

## Cellular Telephones and the Fourth Amendment

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# Cellular Telephones and the Fourth Amendment

BY JEFFREY T. WENNAR AND JAMIE BRINKMEYER PERRY

Cellular telephones (“cell phones”) provide their users with immediate access and connectivity, and this has become the expectation of the majority of society. Cell phones allow users to communicate by way of actual conversations, text messages, and email. As a result, most cell phones store a wealth of information: contact names, phone numbers and addresses, recently called numbers, emails, text messages, and photographs. The majority of cell phone use is for a legal purpose but unfortunately, cell phones are also used in conjunction with criminal activity. This raises the question of whether the Fourth Amendment warrant requirement is applicable to a cell phone seized incident to an arrest. The inquiry also questions whether there is an acceptable period of time within which law enforcement can examine a cell phone incident to an arrest before a search warrant is required.



to searching areas where an individual has a reasonable expectation of privacy.<sup>2</sup> Searches are generally unlawful if they are performed without such warrants and if they violate the owners' reasonable expectation of privacy in the item or area being searched.<sup>3</sup> Evidence gained from an illegal search will

be suppressed.<sup>4</sup> However, there are exceptions to this general warrant requirement.<sup>5</sup> Even when a warrantless search violates a person's reasonable expectation of privacy, it will be deemed constitutional if it falls within an established exception to the warrant requirement.<sup>6</sup> One such exception refers to searches carried out incident to lawful arrests.<sup>7</sup> This exception is based on the principle that a person lawfully arrested has no reasonable expectation of privacy with respect to property taken from

his person. Contemporaneous to arrest, the government has a right to search the person of the accused to obtain evidence of the crime.<sup>8</sup> However, a search incident to arrest must still be reasonable; meaning the need to search outweighs the invasion of privacy imposed by the search.<sup>9</sup>

Over the last forty years, several Supreme Court decisions have clarified the scope of this exception. In *Chimel v. California*,<sup>10</sup> the Court explained that this exception applies to a search incident to an arrest only when limited to a search for weapons or for evidence that could be concealed or destroyed.<sup>11</sup> The Court further restricted this search to the arrestee's person and the area within his immediate control.<sup>12</sup> Yet shortly thereafter the Court extended the scope of this rule, stating that officers could search all items on an arrestee's person, including closed containers, without needing to articulate suspicion that the contents of the container are illegal.<sup>13</sup> In 1981, the Court addressed the search incident to arrest exception as it applies to automobiles, stating that it is lawful to search the passenger compartment of a vehicle and containers therein when an occupant of the car is lawfully arrested.<sup>14</sup> The Court specifically noted that the term “container” should be interpreted broadly to include all objects capable of holding other objects.<sup>15</sup> It is worth noting the recent Supreme Court decision in *Arizona v. Gant* which clarifies and limits the *Belton* rule, although the *Gant* limitation likely does not affect this analysis.<sup>16</sup>

## DISCUSSION

### I. WARRANTLESS SEARCHES OF CELL PHONES INCIDENT TO ARRESTS ARE CONSTITUTIONAL, AS LONG AS THEY ARE PURSUANT TO A VALID ARREST, CONTEMPORANEOUS TO THAT ARREST, AND REASONABLE IN SCOPE.

Warrantless searches of cell phones are generally constitutional pursuant to a valid exception to the warrant requirement, which allows for searches incident to an arrest. Contemporaneous to a lawful arrest, law enforcement officers are permitted to search call logs and text messages for evidence that could potentially be destroyed before a search warrant is obtained.<sup>1</sup> However, this search must be reasonable, and searches extending into further areas of the cell phone, such as pictures and Internet browsing history, may exceed the scope of this exception.

The Fourth Amendment provides constitutional protection against unreasonable searches and seizures and requires that warrants, supported by probable cause, be issued prior

While the case law regarding searches incident to arrest is generally well established, the Supreme Court has not yet addressed issues related to warrantless searches of cell phones incident to arrest. Maryland courts have yet to address the issue as well. Although there is no binding authority in Maryland, decisions from U.S. district and circuit courts from around the country provide persuasive authority on this issue, including two recent cases from the Fourth Circuit.<sup>17</sup>

