ARTICLES

SEARCHING CELL PHONES AFTER ARREST: EXCEPTIONS TO THE WARRANT AND PROBABLE CAUSE REQUIREMENTS

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I. INTRODUCTION

Police officers lawfully arrest a suspect, search him,[1] and seize his cell phone.[2] Sometime later, without first getting a search warrant, an officer answers an incoming call, reads an incoming text, or examines the phone's memory, call log, prior text messages, photographs, or Internet access records. As a result, the police

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1. I use male pronouns here primarily to facilitate ease of expression: "Him," "he," or "his" are less cumbersome than "him or her," "he or she," or "his or her(s)." In further defense of this small measure of political incorrectness, I note that the vast majority of arrestees have always been male, and although in recent decades women have made impressive progress towards equality in this as in so many other walks of life, they still lag far behind men. Thus, in 1960, females constituted eleven percent of all arrests. *See* Darrell Steffensmeier & Emilie Allen, *Gender and Crime: Toward a Gendered Theory of Female Offending*, 22 ANN. REV. SOC. 459, 461 (1996). By 2011, females constituted twenty-six percent of all arrests. *See* FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2011, at Table 42 (2012), *available at* http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-42.

2. For purposes of these sections, the term "cell phone" is used generically to mean all cellular devices and personal digital assistants, including all Androids, Blackberrys, iPhones, and other smart phones.

acquire information that leads to additional evidence concerning the arrest crime,[3] or a totally different and unrelated crime. Prior to trial, the defendant moves to suppress the evidence. The prosecutor argues that the officer's action was justified by exigent circumstances,[4] constituted a lawful search incident to the arrest,[5] or both. Part I of this Article sets out the general rules governing searches and seizures by the police. Part II examines the exigent circumstances doctrine and its application to cell phone searches. It concludes that, properly construed, that doctrine can be applied to cell phone searches without excessive invasions of privacy. Part III examines the search incident to arrest doctrine, criticizes the courts that have taken either too permissive or too restrictive an approach to that doctrine's application to cell phone searches, and proposes an approach that strikes an appropriate balance between the purposes underlying the doctrine and respect for the quantity and kinds of information that the typical cell phone contains.[6]

II. THE FOURTH AMENDMENT

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[7]

A. "Searches" and "Seizures"

To determine the scope of Fourth Amendment protection, it is necessary to define its key terms: "search" and "seizure." Application of the term "seizure" to some forms of electronic surveillance raises

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3. The phrase "arrest crime" is used throughout this Article in lieu of the much wordier "crime for which the defendant was originally arrested."

4. *See infra* Part III.A (discussing this doctrine generally); *see also infra* Part III.B (discussing the judicial application of this doctrine to cell phone searches).

5. *See infra* Part IV.A (discussing this doctrine generally); *see also infra* Part IV.B (discussing the judicial application of this doctrine to cell phone searches).

6. This Article will not address certain related topics: For example, when may police answer a cell phone that rings on premises while they are searching that location pursuant to a search warrant? *See* 3 CLIFFORD S. FISHMAN & ANNE T. MCKENNA, WIRETAPPING AND EAVESDROPPING: SURVEILLANCE IN THE INTERNET AGE § 29:37 (3d ed. 2007). Second, issues often arise under the general heading of "standing": What, if anything, must a defendant do to establish his right to challenge whether the search of a cell phone was lawful? *See id.* at § 28:19. Third, when calls or text messages *to* a cell phone are offered against the phone's owner or possessor, questions often arise relating to hearsay and confrontation. *See* 4 CLIFFORD S. FISHMAN & ANNE T. MCKENNA, JONES ON EVIDENCE § 24:13 (7th ed. 2000 & Supp. 2012).

7. U.S. CONST. amend. IV.

difficult questions,[8] but for purposes of this Article, its application is fairly straightforward: A Fourth Amendment "seizure" occurs when a law enforcement official (or someone acting at the behest of a law enforcement official) acquires physical possession of a cell phone.[9]

As to what constitutes a "search," the Supreme Court has held on several occasions that the Fourth Amendment protects only "a 'reasonable,' or a 'legitimate expectation of privacy'";[10] thus, a Fourth Amendment "search" occurs only when the government intrudes on such an expectation.[11] This definition of search also often raises

8. For example, is a phone call "seized" if it is overheard by someone listening in on an extension phone or wiretap, or only when it is recorded? For a discussion of this issue, see 3 FISHMAN & MCKENNA, WIRETAPPING AND EAVESDROPPING, *supra* note 6, § 1:5. Federal and state statutes regulating electronic surveillance finesse the issue by regulating not the "seizure" of communications, but their "interception," which is defined broadly to include any real-time "acquisition of the contents of . . . wire . . . communication[s]" (i.e., telephone conversations), "electronic . . . communication[s]" (i.e., e-mails, Tweets, etc.), and "oral communication[s]" (i.e., face-to-face conversations), by means "of any electronic, mechanical, or other device." *See, e.g.*, 18 U.S.C. § 2510(4) (2006). For a detailed analysis of this definition and related terms, see 3 FISHMAN & MCKENNA, WIRETAPPING AND EAVESDROPPING, *supra* note 6, §§ 2:61-2:110.

9. *See, e.g.*, United States v. Gordon, 895 F. Supp. 2d 1011, 1024-25 (D. Haw. 2012) (holding that the search of defendant's cell phone seized shortly after his arrest was lawful, thus implicitly holding that its seizure was also lawful).

10. *See, e.g.*, Smith v. Maryland, 442 U.S. 735, 740 (1979). Police, believing Smith was making harassing phone calls, asked the phone company to use a pen register to keep a record of the numbers dialed from Smith's phone. *See id.* at 737. The company complied, confirming those suspicions. *See id.* The Court held that this did not intrude upon Smith's reasonable expectation of privacy and therefore was not a "search" regulated by the Fourth Amendment. *See id.* at 745-46. Use of pen registers and similar devices for law enforcement purposes is now regulated by statute. *See* 1 CLIFFORD S. FISHMAN & ANNE T. MCKENNA, WIRETAPPING AND EAVESDROPPING: SURVEILLANCE IN THE INTERNET AGE § 4 (3d ed. 2007); *see also* California v. Greenwood, 486 U.S. 35, 44-45 (1988) (holding defendant had no reasonable expectation of privacy in garbage set out on the curb for collection). Likewise, the Court has held that, because an "open field" does not come within the Fourth Amendment categories of "persons, houses, papers, and effects," it does not constitute a Fourth Amendment search for the police to trespass onto private property outside the curtilage of a home. *See* United States v. Dunn, 480 U.S. 294, 300, 305 (1987); Oliver v. United States, 466 U.S. 170, 176-77 (1984); Hester v. United States, 265 U.S. 57, 59 (1924).

11. Thus, for example, in *Smith*, the Court held that no search occurred, because the government acquired the information not from Smith or Smith's property, but from the telephone company to whom Smith had voluntarily conveyed "numerical information" (i.e., the numbers that he dialed from his phone). 442 U.S. at 743-44. Similarly, in *Greenwood*, the Court held that police examination of Greenwood's garbage was not a Fourth Amendment search because Greenwood had surrendered his expectation of privacy in the contents of his garbage by leaving it at the curb for collection, knowing it was "readily accessible to animals, children, scavengers, snoops, and other members of the public," and that the trash collector could have examined its contents or given others permission to do so. 486 U.S. at 40 (footnotes omitted).

difficulties,[12] particularly in the realm of electronic surveillance,[13] but rarely does so with regard to cell phones: Courts generally agree that any physical manipulation of someone's cell phone to obtain information about its contents constitutes a "search" of that phone.[14]

12. In 2001, the Court acknowledged that the reasonable expectation of privacy test "has often been criticized as circular, and hence subjective and unpredictable." Kyllo v. United States, 533 U.S. 27, 34 (2001). The Court, per Justice Scalia, held that in *Kyllo* that a person has a reasonable expectation of privacy against government use of surveillance equipment to learn any information about the inside of his home, at least if the equipment was not readily available to the general public, and that, therefore, the use of a thermal imaging device to measure the amount of heat emanating from Kyllo's home was a search which, in the absence of a search warrant, violated that expectation. *See id.* at 40. For a discussion of *Kyllo*, see 3 FISHMAN & MCKENNA, WIRETAPPING AND EAVESDROPPING, *supra* note 6, § 30:1. And in *United States v. Jones*, the Court, again per Justice Scalia, expressed reservations about the reasonable expectation of privacy test. 132 S. Ct. 945, 953-54 (2012). For a discussion of *Jones*, see 3 FISHMAN & MCKENNA, WIRETAPPING AND EAVESDROPPING, *supra* note 6, § 29:37.

13. *See* 1 FISHMAN & MCKENNA, WIRETAPPING AND EAVESDROPPING, *supra* note 10, §§ 1:3-1:6. I have now cited the Fishman-McKenna treatises a total of nine times in the first thirteen footnotes of this Article, a frequency that may set a record for self-adulation, even among law professors. I promise to exercise some modicum of self-restraint hereinafter.

14. Thus, courts generally agree that a search of a suspect's cell phone intrudes upon his "reasonable expectation of privacy," thereby entitling the suspect to challenge the legality of the search. *See, e.g.*, United States v. Ortiz, 84 F.3d 977, 984 (7th Cir. 1996) (holding the owner of a pager has the same reasonable expectation of privacy in its data as if it were a closed container); United States v. Wurie, 612 F. Supp. 2d 104, 109 (D. Mass. 2009) ("It seems indisputable that a person has a subjective expectation of privacy in the contents of his or her cell phone."). In *Wurie*, the suppression hearing judge, after finding that the defendant had standing, concluded that the search of the phone was lawful. *See* 612 F. Supp. 2d at 110. On appeal, however, the First Circuit held the search unlawful. United States v. Wurie, 728 F.3d 1, 13 (1st Cir. 2013). Other courts have commented similarly. *See, e.g.*, United States v. De La Paz, 43 F. Supp. 2d 370, 375 (S.D.N.Y. 1999) ("[A]nswering an arrestee's cellular telephone constitutes a search and . . . generally speaking, a warrant is required to conduct that search."); United States v. Gomez, 807 F. Supp. 2d 1134, 1140 (S.D. Fla. 2011) ("[A]n individual has a reasonable expectation of privacy in the call history of a cell phone."); United States v. Quintana, 594 F. Supp. 2d 1291, 1299 (M.D. Fla. 2009) ("An owner of a cell phone generally has a reasonable expectation of privacy in the electronic data stored on the phone."); Commonwealth v. Berry, 979 N.E.2d 218, 222-23 (Mass. 2012). In *Berry*, police arrested the suspected seller and buyer in a drug transaction, seizing cell phones from each. *Id.* at 220. At some point after arriving at the police station, an officer picked up one of the cell phones, pressed a button on it to reveal the list of recent calls, "then called the most recently dialed number that was displayed on the list, and the other cellular telephone began to ring." *Id.* At the suppression hearing, the officer "could not remember which telephone he had manipulated and searched, or how much time had passed between the seizures of the two cellular telephones and the search." *Id.* Thus, neither the state nor the defendants could establish whose phone was searched. *Id.* The court held that, under the circumstances, both defendants would have standing to challenge the search of the phone, but that the search was lawful. *Id.* at 221-23. It is worth noting that obtaining information from the suspect's cell phone service provider does not constitute an intrusion into the suspect's Fourth Amendment

B. The Probable Cause and Warrant Requirements and Their Exceptions

If a court concludes that government agents have conducted a Fourth Amendment search, the question then becomes whether the search was lawful. The Fourth Amendment does not prohibit all searches and seizures; it protects against only those that are unreasonable.[15]

Other than the general requirement that to be lawful a search must not be "unreasonable," the only explicit guidance the Amendment provides is that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[16] The Amendment does not define probable cause, nor does it explicitly state whether a search may be reasonable in the absence of probable cause, nor does it specify when a warrant is required. To fill this latter gap, courts have stated again and again that, as a general matter, warrantless searches "are per se unreasonable under the Fourth Amendment—subject . . . to a few specifically established and well-delineated exceptions" to that general rule.[17] The Supreme Court has said so in almost exactly the same words at least two dozen times,[18] and lower federal and state court repetitions of this phrase number in the thousands.[19] In fact, however, this oft-repeated expression is not accurate; it is, rather, only a "truthyism."[20] The

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rights; however, to obtain such information, the government must comply with Title II of the Electronic Communications Privacy Act (informally called the "Stored Communications Act"), codified at 18 U.S.C. §§ 2701-2712 (2006).

15. *See* U.S. CONST. amend. IV.

16. *Id.*

17. Katz v. United States, 389 U.S. 347, 357 (1967) (footnote omitted).

18. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971); California v. Acevedo, 500 U.S. 565, 580 (1991) (quoting Mincey v. Arizona, 437 U.S. 385, 390 (1978)); Arizona v. Gant, 556 U.S. 332, 338 (2009) (quoting *Katz*, 389 U.S. at 357). Anyone interested in a complete list need only do a Westlaw search. Supreme Court opinions citing the relevant language, WESTLAWNEXT, https://a.next.westlaw.com (click on Jurisdiction menu; then select "United States Supreme Court" from the "By Court" list; then search for the exact phrase "per se unreasonable under the Fourth Amendment"). A search including minor variations on this phrase may produce additional cases.

19. A similar Westlaw search across all jurisdictions conducted on August 23, 2013 produced 2,639 results. For opinions from all jurisdictions citing the relevant language, visit WESTLAWNEXT, https://a.next.westlaw.com (click on Jurisdiction menu; then select "All States" and "All Federal"; then search for the exact phrase "per se unreasonable under the Fourth Amendment").

20. This is a variation on "truthiness," a word introduced by comedian Steven Colbert. *The Colbert Report* (Comedy Central broadcast Oct. 17, 2005), *available at* http://www.colbertnation.com/the-colbert-report-videos/24039/october-17-2005/the-word---truthiness. It has been defined as "the quality of preferring concepts or facts one wishes to be true, rather than concepts or facts known to be true," *Word of the*

exceptions to the warrant requirement are many rather than few,[21] and some are not at all well-delineated,[22] as even a superficial perusal of the leading treatises on the Fourth Amendment will quickly reveal.[23] The vast majority of searches conducted by government agents are lawful despite the absence of a warrant;[24] a substantial number of these are lawful despite the lack of probable cause.[25] A more accurate statement would probably be that, as a general rule, warrants based on probable cause *are* required to

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Year 2006, MERRIAM-WEBSTER, http://www.merriam-webster.com/info/06words.htm (last visited Nov. 10, 2013), and as "the quality of seeming to be true according to one's intuition, opinion, or perception without regard to logic, factual evidence, or the like." *Truthiness*, DICTIONARY.COM, http://dictionary.reference.com/browse/Truthiness (last visited Nov. 10, 2013). Thus, a "truthyism" is an assertion that is an example of truthiness.

21. In addition to the investigative acquisition of evidence unprotected by the Fourth Amendment because the police did not intrude upon a reasonable expectation of privacy, consider the following exceptions to warrant requirement, the probable cause requirement, or both: search of the person incident to arrest; search of the area incident to arrest; stop-and-frisks; searches conducted during hot pursuit of a fleeing suspect; searches prompted by fear for the health or safety of one or more individuals; searches conducted to prevent the impending destruction of evidence; searches of vehicles; searches of containers in vehicles; consent searches; and an impressive variety of inspection, regulatory, and other "special needs" searches. *See infra* notes 22-23; *see generally* 16 WILLIAM A. KERR, IND. PRAC., CRIMINAL PROCEDURE—PRETRIAL § 2.2f (2013).

