18</sup> Another proposed that courts adopt poly-analogical reasoning approaches.<sup>19</sup> Other authors have proposed that cell phones be analogized to computers, thus requiring a search warrant,<sup>20</sup> while others have proposed assorted new constructs for handling cell phone searches.<sup>21</sup> Finally, one commentator even called for an end to cell phone searches incident to arrest altogether.<sup>22</sup> Each of these presents a too narrow or too broad approach.

This Article addresses warrantless searches (incident to lawful arrest) of text messages, address books, photographs, and other data content stored within an individual cell phone’s internal memory, while disregarding searches of other cell phone data, such as cell tower information, dialed phone number lists, and other data that are resident on the cell phone itself and concurrently stored long-term in the records of cell service providers. While cell phone memory searches that arise in circumstances implicating

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16. E.g., Alexis P. Theriault, Comment, *Constitutional Law—Warrants Required to Search Cell Phones Seized Incident to Arrest—State v. Smith*, 920 N.E.2d 949 (Ohio 2009), 44 SUFFOLK U. L. REV. 317 (2011); Chelsea Oxtton, Note, *The Search Incident to Arrest Exception Plays Catch Up: Why Police May No Longer Search Cell Phones Incident to Arrest Without a Warrant*, 43 CREIGHTON L. REV. 1157 (2010).

17. E.g., Ben E. Stewart, Note, *Cell Phone Searches Incident to Arrest: A New Standard Based on Arizona v. Gant*, 99 KY. L.J. 579 (2011); Snyder, *supra* note 15; Jana L. Knott, Note, *Is There an App for That? Reexamining the Doctrine of Search Incident to Lawful Arrest in the Context of Cell Phones*, 35 OKLA. CITY U. L. REV. 445 (2010) (recommending court follow *United States v. Quintana*, 594 F. Supp. 2d 1291 (M.D. Fla. 2009)).

18. Adam M. Gershowitz, *Password Protected? Can a Password Save Your Cell Phone From a Search Incident to Arrest?*, 96 IOWA L. REV. 1125 (2011); *but see* Susan W. Brenner, *The Fifth Amendment, Cell Phones and Search Incident: A Response to Password Protected?*, 96 IOWA L. REV. BULL. 78 (2011).

19. Luke M. Milligan, *Analogy Breakers: A Reality Check on Emerging Technologies*, 80 MISS. L. J. 1319 (2011).

20. E.g., Byron Kish, Comment, *Cellphone searches: Works Like a Computer, Protected Like a Pager?*, 60 CATH. U. L. REV. 445 (2011); Matthew E. Orso, *Cellular Phones, Warrantless Searches, and the New Frontier of Fourth Amendment Jurisprudence*, 50 SANTA CLARA L. REV. 183 (2010); Knott, *supra* note 21.

21. E.g., Justin M. Wolcott, *Are Smartphones Like Footlockers or Crumpled up Cigarette packages? Applying the Search Incident to Arrest Doctrine to Smartphones in South Carolina Courts*, 61 S.C. L. REV. 843 (2010); Adam M. Gershowitz, *The iPhone Meets the Fourth Amendment*, 56 UCLA L. REV. 27, 45-57 (2008) (proposing that future courts consider these options regarding searches of smartphones: (A) change nothing, since the current search-incident-to-arrest doctrine “works well,” (B) limit all searches of cell phone internal memory to searches related to the crime of arrest, (C) encourage a legislative response *a la* Massachusetts, (D) allow searches incident to arrest only of applications that were open on the smartphone at the time of the arrest, (E) limit the number of search “steps” officers may take to, say, five steps, or (F) draw a conceptual distinction between searches of data stored on the smartphone itself versus data stored elsewhere that is accessible through the smartphone).

22. Bryan A. Stillwagon, *Bringing an End to Warrantless Cell Phone Searches*, 42 GA. L. REV. 1165 (2008).

the motor vehicle exception, booking-inventory searches, and consent contexts implicate legal issues that are significant in this area, those topics are beyond the scope of this Article.

Courts considering searches (incident to arrest) of today's and tomorrow's hi-tech equipment should avoid analogizing each new technology to Fourth Amendment cases involving searches of items that are simply not analogous. Courts should distinguish those prior cases factually, reject the trend to use strained analogies to the facts of decided cases, and instead, either craft search incident to arrest jurisprudence that directly applies to the realities of each new technology, or adhere to the real, original constitutional justifications for searches incident to arrest as clarified in *Chimel*.

A cell phone with just one gigabyte of memory can store over 64,000 pages of Microsoft Word text, or over 100,000 pages of e-mails, or over 675,000 pages of text files.<sup>23</sup> So, the question can be reduced to the following: in *Diaz*, should the court have struggled to analogize a modern cell phone to a cigarette pack in a shirt pocket, when modern cell phones are capable of storing at least sixty-four gigabytes<sup>24</sup> of private information equaling four million pages of Microsoft Word documents, that between 1973 and 1977 would have required dozens of footlockers to hold? The answer for the future lies in a courageous bench, willing to recognize when the line is crossed—willing to recognize when a cell phone is not a cigarette pack.

A cell phone owner has both objective and subjective reasonable expectations of privacy in the content of text messages and other data stored in the cell phone's internal memory, at least where those data are not also maintained long-term by a third party cell service provider. Furthermore, because searching a cell phone's internal memory advances neither the need to protect the arresting officers' safety, nor the need to preserve evidence—the two *Chimel* justifications for searches incident to lawful arrest—a warrantless search of text messages within a cell phone's internal memory incident to a lawful arrest is simply unconstitutional.

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23. Monroe Cmty. Coll., *How Many Pages are in a Gigabyte? Megabyte?* (May 17, 2004, 3:04 PM), <http://web.monroecc.edu/ETSTechNEWS/pagespergigabyte>; see also Don Kohtz & Matt Churchill, *Cell Phone Forensics*, 34 MONT. LAW. 5 (Sept. 2009).

24. Apple iPhone4S Technical Specifications, APPLE COMPUTERS, INC., <http://www.apple.com/iphone/specs.html> (last visited Sept. 25, 2011). (The Apple iPhone4 can accommodate a 32 gigabyte flash drive, which is capable of storing (within the cell phone) about 2 million Microsoft Word pages, or 3.2 million pages of e-mails, or 21 million pages of Microsoft Excel files. A 64 gigabyte Apple iPhone is in the works.).

### III. *PEOPLE V. DIAZ*: FACTUAL BACKDROP AND DECISION

On April 25, 2007, a Ventura County, California law enforcement officer watched as Gregory Diaz facilitated a sale of ecstasy (a controlled substance) to an informant in a controlled buy.<sup>25</sup> Immediately after the sale, surveillance officers arrested Diaz, who had been driving the vehicle used to deliver the drugs.<sup>26</sup>

The arresting officers seized a small amount of ecstasy from within the vehicle and found a small amount of marijuana and a cell phone in Diaz's possession.<sup>27</sup> However, his cell phone was not seized until about one hour after he had been transported to the stationhouse.<sup>28</sup>

Diaz was questioned by police and denied any knowledge of or involvement in the ecstasy sale.<sup>29</sup> Following Diaz's denial, detectives viewed the text messages on his cell phone without his consent or knowledge; one message indicated "6 4 80," which the detective interpreted as an order for six pills of ecstasy for eighty dollars.<sup>30</sup> The detective confronted him with the text message, whereupon Diaz, about thirty minutes after the cell phone was seized at the stationhouse, and about ninety minutes after his arrest, admitted his role in the ecstasy sale.<sup>31</sup>

The trial court ruled the text message and Diaz's admission admissible.<sup>32</sup> The California Court of Appeal affirmed the trial court's evidentiary rulings, explicitly holding the text message on Diaz's cell phone had been "properly subjected to a delayed warrantless search [incident to lawful arrest]."<sup>33</sup>

### IV. A BRIEF HISTORY OF THE MODERN SEARCH INCIDENT TO LAWFUL ARREST DOCTRINE

It is well-established that each person's right to be free from unreasonable searches and seizures is secured by the Fourth Amendment to the United States Constitution.<sup>34</sup> By its terms, the Fourth Amendment, in pertinent part, protects "persons, houses, papers, and effects" from "unreasonable searches and seizures," and requires warrants to be based

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25. *Diaz 2*, 244 P.3d at 502.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Diaz 2*, 244 P.3d at 502-03.

31. *Id.* at 503.

32. *Diaz 1*, 81 Cal. Rptr. at 216, 219.

33. *Diaz 2*, 244 P.2d at 503; *Diaz 1*, 81 Cal. Rptr. at 216.

34. U.S. CONST. amend. IV.

upon probable cause.<sup>35</sup> The United States Supreme Court has spent the many decades following the Fourth Amendment's ratification explaining those few words, finally coming to rest at search and seizure jurisprudence that protects only "reasonable expectations of privacy,"<sup>36</sup> and recognizes many exceptions to the warrant requirement.<sup>37</sup> One of those warrant exceptions covers searches incident to lawful arrest.<sup>38</sup>

The search incident to lawful arrest doctrine is of relatively recent origin, since there was little need for searches incident to arrest in colonial times and in the early years of the nation, due to the widespread use of general warrants, and the ease with which felony arrest warrants could be obtained.<sup>39</sup> Since warrants were so readily obtained, there was less need for warrantless searches and seizures of any kind in those early years.<sup>40</sup> In fact, the Supreme Court never even alluded to the concept of searches incident to an arrest until it did so, in dictum, in *Weeks v. United States* in 1914.<sup>41</sup> Since *Weeks*, the search incident doctrine has changed more frequently and more abruptly than any other area of Fourth Amendment jurisprudence. The Supreme Court itself has even labeled the doctrine's history as "checkered."<sup>42</sup>

Just eleven years after *Weeks*, the Supreme Court in *Carroll v. United States*<sup>43</sup> clarified, again in dictum, that the search incident to lawful arrest included the arrestee's person and anything else within his control so long

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35. *Id.*

36. *Katz v. United States*, 389 U.S. 347, 362 (1967) (Harlan, J., concurring).

