COMMENT

THE FOURTH AMENDMENT AND WARRANTLESS CELL PHONE SEARCHES: WHEN IS YOUR CELL PHONE PROTECTED?

INTRODUCTION

On March 30, 2008, Nathan Newhard was arrested for driving while intoxicated.[1] The arresting officer conducted a routine search of Newhard's person incident to the arrest.[2] In the course of the search, the officer retrieved a cell phone from Newhard's pocket and conducted a warrantless search of the phone's contents.[3] Upon opening the cell phone's images file, the officer viewed multiple photos of Newhard and his girlfriend nude and in "sexually compromising positions."[4] The officer showed Newhard's private images to another officer; subsequently, at the police station, several more officers and stationhouse employees viewed the photos on the seized cell phone, notifying one another that "private pictures were available for their viewing and enjoyment."[5] Newhard, a public school teacher, later claimed that he suffered from anxiety as a result of the dissemination of these intimate photos, and that he lost his job when, in response to the scandal, the county school system declined to renew his teaching contract.[6]

1. Declan McCullagh, *Police Push for Warrantless Searches of Cell Phones*, CNET NEWS (Feb. 18, 2010, 4:00 AM), http://news.cnet.com/8301-13578_3-10455611-38.html.

2. Newhard v. Borders, 649 F. Supp. 2d 440, 444 (W.D. Va. 2009).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* A criminal court never passed on the legality of the officer's search because embarrassing and nonincriminating evidence that has no relation to a charged offense, such as the material found on Newhard's cell phone, is not admissible in a court of law. *See* United States v. Darui, 545 F. Supp. 2d 108, 112 (D.D.C. 2008) (excluding evidence of defendant's extramarital affairs in criminal prosecution for fraud on the basis that such evidence was legally irrelevant and clearly inflammatory in nature). Newhard brought a § 1983 claim against the officers who conducted the warrantless search of his cell phone. *Id.* at 444–45. However, a government agent is entitled to qualified immunity from such claims so long as the government agent's actions did not violate any "clearly established statutory or constitutional rights." *Id.* at 447 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). In Newhard's case, the trial judge reluctantly dismissed the suit, noting that since the Fourth Circuit has approved the retrieval of text messages and other information from

Under the Fourth Circuit's interpretation of the search incident to arrest doctrine, the arresting officer did not clearly violate Newhard's Fourth Amendment right to privacy when he searched the cell phone's contents.[7] The search incident to arrest, which is an established exception to the Fourth Amendment's warrant requirement, permits an officer to conduct a "search of the arrestee's person and the area within his immediate control" in order to protect the officer's safety and to prevent the destruction of evidence.[8]

The Supreme Court has not yet addressed the constitutionality of warrantless cell phone searches conducted by law enforcement incident to arrest. The majority of courts to have considered the issue have found warrantless cell phone searches to be constitutional pursuant to one of the established exceptions to the Fourth Amendment's warrant requirement, most often the search incident to arrest exception.[9] The case law discussing warrantless cell phone searches has overwhelmingly arisen in the context of drug-trafficking prosecutions,[10] in situations in which officers conducted warrantless searches of the contents of a defendant's cell phone and found incriminating photographs, text messages, or call records that later became an essential part of the government's case against the defendant.[11]

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a cell phone seized incident to arrest, the officer's search did not violate "any clearly established" Fourth Amendment right. *See also id.* at 447–49 (noting that "[i]n the Internet age, the extent to which the Fourth Amendment provides protection for the contents of electronic communications (such as images stored on a cell phone) in a search incident to arrest or inventory search is an open question"). This was so even though Judge Norman Moon stated that the officers' actions were "deplorable, reprehensible, and insensitive." *Id.* at 450.

7. *See* United States v. Murphy, 552 F.3d 405, 411 (4th Cir. 2009) (observing that "officers may retrieve text messages and other information from cell phones and pagers seized incident to an arrest" for the purpose of preserving evidence). In *Newhard*, Judge Moon held that, given the Fourth Circuit's holding in *Murphy* and the lack of Supreme Court precedent to the contrary, Newhard's otherwise-valid § 1983 claim had to be dismissed under the doctrine of qualified immunity, since the officer had not violated one of Newhard's "clearly established" Fourth Amendment rights. *Newhard*, 649 F. Supp. 2d at 448.

8. Chimel v. California, 395 U.S. 752, 763 (1969) (internal quotation marks omitted).

9. Editorial, *Cellphone Searches*, N.Y. TIMES, Dec. 26, 2009, at A22; *see, e.g.*, United States v. Finley, 477 F.3d 250, 259–60 (5th Cir. 2007); United States v. Mercado-Nava, 486 F. Supp. 2d 1271, 1279 (D. Kan. 2007).

10. *See, e.g.*, State v. Smith, 124 Ohio St. 3d 163, 2009-Ohio-6426, 920 N.E.2d 949, at ¶ 32 (Cupp, J., dissenting).

11. Privacy-rights advocates have conceded that "they have had trouble rallying citizens to the cause of warrantless gadget searching, because many of the suspects have been accused of storing child pornography on their laptops or are drug suspects whose mobile phones reveal calls or text messages to dealers." Dionne Searcey, *When the Police Go Through Your Email: Quirk of Search Law Sets Off Alarm Bells*, WALL ST. J., Oct. 30, 2008, at A14.

In Newhard's case, it is hard to imagine how an officer's search of his cell phone could reveal any incriminating evidence relevant to his arrest or eventual prosecution for driving while intoxicated. Given the tenuous—at best—justification for the search of Newhard's cell phone and the zeal with which officers shared the personal photos for their own amusement, Newhard's experience underscores the significance of the Fourth Amendment's preference for warrants in order to protect the public against egregious privacy violations by government officials.[12] Today, almost everyone has a cell phone. And if courts do not limit cell phone searches, individuals like Newhard—who are arrested for a DUI or some other less serious traffic violation—may find themselves sitting helplessly by as an officer peruses through a wealth of personal information.[13] Considering the vast amount of personal information a cell phone can hold, it seems surprising that most courts that have considered the constitutionality of warrantless cell phone searches have upheld

12. The purpose of the Fourth Amendment's Warrant Clause is to prevent unreasonable searches by law enforcement by requiring that a detached and neutral third party, such as a magistrate, approve a search. *See* McDonald v. United States, 335 U.S. 451, 455–56 (1948) ("We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. . . . We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.").

13. As Professor Adam Gershowitz noted, most traffic offenses are arrestable offenses and thus, under the current state of the law, millions of drivers are at risk of having their most intimate information viewed by an arresting officer if they commit even a minor traffic violation. Adam M. Gershowitz, *The iPhone Meets the Fourth Amendment*, 56 UCLA L. REV. 27, 27 (2008). For additional examples of how an arrest for a minor traffic offense could lead to a search of one's cell phone or smartphone, see 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, 445–47 (2010) (setting forth a hypothetical situation in which a woman is arrested for a seatbelt infraction and a police officer searching her cell phone views call records showing numerous phone calls between the arrestee and a man who is not her husband as well as work emails containing the confidential medical information of several of the arrestee's patients), and Justin M. Wolcott, Comment, *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, 843 (2010) (discussing a hypothetical situation in which an attorney is arrested for erratic driving and the arresting officer conducts a search of the attorney's BlackBerry, which reveals an email from a colleague discussing an upcoming civil suit against the city for the assault of an arrestee by a police officer).

them under established exceptions to the Fourth Amendment's warrant requirement.[14]

While United States Supreme Court jurisprudence reflects a clear preference for providing law enforcement with bright-line rules for conducting searches incident to arrests, defining the scope of this exception has proven difficult.[15] An analysis of the case law reveals that courts' tolerance for warrantless cell phone searches—and by extension, intrusion upon an individual's right to privacy—is due in part to the law's disappointing failure to adapt to advancements in cell phone technology.[16] Courts that have extended the scope of the search incident to arrest to include a cell phone's contents have asserted a number of rationales that focus primarily on the nature of the information that a cell phone is capable of storing. These courts have, however, often ignored or minimized the importance of the more difficult issue involved—whether the vast amounts of personal information a cell phone holds should be a relevant factor in the analysis of the issues.

Notably, one recent decision departed from the prevailing reasoning of other courts. In 2009, in *State v. Smith*,[17] the Ohio Supreme Court became the first high court in the country to consider the application of the search incident to arrest and exigent circumstances exceptions in the context of warrantless cell phone

14. The reluctance of some courts to hold that a search incident to arrest does not extend to a cell phone's contents may be at least in part attributable to a deferential and broad reading of Supreme Court precedent favoring bright-line rules in this context. For example, in a recent California Supreme Court case addressing the constitutionality of a warrantless cell phone search, Chief Justice Kennard indicated in the concurrence that he joined the majority in upholding the search in part out of respect for binding precedent. *See* People v. Diaz, 244 P.3d 501, 512 (Cal. 2011) (Kennard, C.J., concurring) ("I join the majority rather than the dissent because the United States Supreme Court has cautioned that on issues of federal law all courts must follow its directly applicable precedents, even when there are reasons to anticipate that it might reconsider, or create an exception to, a rule of law that it has established.").

