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Cell Phone Searches Incident to Arrest: A New Standard Based on *Arizona v. Gant*

Ben E. Stewart

**INTRODUCTION**

The value of communication has been recognized since early in recorded history. Recorded history itself is denoted by the development of enduring communication systems, such as writing, that relax the boundaries of time. Importantly, humans employ various methods of communication and often utilize those methods simultaneously. For example, an assistant might write a note to an attorney concerning information conveyed to the assistant by a client. The assistant writes the message as the client speaks to her. In this way, both written and oral communications are performed simultaneously. Communication, in almost every form, is extremely important to individual and societal development. It is, therefore, unsurprising that technological advances facilitating communication are often heralded as defining moments in history.

As has been true of other technological advances in communication, cell phones and the constantly expanding range of possible methods of communications associated with these devices have had significant effects on individuals and society. Cell phones, especially the latest generations of cell phones, have made the communication advances of computers more mobile. Cell phones can send text messages; they can take pictures and record video; and, of course, they can transmit a speaker’s voice. The capability of some phones, like the iPhone, to access the Internet multiplies the value of cell phones in communication. The widespread use of cell

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1 JD, expected May 2011, University of Kentucky College of Law; BA in Government, magna cum laude, May 2008, Centre College.
3 *Communication*, *Columbia Encyclopedia* (2008), available at http://www.encyclopedia.com/topic/communication.aspx (“The reduction of communication to writing was a fundamental step in the evolution of society for, in addition to being useful in situations where speech is not possible, writing permits the preservation of communications, or records, from the past.”).
phones demonstrates the value individuals, businesses, and governments place on them. At the same time, cell phones present challenges to the law. One characteristic of cell phones is the capacity to store vast amounts of information, creating a durable record of communication between individuals. These records (text messages, incoming/outgoing call logs, contact lists, pictures, videos, and so forth) often contain private, personal, and sometimes confidential information.

Like advances in communication technology, the law adapts to meet the needs and desires of society. Long ago, American law developed to protect the privacy of individuals. This development is embodied in the Fourth Amendment to the Constitution of the United States, which protects against unjustified searches and seizures. The effect of the Fourth Amendment on searches of cell phones, however, is somewhat uncertain because of cell phone technology's recent development. As is often the case when considering the law's effect on a new object or idea, the question is whether cell phone searches should be treated as analogous to a well-developed area of Fourth Amendment jurisprudence or as something new and different.

The Fourth Amendment only allows searches premised upon search warrants, notwithstanding some exceptions the Supreme Court has identified. A search of the person of an arrestee incident to his or her lawful arrest has long been recognized as an exception to the warrant requirement of the Fourth Amendment. A warrantless search that does not fall within an exception to the warrant requirement is subject to suppression under the Exclusionary Rule. Through the Fourteenth Amendment, the Exclusionary Rule applies to the states by virtue of incorporation of the Fourth Amendment. In 2009, in Arizona v. Gant, the Supreme Court limited the search incident to arrest exception by only allowing searches related to the reason for the initial arrest.

While the Supreme Court's holding in Gant concerned searches incident to arrest in the vehicle context, a substantially similar standard to the one announced in Gant should be applied to cell phones. Cell phones, unsurprisingly carried on a person, should not be allowed to be searched incident to arrest without a warrant apart from circumstances unique to the particular arrest. These unique circumstances would be those in which

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6 See Press Release, Census Bureau, Text-Messaging Soars (Dec. 15, 2009), available at http://www.census.gov/newsroom/releases/archives/miscellaneous/cbo9-190.html ("In 2008, there were more than 270 million cell phone subscribers; they paid an average monthly bill of $50 with the average call lasting 2 minutes, 16 seconds.").
7 U.S. CONST. amend. IV.
there is reason to believe that evidence of the crime of arrest may be
found in the cell phone. This standard is superior because it balances the
liberty interests of individuals with the societal interests of effective law
enforcement.

