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> *What we do know is that the Framers were men who focused on the wrongs of that day but who intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth.*[1]

I. INTRODUCTION

Cell phones today boast features from Internet access and e-mail to live video streaming from cell phone to cell phone.[2] Cell phones have even replaced trips to the bank, allowing cellular users to deposit checks electronically simply by scanning the check with the phone's built-in camera.[3] Few would dispute that cell phones today have the capacity to store incredible amounts of personal information, and often do.[4] Thus, warrantless searches of cell phones present unique privacy concerns not associated with other personal effects that may be lawfully searched under exceptions to the Warrant Clause of the Fourth Amendment of the U.S. Constitution.[5] While the U.S. Supreme Court has yet to address the specific issue, lower courts have split on whether exceptions to the Fourth Amendment, developed years before the cell phone was invented, apply to warrantless searches of cell phones.[6]

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1. United States v. Chadwick, 433 U.S. 1, 9 (1977).

2. *See HTC Evo™ 4G at Sprint*, HTC, http://www.htc.com/us/products/evo-sprint/ (last visited Jan. 29, 2012); *iPhone Facetime*, Apple, http://www.apple.com/iphone/features/facetime.html (last visited Jan. 29, 2012).

3. Sandra Block, *No Bank? No Problem. Phone Apps Let You Deposit Checks*, USA Today (July 14, 2010, 5:51 PM), http://www.usatoday.com/money/industries/banking/2010-07-13-mobile-deposit_N.htm.

4. *See* United States v. Park, No. CR 05-375 SI, 2007 U.S. Dist. LEXIS 40596, at *2 (N.D. Cal. May 23, 2007).

5. *See* State v. Smith, 920 N.E.2d 949, 955 (Ohio 2009) ("Although cell phones cannot be equated with laptop computers, their ability to store large amounts of private data gives their users a reasonable and justifiable expectation of a higher level of privacy in the information they contain.").

6. *Compare* United States v. Murphy, 552 F.3d 405 (4th Cir. 2009) (upholding warrantless cell phone search as lawful under the search incident to arrest exception to the Fourth Amendment Warrant Clause), United States v. Salgado, No. 1:09-CR-454-CAP-ECS, 2010 U.S. Dist. LEXIS 77266 (N.D. Ga. June 15, 2010) (upholding warrantless searches of a cell phone under the exigent circumstances exceptions to the Warrant Clause of the Fourth Amendment), United States v. Meador, No. 1:06 CR 134 CDP DDN, 2008 U.S. Dist. LEXIS 92728 (E.D. Mo. Jan. 7, 2008) (upholding warrantless cell phone search as lawful under the automobile exception to the Fourth Amendment Warrant Clause), United States v. Suarez-Blanca, No. 1:07-CR-0023-MHS/AJB, 2008 U.S. Dist. LEXIS 111623 (N.D. Ga. Jan. 22, 2008) (upholding warrantless cell phone search as lawful under the search incident to arrest exception to the Fourth Amendment Warrant Clause), United States v. Zamora, No. 1:05-CR-250-WSD, 2005 U.S. Dist. LEXIS 40775 (N.D. Ga. Dec. 7, 2005) (upholding warrantless cell phone search as lawful under the search incident to arrest and exigent circumstances exception to the Fourth Amendment Warrant Clause), *and* United States v. Parada, 289 F. Supp. 2d 1291 (D. Kan. 2003), *aff'd in part, remanded in part sub nom.* United States v. McNeill, 136 F. App'x 153 (10th Cir. 2005) (upholding warrantless cell phone search as lawful under the exigent circumstances exception to the Fourth Amendment Warrant Clause), *with Smith*, 920 N.E.2d 949 (refusing to uphold a warrantless search of a cell phones under any of the exceptions to the Warrant Clause of the Fourth Amendment because cell phones are not closed containers as they cannot hold physical objects within them and warrantless

This note argues that current warrantless cell phone search jurisprudence has become far removed from the liberties that the drafters of the Fourth Amendment sought to protect, namely freedom from warrantless searches.[7] The drafters sought to protect individuals from warrantless searches because "the Framers had the struggle for liberty and history of abuse fresh in the[ir] memories when they adopted the Fourth Amendment and intended to prevent these types of abuses from reoccurring."[8]

Today, cell phones, especially smartphones, are among the most private effects a person owns, storing significant amounts of detailed personal information that would not otherwise be easily accessible to an officer executing a search of an individual. When the drafters convened to author the Fourth Amendment, however, they undoubtedly had not envisioned the invention of cellular telephones, yet they could not have intended that individuals would be denied the protection of the Fourth Amendment with respect to searches of such personal effects, capable of storing an incredible wealth of information about an individual. Still, virtually every court that has faced the issue has upheld as constitutional a warrantless cell phone search.[9] This is problematic because often implicit in upholding a warrantless cell phone search is a court's determination that a cell phone is a closed container akin to an address book or pager. However, cell phones are exceedingly more complex than these items which merely contain phone numbers. Cell phones have the capacity to store a wealth of private information such as bank account information, recently visited locations, photographs, and Internet browsing history—to name a select few. As a result, the reality of warrantless cell phone searches today is that individuals are denied Fourth Amendment protection from searches of their cell phones by certain exceptions

searches of cell phones raise serious privacy concerns that outweigh the rationales of the exceptions to the Fourth Amendment Warrant Clause), *and Park*, 2007 U.S. Dist. LEXIS 40596 (refusing to uphold a warrantless search of a cell phone under any of the exceptions to the Warrant Clause of the Fourth Amendment based on a finding that cell phones are not closed containers as they cannot hold physical objects within them and warrantless searches of cell phones raise serious privacy concerns that outweigh the rationales of the exceptions to the Fourth Amendment Warrant Clause).

7. "The Fourth Amendment was drafted amidst concerns 'almost exclusively about the need to ban house searches under general warrants.' The idea of a warrantless search was foreign to the Framers; indeed, they 'expected that warrants would be used.'" Rachael A. Lynch, Note, *Two Wrongs Don't Make a Fourth Amendment Right:* Samson *Court Errs in Choosing Proper Analytical Framework, Errs in Result, Parolees Lose Fourth Amendment Protection* 11, 41 Akron L. Rev. 651, 693 n.14 (2008) (citation omitted) (quoting Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 552 (1999)).

8. *Id*. at 654 (alteration in original) (internal quotation marks omitted).

9. *See, e.g.*, *Murphy*, 552 F.3d 405 (upholding warrantless cell phone search as lawful under the search incident to arrest exception to the Fourth Amendment Warrant Clause); *Salgado*, 2010 U.S. Dist. LEXIS 77266 (upholding warrantless searches of a cell phone under the exigent circumstances exception to the Warrant Clause of the Fourth Amendment); *Suarez-Blanca*, 2008 U.S. Dist. LEXIS 111623 (upholding warrantless cell phone search as lawful under the search incident to arrest exception to the Fourth Amendment Warrant Clause); *Meador*, 2008 U.S. Dist. LEXIS 92728 (upholding warrantless cell phone search as lawful under the automobile exception to the Fourth Amendment Warrant Clause); *Zamora*, 2005 U.S. Dist. LEXIS 40775 (upholding warrantless cell phone search as lawful under the search incident to arrest and exigent circumstances exception to the Fourth Amendment Warrant Clause); *Parada*, 289 F. Supp. 2d 1291 (upholding warrantless cell phone search as lawful under the exigent circumstances exception to the Fourth Amendment Warrant Clause).

carved out of the Fourth Amendment, specifically, the search incident to arrest, automobile, and exigent circumstances exceptions.

This note also proposes an analytical framework—rooted in two of the only cases to suppress warrantless searches of a cell phone—that courts should use in applying the Fourth Amendment to warrantless cell phone searches. The framework begins with the presumption that the particular warrantless cell phone search was unlawful. This presumption may only be overcome through testimony of the officer who searched the cell phone without a warrant. The officer's testimony must contain specific and articulable facts, known to the officer at the time of the search, demonstrating that the specific cell phone was at risk of remote deletion of potential evidence. Additionally, the officer must further testify that there were no preventative measures available to him at the time of the search which could secure any evidence potentially stored on the cell phone. This framework will adhere to the principles of the Fourth Amendment by protecting the significant privacy concerns unique to modern-day cell phones—concerns that will only increase as society progresses toward further technological advances.

Part II.A of this note describes the invention and development of the cellular telephone and details the vast amount of private information that can be stored on a cell phone. Part II.B examines the evolution of Fourth Amendment jurisprudence and lays the foundation for understanding how courts currently analyze warrantless searches of cell phones. Part III of this note begins by describing the precursors to warrantless cell phone search jurisprudence, namely, how courts evaluated warrantless searches of pagers. Part III then synthesizes current warrantless cell phone search case law. Part IV of this note argues that current warrantless cell phone jurisprudence has strayed far from the principles that motivated the drafting of the Fourth Amendment, a protection of individuals against the great power of the federal government through strict adherence to the Warrant Clause.[10] Part IV also describes the model through which courts may reestablish Fourth Amendment protection in this arena in accordance with the Framers' intent. This framework requires that law enforcement obtain a warrant prior to the execution of any search of a cell phone. However, this framework includes a very limited exception providing for lawful warrantless searches of cell phones where an officer can specifically articulate exigent circumstances at the time of the search, i.e., the officer had facts before him establishing that the particular phone to be searched would delete, or be subject to remote deletion of, evidence. Part V of the note concludes by reiterating the incredible amounts of private information present-day cell phones are capable of storing. Through the adoption of the proposed framework, the protection of personal effects that the Framers sought to ensure will be revived and courts will begin on the long journey back to the Fourth Amendment.

10. *See* Lynch, *supra* note 7, at 654.

II. THE HISTORY OF CELL PHONES AND THE DEVELOPMENT OF EXCEPTIONS TO THE FOURTH AMENDMENT

A. The Invention and Development of Cell Phones

The first cellular telephone was developed by Dr. Martin Cooper, of the Motorola Company, in April 1973.[11] Dubbed the Motorola Dyna-Tac, it weighed approximately two and a half pounds and was over nine inches long.[12] Dyna-Tac's capability permitted the user only to *place* a phone call with the ability to speak and listen to the recipient; the user could not receive incoming calls.[13] Over thirty-seven years later, even the most basic cell phones have the ability to place *and* receive phone calls—and much more.[14] Exponential advances in cell phone technology and capability in the intervening decades have produced cell phones that bear very little resemblance to the Dyna-Tac.[15]

Cell phones now hold vast amounts of detailed personal information.[16] Today, even the most basic cell phones have the capacity to store significant amounts of personal and private information, including telephone numbers, photos, and the dates and times of incoming and outgoing messages.[17] For example, cell phones not only keep a log of the telephone numbers, dates, and times associated with incoming, outgoing, and missed phone calls, but also include a log of stored telephone numbers in an address book.[18] In addition, virtually all modern cell phones have the capacity to send and receive text messages.[19] Most cell phones today also come equipped with

11. Richard Worth, Great Inventions: Telephone and Telegraph 40–41 (2006).

12. *Id.*

13. National Geographic Society, 1000 Events That Shaped the World: History Series 936 (2008).

14. The Dyna-Tac could only place, not receive, calls. *See* Worth, *supra* note 11.

15. "Cell phone," "mobile phone," and "phone" will be used interchangeably throughout the note as their definitions are synonymous. The creation and capabilities of smartphones will also be explored later in this note. Smartphones, as will be defined, are a special category within the broader umbrella of cell phones, mobile phones, and phones. These phones possess certain technological capabilities that other basic cell phones do not.