37. *Groh v. Ramirez*, 540 U.S. 551, 572-73 (2004) (Thomas, J., dissenting) (effectively and succinctly identifying and citing the recognized exceptions to the warrant requirement, and noting ruefully, "That is, our cases stand for the illuminating proposition that warrantless searches are *per se* unreasonable, except, of course, when they are not.")

38. Orin Kerr, *The Origins of the "Search Incident to Arrest" Exception*, THE VOLOKH CONSPIRACY (Dec. 14, 2010, 8:52 PM) <http://volokh.com/2010/12/14/the-origins-of-the-search-incident-to-arrest-exception>.

39. *E.g.*, Telford Taylor, *Two Studies in Constitutional Interpretation* 27-28 (1969); Tracey Maclin & Julia Mirabella, *Framing the Fourth*, 109 MICH. L. REV. 1049, 1059 (2011); James J. Tomkovicz, *Divining and Designing the Future of the Search Incident to Arrest Doctrine: Avoiding Instability, Irrationality, and Infidelity*, 2007 U. ILL. L. REV. 1417, 1421-45 (2007); Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977, 978-80 (2004); Wayne A. Logan, *An Exception Swallows the Rule: Police Authority to Search Incident to Arrest*, 19 YALE L. & POL'Y REV. 381, 385-90 (2001).

40. *See generally*, WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 602-1791 435 (2009).

41. *Weeks v. United States*, 232 U.S. 383, 392 (1914) (dictum) ("[t]he right on the part of the government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime . . . has been uniformly maintained in many cases.") (the case is best-known, perhaps, for having elucidated the exclusionary rule).

42. *Arizona v. Gant*, 556 U.S. 332, 350 (2009).

43. *Carroll v. United States*, 267 U.S. 132 (1925) (a case better known, perhaps, for having devised the motor vehicle exception).

as the items seized were unlawful for the arrestee to possess “and which may be used to prove the offense.”<sup>44</sup> Later that same year, the Court in *Agnello v. United States*<sup>45</sup> expanded the search incident doctrine to include not just the arrestee’s person and items within his control, but also to include the right to “contemporaneously” search the “place” where the arrest was executed.<sup>46</sup> Two years later, the Court in *Marron v. United States*<sup>47</sup> extended searches incident to include the arrestee, the arrestee’s person, items within his “immediate possession and control,” and even to “all parts of the premises used for the unlawful purpose.”<sup>48</sup>

The latter stages of Prohibition,<sup>49</sup> somewhat amazingly, led to the first notable contractions of the search incident doctrine in the 1930s.<sup>50</sup> In *Go-Bart Importing Co. v. United States*<sup>51</sup> and *United States v. Lefkowitz*,<sup>52</sup> faced with more generalized premise searches incident to arrest, the Court held them to be unreasonable and therefore, unconstitutional.

Then the Court turned from contraction of the doctrine in the early 1930s to expansion again in the late 1940s and early 1950s.<sup>53</sup> In *Harris v. United States*, describing the search incident doctrine as “a practice of ancient origin,” the Court had no apparent difficulty extending the search incident ambit to include the arrestee’s person, the premises under his

44. *Id.* at 158.

45. *Agnello v. United States*, 269 U.S. 20 (1925).

46. *Id.* at 30 (“The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody is not to be doubted.”) (in support of that expansive and confident proposition, the Court in *Agnello* cited only *Weeks* and *Carroll*, both of which were only dicta)).

47. *Marron v. United States*, 275 U.S. 192 (1927).

48. *Id.* at 199 (notably and almost exclusively, citing *Weeks*, *Carroll*, and *Agnello* for those propositions).

49. Prohibition extended from the ratification of the Eighteenth Amendment, U.S. CONST. amend. XVIII, on January 16, 1919, to the ratification of the Twenty-first Amendment, U.S. CONST. amend. XXI, on December 5, 1933.

50. See generally George M. Dery III, *A Case of Doubtful Certainty: The Court Relapses into Search Incident to Arrest Confusion in Arizona v. Gant*, 44 IND. L. REV. 395, 400-01 (2011).

51. *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357-58 (1931) (“There is no formula for the determination of reasonableness. . . . [But after finding the search was] a general and apparently unlimited search, ransacking the desk, safe, filing cases and other parts of the office, [i]t was a lawless invasion of the premises and a general exploratory search in the hope that evidence of crime might be found. . . . The uncontradicted evidence requires a finding that here the search of the premises was unreasonable.”).

52. *United States v. Lefkowitz*, 285 U.S. 452, 465-67 (1932) (“Here, the searches were exploratory and general and made solely to find evidence of respondents’ guilt of the alleged conspiracy or some other crime. . . This case does not differ materially from the *Go-Bart* case and is ruled by it. An arrest may not be used as a pretext to search for evidence.”).

53. See generally, Colin Miller, *Stranger than Dictum: Why Arizona v. Gant Compels the Conclusion that Suspicionless Buie Searches Incident to Lawful Arrests are Unconstitutional*, 62 BAYLOR L. REV. 1, 11-12 (2010).

“immediate control,” and to include much more than just the one room in which the defendant had been arrested.<sup>54</sup> Four Justices vehemently offered three separate dissenting opinions in *Harris*, labeling the search there as a general rummaging far beyond the bounds of what the Fourth Amendment allows.<sup>55</sup> In *Trupiano v. United States*,<sup>56</sup> the Court briefly re-asserted a more restricted search incident approach, holding that searches incident to arrest would be invalid if the officers had sufficient time to obtain a search warrant, since the search incident doctrine “has always been considered to be a strictly limited right.”<sup>57</sup> Then, in *United States v. Rabinowitz*,<sup>58</sup> explicitly overruling the warrant requirement created just two years earlier in *Trupiano*,<sup>59</sup> and distinguishing and distancing itself from *Go-Bart* and *Lefkowitz*,<sup>60</sup> the Court returned to a more expansive view of searches incident, holding that officers could lawfully search incident to arrest the arrestee’s person, desk, safe, and file cabinets, all of which the Court considered to be within the arrestee’s immediate control.<sup>61</sup>

Rising out of this vacillating history of the search incident doctrine, in 1969 the Supreme Court in *Chimel v. California* set out the contours of what might be termed the modern search incident to lawful arrest doctrine.<sup>62</sup> In *Chimel*, the Court held a search of an arrestee’s entire house was invalid, since it extended beyond the arrestee’s person, beyond the area within which the arrestee may have obtained a weapon, and beyond the area within which the arrestee may have retrieved and destroyed or secreted evidence against him.<sup>63</sup>

The Court in *Chimel* focused on the reasonableness requirement, that is, that the Fourth Amendment only circumscribes “unreasonable searches and seizures.”<sup>64</sup> The Court held the test for reasonableness “is the reason

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54. *Harris v. United States*, 331 U.S. 145, 151-52 (1946) (note that the majority of the Court in *Harris* had no difficulty authorizing the search of the entire four-room apartment, including searching for evidence the officers were not aware was on the premises at the execution of the arrest or the commencement of the resultant search).

55. *Id.* at 155-82 (Frankfurter, J., dissenting); *Id.* at 182-95 (Murphy, J. dissenting); *Id.* at 195-98 (Jackson, J., dissenting).

56. *Trupiano v. United States*, 334 U.S. 699 (1948).

57. *Id.* at 708-10.

58. *United States v. Rabinowitz*, 339 U.S. 56 (1950).

59. *Id.* at 66.

60. *Id.* at 62.

61. *Id.* at 61-64.

62. *Chimel v. California*, 395 U.S. 752 (1969) (finding a search of an entire house exceeded acceptable scope of a search incident to lawful arrest).

63. *Id.* at 768.

64. *Id.* at 762-63 (“When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons. . . . In 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. And the area into which an arrestee might reach

underlying and expressed by the Fourth Amendment.”<sup>65</sup> That holding essentially yielded the twin *Chimel* justifications: a search incident to lawful arrest must be supported by either officer safety, or the need to preserve evidence from being hidden or destroyed. Those twin justifications are essentially the exigency allowing the officers to bypass the warrant requirement, but only when one of those justifications is present.

The *Chimel* predicate was extended in the three cases cited in *Diaz 2*: *Robinson*, *Edwards*, and *Chadwick*, each of which applied the 1969 *Chimel* rule in a somewhat different factual context. In *Robinson*, the Court permitted search of a closed container, a crumpled cigarette pack found on the arrestee’s person.<sup>66</sup> In *Edwards*, the Court permitted the search and seizure of paint chips on the arrestee’s clothing that had been seized from the arrestee at the time of the arrest.<sup>67</sup> In *Chadwick*, the Court suppressed evidence seized from a footlocker that had been seized after the arrestee let go of the footlocker right before his arrest.<sup>68</sup>

Since these cases from the 1970s, the United States Supreme Court has revisited searches incident to lawful arrest on numerous occasions, but essentially always in the context of motor vehicle, booking-inventory, or residence searches.<sup>69</sup> Rather, the Court has relegated to lower courts the task of addressing the reasonable and constitutional contours of searches incident to lawful arrest in other contexts in the digital age. Unfortunately, in the process of transferring that responsibility to lower courts, the Court has provided precious little guidance since the 1970s. This unfortunate fact has left our jurisprudence in this area sorely rudderless. Thus, lower courts’ decisions on searches incident to lawful arrest in the digital age, outside of motor vehicle and residence contexts, are largely based on strained analogies to the factual contexts from Supreme Court decisions issued nearly forty years ago. That has led these lower courts’ decisions, which were intended to be *Chimel* progeny, to be, in reality, prodigal children that have wandered far from *Chimel*’s original reasoning and justifications for authorizing searches incident to lawful arrest. Analogies to facts from earlier cases should not control future decisions in this area, where those

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in order to grab a weapon or evidentiary items must, of course, be governed by a like rule.”).

65. *Id.* at 765 (quoting *United States v. Rabinowitz*, 339 U.S. 56, 83 (Frankfurter, J., dissenting)).

66. *United States v. Robinson*, 414 U.S. 218, 236 (1973).

67. *United States v. Edwards*, 415 U.S. 800, 807-09 (1974).

68. *United States v. Chadwick*, 433 U.S. 1, 15 (1977).