This Note is divided into five parts that aggregate to justify the
aforementioned conclusion. Part I briefly outlines the development of
Fourth Amendment jurisprudence relating to searches incident to arrest
leading up to Gant, especially in relation to vehicle searches incident to
arrest. Importantly, Part I enumerates the justifications for the exceptions
to the warrant requirement as delineated by the Court. Part II discusses
how Gant has changed the landscape of the search incident to arrest
exception, especially in the vehicle context. Part III analyzes lower court
opinions relating to the admission of evidence found in cell phones. These
decisions were influenced by, and some directly rely upon, the holding in
New York v. Belton, a decision that is limited in scope by Gant. Part IV
critically examines the reasoning behind lower court opinions admitting
evidence obtained as a result of searching a cell phone incident to arrest.
Specifically, Part IV analyzes the classification of a cell phone as a container,
the degree to which a preservation of evidence exigency is persuasive, and
the benefits to law enforcement of searching cell phones incident to arrest.
Part V offers a standard for searches of cell phones incident to arrest based
on Gant. This standard best balances the needs of law enforcement and the
liberty interests of individuals protected by the Fourth Amendment.12

I. BACKGROUND ON THE SEARCH INCIDENT TO ARREST EXCEPTION

The search incident to arrest exception is a justification often cited by
the government in criminal prosecutions in order to introduce evidence
obtained without a search warrant. In United States v. Robinson, the Court
held that an officer may search the person of an arrestee incident to a
custodial arrest.13 The defendant in Robinson was stopped and arrested for
driving on a revoked operator’s permit.14 The arresting officer had checked
the defendant’s license status four days earlier and knew that his operator’s
permit had been revoked, and the defendant conceded for the purposes
of appeal that the officer had probable cause to arrest.15 After arresting the
defendant, the officer began to pat him down.16 Upon feeling an object, the

12 The importance of this question from the perspective of criminal law practice and for
law enforcement has not gone unnoticed. See generally Justin M. Wolcott, Note, Are Smart-
phones Like Footlockers or Crumpled Cigarette Packages? Applying The Search Incident To Arrest Doc-
trine To Smartphones In South Carolina Courts, 61 S.C. L. Rev. 843 (2010).
13 Robinson, 414 U.S. at 235.
14 Id. at 220.
15 Id. at 220-21.
16 Id. at 222-23.
officer reached into the arrestee's coat and retrieved a crumpled cigarette package containing fourteen heroin capsules.\textsuperscript{17} The Court distinguished a \textit{Terry}\textsuperscript{18} search from a search incident to arrest by examining the underlying justifications for each exception: "[t]he justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial."\textsuperscript{19} No particularized suspicion is required in order to search the person of an arrestee incident to a lawful arrest.\textsuperscript{20} The Court also noted that a search incident to arrest is not limited to the person of the arrestee, but includes the area immediately around the arrestee as well.\textsuperscript{21}

In \textit{Chimel v. California}, the Court, to some degree, clarified the boundaries of this area.\textsuperscript{22} \textit{Chimel} involved the search of an entire home purportedly conducted pursuant to a search incident to arrest.\textsuperscript{23} Upon arriving at the defendant's home, officers arrested the defendant pursuant to an arrest warrant.\textsuperscript{24} Prior to the defendant's arrest, his wife let the officers into the home. After arresting the defendant, the officers searched through drawers, closets, and other closed spaces for evidence of a coin shop burglary.\textsuperscript{25} The \textit{Chimel} Court defined the "area within his immediate control" in light of the underlying justifications for a search incident to arrest.\textsuperscript{26} The area within the arrestee's immediate control is "the area from within which [the arrestee] might gain possession of a weapon or destructible evidence";\textsuperscript{27} searching an entire home, without an exigency, is not within the scope of a permissible search.\textsuperscript{28} In this decision, the Court tethered the limits of the exception to the purposes of the exception.

While one can easily distinguish between rooms in a home, the decision as to whether the contents and containers of a vehicle are within

\begin{itemize}
  \item \textsuperscript{17} \textit{Id.} at 223.
  \item \textsuperscript{18} \textit{Terry v. Ohio}, 392 U.S. 1 (1968).
  \item \textsuperscript{19} \textit{Robinson}, 414 U.S. at 234 (citations omitted).
  \item \textsuperscript{20} \textit{Id.} at 235 ("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 \textit{Fourth Amendment}; that intrusion being lawful, a search incident to the arrest requires no additional justification.").
  \item \textsuperscript{21} \textit{Id.} at 224 ("The second is that a search may be made of the area within the control of the arrestee.").
  \item \textsuperscript{22} See \textit{Chimel v. California}, 395 U.S. 752, 763 (1969).
  \item \textsuperscript{23} \textit{Id.} at 753-54.
  \item \textsuperscript{24} \textit{Id.} at 753.
  \item \textsuperscript{25} \textit{Id.} at 753-54.
  \item \textsuperscript{26} \textit{Id.} at 762-63.
  \item \textsuperscript{27} \textit{Id.} at 763.
  \item \textsuperscript{28} \textit{Id.}
\end{itemize}
the arrestee’s immediate control is a more difficult determination. Vehicle searches incident to arrest are relevant to the analysis of cell phone searches incident to arrest: phones, like vehicles, are both mobile and highly regulated. Most importantly, in deciding cell phone suppression issues, lower courts have used reasoning similar to, and cited cases directly addressing, vehicle searches incident to arrest.29