Early cases examining searches incident to arrests with regard to technology focused on electronic pagers.<sup>18</sup> Courts consistently held that retrieving the call history from a pager found on the person of an arrestee did not violate that individual's Fourth Amendment rights.<sup>19</sup> In *United States v. Ortiz*, the defendant was arrested for conspiracy to possess heroin, and an electronic pager was found on his person.<sup>20</sup> An agent on the scene recovered phone numbers and written messages from the pager.<sup>21</sup> The court upheld the constitutionality of this search, stating that due to the finite nature of a pager's memory, incoming pages may erase currently saved messages.<sup>22</sup> Due to the possibility that such evidence may be destroyed, the court stated that it was imperative that law enforcement officers have the authority to immediately search and retrieve such information contemporaneous to an arrest.<sup>23</sup> Similarly, the United States District Court for the Virgin Islands held that numbers stored in a pager on the arrestee's person could be accessed and recorded by law enforcement officers shortly after arrest, likening the contents of pagers and cell phones to the contents of a wallet or address book.<sup>24</sup>

Courts around the country have generally applied the logic from pager and wallet cases to uphold warrantless searches of cell phones incident to arrest. The most commonly cited case is *United States v. Finley*.<sup>25</sup> In *Finley*, the defendant was arrested during a traffic stop immediately following a controlled buy of methamphetamine.<sup>26</sup> A cell phone was recovered from the defendant's shirt pocket and a special agent looked through the call records and text messages, finding incriminating messages tying the defendant to narcotics use and trafficking.<sup>27</sup> The court held that this search incident to arrest, including the search of the defendant's call records and text messages, was lawfully done to preserve evidence. In making this assertion, the court recognized that law enforcement officers on the scene have no way of knowing whether messages will automatically delete themselves as new messages are received.<sup>28</sup> For example, software applications such as TigerText allows the sender to program when a message or picture will automatically be deleted from the recipient's phone.<sup>29</sup> The court reiterated that a search incident to arrest extends to containers found on the arrestee's person regardless of whether that container is open or closed, and determined that a cell phone was an electronic container subject to this warrant exception.<sup>30</sup>

Numerous U.S. district court opinions have also upheld searches of cell phone contents incident to arrest, often analogizing the search of a phone to the search of wallets, address books, and other containers found on a person at the time of arrest.<sup>31</sup> Many of these courts discuss the dynamic nature of cell phone and pager memory, stating that the contents of these electronic containers are subject to change without warning, thus creating a risk that data could be lost with every new call or message received by a particular cell phone.<sup>32</sup>

Two cases out of the Fourth Circuit provide persuasive authority for jurisdictions where courts have not addressed this issue. Both cases cite the need to preserve evidence as justification for the warrantless searches of cell phones incident to arrest.<sup>33</sup> In *United States v. Young*, the search of a defendant arrested for drug trafficking yielded a cell phone, and an officer on the scene accessed text messages and recorded their contents.<sup>34</sup> The court upheld the search, noting that the officer had no way of knowing if the messages would be preserved and thus further analogizing the search of the cell phone to previous cases upholding searches of electronic pagers.<sup>35</sup> In *United States v. Murphy*, the defendant's cell phone was recovered from his person at the time of arrest, and an officer on the scene found incriminating text messages contained within.<sup>36</sup> The court cited *Young*, as well as older cases involving electronic pagers, to justify the search incident to arrest based on a manifest need to preserve evidence.<sup>37</sup> The court further noted that it would be unworkable and unreasonable to require officers to determine the storage capacity of a phone before searching its contents.<sup>38</sup>

Two courts have departed from this logic by suppressing evidence collected from cell phones during searches incident to arrest. However, both of these courts primarily scrutinized the timing of the searches, stating that they were not contemporaneous to the arrest.<sup>39</sup> The *Lasalle* court ended its analysis upon determining that the search was too remote in time and place from the arrest, later declining to address the constitutionality of the search as if it had been conducted contemporaneously.<sup>40</sup> Conversely, the *Park* court included a discussion of warrantless searches of cell phones occurring closer in time and place to the arrest.<sup>41</sup> The court recognized that while a cell phone is similar to a pager or address book, the similarities end there.<sup>42</sup> Modern cell phones often contain calendars, voice messages, emails, videos, pictures, and Internet browsing history. The court in *Park* stated that the line between cell phones and personal computers has grown increasingly blurry, holding that because of the quantity and quality of information that can be stored on modern cell phones, they garner a greater expectation of privacy.<sup>43</sup> Therefore, the court determined a cell phone should not be characterized as a container closely associated with the person of the arrestee and should not be searched without a warrant.<sup>44</sup>