22. Consider, for example, the search of the area incident to arrest doctrine first announced in *Chimel v. California*, in which the Court held that at least in some circumstances, after the police have arrested someone within a premises, they may search the immediate area for weapons or destructible evidence. 395 U.S. 752, 773 (1969). Lower courts have debated ever since whether the right to conduct such a search continues after the arrestee has been secured and moved to a different location. *See, e.g.*, United States v. Julius, 577 F. Supp. 2d 588, 596 (D. Conn. 2008). The Supreme Court returned to that issue in *Arizona v. Gant*, a case involving the search of an automobile, in which the plurality and dissenting opinions each cited *Chimel* more than twenty times, without clarifying that fundamental *Chimel* question much, if at all. *See Gant*, 556 U.S. 332.

23. *See, e.g.*, THOMAS K. CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION ch. 6 (2008) (discussing arrests and seizures of persons, only a small fraction of which require a warrant); *id.* at ch. 8 (discussing searches incident to arrest, virtually none of which require a warrant); *id.* at ch. 9 (discussing protective weapons searches and sweeps, none of which require a warrant); *id.* at ch. 10, §§ 10.1, .4 (discussing automobile and consent searches, few if any of which require a warrant); WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT chs. 5-9 (4th ed. 2004) (discussing these same topics).

24. I do not intend to cite any particular source to defend this statement, which, after all, is merely background information that provides a context in the discussion that follows. Anyone who practices criminal law or teaches criminal procedure—I've done one or the other for more than forty-four years—knows it is true. I respectfully request you simply take my word for its accuracy. Consider, by analogy, a rule of evidence, which permits a court to take judicial notice of an adjudicative fact that "is generally known within the . . . court's territorial jurisdiction." FED. R. EVID. 201(b)(1).

25. *See supra* note 24.

authorize the police to make a non-consensual entry into a home, office, or other private premises; to conduct a search of such premises; to search someone's mail; to open packages and containers; and to intercept oral, wire, or electronic communications without the consent of a participant.[26]

Prosecutors and courts have cited a variety of exceptions to the warrant and probable cause requirements to justify searches of cell phones. The primary exceptions discussed in case law are the exigent circumstances exception[27] and the search of the person incident to arrest exception.[28] The rest of this Article is devoted to an examination of these theories and their application to cell phone searches. It is worth noting, however, that other exceptions may also occasionally apply. For example, if the information obtained from the phone is limited to what appears on the screen and the officers search no further into the phone's content, the information comes within the plain view doctrine.[29] Furthermore, if the person from whom the phone was taken consents to the search, no other justification for the search is required.[30]

III. THE EXIGENT CIRCUMSTANCES EXCEPTION

A. Constitutional Principles: Generally

Police may conduct a search without first obtaining a warrant "when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment."[31] Such exigencies can be divided into two general categories. First, law enforcement officials are entitled to ignore the warrant requirement to respond to situations that pose an immediate threat to life or safety. Thus, for example, police may enter premises and conduct a search without a warrant "to provide emergency assistance to an occupant,"[32] or to

26. *See supra* note 24; *see also* CLANCY, *supra* note 23, chs. 4, 12.

27. *See infra* Part III.

28. *See infra* Part IV.

29. A federal district judge has quite reasonably held that when (1) police have lawfully seized a cell phone incident to arrest, (2) the phone rings, and (3) the phone's screen reveals who the caller is, that information falls within the plain view doctrine and therefore does not constitute a search of the phone. United States v. Gomez, 807 F. Supp. 2d 1134, 1141 (S.D. Fla. 2011).

30. For a general discussion of consent searches, see CLANCY, *supra* note 23, at ch. 10, § 10.4; LAFAVE, *supra* note 23, ch. 8. *See also* Cases discussing consent searches of cell phones, WESTLAW, https://web2.westlaw.com (select "All State and Federal Cases" and search using the following query: 349k17! 349k18! /p cell! % 349k17 % 349k18 % cellophane).

31. Missouri v. McNeely, 133 S. Ct. 1552, 1558 (2013) (quoting Kentucky v. King, 131 S. Ct. 1849, 1856 (2011) (internal quotation marks and brackets omitted)).

32. *Id.* at 1558 (citing Michigan v. Fisher, 558 U.S. 45, 47-48 (2009) (per curiam));

"enter a burning building to put out a fire and investigate its cause."[33] In such cases, the law not only dismisses the warrant requirement—in appropriate circumstances, the police may act even in the absence of probable cause.[34]

Second, in some circumstances law enforcement officers may conduct a search without a warrant for investigative purposes: "to prevent the imminent destruction of evidence,"[35] or to "hotly pursue" a fleeing suspect.[36] For an exigency search conducted without a warrant to preserve evidence or to apprehend a fleeing suspect to be lawful, in addition to the exigency, the officer must have had

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see also Brigham City v. Stuart, 547 U.S. 398, 406 (2006).

33. *McNeely*, 133 S. Ct. at 1559 (citing Michigan v. Tyler, 436 U.S. 499, 509-10 (1978)).

34. Consider *Brigham City v. Stuart*, in which police, responding to a 3:00 a.m. noise complaint, went to a house and, through a window, saw a teenager punch an adult, who then spit blood into a sink. 547 U.S. at 400-01. Police entered and broke up the fight. *Id.* at 401. Once inside, they discovered evidence leading to the defendant's arrest for contributing to the delinquency of a minor and related offenses. *Id.* State courts suppressed the evidence, concluding that the entry was not justified because the punch victim's injury was not all that serious. *See id.* The Supreme Court disagreed:

> In these circumstances, the officers had an objectively reasonable basis for believing both that the injured adult might need help and that the violence in the kitchen was just beginning. Nothing in the Fourth Amendment required them to wait until another blow rendered someone "unconscious" or "semi-conscious" or worse before entering. The role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties; an officer is not like a boxing (or hockey) referee, poised to stop a bout only if it becomes too one-sided.

Id. at 406. The Court did not explicitly state that probable cause was unnecessary in this context, but it may be significant that the Court used the phrase "objectively reasonable belief" rather than probable cause as the necessary factual predicate for police action. *See id.* at 401; *see also Fisher*, 558 U.S. at 47 (holding that where police enter a building to protect someone's safety, the law "requires only 'an objectively reasonable basis for believing' that 'a person within [the house] is in need of immediate aid'") (internal citations omitted).

35. *McNeely*, 133 S. Ct. at 1559 (citing Cupp v. Murphy, 412 U.S. 291, 296 (1973)); *see also* Ker v. California, 374 U.S. 23, 40-41 (1963) (plurality opinion). In *McNeely*, the Court refused to hold that "the natural metabolization of alcohol in the bloodstream present[ed] a *per se* exigency that justifie[d] an exception to the Fourth Amendment's [search] warrant requirement for nonconsensual blood testing in drunk-driving cases." 133 S. Ct. at 1556. Instead, it insisted that the existence of an "exigency in [the DUI] context must be determined case by case based on the totality of the circumstances." *Id.* at 1568. In *Cupp*, the Court held that a limited warrantless search of a suspect's fingernails to preserve evidence that the suspect was trying to rub off was justified "[o]n the facts of this case." 412 U.S. at 292, 296. In *Ker*, a plurality of the Court held that it was lawful for police to enter an apartment without a warrant to seize marijuana given their reasonable concern that the suspects might have consumed the marijuana in the time it would have taken the officers to obtain a warrant. 374 U.S. at 42.

36. *McNeely*, 133 S. Ct. at 1558 (citing United States v. Santana, 427 U.S. 38, 42-43 (1976)).

probable cause for the intrusion.[37]

B. Applying the Exigent Circumstances Doctrine

1. Answering the Phone, Reading Incoming Text Messages, Returning or Initiating Calls or Messages

Police lawfully arrest a suspect and seize his phone. While they are transporting him to the station house or are processing the arrest, the phone rings (or "pings") to indicate it is receiving a text message. May an officer answer the phone or access the incoming text?

2. Where Probable Cause Exists that Defendant Used the Phone to Commit the Arrest Offense

If probable cause exists that the defendant used the cell phone to commit the arrest offense, it should be permissible for the police to answer the phone without first obtaining a warrant, at least during the immediate post-arrest period.[38] Given the myriad duties that arresting officers have,[39] the failure to get a search warrant before answering the phone is reasonable and justified by exigent circumstances: "[I]t would be impracticable to require agents to obtain a warrant to answer an arrestee's cellular telephone in anticipation of the possibility, however remote, that the telephone might ring."[40] As the district judge in *United States v. De La Paz* put

37. The Supreme Court has not said so explicitly, but its decisions clearly imply that this requirement exists. In *McNeely*, the Court observed in passing that "in contexts like drunk-driving investigations . . . the evidence offered to establish probable cause is simple." *Id.* at 1561-62. In *Cupp*, the Court explicitly stated that probable cause existed. 412 U.S. at 293. In *Ker*, the Court did likewise. 374 U.S. at 34-35. In *Santana*, the police saw Santana, whom they "concededly" had probable cause to arrest, just outside her doorway; upon seeing them, she dashed inside. 427 U.S. 38, 40, 42. The Court held that, under these circumstances, it was permissible for the police to pursue Santana inside without first obtaining an arrest warrant. *Id.* at 42-43.

38. Courts generally agree that when police are executing a search warrant in a home or office and a landline phone on that premises rings, the officers may answer the phone, even if the warrant does not explicitly authorize them to do so. The implicit assumption is that probable cause to believe those premises contain contraband also establishes probable cause that the premises' phone is used in that criminal activity. *See* 1 FISHMAN & MCKENNA, WIRETAPPING AND EAVESDROPPING, *supra* note 10, § 5:177. Answering an arrestee's cell phone in the immediate aftermath of the arrest, where probable cause exists that the defendant used his phone in committing the crime, establishes an even stronger justification for answering it or for reading or responding to incoming text messages. *See id.*

39. United States v. De La Paz, 43 F. Supp. 2d 370, 375 (S.D.N.Y. 1999) (including "transporting the arrestee, . . . helping a prosecutor draw up the complaint, . . . fingerprinting and otherwise processing the arrestee, . . . [and] preparing the arrestee for presentation to a magistrate" as examples of such myriad duties).

40. *Id.* at 375. The court in *De La Paz* goes on to quote *Schmerber v. California*, to the effect that "when 'the delay necessary to obtain a warrant . . . threaten[s] "the

it:

> [W]hen the telephone rang while the agents were booking [the arrestee], it was reasonable for them to answer it, notwithstanding that they could conceivably have obtained a warrant in anticipation of the telephone ringing. Having arrested [him] for narcotics conspiracy, the agents had probable cause to believe that calls to his cellular telephone—a common tool of the drug trade—would provide evidence of his criminal activity, and it was not unreasonable for the agents to "seize" that evidence without a warrant before it disappeared.[41]

The incoming phone call would have "disappeared," as the court put it, because any conversation the officer might have had with the caller would not exist if the officer did not answer the call.[42] Other courts have held likewise.[43] Similarly, a federal judge has reasonably concluded it was permissible for an officer to send a text message on a phone taken from a suspect, where probable cause existed that the intended recipient was connected to the quantity of cocaine seized from the defendant when he was arrested.[44] The court reasoned that, given the circumstances, failing to do so would forfeit the opportunity to gather additional evidence about the arrestee and the intended recipient.[45]

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destruction of evidence,'" no warrant is required for a search or seizure." *Id.* at 376 (quoting Schmerber v. California, 384 U.S. 757, 770 (1966)). In *Schmerber*, the Court held that where probable cause existed to arrest a motorist for drunk driving, it was permissible, over defendant's objections, to have a doctor take a blood sample, lest the presence of alcohol in Schmerber's system dissipate during the delay to obtain a warrant. *See* 384 U.S. at 770-71. In *McNeely*, the Court did not overrule *Schmerber*; it merely rejected the prosecutor's argument that *Schmerber* established a per se exigency in drunk driving cases. *See* 133 S. Ct at 1555.

41. *De La Paz*, 43 F. Supp. 2d at 376 (citation omitted) (citing United States v. Ordonez, 737 F.2d 793, 810 (9th Cir. 1983)).

42. *See id.* at 376.

43. *See, e.g.*, United States v. Gomez, 807 F. Supp. 2d 1134, 1151 (S.D. Fla. 2011). In *Gomez*, officers watched the defendant pick up a package that they knew contained cocaine. *Id.* at 1138. Later, he drove erratically away from his residence, using his cell phone as he drove. *Id.* After police arrested him, a single caller, "Javier Blue," made repeated calls to the defendant's cell phone. *Id.* at 1139. The court concluded that this established both probable cause that "Javier Blue" was calling about the cocaine, and that exigent circumstances justified answering the call without getting a warrant, because, had the agent not answered one of the calls, evidence of the defendant's drug-related activity obtained by answering the phone would have been lost. *Id.* at 1151; *see also* State v. Carroll, 778 N.W.2d 1, 14 (Wis. 2010).

44. *See Gomez*, 807 F. Supp. 2d at 1152.

45. *See id.* When an agent answered an incoming call to Gomez's cell phone after Gomez was arrested shortly after picking up a substantial quantity of cocaine, the person on the other end became suspicious and hung up, so the agent sent that person a text message to further the dialogue. *Id.* at 1139. The court held that the ensuing exchange of messages was admissible against Gomez at trial. *Id.* at 1152.

3. Exigent Circumstances in the Absence of a Probable Cause Connection

Sometimes common sense dictates that an officer should answer a suspect's cell phone even if there is no apparent connection between the call and the arrest crime. If the crime is one involving the threat of imminent harm to others, for example, answering the phone or reading and responding to an incoming text message is reasonable even if only a remote possibility exists that doing so will provide useful information.[46]

Even in cases that do not involve apparent danger to others, common sense can justify answering a call or text message despite the absence of any known connection between the arrest crime and the phone. Consider the federal district court decision *United States v. Davis*.[47] An officer saw a motorist (with a passenger) speed through several red lights; when the officer gave chase, the motorist lost control and crashed, and the driver and passenger jumped out of the car and ran off.[48] A few minutes later, Davis, the driver, was apprehended.[49] An officer found a cell phone in the car, which rang repeatedly as the officer drove to the police station.[50] When the officer answered the phone, the female caller became suspicious and the conversation terminated.[51] The judge held that both answering the phone and the subsequent search of it to discover the origin of the call were unlawful because there was no reason to believe the call or phone would produce evidence of the reckless driving charge.[52] While this reasoning is quite sound where the offense is a simple traffic violation, it is questionable whether it applies when a motorist attempts to outrun police pursuit; that fact alone creates, at least, a compelling suspicion that something more serious than a mere traffic violation is afoot, even if at the time the officer could not say with any certainty what that more serious crime might be.[53] Under the

46. I know of no such cases, but this seems an obvious application of the general principle that, in appropriate circumstances, a search may be reasonable even in the absence of probable cause. In a variety of circumstances, for example, a search or seizure may be lawful based on a "reasonable suspicion." *See infra* notes 184-87.

47. 787 F. Supp. 2d 1165 (D. Or. 2011).

48. *Id.* at 1168.

49. *Id.*

50. *See id.* at 1169.

51. *See id.*

52. *See id.* at 1171, 1174.

53. The most obvious possibility is that the driver or his passenger possessed contraband of some kind in the car and did not want to be caught with it. Other possibilities, of course, exist: (*a*) the car was stolen; (*b*) the driver did not have a license; (*c*) the driver knew there was an outstanding warrant against him; or (*d*) the driver was drunk. Less incriminating possible explanations also exist: The driver might simply have reacted stupidly, or police in that particular jurisdiction or

circumstances, answering the phone or taking a quick glance at its recent call log is a reasonable step to investigate whether a more serious crime was in fact being committed.[54]

C. Duration of "Exigency"

The exigency, however, must have limits. Assuming probable cause exists that the arrestee used his cell phone to commit the arrest offense, the duration of the authority to answer the phone, read incoming text messages, and return or initiate calls or text messages without first obtaining a warrant should be measured not in days,[55] but in a limited number of hours. One federal judge suggested that it should be presumptively reasonable for the police to answer or read incoming messages and respond to them until the defendant was arraigned, so long as they did not unreasonably delay the arraignment.[56] This is a plausible approach if the arraignment occurs a few hours after an arrest, or—if the arrest occurs late in the day—the next morning, but should not apply for longer delays.[57]

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neighborhood had a reputation of harassing motorists of the driver's race or nationality.

