2013

From Selfies to Shackles: Why the Government May Be Able to Search Your Cell Phone Without a Warrant

Rochelle Brunot
American University Washington College of Law

Follow this and additional works at: https://digitalcommons.wcl.american.edu/clp

Part of the Criminal Law Commons, and the Fourth Amendment Commons

Recommended Citation
Available at: https://digitalcommons.wcl.american.edu/clp/vol1/iss1/8

This Article is brought to you for free and open access by Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Criminal Law Practitioner by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.
FROM SELFIES TO SHACKLES: WHY THE GOVERNMENT MAY BE ABLE TO SEARCH YOUR CELL PHONE WITHOUT A WARRANT

by Rochelle Brunot

Can you hear me now? This phrase is more than just a Verizon commercial catch phrase; it has been said by almost everyone with a cell phone at one time or another. Cell phones are everywhere, and most individuals have an abundance of personal information on their phone. Consequently, if the police are able to look through an individual’s phone, they will have instant access to a significant amount of personal information. Looking through an individual’s cell phone without a warrant is undoubtedly an invasion of privacy and presents clear Fourth Amendment issues. However, this invasion of privacy may be permissible when the cell phone search falls under one of the exceptions to the general warrant requirement. The following facts describe a situation where the police used their search incident to arrest authority to search through an arrestee’s phone without a warrant.

1. A Proposed Scenario: Recitation of Facts from United States v. Wurie

Consider the following set of facts: a motorist pulls into a parking lot, picks up another person, and engages in what appears to be a drug sale. Police officers involved in routine surveillance of the area stop the motorist immediately after observing this interaction. When the officers search his car, they find two plastic baggies with crack cocaine inside his pocket. The motorist tells the officers he got the drugs from “B,” who sells crack.

The police subsequently arrest the motorist after he allegedly engaged in what the officers suspect is a drug deal. While at the station the police seize two cell phones, a set of keys, and a lump sum of cash. Before completing the booking process, however, they notice that one of the arrestee’s phones is repeatedly receiving calls from a number identified as “my house.” The contact name and phone number are in plain view. After five minutes of repeated calls, the officers look through the arrestee’s call log, without consent. The police identify the phone number associated with “my house” by looking at the call logs and pressing one additional button. When the officers type the phone number into the online white pages, they are then able to track down the address that coincides with that phone number.

The officers advise the man of his Miranda rights, which he waives, and then subsequently question him further: they ask him if he lives at the South Boston address associated with the “my house” number. He denies living at that address in South Boston. Skeptical of his story, the officers take the keys they found and go to the address associated with the “my house” phone number. When they arrive at the house, they notice that the mailboxes contain “his name along with another person’s.” The officers enter the house to “freeze” the scene.

---

1 See United States v. Wurie, 728 F.3d 1 (1st Cir. 2013), petition for cert. filed, 2013 WL 4404658 (U.S. Aug. 15, 2013) (No. 13-212) (the fact pattern created by the author in this section is based generally on the circumstances found in Wurie).
while they obtain a search warrant. After obtaining the search warrant, the officers search the house and find 215 grams of crack, a firearm, ammunition, four bags of marijuana, drug paraphernalia, and $250 in cash. Officers subsequently charge the arrestee with intent to distribute, distributing cocaine base, and being a felon in possession of a firearm and ammunition.

The main question in the aforementioned scenario, which essentially mirrors the facts of United States v. Wurie, is whether the police had the authority to look through the arrestee’s cell phone—specifically his call log and contact information—without consent. Neither party disputes that the police lawfully arrested the individual and could search him pursuant to that lawful arrest. What is also undisputed is that looking through his cell phone constituted a search. The question that remains, however, is whether the officers could actually search through the cell phone as part of a search incident to arrest? Does seeing a specific number in plain view repeatedly ring on a cell phone provide sufficient justification for a warrantless search incident to arrest?