New York v. Belton30 and Thornton v. United States31 were vehicle search incident to arrest cases; these cases were limited in Arizona v. Gant.32 In New York v. Belton, an officer stopped a vehicle for speeding and, upon questioning, discovered that none of the four occupants owned or were related to the owner of the vehicle.33 Smelling marijuana and noticing an envelope labeled “Supergold”34 in the vehicle, the officer frisked all four occupants, looked in the envelope, and discovered marijuana.35 The officer also retrieved a jacket from the passenger compartment of the vehicle, unzipped a pocket, and discovered cocaine.36 The Court held that the scope of a search incident to a lawful arrest included the passenger compartment of an automobile in which the arrestee was riding.37

In Thornton v. United States, the Court considered whether a vehicle recently occupied by an arrestee was within the scope of the rule in Belton.38 A police officer became suspicious of a vehicle whose driver did not seem to want to drive beside him.39 The officer ran the tags and discovered that they did not match the make or model of the vehicle.40 By that time, the defendant had parked the vehicle and was walking away.41 The officer stopped him, patted him down, and after feeling a bulge, asked the defendant if he had any narcotics.42 The defendant removed marijuana and crack cocaine from his pockets.43 The officer placed the defendant in the police cruiser after handcuffing him and informing him that he was under arrest.44

29 See infra Part II.
33 Belton, 453 U.S. at 455.
34 The officer associated “Supergold” with marijuana. Id. at 456.
35 Id.
36 Id. at 455-56.
37 Id. at 462-63.
39 Id.
40 Id. at 618.
41 Id.
42 Id.
43 Id.
44 Id.
The Court applied the bright-line rule announced in *Belton*—namely, that an officer may search the entire passenger compartment once there is probable cause to arrest the recent occupant of a vehicle. The Court declined to make a distinction based on whether the occupant exited the vehicle on his or her own initiative or by police order. The Court held that "so long as an arrestee is the sort of ‘recent occupant’ of a vehicle such as petitioner was here, officers may search that vehicle incident to the arrest."  

II. *Arizona v. Gant* Changes the Landscape of the Search Incident to Arrest Exception

A mere four years after the Court established the bright line rule in *Thornton v. United States*, it blurred that line in *Arizona v. Gant*. In the majority opinion, Justice Stevens devoted considerable energy to relating and distinguishing the *Gant* decision from both *Belton* and *Thornton*. In fact, the majority opinion casts the decisions in *Belton* and *Thornton* as based on fundamentally different fact patterns than the fact pattern in *Gant*.

In *Gant*, the police acted on an anonymous tip that a residence was being used to sell drugs by knocking on the door of the residence and asking to see the owner. Rodney Gant opened the door and told officers the owner would return later. The police left but conducted a records search that revealed that Gant had an outstanding warrant for driving on a suspended license. The police returned later, arresting a man for providing a false name and a woman for possession of drug paraphernalia. Gant pulled in the driveway while the police were at the residence, and he was arrested after exiting his vehicle. Once Gant was handcuffed and secured in a police cruiser, police searched the car he had been driving and discovered cocaine and a firearm.

45 *Id.* at 623.
46 *Id.* at 621-22; see also *id.* at 615-16 ("[W]hile an arrestee’s status as a ‘recent occupant’ may turn on his temporal or spatial relationship to the car at the time of the arrest and search, it certainly does not turn on whether he was inside or outside the car at the moment when the officer first initiated contact with him.").
47 *Id.* at 623-24.
48 *Id.* at 619-20; *Id.* at 615-16.
49 *See id.* at 1722.
50 *See id.*
51 *Id.* at 1714.
52 *Id.* at 1714-15.
53 *Id.* at 1715.
54 *Id.*
55 *Id.*
56 *Id.*
The majority in *Gant* emphatically distinguished these facts from the facts in *Belton* and *Thornton*. First, the Court viewed the ratio of officers to arrestees as an important factor in determining the reasonableness of the search.\(^{57}\) Second, the Court viewed the nature of the suspected crime as salient; that is to say, the Court considered whether the alleged crime was one that might produce physical evidence that could be discovered in a vehicle as an important issue.\(^{58}\) Third, the Court saw the degree to which the arrestees were secured and the situation was stabilized as an important consideration.\(^{59}\) The focus of this third consideration was whether the arrestee was "unsecured and within reaching distance of the passenger compartment at the time of the search" such that it would be possible to access a weapon or destructible evidence.\(^{60}\) The Court described the relationship between the facts of *Belton* and *Gant* as a non-relationship in that "it is hard to imagine two cases that are factually more distinct."\(^{61}\)