Other than *Park*, many courts have yet to address the quickly changing technology of cell phones. With each passing month, cell phone companies release phones with newer features, larger storage capacities, and greater Internet browsing capabilities. As technology improves, cell phones become less like their pager ancestors and more like laptop computers. It is likely that future decisions will begin to analogize cell phones to computers, affording them greater protections due to the increased expectation of privacy. Newer phones, such as the Blackberry and iPhone, are particularly able to store large amounts of information—much more than an arrestee could typically carry on his person in a wallet, address book, or pager. Thus an officer who is conducting a search and comes across this type of cell phone could easily access an arrestee’s Internet browsing history, bank records, passwords, and emails. It is unlikely that courts would

allow warrantless searches of this scope to continue, as one requirement of the search incident to arrest exception is that the search itself is reasonable. Early decisions addressing warrantless searches of laptop computers have shown that courts are unwilling to extend this exception to laptops found on the arrestee’s person, citing the vast amounts of personal and private information stored on such devices.<sup>45</sup>

In *United States v. Arnold*, the defendant’s Blackberry personal digital assistant (“PDA”) was seized from his backpack incident to his arrest and then searched.<sup>46</sup> The court discussed the technology of a PDA, stating that it contains both temporary and permanent memory.<sup>47</sup> Temporary memory includes applications such as the recent calls list, while the permanent memory contains information that is only altered when changes are imputed by the user.<sup>48</sup> Following this discussion the court declined to decide the evidentiary issue, leaving unanswered questions regarding searches of newer technologies such as Blackberries and iPhones.<sup>49</sup> Although the court did not rule on the constitutionality of the search, its analysis of new cell phone technology may provide guidance for future law enforcement procedures governing searches of cell phones incident to arrests.

The vast amount of case law on warrantless searches of cell phones indicates that these types of searches, reasonably conducted contemporaneous to a lawful arrest, are constitutional.<sup>50</sup> When a cell phone is found close to the arrestee’s person at the time of arrest, or inside the passenger compartment of his vehicle, officers should be permitted to conduct a reasonable search of the cell phone. This search can include call logs and

text messages, so that officers might preserve possible evidence that could be erased without warning. However, as new technology continues to improve and expand the capabilities of cell phones, courts may begin to limit the use of the search incident to arrest exception as it applies to such technology. Accordingly, officers should recognize that the scope of this type of search should be limited to call logs and text messages, as these are the areas of the phone that are most dynamic and subject to change without warning. The need to preserve evidence provides the well established justification for a reasonable search of this nature. However, a search of other capabilities of the phone, such as pictures, videos, and Internet browsing history, should be conducted only with a search warrant, as this type of evidence is afforded a higher expectation of privacy, is unlikely to be destroyed, and can be viewed at a later date or time. Whenever possible, a warrant

should be obtained when an officer is unsure if a search will extend beyond the scope permitted by the search incident to arrest exception to the warrant requirement.

## **II. WARRANTLESS SEARCHES OF CELL PHONES INCIDENT TO ARREST MUST BE CONTEMPORANEOUS TO THE ARREST, MEANING THAT THEY ARE NOT REMOTE IN TIME AND PLACE TO THE ARREST.**

The search incident to arrest exception to the warrant requirement allows law enforcement officers to conduct searches contemporaneous to arrest either to recover weapons or to prevent possible destruction of evidence.<sup>51</sup> Evidence obtained as part of a search incident to an arrest will be suppressed if it is not retrieved contemporaneous to that arrest.<sup>52</sup> The term “contemporaneous” is commonly defined as “existing or occurring during the same time.”<sup>53</sup> Neither the U.S. Supreme Court nor courts in Maryland have defined a fixed outer limit regarding how much time can elapse before a search is no longer contemporaneous to an arrest. Generally, a search will be considered contemporaneous if it is completed as soon as reasonably possible, before the booking process is completed, and if it is not remote in time and place. These factors all indicate reasonableness of a search, and Maryland courts have held that such an analysis is not rigid and absolute; rather “each case is to be decided on its own facts and circumstances.”<sup>54</sup>

In *Preston v. United States*,<sup>55</sup> the Supreme Court reiterated that a contemporaneous search after a lawful arrest is permissible to search for weapons and to recover evidence of the crime

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*It is likely that future decisions will begin to analogize cell phones to computers, affording them greater protections due to the increased expectation of privacy.*

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before it can be destroyed.<sup>56</sup> If such a search is so remote in time and place that these two justifications are no longer a concern, then the search is no longer considered contemporaneous and is unconstitutional.<sup>57</sup> It is unreasonable to conduct a warrantless search that does not fall under these justifications, and such searches are not lawful.