The First Circuit Court of Appeals answered this question in the negative, holding that police do not have the authority to search through a suspect’s cell phone without a warrant, simply based on their power to conduct a search incident to arrest.\(^2\) The First Circuit, in reversing the lower court’s decision, reasoned that the government did not present enough evidence to show a search of a cell phone was necessary to either protect officer safety or to prevent the destruction of evidence.\(^3\) The government appealed and petitioned the United States Supreme Court for review.\(^4\) If cert is granted, the Supreme Court’s holding on this issue would inevitably lead to changes in law enforcement procedure, and would help to clarify what degree of privacy citizens can expect in their cell phones.

II. History of Search and Seizure Laws

The Fourth Amendment established broad protections against unreasonable search and seizure. The United States Supreme Court has interpreted the Fourth Amendment requirements to mean that any search without a warrant is presumptively unreasonable.\(^5\) Before the search of a person or place can be conducted, a neutral judge or magistrate must determine there is probable cause to search in a particular location or a particular person.\(^6\) Though any search without a warrant is presumptively unreasonable, the Court has carved out numerous exceptions to this requirement.\(^7\) One exception to the warrant requirement is a search of an individual incident to his arrest; however, the definition of what constitutes this type of search has expanded over time. With new developments and changing technology, the boundaries of this doctrine have become particularly unclear.

Throughout the years, the Supreme Court has examined the doctrine of search incident to arrest in several cases and created rules that define this type of search. In Chimel v. California,\(^8\) the Court found that while a search incident to arrest was permissible, the limited search authority did not permit officers to search a suspect’s entire house.\(^9\) The Court

\(^2\) See Wurie, 728 F.3d at 14 (quoting Arizona v. Gant, 556 U.S. 332, 345 (2009)).
\(^3\) Id. at 12.
\(^4\) See Wurie, 728 F.3d at 1.
\(^5\) See U.S. CONST. amend. IV (regarding reasonableness and the warrant requirement); Katz v. United States, 389 U.S. 347, 357 (1967) (noting that searches conducted without a warrant have been held unlawful “notwithstanding facts unquestionably showing probable cause”) (quoting Agnello v. United States, 269 U.S. 20, 33 (1925)).
\(^6\) See Katz, 389 U.S. at 357 (citing Wong Sun v. United States, 371 U.S. 471, 481-82 (1963)); see also Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971) (noting that the most basic constitutional rule is that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment, subject to only a few exceptions).
\(^9\) See id. at 768 (noting that the scope of the search
concluded that a search incident to arrest was limited to the “grab” area of a suspect because the primary reason for allowing this type of warrantless search was to ensure officer safety.\textsuperscript{10} In \textit{United States v. Robinson},\textsuperscript{11} the Court expanded the boundaries of this authority to include a search inside the pocket of a suspect after an arrest, even though the officer knew the object was not a weapon.\textsuperscript{12} The Court reasoned such a search is permissible because the search incident to arrest doctrine is necessary to prevent suspects from destroying evidence.\textsuperscript{13} Thus, if an individual is lawfully arrested, the Fourth Amendment permits a warrantless search of the individual, with no additional justification required.\textsuperscript{14}

Over the years, the type of search permissible under the search incident to arrest doctrine continued to expand; in 1974 the Court found that a search incident to arrest did not have to occur immediately at the time of arrest. In \textit{United States v. Edwards},\textsuperscript{15} officers searched a suspect’s clothes after arresting the suspect and seizing his clothes.\textsuperscript{16} The Court deemed the search reasonable because the search would have been legal if conducted at the time of the arrest.\textsuperscript{17} The Supreme Court’s most recent case regarding search incident to arrest dealt with the search of a car and, unlike previous decisions, seemed to limit the doctrinal scope with respect to the search of automobiles. In \textit{Arizona v. Gant},\textsuperscript{18} the Court found that a search of a car incident to arrest of the motorist operating it is only permissible when the suspect is not restrained by officers and is within reaching distance of the passenger compartment of the car.\textsuperscript{19} A limited search is warranted in such cases to prevent the destruction of evidence and to promote officer safety, but these two concerns are not present if the suspect cannot reach into the car.\textsuperscript{20}

While these rules regarding the search incident to arrest doctrine are firmly established, the Supreme Court has not yet addressed how the doctrine applies to cell phones. Though the doctrine permits officers to search a person or car for a cell phone, it does not state the limits, if any, placed on officers when looking through the contents of that phone, a device that, in this day and age, often contains personal, private information.