15. For example, in *Kyllo v. United States*, the majority framed the issue broadly in terms of "what limits there are upon this power of technology to shrink the realm of guaranteed privacy." Kyllo v. United States, 533 U.S. 27, 34 (2001). The Court in *Kyllo* faced the issue of whether officers on a public street who used a thermal-imaging device to obtain images of the interior of a home had conducted a "search" within the meaning of the Fourth Amendment. *Id.* at 34–35. Writing for the majority, Justice Scalia noted several examples of the Court's struggle to reconcile advances in technology with the protections of the Fourth Amendment, such as the decision whether the plain view doctrine applies to illegal activity viewed by law enforcement from an airplane. *Id.* at 33–34. For a comprehensive overview of how advancements in technology have complicated interpretation of the Fourth Amendment, see Gershowitz, *supra* note 13, at 36–40.

16. *See* Gershowitz, *supra* note 13, at 36–40.

17. 124 Ohio St. 3d 163, 2009-Ohio-6426, 920 N.E.2d 949, *cert. denied*, 131 S. Ct. 102 (2010).

searches.[18] The court emphatically rejected the application of the search incident to arrest exception to justify warrantless cell phone searches as well as the State's claim of exigent circumstances under the facts of the case.[19] The most significant aspect of the *Smith* opinion was its careful consideration of how rapid advances in cell phone technology have impacted this area of the law. The court explained that cell phone technology has advanced to the point that a warrantless search of a cell phone's contents can no longer be upheld under the search incident to arrest exception.[20] The court also found unconvincing the State's argument that an officer's warrantless search of an arrestee's cell phone could be premised on the need to prevent incoming calls and text messages from destroying evidence.[21] Privacy-rights advocates have hailed the decision as a major victory.[22]

This Comment analyzes the issue of warrantless cell phone searches in four parts. Part I provides context for the issue of warrantless cell phone searches, first by giving an overview of general Fourth Amendment principles as applied to cell phones, and then by supplying background information on both the number of cell phone users and the advancements in cell phone technology that complicate the analysis of warrantless cell phone searches. Part II provides an overview of the leading cases to have considered whether the scope of a search incident to arrest extends to a cell phone's contents and evaluates the strengths and weaknesses of each position. Part III then considers the exigent circumstances exception to the warrant requirement as applied to the pre-arrest search of a defendant's cell phone in *State v. Carroll*. This Part includes a cautionary discussion of how, even if courts decline to apply the search incident to arrest exception to the search of a cell phone's contents, the exigent circumstances exception could still be used to uphold a warrantless cell phone search. Part IV concludes this Comment's discussion of warrantless cell phone searches by considering how courts should approach this issue in future cases.

18. Press Release, ACLU, Ohio Supreme Court Decision on Cell Phone Searches Protects Privacy and Due Process (Dec. 15, 2009), *available at* http://www.aclu.org/technology-and-liberty/ohio-supreme-court-decision-cell-phone-searches-protects-privacy-and-due-proc.

19. *Smith* at ¶ 29.

20. *Id.* at ¶¶ 22–23.

21. *Id.* at ¶¶ 24–25.

22. For example, attorney Carrie Davis of the American Civil Liberties Union of Ohio remarked:

> Today's decision by the Ohio Supreme Court has affirmed that even with changes in technology, we do not sacrifice our core civil liberties. Oftentimes, the law fails to keep up with the fast pace of technology, but this decision lays the groundwork for greater privacy protections as the digital age advances.

Press Release, ACLU, *supra* note 18.

I. WARRANTLESS CELL PHONE SEARCHES IN CONTEXT

A. Overview of General Fourth Amendment Principles as Applied to Cell Phones

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons . . . and effects, against unreasonable searches and seizures," and avers that "no [w]arrants shall issue, but upon probable cause."[23] The Supreme Court has interpreted this Amendment to require that law enforcement procure a warrant prior to conducting a search, unless some exception to the warrant requirement applies.[24] The warrant requirement reflects the notion that a magistrate, rather than a law enforcement officer, is best situated to evaluate whether the requisite probable cause exists to classify a search as reasonable.[25] In light of the Amendment's historic underpinnings, the warrant requirement is more than a mere procedural guarantee, and may be abrogated only within the confines of several well-defined exceptions.[26] Fourth Amendment protections, however, only attach if a "search" has occurred within the meaning of the Fourth Amendment. To determine whether a Fourth Amendment search has occurred, courts apply the two-prong test promulgated in Justice Harlan's concurring opinion from *Katz v. United States*: "[F]irst that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[27]

Since the warrant requirement only attaches if there has been a search within the meaning of the Fourth Amendment, prosecutors frequently argue that a Fourth Amendment search has not occurred when officers search a cell phone's call logs. Prosecutors seeking to uphold the warrantless search of a cell phone's call log have argued that since a defendant has provided the same information to third parties (i.e., the cell phone service provider), he does not have a reasonable expectation of privacy in the contents of his call log.[28] This argument can be traced back to *Smith v. Maryland*—a case in which the United States Supreme Court held that the police had not conducted a search within the meaning of the Fourth Amendment when they used a pen register to capture telephone numbers

23. U.S. CONST. amend. IV.

24. *See* Chimel v. California, 395 U.S. 752, 761 (1969) (citing McDonald v. United States, 335 U.S. 451, 455–56 (1948)).

25. *See supra* note 12.

26. *See supra* note 12.

27. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). While the language of the test came from Justice Harlan's concurrence, subsequent Supreme Court rulings have adopted this two-prong test as the standard inquiry to determine whether a search has occurred within the meaning of the Fourth Amendment. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 32–33 (2001).

28. *E.g.*, State v. Boyd, 992 A.2d 1071, 1082 (Conn. 2010).

dialed.[29] The holding in *Smith* was based on the Court's determination that a search within the meaning of the Fourth Amendment had not occurred because a telephone user does not have a reasonable expectation of privacy in numbers dialed, since that information is shared with the third-party service provider.[30]

A recent opinion by the Supreme Court of Connecticut, *State v. Boyd*,[31] illustrates how the vast majority of courts addressing this argument have responded. In *Boyd*, the court rejected the prosecution's argument that law enforcement's search of the defendant's call log was not a search for Fourth Amendment purposes and held that a cell phone user has a reasonable expectation of privacy in the contents of his cell phone call log.[32] After providing an overview of some of the relevant case law—including *Smith*—the *Boyd* court stated, "[W]e understand the cases to stand for the proposition that the government can obtain information that the defendant has provided to a third party *from that third party* without implicating the defendant's fourth amendment rights."[33] The court went on to hold, however, that the

29. Smith v. Maryland, 442 U.S. 735, 742–44 (1979); *see also* Matthew E. Orso, *Cellular Phones, Warrantless Searches, and the New Frontier of Fourth Amendment Jurisprudence*, 50 SANTA CLARA L. REV. 183, 189–90 (2010) (noting that law enforcement may record incoming and outgoing phone numbers without a warrant because the act of sharing these numbers with the phone company nullifies—or abrogates—any reasonable expectation of privacy).

30. *Smith*, 442 U.S. at 742–44.

31. 992 A.2d 1071.

32. *Id.* at 1079, 1083.

33. *Id.* at 1082. In *Boyd*, law enforcement conducted a warrantless search of the defendant's call log and recorded several numbers, including the defendant's subscriber number. *Id.* at 1077. Law enforcement then obtained and executed a search warrant for the defendant's cell phone records and used the records to establish the defendant's location at the time and place of the murder they were investigating. *Id.* at 1077–78. Although the search of the defendant's call log was ultimately upheld under the search incident to arrest exception and the automobile exception to the warrant requirement, the Connecticut Supreme Court rejected the State's argument that no search had occurred under the Fourth Amendment. *Id.* at 1083, 1090. The court explained that if, for example, the police had obtained the defendant's cell phone number from the subscriber instead of from the defendant's call log, the case would be analogous to *Smith v. Maryland* and the Fourth Amendment's warrant requirement would not have been relevant to the analysis. *See id.* at 1082.

Professor Orso has noted that courts focusing on the location of information, rather than on the nature of information, to determine whether a Fourth Amendment search has taken place can find support for their approach in Supreme Court precedent. *See* Orso, *supra* note 29, at 190. For example, Orso notes that in *Kyllo v. United States*, Justice Scalia explained: "The fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment." *Id.* (quoting Kyllo v. United States, 533 U.S. 27, 35 n.2 (2001)) (internal quotation marks omitted). Courts that resolve the constitutionality of warrantless cell phone searches by asking whether an exception to the warrant requirement applies have implicitly extended this reasoning to searches of cell phones' call

defendant did have a reasonable expectation of privacy in the contents of his cell phone and that the police needed a search warrant to look through his call log.[34] Most courts follow the reasoning of the *Boyd* court when considering the constitutionality of warrantless cell phone searches, starting with the assumption that a cell phone user does have a reasonable expectation of privacy in the contents of his cell phone—including his call log—and then considering whether an exception to the warrant requirement applies.[35]

B. Increasing Cell Phone Usage and Rapidly Advancing Cell Phone Technology

In the decade since the first cases addressing the constitutionality of warrantless cell phone searches arose, courts have taken up the issue with increasing frequency. Greater discussion of this topic is due to both increased cell phone usage and constantly evolving cell phone technology. An overview of current cell phone usage and advancements in cell phone technology is useful for understanding the competing positions taken by privacy-rights advocates and law enforcement.

