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INTRODUCTION

A dramatic increase in consumer demand for more feasible communication has influenced the advancement of convenient devices with powerful capabilities, such as third-generation cell phones.1 While the rapid development of modern cell phones has helped to satisfy this heightened demand, criminals have been similarly satisfied.2 Even subsequent to conviction, criminals have continued to utilize cell phones to carry out criminal activity.3 Recently, several courts have allowed law enforcement officials, acting without a warrant, to seize information stored within cellular phones in order to gather incriminating evidence and further their investigations against individuals suspected of criminal activity.4 Other courts, however, have not reached that same conclusion and have suppressed evidence seized from cell phones.5

The question of whether an exception, specifically the search incident to arrest exception, to the Fourth Amendment warrant requirement permits law enforcement officials to search the content stored within a cell phone without a warrant has not yet been answered

1. See, e.g., Bryan Andrew Stillwagon, Bringing an End to Warrantless Cell Phone Searches, 42 GA. L. REV. 1165, 1171–72 (2008) (explaining that third-generation cell phones have become “portable microcomputers” with multi-media capabilities that include call lists, address books, calendars, voice notes, video capabilities, photo capabilities, text messaging, and access to the Internet; further, in 2007, cell phones “were used by more than 255 million people in the United States, up from 141.8 million in 2002”).

2. Id. at 1173 (noting that “[m]ore criminals are now using pagers, cell phones, [and] laptop computers . . . to aid in the commission of crimes;” and even “[m]ore disturbing are reports of criminals using camera phones to assist in robberies and to record acts of sexual violence”); see also United States v. Portalla, 496 F.3d 23, 27 (1st Cir. 2007) (noting that “throwaway” cell phones are essential tools of the drug trade).

3. See Kelli Arena, Dogs bust inmates using cell phones to carry out crimes, CNN (Aug. 18, 2008), http://www.cnn.com/2008/CRIME/08/18/prison.cellphones/index.html?eref=rss_topstories (explaining that “[c]ell phones have become the hottest contraband in prisons these days . . . [and] can be used to run criminal enterprises, plan escapes and arrange for other illegal items such as drugs to be brought in”).

4. See infra Part II.B.

5. See infra Part II.A.
by the Supreme Court. Unless or until the Supreme Court addresses this issue, courts will have unlimited judicial discretion to either apply "analogous" precedent to permit, or find greater privacy interests to prohibit the warrantless searches of cell phones.

Initially, this Comment will discuss the development of the search incident to arrest exception from the warrant requirement and how this exception has been generally defined and judicially interpreted. The next section will include a discussion of how the search incident to arrest exception has been applied to searches of the content stored within pagers. This Comment will then explain how modern cell phones have created difficulties for courts applying the search incident to arrest exception, causing these courts to diverge down two different lines of reasoning, ultimately reaching opposite conclusions. Finally, this Comment will reiterate the necessity that the Supreme Court rule on this issue and will point out the strengths and weaknesses of some options that the Court may consider.

I. WARRANT REQUIREMENT AND A KEY EXCEPTION

The Fourth Amendment to the U.S. Constitution provides protection against unreasonable searches and seizures, and its fundamental purpose is to "safeguard the privacy and security of

6. See, e.g., Newhard v. Borders, 649 F. Supp. 2d 440, 448 (W.D. Va. 2009) (discussing that "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... is an open question" and there is "a lack of a clear rule from the Supreme Court or other lower courts regarding the permissible scope of a search of a cell phone incident to arrest").

7. See, e.g., United States v. Ayalew, 563 F. Supp. 2d 409, 416 (N.D.N.Y. 2008) (permitting agent to search contents of digital camera incident to arrest but finding that camera was not technically a container); United States v. Ortiz, 84 F.3d 977, 984 (7th Cir. 1996) (explaining that "law enforcement officers have the authority to immediately 'search' or retrieve, incident to a valid arrest, information from a pager in order to prevent its destruction as evidence"); United States v. Diaz-Lizaraza, 981 F.2d 1216, 1222-23 (11th Cir. 1993) (explaining that agents who discovered a beeper in a truck during the defendant's arrest, and who had probable cause to believe that the beeper was connected to criminal activity, acted reasonably in inserting batteries into the beeper and calling it to see if it would ring when the suspect's beeper number was dialed); United States v. Reyes, 922 F. Supp. 818, 833 (S.D.N.Y. 1996) (holding that memory of pager seized incident to arrest could be accessed to obtain numbers and messages).

8. See infra Part II.B.

9. See infra Part II.A.
individuals against arbitrary invasions by government officials.” It states that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause.” The Supreme Court reiterated in Coolidge v. New Hampshire that the most basic constitutional rule under this Amendment “is that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable.”

Therefore, as a general rule, a law enforcement official is required to obtain a warrant from a “neutral and objective magistrate” authorizing the search in order for the search to be reasonable. However, there are certain “specifically established and well-delineated exceptions” to the Fourth Amendment warrant requirement. One exception to this warrant requirement provides that a police officer may, incident to a lawful arrest, search the person arrested and the immediate surrounding area. This is known as the search incident to arrest exception, and it “derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations.” The search incident to arrest exception is the most controversial exception with regard to searches of the content stored within cell phones because these types of searches are most commonly justified by this exception, and there is an increasing division among courts in its application to the warrantless searches of cell phones. Therefore, this exception is key in analyzing whether law enforcement officials are (or should be) lawfully permitted to search the content stored within a cell phone without a warrant.