III. Search Incident to Arrest and Cell Phone Searches

In \textit{Wurie}, the First Circuit held that officers must obtain a warrant to search contents of a suspect’s cell phone.\textsuperscript{21} While the search to find a cell phone was permissible, the subsequent search through the contents of the cell phone required more than the power authorized under the search incident to arrest doctrine; the First Circuit reasoned that searching a cell phone’s contents did not relate to officer safety or to the preservation of evidence.\textsuperscript{22} Though the court expressed concern that the contents of a cell phone could be remotely destroyed, the court went on to list several techniques officers could use to prevent this destruction.\textsuperscript{23} In \textit{Wurie}, the officers simply looked

---

\textsuperscript{10} \textit{Id.} at 764.  
\textsuperscript{12} \textit{Id.} at 235.  
\textsuperscript{13} \textit{Id.} at 234 (citing Abel v. United States, 362 U.S. 217 (1960)).  
\textsuperscript{14} \textit{Id.} at 235.  
\textsuperscript{16} \textit{Id.} at 801–802.  
\textsuperscript{17} \textit{Id.} at 806.  
\textsuperscript{18} \textit{Arizona v. Gant}, 556 U.S. 332 (2009).  
\textsuperscript{19} \textit{Id.} at 343 (applying the rationale regarding search incident to arrest from \textit{Chimel}, 395 U.S. 752). The passenger compartment of the car includes the entire interior of the car.  
\textsuperscript{20} \textit{Id.} at 339 (citing Preston v. United States, 376 U.S. 364, 367–68 (1964)).  
\textsuperscript{21} \textit{See Wurie}, 728 F.3d at 12 (asserting that warrantless cell phone data searches are categorically unlawful under the search-incident-to-arrest exception).  
\textsuperscript{22} \textit{See id.} at 9-11 (stating that the cell phone can be inspected to ensure that it is not actually a weapon, but no further search on the cell phone should be permitted).  
\textsuperscript{23} \textit{See id.} at 11 (suggesting officers could simply remove the battery from the phone or place the phone in a Faraday box which would shield the phone from external electromagnetic radiation).
through the call log, a less invasive intrusion than a search of text messages, photographs, or emails; however, the rule applies equally to all cell phone searches in the First Circuit; as stated by the court in its opinion, it is necessary for all cell phone searches to be governed by the same rule, without regard for the invasiveness of the search.\textsuperscript{24}

In its petition to the Supreme Court in \textit{United States v. Wurie}, the government argued that the power given to officers for a search incident to an arrest should be defined broadly because not only is the search premised on safety and evidentiary concerns, but there is also a diminished expectation of privacy.\textsuperscript{25} The government argued that when a cell phone is found as part of a legitimate search incident to arrest, case law clearly allows for the phone to be searched.\textsuperscript{26} Cell phones are not unique in that they are the only items that store personal, private information. Rather, there are other items an individual can have on their person that would contain such personal information.\textsuperscript{27}

Further, the government argued that not going through cell phones could potentially lead to the destruction of crucial evidence.\textsuperscript{28} The government analogized the search of an individual’s cell phone to the permissible buccal DNA swab the Court recently permitted in \textit{Maryland v. King}.\textsuperscript{29} Both types of searches can provide identifying information to the police.\textsuperscript{30} Consequently, the government disagreed with the First Circuit’s blanket rule that cell phones found in a search incident to arrest may not be searched without a warrant. Part of the government’s argument was based on the connection between cell phone use and drug transactions, and that having a blanket rule would hinder officers’ ability to investigate crimes.\textsuperscript{31}

The following state and federal cases provide reasons for allowing and disallowing the search of cell phones seized incident to an arrest.