As of June 2010, there were approximately 292.8 million U.S. cell phone users.[36] As cell phone usage has become more prevalent over the past decade, the ways in which cell phones can be used have also expanded.[37] Today's devices often include some combination of "personal information management" applications, messaging and email services, and Internet browsing.[38] Potential information stored on a cell phone includes: subscriber and

logs and other contents as well. *Id.* at 191 (noting that it seems indisputable that individuals have a subjective expectation of privacy in their cell phones' contents, since courts have trended heavily in favor of requiring the search incident to arrest or exigent circumstances exceptions to uphold warrantless cell phone searches).

34. *Boyd*, 992 A.2d at 1081.

35. For an extensive collection of case law supporting the Connecticut Supreme Court's holding that a search of a cell phone's contents is a search within the meaning of the Fourth Amendment, see *id.* at 1081 n.9.

36. CTIA–The Wireless Ass'n, *U.S. Wireless Quick Facts*, CTIA ADVOCACY, http://www.ctia.org/advocacy/research/index.cfm/AID/10323 (last visited Mar. 7, 2011). In light of the fact that there are currently 292.8 million cell phone users in the United States—a number that accounts for ninety-three percent of the U.S. population—it is no wonder that a law enforcement officer has observed that "it is rare to make an arrest today without encountering [potential evidence of a crime stored on a cell phone]." Carl Milazzo, *Searching Cell Phones Incident to Arrest: 2009 Update*, POLICE CHIEF, May 2009, at 12.

37. For a general overview of the history and evolution of the cell phone, see Bryan Andrew Stillwagon, Note, *Bringing an End to Warrantless Cell Phone Searches*, 42 GA. L. REV. 1165, 1170–72 (2008).

38. WAYNE JANSEN & RICK AYERS, NAT'L INST. OF STANDARDS AND TECH., GUIDELINES ON CELL PHONE FORENSICS 56 (2007), *available at* http://csrc.nist.gov/publications/nistpubs/800-101/SP800-101.pdf.

equipment identifiers; phonebook information; appointment calendars; text messages; call logs for dialed, incoming, and missed calls; email; photographs; audio and video recordings; multimedia messages; instant messaging; Web browsing history; electronic documents; and user location information.[39]

Given the amount of potential evidence stored on a cell phone, law enforcement officers understandably want to be able to search an arrestee's cell phone in order to uncover information that might establish essential elements of their investigations.[40] An officer performing a warrantless search of a cell phone's contents typically does so by just "thumbing through" the cell phone.[41] The focus of these searches, particularly in the drug-trafficking context, is often the list of recent incoming and outgoing calls and text messages.[42]

Law enforcement's desire to access the information stored on cell phones will only increase as smartphones become more prevalent.[43] Smartphones, such as the BlackBerry and the iPhone, can hold enormous amounts of information and provide users with extensive Internet browsing capabilities.[44] The potentially vast amount of information recoverable from the search of a smartphone raises the issue of whether cell phones and smartphones should be treated differently by the law. Professor Gershowitz has pointed out that courts that currently apply the search incident to arrest exception to pagers and cell phones will most likely take the next

39. *Id.* at 57.

40. For an overview of how law enforcement may use different sources of information from a cell phone to accomplish varying objectives in an investigation, see *id.* at 59–61; and Hilary Hylton/Austin, *What Your Cell Knows About You*, TIME, Aug. 15, 2007, http://www.time.com/time/health/article/0,8599,1653267,00.html. In fact, cell phones contain such a great amount of information that they essentially provide "a subjective picture of our habits, our friends, our interests and activities, and now some even have location tracking." *Id.* (internal quotation marks omitted).

41. Hylton/Austin, *supra* note 40.

42. *E.g.*, United States v. Finley, 477 F.3d 250, 254–55 (5th Cir. 2007). In a recent article, Professor Orso explained that information such as call logs and text messages is "coding information," which is data that merely identifies the parties to a communication. Orso, *supra* note 29, at 188. Such information is distinguishable from "content-based information," which includes the substance of a communication and information stored for personal use. *Id.* at 193. A key distinction between coding information and content-based information is that law enforcement can obtain a user's coding information from the subscriber's phone records. While this information is usually not stored permanently, if law enforcement acts swiftly, most often they will be able to obtain the same coding information stored on the cell phone from the user's service provider. *Id.* at 199–200. Orso finds it useful to distinguish between coding and content-based information because he asserts that this distinction could serve as the basis for a rule permitting the search incident to arrest of a cell phone's coding information but not its content-based information. *Id.* at 209–13.

43. *See generally* Gershowitz, *supra* note 13 (offering a general overview of how the increasing popularity of smartphones impacts this area of the law).

44. *See* Orso, *supra* note 29, at 213–14.

step and apply it to smartphones as well.[45] Although there is relatively little case law on warrantless searches of smartphones, given their increasing popularity, Gershowitz's hypothesis will likely soon be tested.[46] In fact, some prosecutors are already beginning to shift the focus of their arguments from the warrantless searches of cell phones to the broader category of the warrantless searches of handheld devices.[47]

There are, however, advances in cell phone technology that case law has yet to confront. Such advances will undoubtedly complicate a court's analysis when considering whether the fruits of a warrantless cell phone search should be admitted into to evidence. An issue of primary significance is the increasing availability of remote-access wipe programs.[48] For example, Apple's new remote-wipe application allows a user to permanently delete all media and data stored on the iPhone.[49] If the iPhone is connected to a data network when the remote-wipe program is initiated, deletion begins almost instantaneously.[50] Nevertheless, law enforcement can remain confident that a delay in searching a cell phone will not lead to the permanent loss of information like phone records because these records can be obtained from the service provider. However, the development and increasing prevalence of remote-access wipe programs does create the risk that incriminating evidence in the form of photographs and text messages, for example, might be deleted during the delay associated with obtaining a warrant. Since an increasing number of service providers for both smartphones and conventional cell phones offer remote-access wipe programs, courts will most likely begin to factor this dynamic into their analyses, particularly when law enforcement asserts that an exigent need justified the warrantless search of a defendant's cell phone.[51]

45. Gershowitz, *supra* note 13, at 44.

46. *See* McCullagh, *supra* note 1; *see also* People v. Diaz, 244 P.3d 501, 514 (Cal. 2011) (Werdegar, J., dissenting) ("[S]martphones make up a growing share of the United States mobile phone market and are likely to be pervasive in the near future. . . . The question of when and how they may be searched is therefore an important one.").

47. *See, e.g.*, *id.* (discussing the position adopted by prosecutors in San Mateo County, California "that a search of a handheld device that takes place soon after an arrest is lawful").

48. *See* Prince McLean, *MobileMe Pushes Out New Find My iPhone, Remote Wipe Service*, APPLE INSIDER (June 17, 2009, 4:00 PM), http://www.appleinsider.com/articles/09/06/17/mobileme_pushes_out_new_find_my_iphone_remote_wipe_service.html (explaining the remote-wipe feature on iPhones).

49. *Id.* Apple's remote-wipe program allows an iPhone user to delete all information stored on an iPhone and return it to factory settings with the click of a button from a remote location. If the iPhone is turned on and is connected to the Internet, deletion begins immediately. If the phone is offline, deletion begins the next time the phone is online. *Id.*

50. *Id.*

51. *See, e.g.*, United States v. Valdez, No. 06-CR-336, 2008 WL 360548, at

The remainder of this Comment proceeds to discuss more specifically the applicability of the search incident to arrest exception and the exigent circumstances exception to warrantless cell phone searches. Although both of these exceptions are well established, courts have struggled with how best to adapt the exceptions to keep pace with evolving technology.[52] For courts applying these exceptions to warrantless searches of cell phone contents, interpreting the law in light of constantly changing cell phone technology has proven to be no less challenging. The ubiquitous use of cell phones and the extensive amount of information that they can store explains why groups on both sides of the debate—law enforcement and prosecutors on the one hand, and privacy advocates on the other—want courts to settle this area of the law. As one assistant district attorney recently remarked, "It's something we need finality on. It's not an 'occasionally' instance—this is happening frequently."[53]

II. THE SEARCH INCIDENT TO ARREST EXCEPTION TO THE WARRANT REQUIREMENT

The search incident to arrest exception authorizes a law enforcement officer to conduct a warrantless search of an arrestee's person and the physical space within the arrestee's reach.[54] This type of warrantless search is permitted based on the need to protect an officer's safety and to prevent the arrestee from destroying evidence.[55] While the search incident to arrest is a firmly established exception to the warrant requirement, defining its scope has proven to be more controversial.[56] Broadly speaking, when courts assess the exception's application to warrantless cell phone searches, the primary issue is whether the scope of the search incident to arrest exception should extend to include the contents of an arrestee's cell phone as well. Initially, courts overwhelmingly answered this question in the affirmative; however, recent decisions indicate that an ideological divide is emerging among courts that

*1 (E.D. Wis. Feb. 8, 2008) (noting that the arresting officer searched the defendant's phone immediately upon arrest out of concern that records might be deleted remotely and that the defendant's specific cellular-service provider offered a remote-access deletion service for data stored on cell phones).