69. *See, e.g.*, *Arizona v. Gant*, 556 U.S. 332 (2009) (placing some limits on searches incident to lawful arrest within an automobile); *Illinois v. Andreas*, 463 U.S. 765 (1983) (affirming, as an inventory search at the jail, a search of the contents of an arrestee’s purse); *Maryland v. Buie*, 494 U.S. 325 (1990) (affirming search incident to lawful arrest within a residence).

facts are not analogous. Rather, the general and overarching principles from *Chimel* should prevail.

V. THE REAL CONSTITUTIONAL JUSTIFICATIONS FOR SEARCHES  
INCIDENT TO LAWFUL ARREST

Since *Chimel* in 1969, and *Robinson* in 1973, two rationales have been recognized as sufficient to justify a search incident to lawful arrest: officer safety and evidence preservation.<sup>70</sup> But neither of these two rationales supports searches of a cell phone's internal memory. A cell phone is not a weapon (certainly a cell phone's memory is not a weapon), and it is not necessary to immediately search a cell phone's internal memory lest that internal memory be lost, since simple and inexpensive technology available to every law enforcement agency makes it elementary to eliminate any risk that a cell phone's internal memory may be remotely disabled, modified, or erased.<sup>71</sup>

A. *A cell phone is not a weapon*

The first rationale supporting searches incident to lawful arrest—officer safety—is “both legitimate and weighty.”<sup>72</sup> Officers are on the front line, confronting suspects who may pose a threat to them or others. It is, therefore, reasonable to allow a limited search of the arrestee to disarm the arrestee or to ensure the arrestee is unarmed.<sup>73</sup> Indeed, a weapon can be designed to look like a cell phone.<sup>74</sup> As the dissent in *Diaz 2* noted, a cell phone's memory could not pose a threat to the arresting officers:

Weapons, of course, may be hidden in an arrestee's clothing or in a physical container on the person. But there is apparently no ‘app’ that will turn an iPhone or any other mobile phone into an effective weapon for use against an arresting officer (and if there were, officers would presumably

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70. *Knowles v. Iowa*, 525 U.S. 113, 116 (1998) (the twin *Chimel* rationales are “(1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial.”).

71. *See infra* Part V(B).

72. *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977) (per curiam).

73. *See Chimel v. California*, 395 U.S. 752, 762-63 (citing *Terry v. Ohio*, 392 U.S. 1 (1968)) (the Court noted the similarity between the officer-safety rationale supporting searches incident to lawful arrest, and the officer-safety rationale supporting so-called *Terry* searches).

74. *Gun Disguised as a Cell Phone*, SCIENCE AND TECHNOLOGY (No. 07, 2009), <http://technology.nicefun.net/gun-disguised-as-a-cellphone/> (“The cellphone . . . was seized by police in a recent raid on the Italian Mafia. . . . Simply slide the keypad of the mobile phone to transform it into a gun. The gun barrel is hidden in the antenna of the cellphone, and a press of a button on the keypad will fire the bullet. . . . This cellphone gun can be loaded with up to four .22 bullets.”).

seek to disarm the phone rather than search its data files).<sup>75</sup>

As a search of a cell phone's memory cannot be justified by officer safety concerns, the only *Chimel* rationale that could apply to searches of cell phone internal memory incident to lawful arrest is whether the search is necessary to prevent loss or destruction of the evidence potentially contained in the cell phone's internal memory. But even that justification is unavailing given new technology.

*B. Simple and inexpensive equipment can eliminate almost any risk that a cell phone's internal memory can be remotely disabled, modified, or erased*

The second rationale supporting searches incident to lawful arrest—preserving evidence—supports *seizure* of the arrestee's cell phone, but does not support *search* of the internal memory of the arrestee's cell phone absent a warrant. Recall that the *Chimel* rationale regarding preservation of destructible evidence revolved around evidence that could be secreted or destroyed by the arrestee since it was physically located, at the time of the arrest, within reach of the arrestee.<sup>76</sup>

Of course, a cell phone on an arrestee's person at the time of the arrest often may contain evidence of the crime. But on the other hand, it is entirely likely at the time of the arrest that the arresting officers have no idea whether a suspect's cell phone contains any inculpatory evidence. But law enforcement seizure (and only seizure) of a cell phone while awaiting the fruits of that investigation will, without fail, safeguard any evidence within a cell phone's internal memory if simple and inexpensive precautions are undertaken. There is no need to give such short shrift to the Fourth Amendment by holding a cell phone's internal memory can be exhaustively searched as soon as the arrest is affected. The wiser course—the Constitutional course—is to honor the Fourth Amendment's warrant requirement by compelling investigators to obtain a search warrant for the cell phone's internal memory after developing probable cause to believe the internal memory contains relevant evidence. Any such search without a warrant would be unjustifiable and unconstitutional.<sup>77</sup>

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75. *Diaz 2*, 244 P.3d 501, 514 (Cal. 2011) (Werdegar, J., dissenting). A cell phone's memory need not be searched to determine whether it is, in reality, a firearm. Thus, the fact a firearm can be disguised as a cell phone may justify seizure of a cell phone, and brief mechanical inspection, but does not justify, under *Chimel*, a search of the cell phone's memory.

76. *Chimel*, 395 U.S. at 762-63.

77. As Judge Learned Hand noted in holding the search of an entire house for evidence was invalid, "After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued

Many courts have held that it is essential to search a cell phone's internal memory immediately lest the internal memory be remotely disabled, modified, or erased.<sup>78</sup> This is no longer the case. Devices known variously as RF shields,<sup>79</sup> Faraday cages,<sup>80</sup> or Faraday bags<sup>81</sup> (hereinafter referred to as Faraday enclosures<sup>82</sup>) can be used to dramatically reduce or completely eliminate any risk of remotely disturbing a cell phone's internal memory.

A Faraday enclosure is "formed by conducting material that shields the interior from external electromagnetic radiation. . . . They can be used for preservation [of evidence] on crime scenes and powered during transport to bigger facilities for actual examination."<sup>83</sup> A reusable Faraday enclosure large enough to hold a single cell phone is available to law enforcement agencies and others for as little as thirty dollars.<sup>84</sup> Larger, powered units are available at a higher cost, but a small Faraday enclosure will safeguard a seized cell phone from any remote efforts to change its internal memory.<sup>85</sup> Assessments across the industry have shown variation

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by a magistrate . . . but it is small consolation to know that one's papers are safe only so long as one is not at home." *Chimel*, 395 U.S. at 767-68 (quoting *United States v. Kirschenblatt*, 16 F.2d 202, 203 (2d Cir. 1926)). No less can be said of the cell phone memory search in *Diaz 2*, and cell phone memory searches, in general. Cell phone memory searches incident to arrest are simply efforts to rummage through the personal effects of the arrestees, not justified by officer safety, and not justified by any real potential destruction of evidence. Paraphrasing Judge Hand, it is small consolation that one's cell phone is safe from warrantless search only as long as it is not in one's pocket when its owner is arrested.

78. *E.g.*, *United States v. Murphy*, 552 F.3d 405, 411 (4th Cir. 2009); *United States v. Santillan*, 571 F. Supp. 2d 1093, 1102-04 (D. Ariz. 2008).

79. *Testing Solutions for the Wireless Industry*, CONCENTRIC TECHNOLOGY SOLUTIONS, INC., <http://www.rfshieldbox.com/products.html> (last visited Sept. 28, 2011).

80. JONATHAN ZDZIARSKI, *IPHONE FORENSICS: RECOVERING EVIDENCE, PERSONAL DATA, AND CORPORATE ASSETS* 39 (2008).

81. *What the Association of Chief Police Officers (ACPO) Says About Faraday Solutions: Guide for Mobile Phone Seizure & Examination*, DISKLABS, <http://www.faradaybag.com/acpo-guidelines.html> (last visited Sept. 28, 2011).

82. People encounter Faraday enclosures nearly daily. For example, when one peers through the door of a microwave oven and sees a metal mesh behind the window, that mesh is the visible part of a Faraday enclosure, which for microwave ovens, keeps the potentially harmful microwaves inside the oven. As another example, an automobile, that surrounds its occupants in metal, actually serves as a Faraday enclosure and protects the occupants from electrocution should the automobile be struck by lightning. FARADAY CAGE, <http://www.faradaycage.org> (last visited Sept. 27, 2011).

83. *HANDBOOK OF DIGITAL FORENSICS AND INVESTIGATION* 395 (Eogan Casey ed., 2010).

84. *Paraben Product Listing*, GOMEX TECH. LLC, <http://gomextech.com> (follow "Forensic Software"; then follow "Parben") (last visited Sept. 25, 2011).

85. *Patented Wireless StrongHold Bag*, Paraben Corp., <http://www.paraben.com/stronghold-bag.html> (last visited Sept. 25, 2011) (presenting testing results for its individual cell phone Faraday bag, across numerous MHz frequency ranges, at up to 99.99999% effectiveness at blocking cell phone signals).

in the ability of various vendors' Faraday enclosures to intercept incoming cell phone signals; however, those studies have also noted that the industry appears to be improving its effectiveness.<sup>86</sup>

Law enforcement agencies have capitalized on the current majority rule by purchasing equipment with which they can instantaneously search and extract files stored in cell phone memories seized incident to lawful arrest.<sup>87</sup> Rather than continuing to purchase equipment allowing instant cell phone memory searches, law enforcement agencies would be more constitutionally advised to purchase Faraday enclosures to safeguard a cell phone memory in anticipation that a search warrant to search that memory may be obtained later.<sup>88</sup>

Because the two rationales for searches incident to lawful arrest—officer safety and to prevent loss or destruction of evidence—are not applicable to searches of cell phone internal memory, there is no basis upon which a court should find such a search to be constitutional.<sup>89</sup> The lack of the twin *Chimel* rationales notwithstanding, the majority of courts considering the matter to date have authorized warrantless cell phone memory searches incident to lawful arrest by stretching Supreme Court precedents beyond their holdings and facts.

#### VI. A MAJORITY OF COURTS CONSIDERING THE MATTER TO DATE HAVE AUTHORIZED SEARCHES OF CELL PHONE INTERNAL MEMORY INCIDENT TO LAWFUL ARREST

Our federal and state courts have acted as if they were hamstrung in the area of cell phone internal memory searches by a paucity of Supreme

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86. See, e.g., Eric Katz, A Field Test of Mobile Phone Shielding Devices (Dec. 10, 2010) (unpublished Masters Thesis, Purdue Univ. Coll. of Tech.).