IV. The Current Circuit Split: Arguments For and Against the Warrantless Search of Cell Phones

A. Arguments and Cases in Support of the Warrantless Search

The Seventh Circuit upheld the search of a cell phone in \textit{United States v. Flores-Lopez}.\textsuperscript{32} In that case, law enforcement used an informant to buy drugs from a drug dealer, who received his drugs from the defendant. The police were able to overhear a conversation between the drug dealer and the defendant organizing a delivery of drugs at a specific garage; officers then arrested the defendant in front of the garage where the drug delivery was to take place. In a subsequent search of the defendant and his truck, the officers discovered and seized two cell phones. The officers searched one of the cell phones for its number, which they used to subpoena three months of the phone’s call history.\textsuperscript{33}

The Seventh Circuit acknowledged that though an individual’s cell phone may be a useful source for obtaining incriminating in-

\begin{itemize}
\item \textsuperscript{24} \textit{Id.} at 13.
\item \textsuperscript{26} \textit{Id.} at 14 (asserting the validity of such searches based on \textit{Robinson}, 414 U.S. 218; and \textit{Edwards}, 425 U.S. 800).
\item \textsuperscript{27} \textit{Id.} at 16.
\item \textsuperscript{28} \textit{Id.} at 15 (noting that some remote-wiping techniques exist which allow co-conspirators to wipe data from cell phones).
\item \textsuperscript{29} \textit{See id.} at 13-14 (quoting \textit{Maryland v. King}, 133 S. Ct. 1958, 1971 (2013)) (“[T]he constitutionality of a search incident to an arrest does not depend on whether there is any indication that the person arrested possesses weapons or evidence.”).
\item \textsuperscript{30} Brief for Petitioner, \textit{supra} note 25, at 19 (quoting \textit{King}, 133 S. Ct at 1972) (“Like a DNA test, the search of a cell phone's call log can provide 'metrics of identification used to connect the arrestee with his or her public person, as reflected in records of his or her actions that are available to the police.”).
\item \textsuperscript{31} Brief for Petitioner, \textit{supra} note 25, at 25.
\item \textsuperscript{32} 670 F.3d 803 (7th Cir. 2012).
\item \textsuperscript{33} \textit{Id.} at 804 (facts of Flores-Lopez described).
\end{itemize}
formation, it will also have a lot of private information, thus making a search of a cell phone a greater privacy invasion than the search of a conventional container. Because of technological advances, a cell phone is more analogous to a computer than a simple container. The court also noted that the officers could have taken some steps to avoid the cell phone’s data from being remotely wiped, but nevertheless concluded that the risk of evidence destruction outweighed the minimally intrusive search. Consequently, the court found the search to be lawful because the officers simply wanted to look through the cell phone to find the phone’s number.\textsuperscript{34}

Similarly, the Fourth Circuit upheld a warrantless search of a cell phone seized pursuant to a search incident to arrest. In United States v. Murphy,\textsuperscript{35} an officer initiated a traffic stop when he observed a car driving down the road at about ninety-five miles per hour.\textsuperscript{36} None of the occupants of the car provided proper identification when asked and all were subsequently arrested for providing officers with false names and for obstruction of justice.\textsuperscript{37} After all of the suspects in the car were arrested, the officers conducted a thorough search of the vehicle and found a cell phone.\textsuperscript{38} Law enforcement agents sent the phone to the Drug Enforcement Agency for processing and an examination revealed several texts from a man later identified as a drug dealer. This dealer was interviewed and identified the defendant as his drug supplier.

The Fourth Circuit allowed the search of the phone, basing the validity of the search on the need to preserve evidence.\textsuperscript{39} The court relied on another Fourth Circuit opinion, which held that it was permissible for officers to retrieve text messages pursuant to a search incident to arrest.\textsuperscript{40} In addition, the court was not persuaded by Murphy’s argument that a cell phone should only be searched if the phone has a small storage capacity, as it would be too burdensome to require officers to determine the exact storage capacity for each phone before a search could be conducted.\textsuperscript{41} It opined that such a rule would be unworkable and unreasonable. Accordingly, the warrantless search of the cell phone was permissible.\textsuperscript{42}

The Fifth Circuit has also addressed the issue of a cell phone search, and has found it to be permissible when the phone was seized pursuant to a valid search incident to arrest.\textsuperscript{43} In United States v. Finley, police officers took two suspects into custody after conducting a controlled buy of methamphetamines. Officers seized the defendant’s phone incident to arrest.\textsuperscript{44} While questioning the defendant, officers looked through call records and text messages on the phone, and the content was then used to confront the defendant during questioning.\textsuperscript{45}