Notwithstanding the Court's accentuation of factual distinctions from prior decisions, *Gant* changed the landscape of the search incident to arrest exception. The holding of *Belton* had been broadly interpreted, and police had heavily relied upon this interpretation.\(^{62}\) In *Thornton*, Justice O'Connor noted in concurrence that the Court's decision in *Belton* had resulted in a broad interpretation of police power by police departments and lower courts.\(^{63}\) Those two entities, it seems, failed to recognize the implicit assumption upon which the decision in *Belton* was based; namely, containers and articles in a vehicle's passenger compartment are almost inevitably within the reach of a recent occupant at the time of the search.\(^{64}\) *Gant* recognized that this assumption was, in fact, more often incorrect than correct.\(^{65}\)

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\(^{57}\) See *id.* at 1716-17 ("A lone police officer [in *Belton*] stopped a speeding car in which Belton was one of four occupants."); see also *id.* at 1719 ("Unlike in *Belton*,... the five officers in this case outnumbered the three arrestees....").

\(^{58}\) *Id.* at 1719 ("An evidentiary basis for the search was also lacking in this case. Whereas Belton and Thornton were arrested for drug offenses, Gant was arrested for... an offense for which police could not expect to find evidence in the passenger compartment of Gant's car."").

\(^{59}\) *Id.*

\(^{60}\) *Id.* (citation omitted).

\(^{61}\) *Id.* at 1722.

\(^{62}\) *Id.* at 1718 ("[O]ur opinion [in *Belton*] has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search.").


\(^{64}\) See *Gant*, 129 S. Ct. at 1717 (quoting *New York v. Belton*, 453 U.S. 454, 460 (1981)).

\(^{65}\) *Id.* at 1723 ("We now know that articles inside the passenger compartment are rarely 'within the area into which an arrestee might reach'... " (quoting *Belton*, 453 U.S. at 460)).
The Court's decision in *Gant* demonstrates a reaffirmation of and adherence to the rationales announced in *Chimel*. *Chimel* defines the boundaries for the search incident to arrest exception; the rationales of the exception—officer safety and preservation of destructible evidence—demarcate the limits of the exception. If neither interest is implicated in the facts of an arrest, the warrantless search of a vehicle incident to arrest is unreasonable.

In reaffirming *Chimel*, the Court specified two situations when a search is reasonable. First, the Court held that "[p]olice 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 . . . ." Second, the Court adopted a standard proposed by Justice Scalia in his concurrence in *Thornton* related to the destruction of evidence rationale.

In *Thornton*, Justice Scalia argued for limiting *Belton* searches of vehicles to those in which "it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." This basis creates a quasi-bright-line rule for law enforcement: no determination as to whether an arrestee is within reaching distance is required if there is reason to believe that evidence of the offense of arrest is in the vehicle.

III. CELL PHONE ADMISSIBILITY DECISIONS HAVE RELIED ON *NEW YORK v. BELTON*

The Supreme Court has addressed Fourth Amendment issues raised with landline telephones, but the Court has yet to address cell phones directly. Lower courts have used various forms of reasoning to decide Fourth Amendment cell phone search challenges. Many courts have pointed to the preservation of evidence rationale from *Chimel* because of the finite memory and destructibility of information. Other courts have likened the phone to a container. Notably, courts deciding cases in which cell phones were searched incident to arrest have relied on *New York v.*

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66 *See id. at 1719.*
67 *Id. at 1716.*
68 *Id. at 1716, 1723-24.*
69 *Id. at 1723.*
70 *See id. at 1719.*
72 *Gant*, 129 S. Ct. at 1719.
75 *See infra* Part IV.B.
76 *See infra* Part IV.A.1.
Belton. As discussed supra, Arizona v. Gant seemingly calls the validity of cases relying on Belton into question.