54. In *Davis*, the officer traced that call (and several others made to the phone within a brief period) to a motel; further investigation ultimately revealed that the defendant was a pimp who was exploiting two underage girls in acts of prostitution. 787 F. Supp. 2d at 1169-70. The judge suppressed the phone-related evidence, and ordered another hearing to determine whether the link between that evidence and the girls' eventual acknowledgment that defendant was pimping them was attenuated. *Id.* at 1173.

55. United States v. Reyes, 922 F. Supp. 818, 835-36 (S.D.N.Y. 1996) (holding that it is unlawful for the police to seize a pager, turn it on, and monitor incoming messages over the next four days); *see also* United States v. Kim, 803 F. Supp. 352, 361-63 (D. Haw. 1992), *aff'd*, 25 F.3d 1426 (9th Cir. 1994) (holding that government agents do not have the right to answer a drug suspect's cellular phone two days after it, along with a sum of money, were seized pursuant to a federal forfeiture statute).

56. United States v. De La Paz, 43 F. Supp. 2d 370, 376 (S.D.N.Y. 1999). The term "arraignment" in this context is the proceeding during which a defendant is brought before a judge and is informed of the charges against him. *Legal Definition of Arraignment*, THE FREE DICTIONARY, http://legal-dictionary.thefreedictionary.com/arraignment (last visited Nov. 11, 2013). The judge then makes a preliminary determination of whether probable cause existed for the arrest. *See id.* In some jurisdictions, this proceeding is called a "presentment." *See id.*

57. In *County of Riverside v. McLaughlin*, the Supreme Court held that, as a rule, "a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with" the constitutional requirement that this determination be made "promptly" after an arrest. 500 U.S. 44, 56 (1991). Be that as it may, barring unusual circumstances, such as the complete unavailability of a judge from whom a warrant can be sought, forty-eight hours seems far too long a period to excuse the failure to seek a search warrant to continue to answer the phone or respond to incoming messages.

D. Exigent Searches of a Cell Phone's Memory

Part III.B.1 states the argument for applying the exigent circumstances exception to the warrant requirement when an arrestee's phone rings or receives a text message. Depending on the facts, the exigent circumstances exception may also justify searching the phone's memory for phone calls or text messages made or received prior to the arrest.

1. Factually Specific Exigency

The exigent circumstances exception should apply where specific facts justify it. The clearest example would apply where there is reason to believe this is necessary to avert a threat to someone's life or safety—for example, where a kidnapping suspect has been apprehended but the victim has not been located.[58] A similar argument exists where police have probable cause to believe that the phone may lead them to the location of a particular quantity of contraband or other physical evidence, but that delay in accessing the phone may give the arrestee's confederates the opportunity to destroy or relocate the evidence.[59]

2. Concern that the Phone's Memory May Be Erased

Even in the absence of a factually specific exigency, prosecutors have sometimes argued that agents must be allowed to examine a cell phone's memory before obtaining a warrant for fear that any delay may result in the loss of important information in that memory. Several courts have endorsed this argument,[60] which might be called the "peruse it or lose it" theory of exigency. Earlier cases did so on the assumption that the phone's memory was limited and older data would be erased as new data came to the phone,[61] but given the much-expanded storage capacity in modern cell phones, this seems to

58. *See supra* notes 32-34 and accompanying text.

59. *See supra* note 43 and accompanying text.

60. *See, e.g.*, United States v. Ortiz, 84 F.3d 977, 984 (7th Cir. 1996); United States v. Murphy, 552 F.3d 405, 411 (4th Cir. 2009).

61. In *Ortiz*, the court held that, "[b]ecause of the finite nature of a pager's electronic memory, incoming pages may destroy currently stored telephone numbers in a pager's memory," and that this created an exigency justifying the immediate retrieval of the information it contained. 84 F.3d at 984. Several courts have cited *Ortiz* approvingly in upholding warrantless searches of a cell phone's memory for photographs, stored text messages, and the list of calls made and received. *See, e.g.*, *Murphy*, 552 F.3d at 411 (reasoning that an officer would not necessarily know the storage capacity of any particular phone); United States v. Mercado-Nava, 486 F. Supp. 2d 1271, 1278-79 (D. Kan. 2007) (relying on this theory to justify search of the cell phone incident to arrest); United States v. Parada, 289 F. Supp. 2d 1291, 1303-04 (D. Kan. 2003) (same).

be a dubious basis for recognizing an exigency.[62]

The exigent circumstances justification for an immediate search of the phone's memory finds more plausible support in the existence of technology that could enable someone to wipe a cell phone's memory remotely. Thus, the reasoning goes, if police do not access the phone's contents within a reasonably brief period after the phone was seized, the risk exists that its contents will be forever lost to law enforcement officials.[63] Judge Posner, writing for the Seventh Circuit in *United States v. Flores-Lopez*, reviewed the means by which a crafty criminal might manage to arrange this.[64] Other courts have also noted the availability of technology that is capable of remotely wiping a phone's memory.[65]

But, for several reasons, courts should not routinely rely on this possibility as a basis for finding exigency. First, the police can use a variety of simple and inexpensive countermeasures to frustrate an attempt to remotely erase a phone's memory. The easiest is to turn off the phone[66] or remove its battery. The phone can be placed in an enclosure, such as a Faraday bag, which prevents Internet signals from reaching it.[67] Moreover, devices exist that can copy the contents of a phone's memory,[68] after which, assuming the police could

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62. *See* United States v. Wall, No. 08-60016-CR, 2008 WL 5381412, at *4 (S.D. Fla. 2008), *aff'd*, 343 Fed. Appx. 564 (11th Cir. 2009).

63. *See* Noah Shachtman, *Fighting Crime with Cellphones' Clues*, N.Y. TIMES, May 3, 2006, at G (discussing the useful information that police often find on a suspect's cell phone and a criminal's ability to remotely wipe the phone's memory).

64. 670 F.3d 803, 808 (7th Cir. 2012) ("[R]emote-wiping capability is available on all major cell-phone platforms; if the phone's manufacturer doesn't offer it, it can be bought from a mobile-security company."). The opinion even provides several web addresses where applications offering such capability can be purchased. *Id.* The discussion in *Flores-Lopez* is dictum; the Seventh Circuit did not rely on these possibilities in upholding a very limited search of the defendant's phone. *See* discussion *infra* Part IV.B.3.

65. *See, e.g.*, United States v. Gomez, 807 F. Supp. 2d 1134, 1150 n.17 (S.D. Fla. 2011). The court noted the possibility that someone could remotely "wipe" a cell phone's memory, but held that this rationale did not apply where (*a*) no officer expressed a concern that it might happen in the case at hand, and (*b*) the phone in question was not capable of Internet connection. *Id.* at 1145 & n.13.

66. *See Flores-Lopez*, 670 F.3d at 808-09. Judge Posner noted that although this would protect against remote wiping, it might not defeat an application in which the phone acts as a microphone recording anything that is said within its capacity to pick up sounds, including, one presumes, what the police say in its presence. *Id.*

67. *Id.* at 809-10. *See also* Shachtman, *supra* note 63. In November 2013, Amazon advertised a Faraday bag for $58.00. *See Black Hole Faraday Bag*, AMAZON.COM, http://www.amazon.com/Black-Hole-Faraday-Bag-Isolation/dp/B0091WILY0 (last visited Nov. 12, 2013). Other Faraday bags that can hold multiple cell phones exist. *See, e.g.*, *Faraday Mobile Holdall (MJRJ/1)*, DISKLABS, http://www.faradaybag.com/faraday-bag/faraday-mobile-holdall-mjrj1.html (last visited Nov. 12, 2013).

68. *See Flores-Lopez*, 670 F.3d at 809. *See, e.g.*, Kai Mae Huessner, *Michigan Police*

establish probable cause for a search warrant, the police would have the technological ability to peruse what had been on the cell phone's memory when the phone was seized, even if the phone itself is later wiped clean.[69]

Second, even if a phone's memory is remotely erased, much (if not all) of what it contained is still available to investigators from the companies that provided cell phone and Internet service to the phone's user.[70] This significantly undercuts the "peruse it or lose it" exigency argument. To exercise this option, investigators must comply with Title II of the Electronic Communications Privacy Act, often referred to as the Stored Communications Act.[71] The Stored Communications Act essentially divides information into three categories: contents of communications stored for 180 days or less; content of communications stored more than 180 days; and non-content information about electronic communications.[72] To obtain the contents of any electronic communication (i.e., an email, text message, etc.) from the service provider that has been stored for 180 days or less, a government entity must obtain a search warrant based on probable cause.[73] To obtain the contents of any electronic communication stored for more than 180 days, the government may proceed by search warrant, subpoena, or court order, the latter two of which do not require probable cause.[74] To obtain non-content

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Use Device to Download Cellphone Data; ACLU Objects, ABC NEWS (Apr. 21, 2011), http://abcnews.go.com/Technology/michigan-police-cellphone-data-extraction-devices-aclu-objects/story?id=13428178;

ACLU Upset Over Cell Phone Extraction Device, *All Things Considered*, NPR (Apr. 21, 2011, 3:00 PM), www.npr.org/2011/04/21/135610182/aclu-upset-over-cell-phone-extraction-device.

69. Presumably the police would still need a search warrant before they could access the copy that was made of a cell phone's memory. The ability to copy the phone's memory is relevant here to offset the argument that the possibility of remote erasure of the memory does not in and of itself establish an exigency justifying searching the memory without a warrant.

70. *See* WAYNE JANSEN & RICK AYERS, GUIDELINES ON CELL PHONE FORENSICS: RECOMMENDATIONS OF THE NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY 61-64 (2007) (discussing the types of information retained by service providers and the duration of such retention). For example, service providers routinely retain text messages for periods ranging from ten days to two weeks. *See* Joshua Eames, Case Note, *Criminal Procedure—"Can You Hear Me Now?": Warrantless Cell Phone Searches and the Fourth Amendment*; People v. Diaz, *244 P.3d 501 (Cal. 2011)*, 12 WYO. L. REV. 483, 497 n.119 (2012); Matthew E. Orso, *Cellular Phones, Warrantless Searches, and the New Frontier of Fourth Amendment Jurisprudence*, 50 SANTA CLARA L. REV. 183, 199 nn. 68-69, 71 (2010).

71. 18 U.S.C. §§ 2701-2712 (2006).

72. *See id.* § 2703.

73. *Id.* § 2703(a); *see also* 1 FISHMAN & MCKENNA, WIRETAPPING AND EAVESDROPPING, *supra* note 10, § 7:47.

74. 18 U.S.C. § 2703(b). The constitutionality of this provision has been challenged. *See* 1 FISHMAN & MCKENNA, WIRETAPPING AND EAVESDROPPING, *supra*

information about an electronic communication (who sent it, who received it, and when it was sent and received), a subpoena or court order not requiring probable cause, suffices.[75]

There is a third reason why courts should reject the exigency argument based on the theoretical possibility that the phone's memory might be remotely erased. The Supreme Court has made it clear that it rejects such overgeneralizations when applying the exigent circumstances doctrine.[76]

E. Conclusions

Application of the exigent circumstances exception is likely to pose challenging questions in any context: A court will have to decide whether probable cause existed for the search and whether the exigency was sufficiently compelling to obviate the need to obtain a search warrant. Applied to cell phones, certain general rules seem reasonable. Where probable cause exists that the arrestee used the phone in connection with the arrest crime, police should be permitted to answer the phone or read and respond to incoming text messages during the arrest and booking period, so long as that time is limited to a few hours. By contrast, there should be no assumption of exigency with regard to a search of the phone's memory; a court should insist on a factually specific showing.

IV. SEARCH OF THE PERSON INCIDENT TO ARREST ("SPIA")

A. The Basic Principle

1. In General

When someone is arrested, an officer may search that person incident to that arrest, and the scope of that search is generally understood to include the seizure and search of any personal property on his person or in his possession at that time without any requirement that the officer show any justification for the search other than the arrest itself. As the Supreme Court stated in *United*

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note 10, § 7:48-7:51.

75. 18 U.S.C. § 2703(c)-(d); *see also* 1 FISHMAN & MCKENNA, WIRETAPPING AND EAVESDROPPING, *supra* note 10, § 7:51.

76. As a rule, police officers with a search warrant must "knock and announce," i.e., knock on the door, announce their presence and purpose, and wait for a reasonable amount of time before using force to gain entry, although a "no-knock" warrant may be obtained under appropriate circumstances. *See*, *e.g.*, CLANCY, *supra* note 23, § 12.5.4; LAFAVE, *supra* note 23, chs. 2, 4.8(a), 4.8(c), 4.8(e) & 4.8(g). In *Richards v. Wisconsin*, the prosecutor argued that a per se exception to the knock-and-announce requirement should exist in felony drug investigations, because any delay before forcing entry would give the suspects the opportunity to destroy the evidence, prepare for armed resistance, or both. 520 U.S. 385, 391-96 (1997). The Court rejected such an overgeneralization, insisting instead that a judge must evaluate the officers' conduct based on the facts in each particular case. *Id.* at 394.

States v. Robinson:

> The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment.[77]

To facilitate discussion and distinguish searches of the person incident to arrest from its first cousins, search of a premises incident to arrest and search of an auto incident to arrest, a search of the person incident to arrest is hereinafter referred to as "SPIA."

The SPIA doctrine directs that, so long as the officers have probable cause to arrest the suspect for any crime, they need no further factual or legal justification to search the arrestee and his immediate possessions incident to that arrest.[78] Indeed, the Court has upheld SPIAs in cases where there was no possibility that the search could produce evidence relevant to the arrest crime. In *Robinson*, for example, the Court upheld seizure and search of a cigarette pack in the defendant's pocket following an arrest for driving with a suspended license, and the seizure of heroin capsules they found inside it.[79] Subsequently, the Court has upheld the SPIA seizure and subsequent search of various other items within an arrestee's possession: the clothing he wore,[80] small pieces of

77. 414 U.S. 218, 235 (1973).

78. This is not the case if the property is seized from the arrestee's automobile, home office, and so forth. In such cases, limits are imposed on when the police may *search* the automobile or premises incident to arrest. Concerning automobiles, for example, see *Arizona v. Gant*, 556 U.S. 332 (2009) (limiting the scope of a "search incident" of an automobile to cases in which police have a reasonable belief that the car contains evidence relating to the crime for which a defendant was arrested). Similarly, concerning premises, see *Chimel v. California*, 395 U.S. 752 (1969) (holding that police who lawfully enter a premises to make an arrest may conduct a limited search of the immediate area surrounding the arrestee for weapons or destructible evidence). However, as a rule, while searching an automobile or premises incident to arrest, the police may *seize* an item found during such a search only if probable cause exists that the item is evidence of a crime.

79. *Robinson*, 414 U.S. at 235-36; *see also* Gustafson v. Florida, 414 U.S. 260 (1973) (applying the search incident rationale to another traffic-offense arrest even though the arrest offense in that case did not carry a possible jail sentence).

80. United States v. Edwards, 415 U.S. 800 (1974). *Edwards* is discussed in greater detail in Part IV.A.2, *infra*.

luggage,[81] and other non-electronic physical property.[82]

These decisions, taken together, established a fairly stable body of law, which in most situations was comparatively easy to apply.[83] These decisions, however, decided years or decades before the smart phone era, do not and could not have taken into account the technological advancements that make a modern cell phone the repository of huge quantities of information about its possessor.