52. *See, e.g.*, United States v. Kyllo, 533 U.S. 27, 33–35 (2001) (discussing the impact of technology on Fourth Amendment analysis).

53. Andrea Koskey, *Cell Privacy at Heart of Prosecution in Peninsula Case*, S.F. EXAMINER, Feb. 14, 2010, http://www.sfexaminer.com/local/Cell-privacy-at-heart-of-prosecution-in-Peninsula-case-84306612.html.

54. *See* Chimel v. California, 395 U.S. 752, 762–63 (1969) (explaining the search incident to arrest exception and noting that "the area into which an arrestee might reach in order to grab a weapon or evidentiary items must . . . be governed by a like rule").

55. *Id.*

56. *See supra* note 33.

have considered the issue.[57] Analysis of the case law reveals that questions surrounding the exception's scope in this context are complicated by the rapidly advancing and constantly evolving nature of cell phone technology. This Part begins in Subpart A with an analysis of the position taken by the majority of courts—that cell phones are searchable incident to arrest—as well as the counterarguments made by courts rejecting this position. Then, Subpart B analyzes the decision reached in *State v. Smith*, that a warrantless search of a cell phone's contents incident to arrest is unconstitutional.

A. Cell Phone Searches Incident to Arrest: A Focus on Timing in Finley *and* Park

In *Chimel v. California*, the United States Supreme Court stated that the search incident to arrest is a necessary exception to the warrant requirement because such a search is necessary to protect an officer's safety and to prevent an arrestee from destroying evidence.[58] However, in *United States v. Robinson*, the Court made clear that a search incident to arrest is permissible even when neither of the two rationales for the exception set out in *Chimel* are present in a given case.[59] In so holding, one of the *Robinson* Court's primary concerns was providing law enforcement with bright-line rules to follow in the context of a search incident to arrest so as to avoid forcing officers to make hasty, ad hoc judgments.[60] This preference for bright-line rules in the search incident to arrest context provides support for the position of those courts that have extended the scope of the search incident to arrest to the contents of an arrestee's cell phone.[61] Courts applying the search incident to arrest exception to warrantless cell phone searches typically assert at least one of the following reasons in support of their decisions to extend the scope of the search incident to arrest: (1) the search is necessary to prevent the destruction of evidence by incoming phone calls and text messages;[62] (2) a cell phone is no different from any

57. *Compare* United States v. Finley, 477 F.3d 250, 260 (5th Cir. 2007) (upholding a post-arrest search of the defendant-arrestee's cell phone), *with* State v. Smith, 124 Ohio St. 3d 163, 2009-Ohio-6426, 920 N.E.2d 949, at ¶ 24 (holding that a police officer must obtain a warrant before searching a cell phone's contents following an arrest), *cert. denied*, 131 S. Ct. 102 (2010).

58. *Chimel*, 395 U.S. at 763.

59. United States v. Robinson, 414 U.S. 218, 235 (1973) (rejecting the contention that it "must be litigated in each case . . . whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest").

60. *Id.*

61. *See* Gershowitz, *supra* note 13, at 33–35 (discussing how Supreme Court holdings addressing the search incident to arrest after *Chimel* reflect the Court's clear preference for bright-line rules in this area of the law).

62. *E.g.*, United States v. Murphy, 552 F.3d 405, 411 (4th Cir. 2009) (upholding the warrantless search of an arrestee's cell phone under the search

other container that may be searched incident to arrest;[63] (3) cell phones are analogous to pagers, which most courts have held to be searchable incident to arrest;[64] and (4) the nature of the information stored on a cell phone is no different from the information found in a wallet or address book, both of which have been held to be searchable incident to arrest.[65]

In *United States v. Finley*,[66] the Fifth Circuit Court of Appeals issued the leading opinion cited in justifying extending the search incident to arrest exception to the search of a cell phone's contents.[67] The Fifth Circuit extended the scope of a search incident to arrest based on its preference for bright-line rules in this area of the law and its contention that a cell phone is indistinguishable from any other container to which *Robinson* and its progeny apply.[68] In *Finley*, the police arrested the defendant for possession of narcotics.[69] During a search of Finley's person at the scene of the arrest, an officer seized his cell phone.[70] Officers subsequently searched Finley's cell phone after he was transported to another location for further questioning.[71] The *Finley* court noted that in *United States v. Robinson*, the Supreme Court held that the scope of a search incident to arrest is not determined simply by the need to preserve evidence from destruction or to ensure officer safety.[72] Under this view, so long as the arrest is lawful, no additional justification is needed to look for evidence of an arrestee's crime on his person in order to preserve it for use at trial.[73]

The *Finley* holding rests on the assumption that a cell phone is

incident to arrest exception because call logs and text messages may be overwritten as new calls and text messages are received), *cert. denied*, 129 S. Ct. 2016 (2009).

63. *E.g.*, United States v. Finley, 477 F.3d 250, 260 (5th Cir. 2007).

64. *E.g.*, United States v. Young, 278 Fed. App'x. 242, 245–46 (4th Cir. 2008) (per curiam) (noting that the Fourth Circuit had previously found pagers to be searchable incident to arrest, and extending this reasoning to justify the search incident to arrest of a cell phone's text messages); *see also* United States v. Ortiz, 84 F.3d 977, 984 (7th Cir. 1996) (holding that pagers are searchable incident to arrest).

65. *E.g.*, United States v. Cote, No. 03CR271, 2005 WL 1323343, at *6 (N.D. Ill. May 26, 2005) ("Searches of items such as wallets and address books, which I consider analogous to Cote's cellular phone since they would contain similar information, have long been held valid when made incident to an arrest."), *aff'd*, 504 F.3d 682 (7th Cir. 2007).

66. 477 F.3d 250.

67. *See* State v. Smith, 124 Ohio St. 3d 163, 2009-Ohio-6426, 920 N.E.2d 949, at ¶¶ 15–16 (noting that *Finley* is the leading case for the position that cell phones are searchable incident to arrest), *cert. denied*, 131 S. Ct. 102 (2010).

68. *Finley*, 477 F.3d at 259–60.

69. *Id.* at 254.

70. *Id.*

71. *Id.*

72. *Id.* at 259–60.

73. *Id.*

no different from any other item that *Robinson* and its progeny treat as searchable incident to arrest.[74] Rather than focusing on how cell phone technology has changed the amount of personal information a person carries with him, the Fifth Circuit instead emphasized the nature of the information being searched. Implicit in the court's holding is the principle that the potential volume of information an officer may recover from a search of a cell phone's contents is irrelevant. In *United States v. Park*—which, prior to *State v. Smith*, was the leading case to support a finding that a cell phone should not be searched incident to arrest—a California district court rejected the *Finley* court's approach, emphasizing that advancements in cell phone technology and the volume of information individuals can store on their cell phones should be relevant to the analysis.[75]

In *United States v. Park*, the California court held:

> [A] modern cellular phone, which is capable of storing immense amounts of highly personal information, is properly considered a "possession within an arrestee's immediate control" rather than as an element of the person. . . . [O]nce officers seized defendants' cellular phones at the station house, they were required to obtain a warrant to conduct the searches.[76]

Unlike the court in *Finley*, the *Park* court considered important the volume of information a cell phone can hold. It took issue with *Finley*'s classification of a cell phone as an item "immediately associated with [an arrestee's] person because it was on [his] person at the time of arrest."[77] Instead, *Park* classified cell phones as "'possessions within an arrestee's immediate control,'" a distinction that is significant with respect to the timing of a search conducted incident to arrest.[78] The *Park* court reasoned that while information stored on electronic devices like cell phones may be similar to that which police may find in a wallet, the quantity and quality of information these devices hold distinguishes them from other items that are immediately associated with the person.[79] The court acknowledged that Supreme Court jurisprudence has extended the search incident to arrest exception beyond the confines of its original rationales, but concluded that any further extension of this doctrine to encompass the contents of a cell phone was simply taking it too

74. *Id.*

75. United States v. Park, No. CR 05-375 SI, 2007 WL 1521573, at *7–9 (N.D. Cal. May 23, 2007).

76. *Id.* at *1 (quoting United States v. Chadwick, 433 U.S. 1, 16 n.10 (1977)).

