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Chapter 8

CELL PHONES, OTHER MOBILE DIGITAL DEVICES, AND TRADITIONAL FOURTH AMENDMENT DOCTRINE PERMITTING WARRANTLESS SEARCHES

Mobile digital devices are everywhere and have wide ranging capabilities. This chapter pays particular attention to one such device — the cell phone — and some of the circumstances where the police have searched the contents of those devices. The legal analysis is as complex as the modern technology that goes into a cell phone.

§ 8.1 SEARCH INCIDENT TO ARREST

1. Basic Principles

The application of the search incident to arrest principle is one of the main consequences of an arrest. It involves a significant intrusion upon the person of the suspect, as well as the suspect's belongings within the area under the suspect's control. The evidentiary results of such searches often have a significant influence on the course of any subsequent criminal proceedings. Searches incident to arrest are a common form of search and, given the development of modern police forces and the statutory expansion of the number of crimes, such searches now apply to large numbers of criminal suspects. Given the ubiquity of portable digital devices carried on or about one's person in today's world, the search incident to arrest doctrine has potentially vast application.

Search incident to arrest principles have undergone significant evolution since the imposition of the exclusionary rule on federal authorities in *Weeks v. United States*, 232 U.S. 383 (1914), which itself recognized the propriety of a search incident to arrest. First, the nature of the justification for such searches have had several iterations. Many cases prior to *Robinson v. United States*, 414 U.S. 218 (1973), viewed searches incident to arrest in terms of an exception to the warrant requirement, which intimated an exigent circumstances rationale and, perhaps, a need to justify the search in each case. While not all of the United States Supreme Court's cases reflected that view, a dispositive doctrinal shift in the underlying justification for searches incident to arrest occurred in *Robinson*, where the Court stated:

> A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the

> fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.

In *Robinson*, which involved the arrest of a person for driving after his license had been revoked, the Court adopted a "categorical" search incident to arrest rule: it applied to all arrests, regardless of the underlying factual circumstances. In so ruling, the Court rejected a case-by-case inquiry. *Robinson*'s view has prevailed in subsequent decades,[1] although language in *Arizona v. Gant* (reproduced *infra*) recently cast new doubt on that view.

A second consideration concerns the purpose of the search that is being authorized by the fact of the arrest. One aspect, always accepted, is that such searches serve to protect the safety of the officer by allowing the police to search for weapons and other objects that may be used to attack the officer. Thus, for example, in *Chimel v. California*, 395 U.S. 752 (1969), the Court observed: "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated." The cases have also recognized a second purpose for a search incident to arrest: to recover evidence. It is here that much conflict, ambiguity, and changes of course permeate the case law.[2] One view is that the permissible search is for evidence of the crime committed. The broader and current view (outside of the vehicle context) is that the search may be for any evidence of any crime. Depending on which view is adopted, the permitted scope of a search incident to arrest will vary.

2. Permissible Objects Sought

While older case law was somewhat unclear whether, other than weapons, the objects permissibly seized pursuant to the arrest had to relate to the offense for which the arrest was made,[3] modern Supreme Court jurisprudence, with few exceptions, does not impose any limits on the search based on the types of objects sought. *United States v. Robinson*, 414 U.S. 218 (1973), is the leading case. Robinson was arrested for operating a motor vehicle after his operator's permit had been revoked. The arresting officer subjected him to a full search. Upon feeling an object in one of Robinson's coat pockets, the officer removed it. The object was a "crumpled up cigarette package," which the officer opened, revealing gelatin capsules of white powder that, upon later analysis, proved to be heroin. The *Robinson* Court established bright-line authority to search, with no limitations based on the type of crime or the likelihood of finding additional evidence of that

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[1] *E.g.*, Thornton v. United States, 541 U.S. 615 (2004); Michigan v. DeFillippo, 443 U.S. 31, 39 (1979). Some states reject the categorical federal rule on independent state grounds. *E.g.*, Pierce v. State, 171 P.3d 525 (Wyo. 2007) (rejecting per se rule of searches incident to all arrests under state constitution and requiring fact specific justification in each case).

[2] *See generally* Thornton v. United States, 541 U.S. 615, 625 (2004) (Scalia, J., concurring).

[3] *E.g.*, Marron v. United States, 275 U.S. 192, 198-99 (1927); United States v. Rabinowitz, 339 U.S. 56, 64 n.6 (1950).

crime during the search. Subject to few exceptions, the effect of the Court's view is to afford complete discretion to the police as to the objects sought during the search. The ramifications are dramatic: all objects — from the clothing worn by the suspect[4] to the contents of wallets[5] — are subject to search.

3. Cell Phone Searches Incident to Arrest

May the digital contents of cell phones and similar devices be searched incident to arrest? The next case in the reading, *State v. Smith*, examines that question. To date, *Smith* is the minority view.

STATE v. ANTWAUN SMITH
920 N.E.2d 949 (Ohio 2009)

LANZINGER, J.

On January 21, 2007, Wendy Thomas Northern was transported to Miami Valley Hospital after a reported drug overdose. While at the hospital, she was questioned by Beavercreek police. Northern agreed to call her drug dealer, whom she identified as appellant, Antwaun Smith, to arrange for the purchase of crack cocaine at her residence.

That evening, the Beavercreek police arrested Smith at Northern's residence. During the arrest, police searched Smith and found a cell phone on his person. The arresting officer put the cell phone in his pocket and placed Smith in a cruiser, then searched the scene for evidence.

While the record does not show exactly when they first searched Smith's cell phone, at some point police discovered that the call records and phone numbers confirmed that Smith's cell phone had been used to speak with Northern. There was testimony that at least a portion of the search took place when officers returned to the police station and were booking into evidence the items seized from the crime scene.