16. *See* Gijs Van Oenen, *A Logistic Perspective on Crime*, *in* New Directions for Criminology 90 (Ronny Lippens & Patrick Van Calster eds., 2010).

> [The cell phone] has an increasing amount of personal data stored in its memory banks. . . . [O]ur 'handy' is merely one small (SIM-)chip in an enormous wireless computer system. . . . For instance, railway companies use data from cell phone providers to compile precise estimates of how many people travel at a certain stretch at a given time. Because cell phones every few minutes emit signals to let the network know where they are, it is easy to establish how many cell phones there are on a train . . . .

Id. at 90.

17. Michele L. Berry, State of Ohio v. Smith*: Cell Phones Do Not Equal "Closed Containers" for Purposes of Warrantless Search Incident Arrest*, 2010 Emerging Issues 4788.

18. *See, e.g.*, State v. Smith, 920 N.E.2d 949, 954–55 (Ohio 2009).

19. *See, e.g.*, United States v. Wall, No. 08-60016-CR-ZLOCH, 2008 U.S. Dist. LEXIS 103058, at *11 (S.D. Fla. Dec. 22, 2008).

built-in cameras that allow users to take photographs and videos and store them to the phone's memory.[20] Combining the camera and text-message features, most phones can send photos stored on the cell phone to other cell phones using a picture message. Even those phones without the capacity to take photographs usually allow the user to receive picture messages from other cell phone users, and have the capacity to store the photo to the phone's memory as well as the date and time the photo was received. The foregoing capabilities demonstrate that even the most basic cell phones[21] store a significant amount of personal information raising serious privacy concerns in the context of warrantless searches.[22]

In this new era of rapidly advancing technology, most present-day cell phones are significantly more advanced and provide substantially more storage capacity than basic cell phones.[23] The most prominent feature of these phones, often referred to as "smartphones," is access to the Internet,[24] which opens the door to a seemingly endless number of capabilities and, in turn, a seemingly endless amount of personal information that can be stored on the cell phone.[25] The browser function tracks Internet browsing history and stores a log of websites visited, including the dates on which those websites were accessed.[26] In addition, Internet access provides users with the ability to receive and send e-mails, which are all stored to the phone along with the date and time the message was received or sent.[27] Internet access also provides for the download of such confidential information as corporate documents and VPN

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20. *See, e.g.*, United States v. Garcia-Aleman, No. 1:10-CR-29, 2010 U.S. Dist. LEXIS 65333, at *10 (E.D. Tex. June 9, 2010) (photographs); United States v. Roberts, 319 F. App'x 575, 577 (9th Cir. 2009) (videos).

21. It should be noted that these basic cell phones often have a limited storage capacity, forcing the phone to automatically delete the oldest archived entries to make room for incoming calls, texts, or photos or withhold incoming entries until older entries are manually deleted by the user. *See* United States v. Parada, 289 F. Supp. 2d 1291, 1304 (D. Kan. 2003), *aff'd in part, remanded in part sub nom.* United States v. McNeill, 136 F. App'x 153 (10th Cir. 2005). Although this seems to present an argument in favor of warrantless cell phones searches, because of the apparent risk of destruction of evidence, as later discussed in Part V, by simply powering the cell phone off law enforcement officers can preserve the information currently retained on the phone as well as information awaiting to be received by the phone.

22. *See* Norbert Pachler et al., Mobile Learning: Structures, Agency, Practices 88 (2010).

> The risk to privacy that mobile/cell phones may bring is an area of growing concern for some citizens. A device that is carried by the individual, and that contains much information that is highly personalised, carries an inherent ability to compromise our privacy if it falls into the hands of others . . . .

Id.

23. *See* Patsy J. Fulton-Calkins et al., The Administrative Professional: Technology and Procedures 152 (14th ed. 2010).

24. *Id.*

25. *See* Mohammad Ilyas & Syed Ahson, Smartphones: Research Report 3 (2006).

26. *Id.* at 45–46.

27. *See* United States v. Park, No. CR 05-375 SI, 2007 U.S. Dist. LEXIS 40596, at *22 (N.D. Cal. May 23, 2007).

access codes.[28] Further, the creation and proliferation of application technology (also known as "apps") has exponentially increased the amount of personal information that can be stored on a cell phone.[29] These programs can store sensitive personal information, such as the balance of a user's checking account.[30] Social network applications such as Facebook allow users to "check in" to the locations they visit, creating a record of an individual's day-to-day activities and the locations they frequent.[31] The technological capabilities available to smartphone users have created the ability to capture a snapshot of an individual's social interactions, bank account balance, shopping preferences, and daily routine, to name a few. In today's society, smartphones have the capacity to elicit more personal information about its user than a private investigator likely could, and with the single click of an icon. The privacy concerns raised by smartphones do not merely deserve a heightened level of protection in the warrantless search context, they command it.

With technological advancement, so too comes a reduction of privacy. "As societies continue to integrate cell phones into every aspect of life and work, the potential privacy and security problems only grow."[32] Although the wireless capabilities of cell phones have improved the personal and business life of users, it necessarily entails the digitization of information, which then becomes easily accessible to whosever hands the portable device falls into. Even the briefest search of the most basic cell phone can reveal an incredible amount of personal information.[33] Courts should tread lightly on permitting searches of such personal effects. However, since the creation and technological development of cell phones occurred centuries after exceptions to the Fourth Amendment were developed to uphold certain warrantless searches, courts have continued to permit such searches and, thus, the violation of constitutional protections. To understand the current jurisprudence dealing with governmental search and seizure of a cell phone, one must start at the beginning of search and seizure law.

B. Fourth Amendment History and Jurisprudence

The Fourth Amendment to the U.S. Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against

28. Jamie Lendino, *Kill Your Phone Remotely*, PCMag.com (Sept. 11, 2009), http://www.pcmag.com/article2/0,2817,2352755,00.asp.

29. Applications are individual programs capable of performing specific tasks such as word processing, video gaming, or online banking. *Smartphone*, Encyclopedia Britannica Online, http://www.britannica.com/EBchecked/topic/1498102/smartphone (last visited Jan. 29, 2012).

30. Block, *supra* note 3.

31. *Facebook Introduces Check-In Feature*, CNN (Aug. 18, 2010), http://articles.cnn.com/2010-08-18/tech/facebook.location_1_facebook-friends-facebook-executives-facebook-staff?_s=PM:TECH.

32. Andrew Harris et al., *Emerging Privacy and Security Concerns for Digital Wallet Deployment, in* Privacy in America 185 (William Aspray & Philip Doty eds., 2011).

33. *See* Berry, *supra* note 17.

unreasonable searches and seizures, shall not be violated."[34] The U.S. Supreme Court has interpreted the Fourth Amendment as demanding that officers must either have a warrant to search an individual or have probable cause to believe the person they are about to search has committed a crime.[35] It is well settled that the drafters of the Fourth Amendment were motivated by their fear of the writs of assistance and general warrants often issued by the legislature of England.[36] Under these decrees, officers were given general authority to search an individual's effects and even private residences.[37] Thus, the drafters of our constitution sought to protect individuals from such searches and seizures.[38] The Supreme Court has held that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."[39]

Such exceptions become relevant after a "warrantless search," which occurs when a police officer executes a search without first obtaining a warrant from a neutral magistrate to do so. Under the Fourth Amendment, warrantless searches may only be conducted where there is probable cause to believe a crime has been committed.[40] But searches are often conducted for reasons other than an officer's probable cause to believe that a suspect committed a crime, and are permitted under exceptions to the Fourth Amendment's warrant requirement. For example, officers may conduct an inventory search of a suspect or his vehicle after he is arrested in order to ensure the protection of the suspect's property.[41] In other instances officers may search an individual for public safety reasons.[42] In yet another circumstance, officers are permitted to search a suspect following his lawful arrest for concealed weapons or evidence in order to protect the officer or to prevent the destruction of evidence.[43] These exceptions recognize that particular types of searches, although conducted without prior approval of a neutral magistrate, are justified by other considerations.

1. Search Incident to Arrest

A "search incident to arrest" refers to the search an officer conducts on a suspect at the time of arrest. The officer will search for any concealed weapons the suspect

34. U.S. Const. amend. IV.

35. *See* Katz v. United States, 389 U.S. 347, 357 (1967).

36. *See* United States v. Chadwick, 433 U.S. 1, 8 (1977) ("It cannot be doubted that the Fourth Amendment's commands grew in large measure out of the colonists' experience with the writs of assistance and their memories of the general warrants formerly in use in England.").

37. *Id.*

38. *See generally* U.S. Const. amend. IV.

39. *Katz*, 389 U.S. at 357 (footnote omitted).

40. *See* U.S. Const. amend. IV.

41. *See* United States v. Murphy, 552 F.3d 405, 412 (4th Cir. 2009).

42. United States v. McHugh, 639 F.3d 1250, 1260 (10th Cir. 2011).

43. *Id.*

may use against the officer after he is put in custody or any evidence the suspect may seek to destroy while in custody. At the adoption of the Bill of Rights courts were already recognizing warrantless searches conducted pursuant to valid arrests for the above-listed purpose. However, the search incident to arrest exception became increasingly muddled in the years that followed.[44] Although the justifications for the constitutionality of a search incident to arrest—police safety and prevention of evidence destruction—are narrow, these searches necessarily encompass much more than just weapons and evidence as the exception does not restrict officers from only discovering these particular items from the suspect.

By the 1950s, many believed that the search incident to arrest exception had virtually "swallowed up" the warrant requirement of the Fourth Amendment.[45] During the 1950s, the U.S. Supreme Court held that a search incident to arrest extended to the entire premises of the arrest location.[46] In 1969, recognizing the broad expansion of search incident to arrest jurisprudence, the U.S. Supreme Court sought to clarify the rationale for and narrow the scope of the exception. In the landmark case of *Chimel v. California,* the Court held that the exception was carved out solely to maintain officer safety and prevent the destruction of evidence.[47] Overruling two prior cases, *Harris v. United States*[48] and *United States v. Rabinowitz*,[49] the Court held that the exception was limited to the arrestee's person and the area "'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."[50] The Court in *Chimel* ominously admonished that "[n]o consideration relevant to the Fourth Amendment suggests any point of rational limitation, once the search is allowed to go beyond the area from which the person arrested might obtain weapons or evidentiary items."[51]

Indeed, it was not long before the outer limits of *Chimel* were tested. In 1973, the Supreme Court was presented with the question of how to treat an object found within the immediate control, or grab area, of the arrestee.[52] In *United States v. Robinson*, the defendant was lawfully arrested for driving with a revoked operator's

44. Stephen A. Saltzburg & Daniel J. Capra, American Criminal Procedure 289 (8th ed. 2007).

45. Jerold H. Israel & Wayne R. LaFave, Criminal Procedure: Constitutional limitations 107 (7th ed. 2006).

46. *See* Porter v. Ashmore, 421 F.2d 1186, 1190 (4th Cir. 1970) ("[A] search incident to a lawful arrest may extend beyond the immediate vicinity of the one arrested.").