Courts have typically allowed more time for searches of the arrestee's person and items closely associated with his person, while limiting the time allowed to search other personal effects such as luggage. In *United States v. Edwards*,<sup>58</sup> the Supreme Court held that searches of an arrestee's person and articles immediately associated with that person, such as purses or backpacks, may occur either at the time of arrest or when the arrestee arrives at the place of detention, but before booking procedures are completed.<sup>59</sup> Edwards was arrested around 11:00 p.m. and taken to jail, where he remained in his own clothing until the next morning because no substitute clothes were available at the late hour of his arrival.<sup>60</sup> The next morning, his clothing was taken for laboratory analysis without a warrant.<sup>61</sup> The Court held that effects closely associated with his person at the time and place of detention may be searched without a warrant, stating that it would have been unreasonable to leave him with no clothing in order to effectuate the search.<sup>62</sup> As this was not an undue or unreasonable delay, the warrantless search was valid because the officers completed it as soon as reasonably possible.<sup>63</sup> The need to preserve evidence was still present, so despite the delay in time, the search was reasonable and met the requirements of the search incident to arrest exception as defined by the court in *Preston*. However, the *Edwards* decision does not extend to other personal effects not closely associated with the person of the arrestee, such as luggage.<sup>64</sup>

The decision in *Edwards* appears to be one of the more liberal interpretations of the contemporaneous requirement.<sup>65</sup> Maryland courts have not defined a bright line rule regarding how much time can pass before a warrantless search is no longer contemporaneous to arrest, but courts since *Edwards* have not allowed significant periods of time to pass. Guidance from the Maryland Court of Special Appeals indicates that if a search closely anticipates, contemporaneously parallels, or shortly follows an arrest, then it satisfies the requirements of the search incident to arrest requirement.<sup>66</sup> Subsequent decisions in Maryland indicate that a search must simply be "essentially contemporaneous."<sup>67</sup> A search incident to arrest will not be considered contemporaneous if there is any undue delay.<sup>68</sup> Because there is no fixed outer limit regarding time between an arrest and a search incident to that arrest, courts must weigh the many factors involved including time elapsed, change of location, continued need to collect weapons or preserve evidence, and reasonableness of delays.

In *Preston v. State*,<sup>69</sup> the court suppressed evidence collected during a warrantless search that occurred two to three

hours following the defendant's arrest because the search was not essentially contemporaneous.<sup>70</sup> Upon arrest of the defendant, officers transported the defendant's car to a police garage before it was searched, rather than searching the car in the parking lot where the defendant was taken into custody.<sup>71</sup> The detective conducting the search stated that it was conducted in the police garage because it was "just more convenient."<sup>72</sup> The court stated that there was no doubt law enforcement could have conducted the search in the parking lot and that by moving the car, they made no attempt to satisfy reasonable promptness and thus created an undue delay.<sup>73</sup> The court indicated that its decision may have been different if the arrestee's person or items immediately associated with the arrestee's person had been searched after transportation to the police station, but they did not state with certainty that a delay of two to three hours would be essentially contemporaneous.<sup>74</sup>

In some instances, a search may be deemed contemporaneous to arrest even when it is not conducted at the scene or when there is a delay, as long as that delay is reasonable. In *Terrell v. State*,<sup>75</sup> the court upheld as a search incident to arrest that of a vehicle that had been towed to the police station.<sup>76</sup> At the scene of arrest it was dark and raining, the officers did not have the proper means of illumination to search the vehicle, and the station was less than a mile away.<sup>77</sup> The court found that the change in location and short delay was reasonable, considering that there was no break in the chain of events and the search was done with reasonable promptness immediately following the arrest.<sup>78</sup>

When an officer conducts a warrantless search of a cell phone incident to a valid arrest, it must be done contemporaneous to that arrest. It must not be remote in time and place, and there cannot be an unreasonable delay. Case law indicates that if there is a logical reason for a small delay in time or change in location, then the search will remain lawful. Officers must also consider where the cell phone is retrieved from upon arrest. If the cell phone is on the arrestee's person or located in a purse or backpack closely associated with the arrestee's person, the officer may have more leeway as long as the warrantless search is completed before the booking process is finished. On the other hand, if the cell phone is found in luggage or in other containers simply in possession of the arrestee, delays are more likely to be deemed unreasonable.