In part, whether the warrantless search of a cell phone passes constitutional muster depends upon how a cell phone is characterized, because whether a search is determined to be reasonable is always fact-driven.

1. The Approach of *United States v. Finley*

In *United States v. Finley*, 477 F.3d 250 (5th Cir. 2007), the Fifth Circuit upheld the district court's denial of defendant's motion to suppress call records and text messages retrieved from his cell phone. Finley was arrested during a traffic stop after a passenger in his van sold methamphetamine to an informant. During the search incident to the arrest, police found a cell phone in Finley's pocket. He was

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[4] *E.g.*, Powell v. State, 796 So. 2d 404 (Ala. Ct. Crim. App. 1999), *aff'd*, 796 So. 2d 434 (Ala. 2001).

[5] *E.g.*, United States v. Watson, 669 F.2d 1374 (11th Cir. 1982).

taken along with his passenger to the passenger's house, where other officers were conducting a search. While Finley was being questioned there, officers examined the cell phone's call records and text messages, finding evidence that appeared to be related to narcotics use and drug trafficking.

In upholding the search, the Fifth Circuit analogized Finley's cell phone to a closed container found on an arrestee's person, which may be searched.

2. The Approach of *United States v. Park*

The United States District Court for the Northern District of California granted a defendant's motion to suppress the warrantless search of his cell phone. *United States v. Park* (May 23, 2007), N.D.Cal. No. CR 05-375 SI, 2007 WL 1521573. Police officers observed Park entering and leaving a building that they had under surveillance and for which they had obtained a search warrant. When they executed the warrant and searched the building, they found evidence of an indoor marijuana-cultivation operation. They arrested Park and took him to booking, where they searched him and found a cell phone. Before turning over the cell phone to the booking officer, the arresting officer recorded names and phone numbers found in Park's cell phone.

This district court reasoned that modern cell phones "have the capacity for storing immense amounts of private information" and thus likened the devices to laptop computers, in which arrestees have significant privacy interests, rather than to address books or pagers found on their persons, in which they have lesser privacy interests. Because the search of the cell phone's contents was not conducted out of concern for the officer's safety or to preserve evidence, the court found that it did not fall under the search-incident-to-arrest exception and that the officers should have obtained a warrant to conduct the search.

3. Closed Containers

Objects falling under the banner of "closed container" have traditionally been physical objects capable of holding other physical objects. Indeed, the United States Supreme Court has stated that in this situation, "container" means "any object capable of holding another object." *New York v. Belton* (1981), 453 U.S. 454, 460. One such example is a cigarette package containing drugs found in a person's pocket, as in *United States v. Robinson* (1973), 414 U.S. 218.

We acknowledge that some federal courts have likened electronic devices to closed containers. Each of these cases, however, fails to consider the Supreme Court's definition of "container" in *Belton*, which implies that the container must actually have a physical object within it. Additionally, the pagers and computer memo books of the early and mid 1990s bear little resemblance to the cell phones of today. 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.

4. Legitimate Expectation of Privacy

Since cell phones are not closed containers, the question becomes how they should be classified. Given the continuing rapid advancements in cell phone technology, we acknowledge that there are legitimate concerns regarding the effect of allowing warrantless searches of cell phones, especially so-called smart phones, which allow for high-speed Internet access and are capable of storing tremendous amounts of private data. While it is apparent from the record that Smith's cell phone could not be called a smart phone with advanced technological capability, it is clear from the record that Smith's cell phone had phone, text messaging, and camera capabilities. While the dissent argues that Smith's phone is merely a "conventional one," we note that in today's advanced technological age many "standard" cell phones include a variety of features above and beyond the ability to place phone calls. Indeed, like Smith's phone, many cell phones give users the ability to send text messages and take pictures. Other modern "standard" cell phones can also store and transfer data and allow users to connect to the Internet. Because basic cell phones in today's world have a wide variety of possible functions, it would not be helpful to create a rule that requires officers to discern the capabilities of a cell phone before acting accordingly.

Given their unique nature as multifunctional tools, cell phones defy easy categorization. On one hand, they contain digital address books very much akin to traditional address books carried on the person, which are entitled to a lower expectation of privacy in a search incident to an arrest. On the other hand, they have the ability to transmit large amounts of data in various forms, likening them to laptop computers, which are entitled to a higher expectation of privacy.

But cell phones are neither address books nor laptop computers. They are more intricate and multifunctional than traditional address books, yet they are still, in essence, phones, and thus they are distinguishable from laptop computers. 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. 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.

Although the dissent maintains that this case can be decided on the basis of traditional Fourth Amendment principles governing searches incident to arrest, the dissent fails to recognize that the justifications behind allowing a search incident to arrest are officer safety and the preservation of evidence. There is no evidence that either justification was present in this case. A search of the cell phone's contents was not necessary to ensure officer safety, and the state failed to present any evidence that the call records and phone numbers were subject to imminent destruction. We therefore hold that because a cell phone is not a closed container, and because an individual has a privacy interest in the contents of a cell phone that goes beyond the privacy interest in an address book or pager, an officer

may not conduct a search of a cell phone's contents incident to a lawful arrest without first obtaining a warrant.

CUPP, J., dissenting.

The majority needlessly embarks upon a review of cell phone capabilities in the abstract in order to announce a sweeping new Fourth Amendment rule that is at odds with decisions of other courts that have addressed similar questions.

In my view, this case deals with a straightforward, well-established principle: "[I]n the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." In *Robinson*, the United States Supreme Court upheld admission into evidence of a cigarette package containing drugs, which was found as part of a search incident to Robinson's arrest. And as in *United States v. Edwards* (1974), 415 U.S. 800, 803, "searches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention."