47. 395 U.S. 752, 763 (1969).

48. 331 U.S. 145 (1947).

49. 339 U.S. 56 (1950).

50. *Chimel*, 395 U.S. at 763 (internal quotation marks omitted).

51. *Id.* at 766; *cf. Harris*, 331 U.S. at 197 (Jackson, J., dissenting) ("The difficulty with this problem for me is that once the search is allowed to go beyond the person arrested and the objects upon him or in his immediate physical control, I see no practical limit short of that set in the opinion of the Court—and that means to me no limit at all.").

52. *See* United States v. Robinson, 414 U.S. 218 (1973).

permit.[53] Pursuant to the arrest, officers conducted a search of the defendant's person and recovered a crumpled cigarette package from the left breast pocket of his coat.[54] At trial, the arresting officer testified that, upon manipulating the package in his hand, he knew the contents of the package were not cigarettes.[55] At the scene, the officer opened the package, revealing fourteen capsules of what were later verified to be heroin.[56] The Court upheld the search of the cigarette package finding that it was conducted within the parameters of the search incident to arrest exception. "Having in the course of a lawful search come upon the crumpled package of cigarettes, [the officer] was entitled to inspect it."[57] The Court noted,

> 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.[58]

With this decision, the Court ushered in a new era of searches incident to arrest, and established a bright-line rule under which closed containers became fair game for officers to search without violating the Fourth Amendment.[59] The Court essentially held that officers are well within their rights to actually open and search the contents of closed containers, rather than having the authority only to seize them and obtain a warrant to search them at a later juncture. The dissent in *Robinson* admonished, however, that the search fell entirely short of the clearly delineated rationales of *Chimel*[60] and, indeed, fell outside the scope of the search incident to arrest exception to the Fourth Amendment's warrant requirement, explaining that

> [t]he search conducted . . . went far beyond what was reasonably necessary to protect [the officer] from harm or to ensure that respondent would not effect an escape from custody . . . [I]t therefore fell outside the scope of a properly

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53. *Id.* at 220.

54. *Id.* at 223.

55. *Id.*

56. *Id.*

57. *Id.* at 236.

58. *Id.* at 235 (emphasis added).

59. *See* Andrew Fois & Lauren Simmons, *Thomas Jefferson's Carriage:* Arizona v. Gant*'s Assault on the* Belton *Doctrine*, Crim. L. Brief, Winter 2009, at 5–6.

> In *United States v. Robinson*, the Supreme Court drew another bright-line rule delineating the permissible scope of the search of the person of an arrestee incident to his arrest. In that case, Robinson was legally arrested for driving an automobile after his operator's permit was revoked. During a full custodial search of Robinson's person, the arresting officer discovered a crumpled up cigarette package containing packets of heroin in Robinson's breast pocket. The evidence was admitted in his trial and led to his conviction for a narcotics offense.

Id. (footnotes omitted).

60. *See Robinson*, 414 U.S. at 259 (Marshall, J., dissenting).

> drawn 'search incident to arrest' exception to the Fourth Amendment's warrant requirement.[61]

Relying on *Robinson*, federal circuit courts of appeal have upheld as constitutional searches of various objects, considering them closed containers searchable pursuant to a lawful arrest. In *United States v. Molinaro*, the Seventh Circuit upheld the search of an arrestee's wallet.[62] The court explicitly relied on *Robinson* for its holding, explaining that "[t]he Supreme Court has upheld warrantless searches of an arrestee's person, including personal property contained in his pockets, as a search incident to arrest."[63] The Seventh Circuit later relied on *Molinaro* to uphold the search and photocopying of an arrestee's address book in *United States v. Rodriguez*.[64] With virtually no supporting analysis, relying only on a citation to *Robinson,* the Seventh Circuit greatly expanded the scope of the search incident to arrest exception. The Seventh Circuit's holding declared it constitutional for officers to search almost anything found on the arrestee's person despite the fact that the item, by virtue of its seizure, becomes secured and presents no danger to the officer or risk of its own destruction, ignoring the very rationales of the exception justifying the search. As the law stands today, if an officer arrests an individual based on probable cause, she may, incident to that lawful arrest, search the entire person of that individual and the area within that person's immediate control, including any and all closed containers found on their person or within their immediate control.[65]

However, in 1977, in the landmark case of *United States v. Chadwick*, the Supreme Court abrogated *Molinaro* and *Rodriguez*. In *Chadwick*, the Court held that certain containers may *not* be searched as incident to arrest.[66] In *Chadwick*, the defendants were suspected of trafficking drugs in a footlocker, which was locked with both a padlock and a regular trunk lock.[67] After the defendants were lawfully arrested, the footlocker was taken into federal custody and eventually searched without consent and without a warrant.[68] The Court held:

> By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public

61. *Id*.

62. United States v. Molinaro, 877 F.2d 1341, 1346–47 (7th Cir. 1989).

63. *Id.* at 1346 (citing *Robinson*, 414 U.S. 218).

64. 995 F.2d 776, 778 (7th Cir. 1993).

65. *See Robinson*, 414 U.S. at 224.

66. United States v. Chadwick, 433 U.S. 1, 15 (1977) ("Warrantless 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." (citing *Preston v. United States*, 376 U.S. 364 (1964))).

67. *Id.* at 4–5.

68. *Id.*

> examination. No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause. There being no exigency, it was unreasonable for the Government to conduct this search without the safe-guards a judicial warrant provides.[69]

Essentially, *Chadwick* stood for the proposition that certain closed containers have such a great expectation of privacy that, where no exigency exists, the issuance of a warrant is necessary prior to the search of the closed container.[70] Although *Chadwick* partially remains good law, it was explicitly overruled in the context of searches incident to arrest applied to searches of vehicles, as discussed in the following section.[71] This is because arrests of occupants, or recent occupants, of vehicles, pursuant to the search incident to arrest exception, are governed by different rules than ordinary searches incident to arrest.

i. The Search Incident to Arrest Exception's Application to Occupants of a Vehicle

In 1981, the Supreme Court wrestled with the search incident to arrest exception's application to occupants of a vehicle.[72] In *New York v. Belton*, the Court addressed the question of whether the passenger compartment[73] of a vehicle constituted the area within the immediate control of an arrestee and was therefore searchable under the search incident to arrest exception.[74] In *Belton*, an officer pulled over a vehicle for excessive speed and all four occupants were lawfully arrested for unlawful possession of marijuana.[75] Subsequent to those arrests the vehicle, which the defendants had been occupants of, was searched.[76] On the backseat of the vehicle was a jacket belonging to Roger Belton, one of the defendants.[77] The officer began to search the

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69. *Id*. at 11 n.4.

70. *See generally id.*

71. *See* California v. Acevedo, 500 U.S. 565, 579–80 (1991). In *Acevedo* the court held that arrests of occupants, or recent occupants, of vehicles, pursuant to the search incident to arrest exception, are governed by different rules than ordinary searches incident to arrest.

72. *Id.*

73. > The term 'passenger compartment' . . . has been construed to mean all areas reachable without existing [sic] the vehicle, without regard to the likelihood that such reaching actually occurred in the particular case. But . . . does not permit the dismantling of the vehicle to get inside door panels, the opening of sealed containers, or other searches into particular places to which the arrest unquestionably had no chance of accessing immediately preceding his apprehension or exit from the vehicle.
>
> Israel & LaFave, *supra* note 45, at 115.

74. *See Belton*, 453 U.S. at 455–56.

75. *Id.* at 456.

76. *Id.*

77. *Id.*

jacket, unzipped the pockets, and recovered cocaine.[78] At the point the jacket was searched and the cocaine recovered, all four defendants had been placed outside the vehicle and separated from one another.[79]

The Court, in repudiating the "immediate control" limitation articulated in *Chimel*, found the search constitutional on the grounds that it was incident to the arrest, holding that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."[80] The Court also elaborated on the search of closed containers first announced in *Robinson*, holding that "the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach."[81] The Court defined a closed container as "any object capable of holding another object. It thus includes . . . luggage, boxes, bags, clothing, and the like."[82]

After *Belton*, searches incident to arrest of an automobile's occupant are constitutional even if they are not searches of the area solely within the immediate control of the arrestee or justified by the two rationales of *Chimel*, i.e., to maintain officer safety or prevent the destruction of evidence.[83] The search incident to arrest exception for automobile searches was further broadened by *Thorton v. United States*, in which the Supreme Court justified searches of "recent occupants" of an automobile—that is, those who had already exited the vehicle before being confronted by police.[84] Thus the Court's ominous admonition in *Chimel* regarding the expansion of the search incident to arrest exception had come to fruition.[85] The Court had effectively withdrawn any limits on the constitutionality of a search incident to arrest, having extended the exception to searches involving "recent" occupants of a vehicle and to searches of the passenger compartment regardless of whether the arrestee was in reaching distance of the search area.[86]

78. *Id.*

79. *Id.*

80. *Id.* at 460 (footnote omitted).

81. *Id.* at 460–61 (citing United States v. Robinson, 414 U.S. 218 (1973); Draper v. United States, 358 U.S. 307 (1959)).

82. *Id.* at 461 n.4.

83. *See id.* at 461 ("It is true, of course, that these containers will sometimes be such that they could hold neither a weapon nor evidence of the criminal conduct for which the suspect was arrested.").

84. *See* Thorton v. United States, 541 U.S. 615, 622 (2004) ("*Belton* allows police to search the passenger compartment of a vehicle incident to a lawful custodial arrest of both 'occupants' and 'recent occupants'" (citing *Belton*, 453 U.S. at 460)).

85. Chimel v. California, 395 U.S. 752, 765 (1969).

86. *See generally* New York v. Belton, 453 U.S. 454 (1981).

In 2009, the Supreme Court in *Arizona v. Gant* attempted to reign in the *Belton* runaway train[87]:

> Under [a] broad reading of *Belton*, a vehicle search would be authorized incident to every arrest of a recent occupant notwithstanding that in most cases the vehicle's passenger compartment will not be within the arrestee's reach at the time of the search. To read *Belton* as authorizing a vehicle search incident to every recent occupant's arrest would thus untether the rule from the justifications underlying the *Chimel* exception.[88]

After *Gant*, officers may only search the passenger compartment of a vehicle while the arrestee is unsecured and within reaching distance of the passenger compartment when the officers have reasonable suspicion that evidence of the crime for which the defendant was originally arrested might be contained within the vehicle.[89] *Gant*'s application of the search incident to arrest exception to recent occupants of an automobile should not be confused with the separate and distinct automobile exception to the Fourth Amendment, discussed in the following section.

2. The Automobile Exception

In 1925, in *Carroll v. United States*, the Supreme Court upheld the warrantless search of a vehicle where its occupants were not under arrest and the officers conducting the search did not have probable cause to arrest the defendants prior to the search.[90] The officers did, however, have probable cause to believe that evidence of a crime would be found within the vehicle.[91] The search had been conducted in 1921, during Prohibition, near the United States' Canadian border in an area known for bootlegging.[92] Upon recognizing the defendants as bootleggers in an area known for bootlegging, federal agents pulled the defendants over and proceeded to search the vehicle, recovering sixty-nine quarts of bonded whiskey and gin in the upholstery of the seats.[93] The Court upheld the search as constitutional because the application for a warrant was impracticable:

> [T]he guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or

87. Arizona v. Gant, 129 S. Ct. 1710, 1716 (2009) ("The chorus that has called for us to revisit *Belton* includes courts, scholars, and Members of this Court who have questioned that decision's clarity and its fidelity to Fourth Amendment principles.").