87. *Paper Treated Differently Than Smartphones in Automobile Searches*, The Newspaper.com (Nov. 1, 2011) <http://www.thenewspaper.com/news/36/3627.asp> (“Some police departments, including the Michigan State Police, are equipped with a mobile forensics device able to extract images, videos, text messages and emails from smartphones. In some cases, the device is able to bypass password protection.”).

88. *But see United States v. Flores-Lopez*, 670 F.3d 803, 808-10 (7th Cir. 2012) (in dictum, addressing Faraday enclosures – for the first time, in this context, in any federal court opinion – and their ability to safeguard a cell phone’s memory contents, and noting other methods for remote wiping of cell phone memory contents, but still affirming a search incident to arrest of a cell phone’s contents, finding “these are questions for another day, since the police did not search the contents of the defendant’s cell phone, but were content to obtain the cell phone’s phone number.”).

89. Although other approaches for remote wiping of cell phones already exist, or will soon exist, each can be overcome by a relatively simple fix, such as removing the battery, or creating, but not viewing, a mirror copy of the memory contents in anticipation of subsequently obtaining a search warrant (see commentary on other remote wiping approaches in *Flores-Lopez*, *supra* note 88). Moreover, none of those remote wiping techniques is so substantial that it outweighs the cell phone owner’s expectation of privacy and Fourth Amendment rights.

Court guidance. While it is true that no single Supreme Court case has specifically addressed cell phone memory searches incident to lawful arrest, simply put, the Supreme Court will never be able to timely address every new technology spawned in the digital age. Instead, the Fourth Amendment, viewed through the *Chimel* lens, provides the precise contours of the modern search incident to lawful arrest doctrine. Courts ought not stretch the facts of Supreme Court cases in an effort to analogize those facts to today's digital realities.

The Supreme Court tangentially addressed cell phones in two recent cases in 2010 and 2012. In 2010, the Court gave a nod toward the digital age, but that nod did not seem to bode well for those hoping for guidance in the near future:

The Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment. . . . The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.<sup>90</sup>

And in 2012, Justice Alito noted, in passing in a concurring opinion, both the ubiquity of cell phones,<sup>91</sup> and the ability of cell phones to provide, to the user and others, very precise GPS tracking.<sup>92</sup>

Although the Court sounds a bit reticent to wade into this controversy, the Court also tantalizingly noted in 2010, “[c]ell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification. That might strengthen the case for an expectation of privacy.”<sup>93</sup>

In 2009, the Supreme Court in *Arizona v. Gant*, a case involving a search incident to lawful arrest in an automobile, provided guidance that sounds remarkably like a return to the *Chimel* justifications.<sup>94</sup> In *Gant*, the Supreme Court warned not to push searches incident to lawful arrest

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90. *City of Ontario v. Quon*, 130 S. Ct. 2619, 2629 (2010).

91. *United States v. Jones*, 132 S. Ct. 945, 963 n.8 (2012) (Alito, J., concurring) (citing *50 Wireless Quick Facts*, CTIA CONSUMER INFO, <http://www.ctia.org/advocacy/research/index.cfm/aid/10323>) (“as of June 2011, it has been reported, there were more than 322 million wireless devices in use in the United States.”).

92. *Id.* at 963.

93. *Quon*, 130 S.Ct. at 2630.

94. *Arizona v. Gant*, 129 S. Ct. 1714, 1721 (2009) (after citing with favor the “safety and evidentiary justifications underlying *Chimel*,” and noting that the broader search incident to lawful arrest scope in a vehicle context “does not follow from *Chimel*,” the Court held in *Gant*, “Contrary to the State’s suggestion, a broad reading of *Belton* [*New York v. Belton*, 453 U.S. 454 (1981)] is also unnecessary to protect law enforcement safety and evidentiary interests”). The Supreme Court, itself, thereby underscored the ongoing vitality of the *Chimel* justifications. All this struggling with analogies to cigarette packs and wallets is misplaced; *Chimel* says it all.

beyond the *Chimel* justifications: “Notably, none of the dissenters in *Chimel* or the cases that preceded it argued that law enforcement reliance interests outweighed the interest in protecting individual constitutional rights so as to warrant fidelity to an unjustifiable rule.”<sup>95</sup> Nonetheless, lower courts continue to act as if the Supreme Court has not yet provided the needed guidance and continue to bypass simple applications of *Chimel*, choosing instead to struggle with and stretch the facts from Fourth Amendment jurisprudence when those facts are not analogous, and thus, when those cases are not applicable to digital age realities.<sup>96</sup> Many lower federal courts have, in appropriate circumstances, avoided directly confronting search incident to lawful arrest principles in cell phone searches, affirming the searches using other principles. Some lower federal courts have sidestepped search incident analysis by finding the officers, in the absence of clear Supreme Court guidance, especially pre-*Gant*, could have reasonably believed cell phone memory searches are constitutional.<sup>97</sup> Some sidestepped search incident analysis by finding the cell phone memory search was unnecessary, since the officers could posit an independent source for the information obtained in the search.<sup>98</sup> Other lower courts found the cell phone memory search was permissible as an inventory search,<sup>99</sup> or a motor vehicle exception search.<sup>100</sup> Other lower courts found

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95. *Gant*, 129 S. Ct. at 1723; see also Stewart, *supra* note 17.

96. See Mark L. Mayalas, Comment, *Cell Phone – A “Weapon” of Mass Discretion*, 33 CAMPBELL L. REV. 151 (2010).

97. *E.g.*, *United States v. Schuttpelz*, No. 10-1846, 2012 WL 34376 (6th Cir. Jan. 9, 2012); *United States v. Curtis*, 635 F.3d 704 (5th Cir. 2011); *Newhard v. Borders*, 649 F. Supp. 2d 440, 448 (W.D. Va. 2009).

98. *E.g.*, *United States v. Moody*, 664 F.3d 164 (7th Cir. 2011); *United States v. Arellano*, 410 F. App'x. 603 (4th Cir. 2011) (the independent source was a search warrant); *United States v. Burgess*, 576 F.3d 1078, 1090 n.13 (10th Cir. 2009) (the independent source was a search warrant); *United States v. Scott*, No. 10-677, 2011 WL 1474187 (E.D. Pa. Apr. 15, 2011) (the independent source was a search warrant); *United States v. Rodriguez-Gomez*, No. 1:10-CR-103-2-CAP-GGB, 2011 WL 39003 (N.D. Ga. Jan. 4, 2011) (rejecting the portion of the Magistrate's Report and Recommendation [2010 WL 5524891] affirming the search of the cell phone memory incident to arrest, holding that the search was supported by consent, an independent ground); *Jackson v. Kelly*, No. 4:09CV1185, 2010 WL 1913385 (N.D. Ohio Apr. 5, 2010); *United States v. Yockey*, 654 F. Supp. 2d 945 (N.D. Iowa 2009) (the independent source was consent); *United States v. Thompson*, No. 08-60264-CR-COHN, 2009 WL 302037 (S.D. Fla. Feb. 6, 2009); *United States v. James*, No. 1:06CR134 CDP, 2008 WL 1925032 (E.D. Mo. Apr. 29, 2008) (finding searches of three co-defendants' cell phones to be supported by consent, search warrant, and the motor vehicle exception, respectively); *United States v. Parsley*, No. 05-86-P-H, 2006 WL 1441855 (D. Me. May 23, 2006) (the independent sources were consent and motor vehicle exception).

99. *E.g.*, *Brady v. Gonzalez*, 412 F. App'x. 887 (7th Cir. 2011).

100. *E.g.*, *United States v. Stringer*, No. 10-05038-01-CR-SW-GAF, 2011 WL 3847026 (W.D. Mo. Jul. 20, 2011) (also analogizing cell phones to containers); *United States v. Southerland*, No. 7:09-CR-68-FL, 2009 WL 5149263, at \*5 (E.D.N.C. Dec. 23, 2009); *United States v. Meador*, No. 1:06 CR 134 CDP DDN, 2008 WL 4922001 (E.D. Mo. Jan. 7, 2008).

that any taint from an arguably unconstitutional search of a cell phone incident to lawful arrest was harmless error.<sup>101</sup>

Other lower courts have directly confronted the searches of cell phone memories incident to lawful arrest, and most of those courts have held those searches admissible based on one of several grounds that can be usefully divided into three largely separate lines: courts holding (A) cell phones are analogous to pagers;<sup>102</sup> (B) cell phones are analogous to clothing, wallets, or address books;<sup>103</sup> and, (C) cell phones are searchable due to the exigency posed by their use in transporting illicit substances.<sup>104</sup> These strained

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101. *E.g.*, *United States v. Allen*, 416 F. App'x 21 (11th Cir. 2011); *United States v. Fuentes*, 368 F. App'x 95 (11th Cir. 2010).

102. *Curtis*, 635 F.3d 704; *United States v. Pineda-Areola*, 372 F. App'x 661 (7th Cir. 2010); *United States v. Murphy*, 552 F.3d 405 (4th Cir. 2009); *Silvan W. v. Briggs*, 309 F. App'x 216 (10th Cir. 2009); *United States v. Finley*, 477 F.3d 250 (5th Cir. 2007); *United States v. Rodriguez*, No. C-11-344, 2011 WL 3924958 (S.D. Tex. Sept. 6, 2011); *United States v. Cole*, No. 1:09-CR-0412-ODE-RGV, 2010 WL 3210963 (N.D. Ga. Aug. 11, 2010); *Ajan v. United States*, No. 2:02-CR-71, 2:06-CV-24, 2009 WL 1421183 (E.D. Tenn. May 20, 2009) (citing *Finley* and *United States v. Ortiz*, 89 F.3d 977 (7th Cir. 1966)); *United States v. McCray*, No. CR408-231, 2009 WL 29607 (S.D. Ga. Jan. 5, 2009); *United States v. Deans*, 549 F. Supp. 2d 1085 (D. Minn. 2008); *United States v. Carroll*, 537 F. Supp. 2d 1290 (N.D. Ga. 2008) (distinguishing *United States v. Park*, No. CR-05-375 SI, 2007 WL 1521573 (N.D. Cal. May 23, 2007)); *United States v. Dennis*, No. 07-008-DLB, 2007 WL 3400500 (E.D. Ky. Nov. 13, 2007); *United States v. Espinoza*, No. 06-40130-01-JAR, 2007 WL 1018893, at \*6 (D. Kan. Apr. 3, 2007) (“Defendant argues that the cellular phone here is analogous to the footlocker in *Chadwick*. But courts have long recognized the need to retrieve information from a pager, a much more analogous piece of property, in order to prevent its destruction as evidence. The Court finds that this case is not analogous to a closed container, such as the footlocker discussed in *Chadwick*”); *United States v. Brookes*, No. CRIM 2004-0154, 2005 WL 1940124 (D.V.I. June 16, 2005).