2. Delay Between the Arrest and the Search

When a prosecutor relies on the SPIA doctrine to justify the search of a suspect or his belongings, the question arises: For how long does the "incidental" period last?

The Supreme Court has twice addressed how much time may elapse before a search can no longer be considered incident to the arrest. The first came a year after *United States v. Robinson*[84] in *United States v. Edwards*.[85] Edwards was lawfully arrested late at night for attempting to break into a local post office via a window that had been pried open.[86] He was taken to the local jail and lodged in a cell.[87] "[C]ontemporaneously with or shortly after the time

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81. *See* Illinois v. Lafayette, 462 U.S. 640 (1983). When arrested, the defendant possessed a shoulder bag similar to a woman's purse. At the station house, a police officer, acting in accordance with department regulations, inventoried its contents and found a controlled substance. Noting a lower court ruling that the state had waived the search incident to arrest rationale, the Court upheld the officer's action as a lawful inventory search. *Id.* at 641-43.

82. In *Edwards*, the Court cited approvingly several federal circuit court decisions, holding that:

> [B]oth the person and the property in his immediate possession may be searched at the station house after the arrest has occurred at another place and if evidence of crime is discovered, it may be seized and admitted in evidence. Nor is there any doubt that clothing or other belongings may be seized upon arrival of the accused at the place of detention and later subjected to laboratory analysis or that the test results are admissible at trial.

415 U.S. at 803-04 (footnotes omitted).

83. Issues have always existed at the margin. Courts have insisted on a showing of special circumstances to justify a strip search or body cavity search incident to arrest. *See* CLANCY, *supra* note 23, § 8.4; LAFAVE, *supra* note 23, §§ 5.2(c), 5.3(a), 5.3(c); *see also* Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364 (2009) (holding that a school nurse's virtual strip search of a teenage girl to determine if she had ibuprofen hidden in her underwear was constitutionally unreasonable). Moreover, questions arise as to how much time or distance can elapse between the arrest and search before the search is no longer "incident" to the arrest. That issue is briefly addressed in Part IV.A.2, *infra*; its application to cell phone searches is analyzed in Part IV.B.2.b, *infra*.

84. 414 U.S. at 218.

85. 415 U.S. at 800-13.

86. *Id.* at 801.

87. *Id.*

Edwards went to his cell," the police had probable cause to believe that the clothes he was wearing "were themselves material evidence of the crime for which he had been arrested."[88] Because it was late at night and no substitute clothing was available, the officers did not take his clothing until, ten hours later, they had obtained other clothing for Edwards to wear.[89] At trial, the government introduced evidence that his clothing revealed paint chips that matched paint chips from the crime scene.[90] The Sixth Circuit held that the search and seizure violated the Fourth Amendment.[91]

The Supreme Court reversed, concluding: "[T]he Fourth Amendment should not be extended to invalidate the search and seizure in the circumstances of this case."[92] In applying the "search incident" doctrine, the Court first observed that "searches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention."[93] Further, in appropriate circumstances, the right to conduct a seizure or search incident to arrest continued even after a "substantial period of time" after the arrest and, even, after the administrative processing of the arrest:

> [O]nce the accused is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant even though a substantial period of time has elapsed between the arrest and subsequent administrative processing, on the one hand, and the taking of the property for use as evidence, on the other.[94]

Three years after *Edwards*, in *United States v. Chadwick*,[95] the Court appeared to limit the scope of a *Robinson* search incident to arrest and the time frame endorsed in *Edwards*. In *Chadwick*, federal agents had probable cause that defendants, who were arriving by train in Boston, had controlled substances in their footlocker; the agents watched until the defendants placed the

88. *Id.* at 805.

89. *Id.* at 801, 805.

90. *Id.* at 801-02.

91. United States v. Edwards, 474 F.2d 1206 (6th Cir. 1973), *rev'd*, 415 U.S. 800 (1974), *and vacated*, 497 F.2d 952 (6th Cir. 1974).

92. *Edwards*, 415 U.S. at 802.

93. *Id.* at 803.

94. *Id.* at 807. The Court added that, "'[w]hile the legal arrest of a person should not destroy the privacy of his premises, it does —for at least a reasonable time and to a reasonable extent—take his own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence.'" *Id.* at 808-09 (quoting United States v. DeLeo, 422 F.2d 487, 493 (1st Cir. 1970).

95. United States v. Chadwick, 433 U.S. 1 (1977), *abrogated by* California v. Acevedo, 500 U.S. 565 (1991).

footlocker into the trunk of a car, then moved in and arrested them.[96] They opened and searched the footlocker an hour and a half later, well after they had secured the defendants, the car and the footlocker, but did not first obtain a search warrant.[97] The Court acknowledged the validity of the search incident to arrest doctrine,[98] but held that the search of the footlocker could not be justified as being incident to the arrest:

> [W]arrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the "search is remote in time or place from the arrest," or no exigency exists. Once law enforcement officers have reduced luggage or other *personal property not immediately associated with the person of the arrestee* to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest.[99]

I have italicized a particular phrase from this passage in *Chadwick* to emphasize that the limitation *Chadwick* placed on searches incident to arrest contains its own limitation: *Chadwick* arguably applies only to "luggage or other personal property not immediately associated with the person of the arrestee."[100]

B. Applying the SPIA Doctrine to Cell Phone Searches: Conflicting Analogies and Approaches

As we have seen, the SPIA doctrine is in many ways much

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96. *Chadwick*, 433 U.S. at 22-23.

97. *Id*. at 3-5. The government's main argument in *Chadwick* was that the search of the footlocker fell within the scope of the automobile exception to the warrant requirement. The Supreme Court rejected that argument. *Id.* at 5-6. However, the Court abrogated this holding in *California v. Acevedo*. *See* 500 U.S. at 576-79.

98. Such searches may be conducted without a warrant, and they may also be made whether or not there is probable cause to believe that the person arrested may have a weapon or is about to destroy evidence. The potential dangers lurking in all custodial arrests make warrantless searches of items within the "immediate control" area reasonable without requiring the arresting officer to calculate the probability that weapons or destructible evidence may be involved. *Chadwick*, 433 U.S. at 14-15 (citing United States v. Robinson, 414 U.S. 218 (1973)).

99. *Id.* at 15 (emphasis added) (quoting Preston v. United States, 376 U.S. 364, 367 (1964)). The Court acknowledged that other circumstances might justify an immediate, warrantless search of luggage seized at the time of arrest: "[F]or example, if officers have reason to believe that luggage contains some immediately dangerous instrumentality, such as explosives, it would be foolhardy to transport it to the station house without opening the luggage and disarming the weapon." *Id.* at 15 n.9 (citing United States v. Johnson, 467 F.2d 630, 639 (2d Cir. 1972)). It may be worth noting that in *Chadwick*, the only basis to arrest the defendant was probable cause to believe the footlocker contained a controlled substance; arguably, therefore, the search incident to arrest theory might not apply at all. *See id*. at 14-16.

100. *Id.* at 15.

broader than the exigent circumstances doctrine. An exigent circumstances search for evidence requires probable cause to believe the search would reveal evidence of a crime, and also requires the existence of an exigency that precluded obtaining a warrant. The SPIA doctrine, by contrast, imposes no requirements other than: (1) the defendant was lawfully arrested; (2) the item to be searched was on the defendant's person or was "closely associated" to his person; and (3) the search was conducted within a reasonable time of the arrest. If the SPIA doctrine applies broadly to cell phones, therefore, other theories justifying such searches (and the limitations placed on those theories) are rendered nearly irrelevant, and an arrestee's expectations of privacy regarding his cell phone's contents are substantially nullified.

So how should the SPIA rule apply to cell phones? In essence, three approaches to the issue have emerged. Those approaches include two extremes—that a cell phone is simply another container, the search of which is subject to existing precedents, and its opposite, that a cell phone presents issues so different than those posed in prior cases that none of the existing case law applies—and a nuanced but vague middle ground.

1. A Cell Phone Is Like Any Other "Container"

Several courts have held that a cell phone and the information it contains are constitutionally indistinguishable from Robinson's cigarette pack and the heroin capsules hidden inside it.[101] Such decisions are defended on several grounds. First, they involve a straightforward application of what the Supreme Court said in *Robinson*.[102] Second, some courts have reasoned that if the defendant had possessed written documents containing the same information, their seizure would be within the scope of a SPIA; therefore, the

101. *See, e.g.*, United States v. Finley, 477 F.3d 250, 259-60 (5th Cir. 2007); *see also* United States v. Gordon, 895 F. Supp. 2d 1011, 1024 (D. Haw. 2012) ("Just as a wallet taken from a person may be searched incident to arrest, so may a cellular telephone."); United States v. Gomez, 807 F. Supp. 2d 1134, 1146-47 (S.D. Fla. 2011) (holding that the search is justified as incident to arrest, regardless of whether probable cause and exigent circumstances existed); United States v. Valdez, No. 06-CR-336, 2008 WL 360548, at *3 (E.D. Wis. Feb. 8, 2008); United States v. Deans, 549 F. Supp. 2d 1085, 1094 (D. Minn. 2008) (upholding searching the memories of two cell phones found during a post-arrest search of defendant's car); United States v. Mercado-Nava, 486 F. Supp. 2d 1271, 1276 (D. Kan. 2007); State v. James, 288 P.3d 504, 513 (Kan. 2012). In *James*, after arresting the defendant for possession of marijuana with intent to sell, the officer scrolled through text messages on the defendant's phone, finding two that were suggestive of marijuana sales. 288 P.3d 504, 509-10. Relying on *Robinson*, the Supreme Court's seminal search-of-person-incident-to-arrest decision summarized in Part IV.A.1, and on other courts' cell phone decisions, the court held that this was a valid search incident to arrest, and the officer's testimony as to those messages was therefore admissible at trial. *See id.* at 512-14.

102. *See infra* Part IV.B.1.a.

same result should apply even though they were seized from his cell phone instead.[103] Third, applying *Robinson* to cell phone SPIAs is consistent with the Court's frequently announced preference for bright-line rules to guide police conduct.[104] Fourth, this approach is consistent with Supreme Court precedent rejecting the argument that some containers are more Fourth-Amendment-worthy than others.[105] Each of these arguments is addressed in turn.

a. Applying *Robinson*

Robinson states, unequivocally, that anything on the defendant's person and personal property closely associated with his person, may be searched incident to arrest without regard to whether the officers suspect the search may reveal a weapon or incriminating evidence.[106] Therefore, some courts reason, for purposes of the SPIA doctrine, cell phones are no different than any other container found in the defendant's pocket, handbag, or attaché case. But applying *Robinson* and similar precedents to searches of an arrestee's cell phone falls short in at least two significant ways. First, doing so ignores reality. Second, it also ignores the Supreme Court's recognition that existing Fourth Amendment doctrine must evolve to reflect that reality.

Reflexive application of *Robinson* to cell phone searches ignores reality. To equate a physical container (Robinson's cigarette pack, Edwards' trousers, etc.) and its physical contents to a cell phone and its informational contents ignores the qualitative and quantitative differences in the private information that today's "smart" cell phones are likely to contain.[107] A comparison may prove the point: A person (or court) can pretend there is no real difference between a few pages of handwritten notes and the contents of someone's computer hard drive, but pretending ignores the underlying values the Fourth Amendment seeks to protect.

Second, the Supreme Court has acknowledged on several occasions that the law must adjust to reflect this reality, i.e., respond to the threat to privacy which modern surveillance and information storage technology poses. In 2001, in *Kyllo v. United States*,[108] the Court did so with regard to police surveillance of the home.[109] In

103. *See infra* Part IV.B.1.b.

104. *See infra* Part IV.B.1.c.

105. *See infra* Part IV.B.1.d.

106. *See supra* Part IV.A.1.

107. For a forceful discussion of these differences, *see infra* Part IV.B.2.

108. 533 U.S. 27 (2001).

109. Police used thermal imaging equipment to take a heat signature of Kyllo's home, thereby confirming their suspicions that Kyllo was operating a sophisticated marijuana cultivation enterprise inside. They then used information from the imager (as well as other information) to obtain a warrant to search the home. The Court ruled that using the imager itself constituted a search of the home:

2012, in *United States v. Jones*, it did so with regard to police installation of a GPS device on a suspect's car to track its travel through public streets.[110] And, in 2010, in *City of Ontario v. Quon*,[111] the Court expressed similar concerns about technology and privacy with regard to the workplace.[112] At the same time, the Court has demonstrated an understandable reluctance to issue broad, sweeping decisions in this area.[113] This reluctance perhaps reflects the implicit hope that, in the absence of legislation on the subject, the nation's lower courts will be the laboratories in which new approaches to the issues will be devised, tested, and evaluated.

> [O]btaining by sense-enhancing technology any information regarding the interior of a home that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area" constitutes a search—at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted. On the basis of this criterion, the information obtained by the thermal imager in this case was the product of a search.

Id. at 34-35 (quoting Silverman v. United States, 365 U.S. 505, 512 (1961)). Since the use of the imager without a warrant was an unlawful search, the Court held, the information thus obtained had to be excised from the affidavit in support of the warrant before assessing the validity of the warrant. *Id.* at 40.

110. United States v. Jones, 132 S. Ct. 945, 950 (2012). The Court, again per Justice Scalia, applied the *Kyllo* test: "At bottom, the Court must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" *Id.* at 950 (quoting *Kyllo*, 533 U.S. at 34). This time, however, the Court applied the test without any qualification as to the general availability of the technology involved. *See id.* Justice Scalia likened installing the device to an eighteenth-century constable hiding in a suspect's horse-drawn coach—the latter would have constituted an unlawful trespass, and, therefore, an unlawful search. *Id.* at 27. Thus, installation of the GPS device on the suspect's car was also an unlawful search. *Id.* at 951 n.3.

111. 130 S. Ct. 2619 (2010).

112. See discussion *supra* note 110.

113. In *Quon*, the Court had the opportunity to resolve a number of issues relating to a government employee's expectations of privacy when using employer-issued communications equipment. 130 S. Ct. 2619. Instead, the Court decided the case on the narrowest possible grounds, avoiding the broader issues entirely. *See id.* at 2629 (where Justice Kennedy, writing for the Court, devoted more than 800 words expressing the majority's reluctance to resolve those issues). For an analysis of *Quon*, see Clifford S. Fishman, *Electronic Privacy in the Government Workplace and* City of Ontario, California v. Quon*: The Supreme Court Brought Forth a Mouse*, 81 MISS. L. J. 1359 (2012). The Court was probably wise to decide the case narrowly—it appears that several of the Justices had no real understanding of the technology involved. *See id.* at 1409. Similarly, in *Jones*, the Court decided the case on narrow trespass grounds, without directly addressing the larger questions relating to technology, surveillance, and privacy expectations. *See* 132 S. Ct. at 956-67. *But see id.* at 954-57 (Sotomayor, J., concurring); *id.* at 957-64 (Alito, J., concurring) (discussing the broader issues). For an analysis of *Jones*, see 3 FISHMAN & MCKENNA, WIRETAPPING AND EAVESDROPPING, *supra* note 6, § 29:37.

b. "If the Defendant Possessed the Paper Equivalent . . ."