The court in Finley allowed the search of the phone because the phone had been lawfully seized. The court first determined that though the defendant’s employer issued the cell phone, he did have a reasonable expectation of privacy in the phone’s contents.\textsuperscript{46} However, the phone was lawfully seized pursuant to a search incident to arrest and this type of search is permissible for not only weapons, but also for evidence.\textsuperscript{47} Consequently, because the phone was seized with valid authority the warrantless search of the phone was permissible.\textsuperscript{48}

\textsuperscript{34} Id. at 810.
\textsuperscript{35} 522 F.3d 405 (4th Cir. 2009).
\textsuperscript{36} Id. at 407.
\textsuperscript{37} Id. at 407-08.
\textsuperscript{38} Id. at 408-09.
\textsuperscript{39} Id. at 411.
\textsuperscript{40} United States v. Young, 278 Fed. Appx. 242, 245-46
\textsuperscript{41} Id. at 411.
\textsuperscript{42} Id. at 412.
\textsuperscript{43} United States v. Finley, 477 F.3d 250, 260 (5th Cir. 2007).
\textsuperscript{44} Id. at 254 (noting that although the defendant’s phone was issued through his work, he was allowed to use the phone for personal reasons as well).
\textsuperscript{45} Id.
\textsuperscript{46} Id. at 259 (holding that the defendant took normal precautions to maintain his privacy interest in the cell phone even if the phone was not password protected).
\textsuperscript{47} Id. at 259-60.
\textsuperscript{48} Id. at 260.
In addition to the decisions of the Fourth, Fifth, and Seventh Circuits, several state courts have also upheld the search of a suspect’s cell phone incident to arrest, including the Massachusetts Supreme Court. In *Phifer*, the court held that the limited search of the defendant’s call list was valid. The court found the officers had reason to believe the call list would contain evidence because the officers had seen the defendant using the phone to facilitate a drug transaction. The court also acknowledged that the search must be reasonable. Reasonableness is determined by balancing the particular search against the invasion of privacy. The decision by the Massachusetts Supreme Court is particularly important as it stands in direct opposition to the *Wurie* decision from the First Circuit Court of Appeals. As a consequence of this conflict, officers working in Massachusetts are left with conflicting guidance on the issue.

Further, the Georgia Supreme Court found the search of a defendant’s cell phone to be permissible. In *Hawkins v. Georgia*, the defendant set up a buy with an undercover officer to purchase drugs. The undercover officer arrived at the specified location and observed the defendant enter data in her phone; the undercover officer then received a text from the defendant saying she had arrived. The cell phone was found in the defendant’s purse pursuant to a search incident to arrest, and the officer found the text messages the defendant had exchanged with the undercover officer. The prosecution subsequently used this text message evidence in court.

The Georgia Supreme Court analogized a cell phone seized incident to arrest to a search of a container. It concluded that, similar to the rule regarding a traditional container, which permits a search for tangible evidence, a cell phone could also be searched. Though a cell phone may contain personal information, it may also contain evidence of the crime for which the suspect has been arrested. The potentially high volume of information that could be stored on a phone should not control whether the search should be permissible. Nevertheless, it is clear the court did not endorse officers going on a fishing expedition to search through the entire phone for evidence. The search must be narrow in scope; thus, if the officer is searching for text messages the officer cannot look through the photographs or internet browsing history.

The California Supreme Court also upheld the search of a cell phone found incident to arrest. In *California v. Diaz*, the defendant participated in a controlled buy with a confidential informant. The officers listened to the controlled buy via a wire, then stopped the defendant, and found drugs on him. The officers then looked through the defendant’s cell phone and found a text message that read “6 4 80.” From the officer’s previous experience working drug cases, he knew this text message indicated a sale of six Ecstasy pills for eighty dollars.