A. The Search Incident to Arrest Exception

The Supreme Court first noted approval of a warrantless search incident to a lawful arrest in 1914 as dictum in Weeks v. United States.  

11. U.S. CONST. amend. IV.
13. Id. at 454–55.
18. See discussion infra Part II.A–B.
19. Weeks v. United States, 232 U.S. 383, 392 (1914) (recognizing that there is a "right on the part of the government always recognized under English and American law,
A little more than a decade later the Court attempted to define this exception by stating that "[w]hen a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution." 20 Many years later, and after some equivocal jurisprudence 21 that highlighted the unsettled scope of the search incident to arrest exception, the Court attempted to limit and define the scope of the exception in Chimel v. California. 22 Applying the exception, the Court explained that "[the exception] is justified . . . by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime." 23 Further, the Court recognized that it is reasonable for an arresting officer to search for and seize any evidence on the arrestee's person and any area in which an arrestee might gain possession of a weapon or destroy evidence. 24 Thus, the Court was limiting the area that may be searched by an arresting officer to the area "within [the arrestee's] immediate control." 25

The Court expanded the exception in 1973 by holding that a search incident to a lawful arrest extends to a full search of a person, including, for instance, the inner contents of a closed cigarette package. 26 This full search can even include the passenger compartment of a vehicle in which the arrestee was riding. 27 However, once law enforcement

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20. Carroll v. United States, 267 U.S. 132, 158 (1925) (emphasis added because this phrase allows for a broad reading of the search incident to arrest exception since many different items may be probative to prove an offense).


23. Id. at 764.

24. Id. at 763.

25. Id.

26. United States v. Robinson, 414 U.S. 218, 235–36 (1973) (permitting the search of defendant's person and inspection of the inside of a crumpled cigarette package found in defendant's coat pocket, which resulted in the seizure of heroin capsules found within).

27. New York v. Belton, 453 U.S. 454, 460–61 (1981) ("[P]olice may . . . examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach . . . [and] the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have.").
officials have exclusive control over personal property and there is no longer any danger that the arrestee might access the property to seize a weapon or destroy evidence, a search of that property no longer falls under the search incident to arrest exception.  

B. Broad Interpretation of the Search Incident to Arrest Exception

The Supreme Court has generally given broad meaning to the search incident to arrest exception since its creation in Weeks. For example, the Supreme Court upheld the search of a crumpled up cigarette package that contained capsules of heroin, as well as the search within a box of cigarettes found on an arrestee when searched incident to arrest. The Court has also held that it is a reasonable administrative procedure for police to examine all the items removed from an arrestee's person, including a shoulder bag. More recently, the Court has recognized these types of searches by explaining that "police often will be able to search containers without a warrant . . . as a search incident to a lawful arrest." The Court has defined "container" to mean "any object capable of holding another object . . . [including] luggage, boxes, bags, clothing, and the like" even if the container is neither capable of holding "a weapon nor evidence of the criminal conduct for which the suspect was arrested." Therefore, it seems that the Court has generally been validating the warrantless searches of "containers" incident to a lawful arrest, with a broad interpretation as to what such a container may be.

28. United States v. Chadwick, 433 U.S. 1, 15 (1977) (assuming that there was no reasonable belief by the officers that the property contain[ed] some "immediately dangerous instrumentality, such as explosives" because if there was a reasonable belief then the property could then be searched to disarm the danger), rev'd on other grounds by California v. Acevedo, 500 U.S. 565 (1991).


30. United States v. Robinson, 414 U.S. 218, 220 (1973) (holding that a full search of a person incident to arrest is a reasonable search under that amendment).

31. Gustafson v. Florida, 414 U.S. 260, 266 (1973) (holding that an officer having come across a box of cigarettes in the course of a lawful search was entitled to inspect it, and when his inspection revealed homemade cigarettes that he believed to contain an illegal substance, he was entitled to seize them as "fruits, instrumentalities, or contraband" probative of criminal conduct).

32. See Illinois v. Lafayette, 462 U.S. 640, 646–47 (1983) (explaining that "inspection of an arrestee's personal property may assist the police in ascertaining or verifying [the identity of the arrestee]").


Federal circuit courts have also been broadly interpreting the search incident to arrest exception, and even more so in the last several decades. The Fourth Circuit held that the warrantless search of an arrestee and her purse, which was on the front passenger seat of her vehicle, was appropriate and constitutional incident to her arrest.\textsuperscript{35} The Sixth Circuit stated that "the search-incident-to-arrest authority permits an officer to search a glove box, whether open or closed, locked or unlocked."\textsuperscript{36} The Seventh Circuit justified a warrantless search of an address book found inside an arrestee's wallet "as an attempt to preserve evidence."\textsuperscript{37} The Ninth Circuit upheld the warrantless search of a gym bag within an arrestee's "immediate control" as a "closed container that [falls] within the scope of items subject to a search incident to a lawful arrest."\textsuperscript{38}

\section*{C. Search Incident to Arrest Exception Collides with the Cell Phone's Closest Predecessor - the Pager}

The majority of case law relevant to warrantless searches of information stored on electronic devices concerns pagers, not cell phones.\textsuperscript{39} When the search incident to arrest exception was originally conceived nearly a century ago, the Supreme Court could have only considered tangible evidence since digital electronic devices had not yet been developed. With the advent of pagers, courts have been forced to analogize them to tangible "containers" that have been previously considered under the search incident to arrest exception.