103. *United States v. Hill*, No. CR 10-00261 JSW, 2011 WL 90130 (N.D. Cal. Jan. 10, 2011); *Smallwood v. State*, 61 So. 3d 448 (Fla. Dist. Ct. App. 2011); *United States v. Cole*, No. 1:09-CR-0412-ODE-RGV, 2010 WL 3210963 (N.D. Ga. Aug. 11, 2010); *United States v. Wurie*, 612 F. Supp. 2d 104 (D. Mass. 2009); *McCray*, No. CR408-231, 2009 WL 29607; *United States v. Valdez*, No. 06-CR-336, 2008 WL 360548 (E.D. Wis. Feb. 8, 2008) (noting also the need to safeguard the cell phone evidence from destruction); *United States v. Monson-Perez*, No. 4:09CR623 HEA, 2010 WL 889833 (E.D. Mo. Mar. 8, 2010) (analogizing to containers and address books); *United States v. Curry*, No. 07-100-P-H, 2008 WL 219966 (D. Me. Jan. 23, 2008); *United States v. Cote*, No. 03CR271, 2005 WL 1323343 (N.D. Ill. May 26, 2005), *aff'd*, 504 F.3d 682 (7th Cir. 2007).

104. *United States v. Young*, 278 F. App'x 242 (4th Cir. 2008) (also justified the cell phone memory search by analogizing to pagers, and noting the need to protect evidence from destruction); *United States v. Gomez*, 807 F. Supp. 2d 1134 (S.D. Fla. 2011); *United States v. Davis*, 787 F. Supp. 2d 1165 (D. Or. 2011); *United States v. Grooms*, No. 2-10-CR-87, 2011 WL 381036 (E.D. Tenn. Jan. 3, 2011); *United States v. Hodges*, No. 09-40077-04-RDR, 2010 WL 2553780 (D. Kan. Jun. 23, 2010); *United States v. Salgado*, No. 1:09-CR-454-CAP-ECS-5, 2010 WL 3062440 (N.D. Ga. Jun. 12, 2010); *United States v. Garcia-Aleman*, No. 1:10-CR-29, 2010 WL 2635071 (E.D. Tex. Jun. 9, 2010) (extensive discussion of the topic); *State v. Boyd*, 592 A.2d 1071 (Conn. 2010); *United States v. Reynolds*, No. 3:08-CR-143, 2009 WL 1588413 (E.D. Tenn. Jun. 4, 2009); *United States v. Faller*, 681 F. Supp. 2d 1028 (E.D. Mo. 2010); *United States v. Santillan*, 571 F. Supp. 2d 1093 (D. Ariz. 2008); *United States v. Gutierrez*, No. CR 07-1014 JB, 2008 WL 2397668 (D.N.M. Jan. 4, 2008); *United States v. Urbina*, No. 06-CR-336, 2007 WL 4895782 (E.D. Wis. Nov. 6, 2007); *United States v. Mercado-Nava*, 486 F. Supp. 2d 1271 (D.

analogies are inapt, and the exigency analysis is unjustifiable as the Supreme Court warned in *Gant*.<sup>105</sup>

A. *Those courts analogizing cell phones to pagers are misguided (Finley cases*<sup>106</sup>)

A number of courts have analogized cell phones to pagers, thereby ignoring the real reason there is an exception to the warrant requirement for items seized incident to lawful arrest. The correct inquiry should be whether the search of the cell phone was justified by one of the historical, traditional, and logical grounds for carving out a search incident to lawful arrest exception: (1) the search is necessary to protect officer safety, or (2) the search is necessary to protect evidence from being destroyed, hidden, or lost. Instead, courts struggle to analogize to the types of items previously found to have been constitutionally searched incident to lawful arrest, such as pagers.

In 2007, the Fifth Circuit issued its opinion in *United States v. Finley*.<sup>107</sup> Using his employer's van, Jacob Finley drove a drug dealer to the scene of a controlled buy of methamphetamine in Midland, Texas.<sup>108</sup> The informant approached the work van and Finley's passenger exchanged a mixture containing methamphetamine for \$600 dollars in marked bills provided by the informant.<sup>109</sup> After the sale, officers stopped the van and arrested Finley and his passenger. They found the marked bills and additional methamphetamine inside the van, and seized a work cell phone from Finley that his employer had routinely allowed him to use for personal purposes.<sup>110</sup> Finley denied any knowledge of the methamphetamine sale until officers confronted him with the contents of text messages on his cell phone, whereupon Finley admitted some of the messages related to marijuana sales, but denied that any of the text messages related to methamphetamine sales.<sup>111</sup>

Finley was convicted of aiding and abetting the methamphetamine sale and appealed the conviction to the Fifth Circuit challenging the cell

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Kan. 2007); *United States v. Lottie*, No. 3:07-cr-51-AS, 2007 WL 4722439 (N.D. Ind. Oct. 12, 2007); *United States v. Zamora*, No. 1:05 CR 250 WSD, 2006 WL 418390 (N.D. Ga. Feb. 21, 2006); *United States v. Parada*, 289 F. Supp. 2d 1291 (D. Kan. 2003).

105. See *supra* notes 69-70.

106. See *supra* note 102 (listing a number of opinions referred to herein as the *Finley* cases).

107. *United States v. Finley*, 477 F.3d 250 (5th Cir. 2007).

108. *Id.* at 253.

109. *Id.*

110. *Id.* at 254.

111. *Id.* at 254-55.

phone search and the statements that flowed from the search.<sup>112</sup> The Fifth Circuit found the search of the cell phone text messages was permissible incident to lawful arrest, citing a Seventh Circuit case<sup>113</sup> affirming search of the internal memory of an electronic pager incident to lawful arrest.<sup>114</sup> In *Finley*, the Fifth Circuit also noted that a California federal district court,<sup>115</sup> after finding the arrestee had a reasonable expectation of privacy in a pager's memory, had similarly allowed a pager's internal memory to be searched incident to lawful arrest, since the pager was associated with the arrestee's person and was searched contemporaneously with the arrest.<sup>116</sup>

But the Fifth Circuit in *Finley* and other courts analogizing to pagers miss the mark. The point is not whether a court can find another circumstance where some similar item has been seized incident to lawful arrest. Instead, it is whether the circumstances justify the application of the search incident to lawful arrest exception to the warrant requirement where those circumstances do not justify such a search for reasons of officer safety or to safeguard evidence from spoliation. In *Finley*, the cell phone did not represent a threat to the officers and removing the battery or using a Faraday enclosure could have safeguarded the internal memory of the cell phone. In short, there was no reason for the Fifth Circuit in *Finley* to permit a warrantless search when the circumstances obviously did not justify it.

These analogizing courts, especially in the digital age, are elevating analog over reason and the justice system cannot afford that expedience since it so cavalierly diminishes the individual's constitutional rights. Cell phones are not like pagers; instead, that purported analogy is simply a mirage. The real issue is not whether the factual analog is apt, but whether the two *Chimel* justifications for searches incident to lawful arrest have been met. And the issue is not whether one court can find another court that has permitted a search incident to lawful arrest for an allegedly similar item. True progeny would have followed the Supreme Court's search incident to lawful arrest justifications derived from *Chimel*; these analogizing opinions are prodigal children and not progeny.

*B. Those courts analogizing cell phones to clothing and wallets are misguided (Wurie cases<sup>117</sup>)*

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112. *Finley*, 477 F.3d at 255.

113. *United States v. Ortiz*, 84 F.3d 977, 984 (7th Cir. 1996).

114. *Finley*, 477 F.3d at 260.

115. *United States v. Chan*, 830 F. Supp 531, 534-36 (N.D. Cal. 1993).

116. *Finley*, 477 F.3d at 260 n.6.

117. *See supra* note 103 (listing a number of opinions referred to herein as the *Wurie* cases).

Other courts have struggled to analogize cell phones to wallets and clothing, things with which cell phones have essentially nothing in common.<sup>118</sup> A paradigm case of this type bears review.

A Massachusetts federal district court considered a cell phone search incident to lawful arrest in 2009.<sup>119</sup> In that case, after defendant Brima Wurie had stopped and left his vehicle, officers approached Wurie and arrested him on probable cause for a felony drug sale.<sup>120</sup> After Wurie was transported in custody to the stationhouse, two cell phones were seized from his person.<sup>121</sup> Officers searched the calls and text messages on one of two cell phones and used the information to locate his residence, where a subsequent search revealed, *inter alia*, a large quantity of illegal drugs and a loaded gun.<sup>122</sup>

The *Wurie* court relied on *Robinson*, *Edwards*, and *Finley* en route to affirming the cell phone internal memory search by analogizing cell phones to pagers, but also analogizing cell phones to an arrestee's wallet, address book, pockets, and purse, and thus searchable incident to lawful arrest as part of the arrestee's "person."<sup>123</sup>

But the *Wurie* court and other courts analogizing to clothing, wallets, and the like miss the mark. Cell phones are more like extensive computers than wallets. A cell phone can hold millions of pages of data, while a wallet may hold a few. There is simply no analogy to be drawn.<sup>124</sup> And the process of drawing the analogy cheapens the analysis. The focus should be on whether the two *Chimel* justifications for searches incident to lawful arrest, officer safety and preservation of evidence, have been met at all. In *Wurie*, the constitutional path would have been taken if the officers seized the cell phones, but withheld any search of the cell phone's internal memory until a neutral magistrate had issued a search warrant for the cell phone's internal memory. Absent that warrant, even though the cell phone could be seized incident to lawful arrest, it ought not to have been searched.