The term "contemporaneous" is commonly thought to mean "occurring or originating during the same time." Courts have stopped short of providing a bright line rule or fixed outer limit of time that is deemed contemporaneous, so law enforcement officers must consider several factors when conducting the warrantless search of a cell phone. They must consider where the phone was found, how much time has elapsed between the arrest and search, and whether the phone has been transported to a new location. If more than a few minutes have elapsed or if

the phone has been transported, officers must consider whether there was a good reason for these delays. If the delays could not have been avoided and the search is conducted as soon as possible, then it will likely be upheld as contemporaneous. If the delay was simply created for the searching officer's convenience, like in *Preston v. State*, the evidence gained from the search will likely be suppressed.

## CONCLUSION

Warrantless searches of cell phones are generally constitutional under the search incident to arrest exception to the warrant requirement. Contemporaneous to a lawful arrest, law enforcement officers are permitted to search call logs and text messages for evidence that could potentially be destroyed before a search warrant is obtained. Generally, a search will be considered contemporaneous if it is completed as soon as reasonably possible, before the booking process is completed, and if it is not remote in time and place. A search incident to arrest must be reasonable, and searches extending into further areas of the cell phone, such as Internet browsing history, may exceed the scope of this exception. As cellular technology continues to improve and as cell phones begin to function more like computers, courts may find that cell phones should be afforded greater privacy protections. To prevent the possible suppression of evidence, officers should limit cell phone searches incident to arrest to call logs and text messages when there is a fear that such evidence will be destroyed. When possible officers should also ensure that the search occurs within minutes of the arrest, and a search warrant should be obtained whenever possible.

<sup>8</sup> *Weeks*, 232 U.S. at 392 (holding that evidence gained during the contemporaneous search of an individual lawfully arrested has been "uniformly maintained").

<sup>9</sup> *Camara v. Mun. Court*, 387 U.S. 523, 536-37 (1967) (opining that a balancing test should be used to determine the reasonableness of a warrantless code inspection program).

<sup>10</sup> 395 U.S. 752, 764 (1969) (quoting *Preston v. United States*, 376 U.S. 364, 367 (holding that the search of an arrestee's person is limited to a search for weapons and other objects used to harm officers or effectuate escape)).

<sup>11</sup> *Chimel*, 395 U.S. at 764 (invalidating a search of the entire home of the arrestee because the justifications for a warrantless search do not apply to a search that is "remote in time or place from the arrest").

<sup>12</sup> *Id.* at 766 (finding that the justifications of officer safety and preservation of evidence do not apply to searches of items beyond the immediate control of the arrestee).

<sup>13</sup> *United States v. Robinson*, 414 U.S. 218, 236 (1973) (upholding the search of a crumpled cigarette pack, deemed a closed container, found on the arrestee).

<sup>14</sup> *New York v. Belton*, 453 U.S. 454, 462-63 (1981) (reasoning that anything within the passenger compartment at the time of arrest would have been within the immediate control of the arrestee passenger).

<sup>15</sup> *Belton*, 453 U.S. at 461 n.4 (identifying glove compartments, consoles, luggage, clothing, boxes, and bags as containers that may be searched if found in the passenger compartment during an arrest).

<sup>16</sup> *Arizona v. Gant*, 129 S. Ct. 1710, 1714 (2009). This decision limits law enforcement's ability to effectuate a warrantless search of a vehicle incident to arrest when the search is conducted after the recent occupants have been arrested and detained. When an arrestee is secured, the justification to search based on the need to ensure officer safety is no longer present. However, if law enforcement has a reasonable belief that the vehicle contains evidence of crime that may be destroyed even without the arrestee's presence, a warrantless search may still be reasonable based on the need to preserve that evidence. Considering the volatile nature of the memory capacity of cell phones, where an incoming call or text may replace previous calls or texts on the phone's log, the argument for preservation of evidence would likely prevail despite the decision in *Gant*.

<sup>17</sup> *United States v. Murphy*, 552 F.3d 405 (4th Cir. 2009), *cert. denied*, 129 S. Ct. 2016 (2009); *United States v. Young*, 278 F. App'x 242 (4th Cir. 2008).

<sup>18</sup> *E.g. United States v. Ortiz*, 84 F.3d 977, 984 (7th Cir. 1996) (stating that evidence retrieved from a pager discovered in a search incident to an arrest is admissible).

<sup>19</sup> *See id.* (reasoning that a search of the call history on an electronic pager is analogous to searching the contents of a container incident to a lawful arrest).

<sup>20</sup> *Id.* at 982.

<sup>21</sup> *Id.* at 983.

<sup>22</sup> *Id.* at 984 (finding that such a search is necessary to preserve the evidence stored in the call log of the pager).

<sup>23</sup> *United States v. Ortiz*, 84 F.3d 977, 984 (7th Cir. 1996) (reasoning that possession of a pager is akin to possession of a container, and therefore police were justified in searching the contents incident to arrest).