Some courts have reasoned that if the defendant had possessed documents containing the information in question, they would be admissible per the traditional SPIA doctrine; therefore, the same result should apply, even though the information was obtained from a search of his cell phone.[114] This argument is unconvincing because a cell phone, by its very nature, contains vastly more information than a person is likely to carry on paper in his pockets or a brief case. Thus, an unrestricted search of an arrestee's cell phone inevitably will reveal substantially much more information about him than a search limited to physical contents of non-digital containers.

c. Bright-Line Rules

The Supreme Court has on more than one occasion expressed a preference for bright-line rules that police officers should be able to understand and apply.[115] But the Court has sometimes rejected bright lines in favor of protecting the privacy rights of the arrestee, notwithstanding that doing so will make some lines less bright and more fuzzy.[116] The Court's preference for bright lines is a relevant

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114. *See* People v. Diaz, 244 P.3d 501, 507-08 (Cal. 2011), *cert. denied*, 132 S. Ct. 94 (2011) (internal quotation marks and citation omitted) ("[T]ravelers who carry sophisticated cell phones have no greater right to conceal personal information from official inspection than travelers who carry such information in small spatial container[s]."); *see also* State v. Barajas, 817 N.W.2d 204, 216 (Minn. Ct. App. 2012) ("For the purpose of determining the constitutionality of a police search, we cannot identify a meaningful distinction between the digital photographs stored in Barajas's cellular telephone and the personal items stored in the paper bag contemplated by the United States Supreme Court in [United States v. Ross, 456 U.S. 798, 825 (1982)]."); State v. Glasco, 90 So.3d 905, 907 (Fla. Dist. Ct. App. 2012). *But see* Smallwood v. State, 113 So.3d 724 (Fla. 2013), discussed *infra* Part IV.B.2.a (rejecting analogies between cell phones and non-digital containers).

115. *See, e.g.*, Wyoming v. Houghton, 526 U.S. 295 (1999) (holding that if probable cause justifies the search of a lawfully stopped vehicle, the police may search every part of the vehicle and its contents that may conceal what the police have probable cause to search for, and that this rule applies to all containers within the vehicle notwithstanding who among the car's occupants owned any particular container and without a showing of individualized probable cause for each container); *see also* Maryland v. Wilson, 519 U.S. 408 (1997) (holding that if police officers lawfully stop a vehicle, they may order passengers out of the vehicle without any specific reason to suspect the passenger of wrongdoing); Pennsylvania v. Mimms, 434 U.S. 106 (1977) (holding that if police lawfully stop a vehicle, they automatically have authority to order the driver out of the vehicle and there is no requirement that the officer show a basis to suspect the driver of any wrongdoing beyond the basis for the stop); United States v. Robinson, 414 U.S. 218, 477 (1973) (holding that a lawful, custodial arrest justifies a search of the person incident to arrest, regardless of whether the officer suspected that the arrestee possessed weapons, contraband or incriminating evidence). For a useful discussion of the Court's sometimes shifting attitude about "bright-line rules," see LAFAVE, *supra* note 23, ch. 5.1(a).

116. See the discussion of *New York v. Belton*, 453 U.S. 454 (1981) and *Arizona v.*

consideration, but only where bright lines strike an acceptable balance between police efficiency and respect for privacy.

d. The Supreme Court's "Container" Jurisprudence

In *United States v. Ross*, the Supreme Court rejected the concept that some containers are more Fourth-Amendment-worthy than others:

> [A] constitutional distinction between "worthy" and "unworthy" containers would be improper. Even though such a distinction perhaps could evolve in a series of cases in which paper bags, locked trunks, lunch buckets, and orange crates were placed on one side of the line or the other, the central purpose of the Fourth Amendment forecloses such a distinction.[117]

Some courts have reasoned, therefore, that a cell phone merits no greater protection than an arrestee's cigarette pack, wallet,[118] or the like.[119] This argument has superficial plausibility. But the facts in *Ross* are dramatically different than those in a typical cell phone SPIA case. These differences render the analogy to *Ross* inherently flawed, for at least three reasons. First, *Ross* authorizes searches of containers in an automobile only where the police had probable cause to believe that the automobile contained contraband or other incriminating evidence, but lacked specific knowledge of what kind of container it might be found in.[120] The right to conduct a SPIA, by contrast, involves a search of the arrestee and "the effects in his possession,"[121] not his car. Second, a SPIA does not rely on probable cause to search anything; rather, it relies on probable cause to arrest. Third, and perhaps more important, the amount of information a SPIA search of the arrestee's cell phone is likely to reveal far surpasses what is likely to be found in a container placed inside an automobile. Thus, the *Ross* analogy is as flawed as the *Robinson* analogy.

2. Limiting or Rejecting the SPIA Doctrine

a. Inherent Difference Between a Cell Phone and a Physical Container

"[A] cell phone is not a pair of pants"[122]—or a cigarette pack.

Gant, 129 S. Ct. 1710 (2009), *infra* Part IV.B.2.c.

117. 456 U.S. 798, 822 (1982).

118. United States v. Gordon, 895 F. Supp. 2d 1011, 1024 (D. Haw. 2012); *Diaz*, 244 P.3d at 507, *cert. denied*, 132 S. Ct. 94 (2011).

119. *See supra* note 114.

120. *Ross*, 456 U.S. at 824.

121. United States v. Edwards, 415 U.S. 800, 807 (1984). *See supra* Part IV.A.2.

122. State v. Granville, 373 S.W.3d 218, 227 (Tex. Crim. App. 2012), *petition for discretionary review granted*, (Oct. 10, 2012). In Granville, the defendant was arrested

From this premise, some courts have, in essence, ruled that the SPIA doctrine does not apply to cell phones at all. This argument was well-stated by Florida's Supreme Court in *Smallwood v. State*:

> Although *Robinson* discusses the search-incident-to-arrest exception to the warrant requirement, that case clearly did not involve the search of a modern electronic device and the extensive information and data held in a cell phone. When *Robinson* was decided, hand-held portable electronic devices in the form of cell phones containing information and data were not in common and broad use. Further, in recent years, the capabilities of these small electronic devices have expanded to the extent that most types are now interactive, computer-like devices. Vast amounts of private, personal information can be stored and accessed in or through these small electronic devices, including not just phone numbers and call history, but also photos, videos, bank records, medical information, daily planners, and even correspondence between individuals through applications such as Facebook and Twitter. The most private and secret personal information and data is contained in or accessed through small portable electronic devices and, indeed, many people now store documents on their equipment that also operates as a phone that, twenty years ago, were stored and located only in home offices, in safes, or on home computers.
>
> Moreover, as noted by the United States Court of Appeals for the Seventh Circuit, a search of an electronic device that operates as a cell phone incident to an arrest could evolve into a search of the interior of an arrestee's home depending on the technological capabilities of the particular piece of equipment[.]
>
> . . . . .
>
> Thus, we . . . conclude that the electronic devices that operate as cell phones of today are materially distinguishable from the static, limited-capacity cigarette packet in *Robinson,* not only in the ability to hold, import, and export private information, but by the very personal and vast nature of the information that may be stored on them or accessed through the electronic devices. Consistent with this conclusion, we hold that the decision of the

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for causing a disturbance in his school, and his cell phone, which had nothing to do with the arrest crime, was seized and locked up for safekeeping. *Id.* at 220. Several hours later, another officer, who had not participated in the defendant's arrest, acquired probable cause that the defendant had used his phone to photograph another student urinating, which constituted a separate crime. *Id.* This officer accessed the phone, scrolled through its photos, and found the offending (and offensive) photo. *Id.* At the suppression hearing, the state explicitly eschewed relying on the search incident theory, arguing, merely, that once a cell phone has been lawfully seized from an arrestee and probable cause later develops that it contains evidence of a crime, an officer may search it without first obtaining a warrant. *Id.* at 221-22. Relying on the nature of a cell phone and the quantity and kind of the information it is likely to contain, the court disagreed and rejected the implicit analogy the prosecutor apparently sought to draw to *Edwards*. *See id.* at 226-27; *see also supra* Part IV.A.2.

> United States Supreme Court in *Robinson,* which governed the search of a static, non-interactive container, cannot be deemed analogous to the search of a modern electronic device cell phone.[123]

Other courts have likewise held the very nature of a modern cell phone dictates that the SPIA doctrine does not apply.[124] Each, like Florida's Supreme Court in *Smallwood*, emphasizes the fundamental and profound difference between physical contents of a physical container, the information contained in a digital device such as a cell phone.

In justifying this result, some courts cite *Chadwick* as holding that "when the interests in officer safety and evidence preservation are minimized, the [Supreme Court] has held that this exception no longer applies."[125] This approach, in essence, ignores the Supreme Court's insistence in *Robinson* that the right to conduct a SPIA does not depend upon a showing that those concerns were in fact in play.[126] It also ignores that *Chadwick* explicitly applies only to "luggage or other personal property *not* immediately associated with the person of the arrestee,"[127] and that *Chadwick* involved a footlocker seized from the trunk of a car,[128] rather than a cell phone seized from an arrestee's pocket, handbag or attaché case.

b. Delay Between the Arrest and Search

Other courts, relying on *Chadwick*'s discussion of the passage of time,[129] have refused to apply the SPIA doctrine in specific cases because the search was not conducted simultaneously with or immediately after the arrest.[130] But reliance on this aspect of

123. Smallwood v. State, 113 So.3d 724, 731-32 (Fla. 2013) (citing, in the second quoted paragraph, United States v. Flores-Lopez*,* 670 F.3d 803, 805-06 (7th Cir. 2012)). *Flores-Lopez* is discussed extensively *infra* Part IV.B.3.

124. *See, e.g.*, United States v. Wurie, No. 11-1792, 2013 WL 2129119, at *9-10 (1st Cir. May 17, 2013); United States v. Park, No. CR 05-375 SI, 2007 WL 1521573, at *10-11 (N.D. Cal. May 23, 2007); State v. Smith, 920 N.E.2d 949 (Ohio 2009), *cert. denied*, 131 S. Ct. 102 (2010); *Granville*, 373 S.W.3d at 218; Schlossberg v. Solesbee, 844 F. Supp. 2d 1165 (D. Or. 2012) (relying on case law barring searches of cell phones incident to arrest, to rule similarly with regard to a search of a digital camera); *Flores-Lopez*, 670 F.3d at 803.

125. *E.g.*, *Smith*, 920 N.E.2d at 952 ¶12 (citing United States v. Chadwick, 433 U.S. 1, 15 (1977)); *see also* discussion *supra* Part IV.A.2.

126. "The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." United States v. Robinson, 414 U.S. 218, 235 (1973). *See* discussion *supra* Part IV.A.1.

127. *Chadwick*, 433 U.S. at 15 (1977), *abrogated on other grounds by* California v. Acevedo, 500 U.S. 565 (1991) (emphasis added).

128. *See supra* Part IV.A.2.

129. *See supra* Part IV.A.2.

130. United States. v. Yockey, No. CR09-4023-MWB, 2009 WL 2400973, at *5 (N.D.

Chadwick in a cell phone search case is also problematic, because, unlike the footlocker in *Chadwick* a cell phone is "personal property" that is "immediately associated with the person of the arrestee."[131] A rigid insistence that a SPIA occur nearly simultaneously with the arrest would often require the police to examine an arrestee's cell phone—and his wallet, or address book, or anything else in the arrestee's pockets, handbag, gym bag, attaché case, etc.—on the street, as soon as the arrestee has been handcuffed, even though doing so would be inconvenient and potentially dangerous, would interfere with the proper handling of the arrestee's property, and would serve no useful purpose.

An analogy to the automobile exception to the warrant requirement is useful here.[132] It is black letter doctrine that police may search an automobile without a search warrant, so long as probable cause exists that the automobile contains incriminating

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Iowa Aug. 3, 2009), *report and recommendation adopted*, 654 F. Supp. 2d 945 (N.D. Iowa 2009). Yockey was arrested for driving with an expired license. *Id.* at *1. At the station house, he was searched and his cell phone was seized. *Id.* While trying to turn it off—an act the magistrate judge concluded was entirely reasonable—an officer accidently brought up a pornographic image of a child. *Id.* This officer reported this information to a second officer, who then accessed the phone's photo files and found more than a hundred other similar photos. *Id.* at *2. The court held that the second officer's search was unlawful: "[T]he cell phone was searched by Williams after the defendant had been arrested, delivered to the custody of the jail, and booked. No reasonable claim can be made that the search was contemporaneous with the arrest." *Id.* at *4. The court apparently did not consider—because perhaps the government failed to argue—that once the first officer saw the first image, Yockey was effectively under arrest for the more serious charge of possessing child pornography, and the second officer's search was incident to that arrest. *See also* United States v. Wall, No. 08-60016-CR, 2008 WL 5381412, at *3 (S.D. Fla. Dec. 22, 2008), *aff'd*, 343 Fed. Appx. 564 (11th Cir. 2009) (holding that a search of defendant's cell phone "cannot be justified as a search incident to lawful arrest [because]. . . Agent Mitchell accessed the text messages when Wall was being booked at the stationhouse. Thus, it was not contemporaneous with the arrest."); United States v. Lasalle, No. 07-000032 SOM, 2007 WL 1390820, at *7 (D. Haw. May 9, 2007). In *Lasalle*, after defendant's arrest for attempting to purchase drugs, his cell phones were given to an officer for safekeeping. That officer then participated in the execution of a search warrant in the same case; she did not get around to searching the phone until roughly three hours or so after the arrest. Relying on Ninth Circuit precedent concluding that *Chadwick* abrogated what the Circuit court categorized as "dictum" in *Edwards*, the court held that too much time had elapsed, and the cell phone search was no longer "incident" to the arrest. *Lasalle*, 2007 WL 1390820, at *7.

131. California's Supreme Court stressed this limitation on *Chadwick* in upholding a post-arrest search of a cell phone made roughly ninety minutes after the defendant was arrested on drug distribution charges and his phone was seized. People v. Diaz, 244 P.3d 501, 505-07 (Cal. 2011), *cert. denied*, 132 S. Ct. 94 (2011).

132. I acknowledge that the analogy between the automobile exception to the warrant requirement and a SPIA search of a cell phone has its flaws. But one of the enjoyable aspects of litigating or writing about Fourth Amendment issues is that you get to choose the analogies that support your position, and to disparage those on which the other side relies.

evidence.[133] One primary basis for the auto exception is that the inherent mobility of automobiles and other vehicles makes obtaining a warrant problematic.[134] But the automobile exception to the warrant requirement continues to apply even after the car has been seized and impounded: "[I]f an immediate search on the scene could be conducted, but not one at the station if the vehicle is impounded, police often simply would search the vehicle on the street—at no advantage to the occupants, yet possibly at certain cost to the police."[135] This reasoning is equally applicable to a SPIA conducted at the police station, rather than on the street.[136]

Clearly the "incident to arrest" period must end at some point, even as to items "closely associated with" the arrestee's person. But the "incident to arrest" time frame should be measured by the standard set out in *Edwards*:[137] So long as the police act with reasonable promptness (and what is reasonable must be measured by the surrounding circumstances),[138] a search should not be considered too tardy to be "incident," merely because an officer first took the defendant (and the cell phone) to another location closely connected to the arrest crime;[139] or first took the arrestee to a police station, and did not search the phone until he was in the process of interrogating the arrestee,[140] or booking the arrestee,[141] or until

133. *See, e.g.*, Carroll v. United States, 267 U.S. 132 (1925); Chambers v. Maroney, 399 U.S. 42 (1970); United States v. Ross, 456 U.S. 798 (1982); California v. Carney, 471 U.S. 386 (1985); California v. Acevedo, 500 U.S. 565, 573-75 (1991) (holding likewise regarding a container about which the police have probable cause to search when the container is found in an automobile).

134. *See, e.g.*, *Carney*, 471 U.S. at 392-93.

135. *Ross*, 456 U.S. at 807 n.9.

136. The second primary justification for the automobile exception to the warrant requirement is that people have lesser expectations of privacy in vehicles than they do in their homes or other fixed premises. *Carney*, 471 U.S. at 392-93. Similarly, once a person has been lawfully arrested, his expectation of privacy must yield to the police officer's right to conduct a full search of the arrestee, including his clothing and its contents. *See* discussion of *Robinson*, *supra* Part IV.A.1.