### C. *Those courts justifying cell phone internal memory searches based on*

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118. *Watters v. City of Cotari*, No. C 10-2574 SBA, 2011 WL 4853590 (N.D. Cal. Oct. 13, 2011); *United States v. Hill*, No. CR 10-00261 JSW, 2011 WL 90130 (N.D. Cal. Jan. 10, 2011); *United States v. Wurie*, 612 F. Supp. 2d 104, 110 (D. Mass. 2009).

119. *Wurie*, 612 F. Supp. 2d 104 (D. Mass. 2009).

120. *Id.* at 106.

121. *Id.*

122. *Id.* at 106-07.

123. *Id.* at 110.

124. *E.g.*, *United States v. Carey*, 172 F.3d 1268, 1275 (10th Cir. 1999) ("Relying on analogies to closed containers . . . may lead courts to 'oversimplify a complex area of Fourth Amendment doctrines and ignore the realities of massive modern computer storage'") (quoting Raphael Winicle, *Searches and Seizures of Computers and Computer Data*, 8 HARV. J.L. & TECH. 75, 104 (1994)).

*use in drug trafficking and exigency are misguided (Boyd cases*<sup>125</sup>)

Still other courts have tried to justify cell phone internal memory searches in drug trafficking cases as searches of contraband or as searches of drug paraphernalia—a precious-thin line upon which to balance an arrestee’s constitutional rights. A paradigm case of this type bears review.

In 2010, the Connecticut Supreme Court, applying New York law, considered a cell phone internal memory search in a drug trafficking case.<sup>126</sup> The court held, “the Mamaroneck [New York] police consider cell phones to constitute drug paraphernalia and records because they are likely to contain information about drug transactions.”<sup>127</sup> In fairness, that Connecticut court also noted with favor the search incident to lawful arrest holdings in *Finley* and *McCray*, and rejected the holding in *United States v. Park*,<sup>128</sup> discussed in section VI *infra*. Nonetheless, holding that drug traffickers may have relevant information stored in their cell phones’ memories cannot, without much, much more, yield a constitutional exception to the warrant requirement.

The focus, instead, should be on whether the two justifications for searches incident to lawful arrest, officer safety and preservation of evidence, have been met at all.

*D. The cases upholding these cell phone searches are not consistent with the main thrust of Chimel.*

The *Chimel* justifications, reaffirmed in *Gant*, ought to inform and guide the jurisprudence in searches of cell phone memories incident to lawful arrest. The pager and wallet analogies are not helpful; they just detract from the core analysis. Factual analogy is just one variant of legal analysis and it is a variant that weakens the analysis at issue here. Whether a court sometime in the past has authorized a search of some item incident to lawful arrest is not dispositive of whether a different item, perceived to have similarities to the earlier item, can be constitutionally searched incident to lawful arrest. First, the cited similarities (e.g., a cigarette pack in an arrestee’s pocket is about the same size as a cell phone in an arrestee’s pocket) are not legally relevant similarities at all. Second, if relying on an analogy causes the court to stray from the original constitutional justifications supporting the search, then that analogy does not illuminate

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125. See *supra* note 104 (listing a number of opinions referred to herein as the *Boyd* cases).

126. *State v. Boyd*, 992 A.2d 1071 (Conn. 2010).

127. *Id.* at 1090.

128. *United States v. Park*, No. CR-05-375-SI, 2007 WL 1521573 (N.D. Cal. May 23, 2007).

the issue, it obscures it.

A number of courts have departed from the analogy lines of cases and have proposed rules much closer to *Chimel*'s justifications in suppressing the fruits of cell phone memory searches incident to lawful arrest. Several of those cases are examined in the following section.

#### VII. A MINORITY OF COURTS CONSIDERING THE MATTER TO DATE HAVE FORBIDDEN SEARCHES OF CELL PHONE INTERNAL MEMORY INCIDENT TO LAWFUL ARREST

A minority of courts considering cell phone internal memory searches to date and finding them unconstitutional can be usefully distributed into three categories: courts holding (A) cell phones have capabilities far beyond wallets and pagers, and thus require additional protection;<sup>129</sup> (B) there was no exigency, at least not sufficient exigency, to justify a warrantless cell phone internal memory search;<sup>130</sup> and, (C) any cell phone search must be contemporaneous to the arrest and not delayed, since it was a container, and not part of the arrestee's "person."<sup>131</sup>

##### A. *Cell phones have capabilities far beyond pagers and wallets, and therefore are entitled to greater expectation of privacy and greater protection (Park cases<sup>132</sup>)*

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129. Schlossberg v. Solesbee, No. 10-6014-TC, 2012 WL 141741, at \*4 (D. Or. Jan. 18, 2012) (cell phones "are capable of holding large volumes of private information and legitimate concerns exist regarding the effect of allowing warrantless searches of such devices . . . [which] hold large amounts of private information, entitling them to a higher standard of privacy. I find that warrantless searches of such devices are not reasonable incident to a valid arrest absent a showing that the search was necessary to prevent the destruction of evidence, to ensure officer safety, or that other exigent circumstances exist." (citation omitted)); United States v. Jones, No. 1:06CR134 CDP, 2008 WL 1925032 (E.D. Mo. Apr. 29, 2008) (dictum); United States v. Park, No. CR-05-375 SI, 2007 WL 1521573 (N.D. Cal. May 23, 2007); Hawkins v. State, 704 S.E.2d 886 (Ga. Ct. App. 2010); State v. Smith, 920 N.E.2d 949 (Ohio 2009).

130. United States v. Quintana, 594 F. Supp. 2d 1291 (M.D. Fla. 2009); United States v. Wall, No. 08-60016-CR, 2008 WL 5381412 (S.D. Fla. 2008); State v. Isaac, No. 101,230, 2009 WL 1858754 (Kan. Ct. App. June 26, 2009); see also United States v. Chappell, No. 09-139 (JNE/JJK), 2010 WL 1131474, at \*14 n.9, 15 (D. Minn. Jan. 12, 2010) (although noting the government did not assert the search incident argument, the court referred to *Park* with favor, and found the search here to be an unconstitutional "general rummaging").

131. United States v. Zavala, 541 F.3d 562 (5th Cir. 2008); United States v. McGhee, No. 8:09CR31, 2009 WL 2424104 (D. Neb. July 21, 2009) (finding cell phones contain vast amounts of private data to which the possessor has a reasonable expectation of privacy, and further finding no risk to the officers, and no risk of evidence destruction that might otherwise support a search incident); United States v. LaSalle, No. 07-00032 (SOM), 2007 WL 1390820 (D. Haw. May 9, 2007); State v. Todd, No. 23291, 2011 WL 1346864 (Ohio Ct. App. Apr. 8, 2011); Commonwealth v. Diaz, No. ESCR 2009-00060, 2009 WL 2963693 (Mass. Super. Ct. Sept. 3, 2009); State v. Novicky, No. A07-0170, 2008 WL 1747805 (Minn. Ct. App. Apr. 15, 2008).

132. See *supra* note 129 (listing a number of opinions referred to herein as the *Park*

In 2007, a California federal district court in *United States v. Park* evaluated the impact of modern, high-capacity, cell phones on the applicability of the search incident to lawful arrest doctrine, and ultimately suppressed the evidence seized from a search of the defendant's cell phone internal memory incident to his lawful arrest.<sup>133</sup>

Defendant Edward Park was arrested as part of an investigation into a marijuana growing operation.<sup>134</sup> Park's cell phone was seized from him, its internal memory was searched after he was booked at the jail, and inculcating content from the cell phone's digital address book obtained during that search was used in the investigation to generate evidence that was admitted at trial.<sup>135</sup> Citing Ninth Circuit precedent, the court held the "justification for permitting a warrantless search is the need of law enforcement officers to seize weapons or other things which might be used to assault an officer or effect an escape, as well as the need to prevent the loss or destruction of evidence," and that search must be conducted essentially contemporaneous with the arrest.<sup>136</sup> The court rejected the pager analogy<sup>137</sup> and the wallet and clothing analogy, deeming the cell phone part of the "possessions within the arrestee's immediate control," rather than part of "the [arrestee's] person."<sup>138</sup> After taking judicial notice of the wide range of features and immense memories of modern cell phones, the court reasoned:

[M]odern cellular phones have the capacity for storing immense amounts of private information. Unlike pagers or address books, modern cell phones record incoming and outgoing calls, and can also contain address books, calendars, voice and text messages, email, video and pictures. Individuals can store highly personal information on their cell phones, and can record their most private thoughts and conversations on their cell phones through email and text, voice and instant messages . . . the line between cell phones and personal computers has grown increasingly blurry.<sup>139</sup>

The *Park* court thus recognized the original justifications for finding searches incident to lawful arrest to be an exception to the warrant requirement—officer safety and to prevent loss or destruction of

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cases).

133. *Park*, 2007 WL 1521573.

134. *Id.* at \*1-2.

135. *Id.* at \*2-5.

136. *Id.* at \*6 (citing *United States v. Hudson*, 100 F.3d 1409, 1419 (9th Cir. 1996)).

137. *Id.* at \*9.

138. *Park*, 2007 WL 1521573 at \*8 (quoting *United States v. Chadwick*, 433 U.S. 1, 16 n. 10 (1977)).

139. *Id.* at \*8.

evidence—do not apply generally to cell phone internal memory searches. And en route to that reasoning, the court implicitly rejected cases finding such searches were justified in drug trafficking investigations, and explicitly rejected both the pager and clothing or wallet analogies of other cases that had held cell phone internal memory searches constitutional.

The real point can be found at the root of the *Park* court's analysis. Before a government official can sidestep the federal Constitution's warrant requirement via the search incident to lawful arrest exception, a search of a cell phone's internal memory incident to a lawful arrest must be supported by at least one of the two original *Chimel* justifications for that exception: (1) protecting officer safety, or (2) preventing the loss or destruction of evidence.