In United States v. Sam Tong Chan, a California federal district court faced a Fourth Amendment challenge to the admission of information obtained from a warrantless search of the defendant's pager. An undercover Drug Enforcement Administration (DEA) agent had a person named Ma (later a codefendant in the case) page Chan and request that he deliver heroin to the DEA. Ma used a hotel telephone to request the delivery. Chan was arrested after delivery, and a DEA agent seized his pager. After "activating its memory and retrieving certain telephone numbers that were stored in the pager," the DEA agent discovered that it contained the number from the hotel telephone. The court ruled that there was a legitimate expectation of privacy in the contents of the pager but determined this expectation of privacy was "destroyed as the result of a valid search incident to an arrest." Interestingly, Chan did not challenge the seizure of the pager because it was on his person. Instead, he challenged the warrantless search of the contents after the seizure. Chan argued that a warrant is required to search a closed container once the container is reduced to police control. Relying on Belton, which permits warrantless searches of containers in the immediate control of the arrestee, the court ruled that a container may be searched when the search is incident to an arrest.

Another case arising out of the pager era is United States v. Ortiz. The facts of Ortiz are strikingly similar to the facts in Chan. A heroin dealer named Hurtado agreed to cooperate with law enforcement after selling heroin to an undercover agent. Hurtado provided the pager number of a man he identified as "Julio" to the DEA. Hurtado then spoke on the phone to the defendant, Julio Ortiz, and the two agreed to consummate
a heroin transaction at a nearby McDonald’s restaurant. When Hurtado identified Julio, officers arrested Julio and seized his pager; Hurtado’s call was discovered after a search of the pager’s contents. The Seventh Circuit cited the reasoning in Chan with approval, noting that searching the contents of a pager immediately after arrest was not so remote in time or place as to be outside the search incident to arrest exception. By citing Chan, the court in Ortiz relied on Belton and the broad meaning of “container” defined therein.

In both Chan and Ortiz, the pagers were used to set up the purchase of controlled substances. By contrast, United States v. Finley involved a cell phone, and the device was not used in setting up the purchase. Furthermore, the defendant’s cell phone was searched for text messages rather than numbers linking him to some previous call initiated by police.

Finley drove a passenger named Brown to a truck stop in order for Brown to engage in a methamphetamine transaction that, unbeknownst to Brown or Finley, had been set up by the DEA. Officers stopped the vehicle in which Finley and Brown were traveling. The van was searched, and both individuals were arrested and transported to Brown’s residence, which was being searched pursuant to a search warrant. Finley’s cell phone was seized from his person at the time of arrest. The court relied on the search incident to arrest exception in deciding that the text messages did not have to be suppressed. The Fifth Circuit cited Belton and Ortiz in ruling that the search was reasonable. As the phone was not used in establishing the illegal transaction, Finley demonstrates the broad scope afforded the search of containers, including cell phones, under Belton.

91 Id.
92 Id. at 982-83.
93 Id. at 984.
95 United States v. Finley, 477 F.3d 250, 254 (5th Cir. 2007).
96 Id.
97 Id. at 253.
98 Id. at 254.
99 Id.
100 Id.
101 Id.
102 Id. at 259-60.
103 Id. at 260.
IV. THE POST-GANT LANDSCAPE

A. The "Container" Question

1. Classification of Cell Phones as Containers.—Perhaps one reason courts have been willing to view cell phone searches under the vehicle search incident to arrest analysis is the fact that there seems to be little hesitation in classifying a cell phone as a "container." Apart from cell phones, the Supreme Court has addressed issues arising from warrantless searches of closed containers on numerous occasions.104

Criminal defendants have made the argument that the rule announced in United States v. Chadwick105 should control.106 Chadwick involved a locked footlocker transported by train. When the travelers toting the footlocker arrived at their destination, police arrested them immediately after they loaded the footlocker in the trunk of a car.107 Federal agents took the defendants and the footlocker to a secure federal building where the footlocker was opened, without a warrant, and marijuana was discovered.108

The rule from Chadwick is that in the context of a search incident to arrest, if "no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of the police authority."109

The Court made a distinction between "searches of possessions within an arrestee's control" and "searches of the person"; Chadwick controls the latter but not the former.110

The Supreme Court revisited Chadwick, along with other precedent, in California v. Acevedo.111 Chadwick caused some confusion among law enforcement and lower courts concerning containers found in vehicles, especially outside the passenger compartment. The Court established the rule that "police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained."112 In essence, the basis for the probable cause determines the scope of the search.113 However, Acevedo addressed the scope of container

107 Chadwick, 433 U.S. at 4.
108 Id. at 4-5.
109 Id. at 15.
110 Id. at 16 n.10 (citations omitted).
112 Id. at 579-80 ("The scope of a warrantless search of an automobile ... is not defined by the nature of the container in which the contraband is secreted. Rather it is defined by
searches under the vehicle exception, not the search incident to arrest exception.  