In this case, there is no dispute that the arrest of Smith was lawful. During the search of Smith incident to his arrest for drug trafficking and other offenses, the officers located his cell phone on his person. There is no evidence that this phone was anything other than a conventional one, rather than a "smart phone" with advanced technological capability.

The police later (at the police station) searched Smith's cell phone's address book and call list. A cell phone's digital address book is akin to traditional address books carried on the person. Courts have upheld police officers' search of an address book found on an arrestee's person during a search incident to a lawful arrest. The phone's call list is similar, showing a list of telephone numbers that called to or were called from the phone.

Thus, I would hold that the search here — which resembles police officers' search of a traditional address book found on the person of an arrestee during a search incident to arrest — is permissible under the Fourth Amendment.

It would be unworkable to devise a rule that required police to determine the particular cell phone's storage capacity, and the concomitant risk that telephone numbers stored on the phone could be lost over time, before searching the phone's address book or call list. I would hold that a search of an arrestee's cell phone's address book and call list is permissible as part of a search incident to arrest without first requiring police to determine the cell phone's storage capabilities.

I see no need here to delve into a wide-ranging examination of the capabilities of different types of cell phones and other electronic devices. The majority bases its broad holdings on its estimation of the possible capabilities of other cell phones and computers. But here, only the address book and call records were admitted into evidence. The issue of a more in-depth warrantless search of "data within a cell phone" is not before us.

4. Location of the Search

The scope of a search incident to arrest includes the location where the accused is arrested but the right to search does not extend to other places.[6] There is considerable fiction involved in fixing the place of search. The permissible location for searches incident to arrest is generally the spot where the police first detained the person, even if he or she has been moved some distance thereafter or is sitting handcuffed in a vehicle.[7] This result is widely criticized by commentators because, factually, there is usually no basis for believing that the suspect could obtain a weapon or destroy evidence in the area searched; yet, factual considerations are no longer the inquiry after *Robinson*, which substituted a categorical rule for any case-by-case analysis. The fictionalized area of control at least prevents the police from using the suspect as a "walking search warrant" by moving him into a house and from room to room to conduct a warrantless search of the house.[8]

The Court has often remarked that the search must be contemporaneous[9] or "substantially contemporaneous with the arrest" both as to time and place.[10] As with other features of the search incident to arrest rule, there is considerable debate as to the meanings of those requirements.[11] The Supreme Court seemed to abandon the contemporaneous limitation for searches of the *person* incident to a lawful arrest in *United States v. Edwards*, 415 U.S. 800 (1974), which involved the search of the defendant's clothing at the jail where he was incarcerated ten hours after he was arrested. The *Edwards* Court stated: "It is . . . plain that searches and seizures that could be made on the spot at the time of the arrest may legally be conducted later when the accused arrives at the place of detention." The Court broadly opined:

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

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[6] *E.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 457 (1971).

[7] *See generally* Myron Moskovitz, *A Rule in Search of a Reason: An Empirical Reexamination of* Chimel *and* Belton, 2002 Wis. L. Rev. 657.

[8] Vale v. Louisiana, 399 U.S. 30, 33-34 (1970).

[9] *E.g.*, Agnello v. United States, 269 U.S. 20, 29 (1925). *See generally* Edwin Butterfoss, *As Time Goes By: The Elimination of Contemporaneity and Brevity as Factors in Search and Seizure Cases*, 21 Harv. C.R. — C.L. L. Rev. 603, 620-35 (1986).

[10] *E.g.*, Stoner v. California, 376 U.S. 483, 486 (1964) (invalidating warrantless search conducted two days before arrest). *Cf.* Preston v. State, 784 A.2d 601 (Md. Ct. Spec. App. 2001) (Collecting cases and observing: "Searches have been deemed to be 'essentially contemporaneous' with an arrest when made within a few minutes after the arrest even if the suspect, at the time of a search, has been placed in a police cruiser and handcuffed." Rejecting a delay of "at least two or three hours," the court added that "we have found none, where *any* court has held that a search that takes place two or more hours after an arrest is nevertheless 'essentially contemporaneous' with that arrest.").

[11] United States v. Hrasky, 453 F.3d 1099 (8th Cir. 2006).

> under the defendant's name in the "property room" of the jail, and at a later time searched and taken for use at the subsequent criminal trial. The result is the same where the property is not physically taken from the defendant until sometime after his incarceration.

Edwards' reasoning was a blend of various justifications for the permissibility of the search, including search incident to arrest, search incident to incarceration, inventory, and a probable cause-based analysis combined with the fact that Edwards and his property were rightfully in police custody. The *Edwards* Court "perceived little difference" in a search at the scene of the arrest and at the police station, with "similar" justifications supporting a search at either place. The Court also justified the delayed search based on a factual analysis of the case:

> [T]he police had probable cause to believe that the articles of clothing [Edwards] wore were themselves material evidence of the crime for which he had been arrested. But it was late at night; no substitute clothing was then available for Edwards to wear, and it would certainly have been unreasonable for the police to have stripped respondent of his clothing and left him exposed in his cell throughout the night. When the substitutes were purchased the next morning, the clothing he had been wearing at the time of arrest was taken from him and subjected to laboratory analysis. This was no more than taking from respondent the effects in his immediate possession that constituted evidence of crime. This was and is a normal incident of a custodial arrest, and reasonable delay in effectuating it does not change the fact that Edwards was no more imposed upon than he could have been at the time and place of the arrest or immediately upon arrival at the place of detention. The police did no more . . . than they were entitled to do incident to the usual custodial arrest and incarceration.

In *United States v. Chadwick*, 433 U.S. 1 (1977), which did not involve the search incident to arrest doctrine because the object searched — a footlocker located in the trunk of a vehicle — was outside the defined area of an arrestee's control, the Court nonetheless observed:

> [W]arrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the "search is remote in time or place from the arrest," or no exigency exists. Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest.
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> Here the search was conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody; the search therefore cannot be viewed as incidental to the arrest or as justified by any other exigency.