77. *Id.* at *7 (quoting *Finley*, 477 F.3d at 260 n.7) (internal quotation marks omitted).

78. *Id.* at *8 (quoting *Chadwick*, 433 U.S. at 16 n.10).

79. *Id.* at *8–9.

far.[80] The court relied heavily on the observation that the line between cell phones and computers has become increasingly blurry, quoting another California district court that had noted:

> [T]he information contained in a laptop and in electronic storage devices renders a search of their contents substantially more intrusive than a search of the contents of a lunchbox or other tangible object. A laptop and its storage devices have the potential to contain vast amounts of information. People keep all types of personal information on computers, including diaries, personal letters, medical information, photos, and financial records.[81]

Essentially, the breadth of information to which cell phones offer access, coupled with the absence of concerns for either officer safety or evidence preservation, led the *Park* court to engage in a more meaningful analysis of how the search incident to arrest exception should be applied to a search of a cell phone's contents. While acknowledging that its holding technically turned on the timing of the search, the court makes clear that its disagreement with the *Finley* court's analysis was more fundamental: "[T]his Court finds, unlike the *Finley* court, that for purposes of Fourth Amendment analysis cellular phones should be considered 'possessions within an arrestee's immediate control' and not part of 'the person.' This is so because modern cellular phones have the capacity for storing immense amounts of private information."[82]

The timing of the cell phone searches in *Finley* and *Park* is key to understanding the established doctrinal differences that enabled the *Park* court to distinguish that case factually from *Finley*. In *United States v. Chadwick*, the Supreme Court addressed the timing of a search incident to arrest, distinguishing items immediately associated with the person from possessions within an arrestee's control.[83] Items that are immediately associated with the person are searchable incident to arrest at any time during the administrative process that accompanies taking custody and completing an arrest, whereas a search of the possessions within an arrestee's control must be "substantially contemporaneous with his arrest."[84] In *Park*, the officers searched the defendant's cell phone almost an hour and a half after his arrest.[85] Therefore, the court concluded that while the search in *Finley* had been conducted substantially contemporaneously with the defendant's arrest, this search had

80. *Id.* at *9.

81. *Id.* at *8 (quoting United States v. Arnold, 454 F. Supp. 2d 999, 1004 (C.D. Cal. 2006)) (internal quotation marks omitted).

82. *Id.* (citation omitted) (quoting *Chadwick*, 433 U.S. at 16 n.10).

83. *Chadwick*, 433 U.S. at 14–15.

84. United States v. Finley, 477 F.3d 250, 260 n.7 (5th Cir. 2007).

85. *Park*, 2007 WL 1521573, at *1.

not.[86] This factual distinction in the timing of the searches was significant. As was the case in *Park*, even if an item is classified as within the possession of an arrestee, the *Chadwick* limitation is relevant only if law enforcement delays its search of the object.[87]

Although the *Park* opinion is not an outright victory for privacy-rights activists, it is significant because, for the first time, a court acknowledged that advancements in technology should be relevant to legal analysis when evaluating the constitutionality of a warrantless cell phone search. However, it is important to note that the *Park* opinion did not stand for the proposition that a cell phone may never be searched incident to arrest. Instead, the *Park* court's holding turned on a doctrinal limitation in the search incident to arrest exception that is relevant only if the warrantless search was not performed substantially contemporaneously to arrest. Since the *Park* court declined to follow *Finley* for the reasons stated above and classified the cell phone as a possession within the arrestee's control, it held that the search of Park's cell phone was unreasonable. In other words, it did not occur substantially contemporaneously with the arrest.

B. An Emphasis on the Scope of the Search Incident to Arrest and Advancements in Cell Phone Technology: State v. Smith

Privacy-rights advocates won their first unequivocal victory on the issue of warrantless cell phone searches in December of 2009, when the Ohio Supreme Court held that the permissible scope of a search incident to arrest does not extend to a cell phone's contents.[88] In *Smith*, Wendy Northern had identified the defendant, Smith, as her drug dealer when police interviewed her at the hospital following an overdose.[89] Northern agreed to allow the police to

86. *Id.* at *8.

87. Recently, however, another California district court declined to follow the holding of the *Park* court. In *United States v. Hill*, No. CR 10-00261 JSW, 2011 WL 90130 (N.D. Cal. Jan. 10, 2011), the court considered the admissibility of evidence derived from a warrantless search of the arrestee's iPhone, which uncovered pornographic images of children. Like the search in *Park*, one of the searches of the arestee's cell phone was conducted after the police returned to the station house. *Id.* at *2, *7. The *Hill* court, however, concluded that while a cell phone has a significant storage capacity,

> absent guidance from the Supreme Court or the Ninth Circuit, the Court is unwilling to conclude that a cell-phone that is found in a defendant's clothing and on his person, *as is the case here*, should not be considered an element of the person's clothing. Accordingly, the Court concludes that, on the facts of this case, Hill's iPhone should not be treated any differently than, for example, a wallet taken from a defendant's person.

Id. at *7.

88. State v. Smith, 124 Ohio St. 3d 163, 2009-Ohio-6426, 920 N.E.2d 949, at ¶ 24, *cert. denied*, 131 S. Ct. 102 (2010).

89. *Id.* at ¶ 2.

record a cell phone conversation between herself and Smith in which the two arranged a drug purchase at her home.[90] Later that evening, the police arrested Smith at Northern's residence and seized his cell phone during a search of his person.[91] The record was unclear as to precisely when Smith's cell phone was initially searched, but at some point a search of his call records and phone numbers confirmed that his phone had been used to speak with Northern earlier that day.[92] The Ohio Supreme Court overturned the trial court's denial of Smith's motion to suppress the evidence found on his cell phone and held that a warrant is required to search a cell phone seized pursuant to arrest.[93]

Smith's reasoning turned primarily on the issue of how a cell phone should be classified for Fourth Amendment purposes. The court rejected the Fifth Circuit's reasoning in *Finley* that a cell phone is a container for the purposes of Fourth Amendment analysis.[94] While courts following *Finley* have analogized cell phones to containers such as wallets because they contain similar types of information, the *Smith* court instead centered its argument on the definition of "container," as articulated by the Supreme Court in *New York v. Belton*.[95] In *Belton*, the Supreme Court defined a "container" as "any object capable of holding another object."[96] The *Smith* court criticized likening cell phones and other electronic devices such as pagers to containers, on the basis that *Belton*'s definition implied that a container must actually have a physical object within it.[97]

After rejecting a closed-container analysis, the *Smith* court's discussion shifted to how a cell phone should be classified. The defendant's cell phone in *Smith* was "conventional" when compared to the capabilities of smartphones.[98] One option before the court was to uphold the warrantless search of a conventional cell phone incident to arrest, while prohibiting such a search of a smartphone. However, the court rejected fashioning different rules for conventional cell phones and smartphones because classification as either a smartphone or a conventional cell phone should no longer

90. *Id.*
91. *Id.* at ¶ 3.
92. *Id.* at ¶ 4.
93. *Id.* at ¶ 23 ("Once the cell phone is in police custody, the state has satisfied its immediate interest in collecting and preserving evidence and can take preventive steps to ensure that the data found on the phone are neither lost nor erased. But because a person has a high expectation of privacy in a cell phone's contents, police must then obtain a warrant before intruding into the phone's contents.").
94. *See id.* at ¶¶ 19–23.
95. 453 U.S. 454 (1981).
96. *Id.* at 460 n.4.
97. *Smith* at ¶ 19.
98. *Id.* at ¶ 21 (acknowledging the dissent's use of the term "conventional").

matter.[99] Notably, the *Smith* court concluded, "[I]n today's advanced technological age many 'standard' cell phones include a variety of features . . . . Because basic cell phones . . . have a wide variety of possible functions, it would not be helpful to create a rule that requires officers to discern the capabilities of a cell phone before acting accordingly."[100]

The *Smith* court then addressed whether Fourth Amendment protection attaches to a cell phone's contents. Fourth Amendment protection attaches to protect an individual's "subjective expectation of privacy if that expectation is reasonable and justifiable."[101] While cell phones contain digital address books akin to traditional address books, which are entitled to a lower expectation of privacy in a search incident to arrest, they are also analogous to computers, which are entitled to a higher expectation of privacy due to the quantity of data they can hold.[102] The court concluded that while cell phones are not synonymous with computers, "their ability to store large amounts of private data gives their users a reasonable and justifiable expectation of a higher level of privacy in the information they contain."[103] Therefore, once police have seized a cell phone, they must obtain a warrant to search its contents.[104] Furthermore, the court noted that traditional Fourth Amendment principles support this holding since searching the contents of a seized cell phone furthers neither officer safety nor the preservation of evidence.[105]

Given that a primary problem of warrantless cell phone searches is one of the law keeping up with technology, *Smith*'s initial focus on such a rigid application of the definition of "container" was unsatisfying. The court regained its focus when it stated that the quantity and quality of information a cell phone is capable of holding was an additional factor in its refusal to classify cell phones as closed containers.[106] While the majority of courts

99. *Id.*

100. *Id.*

101. *Id.* at ¶ 22 (quoting State v. Buzzard, 112 Ohio St. 3d 451, 2007-Ohio-373, 860 N.E.2d 1006, at ¶ 14) (internal quotation marks omitted).