<sup>24</sup> *United States v. Brookes*, No. CRIM 2004-0154, 2005 WL 1940124, at \*3 (D. V.I. Jun. 16, 2005); *see also United States v. Molinaro*, 877 F.2d 1341, 1347 (7th Cir. 1989) (holding that a wallet seized incident during arrest could be searched without a warrant to prevent the destruction of evidence).

<sup>25</sup> 477 F.3d 250, 254 (5th Cir. 2007) (affirming a conviction in which evidence was gained by a search of the arrestee's cell phone call log and text messages contemporaneously with a lawful arrest).

<sup>1</sup> *United States v. Finley*, 477 F.3d 250, 260 (5th Cir. 2007) (reasoning that a cell phone located on the person under arrest could contain evidence that should be preserved for trial and therefore falls within the search incident to arrest exception).

<sup>2</sup> U.S. CONST. amend IV.

<sup>3</sup> *Agnello v. United States*, 269 U.S. 20, 33 (1925) (holding that the search by an agent of the government is unlawful under the Fourth Amendment absent a warrant based on probable cause).

<sup>4</sup> *Weeks v. United States*, 232 U.S. 383, 398 (1914) (ruling that an item seized pursuant to an unlawful arrest could not be used at trial and must be returned to the accused).

<sup>5</sup> *Illinois v. Rodriguez*, 497 U.S. 177, 185 (1990) (identifying circumstances in which a search is not unreasonable under the Fourth Amendment such as a search incident to arrest or a good faith error by police).

<sup>6</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (recognizing the consensual search as another exception to the warrant requirement).

<sup>7</sup> *Agnello*, 269 U.S. at 30 (holding that a warrantless search must be proximate to a lawful arrest in time and location for this exception to apply).