In a footnote, the *Chadwick* Court sought to distinguish *Edwards:* "Unlike searches of the person, searches of possessions within an arrestee's immediate control cannot be justified by any reduced expectations of privacy caused by the arrest."

Given the mixture of rationales supporting the *Edwards* decision, combined with *Chadwick's* interpretation of that case and the lack of any guidance in subsequent Supreme Court case law, it is not surprising that the lower court decisions are in conflict. What appears clear after *Edwards* is that, using any of its alternative rationales, a full search of an arrestee at the police station is permitted. But what about other objects seized at the time of the arrest and transported to the station? Under current Supreme Court doctrine, many objects may be searched under the inventory search doctrine.[12] Some courts ask whether the administrative processes incident to arrest are still continuing at the time the search occurs.[13] Putting those considerations aside, lower courts have grappled with the impact of the *Edwards* and *Chadwick* "contemporaneous" requirement for a search incident to arrest. "Cases decided subsequent to *Chadwick* have distinguished between searches of items 'closely associated with the arrestee' made at the police station and searches of luggage and other articles of personal property not immediately associated with the person of the arrestee. The former may be searched long after the arrest, while the latter may be searched only incident to the suspect's arrest."[14] There has arisen a dubious jurisprudence of containers,[15] with fine distinctions between types of containers and their closeness of association with the person. Thus, cases have determined whether searches of wallets,[16] purses,[17] luggage,[18] and backpacks[19] are permissible.

PEOPLE v. GREGORY DIAZ

81 Cal. Rptr. 3d 215 (Cal. Ct. App. 2008), ***aff'd***, 244 P.3d 501 (Cal. 2011)

Perren, J.

Gregory Diaz appeals the judgment entered after he pled guilty to transportation of a controlled substance, Ecstacy. He contends that the delayed warrantless search of his cell phone violated the Fourth Amendment because the phone was a

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[12] *See* Thomas K. Clancy, The Fourth Amendment: Its History and Interpretation § 10.8. (2008).

[13] *E.g.*, United States v. Finley, 477 F.3d 250, 260 n.7 (5th Cir. 2007); United States v. Ruigomez, 702 F.2d 61, 66 (5th Cir. 1983).

[14] Preston v. State, 784 A.2d 601 (Md. Ct. Spec. App. 2001) (collecting cases). *See* United States v. Finley, 477 F.3d 250, 260 (5th Cir. 2007) ("Finley's cell phone does not fit into the category of 'property not immediately associated with [his] person' because it was on his person at the time of his arrest.").

[15] The Court, in other aspects of Fourth Amendment jurisprudence, had at one time attempted to create a distinction between containers but ultimately rejected that view as without logical support. *See* Thomas K. Clancy, The Fourth Amendment: Its History and Interpretation § 4.6.1. (2008).

[16] United States v. Phillips, 607 F.2d 808, 809-10 (8th Cir. 1979) (search of defendant's wallet at police station "substantial period of time" after arrest was valid search incident to arrest).

[17] Curd v. City Court of Judsonia, 141 F.3d 839 (8th Cir. 1998) (plaintiff's purse permissibly searched at police station fifteen minutes after arrest).

[18] United States v. $639,558 in U.S. Currency, 955 F.2d 712, 715-16 (D.C. Cir. 1992) (luggage search half an hour after arrest not contemporaneous); State v. Calegar, 661 P.2d 311, 315-16 (Idaho 1983) (suitcase seized from automobile in which defendant was arrested permissibly searched at police station).

[19] People v. Boff, 766 P.2d 646, 650-51 (Colo. 1988).

"possession[ ] within an arrestee's immediate control," instead of an item "spacially limited to the person of the arrestee," as those terms are defined by *United States v. Chadwick* (1977) 433 U.S. 1, 16, footnote 10, and *United States v. Edwards* (1974) 415 U.S. 800, 810. We conclude that the cell phone was immediately associated with Diaz's person at the time of his arrest, and was therefore properly subjected to a delayed warrantless search.

At 2:50 p.m. on April 25, 2007, Diaz participated in a controlled buy of six Ecstacy pills. Diaz drove Lorenzo Hampton to the location in Thousand Oaks, and waited while Hampton and a confidential informant conducted the transaction in the back seat of his car. Diaz and Hampton were arrested shortly thereafter. When Diaz was searched at the scene, a small amount of marijuana was recovered from his back pocket. Diaz also had a cell phone in his possession, but it was not seized at that time.

Diaz was transported to the East County Sheriff's Station. At approximately 4:00 p.m., Diaz's cell phone was seized from his person and placed with the other evidence that had been collected. At 4:18 p.m., Diaz was interviewed by Detective Victor Fazio of the Ventura County Sheriff's Department. Diaz waived his *Miranda* rights and denied any involvement in the incident. At about 4:23 p.m., and while Diaz was still being interrogated, Detective Fazio retrieved Diaz's cell phone, searched the text message folder, and found a recent message addressed to Hampton stating "6 4 80." Based on his training and experience, the detective believed that this message referred to 6 Ecstacy pills for the price of $80. Diaz admitted his participation in the crime when confronted with this information.

Diaz does not dispute that his cell phone was properly seized incident to his arrest and that the police could have searched it contemporaneous with the arrest. He contends, however, that the search of his cell phone approximately 90 minutes after his arrest violated the Fourth Amendment's requirement that a warrant be obtained for delayed searches of "possessions within an arrestee's immediate control." While he acknowledges that items "immediately associated with the person of the arrestee" are properly subject to delayed warrantless searches, he argues that cell phones should be afforded greater constitutional protection than other items an arrestee might carry on his or her person, such as wallets, letters, or address books, because they "have the capacity to store tremendous quantities of personal information." He also asserts that cell phones should be characterized differently from other items associated with the person of an arrestee because they are "no more likely to be inside a person's pocket than inside a briefcase, backpack, or purse, or on a car seat or table, or plugged into a power source, or stashed inside any manner of separate bags or carrying containers."