The California Supreme Court found the cell phone could be considered personal property immediately associated with the defendant; because the contents of the cell phone were not deemed distinguishable from the arrestee’s person, the warrantless search was permissible. Like the Georgia Supreme Court,
the California Supreme Court did not find the sheer quantity of information that could be found on a cell phone to be determinative of whether the search was permissible. Moreover, allowing searches based on the storage capacity of the cell phone would be an unworkable rule for the officers and the courts, as has been found by other courts.

The Maryland Court of Special Appeals upheld the search of a defendant’s cell phone in *Sinclair v. Maryland*. Here, the defendant was arrested for an armed carjacking, and a cell phone was recovered following a search incident to arrest. The officers, within minutes of the arrest, looked at the screensaver and saw a photograph that matched the rims from the victim’s car. Before discussing the specific facts of the case, the court reiterated that because the cell phone had an enormous amount of data, a cell phone could not be evaluated in the same way as other items seized pursuant to a search incident to arrest. Nevertheless, the court admitted the screensaver and photographic evidence at trial because it was direct evidence of the crime, seized during a limited and immediate search.

**B. Arguments and Cases Against the Warrantless Search**

In every challenge to the warrantless search of the cell phone, the defense has acknowledged that the search for the cell phone was allowed, but contended that the search through the cell phone’s contents was not. While it appears that the First Circuit is the only Circuit Court of Appeals to hold a warrant is required for the search of a cell phone, many lower state and federal courts using similar reasoning as the First Circuit have also found the warrantless search improper.

In *Smallwood v. Florida*, a man was arrested for armed robbery of a convenience store. When the defendant was arrested, his cell phone was seized incident to that arrest; however, the officer did not mention the seized cell phone or mention the data observed on the cell phone in his report. More than a year after the arrest, but before the trial started, the officer told the prosecutor he had searched the phone and found several incriminating photographs.

In deciding *Smallwood*, the Florida Supreme Court held that the Supreme Court’s decision in *United States v. Robinson*, allowing the search incident to arrest of a suspect’s cigarette pack, was not applicable to the search of an electronic device found incident to an arrest. The *Robinson* case did not involve a cell phone, and the court noted that at the time that case was decided, in 1973, cell phones were not commonly used nor did they carry the immense amount of information they do now. The court also expressed concern about allowing law enforcement to have access to this immense amount of information without a warrant. Accordingly, the court distinguished a cell phone from the cigarette pack searched in *Robinson*.

---

64 See *id.* at 508 (finding the search was not presumptively unreasonable because of the storage capacity of the phone).
65 *Id.* at 508.
67 *Id.* at 446-47.
68 *Id.* at 447.
69 *Id.* at 453.
70 *Id.* at 454.
72 *Smallwood*, 113 So. 3d at 726.
73 *Id.* at 726-27.
74 *Id.* at 727.
76 *Id.* at 730.
77 *Id.* at 731-32.
78 See *id.* at 732 (noting that the "most private and secret personal information and data is contained in or accessed through small portable electronic devices").
79 *Id.*
Instead, the court found that the facts of *Arizona v. Gant* were more applicable to this case. The court stated that the officer was allowed to remove the cell phone from the defendant’s person, but once the device was no longer in the defendant’s possession, the search of the phone was not permitted because the phone could not be used as a weapon nor could the defendant destroy any evidence on the phone. The absence of evidence to indicate those two interests required the officers to get a warrant before searching the phone.

Similarly, in *Ohio v. Smith*, a woman who was taken to a hospital for a drug overdose agreed to call her drug dealer to arrange a drug buy. The woman identified the defendant as her drug dealer, and the officers showed up at the buy and arrested him. During the search they found a cell phone on his person. While it is not clear when exactly the defendant’s phone was searched, at some point the officers did search the call records and confirmed that he was the individual the woman from the hospital called to arrange the drug buy.

The court disagreed with the characterization of a cell phone as analogous to a container because of the wealth of personal information that can be stored on the phone. Again, the court was concerned about allowing the warrantless search of a cell phone because it would give the police access to this immense amount of personal information. Though a cell phone is not the same as a computer, it carries with it a higher level a privacy interest than the typical container an individual may carry. Further, the police can take steps to ensure the information from the phone is not destroyed. The court rejected the state’s argument that a search of the cell phone was necessary because the call records could be deleted, since the records could be obtained by the cell phone service provider. In addition, the circumstances in this case did not justify the warrantless search of the cell phone in order to determine the identity of the suspect.