- <sup>26</sup> *Id.* at 253-54.
- <sup>27</sup> *Id.* at 254.
- <sup>28</sup> *Id.* at 260.
- <sup>29</sup> TigerText, *Features: Self-Destructing Messages*, <http://www.tigertext.com/features>.
- <sup>30</sup> *Finley*, 477 F.3d at 260.
- <sup>31</sup> *See, e.g., United States v. Cote*, No. 03CR271, 2005 WL 1323343, at \*6 (N.D. Ill. May 26, 2005).
- <sup>32</sup> *See, e.g., United States v. Zamora*, No. 1:05 CR 250 WSD, 2006 WL 418390, at \*4 (N.D. Ga. Feb. 21, 2006) (distinguishing between the need to secure and preserve electronic data on a cell phone and the absence of such exigency in securing static objects such as luggage).
- <sup>33</sup> *United States v. Young*, 278 F. App'x 242, 245 (4th Cir. 2008); *United States v. Murphy*, 552 F.3d 405, 411 (4th Cir. 2009), *cert. denied*, 129 S. Ct. 2016 (2009).
- <sup>34</sup> *United States v. Young*, 278 F. App'x 242, 245 (4th Cir. 2008) (affirming the conviction because the cell phone was searched incident to the lawful arrest of the defendant).
- <sup>35</sup> *Id.* at 245-46 (citing cases in which preservation of evidence was identified as an acceptable justification for searching and recording the contents of a cell phone or pager call log).
- <sup>36</sup> *Id.* at 409, 413 (upholding a conviction based in part on the admission into evidence of incriminating information found in the defendant's cell phone during a search incident to arrest).
- <sup>37</sup> *Id.* at 411.
- <sup>38</sup> *Id.* (ruling that the search was valid simply because it was incident to an arrest).
- <sup>39</sup> *See United States v. Lasalle*, No. 07-00032 SOM, 2007 WL 1390820, at \*7 (D. Haw. May 9, 2007) (holding that a search incident to arrest occurring approximately three to four hours after arrest was not contemporaneous); *see also United States v. Park*, No. CR 05-375 SI, 2007 WL 1521573, at \*1 (N.D. Cal. May 23, 2007) (stating that a search conducted an hour and a half after arrest was no longer contemporaneous). In addition to these two reported cases, a first-degree murder charge in Baltimore, Maryland was dismissed after key evidence was suppressed by the court. Prosecutors intended to introduce evidence of a text message found on defendant Davon David Temple's phone that said "I killed 2 white people around my way 2day & 1 of them was a woman." This text message was obtained by a police detective without a warrant and was suppressed by the court. No further information could be obtained regarding the court's reasoning, the specific facts of the warrantless search, or whether the search was contemporaneous to the arrest. Gus G. Sentementes, *Maryland: Text Messages Leads to Arrest*, BALT. SUN, May 2, 2006, available at <http://www.policeone.com/evidence-collection/articles/131968-Maryland-Text-message-leads-to-arrest>.
- <sup>40</sup> *Lasalle*, 2007 WL 1390820 at \*7 (ruling that the search was not incident to arrest because it occurred approximately three to four hours after and several miles away from the time and location of the arrest).
- <sup>41</sup> *Park*, 2007 WL 1521573 at \*7-8.
- <sup>42</sup> *Id.* at \*8 (recognizing that a cell phone can store text messages and phone numbers but also photographs, videos, email, and instant messages, giving police warrantless access to an enormous amount of personal information unless proximity in time and location are strictly adhered to during a contemporaneous search incident to arrest).
- <sup>43</sup> *Id.* (noting that the search of a personal computer is substantially more intrusive than simply looking through a call log or contact list).
- <sup>44</sup> *Id.* at \*9 (reasoning that the amount of time that had elapsed between the arrest and search and the technological characteristics of the cell phone made the warrantless search unreasonable).
- <sup>45</sup> *See United States v. Arnold*, 454 F. Supp. 2d 999, 1001 (C.D. Cal. 2006) (holding that Customs and Border Patrol agents needed reasonable suspicion of a crime before conducting a warrantless search of the defendant's laptop computer); *see also State v. Washington*, No. 47773-1-I, 2002 WL 104492, at \*2 (Wash. Ct. App. Jan. 28, 2002) (holding that a search for the identity of the rightful owner of a laptop suspected as stolen does not fall within an exception to the warrant requirement because it is necessarily a search for evidence to be used against the possessor suspected of stealing the laptop); *see also United States v. Carroll*, 537 F. Supp. 2d 1290 (N.D. Ga. 2008) (representing the only case thus far addressing evolving cell phone technology).
- <sup>46</sup> *Carroll*, 537 F. Supp. 2d at 1294 (deferring judgment on the validity of a search incident to arrest when the arrestee voluntarily surrendered at the police station).
- <sup>47</sup> *Id.* (noting that dynamic memory such as a recent call log changes every time a new call arrives but stable memory such as a contact list can only be altered when a person actively inputs new or different information).
- <sup>48</sup> *Id.* (suggesting that the characteristics of certain types of stored data may impact the preservation of evidence justification).
- <sup>49</sup> *Id.* at 1300 (instructing parties to brief and prepare arguments to determine the validity of a search incident to arrest when the arrestee voluntarily surrendered at the police station).
- <sup>50</sup> *United States v. Finley*, 477 F.3d 250, 260 (5th Cir. 2007) (reasoning that a cell phone on the person under arrest could be searched incident to arrest because it may contain evidence that should be preserved for trial.); *Cote*, 2005 WL 1323343, at \*6 (finding that a cell phone found on the arrestee may be searched incident to arrest just as any other container could be).
- <sup>51</sup> *Chimel*, 395 U.S. at 764 (invalidating a search of the arrestee's entire home because there was no risk that he would have access to weapons or perishable evidence in areas of the house beyond his immediate control).
- <sup>52</sup> *Lasalle*, 2007 WL 1290820 at \*7 (ruling that the unwarranted search was not incident to arrest and therefore unlawful because it occurred some three to four hours after and several miles away from the time and location of the arrest).
- <sup>53</sup> MERRIAM-WEBSTER, INC., WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 491 (Philip Babcock Gove & Merriam-Webster Editorial Staff, eds. 1993). Courts in Maryland have not specifically defined the term "contemporaneous," nor have they overtly adopted this particular definition. However, the neighboring Court of Appeals of Virginia has adopted this definition. *See Jones v. Commonwealth*, 563 S.E.2d 364, 367 (Va. Ct. App. 2002). Furthermore, Maryland courts have cited to Webster's Dictionary over 600 times to define terms not otherwise defined by case law.
- <sup>54</sup> *See Pinkney v. State*, 283 A.2d 800, 806 (Md. Ct. Spec. App. 1971) (affirming a warrantless search incident to arrest while noting that there is no fixed formula for reasonableness).
- <sup>55</sup> 376 U.S. 364 (1964).
- <sup>56</sup> *Id.* at 367 (holding that the justifications for a warrantless search incident to arrest, being preservation of evidence and officer safety, do not apply when the search occurs far from the arrest in time or location).
- <sup>57</sup> *Id.* at 368 (reversing a conviction based on the search of an arrestee's car while he and his accomplices were in custody at the police station and the car was impounded at a garage).
- <sup>58</sup> 415 U.S. 800 (1974).
- <sup>59</sup> *Id.* at 805 (invalidating a search of the arrestee's clothing after he had been arrested, booked, and placed in a cell overnight because substitute clothing was not initially available).
- <sup>60</sup> *Id.* at 810 (dissenting that practical justifications, such as the need for replacement clothing, were not a substitute for officer safety and preservation of evidence justifications).
- <sup>61</sup> *Id.* at 805 (reasoning that the police imposed no more upon the arrestee at the time of the search than they would have the night before).