Cell phones may contain personal information, but so do wallets, purses and the like. The fact that electronic devices are capable of storing vast amounts of private information does not give rise to a legitimate heightened expectation of privacy where, as here, the defendant is subject to a lawful arrest while carrying the device on his person.[n.2][20] Whether Diaz *could* have kept his cell phone in a briefcase or backpack is of no moment. Because he had the phone on his person at the time of

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[20] [n.2] The record does not disclose whether Diaz's phone was in his hand, a pocket of his clothing,

his arrest, it was taken "out of the realm of protection from police interest" for a reasonable amount of time following the arrest.

Diaz also contends that "a cell phone text message search exceeds the original rationale for searches incident to arrest: to ensure officer safety and to preserve evidence that could be concealed or destroyed." The United States Supreme Court has recognized, however, that "[a] police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick ad hoc judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search. The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." In any event, "[t]he need to preserve evidence is underscored where evidence may be lost due to the dynamic nature of the information stored on and deleted from cell phones or pagers."

QUESTION

Assuming that the court is applying traditional Fourth Amendment doctrine and is not creating "special" rules for digital devices and also assuming that the cell phone was in the arrestee's pocket and accessed at the scene of the arrest, are any or all of the following actions by the officer permissible:[24]

1. activates touch screen to view phone's contents

2. clicks on internet browser icon

3. clicks on toolbar to find bookmarks link

4. finds suspicious-looking bookmark labeled "porn pictures"

5. clicks on bookmark to bring up webpage

6. webpage contains series of icons including "members" button; clicks image

7. brings up "members" page, which already has the account number / password entered

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or elsewhere on his person at the time it was seized. It is undisputed, however, that the phone was "on his person."

[24] *See* Adam M. Gershowitz, Note, *The IPhone Meets The Fourth Amendment*, 56 UCLA L. REV. 27 (2008).

8. clicks "submit" button, which utilizes the saved account information / password to bring up the content of a website

9. sees pictures and message function; account owner has new messages

Here's a hint: An iPhone is a smartphone sold by Apple. It integrates cell phone technology, iPod, camera, text messaging, email, and Web browsing. Data and applications can be sent to this device via a wireless signal or Apple's iTunes software, which is used to organize music, videos, photos, and applications.[25] Are all of those functions accessible under traditional search incident to arrest doctrine?

5. Scope: Areas Within the Arrestee's "Control"

Throughout much of the twentieth century, the Court struggled to establish the proper scope of the area around the arrestee that may be searched. In the 1969 case of *Chimel v. California*, 395 U.S. 752 (1969), the Court created a rule that has since prevailed:

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of 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.
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> There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs — or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant. The "adherence to judicial processes" mandated by the Fourth Amendment requires no less.

Since *Chimel*, the scope of the search incident to arrest rule's application to areas beyond the arrestee's person has been settled — at least rhetorically.[26] That scope is defined to include only those areas within the arrestee's "immediate control," which is in turn defined as those areas where he "might reach in order to grab a weapon or evidentiary item." This grab area has often been referred to as the

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[25] *See* PC MAGAZINE, Encyclopedia, available at http://www.pcmag.com/encyclopedia term/0,2542,t=iPhone&i=45393,00.asp.

[26] *See, e.g.*, Thornton v. United States, 541 U.S. 615 (2004) ("Although easily stated, the *Chimel* principle had proved difficult to apply in specific cases.").

"wingspan" or "lunge area." Unlike many aspects of the modern search incident to arrest rule, the area to be searched (with the exception of vehicle searches), is a fact-based inquiry in each case. However, the area of immediate control is measured as of the moment of arrest and not at the moment of search. Hence, as with many of the principles regulating searches incident to arrest, there is a significant amount of fiction in deciding what the area of immediate control is: "Because police officers virtually always restrain the individual immediately after placing him under arrest, as they are trained to do, an arrestee generally will be handcuffed or locked in a squad car, or both, before any search . . . takes place."[27]

6. Scope: Vehicle Searches Incident to Arrest

When a person who has been in a vehicle is arrested, what is the proper area of "immediate control" to be searched incident to that arrest? To establish a workable rule, the Court in *New York v. Belton*, 453 U.S. 454 (1981), held that, as an incident to arrest of an automobile occupant, the police may search the entire passenger compartment of the car, including any open or closed containers,[28] but not the trunk. The *Belton* Court believed that the entire passenger compartment of a vehicle was "in fact generally, even if not inevitably," the area where a person could reach to grab a weapon or evidence. It therefore held: "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." The next case in the reading, *Arizona v. Gant*, while claiming not to overrule *Belton*, has effectively done so. *Gant* is a major new Fourth Amendment case, decided by a 5-4 vote. Excerpted here are the two holdings of the majority opinion.

ARIZONA v. RODNEY JOSEPH GANT

556 U.S. 332, 129 S. Ct. 1710 (2009)

Justice Stevens delivered the opinion of the Court.

Acting on an anonymous tip that the residence at 2524 North Walnut Avenue was being used to sell drugs, Tucson police officers Griffith and Reed knocked on the front door and asked to speak to the owner. Gant answered the door and, after identifying himself, stated that he expected the owner to return later. The officers left the residence and conducted a records check, which revealed that Gant's

[27] David S. Rudstein, Belton *Redux: Reevaluating* Belton's *per se Rule Governing the Search of an Automobile Incident to an Arrest*, 40 Wake Forest L. Rev. 1287, 1316 n.169 (2005).