The Supreme Court has not specifically addressed the warrantless search of a pager incident to arrest, but lower courts have uniformly concurred in the broad interpretation of a pager as a type of "container" and have upheld the search of a pager's contents incident to arrest. For example, in \textit{United States v. Chan}, the court stated that the expectation of privacy in a pager is analogous to that of other closed containers found on or near the arrestee, and admitted evidence of phone numbers...
obtained from the activation of a pager's memory.\textsuperscript{40} Another court explained that a pager within a vehicle can be considered a “closed container” within the vehicle.\textsuperscript{41} The court in \textit{United States v. Reyes} upheld the search of a pager and noted that “[w]hen searching a container that is seized incident to arrest, ‘the general requirement for a warrant prior to the search of a container does not apply.’”\textsuperscript{42} In that case, ATF agents recovered a pager from inside a bag attached to defendant’s wheelchair, and, incident to defendant’s arrest, the agents accessed the pager’s memory and retrieved numbers from within the pager.\textsuperscript{43} Numerous other courts have also upheld the searches of pagers incident to arrest based upon similar “container” analogies as those used by the courts in \textit{Chan}, \textit{Galante}, and \textit{Reyes}.\textsuperscript{44}

The need to preserve evidence, suggested by the Supreme Court in \textit{Chimel} as a key rationale supporting the search incident to arrest exception,\textsuperscript{45} has also shaped how courts have dealt with warrantless searches of pagers. As the Seventh Circuit in \textit{United States v. Ortiz} explained, “[a]n officer’s need to preserve evidence is an important law enforcement component of the rationale for permitting a search of a suspect incident to a valid arrest.”\textsuperscript{46} Further, “[b]ecause of the finite nature of a pager’s electronic memory, incoming pages may destroy

\textsuperscript{40} United States v. Chan, 830 F. Supp. 531, 533–36 (N.D. Cal. 1993) (seizing an electronic pager from the defendant’s possession, a DEA agent searched the contents of the pager incident to arrest, activated its memory, and retrieved certain telephone numbers that were stored within).


\textsuperscript{43} \textit{Id.} at 822, 833 (noting that the search of the pager’s memory was not at all remote in time or place of defendant’s arrest and was valid as a search incident to arrest because it occurred within twenty minutes).

\textsuperscript{44} \textit{See, e.g., United States v. Lynch, 908 F. Supp. 284, 288 (D.V.I. 1995) (stating that “[j]ust as police can lawfully search the contents of an arrestee’s wallet or address book incident to an arrest . . . the [agents] could lawfully search the contents of [defendant’s] pager incident to his arrest”); United States v. Diaz-Lizaraza, 981 F.2d 1216, 1223 (11th Cir. 1993) (holding that customs agents acted reasonably when they inserted batteries into and reactivated a pager that defendant had been wearing and dialed the number that had been recently used to contact the defendant to set up a cocaine distribution to determine if it was in fact the pager of the defendant); United States v. Thomas, 114 F.3d 403, 404 (3d Cir. 1997) (noting in dicta that the retrieval of a phone number from a pager found on defendant falls within a lawful search incident to arrest).

\textsuperscript{45} \textit{Chimel v. California, 395 U.S. 752, 764 (1969).}

\textsuperscript{46} United States v. Ortiz, 84 F.3d 977, 984 (7th Cir. 1996).
currently stored telephone numbers in a pager's memory. Thus, the court validated the search of a pager's data incident to a lawful arrest under the preservation of evidence rationale. The Fourth Circuit, using the same analysis and quoting Ortiz, also concluded that it is an officer's need to preserve evidence that permits the officer to search or retrieve information from a pager. Further, in United States v. Stroud, the Ninth Circuit permitted the search of the contents of a pager, reasoning that, since "the pager was seized incident to a lawful arrest and searched to obtain evidence that might otherwise have been destroyed . . . [t]his . . . destroyed [the defendant's] reasonable expectation of privacy in the contents of his pager." While courts seem to be validating as constitutional the searches of pagers incident to arrest, they must be careful when analogizing these devices to modern cell phones because of the vast technological differences between the two.

II. CELL PHONES CREATE A DIFFICULT PROBLEM FOR AN EXISTING EXCEPTION

Cell phones pose a difficult dilemma that could not have been taken into account when the search incident to arrest exception was created nearly a century ago in Weeks. This follows from the unique multifunctional nature of cell phones that at least one court has noted results in the extremely difficult task of classifying the level of privacy the user should expect. To date, the Supreme Court has not specifically addressed the constitutionality of searching the content

47. Id. (7th Cir. 1996) (explaining that a pager's content can be destroyed merely by turning it off or touching a button, and "[t]hus, it is imperative that law enforcement officers have the authority to immediately 'search' or retrieve, incident to a valid arrest, information from a pager in order to prevent its destruction as evidence").

48. Id.


51. See infra Part II.B.

52. See, e.g., United States v. Park, 2007 WL 1521573, at *9 (N.D. Cal. May 23, 2007) (recognizing that the search of the contents of a pager in such cases as Ortiz and Chan implicates significantly fewer privacy interests than that of a modern cell phone because of the technological differences between the two).