137. 415 U.S. 800 (1974).

138. In *Edwards*, the Court held that the ten-hour delay was reasonable because the alternative—to seize his clothing immediately, leaving him naked or nearly so in his cell—would have been unreasonable. *Id.* at 806.

139. United States v. Finley, 477 F.3d 250, 260 n.7 (1st Cir 2007). Police observed Finley drive Brown to a location where Brown sold methamphetamine to an informant. *Id.* at 253. The vehicle contained additional contraband, both Finley and Brown were arrested, and police seized Finley's cell phone. *Id.* at 254. The officers then drove Finley and Brown to Brown's house, which other officers were searching pursuant to a warrant. *Id.* While Finley was being detained outside Brown's residence, an officer examined his phone and found text messages relating to drug use and trafficking. *Id.* The court held that the search of the phone was incident to arrest, despite the passage of time between the arrest and the search. *Id.*

140. People v. Diaz, 244 P.3d 501 (Cal. 2011), *cert. denied*, 132 S. Ct. 94 (2011). Diaz drove his passenger to a location at which an informant was waiting to purchase

immediately after booking him;[142] nor, for that matter, even despite several hours passing by, if the officer was legitimately involved in other, more time-sensitive activities connected with the arrest.[143]

c. *Arizona v. Gant*

Some court decisions that reject applying the SPIA rule to cell phones find additional support in *Arizona v. Gant*,[144] in which the Supreme Court limited the circumstances under which the police could search an arrestee's automobile.[145] The Court held that such a search would be lawful only if the officers could "reasonably . . . believe[] either that [the defendant] could have accessed his car at the time of the search or that evidence of the offense for which he was arrested might have been found therein."[146] But while *Gant* "correctly balance[d] law enforcement interests . . . with an arrestee's

ecstasy; the sale took place in the back seat of Diaz's car. *Id.* at 502. Diaz was immediately arrested. *Id.* The search of his cell phone occurred in the station house ninety minutes later, while a detective was interrogating him. *Id.* at 502-03. The court held that, despite the delay, the search was properly incident to the arrest. *Id.* at 508.

141. *Cf.* United States v. Wall, No. 08-60016-CR, 2008 WL 5381412, at *3 (S.D. Fla. Dec. 22, 2008), *aff'd,* 343 Fed. Appx. 564 (11th Cir. 2009).

142. In general, as long as the administrative processes incident to the arrest and custody have not been completed, a search of effects seized from the defendant's person is still incident to the defendant's arrest. *Finley*, 477 F.3d at 260 n.7.

143. Recall that, on the related issue of how long an exigent circumstance can exist that justifies answering or searching a cell phone without first obtaining a search warrant, courts have reasonably concluded that an exigency period might plausibly last until the arrestee has been arraigned. *See supra* Part III.B.1.c.

144. 129 S. Ct. 1710 (2009). Decisions relying on *Gant* to hold cell phone SPIAs invalid include *United States v. Wurie*, No. 11-1792, 2013 WL 2129119, at *4-6, *8, *12 (1st Cir. May 17, 2013) and *Smallwood v. State*, 113 So. 3d 724, 734-737, 739 (Fla. 2013).

145. After Gant was arrested for driving with a suspended license, handcuffed, and locked in a patrol car, officers searched his car and found cocaine in a jacket pocket. 129 S. Ct. at 1714. The trial court upheld the search, relying on *New York v. Belton*, 453 U.S. 454 (1981), *abrogated by* Davis v. United States, 131 S. Ct. 2419 (2011), in which the Supreme Court appeared to hold that so long as a defendant was arrested while in his car, the police could on that basis alone search the passenger compartment and all containers found therein, incident to the arrest. *See Gant*, 129 S. Ct. 1715-16; *see also* Thornton v. United States, 541 U.S. 615 (2004) (holding, four years before *Gant*, that *Belton* also applied if the arrest was made shortly after the defendant had left his car). In *State v. Gant*, the Arizona Court of Appeals reversed, ruling that *Belton* did not support the trial judge's conclusions. 43 P.3d 188, 192 (Ariz. Ct. App. 2002). Subsequently, the state appealed.

146. *Gant*, 129 S. Ct. at 1719. Neither of these grounds existed in Gant: There was no realistic likelihood that he could have escaped from the police car and, while still handcuffed, evade or overpower the police and gain access to his car, and the arrest crime, driving with a suspended license, is not one for which physical evidence is likely to exist at all. The Court therefore affirmed the Arizona Supreme Court's suppression of the evidence. *Id.* at 1723-24.

limited privacy interest in his vehicle,"[147] nothing in that decision suggests any inclination to revisit the Court's earlier holding in *Robinson* involving searching the *person* (or immediate effects closely associated with the person), incident to arrest.[148] It is highly unlikely the Court in *Gant* intended to silently undo its leading decision on searches of the arrestee incident to arrest.[149]

Thus, *Gant* does not support the cell phone search cases that cite it, particularly given that the thrust of many of these decisions appears to be that cell phones are completely immune to incident-to-arrest searches.[150] As Part IV.C proposes, however, *Gant* does suggest a solution to the application of *Robinson* to SPIAs involving cell phones.

147. *Id.* at 1720.

148. The only reference to *Robinson* in *Gant* is this: "The [search incident to arrest] exception derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations." *Id.* at 1716 (citing United States v. Robinson, 414 U.S. 218, 230-34 (1973)). But in *Robinson*, the Court made clear that the validity of a search of a defendant incident to arrest does not depend on the likelihood that the search will produce a weapon or evidence. *See supra* Part IV.A.1.

149. *See, e.g.*, United States v. Rodriguez, 702 F.3d 206, 209-10 (5th Cir. 2012) (rejecting the proposition that *Gant* is applicable outside automobiles, and, in particular, that it would apply to the search of a cell phone seized from the arrestee and searched incident to arrest); United States v. Gordon, 895 F. Supp. 2d 1011, 1023 (D. Haw. 2012) (quoting United States v. Gomez, 807 F. Supp. 2d 1134, 1143 (S.D. Fla. 2011)); *Gomez*, 807 F. Supp. 2d at 1143 ("While *Gant* signaled a retraction from the ever-expanding line of *Belton* cases in the vehicle context, it is still well established that any objects found on an arrestee's person, on his clothing, [or] any area within his immediate control, may be searched by law enforcement, *with or without* any reason to suspect that the person is armed or carrying contraband."); People v. Taylor, 296 P.3d 317, 322 (Colo. App. 2012) (rejecting the argument that *Gant* in any way limits the holdings of *Robinson* and *Edwards*); State v. James, 288 P.3d 504, 513 (Kan. Ct. App. 2012) ("Although *Gant* addresses the issue of whether a motor vehicle outside an arrestee's immediate presence can be searched incident to a lawful arrest, we find nothing in the opinion that indicates the United States Supreme Court is backing away from its holding in *Robinson,* which allows law enforcement officers to look in containers found on a person incident to a lawful arrest.").

150. "This case requires us to decide whether the police, after seizing a cell phone from an individual's person as part of his lawful arrest, can search the phone's data without a warrant. We conclude that such a search exceeds the boundaries of the Fourth Amendment search-incident-to-arrest exception." United States v. Wurie, No. 11-1792, 2013 WL 2129119, at *1 (1st Cir. May 17, 2013); *see also* Smallwood v. State, 113 So. 3d 724, 735 (Fla. 2013) ("*Gant* demonstrates that while the search-incident-to-arrest warrant exception is still clearly valid, once an arrestee is physically separated from an item or thing, and thereby separated from any possible weapon or destructible evidence, the dual rationales for this search exception no longer apply.").

3. Cell Phones as Matrushka:[151] Many Containers, Many Nuances—*United States v. Flores-Lopez*

In *United States v. Flores-Lopez*,[152] the Seventh Circuit, per Judge Posner, took a nuanced approach to the question of cell phones in the context of SPIA, reasoning that a cell phone should not be regarded as a single container, but as several, and that different standards might reasonably apply,[153] depending upon the extent of the search or the "areas" within the phone that were searched. Judge Posner began by stressing the breadth and depth of information that a cell phone search might reveal, which distinguishes it from non-digital containers with physical contents.[154] Judge Posner nevertheless upheld a warrantless search of a phone seized from the defendant.[155]

In doing so, Judge Posner emphasized the extremely limited nature of the search in *Flores-Lopez*: The agents did no more than search the phone to determine its phone number.[156] "[T]hat bit of information," Judge Posner suggested, "might be so trivial that its seizure would not infringe the Fourth Amendment."[157] Expanding on this point, and citing lower court decisions somewhat limiting the

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151. The matrushka (or matryoshka) doll, "also known as Russian nesting/nested doll, [is] a set of wooden dolls of decreasing size placed one inside the other." *See generally Matryoshka Doll*, WIKIPEDIA.ORG, https://en.wikipedia.org/wiki/Matryoshka_doll (last visited Nov. 12, 2013).

152. 670 F.3d 803 (7th Cir. 2012).

153. *See id*. at 805.

154. *Id.* at 805-06. Indeed, Judge Posner concluded that a modern cell phone is a computer, and that the rules governing searches of computers should apply as well to cell phones. *Id.* at 804-05. As an astute example that reflects the growing capabilities and remarkable software applications available on all smart phones, Judge Posner cited an iPhone application called iCam which enables a user "to access your home computer's webcam so that you can survey the inside of your home while you're a thousand miles away." *Id.* at 806. Thus, "[a]t the touch of a button a cell phone search becomes a house search, and that is not a search of a container in any normal sense of that word, though a house contains data." *Id.* Judge Posner observed that although the capabilities of the phone in question are an important consideration, "[e]ven the dumbest of modern cell phones gives the user access to large stores of information." *Id.* As an example, Judge Posner described Walgreens' TracFone Prepaid Cell Phone, which then sold "for $14.99, include[d] a camera, MMS (multimedia messaging service) picture messaging for sending and receiving photos, video, etc., mobile web access, text messaging, voicemail, call waiting, a voice recorder, and a phonebook that can hold 1000 entries." *Id.*

155. *Id.* at 809-10.

156. *Id.* at 804, 806-07, 810. The government later used that information to subpoena the phone's call history from the phone company. *Id.* at 804.

157. *Id.* at 806-07. Judge Posner added that a cell phone's phone number generally "can be found without searching the phone's contents," and described how this can be done with an iPhone or a Blackberry. *Id.* at 807 (acknowledging that the process would be more difficult if the phone is password protected).

search-of-container-incident-to-arrest doctrine, he speculated that a properly nuanced container-search analogy might obviate the need for a special rule governing cell phone searches:

> It's not even clear that we need a rule of law specific to cell phones or other computers. If [(a)] police are entitled to open a pocket diary to copy the owner's address, they should be entitled to turn on a cell phone to learn its number. If [(b)] allowed to leaf through a pocket address book, as they are, they should be entitled to read the address book in a cell phone. If [(c)] forbidden to peruse love letters recognized as such found wedged between the pages of the address book, [(d)] they should be forbidden to read love letters in the files of a cell phone.[158]

Although Judge Posner's overall approach merits serious consideration, some of the examples he provides, and the sources he cites to substantiate them, do not measure up. Concerning the bracketed letters inserted into the aforementioned quotation:

(*a*) If the police seize a pocket diary from an arrestee, they are "entitled to open [it] to copy the owner's address."[159] Judge Posner cited no authority for this proposition, but clearly it is accurate.[160]

(*b*) The police are "allowed to leaf through [that] pocket address book."[161] Judge Posner cited a Seventh Circuit opinion to this effect,[162] and a number of courts have held likewise with regard to physical address books and the like;[163] courts have also applied the application of the address book analogy to the search of a cell phone's memory.[164]

(*c*) Judge Posner posited that the police are "forbidden to peruse love letters recognized as such found wedged between the pages of the address book."[165] Judge Posner cited no direct authority for this proposition. Earlier in the opinion, however, he asserted that in *United States v. Robinson*, "the Court did not reject the possibility of categorical limits to the rule laid down in it,"[166] which is true to the

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158. *Id.* (citation omitted).

159. *Id.*

160. *See generally* Andrea G. Nadel, *Lawfulness of Warrantless Search of Purse or Wallet of Person Arrested or Suspected of Crime*, 29 A.L.R.4TH 771 (1984).

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

162. *Id.* (citing United States v. Rodriguez, 995 F.2d 776, 778 (7th Cir. 1993)).

163. United States v. Holzman, 871 F.2d 1496, 1504-05 (9th Cir. 1989), *abrogated on other grounds by* Horton v. California, 496 U.S. 128, 141-42 (1990) (upholding the search of an address book seized incident to arrest); United States v. Vaneenwyk, 206 F. Supp. 2d 423, 426-27 (W.D.N.Y. 2002) (upholding the search and subsequent photocopying of a day planner found during a vehicle search made incident to arrest).

164. *Holzman*, 871 F.2d 1496, has been cited approvingly in upholding searches of pagers and cell phones. *See, e.g.*, United States v. Lynch, 908 F. Supp. 284, 288 (D.V.I. 1995) (upholding search of a pager to retrieve telephone numbers stored therein).

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

166. *Id.* at 805.

extent that in *Robinson* the Supreme Court did not discuss whether "categorical limits" might exist, other than stomach pumping.[167] Judge Posner suggested that if police officers seized a dealer's diary incident to arrest, "but a quick look reveals that it is a personal diary rather than a record of drug transactions, yet the officers keep on reading," a court may reasonably conclude that "acquiring information *known* to be unrelated to the crime of which the person being arrested is suspected is an intrusion beyond the scope of *Robinson*'s rule."[168] The difficulty with this reasoning is that even before the police looked inside the crumpled cigarette pack in Robinson's pocket, they *knew* it could not contain information relevant to the arrest crime—which was driving with a suspended permit; yet the Court upheld the search.[169] Nor does Judge Posner's diary example support his conclusion. Even if the first eight or ten (or however many) entries into an arrestee's diary were personal and not crime-related, that does not conclusively eliminate the possibility that it may contain later entries that include relevant evidence about the defendant's crimes.

(d) The police "should be forbidden to read love letters in the files of a cell phone."[170] To support this conclusion, Judge Posner cited a Seventh Circuit opinion, *United States v. Mann*,[171] and cases cited therein. *Mann* and the cases it cites each involve the permissible scope of a search of a computer pursuant to a search warrant, which to a significant measure turns on what the warrant authorized the police to search for[172]—a less than perfect analogy, but one worth

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167. "While through [sic], the search partook of none of the extreme or patently abusive characteristics which were held to violate the Due Process Clause of the Fourteenth Amendment in [Rochin v. California, 342 U.S. 165 (1952)]." United States v. Robinson, 414 U.S. 218, 236 (1973) (internal parallel citations omitted). *Rochin* is summed up in Justice Frankfurter's famous passage:

> This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner['s home], the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

Rochin, 342 U.S. at 209-10. *Rochin* was decided in 1952, nine years before the Court held in *Mapp v. Ohio*, 367 U.S. 643, 660 (1961), that the Fourth Amendment is applicable to the states, hence the Court's reliance solely on due process grounds.

168. *Flores-Lopez*, 670 F.3d at 805.

169. *Robinson*, 414 U.S. at 220-23, 236.

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

171. 592 F.3d 779 (7th Cir. 2010), *cert. denied*, 130 S. Ct. 3525 (2010).