[28] The *Belton* Court stated:

> "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. Our holding encompasses only the interior of the passenger compartment of an automobile and does not encompass the trunk.

driver's license had been suspended and there was an outstanding warrant for his arrest for driving with a suspended license.

When the officers returned to the house that evening, they found a man near the back of the house and a woman in a car parked in front of it. After a third officer arrived, they arrested the man for providing a false name and the woman for possessing drug paraphernalia. Both arrestees were handcuffed and secured in separate patrol cars when Gant arrived. The officers recognized his car as it entered the driveway, and Officer Griffith confirmed that Gant was the driver by shining a flashlight into the car as it drove by him. Gant parked at the end of the driveway, got out of his car, and shut the door. Griffith, who was about 30 feet away, called to Gant, and they approached each other, meeting 10-to-12 feet from Gant's car. Griffith immediately arrested Gant and handcuffed him.

Because the other arrestees were secured in the only patrol cars at the scene, Griffith called for backup. When two more officers arrived, they locked Gant in the backseat of their vehicle. After Gant had been handcuffed and placed in the back of a patrol car, two officers searched his car: One of them found a gun, and the other discovered a bag of cocaine in the pocket of a jacket on the backseat.

In *Chimel*, we held that a search incident to arrest may only include "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." That limitation, which continues to define the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy. If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply.

In *Belton*, we considered *Chimel*'s application to the automobile context. . . . [W]e held that when an officer lawfully arrests "the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile" and any containers therein. That holding was based in large part on our assumption "that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach.' "

To read *Belton* as authorizing a vehicle search incident to every recent occupant's arrest would untether the rule from the justifications underlying the *Chimel* exception. Accordingly, we reject this reading of *Belton* and hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.[n.4][29]

We also conclude that circumstances unique to the vehicle context justify a search

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[29] [n.4] Because officers have many means of ensuring the safe arrest of vehicle occupants, it will be the rare case in which an officer is unable to fully effectuate an arrest so that a real possibility of access to the arrestee's vehicle remains. But in such a case a search incident to arrest is reasonable under the Fourth Amendment.

incident to a lawful arrest when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." In many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence. But in others, including *Belton*, the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein.

Neither the possibility of access nor the likelihood of discovering offense-related evidence authorized the search in this case. Unlike in *Belton*, which involved a single officer confronted with four unsecured arrestees, the five officers in this case outnumbered the three arrestees, all of whom had been handcuffed and secured in separate patrol cars before the officers searched Gant's car. Under those circumstances, Gant clearly was not within reaching distance of his car at the time of the search. An evidentiary basis for the search was also lacking in this case. Whereas Belton [was] arrested for drug offenses, Gant was arrested for driving with a suspended license — an offense for which police could not expect to find evidence in the passenger compartment of Gant's car. Because police could not reasonably have believed either that Gant could have accessed his car at the time of the search or that evidence of the offense for which he was arrested might have been found therein, the search in this case was unreasonable.

Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

QUESTIONS

1. What ramifications do these new rules have on a search incident to arrest for digital evidence devices found in vehicles, such as cell phones, GPS devices, or laptops?

2. What if the driver, who is arrested, has a cell phone in his pocket, a laptop in the front passenger seat, and a GPS device in his vehicle's dashboard?

3. Can hard drives, which are typically used to store music to play on the vehicle's sound system, be searched? What about vehicle "black boxes," that is, event recorders, which register many of the operations of the vehicle, including speed, braking, and air bag deployment?

§ 8.2 ADDITIONAL THEORIES TO JUSTIFY A SEARCH AND THE SCOPE OF A PERMISSIBLE SEARCH OF CELL PHONES: VIEWING IMAGES DISPLAYED, BROWSING, ANSWERING CALLS

STATE v. JERMICHAEL JAMES CARROLL

778 N.W.2d 1 (Wis. 2010)

N. Patrick Crooks, J.

The defendant, Jermichael James Carroll, was charged with possession of a firearm by a felon [and subsequently convicted. The sole basis for that charge was an image that Carroll stored in his cellphone. The question before the court was whether the police legally obtained that image].

Detective Belsha of the Milwaukee police department and his partner were conducting surveillance on a residence as part of an armed robbery investigation. They observed a white Ford Escort leave that residence, slow down as it passed their squad car, and speed away.

The officers attempted to catch the vehicle, which reached speeds of 60 miles per hour on residential streets with speed limits no higher than 25 miles per hour. According to Belsha's testimony, the driver, Carroll, eventually pulled the car to "an abrupt stop" in a gas station lot and quickly got out of the car while holding an object in his hands. The officers could not identify what Carroll was holding, so Belsha drew his weapon and ordered Carroll to drop the object and get on the ground, which Carroll did. The officers then handcuffed Carroll behind his back.

After handcuffing Carroll, Belsha retrieved the dropped object, which was a flip-style cell phone. The cell phone was lying open on the ground and displayed an image of Carroll smoking a long, thin, brown cigarlike object ("the marijuana image"). Belsha, a member of the High Intensity Drug Trafficking Area Drug and Gang Task Force, testified that he recognized the object as a marijuana blunt.

When the officers asked Carroll for identification, Carroll did not have any with him but gave the officers his name. The officers ran a "routine check" and learned that he was driving with a suspended license. Carroll also had a record of being adjudicated delinquent for a drug-related felony two years earlier as a juvenile.

Belsha placed Carroll in the back seat of the squad car and sat in the front seat with the cell phone, where he activated the menus, opened the image gallery, scrolled through it, and saw images showing illegal drugs, firearms, and large amounts of U.S. currency. Specifically, Belsha testified that he saw an image of Carroll with what appeared to be a gallon-size bag of marijuana held in his teeth, and "several photos depicting firearms," including one showing Carroll holding a semiautomatic firearm ("the firearm image").