88. *Id*. at 1719.

89. *See id.* at 1710–19.

90. *See* Carroll v. United States, 267 U.S. 132 (1925).

91. *Id.*

92. *Id*. at 160.

93. *Id*. at 174.

> automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.[94]

Thus, the automobile exception, or the so-called "*Carroll* Doctrine," was born. Where probable cause exists to believe that evidence of the suspected crime will be found within the vehicle, no warrant or prior arrest is necessary to search the vehicle.[95] The rationale of *Carroll* rested on the inherent mobility of the vehicle and, thus, the potential loss of evidence.[96] For this reason, the automobile exception to the Fourth Amendment is separate and distinct from the search incident to arrest exception.[97]

The rationale underlying the automobile exception, like other exceptions to the Fourth Amendment, eventually evolved over time to include more than what was originally contemplated when the exception was created. In 1985, the U.S. Supreme Court added a further rationale to *Carroll*'s mobility justification.[98] In *California v. Carney*, federal Drug Enforcement Administration (DEA) agents entered the motor home of a man suspected of selling marijuana for sex.[99] The Supreme Court held that, "[b]esides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office."[100]

Thus, a diminished expectation of privacy in one's automobile became another rationale underlying the automobile exception and, by most scholars' interpretations, the primary rationale.[101] However, this rationale proved to further the confusion that

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94. *Id*. at 153.

95. *See id*.

96. *See id.*

97. Because there is no arrest, the occupants of the vehicle are not detained and are free to move the vehicle quickly outside the jurisdiction of the officers wishing to conduct the search. *See* Israel & LaFave, *supra* note 45, at 115.

98. *See generally* California v. Carney, 471 U.S. 386 (1985).

99. *Id*. at 387–88.

100. *Id.* at 391 (quoting South Dakota v. Opperman, 428 U.S. 364, 367 (1976)) (internal quotation marks omitted). In *South Dakota v. Opperman*, the Court expounded upon this holding by stating:

> Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office. In discharging their varied responsibilities for ensuring the public safety, law enforcement officials are necessarily brought into frequent contact with automobiles. Most of this contact is distinctly noncriminal in nature. Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order.

Opperman, 428 U.S. at 367 (footnote omitted) (citation omitted).

101. *Id.*; Saltzburg & Capra, *supra* note 44, at 41; Jaclyn L. McAndrew, *Who Has More Privacy?:* State v. Brown *and Its Effect on South Carolina Criminal Defendants*, 62 S.C. L. Rev. 671, 681–82 (2011).

already existed in case law defining the automobile exception. The confusion had developed mainly due to the principle announced in *United States v. Chadwick*: because certain closed containers—such as luggage—"are intended as a repository of personal effects," it is reasonable for someone to have a greater expectation of privacy in them, and, therefore, in the context of a search incident to arrest, a warrant is necessary to open the closed container.[102] It was not long after the Court's holding in *Chadwick* that questions arose as to whether *Chadwick* applied to automobile exception cases—specifically, whether closed containers found pursuant to the automobile exception (not only pursuant to searches incident to arrest) necessitate a warrant.[103]

In *California v. Acevedo*, the Supreme Court attempted to resolve this confusion.[104] The Court interpreted *Carroll* as "providing one rule to govern all automobile searches."[105] In *Acevedo*, the Court held that it is constitutional for law enforcement to "search an automobile and the containers within it when they have probable cause to believe contraband or evidence is contained" within the automobile.[106] The Court therefore effectively rejected *Chadwick*'s warrant requirement for closed containers in searches conducted according to the automobile exception.[107] However, *Acevedo* concerned closed containers that belonged to the owner and driver of the vehicle. As such, it was unclear whether the bright-line rule announced in *Acevedo* also allowed the warrantless search of closed containers belonging to passengers of the vehicle.

In *Wyoming v. Houghton*, the Supreme Court was presented with that exact question.[108] The Court opted to extend the bright-line rule to closed containers belonging to passengers, holding that "police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search."[109] The Court, in a majority opinion authored by Justice Scalia, reasoned that

> [w]hen there is probable cause to search for contraband in a car, it is reasonable for police officers—like customs officials in the founding era—to examine packages and containers without a showing of individualized probable cause for each one. A passenger's personal belongings, just like the driver's belongings or containers attached to the car like a glove compartment, are "in" the car, and the officer has probable cause to search for contraband *in* the

102. 433 U.S. 1, 13 (1977).

103. *See* Arkansas v. Sanders, 442 U.S. 753 (1979) (holding that a warrant is required to search a suitcase that had been placed in the trunk of a taxi); *cf.* United States v. Ross, 456 U.S. 798 (1982) (holding that no warrant was necessary to search a paper bag and pouch found inside the vehicle).

104. 500 U.S. 565 (1991).

105. *Id.* at 580.

106. *Id.*

107. *Id.* ("Until today, this Court has drawn a curious line between the search of an automobile that coincidentally turns up a container and the search of a container that coincidentally turns up in an automobile. The protections of the Fourth Amendment must not turn on such coincidences.").

108. 526 U.S. 295 (1999).

109. *Id.* at 307.

> car . . . . Passengers, no less than drivers, possess a reduced expectation of privacy with regard to the property that they transport in cars, which "travel public thoroughfares, seldom serve as . . . the repository of personal effects," are subjected to police stop and examination to enforce "pervasive" governmental controls "as an everyday occurrence," and, finally, are exposed to traffic accidents that may render all their contents open to public scrutiny.[110]

Thus, as the law currently stands, any closed container found within a vehicle, regardless of whom it belongs to, is subject to search pursuant to the automobile exception without need for a warrant when there is probable cause that evidence may be found within the container.[111]

3. Exigent Circumstances

A third exception to the Fourth Amendment's warrant requirement arises in exigent circumstances, which exist when immediate governmental action is necessary either to prevent flight, to maintain the safety of police or the public, or to protect against the destruction of evidence.[112] The Supreme Court stated that "searches and seizures inside a home without a warrant are presumptively unreasonable but . . . this presumption may be overcome . . . . 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."[113]Accordingly, the exigent circumstances exception is divided into three separate subcategories: hot pursuit, police and public safety, and risk of destruction of evidence.[114] Only the third category is relevant for purposes of this note and an analysis of cell phone searches.

First announced in 1966 in *Schmerber v. California*, a risk of the destruction of evidence excuses the warrant requirement of the Fourth Amendment if the "delay necessary to obtain a warrant, under the circumstances, threaten[s] 'the destruction of evidence.'"[115] This exception is commonly invoked in criminal cases involving narcotics because of the ease with which evidence can be discarded, such as by flushing the drugs down the toilet.[116]

For example, in *United States v. MacDonald,* the Second Circuit upheld the warrantless search of an apartment based in part on the risk of a destruction of

110. *Id.* at 302–03 (alterations in original) (quoting Cardwell v. Lewis, 417 U.S. 583, 590 (1974); South Dakota v. Opperman, 428 U.S. 364, 368 (1976)).

111. *See generally Acevedo*, 500 U.S. 565.

112. *See* Saltzburg & Capra, *supra* note 44, at 363.

113. Kentucky v. King, 131 S. Ct. 1849, 1852 (2011) (third alteration in original) (internal quotation marks omitted) (citing Mincey v. Arizona, 437 U.S. 385 (1978)).

114. *See id.* at 1865.

115. 384 U.S. 757, 770 (1966) (quoting Preston v. United States, 376 U.S. 364, 367 (1964)).

116. *See* Saltzburg & Capra, *supra* note 44, at 368.

narcotics and prerecorded buy money.[117] In *MacDonald*, pursuant to an informant's tip that drugs were being stored and sold in an apartment, an undercover New York Drug Enforcement (NYDEA) Task Force agent went to the apartment and successfully transacted a drug sale with prerecorded buy money.[118] While inside, the undercover agent observed large quantities of marijuana and cocaine, large stacks of money, several men, and several weapons.[119] The undercover agent left the apartment and returned shortly thereafter with other NYDEA agents.[120] Upon knocking on the apartment door and identifying themselves, the agents heard rummaging inside and were told by agents remaining outside the building that some men were attempting to exit through the apartment's bathroom window.[121] At that point the agents forced their way into the apartment, arrested five men from within, recovered two loaded weapons, a substantial amount of cocaine and marijuana, drug paraphernalia, drug packaging supplies, and large amounts of cash.[122] The court held that, based on the circumstances, the NYDEA agents' warrantless search was permissible because the agents were "confronted by an urgent need to prevent the possible loss of evidence."[123] *MacDonald* implicitly demonstrates the requirement that, in order to proceed with a warrantless search under this exception, there must be some indication that someone was in a position to destroy the evidence.[124]

In *Vale v. Louisiana*, the Supreme Court explicitly announced this rule.[125] In *Vale*, the defendant was arrested outside his home.[126] Shortly after his arrest, while officers were still present with him outside the home, his mother and brother walked up to the house carrying groceries.[127] The relatives were kept outside the home while the officers went inside, initially conducting a protective sweep to verify that no one else was inside.[128] The officers then proceeded to conduct a thorough search of the entire premises without a warrant.[129] The Louisiana Supreme Court upheld the search as constitutional under the Fourth Amendment's exigent circumstances exception,

117. 916 F.2d 766, 770 (2d Cir. 1990). Pre-recorded buy money is money that has been previously marked by law enforcement agents. The pre-recordation of the money helps to prove that a drug transaction transpired if such money is later recovered from a defendant.

118. *Id.* at 768.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 770 (citing United States v. Miles, 889 F.2d 382, 383 (2d Cir. 1989); United States v. Campbell, 581 F.2d 22, 26 (2d Cir. 1978)).

124. *See MacDonald*, 916 F.2d at 770; *see also* United States v. Howard, 106 F.3d 70, 77 (5th Cir. 1997).

125. 399 U.S. 30 (1970).

126. *Id.* at 32.

127. *Id.* at 33.

128. *Id.*

129. *Id.*

specifically finding a risk that evidence of drugs could easily be destroyed.[130] The U.S. Supreme Court rejected the state court's analysis, explaining that

> [s]uch a rationale could not apply to the present case, since by their own account the arresting officers satisfied themselves that no one else was in the house when they first entered the premises. But entirely apart from that point, our past decisions make clear that only in "a few specifically established and well-delineated" situations may a warrantless search of a dwelling withstand constitutional scrutiny, even though the authorities have probable cause to conduct it. The burden rests on the State to show the existence of such an exceptional situation. And the record before us discloses none.[131]

Thus, the Court held that there must be a showing that someone was in a position to destroy evidence in order to invoke this as grounds for conducting a search under the exigent circumstances exception to the Fourth Amendment's warrant requirement.[132]

III. PAGER CASES AS AN ANALOG FOR PRESENT-DAY (WARRANTLESS) SEARCHES OF CELL PHONES

The limits and the underlying rationales of the three aforementioned exceptions to the Fourth Amendment's warrant requirement have been tested in cases involving electronic devices capable of storing personal information.