172. Mann was arrested and charged with voyeurism for concealing a camera in a women's locker room. *Id.* at 780-81. Police obtained a warrant authorizing a search of Mann's computer for evidence of that crime. *Id.* That search revealed substantial quantities of child pornography, and Mann was ultimately prosecuted for that crime. *Id.* The Seventh Circuit held that of most of those images were discovered as part of a

considering. Judge Posner also drew an analogy to the requirement that wiretaps minimize the interception of communications not otherwise subject to interception.[173]

Judge Posner is correct in this regard: To treat a cell phone as a single container treats every part of the phone's memory as identical; it ignores the substantial difference between the kind of information contained in, say, the log of ingoing and outgoing calls—information that is otherwise available from the service provider by a mere subpoena—and the contents of text messages, which can be obtained from the service provider only with a search warrant based on probable cause.[174] There is no inherent reason to treat all the information a cell phone contains by an unnecessarily rigid all-or-nothing standard. The law should not have to choose between the extremes, either permitting the police to search the entire phone incident to arrest, or forbidding them from searching any of it incident to arrest. The former approach ignores the fundamental difference between a cell phone and a container with physical contents; the latter ignores the Supreme Court's endorsement of the search incident doctrine to enable the police "to discover evidence.[175]

Thus, Judge Posner's suggestion—to categorize some aspects of a phone's memory as within the search incident doctrine, while others are outside of it—has its attractions. Its disadvantage is that it would introduce a fairly complex set of distinctions into the law, in an area of the law where the Supreme Court has emphasized the utility of a bright line rule that police can be expected to learn and

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valid search for the locker room videos specified in the search warrant, and therefore were lawfully found, but further held that a few images on Mann's computer that had been downloaded from databases known to contain child pornography exceeded the scope of the warrant because there was no basis to believe that those files would contain evidence relating to the locker room camera. *Id.* at 784-85. Once the officer first discovered child pornography, he should have obtained a second warrant authorizing him to search for that as well as the locker room videos.

173. *Flores-Lopez*, 670 F.3d at 807 (citing 18 U.S.C. § 2518(5), which contains the Title III minimization requirement); Scott v. United States, 436 U.S. 128, 130–43 (1978) (containing the Supreme Court's analysis of the Title III requirement); United States v. Mansoori, 304 F.3d 635, 645-49 (7th Cir. 2002), *as amended on denial of reh'g*, United States v. Young, 2002 U.S. App. LEXIS 21622 (7th Cir. Oct. 16, 2002) (a leading Seventh Circuit case on the subject). Minimization in wiretapping and eavesdropping is covered exhaustively in 2 CLIFFORD S. FISHMAN & ANNE T. MCKENNA, WIRETAPPING AND EAVESDROPPING, §§ 8:101-8:107 (3d ed. 2007), which discusses what an intercept application and order should say about it, and in section 15:1 et seq. of the same, which discusses how law enforcement officials should comply with the requirement. *See also* 4 Clifford S. FISHMAN & ANNE T. MCKENNA, WIRETAPPING AND EAVESDROPPING, §§ 35:50-35:70 (3d ed. 2007) (containing guidelines as to how minimization issues should be litigated).

174. *See supra* Part IV.B.1.b.

175. United States v. Robinson, 414 U.S. 218, 235 (1973).

follow.[176] Accordingly, at least one federal circuit has explicitly rejected Judge Posner's approach:

> The Supreme Court has . . . rejected "inherently subjective and highly fact specific' rules that require "ad hoc determinations on the part of officers in the field and reviewing courts' in favor of clear ones that will be "readily understood by police officers.' . . . Thus, we find it necessary to craft a bright-line rule that applies to all warrantless cell phone searches, rather than resolving this case based solely on the particular circumstances of the search at issue.[177]

But the law should insist on a bright line only when that bright line is likely to produce results which, at least most of the time, strike a reasonable balance between the needs of effective law enforcement, and the protection of privacy—even the privacy of those who have been lawfully arrested. To regard a cell phone's memory as a single container, subject to an "all or nothing at all" application of the search incident rule, is likely to produce unreasonable results: it would either too often preclude a narrow search which under the circumstances would be reasonable, or it would too often permit a wholesale rummaging through extraneous but intimate details of the arrestee's life.

Accordingly, several courts have indicated a willingness to consider an approach similar to that urged by Judge Posner in *Flores-Lopez*, upholding a limited search of a cell phone under specific circumstances, while declining to endorse any broad, general principle.[178]

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176. *See supra* Part IV.B.1.c.

177. United States v. Wurie, No. 11-1792, 2013 WL 2129119, at *5 (1st Cir. May 17, 2013) (citations omitted) (quoting Thornton v. United States, 541 U.S. 615, 623 (2004)). The court in *Wurie* also cited *New York v. Belton*, in which the Supreme Court appeared to hold that so long as a defendant was arrested:

> A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be literally impossible of application by the officer in the field.

Belton, 453 U.S. 454, 458 (1981), *abrogated by* Davis v. United States, 131 S. Ct. 2419 (2011). Reliance on *Belton* and *Thornton*, however, is problematic, as those cases were effectively reversed by *Gant*. *See supra* Part IV.B.2.c.

178. United States v. Henry, No. 1:10-CR-521-TCB-AJB-02, 2013 WL 1397136, at *8-10 (N.D. Ga. Apr. 5, 2013). After arresting Henry on an outstanding arrest warrant for drug offenses, police seized his cell phone. An officer checked to confirm that this was in fact the phone for which investigators had obtained a pen register order, and then scrolled through the contacts list and checked for missed calls. The court held that doing so "does not offend the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement." For further discussion, see People v. Taylor, 296 P.3d 317, 320-24 (Colo. App. 2012). Taylor offered to find someone to sell crack cocaine to an undercover officer, then made a call on his cell phone. When a woman arrived,

she conferred with defendant, then sold the drugs. Police arrested them both, seized Taylor's phone, and confirmed that he had phoned the woman; apparently that was the extent to which his phone was searched. The court upheld the search on general search-incident-to-arrest principles, but added that under the "narrower view proposed by some courts that officers may not search all data contained in a cell phone, nevertheless the search of the call history of defendant's cell phone was lawful. Also relevant is *Hawkins v. State*. 723 S.E.2d 924, 925-26 (Ga. 2012). Ms. Hawkins exchanged a series of text messages with an undercover officer, agreed to meet with him to purchase drugs from him, then texted the officer from her car to say that she had arrived. After she was arrested, the officer took Hawkins' cell phone from her purse, searched it for the text messages he and Hawkins had exchanged, then downloaded and printed them. Affirming the lower court, Georgia's Supreme Court held that the searches of Hawkins' purse and cell phone both came within the scope of a lawful search of an auto incident to arrest. The fact that a cell phone can contain vast quantities of information did not protect it from traditional search incident jurisprudence:

> [W]e do not believe that the potential volume of information contained in a cell phone changes its character; it is an object that can store considerable evidence of the crime for which the suspect has been arrested, and that evidence may be transitory in nature [noting that information contained in a cell phone might be lost to investigators if not accessed quickly]. And, the mere fact that there is a potentially high volume of information stored in the cell phone should not control the question of whether that electronic container may be searched.

Id. On the other hand, the court cautioned that the search incident doctrine did not empower the police to conduct a general search of the entire contents of the phone's memory:

> [T]he fact that a large amount of information may be in a cell phone has substantial import as to the scope of the permitted search; it requires . . . that "we must apply the principles set forth in traditional 'container' cases to searches for electronic data with great care and caution." . . . [T]he scope of a search of a cell phone incident to arrest . . . "must be limited as much as is reasonably practicable by the object of the search." That will usually mean that an officer may not conduct a "fishing expedition" and sift through all of the data stored in the cell phone. Thus, when 'the object of the search is to discover certain text messages, for instance, there is no need for the officer to sift through photos or audio files or Internet browsing history data stored [in] the phone." Accordingly, reviewing the reasonable scope of the search will largely be a fact-specific inquiry.

Id. (quoting, approvingly, the intermediate appellate court's decision in the case, Hawkins v. State, 704 S.E.2d 886, 892-93 (Ga. Ct. App. 2010)).

In *Kirk v. State*, the court held under the state's equivalent of the Fourth Amendment that an officer could not search an arrestee's text messages when there was no suggestion that the phone might contain evidence of the arrest crime. 974 N.E.2d 1059, 1070-71 (Ind. Ct. App. 2012). In *Commonwealth v. Phifer*, two officers observed Phifer, whom they knew had outstanding warrants on drug charges, use his cell phone. 979 N.E.2d 210, 212 (Mass. 2012). A few minutes later, Phifer got into the car of someone who the officers knew was a drug user. The officers witnessed what they believed was a sale by Phifer to the driver. After Phifer exited the car, they arrested him on the outstanding warrants, then approached the car and seized cocaine from it. The driver gave the officers his cell phone number. After transporting defendant to the police station, an officer accessed the recent call log display on defendant's cell phone, confirming that defendant had received several recent calls from the driver. *Id.* The court held that this was a valid search of the phone incident to arrest. *Id.* at 215-16.

But while Judge Posner's suggestion that some contents of a cell phone merit no Fourth Amendment protection is useful in the quest for a middle ground between the all-or-nothing extremes regarding application of the SPIA doctrine to cell phones, it leaves two significant questions unanswered. First, what contents (if any) aside from the cell phone's own number, would fall into the unprotected area? Second, what portions of a cell phone's memory that are presumably protected by the Fourth Amendment would actually be protected?[179] What standard should be used in applying the SPIA doctrine to searches of those portions of the phone's memory? No case has yet suggested a unified basis on which courts can assess the reasonableness of any given search of a cell phone incident to arrest. Boldly going where (so far as I know) no one has gone before,[180] this article now offers such a basis.

C. The Reason to Believe Standard

In *Arizona v. Gant*, the Supreme Court held that when police arrest the occupant (or a recent occupant) of a car, they may search the passenger compartment of automobile incident to that arrest "when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'[181] It is appropriate to define the

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However, the court also stressed that it restricted its ruling to the facts:

> [O]n the particular facts of this case, where the defendant agrees his arrest was lawful and does not appear to challenge the seizure of his cellular telephone incident to that arrest, and where the officer performed only a limited search of the cellular telephone's recent call history for evidence directly relating to the crime for which the defendant was arrested, the defendant's motion to suppress properly was denied. In reaching this decision, we leave open for another day questions concerning whether, when a cellular telephone is validly seized incident to arrest, it may always, or at least generally, be searched without a warrant, and if so, the permissible extent of such a search.

Id. at 211-12. The court held likewise in *Commonwealth v. Berry*, 979 N.E.2d 218 (Mass. 2012), which was argued, and later decided, on the same day as *Phifer*.

179. Memory may include, for example, history of calls made and received, text messages, Internet access, and photographs.

180. *Cf. Where No Man Has Gone Before*, WIKIPEDIA.ORG, https://en.wikipedia.org/wiki/Where_no_man_has_gone_before (last visited Nov. 14, 2013). The opening narrative of most episodes of the original Star Trek series, intoned by William Shatner: "Space: the final frontier. These are the voyages of the [S]tarship Enterprise. Its five-year mission: to explore strange new worlds, to seek out new life and new civilizations, to boldly go where no man has gone before." *Id.* (emphasis omitted). For a discussion of this narrative and its evolution, see *id.* Perhaps it would have been classier if, instead of a pop-culture reference, I'd gone highbrow and said I was "rushing in where angels fear to tread." *Cf.* ALEXANDER POPE, AN ESSAY IN CRITICISM pt. III l. 66 (1711), *available at* poetry.eserver.org/essay-on-criticism.html ("For Fools rush in where Angels fear to tread.").

181. Arizona v. Gant, 129 S. Ct. 1710, 1719 (2009) (quoting Thornton v. United States, 541 U.S. 615, 632 (2004) (Scalia, J., concurring)). As to whether that search

limits of the SPIA doctrine to cell phones by applying that same standard: permit the search of any given portion of the phone's memory, incident to arrest, so long as it is reasonable to believe that that portion of its memory contains evidence connected with the crime for which the arrest was made.

1. Defining the Standard

The reasonable to believe standard is not the clearest and brightest of lines, because there is as yet little case law as to what reason to believe means. At least one court has held that "reasonable to believe" simply means probable cause.[182] But it is quite clear that the Supreme Court in *Gant* did not intend a probable cause standard, and the vast majority of courts have rejected this interpretation, correctly concluding that reasonable to believe means something less than probable cause.[183]

The better approach argues that reasonable to believe is the same as the reasonable, "articulable suspicion" required to justify a temporary detention under *Terry v. Ohio.*[184] One Supreme Court justice has said as much,[185] and several courts have followed this approach.[186] The Supreme Court has already applied the reasonable suspicion standard in a variety of contexts unrelated to the stop-and-

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should be restricted to the passenger compartment or should also include the trunk, see Myron Moskowitz, *The Road to Reason:* Arizona v. Gant *and the Search Incident to Arrest Doctrine*, 79 MISS. L.J. 181, 194-96 (2009).

182. United States v. Grote, 629 F. Supp. 2d 1201, 1203, 1205 (E.D. Wash. 2009) (holding that information providing less than probable cause could not justify a search).

183. *See infra* notes 175, 177-78, 181, 186.

184. Terry v. Ohio, 392 U.S. 1, 32 (1968) (Harlan, J., concurring). In *Terry* and its progeny, the Supreme Court held that a police officer may temporarily detain a person if the officer has a reasonable suspicion that the person is committing, has committed, or is about to commit a crime, and may frisk that person if the officer has reasonable suspicion that he or she is armed. *See, e.g.*, United States v. Sokolow, 490 U.S. 1, 7 (1989) (holding that "the police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity may be afoot, even if the officer lacks probable cause"); Arizona v. Johnson, 129 S. Ct. 781, 784, 788 (2009) (holding that frisking of a car passenger is permissible if reasonable suspicion exists that the passenger is armed and dangerous).

185. Justice Alito, in dissenting from the denial of certiorari in *Megginson v. United States*, referred to "the reasonable suspicion requirement in *Gant*." 129 S. Ct. 1982 (2009) (Alito, J., dissenting).

186. *See* United States v. Vinton, 594 F.3d 14, 25 (D.C. Cir. 2010) ("[Gant's] 'reasonable to believe' standard probably is akin to the 'reasonable suspicion' standard required to justify a *Terry* search."); People v. McCarty, 229 P.3d 1041, 1046 (Colo. 2010); ("[B]y using language like 'reason to believe' . . . the Supreme Court intended a degree of articulable suspicion . . . . "); United States v. Taylor, 49 A.3d 818, 824 (D.C. Cir. 2012); State v. Price, 986 N.E.2d 553, 562 (Ohio Ct. App. 2013) ("'[R]eason[] to believe' . . . appears closer to 'reasonable suspicion' than to probable cause . . . .").

frisk concept from which it arose.[187]

In any event, the Court has already given some guidance, having held that reason to believe clearly exists in one context, and clearly does not exist in another.[188] When a defendant is arrested in, or immediately after exiting, his car, and the arrest is for possession of narcotics seized at the time of the arrest, the Supreme Court has held that the basis to conduct a narcotics search of the car is clearly established.[189] Other courts have held similarly with regard to arrests for possession of other forms of contraband,[190] which seems

187. *See, e.g.*, Hudson v. Michigan, 547 U.S. 586, 590 (2006) (holding that to lawfully execute a search warrant without first knocking and announcing their identity and purpose, police must have a reasonable suspicion that one of the grounds justifying no-knock execution exists, reasoning that the "reasonable suspicion" standard is not a high one); United States. v. Arvizu, 534 U.S. 266, 277 (2002) (reiterating the rule that a reasonable suspicion that a motorist is committing a crime or violating a traffic ordinance justifies a stop of the car); United States v. Knights, 534 U.S. 112, 121 (2001) (holding that a probation officer or police officer may search a probationer's house, provided a reasonable suspicion exists that the probationer is violating the law or a condition of probation); New Jersey v. T.L.O., 469 U.S. 325, 332-33 (1985) (holding that a public school official may search a student's purse on reasonable suspicion that the purse holds evidence that the child possesses cigarettes in violation of school rule).

188. *See* Arizona v. Gant, 129 S. Ct. 1710, 1722-23 (2009).