While Belsha continued to possess Carroll's cell phone, it rang several times and Belsha answered one of those calls, pretending to be Carroll. The caller asked for "four of those things; four and a split." Based on his training, Belsha recognized

that the caller was attempting to purchase four and a half ounces of cocaine.

Two days later, Belsha sought a search warrant for the cell phone. After obtaining the warrant, the police downloaded the data on the cell phone, including the firearm image. Detective McQuown, who was trained in the handling of digital evidence, testified at a preliminary hearing that each image on the phone had attached "metadata," which he described as information indicating the date and time at which the image was created. He also testified that the metadata is based on the date and time updates regularly provided through cell phone towers. The metadata indicated that the firearm image had been created on May 22, 2006. Carroll was charged with possession of a firearm by a felon based on photographic evidence downloaded from the cell phone.

A. Constitutional Permissibility of the Warrantless Searches

1. Belsha's Initial Seizure of the Cell Phone

Carroll led officers on a high-speed chase in a car that the officers had been observing in connection with an armed robbery investigation, and exited his car quickly while holding an unknown object. Given that behavior, the officers would have been justified — based on the objective belief that Carroll could have been holding a weapon — in conducting a frisk or pat-down, which would have resulted in Belsha's legal possession of the cell phone. Hence, Belsha's order for Carroll to drop the object and his subsequent retrieval of it were reasonable actions, and accordingly, his initial seizure of the phone was justified.

After Belsha legally seized the open phone, his viewing of the marijuana image also was legitimate because that image was in plain view. Under Wisconsin case law, a warrantless seizure is justified under the plain view doctrine where the object is in plain view of an officer lawfully in a position to see it, the officer's discovery is inadvertent, and the seized object, either in itself or in context with facts known to the officer at the time of the seizure, supplies probable cause to believe that the object is connected to or used for criminal activity.

Here, Belsha was in legal possession of the phone and thus in a lawful position to view the display screen, which, according to Belsha's uncontroverted testimony, was open and displayed the marijuana image. Further, Belsha testified that based on his experience, he recognized the object Carroll was smoking in the image as a marijuana blunt. That, taken in context with other facts known to Belsha at the time, namely, that individuals involved in drug trafficking often personalize their phones with such images, provided sufficient probable cause to believe that the phone was an instrument of criminal activity and contained evidence linked to that activity. Under the circumstances, Belsha had probable cause to seize the cell phone.

2. Belsha's Continued Possession of the Cell Phone

After Belsha seized the phone with the marijuana image displayed, he continued to maintain possession of the phone after he had placed Carroll in the squad car. We

conclude that that continued possession was justified. The Court in *United States v. Place*, 462 U.S. 696 (1983), addressed the ability of law enforcement agents to seize and detain a person's luggage based on reasonable suspicion that the luggage contained narcotics and under circumstances where that owner was not in custody or under arrest. The Court went on to hold that the agents had narrow authority to detain temporarily a container in such circumstances though the agents in that case exceeded their authority to do so. However, in reaching its conclusion, the Court explained,

> Where law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the [Fourth] Amendment to permit seizure of the property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present.

In other words, law enforcement agents are justified in seizing and continuing to hold a container if (1) there is probable cause to believe that it contains evidence of a crime, and (2) if exigencies of the circumstances demand it.

Although the "containers" discussed in *Place* were pieces of luggage, it is reasonable to analogize the cell phone in this case to the luggage in *Place.* The underlying concern with the agents' detention of the luggage in *Place* was that Place had a reasonable expectation of privacy in the contents of his bags. So, too, here, the concern is protecting a person's reasonable expectation of privacy in the contents of his or her cell phone. Other courts, in assessing the validity of a search without a warrant, have likened a person's privacy expectations in cell phones and electronic devices to that of closed containers in his or her possession. Accordingly, in this situation, the analogy to a closed container appears to be appropriate.

To establish probable cause to search, the evidence must indicate a "fair probability" that the particular place contains evidence of a crime. An officer's knowledge, training, and experience are germane to the court's assessment of probable cause.

Here, Belsha legally viewed the marijuana image; we consider that fact along with his testimony that he knew, based on his training and experience, that drug traffickers frequently personalize their cell phones with images of themselves with items acquired through drug activity. Furthermore, it is those personalized cell phones on which drug traffickers commonly make many of their transactions. We are satisfied, under all of the circumstances here, that that information, taken as a whole, gave Belsha probable cause to believe that the phone contained evidence of illegal drug activity.

Given that Belsha had probable cause to believe that a search of the phone would produce evidence of illegal drug activity, his continued possession of the phone while he sought a warrant was permissible. The same reasons that permitted Belsha to seize the phone in the first instance permitted him to continue to possess it in the short time after Carroll was secured. Exigent circumstances further justify that continued possession. Had Belsha returned the phone to Carroll and released him, Carroll could have deleted incriminating images and data, such as phone numbers and calling records stored in the phone.

3. Belsha's Browsing Through the Image Gallery and Answering the Incoming Call

Next, two things happened as Belsha continued to possess the phone legally. First, he opened and browsed through the cell phone's image gallery. Second, he answered an incoming call. As an initial matter, the image gallery search clearly seems to be contrary to the holding in *Place* because there were no exigent circumstances at the time requiring him to review the gallery or other data stored in the phone. We are satisfied that that search was indeed improper and that the evidence obtained from that search at that time was tainted.