53. State v. Smith, 920 N.E.2d 949, 955 (Ohio 2009) ("On one hand, [cell phones] contain digital address books very much akin to traditional address books carried on the person, which are entitled to a lower expectation of privacy in a search incident to an arrest. On the other hand, they have the ability to transmit large amounts of data in various forms, likening them to laptop computers, which are entitled to a higher expectation of privacy.").
stored within a cell phone incident to a lawful arrest, or the level of privacy a cell phone user should be afforded. Perhaps this is because the computer-like multifunctional capabilities of cell phones have not evolved until recently. Until the Supreme Court rules on this issue, courts will have unlimited judicial discretion to favor or disfavor the warrantless searches of cell phones, which will allow the emerging ambiguities and inconsistencies in case law to persist.

In the last few years, several federal and state courts have attempted to address this unsettled issue of the warrantless searches of the content stored within cell phones incident to arrest. Some courts have found an increased privacy interest similar to that of a computer and have suppressed any evidence contained therein, while others have attempted to justify decisions admitting this evidence with precedent that permits police to search "analogous closed containers" such as pagers, purses, wallets, glasses cases, shoulder bags, address books, briefcases, cigarette packages, etc. . . .

A. Courts Finding Greater Expectation of Privacy in the Content Stored Within Cell Phones

As one court has commented:

[Modern 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.]

These advanced capabilities of modern cell phones have caused the line to grow "increasingly blurry" between these handheld devices and personal computers because of the amount of private information they may contain that never could have been found in an arrestee's purse, wallet, cigarette box, or even pager. This has caused the Fifth Circuit to recognize that a cell phone is "similar to a personal computer that is carried on one's person." As one prominent legal scholar has noted,

54. See infra Part II.A.
55. See infra Part II.B.
57. Id. at *8.
58. United States v. Zavala, 541 F.3d 562, 577 (5th Cir. 2008) (analogizing a cell phone to a personal computer because of the "wealth of private information, including
"computers make tempting targets in searches for incriminating information" because of the greater quantity and variety of information they can electronically store. This in turn "increases the likelihood that highly personal information, irrelevant to the subject of the lawful investigation, will also be searched or seized." Citing this legal scholar, the Tenth Circuit suppressed evidence seized from the contents of a computer because the police had searched through personal files not identified in the warrant. Modern cell phones also have the capability of containing highly personal content not a part of a lawful investigation, such as those potentially contained in calendars, text messages, address books, photos, videos, voicemail, email, and the like. Therefore, the "increasingly blurring" line between modern cell phones and personal computers has led some courts to conclude that searches of the content stored within cell phones are substantially more intrusive and implicate greater privacy interests than those of traditional closed containers.

For example, in one case, deputies acting without consent or a search warrant inquired into the names and numbers on a defendant's cell phone after it rang and an unidentified caller asked to purchase twenty dollars worth of marijuana. The court analogized this search of the content within the cell phone to that of a computer and held that a valid warrant was required to search the phone because "[i]t is clear that the modern cell phone contains personal data in the same fashion as a computer; therefore, a cell phone owner's expectation of privacy does not differ from the expectation of privacy in the data stored in a computer." Therefore, the search was unlawful absent a warrant and the evidence seized from the cell phone was suppressed.

In another case, police officers searched and recorded certain contents of the defendants' cell phones incident to the defendants' arrests and as part of the booking process. The court found that the government did not meet its burden, failing to establish that either the search incident to arrest or the booking search applied as an exception

60. Id.
61. United States v. Carey, 172 F.3d 1268, 1276 (10th Cir. 1999).
63. Id. at *4.
64. Id. at *4, *7.
to the warrant requirement in regard to the cell phones, and suppressed the information retrieved.\textsuperscript{66} In reaching its conclusion, the court distinguished the searches of the cell phones from those of pagers in such cases as \textit{Chan} and \textit{Ortiz} because the searches of pagers “implicated significantly fewer privacy interests given the technological differences between pagers and modern cellular phones.”\textsuperscript{67}

Even the “more basic models of modern cell phones” have the technological capabilities of storing and transmitting exponentially greater amounts of private information than that of a pager or any traditional closed container.\textsuperscript{68} This reasoning was applied very recently by a court which held that “because an individual has a privacy interest in the contents of a cell phone that goes beyond the privacy interest in an address book or pager, an officer may not conduct a search of a cell phone’s contents incident to a lawful arrest without first obtaining a warrant.”\textsuperscript{69} “[Cell phones’] 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.”\textsuperscript{70}

While some courts have been suppressing evidence seized from cell phones incident to arrest by finding a higher expectation of privacy in the content stored within by analogizing them to computers, other courts have not been persuaded by this line of reasoning. These courts are finding cell phones analogous to traditional “closed containers” and are upholding searches of their content incident to arrest.