*B. Cell phone internal memory cannot be searched without a warrant unless the exigency is clearly established (Quintana cases<sup>140</sup>)*

A second line of cases forbidding cell phone internal memory searches incident to lawful arrest is also grounded on the two original *Chimel* justifications for the search incident to lawful arrest exception to the Constitution's warrant requirement.

In 2009, a Florida federal district court, in *United States v. Quintana*,<sup>141</sup> considered a search incident to lawful arrest of the digital photo album within an arrestee's cell phone. After giving a nod to cases permitting searches of cell phone internal memory incident to arrests in drug trafficking cases,<sup>142</sup> the *Quintana* court cited *Quon v. Arch Wireless Operating Co*,<sup>143</sup> and *Finley*<sup>144</sup> to the effect that a cell phone owner has a reasonable expectation of privacy in the cell phone's internal memory, such that a search warrant is required to search the cell phone's memory unless a recognized warrant exception applies.<sup>145</sup>

The *Quintana* court noted the officers were simply "rummaging" through the cell phone internal memory, and the search "had nothing to do with officer safety or the preservation of evidence related to the crime of arrest [thus this type of] search is not justified by the twin rationales of *Chimel* and pushes the search-incident-to-arrest doctrine beyond its limits."<sup>146</sup> In essence, the *Quintana* line of cases holds that at least one of

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140. See *supra* note 130 (listing a number of opinions referred to herein as the *Quintana* cases).

141. *United States v. Quintana*, 594 F. Supp. 2d 1291 (M.D. Fla. 2009).

142. *Id.* at 1299; see also case discussion *infra* Part IV.C.

143. *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 905 (9th Cir. 2008).

144. *United States v. Finley*, 477 F.3d 250, 259 (5th Cir. 2007).

145. *Quintana*, 594 F. Supp. 2d at 1299.

146. *Id.* at 1300 (citing *Chimel v. California*, 395 U.S. 752 (1969)).

the two *Chimel* justifications for searches incident to lawful arrest must be present or the search incident to lawful arrest exception cannot serve to permit sidestepping of the federal Constitution's warrant requirement.

C. *A cell phone internal memory search incident to lawful arrest may not be unnecessarily delayed and must be substantially contemporaneous with the arrest (LaSalle cases)*<sup>147</sup>

The third line of cases forbidding cell phone internal memory searches incident to lawful arrest is exemplified by *United States v. LaSalle*.<sup>148</sup> In *LaSalle*, the arrestee's cell phone was searched between two and four hours after the arrest. The court suppressed the cell phone search proceeds, since the cell phone was not part of the arrestee's "person" and the delayed search was not performed substantially contemporaneously with the arrest.<sup>149</sup> Some cases in this line declare that cell phone possessors have a reasonable expectation of privacy in the cell phone contents, since a modern cell phone is capable of holding such a huge amount of private data.<sup>150</sup> Others hold that absent some reasonable basis to believe the cell phone posed a risk to the officers or others or any evidence in the cell phone memory was subject to destruction, a cell phone memory search incident to arrest was impermissible.<sup>151</sup>

Overall, the cases in this line seem to start with a healthy dose of skepticism about the searching officers' basic justifications for the search. This line of cases has the admirable quality of distinguishing cell phone searches from wallets and clothing, which are on the arrestee's person, but at times gives insufficient attention to whether cell phone searches are supported by the twin justifications from *Chimel*.

D. *A warrantless cell phone internal memory search incident to lawful arrest can only be constitutionally justified by the twin Chimel prongs*

Each of these three lines of cases suppressing the fruits of cell phone memory searches informs the debate, but the issue is, in a sense, much simpler than that.<sup>152</sup> While some distinctions are illuminated by bright line

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147. See *supra* note 131 (listing a number of opinions referred to herein as the *LaSalle* cases).

148. *United States v. LaSalle*, No. 07-00032 (SOM), 2007 WL 1390820 (D. Haw. May 9, 2007).

149. *Id.* at \*6-7.

150. E.g., *United States v. Zavala*, 541 F.3d 562, 577 (5th Cir. 2008).

151. E.g., *United States v. McGhee*, No. 8:09CR31, 2009 WL 2424104, at \*2-3 (D. Neb. July 21, 2009) (finding similarly that a cell phone possessor has a reasonable expectation of privacy in the memory contents).

152. As one Minnesota federal district court judge noted in a cell phone memory search

rules, others lines are obscured. It is hoped, of course, that the crucial lines are those left in a brighter light by the rule. Here, though, although the bright line of the majority tends to focus on whether the cell phone is on the arrestee's person, that obscures the much more important line between what searches are justified and therefore constitutional, and which are neither. The rule should, therefore, focus on the justifications, not the bright line factual distinctions and analogies.

Further, a rule aimed specifically at cell phones is doomed to be outdated from the moment it is published. And with the Supreme Court only issuing formal opinions on perhaps eighty cases per year, we cannot reasonably expect a Supreme Court ruling on point for every new technology. Rather, the Supreme Court, through *Chimel* in 1969, gave all the guidance needed no matter where the technology revolution may lead. A search of any device incident to lawful arrest (outside of motor vehicle and other contexts expressly excluded from consideration in this article) may be conducted constitutionally only if necessary to protect officer safety or to protect evidence from loss or destruction. We do not need a new crop of cases with another round of analogies being drawn. We only need to return to *Chimel*.

#### VIII. THE LEGISLATIVE RESPONSE TO CELL PHONE INTERNAL MEMORY SEARCHES INCIDENT TO LAWFUL ARREST HAS BEEN MINIMAL

At least one commentator<sup>153</sup> has noted the legislative response to cell phone internal memory searches incident to lawful arrest has been somewhat anemic. For one recent example, in response to the *Diaz 2* case, the California Assembly unanimously passed a bill,<sup>154</sup> and sent it on for the Governor's signature,<sup>155</sup> that would have outlawed cell phone internal

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case: "There is no evidence [the officer] was searching through the data stored on the [cell] phone, including its memory of phone numbers of incoming and outgoing calls and the content of its recent text messages, to confirm Defendant's identity, to protect Defendant's property from a theft or [protect the arresting agency] from a lawsuit, to ensure the safety of others, or because he had reason to believe that evidence on the phone would be destroyed. Rather, [the officer's] only motivation in reviewing the contents of the phone was to gather as much information for his investigation as possible without first obtaining a warrant. . . . Therefore, this Court finds that the search of the cellular phone . . . was nothing more than a general rummaging." *United States v. Chappell*, No. 09-139 (JNE/JJK), 2010 WL 1131474, at \*15 (D. Minn. Jan. 12, 2010). That pithy opinion cuts to the heart of the matter. Bright line rules are expedient, but if used to justify warrantless searches without justification arising to constitutional dimension, those simple rules are simply unconstitutional.

153. Gershowitz, *supra* note 18, at 1146-47.

154. S.B. 914, 2011-2012 Reg.Sess. (Cal. 2011).

155. Amy Gahran, *California Bill Would Ban Warrantless Cell Phone Searches*, CNN.COM, <http://www.cnn.com/2011/09/20/tech/mobile/california-phone-search-law/index.html?iref=allsearch> (Sept. 21, 2011, 4:52 PM) (California Governor Jerry Brown had until

memory searches incident to lawful arrest absent a warrant. The rationales for the bill, identified in the “whereas” section of the bill, highlighted the importance and ubiquity of cell phones today; the propensity to use them to store vast amounts of personal and private data; that once in the exclusive control of law enforcement officers, cell phones do not pose a threat to the officers; and, that concerns regarding evidence preservation can be alleviated by employing “simple evidence preservation methods and prompt application to a magistrate for a search warrant.”<sup>156</sup> California Governor Jerry Brown vetoed the bill on October 8-9, 2011, stating succinctly in his veto message, “The courts are better suited to resolve the complex and case-specific issues relating to constitutional search-and-seizure protections.”<sup>157</sup> Viewed through the prism of public opinion, in spite of Governor Brown’s demurrer, the California Assembly thus unanimously acknowledged that Californians believe they have a reasonable expectation of privacy in their cell phones’ internal memory and any search of that internal memory must comport fully with the warrant requirement.<sup>158</sup>

Add to this California Assembly perspective the United States Supreme Court’s indication, in 2010, that the ubiquity of cell phones and their “almost necessary” use for self-expression strengthen the case for a

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October 9, 2011 to act on the bill, or it would be enacted on that date without his signature).

156. S.B. 914 § 1(a)-(e), 2011-2012 Reg. Sess. (Cal. 2011), providing in pertinent part, “The right of privacy is fundamental in a free and civilized society. . . . The number of Californians utilizing and carrying portable electronic devices is growing at a rapidly increasing rate. These devices are capable of and encourage the storing of an almost limitless amount of personal and private information. Commonly linked to the Internet, these devices are used to access personal and business information and databases that reside in computers and servers located anywhere in the world. Users of portable electronic devices have a reasonable and justifiable expectation of privacy in the information these devices contain and can access through the internet . . . The intrusion on the information privacy and freedom of communication of any person arrested [as held in *Diaz* 2] is of such enormity that it must require arresting officers to obtain a warrant to search the information contained in . . . a cellular telephone. The Legislature finds that once in the exclusive control of the police, cellular telephones do not ordinarily pose a threat to officer safety. The Legislature declares that concerns about destruction of evidence on a cellular telephone can ordinarily be addressed through simple evidence preservation methods and prompt application to a magistrate for a search warrant and, therefore, do not justify a blanket exception to the warrant requirement.”

157. Letter from Edmund G. Brown, Jr., Governor of Cal., to Members of the Cal. State Senate (Oct. 9, 2011) available at [http://gov.ca.gov/docs/SB\\_914\\_Veto\\_Message.pdf](http://gov.ca.gov/docs/SB_914_Veto_Message.pdf).