102. *Id.* at ¶ 22.

103. *Id.* at ¶ 23.

104. *Id.* at ¶ 24.

105. *Id. But see id.* at ¶¶ 30–31 (Cupp, J., dissenting) ("The majority needlessly embarks upon a review of cell phone capabilities in the abstract in order to announce a sweeping new Fourth Amendment rule that is at odds with decisions of other courts that have addressed similar questions. In my view, this case deals with a straightforward, well-established principle: '[I]n the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment.'" (quoting United States v. Robinson, 414 U.S. 218, 235 (1973))).

106. *Id.* at ¶ 20 ("Even the more basic models of modern cell phones are capable of storing a wealth of digitized information wholly unlike any physical

follow *Finley*, case law demonstrates that when courts consider it significant that cell phone technology has dramatically changed the volume of personal information individuals carry with them, they will then consider warrantless searches to be unreasonable. Whether other courts follow Ohio's lead and consider the issue of developing cell phone technology in their analyses and apply it as a basis for refusing to extend the scope of a search incident to arrest to a cell phone's contents remains to be seen.[107]

III. WHEN DO EXIGENT CIRCUMSTANCES JUSTIFY THE WARRANTLESS SEARCH OF A CELL PHONE'S CONTENTS?

While the majority of courts upholding warrantless cell phone searches have done so under the search incident to arrest exception, a number of these courts have noted that, in addition, the search was justified by the exigent circumstances exception.[108] The exigent circumstances exception is another well-established exception to the warrant requirement, permitting an officer to conduct a warrantless

object found within a closed container.").

107. In a recent case addressing a warrantless cell phone search performed incident to arrest, the California Supreme Court did consider developing cell phone technology, yet still upheld the search under this exception. *See* People v. Diaz, 244 P.3d 501, 507–09 (Cal. 2011). The dissenting judge, however, considered evolving cell phone technology and increasing storage capacity to be highly relevant to her conclusion that U.S. Supreme Court precedent did not support extending the scope of the search incident to arrest exception to the contents of an arrestee's cell phone:

> The majority's holding . . . goes [too far], apparently allowing police carte blanche, with no showing of exigency, to rummage at leisure through the wealth of personal and business information that can be carried on a mobile phone or handheld computer merely because the device was taken from an arrestee's person. The majority thus sanctions a highly intrusive and unjustified type of search, one meeting neither the warrant requirement nor the reasonableness requirement of the Fourth Amendment to the United States Constitution. As a commentator has noted, "[i]f courts adopted this rule, it would subject anyone who is the subject of a custodial arrest, even for a traffic violation, to a preapproved foray into a virtual warehouse of their most intimate communications and photographs without probable cause." . . . United States Supreme Court authority does not compel this overly permissive rule, and I cannot agree to its adoption.

Id. at 518 (Werdegar, J., dissenting) (citation omitted) (quoting Orso, *supra* note 29, at 211).

108. *E.g.*, United States v. Santillan, 571 F. Supp. 2d 1093, 1101 (D. Ariz. 2008) (holding that exigent circumstances justified the warrantless search of a defendant's cell phone based on the danger that drug-trafficking activity posed to the community and on the officers' suspicions that the defendant used his phone in drug trafficking); United States v. Parada, 289 F. Supp. 2d 1291, 1303–04 (D. Kan. 2003) (holding in the alternative that exigent circumstances justified the search of the contents of the defendant's cell phone because the phone's limited memory created a risk that evidence might be erased or destroyed).

search when she has a reasonable belief that the delay necessary to obtain a warrant creates a threat that potential evidence will be destroyed.[109] If other courts follow Ohio's lead and decline to extend the scope of a search incident to arrest to a cell phone's contents, law enforcement will most likely then seek to rely on the exigent circumstances exception instead. Subpart A will first assess the applicability of this exception to situations in which officers claim an exigent need to proceed with a warrantless search to prevent the destruction of evidence through incoming calls and text messages. Subpart B will then discuss the application of the exigent circumstances exception in an opinion handed down by the Wisconsin Supreme Court, *State v. Carroll*, which addressed the application of the exception to both the search of a cell phone's images gallery and the interception of an incoming phone call by an officer impersonating the defendant.

A. The Possibility of Deleted Call Logs and Text Messages: An Exigent Circumstance?

Application of the exigent circumstances exception to warrantless cell phone searches thus far has arisen primarily in situations when officers conducted a search of a cell phone's call log and text messages. Most of the courts that have considered the exception's application in this context have held that a warrantless search is justified by the threat that incoming calls and text messages will delete older call history and text messages.[110] This reasoning first appeared in the opinions of courts addressing warrantless searches of pagers and has since been extended to cell phones without consideration of the differences between the two.[111] Recently, however, in *United States v. Wall*, a Florida federal district court declined to apply this very reasoning as justification for upholding the warrantless search of a cell phone's call logs, noting that the differences in pager and cell phone technology made such an extension in reasoning untenable.[112] In *Wall*, the court noted that, whereas pagers use a first-in-first-out storage method for numbers, a cell phone's text messages are not deleted in a similar fashion.[113] Once the officer seizes a cell phone, there is no longer a risk that by waiting to obtain a search warrant evidence will be

109. State v. Carroll, 2010 WI 8, ¶ 21, 322 Wis. 2d 299, 778 N.W.2d 1.

110. *E.g.*, *Santillan*, 571 F. Supp. 2d at 1102 ("The agents thus had a valid concern that more incoming calls to the defendant's cell phone could destroy evidence that was the located on the cell phone's recent contacts lists.").

111. *See* United States v. Wall, No. 08-60016-CR, 2008 WL 5381412, at *3 (S.D. Fla. Dec. 22, 2008) (observing that when extending the exigent circumstances exception to cell phones, "the *Finley* court did not explain why cell phones should be treated the same as pagers for purposes of the Fourth Amendment").

112. *Id.* at *4.

113. *Id.*

destroyed, so the exigent circumstances exception no longer applies.[114]

In *State v. Smith*, the Ohio Supreme Court went a step further than the Florida district court in *Wall*. It rejected the application of the exigent circumstances exception to the search of a cell phone's call logs and text messages, by concentrating on the fact that this same information is available from a cell phone service provider, rather than focusing on the way the cell phone stores information.[115] In *Smith*, the prosecution argued that since cell phones have a finite memory and incoming and outgoing calls incrementally cause part of the call logs or text messages to be permanently deleted, law enforcement should be able to search cell phones under the exigent circumstances exception.[116] The court flatly rejected the prosecution's argument that an exigent need to preserve evidence existed under these circumstances. Instead of focusing on the way a cell phone stores information as the court did in *Wall*, the *Smith* court instead observed that an exigency did not truly exist because this information was recoverable from cell phone service providers, which maintain call records as part of their normal operating procedures.[117] Essentially, in *Smith*, the court concentrated on the fact that while incoming calls and texts may delete some information on a cell phone, the analysis of whether the evidence risks being lost should not end there. The court instead emphasized that evidence must be truly irrecoverable from *any* source—which includes the third-party cell phone service provider—to justify application of the exigent circumstances exception.

B. An Exigent Need To Search a Cell Phone's Images Gallery and To Answer Incoming Phone Calls?

While Subpart A focused on the exigent circumstances exception as applied to the search of call logs and text messages, this Subpart focuses on application of the exigent circumstances exception to evidence that is not available from a cell phone service provider, such as photographs or the actual content of an incoming phone call. A recent opinion by the Wisconsin Supreme Court, *State v.*

114. *Id.* The court noted:

> The differences in technology between pagers and cell phones cut to the heart of this issue. The technological developments that have occurred in the last decade . . . are significant. Previously, there was a legitimate concern that by waiting minutes or even seconds to check the numbers stored inside a pager an officer ran the risk that another page may come in and destroy the oldest numbers being stored. . . . Text messages on cell phones are not stored in the same manner.

Id.

115. State v. Smith, 124 Ohio St. 3d 163, 2009-Ohio-6426, 920 N.E.2d 949, at ¶ 25, *cert. denied*, 131 S. Ct. 102 (2010).

116. *Id.* at ¶ 25.

117. *Id.* at ¶¶ 25, 29.

Carroll,[118] provides an opportunity to examine the exigent circumstances exception as applied to both the search of a cell phone's images gallery and to the act of an officer answering an incoming call. The ultimate issue before the Wisconsin Supreme Court was whether either of the warrantless searches of defendant Carroll's cell phone were constitutional and, if so, whether the searches provided probable cause for the issuance of a search warrant for the contents of Carroll's phone several days later.[119] For this Comment's purposes, discussion of *State v. Carroll* focuses on the court's application of the exigent circumstances exception to the search of the cell phone's images gallery and the incoming phone calls, and the facts the court found persuasive in applying the exigent circumstances exception to the search of the incoming phone calls.