However, Belsha's answering the incoming call was justified. We again apply the standard from *Place*, which requires that the officer had probable cause to believe that the device contains evidence of a crime and that exigent circumstances justify a warrantless search. Here, Belsha had probable cause to believe that the cell phone was a tool used in drug trafficking based on the plain view of the marijuana image and his knowledge that such images are typically found on drug traffickers' phones. That evidence shows more than a fair probability that an incoming call to such a phone would contain evidence of illegal drug activity.

Moreover, exigent circumstances permitted Belsha's answering the call. The test for whether exigent circumstances are present focuses on whether the officer reasonably believes that the delay necessary to obtain a warrant, under the circumstances, threatens the destruction of evidence. Several federal cases address whether an officer may, based on exigent circumstances, access data or answer incoming calls on an electronic device that the officer had legally seized.

In the foundational case, *United States v. Ortiz*, [84 F.3d 977 (7th Cir. 1996),] officers seized an electronic pager incident to Ortiz's arrest for distribution of heroin. While continuing to search Ortiz and his vehicle for evidence, one of the agents pushed a button on the pager that revealed the numeric codes that the pager previously had received. The district court denied Ortiz's motion to suppress that evidence. The Seventh Circuit Court of Appeals affirmed that denial based on the risk that the data would be destroyed or lost if agents were required to first obtain a warrant:

> 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.

In subsequent cases, other courts have adopted that rationale when evaluating an officer's ability to search a seized cell phone incident to arrest, and have permitted law enforcement to conduct a warrantless search of a phone's stored data, such as records of calls received and made, so long as the other requirements of the search incident to arrest exception were satisfied.

To be sure, cell phones and pagers are not interchangeable. Indeed, the court in *United States v. Wall*, 2008 U.S. Dist. LEXIS 103058 (S.D.Fla.2008), observed that while exigent circumstances could justify a warrantless search of a cell phone,

> [t]he differences in technology between pagers and cell phones cut to the heart of this issue [of whether an officer's reading of stored text messages within a cell phone was justified based on exigent circumstances]. The technological developments that have occurred in the last decade, since *Ortiz* was decided, are significant. Previously, there was legitimate concern that by waiting minutes or even seconds to check the numbers stored inside a pager an officer ran the risk that another page may come in and destroy the oldest number being stored. This was based on a platform of first-in-first-out storage of numbers used for pagers. Text messages on cell phones are not stored in the same manner . . . . [I]f a text message is not deleted by the user, the phone will store it.

In *Wall*, the court concluded that the government failed to demonstrate an exigency justifying the agent's search of the defendant's text messages. There, the government put forth no evidence of the danger of the text messages being destroyed; to the contrary, it acknowledged that such messages generally remain stored in the phone unless a user actively deletes them. Given that, the court concluded that the officers' review of the text messages was purely investigatory and evidence obtained from that review was therefore tainted.

Significantly, at least one court has concluded that when a government agent lawfully possesses a phone and there is probable cause to believe it is used in illegal drug activity, the agent can answer incoming calls if the calls arrive in a period when it is impracticable for the agent to obtain a warrant first. *See United States v. De La Paz*, 43 F.Supp.2d 370, 375 (S.D.N.Y.1999). In *De La Paz*, agents had lawfully seized a cell phone incident to an arrest. While the agents were processing the defendant's arrest, the defendant's phone rang nine times and the agents answered it each time. The court concluded that it was reasonable under the circumstances for the agents to answer the cell phone of a suspected drug dealer in the time between the arrest and arraignment, given both the impossibility of timely obtaining a warrant allowing agents to answer incoming calls and the risk of losing evidence by leaving those calls unanswered.

The consistent approach taken in these cases is that the courts scrutinized the nature of the evidence obtained, i.e., numeric codes on a pager, stored text messages, and incoming phone calls, and balanced that with an inquiry into whether the agent reasonably believed that the situation required a search to avoid lost evidence. Based on that assessment, it appears that the courts then reserved the exigent circumstances exception for searches directed at the type of evidence that is truly in danger of being lost or destroyed if not immediately seized.

Hence, we are satisfied that exigent circumstances justified Belsha's answering Carroll's cell phone. The fleeting nature of a phone call is apparent; if it is not picked up, the opportunity to gather evidence is likely to be lost, as there is no guarantee — or likelihood — that the caller would leave a voice mail or otherwise preserve the evidence. Given these narrow circumstances, Belsha had a reasonable belief that he was in danger of losing potential evidence if he ignored the call. Thus, the evidence obtained as a result of answering that phone call was untainted.

B. Independent Source Doctrine

Having determined that the warrantless seizure and subsequent viewing of the image gallery on Carroll's phone produced tainted evidence, we turn our attention to the question of whether the resulting warrant is nonetheless valid. We conclude . . . that the phone call Belsha answered is an untainted independent source of evidence to support the search warrant, that the untainted evidence, which is combined with the officer's knowledge of drug traffickers and Carroll's juvenile record, provides sufficient probable cause to issue the warrant, and that as a result, the warrant is valid. [Based on the warrant, the search that resulted in the recovery of the firearm image was valid.]

NOTES

1. Exigent Circumstances. In *State v. Smith*, 920 N.E.2d 949 (Ohio 2009), reproduced *supra*, the court rejected the legality of a search of a cell phone incident to arrest. The state also argued that the search of the cell phone was proper based on exigent circumstances, that is, "that cell phones store a finite number of calls in their memory and that once these records have been deleted, they cannot be recovered." The court concluded that the issue was not properly before it, reasoning:

> At the suppression hearing, the state offered no evidence or argument to support its claim that the search was justified by the need to preserve evidence. Additionally, even if one accepts the premise that the call records on Smith's phone were subject to imminent permanent deletion, the state failed to show that it would be unable to obtain call records from the cell phone service provider, which might possibly maintain such records as part of its normal operating procedures.

Based on *Smith*, what advice would you give to police officers who are validly in possession of a ringing cell phone?