The first major information-storing device that was analyzed under these exceptions was the pager. Pagers, however, were slow to gain public interest, and it was not until the 1980s and early 1990s that the pager gained national popularity.[133] Unlike cell phones that contain a wealth of capabilities, pagers can merely relay call-back numbers entered into a phone carrier's automated system.[134]

Shortly after pagers gained national popularity courts began to wrestle with the Fourth Amendment's application to warrantless searches of these electronic devices. The decisions that came out of this era laid the foundation for evaluating warrantless cell phone searches in the decades that followed. This section tracks the development of warrantless pager search jurisprudence, demonstrating that courts almost uniformly upheld warrantless searches of pagers under the exceptions to the Fourth Amendment Warrant Clause. Specifically, pagers were analogized to previously defined closed containers such as address books, which are searchable under the exceptions.

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130. *See* State v. Vale, 215 So.2d 811 (La. 1968), *rev'd*, 399 U.S. 30 (1970).

131. *Vale*, 399 U.S. at 34 (citations omitted) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)).

132. *See id.*

133. Bernice Kanner, *The Beep Generation*, N.Y. Mag., Aug. 15, 1983, at 12.

134. Glynis Frater, GCSE Business and Communication Systems 174 (2003).

> Pagers or 'beepers' are a portable communication messenger device. The person sending the message uses a [touch]-tone phone and calls the pager's number, then the person enters their number or voice message and within moments the pager carrier is notified by an audible 'beep' or silent vibration. The number or voice message can be read on the pager's screen. The pager's secret is that inside that little case is a simple, yet sophisticated receiver.

Id.

A. Cases Addressing the Constitutionality of Warrantless Pager Searches

Courts began evaluating the constitutionality of warrantless searches of pagers in the early 1990s and almost always denied the defendants' motions to suppress evidence obtained through those searches.[135] In *United States v. Chan*, the U.S. District Court for the Northern District of California upheld a warrantless search of a pager as a lawful search incident to arrest.[136] Sam Tong Chan was arrested as part of an undercover investigation into the illegal distribution of heroin.[137] Undercover agents had previously witnessed a co-defendant place a phone call to an unknown individual to secure the heroin.[138] The co-defendant then rendezvoused with Chan inside of a vehicle.[139] Both men were arrested after the co-defendant exited the vehicle with the heroin.[140] At the time of Chan's arrest, he had a pager in his possession.[141] The undercover agents searched the pager's memory, without first obtaining a warrant, and discovered that Chan was in fact the person whom the co-defendant had called to secure the heroin.[142] Although the court found that Chan had a reasonable expectation of privacy in the contents of his pager, it went on to hold that this privacy interest was "irrelevant . . . because the pager was searched incident to Chan's arrest."[143] With little further explanation, the court found that the pager was a closed container and therefore could be searched pursuant to *Belton* without a warrant under the search incident to arrest exception of the Fourth Amendment.[144]

Courts thereafter followed *Chan* and upheld warrantless searches of pagers as closed containers searchable under the search incident to arrest and exigent circumstances exceptions to the Fourth Amendment Warrant Clause. In *United States v. Ortiz*, the defendant Ortiz was arrested as part of an undercover investigation by federal authorities for the illegal distribution of heroin.[145] The agents had previously arrested a co-defendant for the sale of heroin.[146] The co-defendant agreed to cooperate and provided Ortiz's pager number.[147] The agents called the pager from

135. *See generally* United States v. Ortiz, 84 F.3d 977 (7th Cir. 1996) (upholding warrantless search of a pager as lawful search incident to arrest); United States v. Chan, 830 F. Supp. 531 (N.D. Cal. 1993) (upholding warrantless search of a pager as lawful search incident to arrest).

136. 830 F. Supp. at 535.

137. *Id.*

138. *Id.* at 533.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 535.

144. *Id.* at 536 (citing New York v. Belton, 453 U.S. 454 (1981)).

145. 84 F.3d 977, 980–82 (7th Cir. 1996).

146. *Id.* at 982.

147. *Id.*

a Shell gas station and set up a meeting to purchase more heroin from Oritz.[148] Upon Mr. Ortiz's arrest, agents recovered the pager.[149] They activated the pager's memory and verified that it contained the number of the Shell gas station from which the agents had contacted Mr. Ortiz.[150] The Seventh Circuit upheld the constitutionality of the search under the incident to arrest exception, explaining:

> Because of the finite nature of a pager's electronic memory, incoming pages may destroy currently stored telephone numbers in a pager's memory. . . . Thus, it is imperative that law enforcement officers have the authority to immediately "search" or retrieve, incident to a valid arrest, information from a pager in order to prevent its destruction as evidence.[151]

Other Fourth Amendment exceptions were also found to apply to warrantless searches of pagers. For example, in *United States v. Hunter*, the Fourth Circuit upheld the warrantless search of the defendant's pager on the basis of exigent circumstances.[152] In *Hunter*, the defendant was arrested upon the execution of a search warrant secured by the DEA.[153] At the time of his arrest, the defendant had in his possession a pager, which the agents searched and which contained several telephone numbers that were used as evidence against him in his trial.[154] The Fourth Circuit held that "exigent circumstances surrounding the potentially fleeting nature of the evidence contained in a pager justifies a warrantless 'search' of the contents of the pager."[155]

Most of the courts that have analyzed warrantless searches of pagers have emphasized the limited storage capacity of pagers as the key factor in upholding a warrantless search. [156] However, one district court offered a very different rationale for upholding a warrantless search of the defendant's pager.[157] In *United States v. Lynch*, the defendant was arrested by DEA agents after receiving a suitcase of cocaine from his co-defendant in a hotel room in Atlanta, Georgia.[158] At the time of the defendant's arrest, the agents searched his pager, which contained various numbers in its memory.[159] Relying on *Robinson* and its progeny, which held that officers may search closed

148. *Id.*

149. *Id.* at 983.

150. *Id.*

151. *Id.* at 984 (citing United States v. Meriwether, 917 F.2d 955, 957 (6th Cir. 1990)).

152. No. 96-4259, 1998 U.S. App. LEXIS 27765, at *10 (4th Cir. Oct. 29, 1998).

153. *Id.* at *3.

154. *Id.* at *8.

155. *See id.* at *10 (citing *Ortiz*, 84 F.3d 977, 984 (7th Cir. 1996)).

156. *See Ortiz*, 84 F.3d at 984; *see also Hunter*, 1998 U.S. App. LEXIS 27765, at *10.

157. *See generally* United States v. Lynch, 908 F. Supp. 284 (D.V.I. 1995).

158. *Id.* at 286.

159. *Id.*

containers on the person of a suspect incident to a lawful arrest,[160] the court held that "[j]ust as police can lawfully search the contents of an arrestee's wallet or address book incident to an arrest, we hold that the agents here could lawfully search the contents of [the defendant's] pager incident to his arrest."[161] The court, sidestepping the holding in *Chadwick* requiring a search warrant for closed container searches, explained:

> The [Supreme Court] in *Chadwick* noted that the search of the footlocker was *not* a search of the "person . . . justified by . . . reduced expectations of privacy caused by the arrest." Since a search of the "person" has been held to include a person's wallet or address book, we find that a search of Thomas' pager was a search of his "person" and thus was valid.[162]

The aforementioned pager cases played an integral role in how courts would later apply the Fourth Amendment's exceptions to cell phone searches. The courts in the pager cases pulled the first thread that would eventually unravel the Fourth Amendment protection against searches of modern-day cell phones. Courts analogized cell phones to pagers because at the time of their creation, cell phones represented the next step in technology, essentially allowing the cell phone user to receive a phone call directly instead of receiving just the call back number as with pagers. The holdings that pagers, the direct predecessors to cell phones, were freely searchable as closed containers would later allow courts to hold that cell phones were also searchable as closed containers. This analysis, however, did not account for the dramatic differences in the information-storing capacity between the two technologies and, in turn, the heightened privacy expectations and concerns involved in a cell phone search.

B. Cases Addressing the Constitutionality of Warrantless Cell Phone Searches

Many courts have wrestled with the application of the search incident to arrest, the automobile, and the exigent circumstances exception to the Fourth Amendment's warrant requirement. Although sometimes recognizing the existence of heightened privacy expectations unique to cell phones, courts have almost uniformly held that cell phones are closed containers and thus searchable under the exceptions of the Fourth Amendment Warrant Clause.

1. The Search Incident to Arrest Exception as Applied to Cell Phone Searches

In 2005, in *United States v. Cote*, the U.S. District Court for the North District of Illinois became one of the first courts to evaluate the constitutionality of a warrantless search of a cell phone, and the court looked for guidance in *Robinson* and

160. *Id*. at 288 (citing United States v. Rodriguez, 995 F.2d 776 (7th Cir. 1993) (holding that the search of address book was valid search incident to arrest)); *see also* United States v. Molinaro, 877 F.2d 1341, 1346 (7th Cir. 1989) (finding the search of wallet valid incident to arrest).

161. *Lynch*, 908 F. Supp. at 288 (D.V.I. 1995).

162. *Id*. at 288–89 (second and third alteration in origianl) (quoting United States v. Chadwick, 433 U.S. 1, 15, 16 n.10 (1977)).

its progeny.[163] In *Cote*, the defendant was arrested for attempting to engage in sexual acts with a minor.[164] At the time of his arrest the defendant was carrying a cell phone, which FBI agents seized and searched without a warrant—specifically searching the recent calls log, address book, and e-mail inbox.[165] The court held that the warrantless search of the defendant's cell phone was "made incident to a valid arrest," likening the search of the defendant's cell phone to searches of wallets and address books, which have been deemed constitutional when made incident to arrest.[166] Similarly, when the District of Massachusetts in *United States v. Wurie* was presented with the same issue, it too relied on the *Robinson* line of cases to uphold the warrantless search of a cell phone under the search incident to arrest exception.[167] In *Wurie*, the court concluded that there is "no principled basis for distinguishing a warrantless search of a cell phone from the search of other types of personal containers found on a defendant's person."[168]

Many courts presented with questions about the constitutionality of warrantless searches of cell phones, including the Fifth and Fourth Circuits, looked back to the analyses employed in the pager cases. In *United States v. Finley*, the defendant was arrested for aiding and abetting possession with intent to distribute methamphetamine.[169] At the time of his arrest, the defendant had on his person a cell phone, which was seized and later searched without a warrant by a DEA agent.[170] Specifically, the agent searched the defendant's recent call log and text messages.[171] The court explained that

> [p]olice officers are not constrained to search only for weapons or instruments of escape on the arrestee's person; they may also, without any additional justification, look for evidence of the arrestee's crime on his person in order to preserve it for use at trial. The permissible scope of a search incident to a lawful arrest extends to containers found on the arrestee's person.[172]

163. United States v. Cote, No. 03 CR 271, 2005 U.S. Dist. LEXIS 11725 (N.D. Ill. May 25, 2005), *aff'd*, 504 F.3d 682 (7th Cir. 2007).

164. *Id*. at *6.

165. *Id*. at *19.