\textbf{B. Courts Finding Cell Phones Analogous to Supreme Court’s Broad Interpretation of “Containers”}

Without specific guidance from the Supreme Court in regard to the searches of cell phones incident to arrest, some courts have been applying the broad interpretation of containers that the Supreme Court has permitted to be searched without a warrant in cases like \textit{Robinson}, \textit{Gustafson}, \textit{Lafayette}, and \textit{Belton}.\textsuperscript{71} Some courts have also analogized cell phones to pagers, which have been widely interpreted, by lower courts, to be within the Supreme Court’s definition of closed containers.\textsuperscript{72}

\begin{itemize}
  \item \textsuperscript{66} \textit{Id.} at *12.
  \item \textsuperscript{67} \textit{Id.} at *9.
  \item \textsuperscript{68} \textit{State v. Smith}, 920 N.E.2d 949, 954 (Ohio 2009).
  \item \textsuperscript{69} \textit{Id.} at 955.
  \item \textsuperscript{70} \textit{Id.}
  \item \textsuperscript{71} \textit{See supra} Part I.B.
  \item \textsuperscript{72} \textit{See supra} Part I.C.
\end{itemize}
Finally, the twin aims of the search incident to arrest exception set out by the Supreme Court in *Chimel*, to provide for the safety of law enforcement and prevent the destruction or concealment of evidence, have also been used as justification for applying the exception to the searches of cell phones. As one federal court recently commented, using all three of these justifications to uphold the search of a cell phone incident to arrest:

A cell phone, like a beeper, is an electronic “container,” in that it stores information that may have great evidentiary value (and that might easily be destroyed or corrupted). While such electronic storage devices are of more recent vintage than papers, diaries, or traditional photographs, the basic principle still applies: incident to a person's arrest, a mobile phone or beeper may be briefly inspected to see if it contains evidence relevant to the charge for which the defendant has been arrested.

One of the first and most frequently cited cases permitting the warrantless search of a cell phone incident to arrest is *United States v. Finley*, a 2007 decision by the Fifth Circuit. In this case the defendant was arrested for aiding and abetting possession with intent to distribute methamphetamine. Upon arrest the officers found a cell phone in the defendant's pocket and then searched through the call records and text messages. Several of the text messages appeared to be related to narcotics, and the defendant affirmed this upon questioning. The court denied the defendant's motion to suppress the contents of the text messages citing *Chan* and *Ortiz*, which upheld the searches of pagers incident to arrest by analogizing them to closed containers. The court further relied upon the Supreme Court's holdings in *Belton* and *Robinson* that allowed police to search “closed containers” incident to arrest, including a closed cigarette package located on the arrestee. Finally, the court explained that police may “look for evidence of the arrestee's crime on his person in order to preserve it for use at trial.”

76. *Id.* at 253.
77. *Id.* at 254.
78. *Id.*
79. *Id.* at 260.
80. *See supra* Part I.C.
81. *Finley*, 477 F.3d at 260.
82. *Id.* at 259–60.
Since the Finley case was decided many courts seem to be on a slippery slope of allowing searches of the contents stored within cell phones through analogies to closed containers and pagers, the need to preserve evidence, and by citing Finley itself. For example, the Fourth Circuit recently upheld the retrieval of text messages from a cell phone incident to arrest, based upon its previous reasoning in Hunter (allowing the search of a pager), because of the "manifest need of the officers to preserve evidence," and because of the Fifth Circuit's conclusion in Finley. The Tenth Circuit has also recently cited Finley to support its conclusion that the "permissible scope of a search incident to arrest includes the contents of a cell phone found on the arrestee's person." This court also noted that pagers and other containers that are within the arrestee's control have been held to be searchable within the exception and, therefore, found no difference in applying the exception to cell phones.

Almost every court that has permitted the searches of the contents within cell phones incident to arrest has cited Finley and its analysis for justification. While the Fifth Circuit's reasoning in Finley attempts to reconcile the Fourth Amendment with twenty-first-century realities, it nevertheless draws analogies based on twentieth-century precedent that gave a broad interpretation to tangible closed containers, and permitted their searches incident to a lawful arrest. While Finley's argument that a cell phone should not be treated any differently than a pager or

83. United States v. Young, 278 F. App'x 242, 245-46 (4th Cir. 2008).
84. Silvan W. v. Briggs, 309 F. App'x 216, 225 (10th Cir. 2009).
85. Id.
86. See, e.g., United States v. Murphy, 552 F.3d 405, 411 (4th Cir. 2009) ("[T]he Fifth Circuit and Seventh Circuit have held that the need for the preservation of evidence justifies the retrieval of call records and text messages from a cell phone or pager without a warrant during a search incident to arrest." (citing Finley, 477 F.3d at 260)); United States v. Santillan, 571 F. Supp. 2d 1093, 1102 (D. Ariz. 2008) ("There is authority for the proposition that warrantless searches of cell phones incident to a lawful arrest may be proper." (citing Finley, 477 F.3d at 258-60)); United States v. Mercado-Nava, 486 F. Supp. 2d 1271, 1277 (D. Kan. 2007) ("Traditional search warrant exceptions apply to the search of cell phones." (citing Finley, 477 F.3d at 260)); United States v. Deans, 549 F. Supp. 2d 1085, 1094 (D. Minn. 2008) ("The Fifth Circuit has held that the arresting officers may search the arrestee's 'cell phone pursuant to his arrest.'" (quoting Finley, 477 F.3d at 260)); United States v. Valdez, 2008 WL 360548, at *2 (E.D. Wis. Feb. 8, 2008) ("Relying on the logic of [the pager cases], numerous other courts have upheld the search of cell phones for similar information." (citing Finley, 477 F.3d at 259-60)); see also United States v. Wurie, 612 F. Supp. 2d 104, 109 (D. Mass. 2009); Newhard v. Borders, 649 F. Supp. 2d 440, 448 (W.D. Va. 2009); United States v. Curry, 2008 WL 219966, at *10 (D. Me. Jan. 23, 2008).
traditional closed container in light of the need to preserve evidence and protect officers does seem valid, there is equally reasonable justification to treat a modern cell phone more like a computer because of the multifunctional computer-like capabilities that would afford the user a heightened level of privacy interest.