In *United States v. Mayo*, an officer stopped a vehicle because he suspected the driver was on his cell phone in violation of Vermont law. After the stop was initiated, the officer asked for consent to search the vehicle, but when consent was not given, the officer stated he would simply get a search warrant. The defendant then allowed the officer to search the vehicle, and drugs and paraphernalia were found in the car. In addition, a cell phone was seized, and the contents of the phone were downloaded for officer use, including the phone number, contacts lists, texts, call records, and other images.

The Vermont court found that because cell phones can connect to the Internet, the phones have an almost unlimited storage capacity and, thus, do not fit within the container doctrine. It instead makes more sense to compare cell phones to computers. In this particular case, the court found the extreme invasive nature of the search was not justified as the government failed to demonstrate the need for the search. Accordingly, the court created a bright-line rule finding that because of the technological advances in cell phones a war-

---

80 *Id.* at 735. In *Arizona v. Gant*, the Court found that the search incident to arrest was not permissible because the arrestee was separated from the item or thing to be searched.
81 *Id.*
82 *Id.*
83 920 N.E.2d 949, 950 (Ohio 2009).
84 *Id.*
85 *Id.*
86 *Id.* at 950-51.
87 *Id.* at 954.
88 See *id.* (discussing even though the defendant had a standard cell phone, it still had other capabilities besides making phone calls, including text messaging and camera capabilities).
89 Ohio v. Smith, 920 N.E.2d 949, 955 (Ohio 2009).
90 *Id.*
91 *Id.* at 955-56.
92 *Id.* at 956.
94 *Id.* at *2.
95 In Vermont, consent or a warrant is needed to search a cell phone, but for federal investigations the search incident to arrest authority is sufficient. *Id.*
96 *Id.* at *8.
97 *Id.* at *9.
98 *Id.* at *11.
rant is required before a search.\textsuperscript{99}

In \textit{United States v. Aispuro}, a federal district court in Kansas granted a defendant’s motion to suppress the evidence found after a search was done of the contents of his phone.\textsuperscript{100} Though the phone was found as part of a search incident to arrest, the phone’s contents were downloaded when the phone was in the officer’s custody, and therefore, no risk of evidence destruction by the defendant existed.\textsuperscript{101} Further, there was no specific threat of remote evidence destruction.\textsuperscript{102} As a result, there was no evidence that exigency existed as the downloaded contents of the phone was not searched until five days after it was received.\textsuperscript{103} The officers could have asked for a warrant before examining the information.\textsuperscript{104} The court noted that allowing a warrantless search in this situation would have been completely contrary to the reasonable expectation of privacy people have in their cell phones. Here, the police were either required to obtain a warrant or to demonstrate the existence of some sort of exigency.\textsuperscript{105}

In \textit{United States v. McGhee}, the defendant was arrested in January 2009, pursuant to an arrest warrant, for conspiracy to distribute and distribution of drugs, though the actual crimes were committed in March 2008.\textsuperscript{106} A cell phone was seized incident to the defendant’s arrest, and the contact list was scanned. The officer who put the scanned contact list into an FBI report did not know the arrest warrant was for a 2008 incident. As in most cases, the court began by detailing the vast personal information that cell phones contain and noted that because of this vast information there is an inherent expectation of privacy in one’s cell phone.\textsuperscript{107} Because the defendant was arrested in January 2009, there was no reason to believe that this cell phone would still have evidence, almost a year later, from crimes committed in March 2008. Also, as the cell phone was in the immediate control of the officer, there was no risk of harm to the officer or risk of evidence destruction that warranted the search.\textsuperscript{108} Accordingly, the court found the warrantless search of the phone was not justified.\textsuperscript{109}