<sup>62</sup> *United States v. Edwards*, 415 U.S. 800, 811 (1974) (reasoning that paint chips on the arrestee's clothing could be evidence of the crime and could have been destroyed had a search not been allowed).

<sup>63</sup> *Id.* at 805 (finding the delay to be reasonable because an earlier search would have left the arrestee without clothing).

<sup>64</sup> *See generally United States v. Chadwick*, 443 U.S. 1, 16 (1977) (holding that the station house search of a two hundred pound footlocker over an hour after arrest was too remote in time and place for a warrantless search incident to arrest, and distinguishing the footlocker as an item in the arrestee's possession rather than an item on the arrestee's person or closely associated with him).

<sup>65</sup> Additionally, a case decided by the California Supreme Court, after this article was written but before it was published, *People v. Diaz*, No. S166600, 2011 Cal. LEXIS 1 at \*35 (Cal. Jan. 3, 2011), holds that a cell phone search conducted approximately 90 minutes after a lawful custodial arrest is reasonable as being incident to that arrest.

<sup>66</sup> *Anderson v. State*, 553 A.2d 1296, 1301 (Md. Ct. Spec. App. 1989) (upholding a search by police to disarm a suspect moments before arrest because the exact sequence of a search incident to arrest is less important than fidelity to the justifications for the warrant exception).

<sup>67</sup> *See State v. Funkhouser*, 782 A.2d 387, 409 (Md. Ct. Spec. App. 2001) (quoting *Anderson*, 533 A.2d at 1301) (reasoning that contemporaneousness does not require a specific sequence of events)).

<sup>68</sup> *Wallace v. State*, 791 A.2d 968, 973 (Md. Ct. Spec. App. 2002) (finding no undue delay when arrestee was detained in routine traffic stop and drug-sniffing dog arrived almost simultaneous to officer initiating traffic stop).

<sup>69</sup> 784 A.2d 601 (Md. Ct. Spec. App. 2001).

<sup>70</sup> *Id.* at 609 (noting that the search of a vehicle, taking place in a crime lab after arrest, is not sufficiently contemporaneous).

<sup>71</sup> *Id.* at 604 (reasoning that a search incident to arrest became unreasonable when the vehicle was towed from the scene of the arrest to a crime lab before being searched because officer safety and preservation of evidence justifications no longer apply).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 609-10 (finding that a search that occurred two to three hours after the arrest was no longer essentially contemporaneous).

<sup>74</sup> *Preston v. State*, 784 A.2d 601, 608 (Md. Ct. Spec. App. 2001). (distinguishing between searches of items closely associated with the arrestee and searches of items that were simply in the possession or under the control of the arrestee).

<sup>75</sup> 239 A.2d. 128 (Md. Ct. Spec. App. 1968).

<sup>76</sup> *Id.* at 140 (holding that a search of a vehicle at a police station was valid because the search began at the scene of the arrest and resumed at the police station in a continuous, uninterrupted event).

<sup>77</sup> *Id.* (reasoning that the traditional justifications of officer safety and preservation of evidence do not preclude other considerations in which it would be more reasonable to search at a different location).

<sup>78</sup> *Id.* (holding that a search of a vehicle after it had been moved from the scene of an arrest to the police station was still incident to arrest).

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**Jeffrey Wennar** is an Assistant State's Attorney for Montgomery County, Maryland. He has been practicing law since 1979. Mr. Wennar brought an expertise on gangs, and especially gangs in Maryland, to the position of Gang Prosecutor. In 1993 Governor Schaefer appointed Mr. Wennar to the Governor's Executive Advisory Council requesting him to study gangs in Maryland. As a result of that study, the Governor was presented with, "A Report on Gang Violence in Maryland," written by Mr. Wennar and other members of the study group. Mr. Wennar is also an Adjunct Professor at Washington College of Law where he developed and teaches an advanced trial advocacy class focusing on prosecuting the gang homicide.

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