Because of the unique characteristics and capabilities of these handheld devices, the inconsistency among courts attempting to interpret Supreme Court case law, in either permitting or forbidding the warrantless searches of cell phones incident to arrest, has become more apparent. Without any specific guidance from the Supreme Court, lower courts will continue to have un-tethered discretion to try and stabilize this confused area of law, and as an inevitable result, the muddled jurisprudence will persist. Therefore, it is a necessity that the Supreme Court update the search incident to arrest exception to put an end to this developing inconsistency.

III. **UPDATING THE SEARCH INCIDENT TO ARREST DOCTRINE AND ALTERNATIVES FOR THE SUPREME COURT TO CONSIDER**

Justice Breyer has recognized that “efforts to revise privacy law to take account of the new technology will involve, in different areas of human activity, the balancing of values in light of predictions about the technological future.” 87 It is reasonable to predict that cell phones will only become more and more advanced in the near future, and develop the capabilities to store much more personal data. It is also reasonable to assume that a user’s privacy interest regarding the content contained within a cell phone is higher than that contained within a traditional closed container, such as a cigarette package. On the other hand, law enforcement officials need to have a bright-line rule that is relatively easy to apply during the split-second judgments that their profession requires in order to ensure their safety and preserve evidence.

The search incident to arrest exception has worked reasonably well since its creation because it is relatively easy for law enforcement officials to understand and apply to searches of traditional closed containers, which have been found to be within its permissible scope. 88 However, the issue that must be addressed is whether modern cell phones fall into the Supreme Court’s broad interpretation of closed containers or if a search of a modern cell phone’s content is

88. See supra Part I.B.
unreasonable and outside the scope of a search incident to arrest in light of the highly private content it might contain. There are many different alternatives for the Supreme Court to consider on this issue, some more persuasive than others. The Court might not find any of these options to be persuasive. However, that is irrelevant; all that is essential is that the Court grant certiorari to rule on this issue in order to put an end to a growing ambiguity in case law.

A. An Option for the Court to Consider – Obtain a Warrant

Since a modern cell phone potentially has the capability to store much more personal content than ever could have been confiscated from a wallet, briefcase, purse, cigarette package, or pager, officers should first obtain a warrant from a neutral and detached magistrate before exercising individual discretion and exploring the content themselves. In light of the twin aims of the search incident to arrest exception, an officer should be allowed to seize a cell phone from the immediate vicinity of an arrestee to prevent the arrestee from destroying evidence contemporaneous to the crime, or from using the phone to orchestrate an escape. The officer should then show the required probable cause to a neutral magistrate in order to obtain a warrant to search the content contained within the cell phone. This requires the officer to show that there is a “fair probability” under a “totality of the circumstances” that the proposed search is justified.

This process will obviously require extra effort by the arresting officer, and might even seem quite cumbersome to effectuate effective law enforcement. While society has a great interest in effective law enforcement, it has an equally great interest in safeguarding the Fourth Amendment’s protection against unreasonable searches and seizures. While the reasonable reflections and concerns of society can not easily be defined, it is not potentially unreasonable to assert that one has a higher level of privacy interest in the personal content contained within a modern cell phone than in that of a traditional closed container, such as a cigarette package. Therefore, incident to a lawful arrest, a law enforcement officer may seize a cell phone on or near an arrestee to preserve evidence and prevent an escape. Requiring that officer to then

89. See infra Part III.A–D.

90. Maryland v. Pringle, 540 U.S. 366, 371 (2003) (explaining that the probable cause standard to obtain a search warrant “is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances”).
take the extra step of obtaining a warrant in order to search through the content itself, in order to protect Fourth Amendment interests, seems like a viable solution.

B. A Second Option – Follow Finley’s Line of Reasoning to Allow Cell Phone Searches Incident to a Lawful Arrest

The Fifth Circuit in Finley\(^91\) did not just set out a legal conclusion without consideration of Supreme Court precedent, or without mindful analysis of how courts had been handling more recent technologies, such as pagers. Rather, the court in Finley undertook careful legal analysis to justify its upholding of a cell phone search incident to a lawful arrest.\(^92\)

This 2007 decision seems to have a growing following and almost every court that has since supported a warrantless cell phone search incident to arrest has cited to Finley.\(^93\) Following Finley’s analysis, these courts have also broadly interpreted Supreme Court case law (which allows for searches incident to a lawful arrest of such closed containers as purses, wallets, address books, cigarette packages, etc.) that has allowed them to fit a modern cell phone into the Court’s definition of a closed container.\(^94\) Similar to Finley, they have also found support in cases that have uniformly upheld the searches of pagers incident to arrest, and through the Chimel twin rationales of officer safety and evidence preservation.\(^95\)