166. *Id*. (citing United States v. Rodriguez, 995 F.2d 776 (7th Cir. 1993); United States v. Molinaro, 877 F.2d 1341, 1346–47 (7th Cir. 1989)).

167. United States v. Wurie, 612 F. Supp. 2d 104, 110 (D. Mass. 2009).

168. *Id*. (citing United States v. Rodriguez, 995 F.2d 776, 778 (7th Cir. 1993) (contents of an address book in arrestee's wallet); United States v. Rust, 650 F.2d 927, 928 (8th Cir. 1981) (arrestee's pockets); United States v. Garcia, 605 F.2d 349, 355 (7th Cir. 1979) (hand-held luggage); United States v. Castro, 596 F.2d 674, 677 (5th Cir. 1979) (man's wallet); United States v. Moreno, 569 F.2d 1049, 1052 (9th Cir. 1978) (woman's purse)). The court cites these cases as examples of other personal containers found on the person which the court does not distinguish from cell phones found on the person.

169. 477 F.3d 250, 253 (5th Cir. 2007).

170. *Id*. at 254.

171. *Id*.

172. *Id*. at 259–60 (citation omitted) (citing New York v. Belton, 453 U.S. 454, 460–61 (1981); United States v. Robinson, 414 U.S. 218, 233–34 (1973); United States v. Johnson, 846 F.2d 279, 282 (5th Cir. 1988)).

The court in *Finley*, citing *Ortiz* (in which the court upheld the warrantless search of a pager under the search incident to arrest exception), held that the agent was "permitted to search Finley's cell phone pursuant to his arrest."[173] Likewise, in *United States v. Young*, the Fourth Circuit, citing *Hunter* (in which the court upheld the warrantless search of a pager under the exigent circumstances exception) and *Finley*, upheld the warrantless search of a cell phone.[174] The court in *Young* also pointed to the "manifest need of the officers to preserve evidence" due to the fact that the officers "had no way of knowing whether the text messages would automatically delete themselves or be preserved" as support for upholding the search.[175]

Other courts faced with the same issue opted to apply a different analysis, grounded in the possibility that the information stored on the cell phone could be remotely deleted and thus a warrantless search satisfied the *Chimel* rationale to prevent destruction of evidence. In *United States v. Urbina*, the defendant was arrested pursuant to an arrest warrant at his home.[176] At the time of the defendant's arrest, a detective recovered a cell phone from his person and conducted a search, specifically viewing the phone's address book and recent calls log.[177] The officer later testified that he conducted the search immediately because he feared that information he sought on the phone could be remotely erased.[178] In evaluating whether a cell phone constitutes a closed container for the purposes of search incident to arrest, the court explained that

> countervailing [the] increased privacy interest [in a cell phone] is the increased vulnerability of the data contained on a cell phone . . . the contents of a cell phone may be easily deleted, either by the replacement of old data with new, a mistaken push of a button, a loss of power, or even remotely by a person contacting the cell phone provider.[179]

The court held that the warrantless search was constitutional as a search incident to arrest because cell phones are closed containers and "data on a cell phone is vulnerable to loss if not promptly searched."[180] The *Urbina* court implicitly found that the need to search the phone at the time of the arrest derived from the risk of destruction of evidence contained on the cell phone, that is, the second rationale for the search incident to arrest exception under *Chimel*. However, despite the officer's testimony and the court's reasoning, there was no evidence in *Urbina* that the defendant's cell phone was actually at risk of losing the data it contained; there was no evidence that the

173. *Finley*, 477 F.3d at 260 (citing United States v. Ortiz, 84 F.3d 977, 984 (7th Cir. 1996)).

174. *See* United States v. Young, 278 F. App'x 242 (4th Cir. 2008).

175. *Id.* at 245–46.

176. No. 06-CR-336, 2007 U.S. Dist. LEXIS 96345, at *28 (E.D. Wis. Nov. 6, 2007).

177. *Id.* at *29.

178. *Id.* at *30.

179. *Id.* at *37–38 (citing United States v. Garcia, 605 F.2d 349, 355 (7th Cir. 1979) (discussing that a search of a wallet, purse or shoulder bag is permitted as a search incident to arrest)).

180. *Id.* at *38.

phone was of the type that automatically deleted old messages or any evidence that an individual was in a position to remotely delete information contained on the phone.

Similarly, in *United States v. Murphy*, the circuit court upheld the warrantless search of a cell phone incident to arrest based on the generalized notion that information stored on the phone could be lost.[181] In *Murphy*, the defendant was arrested for possession with intent to distribute cocaine and methamphetamine.[182] The arresting officers seized the defendant's cell phone as the result of an inventory search of the vehicle in which the defendant was arrested.[183] The cell phone was sent to the DEA, where an agent searched the text messaging log.[184] The fourth circuit explained:

> Citing the "manifest need . . . to preserve evidence," this Court has held on at least two prior occasions, albeit in unpublished opinions, that officers may retrieve text messages and other information from cell phones and pagers seized incident to an arrest. Similarly, the Fifth Circuit and Seventh Circuit have held that the need for the preservation of evidence justifies the retrieval of call records and text messages from a cell phone or pager without a warrant during a search incident to arrest.[185]

The defendant argued that, under the court's rationale, only those phones with minimal storage capacity should be subject to the exception since those phones pose a greater risk of having their archived information deleted, whereas phones with large storage capacity do not present the same risk.[186] The court rejected such a rule, explaining that

> to require police officers to ascertain the storage capacity of a cell phone before conducting a search would simply be an unworkable and unreasonable rule. It is unlikely that police officers would have any way of knowing whether the text messages and other information stored on a cell phone will be preserved or be automatically deleted simply by looking at the cell phone.[187]

Thus, those courts that have upheld warrantless searches of cell phones under the original *Chimel* rationale based upon the risk of a destruction of evidence have been satisfied in the mere possibility that the phone's information could be lost or destroyed without proof that the specific phone could have suffered the deletion of relevant evidence.

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181. 552 F.3d 405, 411 (4th Cir. 2009).

182. *Id.*

183. *Id.* at 408.

184. *Id.* at 409.

185. *Id.* at 411 (alteration in original) (citing United States v. Young, 278 F. App'x 242, 245–46 (4th Cir. 2008); United States v. Finley, 477 F.3d 250, 260 (5th Cir. 2007); United States v. Hunter, No. 96-4259, 1998 U.S. App. LEXIS 27765, at *3 (4th Cir. Oct. 29, 1998); United States v. Ortiz, 84 F.3d 977, 984 (7th Cir. 1996)).

186. *Murphy*, 552 F.3d at 411.

187. *Id.* (citing *Young*, 278 F. App'x at 245).

2. The Automobile Exception as Applied to Warrantless Cell Phone Searches

In *United States v. Ball*, the district court was faced with a challenge to a warrantless cell phone search involving a vehicle and invoked the automobile exception to uphold the search.[188] In *Ball*, the defendant was arrested in a vehicle following an undercover investigation into the illegal distribution of methamphetamine.[189] At the time of his arrest, the defendant was carrying a cell phone, which the officers seized and searched.[190] Without recognition of the heightened privacy concerns unique to cell phones, the court upheld the search of the cell phone as a search of a closed container. The court relied on the holding of a 1982 Supreme Court case that upheld the search of a brown paper bag as a closed container searchable under the automobile exception.[191] The court in *Ball* explained that:

> Clearly, at the time of arrest the officers through the use of the cooperators, independent investigation, and observations of the Defendant had probable cause to believe that the vehicle would contain evidence of crimes. This probable cause extended to the container and the cell phone as they were likely places for the evidence of crimes or contraband to be found.[192]

Although the court in *Ball* employed very generalized reasoning for the application of the automobile exception, other courts have been more detailed in their analyses.

In *United States v. Cole*, the defendant was arrested for unlawful possession of marijuana.[193] At the time of his arrest, officers seized several cell phones from the defendant's vehicle and gave them to a DEA agent who subsequently conducted a search of the phone, specifically, the recent call log and the address book.[194] The court recognized that some courts have refused to apply the automobile exception to warrantless searches of cell phones given "the vast amounts of data that some cell phones contain or may store, making them more analogous to computers than traditional telephones, pagers, or closed containers."[195] The court, however, did not

188. No. 04-03056-05-CR-S-RED, 2005 U.S. Dist. LEXIS 24180 (W.D. Mo. Oct. 17, 2005), *aff'd*, 499 F.3d 890 (8th Cir. 2007), *vacated*, 129 S. Ct. 2049 (2009).

189. *Id.* at *8–9.

190. *Id.* at *3–4.

191. *Id.* at *9–10. In the 1982 case, *United States v. Ross,* the court declared "[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." 456 U.S. 798, 825 (1982).

192. *Ball*, 2005 U.S. Dist. LEXIS 24180, at *9–10 (citing *Ross*, 456 U.S. at 825).

193. No. 1:09-CR-0412-ODE-RGV, 2010 U.S. Dist. LEXIS 82822, at *6 (N.D. Ga. Aug. 11, 2010).

194. *Id*. at *10.

195. *Id*. at *61 (citing United States v. Carey, 172 F.3d 1268, 1275 (10th Cir. 1999) ("Relying on analogies to closed containers . . . may lead courts to oversimplify a complex area of Fourth Amendment doctrines and ignore the realities of massive modern computer storage." (internal quotation marks omitted)); State v. Smith, 920 N.E.2d 949, 954 (Ohio 2009) ("Even the more basic models of modern cell phones are capable of storing a wealth of digitized information wholly unlike any physical object found within a closed container. We thus hold that a cell phone is not a closed container for purposes of a Fourth Amendment analysis.")).

agree and found that the defendant's cell phone constituted a closed container "in that it contained information—recent calls, contacts' telephone numbers, and so forth—not readily apparent without manipulating the cell phone itself."[196]

Similarly, in *United States v. Meador*, officers searched defendant's cell phone, which they had seized from his parents' vehicle the day after he was arrested.[197] Specifically, the officers searched the call log and address book of defendant's cell phone. Notably, the court recognized that "[r]elying on analogies to closed containers . . . may lead courts to oversimplify a complex area of Fourth Amendment doctrines and ignore the realities of massive modern computer storage."[198] Nonetheless, the court upheld the search, explaining that

> [c]ellular phones are well-known and recognized tools of the drug dealing trade. Confronted with Meador's cell phone and these historical facts, the undersigned believes that a person of reasonable caution would believe that contraband or evidence of a crime would be found in the memory data of Meador's cellular phone. The officers therefore had probable cause to search the cell phone's memory.[199]

Following this same line of reasoning, the court in *United States v. Suarez-Blanca* upheld the warrantless searches of the defendants' cell phones.[200] In that case, the defendants were arrested for conspiring to possess with intent to distribute marijuana and cocaine.[201] At the time of their arrest, the defendants' cell phones were seized and later searched.[202] The court explained that "cell phones, with their directories and . . . memory of numbers recently or frequently called, are a known tool of the drug trade."[203] The court held that since the defendants had either been seen on their cell phones while participating in the illegal distribution of drugs or admitted calling other members of the drug conspiracy on the cell phones, there was "a fair probability that evidence of the crime for which Defendants had been arrested would be located . . . in the cell phones."[204]

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196. *Id.* at *64.