158. Another litmus test for public perspectives on whether there is a reasonable expectation of privacy in a cell phone’s internal memory could be derived by querying law students; if they laugh at the very concept that there is no such reasonable expectation of privacy in a cell phone’s internal memory, then it could be argued that (1) a cell phone owner would have a subjectively reasonable expectation of privacy in its internal memory, and (2) the “public” and “society” must be willing to accept such an expectation of privacy as reasonable. For a discussion of the concept that some Fourth Amendment holdings and reasoning are so out-of-touch as to be laughable, see James A. Adams, *Search and Seizure as Seen by Supreme Court Justices: Are They Serious or is This Just Judicial Humor?*, 12 ST. LOUIS U. PUB. L. REV. 413 (1993).

reasonable expectation of privacy in cell phone internal memory,<sup>159</sup> and one begins to predict that should the Supreme Court ever directly consider the cell phone search incident to lawful arrest issue, the Court would find users have a reasonable expectation of privacy in their cell phones' memories and one of the *Chimel* justifications must be met to constitutionally avoid the warrant requirement.

IX. RELATED DIGITAL AGE PARADIGMS – OF THERMAL IMAGING, BIRDDOGS, OTHER SENSORY ENHANCEMENT, FACE RECOGNITION, AND GPS TRACKING

Of course, searches of modern cell phones incident to lawful arrest are not the first time the digital age has strained the ability of analogy to allow application of decades-old cases to modern technologies. And at every turn, as the digital age hare leaps forward, the constitutional jurisprudence lags, like a tortoise, far behind. Perhaps the most unfortunate flaw in the tortoise-hare analogy is that constitutional jurisprudence, unlike Aesop's tortoise,<sup>160</sup> never quite seems to catch up.

Thermal imaging, often used to remotely determine whether a drug grow operation (with the extra heat from lighting) is underway inside a location, was once thought to be permissible without a warrant, because it only sensed emanations from within to outside of a building, and thus was not a search.<sup>161</sup> But the United States Supreme Court ultimately extended privacy protection and therefore required a warrant prior to the use of thermal imaging, sense enhancement, technology.<sup>162</sup>

On the horizon, many other technologies await the Court's consideration, such as various sense enhancement technologies,<sup>163</sup> face recognition technology,<sup>164</sup> and new uses and extensions of global positioning system (GPS) technology.<sup>165</sup> The Supreme Court's answers to the constitutional questions regarding these digital age technologies and many others will, no doubt, lag behind the questions, but the implicit answers to each new technology may be found in the Fourth Amendment

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159. *City of Ontario v. Quon*, 130 S. Ct. 2619, 2630 (2010).

160. Ben Edwin Perry, *BABRIUS AND PHAEDRUS* at 465 (Harv. Univ. Press 1965) (identifying Aesop's Tortoise and the Hare fable as Perry Index No. 226).

161. Jessica T. Kobos, Note, *Kyllo v. United States: A Lukewarm Interpretation of the Fourth Amendment*, 64 MONT. L. REV. 519 (2003).

162. *Kyllo v. United States*, 533 U.S. 27, 40 (2001).

163. David E. Steinberg, *Sense-Enhanced Searches and the Irrelevance of the Fourth Amendment*, 16 WM. & MARY BILL RTS. J. 465 (2007).

164. Alexander T. Nguyen, Note, *Here's Looking at You, Kid: Has Face-Recognition Technology Completely Outflanked the Fourth Amendment?*, 7 VA. J. L. & TECH. 2 (2002).

165. Arthur G. LeFrancois, *Global Positioning System Technology and the Fourth Amendment*, SCI. TECH. LAW. 18 (2009).

itself, and the general principles flowing therefrom.

X. DOES THE UNITED STATES SUPREME COURT DECISION IN *UNITED STATES V. JONES* RESOLVE THE *DIAZ* SEARCH INCIDENT QUESTION?

A birddog, or mobile tracking device, allows an officer to remotely track a person wittingly or unwittingly possessing the device.<sup>166</sup> Although the United States Supreme Court first ruled, in one factual context, the use of such devices does not require a warrant since the officers could have obtained roughly the same information by trailing the person possessing the birddog,<sup>167</sup> by the next year, in a somewhat different factual context, the Court determined a warrant was required for use of a birddog if, for example, it entered private residences.<sup>168</sup>

The Court, most recently in *United States v. Jones*,<sup>169</sup> handed down a monumental GPS birddog tracking decision, suppressing four weeks of the proceeds of a birddog GPS location tracking device, which had been affixed to the undercarriage of the suspect's vehicle, while the vehicle was parked in a public place, but without benefit of a search warrant.<sup>170</sup> The *Jones* birddog had "relayed [to the surveilling officers] more than 2,000 pages of data over the 4-week period."<sup>171</sup> Harking back to the origins of search and seizure law and the Fourth Amendment, a unanimous Court suppressed the GPS location data obtained via the birddog, with roughly half the justices adopting a trespass theory,<sup>172</sup> since the birddog had been physically placed on the suspect's vehicle without a warrant, and roughly another half adopting a more general reasonable expectation of privacy theory.<sup>173</sup>

Although many practitioners and lower courts may be hoping for a clear single answer to searches in the digital age, as the Court itself noted in *Jones*, the decision does not answer all the questions even within a physically-attached birddog context.<sup>174</sup> *Jones* did not directly address

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166. Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 832 (2004).

167. *United States v. Knotts*, 460 U.S. 276, 285 (1983).

168. *United States v. Karo*, 468 U.S. 705, 714 (1984).

169. *United States v. Jones*, 132 S.Ct. 945 (2012). Although a unanimous decision on its face, Justice Sotomayor actually supported both the "majority" opinion, which was based on a trespass theory, and the predominate concurring opinion, which was based on a reasonable expectation theory; this split approach, with just over half of the justices suppressing on a trespass theory, with another group of justices, also just over half, suppressing on a reasonable expectation of privacy, *Katz*, theory, has, even in the birddog context, left a few questions unanswered.

170. *Id.* at 949.

171. *Id.*

172. *Id.* at 948-54.

173. *Id.* at 954-64.

174. *Jones*, 132 S.Ct. at 954 ("What of a 2-day monitoring of a suspected purveyor of stolen electronics? Or, of a 6-month monitoring of a suspected terrorist? We may have to grapple

searches incident to lawful arrest. Nor did the majority in *Jones* address cell phones per se; however, since modern cell phones also are capable to transmitting GPS location data, using cell phone GPS emanations for suspect tracking avoids the *Jones* majority's trespass principles, but implicates some of the same reasonable expectation of privacy concerns as noted by the concurring justices,<sup>175</sup> a topic already spawning a growing body of scholarly works.<sup>176</sup>

In *Jones*, the Court's digital jurisprudence "tortoise" inched a bit closer to the digital age "hare." Beyond that, if one synthesizes *Jones*,<sup>177</sup> *Gant*,<sup>178</sup> and *Quon*,<sup>179</sup> it becomes clear that the Court is beginning to paint with a broader brush in an apparent effort to sketch out the penumbra of Fourth Amendment jurisprudence in the digital age by using general rules and basic constitutional concepts, such as reasonable expectation of privacy, officer safety, and evidence evanescence, and eschewing rules that merely provide bright lines and analogies.

## XI. CONCLUSION

Should the Supreme Court grant certiorari in a cell phone internal memory search incident to lawful arrest case in the near future, this author hopes for a clear holding that a cell phone's internal memory is entitled to a reasonable expectation of privacy (whether the cell phone is password protected or not), and a return to the clear and defensible *Chimel* justifications for searches incident to lawful arrest: officer safety and a verifiable need to protect the cell phone evidence from loss or destruction. Since cell phone memories do not threaten officer safety and Faraday

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with these 'vexing problems' in some future cases where a classic trespassory search is not involved and resort must be had to *Katz* analysis; but there is no reason for rushing forward to resolve them here.").

175. See *supra* note 158 and accompanying discussion.

176. See, e.g., Susan Freiwald, *Cell Phone Location Data and the Fourth Amendment: A Question of Law, Not Fact*, 70 MD. L. REV. 681 (2011); Peter Brown et al., *Cell Phone Technology: The Business of Mobile Data, and the Emergence of Location Based Services*, in G-1070 Think Like a Lawyer and Ask Questions Like a Geek: Understanding Cyber Security, Social Media and Mobile Technology 7 (2011); Briana Schwandt, *Is the Government in My Pocket? An Overview of Government Location Tracking of Cell Phones under the Federal System and in Montana*, 72 MONT. L. REV. 261 (2011); Adam B. Merrill, *Can you Find Me Now? The Federal Government's Attempt to Track Criminal Suspects Using Their Cell Phones*, 43 ARIZ. ST. L.J. 591 (2011); *Criminal Law – Stored Communications Act – Third Circuit Allows Government to Acquire Cell Phone Tracking Data Without Probable Cause*, 124 HARV. L. REV. 1580 (2011); M. Wesley Clark, *Cell Phones as Tracking Devices*, 41 VAL. U. L. REV. 1413 (2007); Kenn McLaughlin, *The Fourth Amendment and Cell Phone Location Tracking: Where are We?*, 29 HASTINGS COMM. & ENT. L.J. 421 (2007).

177. See *supra* notes 169-74 and accompanying text.

178. See *supra* notes 94-95 and accompanying text.

179. See *supra* notes 90, 93 and accompanying text.

enclosures<sup>180</sup> render it almost impossible for anyone to remotely erase or change the memory contents of a cell phone, neither of the two *Chimel* justifications will be met in almost all search incident to lawful arrest situations. As the *Chimel* Court noted, absent a sufficient showing to support at least one of those two justifications, a warrant is required by the federal Constitution:

A search or seizure without a warrant as an incident to a lawful arrest has always been considered a strictly limited right. It grows out of the inherent necessities of the situation at the time of the arrest. But there must be something more in the way of a necessity than merely a lawful arrest.<sup>181</sup>

In the final analysis, there is no need to stretch and strain in an effort to analogize modern cell phones and other digital devices to cigarette packs, pagers, wallets, or clothing. Indeed, there is no need for any new constitutional jurisprudence at all; courts only need to apply the logic and holding of *Chimel*, which properly honors the sanctity of the Fourth Amendment by eschewing artificial bright lines and inapt analogs. The *Chimel* justifications will be applicable, just, and constitutional no matter what the digital age offers up in the future. It is this author's hope that lower courts will, with increasing frequency, honor *Chimel* and the reasoning in *Park*, and put an end to this era during which false analogies supplanted constitutional reason. After all, a cell phone is not a cigarette pack, your Honor.

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180. See *supra* Part V(B).

181. *Chimel v. California*, 395 U.S. 752, 759 (1969).