189. In "*Belton* and *Thornton,* the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein." *Id.* at 1719. In *Belton* and *Thornton*, the defendants were arrested for possession of drugs while they were in, or immediately after exiting, their cars. Thornton v. United States, 541 U.S. 615, 618 (2004); New York v. Belton, 453 U.S. 454, 455-56 (1981), *abrogated by* Davis v. United States, 131 S. Ct. 2419 (2011). Since *Gant*, lower courts have addressed this situation. Consider *United States v. Page*, where police arrested Page for driving with a suspended license. 679 F. Supp. 2d 648, 650 (E.D. Va. 2009). A search incident to arrest produced a small quantity of marijuana in his shirt pocket. *Id.* The court held this established reason to believe (a standard, the court held, which was less demanding than probable cause) that additional marijuana might be in the car; hence, a seizure of additional marijuana in the passenger compartment was lawful. *Id.* at 654. Conversely, the court in *McCarty* held that the evidence was insufficient for the search. 229 P.3d at 1042. In *McCarty*, McCarty was stopped for a traffic infraction immediately after leaving an import store that police suspected included controlled substances among its imports; when searched, he possessed a recently purchased and still unwrapped and unused "pot pipe." *Id.* Police searched the car and found drugs, which McCarty moved to suppress. *Id.* at 1042-43. The court concluded that "reasonable to believe" was akin to a standard required to justify temporary detention, i.e., the equivalent of a reasonable suspicion. *Id.* at 1046. Applying that definition, the court held that although this sufficed "to justify an arrest for possession of drug paraphernalia, [it] is nevertheless insufficient to provide reasonable, articulable suspicion that additional evidence of that offense might be found in the arrestee's vehicle." *Id.* I believe the court articulated the correct standard, but reached the wrong result.

190. In *United States v. Casteel*, an undercover federal agent sold two firearms to Casteel, a convicted felon, who put the weapons in the back seat of his car and drove off. 717 F.3d 635, 638 (8th Cir. 2013). He was apprehended. *Id.* After agents seized the guns from the car, they continued to search it, and discovered property that had been

appropriate—so long as the facts plausibly support that conclusion.[191]

In *Gant,* the Supreme Court held that if the arrest is for driving with a suspended license, the arrest does not justify a search of the auto.[192] This rule should apply to most driving-related arrests,[193] but not necessarily all.[194] The issue has arisen with some frequency in cases involving an arrest for driving under the influence (DUI), or the like. Several courts have held that reason to believe exists whenever the crime, by its nature, might yield physical evidence,[195] and that DUI is such a crime, because it is reasonable to believe that an open

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stolen in a home burglary earlier that morning. *Id.* The Eighth Circuit concluded that the agents had "reason to believe" they might find other evidence connected with the weapons, such as ammunition, printouts Casteel might have made of this internet communications about the purchases, a map to the meeting location, and so on. *Id.* at 646. Thus, the search that revealed the stolen property was permissible under *Gant*. *Id.* at 646. Similarly, see *United States v. Allen*, 713 F.3d 382, 384-85 (8th Cir. 2013), where shortly after three of his associates were arrested for attempting to cash counterfeit or forged checks, police saw Allen throw away a bag in a motel parking lot which, when retrieved, contained torn-up counterfeit checks. After throwing away the bag, Allen checked out from the motel and placed all of his luggage in his car. *Id.* The court held this established reason to believe that evidence relating to the checks (such as equipment to print such checks) would be found in the car. *Id.* at 386-87. In *People v. Osborne*, police came upon defendant apparently tampering with a car, handcuffed him, seized an unlawfully possessed handgun from him, and searched the car, discovering drugs as well as proof that the car belonged to defendant. 96 Cal. Rptr. 3d 696, 698 (Cal. Ct. App. 2009). The court found that the handgun established reason to believe—a standard less than probable cause—that other evidence connected with possession of a weapon crime would be in the car. *Id.* at 705.

191. Suppose, for example, on March 1, *X* sold methamphetamine to an undercover officer. The sale took place in a room behind a barbershop. On May 1, police, seeing *X* driving his car, pull him over and arrest him for the March 1 sale. When searched, *X* possesses no contraband of any kind. It is difficult to see how the officer could claim any valid "reason to believe" that the car contains evidence relating to the methamphetamine sale of March 1.

192. *Gant*, 129 S. Ct. at 1722-24.

193. "In many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence." *Id.* at 1719 (citing Knowles v. Iowa*,* 525 U.S. 113, 118 (1998), a case involving speeding, and Atwater v. Lago Vista*,* 532 U.S. 318, 324 (2001), in which the driver was arrested for failure to wear a seatbelt, driving without a license, and failure to provide proof of insurance).

194. Sometimes the surrounding circumstances might justify a search of a car, or a cell phone found in a car, even following an arrest for a traffic offense. See the discussion of *United States v. Davis* in Part III.B.1.b, *supra.* And, of course, a valid basis may exist to search the car independent of the arrest. *See, e.g.*, United States v. Forney, No. 3:12-cr-00381-FDW-DCK, 2013 WL 2317700, at *11 (W.D.N.C. 2013) (holding that although the driver's arrest for driving with a suspended license did not justify a search, the search was justified by the passenger's motions which gave the officer a basis to suspect that the passenger was hiding something—perhaps a weapon under the front seat).

195. *See, e.g.*, Brown v. State, 24 So. 3d 671, 677-78 (Fla. Dist. Ct. App. 2009); State v. Cantrell, 233 P.3d 178, 186 (Idaho Ct. App. 2010); State v. Ewertz, 2013 WL 2450164, at *4 (Kan. Ct. App. 2013).

container of alcohol might be in the car.[196] But other courts have rejected this approach in connection with DUI, holding that although the [r]easonable belief standard requires less than probable cause and is established by "looking at common sense factors and evaluating the totality of the circumstances," it requires some factually specific basis: The mere fact that a motorist was driving under the influence does not suffice, despite the officer's testimony that such searches quite often reveal open containers of alcohol.[197]

Other judicial attempts to define and apply the reasonable to believe standard in auto search cases have emerged in the case law.[198]

2. Application to Cell Phones

The situation arises often where someone has been arrested for possession or sale of a controlled substance or an attempt to commit such a crime. If specific evidence exists that the arrestee used his or her cell phone to facilitate the crime, this should clearly satisfy the reasonable to believe standard.[199] This would justify searching the

196. Brown v. State, 24 So. 3d 671 (Fla. Dist. Ct. App. 2009); State v. Cantrell, 233 P.3d 178 (Idaho Ct. App. 2010).

197. United States v. Reagan, 713 F. Supp. 2d 724, 728, 733-34 (E.D. Tenn. 2010) (holding that a search of the car, which produced an opened container of alcohol and a gun, was unlawful); United States v. Taylor, 49 A.3d 818, 826-28 (D.C. Cir. 2012) (concluding, after an extensive review of the case law, that in most cases upholding a *Gant* search, the officer had evidence in addition to the driver's inebriation to support the inference that he would find evidence in the car relating to drunk driving).

198. In *Davis v. United States*, after arresting the passenger of a car for giving a false name, the officer searched the car and found a pistol in Davis' jacket pocket. 131 S. Ct. 2419, 2425 (2011). Davis, a convicted felon, was charged with possession. *Id.* at 2425-26. The Court took it as given that "the search turned out to be unconstitutional under *Gant*. *Id.* at 2429. It nevertheless upheld the denial of suppression, reasoning that since the search occurred two years before *Gant* was decided and the officer acted in good-faith reliance on the then widely-held understanding that such a search was lawful under *Belton*, no useful deterrent purpose would be served by suppressing the gun. *Id.* at 2428-29. Where police had probable cause to believe that the occupants of a car had committed a bank robbery only a short time before they were apprehended in a car, there was reason to believe that evidence relating to the robbery would be found in the car. United States v. Smith, 697 F.3d 625, 630-31 (7th Cir. 2012). In *State v. Lefler*, Lefler, a suspect in several recent burglaries, was arrested for drunk driving. 827 N.W.2d 650, 651-52 (Wis. Ct. App. 2013). The officer noticed several tools in the car. *Id.* at 651. He knew that Lefler did not have a job that would require use of such tools, which led him to believe Lefler had recently committed a burglary, or was about to commit one. *Id.* at 652. He searched the trunk and found stolen property. *Id.* The court concluded that the search was within the parameters permitted by *Gant*. *Id.* at 654. The result seems questionable, unless the officer's suspicions about Lefler and the tools in the passenger compartment established probable cause to arrest on burglary-related charges.

199. *See, e.g.*, Hawkins v. State, 704 S.E.2d 886, 888-89, 892 (Ga. Ct. App. 2010) (holding that, even under the most restrictive definition of reasonable to believe, that standard was satisfied where a police officer obtained a drug supplier's cell phone and,

phone's memory for messages sent or received immediately prior to the arrest,[200] but, at least under Judge Posner's approach in *Flores-Lopez*,[201] it would not justify searching the phone's entire memory incident to arrest. If the arrest came several hours or days after the crime[202] and specific evidence suggested that the defendant used his or her cell phone to set up that crime, a search of the phone's messages sent and received at appropriate times before and after the crime should also be within the scope of a SPIA, but a search of such messages in the days or weeks after that sale would not be.[203] If this limited cell phone search in fact establishes the phone's use in connection with the drug transaction, that information, together with whatever else the police know about the phone's user, likely will establish the probable cause needed to obtain a warrant authorizing a more detailed, less restricted search of the phone.

Application of the *Gant* "reason to believe" test is less clear when the purchaser is not someone cooperating to the police. Suppose, for example, the police arrest someone after seeing him sell a controlled substance; or arrest him for possession of a quantity of drugs suggestive of dealing, rather than personal use. The SPIA produces a cell phone.[204] The question arises: is it reasonable to believe that the

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after an exchange of text messages with an as-yet-unidentified customer, arranged a meet to sell drugs to the customer, who turned out to be the defendant Hawkins). In *United States v. Gomez*, knowing that cocaine was in a package, the police watched as Gomez retrieved it, hoping to follow him wherever he would take it. 807 F.Supp.2d 1134, 1138 (S.D. Fla. 2011). He apparently spotted the surveillance, however, and police saw him use his cell phone as he drove evasively. *Id.* The court upheld the search of the call log history on the ground that the phone was within the defendant's immediate reach when he was arrested, and was therefore within the scope of a traditional search of the person incident to arrest. *Id.* at 1143-45 (alternately, the court also held that the officers had probable cause to search the phone log).

200. Such was the case in *Hawkins*, 704 S.E.2d at 892.

201. United States v. Flores-Lopez, 670 F.3d 803 (7th Cir. 2012); *see supra* Part IV.B.3.

202. It is of course perfectly permissible, and often advisable, for investigators to postpone an arrest for hours, days or weeks after acquiring probable cause, to avoid premature termination of an investigation. Hoffa v. United States, 385 U.S. 293, 310 (1966) ("There is no constitutional right to be arrested . . . . Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause.").

203. For example, if the defendant is arrested on June 20 for a sale that took place on June 13 at 3 p.m.—a sale set up by an exchange of text messages or phone calls at specific times on June 11 and 12—police should be entitled to search the phone's memory, incident to arrest, for proof that calls or relevant text messages were sent or received on those dates and at those times. However, if I was a prosecutor advising police, I would urge them to get a warrant whenever probable cause existed to search a part of an arrestee's cell phone's memory: While it would be interesting to try to establish new law governing SPIAs, I would rather have the comfort of knowing a valid search warrant makes the suppression motion a slam dunk.

204. A variation on this theme: Police arrest a defendant for an unrelated crime, but

defendant's cell phone contains evidence of drug offenses based solely on the fact that a cell phone is now routinely used by drug dealers as a tool of the trade? Law enforcement officials from around the country who regularly investigate drug crimes tell me that it is not only reasonable to believe that any given drug dealer uses his or her cell phone to negotiate and arrange transactions, it is a virtual certainty.[205] Whether an officer's testimony to this effect at a suppression hearing would suffice to satisfy the reasonable to believe standard has not yet been addressed in the case law; and even if this does satisfy the standard, that still leaves open the permissible scope of the search of the phone incident to arrest.

Another pattern, though not as frequent, also emerges in the case law and news media: When defendants are arrested for a robbery or other crime of violence, it is not uncommon for the police to find photographs on an arrestee's cell phone portraying the defendants brandishing the same kinds of weapons as the robbers used. Does this establish reason to believe that any robber's cell phone may contain such photographs?

Although applying the reasonable suspicion test to cell phone searches incident to arrest will not provide a quick and easy solution to every case that will arise, promulgation of such a test would serve at least two useful purposes. First, doing so respects and effectuates the Supreme Court's unequivocal pronouncement in *Robinson* that the search-of-the-person-incident-to-arrest doctrine is intended to empower police to search for incriminating evidence,[206] but it does not automatically empower the police to examine every nook and cranny of the phone's memory regardless of the arrest crime or underlying circumstances. It recognizes an arrestee's continued legitimate privacy interest in his cell phone's contents by establishing reasonable limits as to when the police may search an arrestee's cell phone incident to that arrest, and the extent to which they may do so. Second, reasonable suspicion is an already-existing Fourth Amendment standard, with which police officers and courts are familiar. Third, the Supreme Court in *Gant* has already applied the reason to believe-reasonable suspicion standard to one category

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find dealer-quantity controlled substances, and a cell phone, during a search incident to arrest.

205. For many years I have made presentations at the annual conference of the National Technical Investigators Association (NATIA) and to some of its regional chapters, entitled *Search, Seizure and Technology*, in which I review the application of the Fourth Amendment and federal legislation to surveillance technology ranging from a flashlight to the most sophisticated equipment available to law enforcement. I get a great deal of feedback from the federal, state, and local officers who attend these conferences. For more information about NATIA, visit its home page, http://www.natia.org/i4a/pages/index.cfm?pageid=1.

206. *See supra* Part IV.A.1.

of searches-incident-to-arrest (involving automobiles). That does not guarantee that the Court will ultimately endorse its application to cell phone searches—there are obvious differences between searches of automobiles and searches of cell phones—but it probably increases the odds some.

V. CONCLUSION

The Supreme Court has strongly indicated that some aspects of its Fourth Amendment jurisprudence need to be rethought in light of technological advances in surveillance and information storage technology. Lower courts should keep this in mind in applying existing Supreme Court case law to searches of an arrestee's cell phones, which typically contain quantities of personal data far beyond anything that the Supreme Court could have imagined decades earlier when it promulgated the rules governing various types of searches.

Application of the exigent circumstances doctrine to the search of an arrestee's cell phone presents certain challenges. Fortunately, the existing rules governing exigent searches should suffice to guide courts (and police officers) in the right direction.

Applying the SPIA doctrine to cell phones, by contrast, presents much greater challenges. Unfortunately, a number of courts have concluded that the police should never be permitted to search an arrestee's cell phone seized incident to arrest unless they first obtain a search warrant based on probable cause, an approach which abrogates the SPIA doctrine altogether. Others pretend that the Fourth Amendment cannot distinguish between searching, say, a cigarette pack or wallet, on one hand, and a cell phone, on the other. The proper solution is to reject both of these extremes in favor of a more nuanced approach, which recognizes that although some aspects of a cell phone's memory may deserve little or no Fourth Amendment protection. Others, such as phone call logs, text messages, and photographs, clearly do. As to the latter, a police officer should be permitted to search an arrestee's cell phone incident to arrest, when and to the extent that the officer has "reason to believe," i.e., a reasonable suspicion that a particular portion of the phone's memory contains evidence relating to the arrest crime. Such an approach strikes the proper balance between existing search and seizure doctrine, and the amount of information the typical cell phone contains; and therefore strikes the proper balance between giving the police reasonable leeway to investigate crime, and the protection of privacy.