197. No. 1:06 CR 134 CDP DDN, 2008 U.S. Dist. LEXIS 92728, at *16, 21 (E.D. Mo. Jan. 7, 2008).

198. *Id.* at *38 (citing *Carey*, 172 F.3d at 1275) (internal quotation marks omitted).

199. *Id.* at *41–42 (quoting California v. Acevedo, 500 U.S. 565, 573, 580 (1991); United States v. Cleveland, 106 F.3d 1056, 1061 (1st Cir. 1997); United States v. Slater, 971 F.2d 626, 637 (10th Cir. 1992)).

200. No. 1:07-CR-0023-MHS/AJB, 2008 U.S. Dist. LEXIS 111623 (N.D. Ga. Jan. 22, 2008).

201. *Id.* at *2.

202. *Id.* at *57.

203. *Id.* at *58–59 (citing United States v. Slater, 971 F.2d 626, 637 (10th Cir. 1992) (stating that a cell phone is a "recognized tool of the trade in drug dealing"); United States v. Nixon, 918 F.2d 895, 900 (11th Cir. 1990) (stating that a cellular phone is "a known tool of the drug trade"); United States v. Wiseman, 158 F. Supp. 2d 1242, 1249 (D. Kan. 2001) (stating that it is "common knowledge in the courts . . . that cellular phones, complete with memory of numbers recently or frequently called, or their 'address books,' are a known tool of the drug trade")).

204. *Id.* 2008 U.S. Dist. LEXIS 111623, at *64.

In *United States v. Garcia-Aleman*, the defendants were arrested for possession of cocaine that was found in their vehicle after it was lawfully stopped and then searched.[205] At the time of their arrest, officers seized the defendants' cell phones from their persons and forwarded them to DEA agents who conducted a thorough, but warrantless, search.[206] Specifically, an agent downloaded the address books and the photographs stored on the phones.[207] The court explained that cell phones are considered "tools of the drug trade."[208] Therefore, the court held that "the automobile exception gave law enforcement officers latitude to search Benitez's cell phones like it would allow the search of other closed containers in the pickup truck."[209]

Thus courts have extended the reach of the automobile exception to cell phones on the basis that cell phones are closed containers—despite often recognizing that cell phones present unique privacy concerns not akin to personal effects previously held to be closed containers.

3. The Exigent Circumstances Exception as Applied to Warrantless Cell Phone Searches

United States v. Parada, one of the earliest cases to address a warrantless search of a cell phone, justified the search in that case under the exigent circumstances exception to the Fourth Amendment.[210] There, the defendants were arrested for possession with intent to distribute PCP.[211] A cell phone belonging to defendant Parada was found in the vehicle containing the PCP and was given to a DEA agent who conducted a warrantless search of the recent calls log.[212] Citing the exigency rationales proposed in the pager cases, the court held:

> Because a cell phone has a limited memory to store numbers, the agent recorded the numbers in the event that subsequent incoming calls effected the deletion or overwriting of the earlier stored numbers. This can occur whether the phone is turned on or off, so it is irrelevant whether the defendant or the officers turned on the phone. The Court concludes that under these circumstances, the agent had the authority to immediately search or retrieve,

205. *See* No. 1:10-CR-29, 2010 U.S. Dist. LEXIS 65333 (E.D. Tex. June 9, 2010).

206. *Id.* at *10–11.

207. *Id.*

208. *Id.* at *36–37 (citing United States v. Munera-Uribe, No. 98-20438, 1999 U.S. App. LEXIS 18426, at *19 (5th Cir. Apr. 5, 1999); United States v. Cleveland, 106 F.3d 1056, 1061 (1st Cir. 1997); United States v. Sasson, 62 F.3d 874, 886 (7th Cir. 1995)).

209. *Garcia-Aleman*, 2010 U.S. Dist. LEXIS 65333, at *37.

210. *See* United States v. Parada, 289 F. Supp. 2d 1291 (D. Kan. 2003), *aff'd in part, remanded in part sub nom.* United States v. McNeill, 136 F. App'x 153 (10th Cir. 2005).

211. *Id.* at 1295.

212. *Id.* at 1298.

> as a matter of exigency, the cell phone's memory of stored numbers of incoming phone calls, in order to prevent the destruction of this evidence.[213]

In *United States v. Zamora*, the court also relied on the rationales underlying the pager cases to uphold the warrantless search of a cell phone, as an apparently analogous electronic device.[214] In *Zamora*, the defendants were arrested for conspiring to manufacture methamphetamine.[215] At the time of their arrest, their cell phones were seized and given to a DEA agent who searched the recent calls log without a warrant.[216] The agent testified at trial that "the contents of the cell phones can be altered by each incoming call creating an exigency to conduct the search before the cell phone memory is altered."[217] The court, relying on *Ortiz*, held that the warrantless search in this case was permissible under the search incident to arrest exception or the exigent circumstances exception since

> [t]here is no material difference between the information retrieved from a pager and the information retrieved from the cell phones in this case . . . .
>
> . . . .
>
> [Therefore,] . . . the immediate searches of the cell phones taken from their persons were lawful either as part of the search incident to arrest or based on exigent circumstances.[218]

Parada and *Zamora* demonstrate the early justifications courts relied upon in holding that exigent circumstances rendered the warrantless searches of cell phones constitutional. In those cases, the courts upheld the searches under the proposition that all cell phones have a limited storage capacity and delete archived information to make room for new incoming information, creating an exigency permitting officers to search the cell phones before information is lost.[219] More recently, however, courts have justified the invocation of exigent circumstances on other grounds. In *United States v. Salgado*, the defendant was arrested pursuant to a valid arrest warrant for conspiring to distribute a controlled substance.[220] Subsequent to his arrest, agents seized a phone that was in a pair of pants that the defendant wished to put on before being transported to the station.[221] An agent searched and recorded all the numbers contained in the address book of defendant's cell phone.[222] At trial, the agent who

213. *Id*. at 1303–04

214. *See* No. 1:05-CR-250-WSD, 2005 U.S. Dist. LEXIS 40775, at *33 (N.D. Ga. Dec. 7, 2005).

215. *Id.* at *3.

216. *Id.* at *31–32.

217. *Id.* at *32.

218. *Id.* at *33, *35.

219. *See id.*; United States v. Parada, 289 F. Supp. 2d 1291 (D. Kan. 2003), *aff'd in part, remanded in part sub nom*. United States v. McNeill, 136 F. App'x 153 (10th Cir. 2005).

220. No. 1:09-CR-454-CAP-ECS-5, 2010 U.S. Dist. LEXIS 77266, at *2 (N.D. Ga. June 15, 2010).

221. *Id.* at *4.

222. *Id.*

searched the phone testified that there currently exists technology that allows users to remotely delete information on their cell phones.[223] The court held that "the search of the cellular phone data was supported by exigent circumstances. At the time the cellular phone came into Agent Barnes' possession the data on the phone could have been altered, erased, or deleted remotely."[224] This suggests that the possibility that anyone can remotely delete information from a cell phone creates an exigency justifying a warrantless search of a cell phone.

IV. WARRANTLESS SEARCHES OF CELL PHONES: WHY COURTS HAVE IT WRONG AND HOW THEY CAN RETURN TO THE UNDERLYING PRINCIPLES OF THE FOURTH AMENDMENT

The foregoing cases have demonstrated the weakened Fourth Amendment protection against unreasonable searches of cellular telephones, resulting from two primary factors: First, many courts have held that cell phones are closed containers that may be lawfully searched without a warrant under both the search incident to arrest exception and the automobile exception of the Fourth Amendment.[225] Second, in exigent circumstance cases, courts have excused warrantless searches of cell phones without specific evidence that the cell phone in the case would actually delete, or be subject to remote deletion of, information contained within the phone.[226] As a result, courts have lost touch with the underlying principle of the Fourth Amendment and the original justifications for what were once referred to as the "few specifically established and well-delineated exceptions" of the Fourth Amendment.[227]

The drafters of the Fourth Amendment were undoubtedly motivated by a fear of a powerful unfettered government, and sought to ensure the protection of individual's personal effects beyond the life of the very ink which breathed life into the Amendment.[228] One of the most personal effects an individual can own in today's society is the cell phone, with its capacity to store an unbelievable amount of private information. This raises serious privacy concerns when such personal data is stored in a digitized format, easily visible to anyone in possession of the cell phone. Thus, cell phones are decidedly *not* analogous to address books or even other electronic devices such as pagers, which the Court has found searchable under the exceptions to the Fourth Amendment Warrant Clause. Cell phones, capable of storing recent

223. *See id.* at *10.

224. *Id.* at *11.

225. *See, e.g.*, United States v. Murphy, 552 F.3d 405 (4th Cir. 2009); United States v. Suarez-Blanca, No. 1:07-CR-0023-MHS/AJB, 2008 U.S. Dist. LEXIS 111623 (N.D. Ga. Jan. 22, 2008); United States v. Meador, No. 1:06 CR 134 CDP DDN, 2008 U.S. Dist. LEXIS 92728 (E.D. Mo. Jan. 7, 2008).

226. *See, e.g.*, *Salgado*, 2010 U.S. Dist. LEXIS 77266; United States v. Zamora, No. 1:05-CR-250-WSD, 2005 U.S. Dist. LEXIS 40775 (N.D. Ga. Dec. 7, 2005); United States v. Parada, 289 F. Supp. 2d 1291 (D. Kan. 2003), *aff'd in part, remanded in part sub nom.* United States v. McNeill, 136 F. App'x 153 (10th Cir. 2005).

227. Katz v. United States, 389 U.S. 347, 357 (1967).

228. *See* United States v. Chadwick, 433 U.S. 1 (1977).

checking account transactions and e-mails of its users, among other things, cannot be equated with solely call-back-number-storing pagers. To make such a conclusion is to ignore and virtually nullify the very protections the drafters of the Fourth Amendment sought to ensure throughout time and to all types of effects, even those not yet even envisioned at the time of the drafting. A thorough examination of the early Fourth Amendment jurisprudence raises questions about how a warrantless search of a modern-day cell phone could fall into any of the exceptions of the Fourth Amendment.

A thorough and critical analysis of Fourth Amendment jurisprudence demonstrates that cell phones are not closed containers because they are not capable of storing physical objects, as closed containers were originally defined. Unlike mere physical objects, cell phones store information in a digital format, allowing for an incredible amount of personal information to be stored on a very small device. Therefore, warrantless cell phone searches should not be upheld under the search incident to arrest or automobile exception. Additionally, the exigent circumstances exception should only justify a warrantless cell phone search where there are specific and articulable facts, known to the officer at the time of a warrantless cell phone search, that the particular phone would delete archived information or be subject to remote deletion.

The Ohio Supreme Court in *State v. Smith* and the Northern U.S. District Court for the District Court of California in *United States* v. *Park* provide instruction for how courts can adhere to these principles, and, thus, the Fourth Amendment's warrant requirement, in adjudicating warrantless cell phone searches.[229]

In *Smith*, the defendant was lawfully arrested at his home for trafficking cocaine.[230] Upon defendant's arrest, a cell phone found on his person was seized and later searched, specifically, officers searched the recent calls log and address book.[231] The court found that cell phones are not closed containers because they cannot hold physical objects within them as required by *Belton*.[232] Further, the court recognized the unique privacy concerns at stake when an officer conducts a warrantless search of a cell phone.[233] Invoking the rationale of *Chadwick*, the Ohio Supreme Court stated:

> Once the cell phone is in police custody, the state has satisfied its immediate interest in collecting and preserving evidence and can take preventive steps to ensure that the data found on the phone are neither lost nor erased. But because a person has a high expectation of privacy in a cell phone's contents, police must then obtain a warrant before intruding into the phone's contents.[234]

229. *See* State v. Smith, 920 N.E.2d 949 (Ohio 2009); United States v. Park, No. CR 05-375 SI, 2007 U.S. Dist. LEXIS 40596 (N.D. Cal. May 23, 2007).