In *Carroll*, officers were conducting surveillance on a residence in connection with an armed-robbery investigation.[120] The officers observed a car driven by the defendant leaving the residence and decided to pursue the car after the defendant sped away upon noticing the officers' surveillance of the house.[121] When the car stopped at a gas station, Carroll emerged from the car holding a flip-style cell phone that he dropped on the ground in the open position after the officers ordered him to stop.[122] The officers recovered the phone and viewed the display screen, which featured a picture of Carroll smoking a marijuana cigarette.[123] This image prompted officers to run a background check on Carroll, which revealed that he was driving with a suspended license and had a juvenile record for a drug-related felony two years earlier.[124] Carroll, although not under arrest, was placed in the back of the squad car.[125] At this point, the officers searched the phone's image gallery, which revealed photos of Carroll involved in illegal activity, including an image of him holding a gallon-size bag of marijuana in his teeth and another of him posing with a semiautomatic firearm.[126] During this time, Carroll's phone rang several times, and the officer answered one of the calls, pretending to be Carroll as he spoke with someone attempting to purchase four-and-a-half ounces of cocaine.[127]

118. 2010 WI 8, 322 Wis. 2d 299, 778 N.W.2d 1.
119. *Id.* at ¶ 2.
120. *Id.* at ¶ 4.
121. *Id.* at ¶¶ 4–5.
122. *Id.* at ¶¶ 5–6.
123. *Id.* at ¶ 6. Additionally, and presumably to emphasize that the image of Carroll smoking marijuana was in fact in plain view, the court observed that immediately upon opening the flip-style cell phone, a banner reading "Big Boss Player" faded into the picture of Carroll smoking marijuana, which the officers never testified that they viewed. *Id.* at ¶ 6 n.2.
124. *Id.* at ¶ 7.
125. *Id.* at ¶ 8.
126. *Id.*
127. *Id.* at ¶ 9.

Since Carroll was not under arrest when either of these searches occurred, the search incident to arrest exception was not applicable and the court did not consider whether the scope of that exception would extend to a cell phone's contents.[128] The court instead considered the application of the exigent circumstances exception to the search of the cell phone's images gallery and the officer's decision to answer one of the defendant's phone calls. It first determined that the officers had probable cause to seize Carroll's cell phone and hold it until a warrant could be obtained for a search of its contents.[129] The court went on to note that once the cell phone was seized, exigent circumstances no longer justified an immediate search of the cell phone's images gallery and the officers should have waited to obtain a warrant before conducting the search.[130] However, in contrast to the court's refusal to apply the exigent circumstances exception to uphold the search of the images gallery, it upheld the search of Carroll's cell phone when the officer answered an incoming call on the basis of exigent circumstances.[131] The court stated that by the time the phone calls were received, there was probable cause to believe that Carroll was a drug dealer and that the incoming call would most likely contain evidence supporting this belief; therefore, evidence would be lost if the officer did not answer the call.[132]

The Wisconsin Supreme Court set a disappointingly low bar to justify an exigent need to answer a defendant's cell phone. Under the exigent circumstances exception, the officer must demonstrate both a reasonable belief that evidence will be permanently lost and a reasonable belief that that the cell phone contains evidence of illegal activity.[133] The court's analysis of this second prong provoked strong disagreement from the dissent.[134] Specifically, the officers asserted that their belief that the phone call would contain evidence of drug trafficking was reasonable based on the display-screen image of Carroll smoking marijuana—which the majority held was legally viewed under the plain view doctrine[135]—as well as their knowledge

128. *See id.* at ¶ 12.
129. *Id.* at ¶¶ 22–25.
130. *Id.* at ¶ 33.
131. *Id.* at ¶¶ 34–35.
132. *Id.* at ¶ 34.
133. *Id.* (citing United States v. Place, 462 U.S. 696, 701 (1983)) (noting that the Fourth Amendment permits warrantless seizures of property when there is probable cause to believe that the property contains evidence of a crime and exigent circumstances demand the seizure); *see also* State v. Faust, 2004 WI 99, ¶ 11, 274 Wis. 2d 183, 682 N.W.2d 371 (explaining that exigent circumstances exist when an officer fears that evidence will be lost or destroyed).
134. *See Carroll* at ¶¶ 109–15 (Prosser, J., dissenting).
135. *Id.* at ¶ 3 (majority opinion); *cf.* Coolidge v. New Hampshire, 403 U.S. 443, 465–66 (1971) (holding that the plain view doctrine permits seizure of an object without a warrant when the officer is not searching for evidence against the accused, but the object nonetheless appears in plain view).

that drug traffickers often personalize their phones with images of themselves and "property acquired from the distribution of drugs."[136] The court held that this was enough to justify the inference that incoming calls would contain evidence of illegal drug activity—evidence that would be lost and irrecoverable unless the officer answered the phone.[137] Under these circumstances, the court held that exigent circumstances justified the officer's decision to answer the incoming call on Carroll's cell phone.[138]

Because the *Carroll* court declined to apply the exigent circumstances exception to search the contents of a cell phone's images gallery once the phone had been seized, this decision represents a mixed victory for privacy-rights advocates. However, privacy-rights advocates should view this holding cautiously and with skepticism. While the officers' initial search of Carroll's images gallery was struck down, the officers were able to justify answering an incoming phone call on the basis of exigent circumstances that were supported by scant evidence. Both dissenters lamented that the majority's opinion set the bar far too low for establishing exigent circumstances to justify a warrantless search, by allowing law enforcement to establish probable cause on the basis of generalizations rather than facts.[139]

In his dissent, Justice Prosser criticized the majority's holding as being at odds with the privacy of citizens because of the court's willingness to allow the single display photo of Carroll smoking marijuana to serve as the basis for the interception of his phone calls.[140] Prosser wrote, "The syllogism that the majority appears to rely on is as follows: (1) Drug traffickers frequently personalize their cell phones with pictures of themselves possessing illegal drugs. (2) The defendant's cell phone shows him smoking a marijuana cigarette. (3) Therefore, the defendant is probably a drug trafficker."[141] Essentially, Judge Prosser argued that the facts were simply insufficient to justify a reasonable belief that incoming calls would contain evidence that Carroll was involved in the business of drug trafficking. The police pursued Carroll from a house they were watching in connection with an armed robbery, not drug trafficking.[142] Furthermore, the police did not have any additional evidence that Carroll was either a drug user or a drug trafficker. Consequently, the only evidence the officer had of Carroll's suspected involvement in drug trafficking at the time he intercepted

136. *Carroll* at ¶ 10.
137. *Id.* at ¶¶ 34, 42.
138. *Id.* at ¶ 42.
139. *See id.* at ¶ 61 & nn.2–3 (Abrahamson, J., dissenting); *id.* at ¶¶ 109–12 (Prosser, J. dissenting).
140. *Id.* at ¶ 99.
141. *Id.* at ¶ 109.
142. *Id.* at ¶ 108.

the phone call was a single image of Carroll smoking marijuana.[143] As Prosser pointed out, a variety of inferences could be drawn from this image, including the conclusion that Carroll was merely a drug user and not a drug trafficker.[144]

In this light, *Carroll* illustrates an important point: because the basis of a reasonable belief is a fact-specific inquiry, in cases in which evidence is irrecoverable, privacy-rights advocates will continue to have cause for concern over how this exception is applied. In an article written in response to the *Carroll* opinion, Wisconsin assistant attorney general David Perlman provided a preview of how the state may be able to use *Carroll* in the future to justify a warrantless search of an individual's images gallery under facts similar to those presented in *Carroll*. Perlman wrote:

> From a prosecutorial perspective [the court's reasoning in striking down the search of the image's gallery on the basis that there was no risk the evidence would be lost] is flawed since the contents of high tech cell phones can be altered from remote locations and Internet Service Providers can inadvertently remove potential evidence through their normal procedures.[145]

As discussed in Part I, courts have yet to directly confront how remote-access wipe programs will complicate any analysis of the exigent circumstances exception to "content-based" information. However, due to the rising popularity and availability of remote-wipe services, courts most likely will be forced to confront this issue in the near future. It stands to reason that as remote-wipe programs become increasingly popular, the prosecution could argue that an exigent need to search through an images gallery exists. And, in Wisconsin at least, post-*Carroll*, the state has to clear a low bar in establishing that an exigent need exists based on the officer's reasonable belief that evidence relevant to the crime will be lost forever if the search is not immediately executed.

The court's holding in *State v. Carroll* serves as a useful reminder that even if courts follow the approach set forth by the Ohio Supreme Court—by declining to extend the scope of the search incident to arrest to a cell phone's contents and by declining to find a

143. *Id.* at ¶¶ 112, 115.