The fact that Finley is cited by nearly every court upholding the search of a cell phone incident to arrest is unsettling. This is because some of these courts do not really partake in their own careful analysis, but rather just rely on Finley’s analysis.\(^96\) It raises the question that if Finley had never been decided or had undertaken a different approach,

\(^91\) United States v. Finley, 477 F.3d 250 (5th Cir. 2007), cert. denied, 549 U.S 1353 (2007).
\(^92\) See supra Part II.B.
\(^93\) Id.
\(^94\) Id.
\(^95\) Id.
\(^96\) See, e.g., United States v. Curry, 2008 WL 219966, at *10 (D. Me. Jan. 23, 2008) (upholding the search of a cell phone incident to arrest and analogizing that search to the search in Finley by stating that “[t]he instant search is not materially distinguishable from that at issue in Finley . . . [because] [h]ere, as in Finley, the phones were seized in the field at the time of arrest (at the traffic stop in Finley; at the Wal-Mart in this case). Here, as in Finley, officers transported the defendant to another location where the phone-content search was undertaken”).
would there be such support for allowing the warrantless search of a cell phone incident to a lawful arrest? While this question is impossible to answer, the only viable way for a court to find permissible the search of a cell phone incident to a lawful arrest is to follow a similar, if not identical, approach as to that taken by the Finley court.

In conclusion, the court in Finley undertook careful legal analysis of Supreme Court precedent and considered how other courts had been handling other more recent technologies, such as pagers. Therefore, it would not be surprising if the Supreme Court were swayed by the relatively persuasive reasoning in Finley, which seems to have explicit support from nearly every court upholding the search of a cell phone incident to arrest.

C. A Third Option – Adopt Scalia’s Bright-Line Rule as a Single Governing Rule

Justice Scalia has expressed his frustration with the current state of Fourth Amendment jurisprudence. In order to rid the Fourth Amendment of “anomalies” and inconsistencies, Justice Scalia has repeatedly advocated a single, bright-line approach in both his 2004 concurrence in Thornton v. United States, and in his 2009 concurrence in Arizona v. Gant. Justice Scalia’s revision and “single rule” approach to the search incident to arrest exception would be that “a vehicle search incident to arrest is ipso facto ‘reasonable’ only when the object of the search is evidence of the crime for which the arrest was made, or of another crime that the officer has probable cause to believe occurred.”

This single rule could be modified to encompass all searches incident to arrest and could therefore be applicable to the content found within a cell phone on an arrestee or within an arrestee’s vehicle. Thus, if a person is stopped and subsequently arrested for possession of drugs,
an officer would have a reasonable belief that evidence related to the
drug offense could be found within the content of the arrestee’s cell
phone. Therefore, the content of that phone could then be lawfully
searched. However, if a person is stopped and arrested for driving with a
suspended license and the officer finds a cell phone on the arrestee or
within the vehicle, unless the officer has probable cause to believe the
phone contains evidence of another crime that has occurred, it would
not be reasonable to search through the content on that phone absent a
warrant. This example follows from Justice Scalia’s comment that “[a] 
motorist may be arrested for a wide variety of offenses; in many cases,
there is no reasonable basis to believe relevant evidence might be found
in the car.”

The majority in Gant actually adopted Justice Scalia’s rule, but only
as an addition to the search incident to arrest exception and not as the
bright-line, single rule that Justice Scalia had opted for. The majority in
Gant also seemed to be concerned with a timing issue regarding a search
incident to arrest, and ultimately held that the “[p]olice may search a
vehicle incident to a recent occupant’s arrest only if the arrestee is within
reaching distance of the passenger compartment at the time of the search
or it is reasonable to believe the vehicle contains evidence of the offense
of arrest.” Therefore, the majority has set out two separate rules, the
former narrowing the search incident to arrest exception to apply only
when an arrestee is unsecure and has access to his vehicle, and the latter
adopting Justice Scalia’s bright-line rule. Thus, while the majority
adopted Justice Scalia’s single rule, in the process it has muddied up the
search incident to arrest exception even further by narrowing its scope
based on a timing issue, which Justice Scalia specifically sought to avoid
with his bright-line rule.

Justice Scalia’s bright-line rule has, therefore, backfired in a sense,
in that it was adopted by the majority in Gant, but as an addition to the
current search incident to arrest exception, not creating the “degree of
certainty” that he so desired. This lack of certainty led the dissent to
discuss its discontent that the majority has left “the law relating to
searches incident to arrest in a confused and unstable state.”

Therefore, in order to try and remedy the even more confusing state
of the search incident to arrest exception, the third option for the Court
to consider is to adopt Justice Scalia’s rule as a single, bright-line rule in

103. Thornton, 541 U.S. at 632 (Scalia, J., concurring).
104. Gant, 129 S. Ct. at 1723 (emphasis added).
105. Id. at 1725 (Scalia, J., concurring).
106. Id. at 1731 (Alito, J., dissenting).
regard to all searches incident to arrest, not just vehicle searches. This rule would set forth that a "search incident to arrest is *ipso facto* 'reasonable' only when the object of the search is evidence of the crime for which the arrest was made, or of another crime that the officer has probable cause to believe occurred." This single rule would have the potential to permit the search of the content stored within a cell phone, but only if the cell phone might contain evidence of the crime for which the arrest was made.