In \textit{United States v. Park}, officers executed a search warrant on a building in California and uncovered a marijuana grow operation, and the defendant was determined to be part of this operation.\textsuperscript{110} Though the defendant’s cell phone was not seized as part of a search incident to his arrest, his phone was placed in evidence for safekeeping as part of the routine booking procedure when he was taken to the police station. The officers were not clear on when the search of the phone happened; however, it was clear that searching cell phones was not part of the routine booking procedure.\textsuperscript{111} The court concluded the search of the phone was purely investigatory and was not conducted pursuant to the rationales for search incident to arrest, officer safety, or evidence destruction.\textsuperscript{112} Consequently, the search was found to be impermissible.\textsuperscript{113}

\section*{V. Conclusion}

The search of cell phones found incident to an arrest is not a novel issue. As demonstrated by the cases above, the Supreme Court has been asked to review a number of these cases, but has failed to grant certiorari. The Supreme Court should grant certiorari in \textit{United States v. Wurie} because the different sets of rules that apply in Massachusetts as a result of the First Circuit’s ruling merit review.

\begin{itemize}
\item \textsuperscript{99} Id. at *12-13.
\item \textsuperscript{100} Aispuro, 2013 WL 3820017, at *15.
\item \textsuperscript{101} Id. at *12.
\item \textsuperscript{102} Id. at *13.
\item \textsuperscript{103} Id. at *14.
\item \textsuperscript{104} See id. (finding that getting a warrant is consistent with exigency circumstances and privacy concerns as cell phones contain personal data).
\item \textsuperscript{105} Id. at *14.
\item \textsuperscript{106} McGhee, 2009 WL 2424104, at *1.
\item \textsuperscript{107} Id. at *3.
\item \textsuperscript{108} Id.
\item \textsuperscript{109} Id.
\item \textsuperscript{110} 2007 WL 1521573, at *2.
\item \textsuperscript{111} Id. at *2-3.
\item \textsuperscript{112} Id. at *8.
\item \textsuperscript{113} Id. at *11-12.
\end{itemize}
Moreover, because there are conflicting rulings among the courts at the state and federal level across the country, a clear rule on the issue is needed for officers and suspects alike.

When the Founders drafted the Fourth Amendment, and the Supreme Court subsequently interpreted its requirements, cell phones were not yet invented, let alone part of the consideration for the warrant requirement. In addition, with ever-advancing technology in cell phones, more and more personal information can be stored on the phone, and law enforcement can use that information to investigate and prosecute crimes. With this changing landscape in mind, it is up to the Court to determine if cell phones require a special consideration. The Court has already interpreted the Fourth Amendment as requiring different rules for the home and car. Therefore, the Court must determine if a cell phone is more analogous to a container found in a car, or to a computer. Further, in determining if a search should be allowed, the Court will have to balance privacy interests with law enforcement interests.

Based on the rationales adopted by the lower courts, the Supreme Court seems to have three different ways it could rule on Wurie. The Court could find that the warrantless search of a cell phone is per se unreasonable, and even if found pursuant to a search incident to arrest, a warrant is required. Alternatively, the Court could hold that when a cell phone is found pursuant to a search incident to arrest, the search is always permissible. Finally, the Court could also limit what the officers could search for in the phone and then require a showing of exigency to do a full search of the phone’s content without a warrant.

In the interim, even in jurisdictions where the search is allowed, prosecutors should caution law enforcement officers about doing complete searches of cell phones found incident to arrest. While the search may be allowed in those jurisdictions, the courts have often expressed concerns in their opinions about the abundance of information that can be found on a cell phone. In addition, usually when the search has been upheld it is because the officer conducted a limited search of the contents of the phone. Nevertheless, defense attorneys must continue to challenge law enforcement’s searches of these phones.

About the AUTHOR

ROCHELLE BRUNOT is a 3L at American University Washington College of Law where she serves as the Associate Publications Editor of the Criminal Law Practitioner. Rochelle is also a Senior Staff Member for the Administrative Law Review. She has previously interned at the District Screening and Gang Unit of the Montgomery County States Attorney’s Office, the House of Ruth Domestic Violence Legal Clinic, and the Office of Special Counsel-Hatch Act Division. She worked this fall semester as a student-attorney in the Criminal Justice Clinic and prosecuted misdemeanor criminal and traffic cases in Montgomery County District Court. She is currently working as a legal intern at the Department of Justice: Narcotics and Dangerous Drugs Section.