230. *Smith*, 920 N.E.2d at 950–51.

231. *Id.* at 950.

232. *Id.* at 954.

233. *Id.* at 955.

234. *Id.*

Importantly, the court acknowledged that the government was unable to prove that the cell phone posed a danger to officer safety or that exigent circumstances justified the search.[235]

In *United States v. Park*, the court found that a warrantless search of a defendant's cell phone violated his Fourth Amendment right to be free from unreasonable searches.[236] There, the defendants were arrested pursuant to a valid search warrant.[237] Upon their arrest, officers seized cell phones and later searched the cell phones.[238] Relying on *Chadwick*, the district court in *Park* held that "for the purposes of Fourth Amendment analysis cellular phones should be considered 'possessions within an arrestee's immediate control' and not part of 'the person.' This is so because modern cellular phones have the capacity for storing immense amounts of private information."[239] The court in *Park*, like the court in *Smith,* took notice that the government did not present specific evidence of exigent circumstances justifying the search.[240]

Park and *Smith* provide a model for courts to use when analyzing warrantless cell phone searches that will ensure adherence to the principles underlying the Fourth Amendment. Preliminarily, a court deciding whether a particular warrantless cell phone search was lawful should engage in only one colloquy[241]—whether there were exigent circumstances justifying the search, specifically, whether information on the cell phone was actually subject to remote deletion at the moment of the search. Where officers entertained a reasonable belief that the cell phone would be subject to imminent remote deletion and could not engage in any preventative measures to ensure that the data on the phone would not be lost, a warrantless search of a cell phone should be excused by exigent circumstances and found to be constitutional. Absent this very limited circumstance, however, a court should never uphold the search of a cell phone absent a warrant.

A. Cell Phones Are Not Closed Containers

Integral to any analysis of a warrantless cell phone search is whether cell phones are closed containers. In all three aforementioned exceptions to the Fourth Amendment, the searches of the contents of cell phones were upon a finding that a cell phone is a closed container. In *Belton*, the Court defined a closed container as "any object capable of holding another object. It thus includes . . . luggage, boxes,

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235. *Id.*

236. *See* United States v. Park, No. CR 05-375, 2007 U.S. Dist. LEXIS 40596 (N.D. Cal. May 23, 2007).

237. *Id.* at *4.

238. *Id.* at *4, *12, *13.

239. *Id.* at *21 (citing United States v. Chadwick, 433 U.S. 1, 16 n.10 (1977)).

240. *Id.* at *24.

241. This is because, as *Smith* and *Park* have demonstrated, cell phones are not closed containers and thus not searchable under the search incident to arrest and automobile exceptions. Therefore, an analysis of those exceptions is irrelevant.

bags, clothing, and the like."[242] Objects that have been found to be closed containers include a cigarette package, a wallet, and an address book.[243] The definition assumes that a closed container must be able to contain a physical, tangible object. Electronic information, in contrast, is not a physical, tangible object and, therefore, does not fall within *Belton*'s definition of a closed container.

Courts erred in applying the closed container definition from the early 1990s to the pager cases.[244] The analyses applied in the pager cases laid the foundation for courts to later find that electronic devices, like cell phones, are closed containers by analogy to pagers.[245] Other courts tasked with evaluating the legality of warrantless searches of cell phones merely assumed, without provided any analysis in support, that cell phones were closed containers.[246] Yet other courts asserted that cell phones are analogous to wallets and address books.[247] At least one court acknowledged the definition of *Belton* and posited that cell phones are closed containers because they contain information within.[248] In sum, these courts have "fail[ed] to consider the Supreme Court's definition of 'container' in *Belton*."[249]

B. A Showing of Exigent Circumstances Should Require Proof of an Actual Risk of Information Loss

The warrantless searches of cell phones should not be justified by the exigent circumstances exception to the Fourth Amendment without specific proof that the cell phone could have *actually* lost information. In *Vale v. Lousiana*, the Supreme Court explicitly held that "the burden rests on the State to show the existence of . . . an exceptional situation" to excuse a warrantless search on the basis of exigent

242. New York v. Belton, 453 U.S. 454, 461 n.4 (1981) ("'Container' here denotes any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like.").

243. *See* United States v. Robinson, 414 U.S. 218 (1973) (cigarette package); United States v. Rodriguez, 995 F.2d 776, 778 (7th Cir. 1993) (address book); United States v. Molinaro, 877 F.2d 1341 (7th Cir. 1989) (wallet).

244. *See, e.g.*, United States v. Ortiz, 84 F.3d 977 (7th Cir. 1996); United States v. Romero-Garcia, 991 F. Supp. 1223 (D. Or. 1997); United States v. Chan, 830 F. Supp. 531 (N.D. Cal. 1993); People v. Samaniego, 31 Cal. Rptr. 2d 107 (Cal. Ct. App. 1994); People v. Bullock, 277 Cal. Rptr. 63 (Cal. Ct. App. 1990); State v. Deluca, 775 A.2d 1284 (N.J. 2001); State v. Harris, 648 S.E.2d 218 (N.C. Ct. App. 2007).

245. *See* United States v. Wurie, 612 F. Supp. 2d 104 (D. Mass. 2009).

246. *See, e.g.*, United States v. Murphy, 552 F.3d 405 (4th Cir. 2009); United States v. Suarez-Blanca, No. 1:07-CR-0023-MHS/AJB, 2008 U.S. Dist. LEXIS 111623 (N.D. Ga. Jan. 22, 2008); United States v. Meador, No. 1:06 CR 134 CDP DDN, 2008 U.S. Dist. LEXIS 92728 (E.D. Mo. Jan. 7, 2008).

247. *See, e.g.*, *Wurie*, 612 F. Supp. 2d 104; United States v. Urbina, No. 06-CR-336, 2007 U.S. Dist. LEXIS 96345 (E.D. Wis. Nov. 6, 2007); United States v. Cote, No. 03 CR 271, 2005 U.S. Dist. LEXIS 11725 (N.D. Ill. May 26, 2005), *aff'd*, 504 F.3d 682 (7th Cir. 2007).

248. United States v. Cole, No. 1:09-CR-0412-ODE-RGV, 2010 U.S. Dist. LEXIS 82822, at *64 (N.D. Ga. Aug. 11, 2010).

249. State v. Smith, 920 N.E.2d 949, 954 (Ohio 2009).

circumstances.[250] In *Vale*, the Court held that where there was no evidence that anyone was in a position to actually destroy the narcotics, the warrantless search could not be justified under exigent circumstances.[251]

Likewise, in the case of a warrantless search of a cell phone, unless it can be demonstrated that the specific phone could delete information or that someone was in a position to remotely erase the information on the phone, the search should not be excused on the basis of exigent circumstances. When such definitive constitutionally protected privacy rights are at stake, it is not sufficient to merely assert the possibility that the information could be deleted from the cell phone to justify the warrantless search.[252]

The analytical framework that this note proposes begins with the presumption that the particular warrantless cell phone search was unlawful. This presumption may only be overcome through testimony of the officer who searched the cell phone without a warrant. The officer's testimony must contain specific and articulable facts, known to the officer at the time of the search, demonstrating that the specific cell phone was at risk of remote deletion of potential evidence. Additionally, the officer must further testify that there were no preventative measures available to him at the time of the search which could secure any evidence potentially stored on the cell phone. This framework will adhere to the principles of the Fourth Amendment by protecting the significant privacy concerns unique to modern-day cell phones—concerns that will only increase as society progresses toward further technological advances.

V. GETTING BACK TO THE FOURTH AMENDMENT: THE IMPORTANCE OF INSTILLING A ROBUST FRAMEWORK FOR THE SEARCH OF CELL PHONES

The courts that have upheld warrantless searches of cell phones have failed to fully account for the unique privacy concerns inherent in modern-day cell phones.[253] There are few items today that are more personal and deserving of robust Fourth Amendment protection than a cell phone. The ability of modern cell phones "to store large amounts of private data gives their users a reasonable and justifiable expectation of a higher level of privacy in the information they contain."[254] This level

250. 399 U.S. 30, 34 (1970).

251. *See id.*

252. *See id.*

253. *See, e.g.*, United States v. Park, No. CR 05-375, 2007 U.S. Dist. LEXIS 40596, at *21 (N.D. Cal. May 23, 2007) ("[M]odern cellular phones have the capacity for storing immense amounts of private information. Unlike pagers or address books, modern cell phones record incoming and outgoing calls, and can also contain address books, calendars, voice and text messages, email, video and pictures. Individuals can store highly personal information on their cell phones, and can record their most private thoughts and conversations on their cell phones through email and text, voice and instant messages" (footnote omitted)).

254. *Smith*, 920 N.E.2d at 955.

of privacy should not be subject to exceptions to the warrant requirement that bear no relation to the specific search.

The exceptions to the Warrant Clause of the Fourth Amendment were not meant to swallow up the protection against unreasonable searches that the drafters sought to guarantee.[255] However, the application of the exceptions to the Fourth Amendment warrant requirement to searches of cell phones have threatened to do just that and have undermined much of the Fourth Amendment's protections.

Courts should strictly enforce the warrant requirement for searches of cell phones to ensure that the Fourth Amendment protection remains intact. Notably, when applications for a warrant to search cell phones are presented to the courts they can be *denied* because a neutral magistrate has decided that there is insufficient cause to sidestep an individual's Fourth Amendment right to be secure against unreasonable searches and seizures.[256] The one and only exception that should ever be entertained by a court is the exigent circumstances exception. Second, a court should only excuse a warrantless search of a cell phone under this exception when the government has produced evidence to show that, but for the warrantless search, the specific cell phone would actually have deleted information or would have been subject to remote deletion of information.

The very high and well-founded expectation of privacy a person has in their cell phone should not be overridden by anything less than this high standard. The fundamental command of the Fourth Amendment—that no search shall be conducted without warrant or probable cause—demands it.

To uphold a warrantless search of a modern-day cell phone is to permit the very invasion of privacy the drafters of the Fourth Amendment sought to protect against. Modern-day cell phones have the capacity to store an incredible wealth of private information, from bank account passwords to a detailed log of an individual's day-to-day activities. By strictly enforcing the Warrant Clause of the Fourth Amendment to searches of cell phones, courts will ensure, through a neutral magistrate, that there exist valid justifications to invade one of the most private personal effects of individuals today. Courts will thereby take the first in what will hopefully be many steps toward getting back to the Fourth Amendment.

255. *See* Johnson v. United States, 333 U.S. 10, 14 (1948).

256. *See, e.g.*, *In re* The Search of Certain Cell Phones, 541 F. Supp. 2d 1 (D.D.C. 2008).