While this bright-line "evidence-gathering" rule would be easy for law enforcement officers to understand and apply, it is very unlikely to ever be adopted by itself. First, the majority in *Gant* adopted it as an addition to its holding and not as a single, governing rule. Second, the dissent in *Gant* made note that it "raises doctrinal and practical problems that the Court [made] no effort to address." This is because Justice Scalia's rule sets the standard for this type of evidence-gathering search to be "reason to believe" rather than probable cause. Probable cause has always been the standard for obtaining a warrant and for warrantless searches incident to arrest. It would be unsettling to allow officers to search based only on a reasonable suspicion because this standard is "not based on officer safety or the preservation of evidence, [therefore] the ground for this limitation is obscure." While "reason to believe" is readily applicable by law enforcement officials, it can also be easily manipulated, and is not the well-grounded standard set by the Fourth Amendment. The standard under the Fourth Amendment has always been probable cause, and a "reason to believe" standard would constitute a major divergence. In conclusion, Scalia's single, bright-line rule could be considered as the sole overarching rule governing all searches incident to arrest, but this is relatively unlikely.

D. A Fourth Option – Categorize the Content Within a Cell Phone and Permit Searches of Only Coding Based Information

Very recently, a legal commentator advocated a modern revision to the search incident to arrest exception by categorizing the data stored within a cell phone into one of two categories: coding information and

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107. *Id.* at 1725 (Scalia, J., concurring); *Thornton*, 541 U.S. at 632 (Scalia, J., concurring).
109. *Id.*
content-based information, and only permitting officers to search the coding information incident to a lawful arrest. Coding information is data "that merely identifies the parties to a communication... [which] is similar to the return or receiving addresses printed on an envelope... without disclosing the subject matter of that communication." In regard to a cell phone, this information would include "phone numbers, email addresses, pager numbers, and any label that uniquely identifies... a location." Content-based information is data that "consists of the subject matter of a communication as well as privately stored data reserved for one's personal use." This information would include text messages, voicemails, photographs, emails, videos, personal memos, and any other data of a "highly private" nature.

This coding/content-based distinction is appealing on its face because it sets out a bright-line rule that is easy for officers to apply in the field. This rule also balances competing interests because it allows police officers to view desired content-based information, such as numbers dialed, while safeguarding a citizen's more personal information by prohibiting officers from freely delving into the content-based information, such as photographs, in which there is a higher expectation of privacy. At least one court has permitted the search of a cell phone incident to arrest based partly upon this distinction. The Valdez court explained that the cell phone search incident to arrest was permissible because "[the officer] limited his search to the phone's address book and call history. He did not listen to voice mails or read any text messages." Further, the Supreme Court has explained that "we doubt that people entertain any actual expectation of privacy in the numbers they dial" since these numbers are contained within permanent records kept by the phone company. However, this bright-line rule is flawed for several reasons.

113. Id. at 210.
114. Id. at 187–88.
115. Id. at 187.
116. Id. at 193.
117. Id. at 188, 193, 210.
118. Id. at 210.
120. Id. at *3.
First, in order to view the coding information contained within a cell phone, an officer must access the phone and manipulate it to get to the desired locations. There are many different types of cell phones, each containing its own unique pathways to this type of information, and even officers acting in good-faith will almost inevitably come into contact with content-based information when searching solely for coding information.

Second, coding-based information is often intertwined with content-based information and it is reasonable to assume that this will only become more apparent as the computer-like capabilities of modern cell phones continue to evolve. For example, many cell phones have the ability to store pictures and emails under phone numbers, which may be accessed contemporaneously with the numbers. This causes the bright-line to be diminished because the coding/content-based distinction disappears once an officer has involuntary access to both coding and content-based information at the same time. This would also potentially preclude the officer from accessing any coding information at all.

Third, creating this type of bright-line rule will necessitate a case-by-case analysis that will require every single action of an arresting officer to be highly scrutinized by a court in deciding if the officer impermissibly intruded into the content-based information, irrespective of whether it was intentional or inadvertent. This might act as a deterrent that could impede effective law enforcement. It will also result in a large volume of new litigation that will flood the courts and cause judges to make fact-specific decisions that might likely be overturned. Therefore, while the coding/content-based distinction is a creative bright-line rule that is easy to understand, it contains some serious flaws that would impede its effectiveness, if and where it is implemented.

IV. CONCLUSION

The search incident to arrest exception has worked reasonably well since its inception nearly a century ago. Perhaps that is why there have been no significant changes to it. Its twin purposes of protecting the safety of law enforcement officials and preserving evidence have served a vital role in the fight against crime. However, without guidance from the high Court, some courts have been able to use their discretionary power to apply analogies and borrow reasoning from previous cases to try and fit modern cell phones into this exception. These courts have analogized cell phones to the Supreme Court's broad definition of "closed containers," and to pagers, upholding searches of their contents incident to arrest. Other courts have rejected this line of reasoning and
recognized an increased privacy interest of the user of a cell phone because of the immense amount of personal data that it may contain, and the similarities of modern cell phones to computers. Therefore, conflicting court decisions have emerged and have become the only guidance available on this issue. This ambiguous treatment will continue, along with inconsistent jurisprudence that will spiral out of control if the Supreme Court does not bring the search incident to arrest exception into the twenty-first century. Thus, it is an absolute necessity that the Supreme Court rule on the constitutionality of the warrantless search of the content stored within a cell phone incident to a lawful arrest because, until then, case law will become more and more muddled.

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