144. *Id.* at ¶ 112. Judge Prosser went on to pose the following observation and question in his dissent: "The internet features many pictures of marijuana that people can employ as 'wallpaper' on their cell phone display screens. After this decision, will an impersonal picture of illegal drugs on a cell phone provide probable cause for a search of the phone without a warrant?" *Id.* at ¶ 112.

145. David Perlman, *The Prosecutor's Perspective: Supreme Court Avoids GPS Issue and Rules on Cell Phone Privacy, Among Other Decisions*, INSIDE TRACK (State Bar of Wis., Madison, Wis.), Oct. 20, 2010, http://www.wisbar.org/AM/Template.cfm?Section=InsideTrack&Template=/CustomSource/InsideTrack/contentDisplay.cfm&ContentID=97434#end1.

search of a cell phone's call logs justified by exigent circumstances once seized—the exigent circumstances exception could still be used to justify a warrantless search of a cell phone's contents for information that is not available from third-party providers. While application of the exigent circumstances exception may indeed be necessary in many situations, it should not be used as a backdoor to justify the warrantless search of a cell phone's contents merely because law enforcement has a hunch that a cell phone may contain incriminating evidence that could be lost if the phone is not searched immediately. The facts held to be sufficient to establish exigent circumstances in these instances will be crucial to the future analysis of this issue, particularly as remote-wipe programs become more popular. The Wisconsin Supreme Court established a disappointingly low standard for applying the exigent circumstances exception to the search of a cell phone. Other courts should show restraint and require more of their states' law enforcement officers before casting aside the Fourth Amendment's warrant requirement.

IV. A STANDARD FOR WARRANTLESS CELL PHONE SEARCHES GOING FORWARD

Courts and commentators have suggested several approaches to analyzing whether a cell phone's contents should be searchable incident to arrest. Subpart A begins with a discussion of why the holding reached in *State v. Smith* should serve as a model for courts going forward. Subparts B and C discuss alternative standards proposed by courts and commentators.

A. A Search Incident to Arrest Should Not Include a Search of a Cell Phone's Contents

In *State v. Smith*, the court held that a cell phone's contents are not searchable incident to arrest.[146] Instead, the *Smith* court held that once the police have seized an arrestee's cell phone, then—absent exigent circumstances—a warrant is necessary to authorize a search of the cell phone's contents.[147] The *Smith* court's approach is laudable because it acknowledges that cell phone technology has evolved to the point that courts should no longer apply established exceptions to the warrant requirement without engaging in a meaningful analysis of cell phone technology and its impact on this area of the law. While courts and commentators have suggested a variety of alternatives to a bright-line rule either permitting or prohibiting the warrantless search of a cell phone's contents,[148]

146. State v. Smith, 124 Ohio St. 3d 163, 2009-Ohio-6426, 920 N.E.2d 949, at ¶ 24, *cert. denied*, 131 S. Ct. 102 (2010).

147. *Id.* at ¶ 23.

148. *See, e.g.*, United States v. Valdez, No. 06-CR-336, 2008 WL 360548, at *3 (E.D. Wis. Feb. 8, 2008) (distinguishing the legal issues implicated by a mere search of an address book and call history from "a broader search equivalent to

Smith's holding that a cell phone's contents are not searchable incident to arrest absent a showing that such a search is necessary to prevent the destruction of evidence or ensure officer safety should be the standard. The *Smith* court's deft analysis of the application of the search incident to arrest exception to warrantless cell phone searches leaves little doubt that courts upholding searches under this exception are furthering a legal fiction at great expense to privacy rights. An added benefit of the *Smith* holding is that it provides law enforcement with a clear, bright-line rule to apply in this context. The following analysis of two other standards proposed by courts and commentators demonstrates why *Smith*'s approach is best.

B. Differentiating Between Conventional Cell Phones and Smartphones Makes Little Sense—Both in Application and Doctrinally

One option of compromise some courts and commentators have proposed is a rule permitting the search of a conventional cell phone incident to arrest, while prohibiting the search of a smartphone incident to arrest.[149] This argument rests on the reasoning that the quantity and quality of information stored on a smartphone, as well as the capabilities of such a device, makes it more like a computer than a phone.[150] Assuming the distinction between conventional cell phones and smartphones is significant, law enforcement would still need some guidance on how to distinguish between the two.

Both the majority and dissent in *Smith* noted that it would be impractical to require an officer to discern whether a cell phone is "conventional" or a smartphone before deciding whether to proceed with a search of its contents incident to arrest.[151] The *Smith* court was correct to dismiss this option for two reasons. First, a rule requiring officers to discern a cell phone's capabilities is simply impractical. Given that there are well over two thousand cell phone models available in the United States alone,[152] no officer could be expected to obtain the requisite knowledge to correctly distinguish a

the search of a personal computer"); Gershowitz, *supra* note 13, at 45–56 (discussing a variety of potential approaches); Orso, *supra* note 29, at 210–12, 219–22 (same).

149. *See, e.g.*, Orso, *supra* note 29, at 219–22.

150. *See id.*

151. *Smith* at ¶ 21 (majority opinion) ("Because basic cell phones in today's world have a wide variety of possible functions, it would not be helpful to create a rule that requires officers to discern the capabilities of a cell phone before acting accordingly."); *id.* at ¶ 35 (Cupp, J., dissenting) ("It would be unworkable to devise a rule that required police to determine the particular cell phone's storage capacity, and the concomitant risk that telephone numbers stored on the phone could be lost over time, before searching the phone's address book or call list.").

152. Hylton/Austin, *supra* note 40.

cell phone from a smartphone on every occasion. Additionally, a primary goal in search-and-seizure law has been to provide law enforcement with clear standards to follow. Since cell phone designs are constantly evolving, it would be difficult for law enforcement to stay abreast of the most current ways to differentiate these two classes of phones. Second, and most importantly, as the *Smith* court observed, the distinction between the conventional cell phone and smartphone should simply no longer matter.[153] Even today's more basic cell phones are so advanced that categorizing them as "conventional" does not aptly convey their capabilities; it merely serves as a label that differentiates their features from the superior memory and Internet capabilities typical of smartphones.

C. Distinguishing Between "Coding Information" and "Content-Based Information"

Another option is to allow a search incident to arrest of some of a cell phone's contents. In a recent article, Professor Orso considered whether police should be allowed to search a cell phone's coding information incident to arrest, but not its content-based information.[154] Coding information is defined as information that "reveals only the identity of a party to a communication without disclosing the subject matter of that communication,"[155] while content-based information includes the substance of communications as well as other materials, such as photographs and personal memos.[156] This approach would allow officers to view lists displaying recent calls and recipients of text messages, but not the content of the text messages, photos, or address books.[157] Professor Orso explained that a primary virtue of this approach is that it gives law enforcement the ability to view some information while also accounting for the heightened expectation of privacy that citizens have regarding more personal information.[158]

However, a rule premised on the distinction between coding information and content-based information is also unsatisfactory. The compromise proposed by distinguishing between these two forms of information still violates an individual's right to privacy, absent any demonstrated exigent need for a warrantless search. This observation is supported by Justice Scalia's statement in *Kyllo*—that justification does not exist to abrogate the warrant requirement merely because the same information could be obtained without a warrant under different circumstances.[159]

153. *Smith* at ¶ 21.
154. *See* Orso, *supra* note 29, at 209–13.
155. *Id.* at 188.
156. *Id.* at 193.
157. *Id.*
158. *Id.* at 193–95.
159. *Id.* at 190 (citing Kyllo v. United States, 533 U.S. 27, 35 n.2 (2001)).

Additionally, this reasoning raises another question: Would adopting Orso's approach mean that in cases such as *Carroll* for example, when police open a defendant's cell phone to conduct a search of coding information and in doing so view incriminating evidence that is in plain view (e.g., an incriminating wallpaper photograph of the arrestee smoking marijuana), that exigent circumstances could then be used to justify a more intrusive search of content-based information? For these reasons, distinguishing between coding and content-based information should also be dismissed as a basis for a rule allowing a search incident to arrest of some of a phone's contents.

CONCLUSION

Courts currently upholding the search of a cell phone's contents incident to arrest have placed the privacy rights of many at risk with little sound legal reason for doing so. Most Americans carry their cell phones with them throughout the day, using them to make phone calls, check email, take pictures, and store a variety of personal information. Cell phone technology has evolved to the point that courts should no longer continue to entertain the legal fiction that a cell phone is no different from other items—such as address books or pagers—that courts have traditionally held to be searchable incident to arrest. Instead, courts should follow the lead of the Ohio Supreme Court in *State v. Smith* and hold that cell phones are not searchable incident to arrest. Even if this approach is taken, however, courts should be mindful that law enforcement officers may then try to justify the warrantless search of a cell phone's contents in situations when no exigency truly exists. When confronted with claims that warrantless cell phone searches were justified by exigent circumstances, courts should carefully consider whether the information was truly irrecoverable.

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