Chadwick and Acevedo indicate that some rather fine distinctions come into play if a cell phone is characterized as a container in the same sense that a footlocker, suitcase, or an opaque bag is a container. One such distinction is whether the phone was on the person of the arrestee, in the area of the arrestee’s immediate control but reduced to exclusive police control, or merely in the vehicle that the arrestee recently occupied. Under Chadwick, if the phone was on the person of the arrestee, then no suspicion is required; the container may be searched without concern for officer safety or evidentiary considerations. Also under Chadwick, if the phone was in the arrestee’s immediate control, then the police could seize the phone but could not examine the contents in the absence of a safety or preservation of evidence exigency. Alternatively, under Acevedo, if the phone was discovered in the trunk of a vehicle, outside the arrestee’s immediate control, then the police must have probable cause to search the contents.

This distinction is discussed in the unreported case, United States v. Park. In Park, the defendant was detained when he visited a home being monitored by police immediately preceding the execution of a search warrant. Upon executing the warrant, police discovered an indoor marijuana cultivation operation; all those detained were then arrested. The arrestees’ cell phones were not seized at the time of arrest, but the defendant's phone was searched at the stationhouse during booking, over ninety minutes after his arrest. The court elucidated the holding of Chadwick by making a distinction between items closely associated with the person of the arrestee and possessions in the immediate control of the arrestee.

The court in Park concluded that a cell phone should be characterized as a “possession[] within [the] arrestee’s immediate control.” The particular facts of Park make this an easier classification than the facts in many other

114 See id. at 579-80.
116 See id. at 15.
117 See Acevedo, 500 U.S. at 580.
119 Id. at *1-2.
120 Id. at *2.
121 Id. at *2-5.
122 Id. at *6.
123 Id. at *8 (quoting United States v. Chadwick, 433 U.S. 1, 16 n.10 (1977)).
cell phone search cases. First, the defendant was not in a vehicle at the

time he was arrested. Second, the defendant’s phone was not seized

during the period of his arrest. There was significant delay between arrest and

seizure and the subsequent search; the search was after booking, in the

stationhouse. The fact that the search was in the stationhouse tends to

make it seem more like an inventory search. Thus, there are significant

factual differences between Park and other cell phone search cases. But,

the court in Park did not base its ruling upon the factual differences, stating

that the facts only “differ slightly.” Rather, the court determined that cell

phones are possessions within the arrestee’s immediate control “because

modern cellular phones have the capacity for storing immense amounts of

private information.” Accordingly, the court applied the rule in Chadwick

that a warrant is required for containers that are possessions within an

arrestee’s immediate control when there is no exigency.

2. Cell Phones Are Not Containers For Purposes of the Fourth Amendment.—A

cell phone is not a “container” according to the term’s common usage,

but more importantly, a cell phone should not be a “container” for the

purposes of the Fourth Amendment. Three lines of reasoning support this

collection. First, Belton’s definition of “container” would not include cell

phones. Second, cell phones do not contain mysterious contents, the nature

of which police cannot determine. Third, cases classifying cell phones as

containers have incorrectly relied on United States v. Finley in support of the

decisions.

While Belton defined “container” broadly, that definition does not

include the contents of cell phones. Belton defined “container” as an

“object capable of holding another object.” Containers are typically those

objects that by their nature hold some other object in such a way that the

contained object can be removed from the containing object and used.

\[\text{124 Id. at } *2.\]

\[\text{125 Id.}\]

\[\text{126 Id. at } *2-3.\]

\[\text{127 Id. at } *10-12.\]

\[\text{128 Id. at } *8\text{ (referring to a discussion of the factual context of United States v. Finley, 477 F.3d 250, 253 (5th Cir. 2007) and Park).}\]

\[\text{129 Id.}\]

\[\text{130 Id. at } *9.\]

\[\text{131 con-tain-er: one that contains: as}\]

\[\text{a: a receptacle (as a box or jar) for holding goods}\]

\[\text{b: a portable compartment in which freight is placed (as on a train or ship) for}\]

\[\text{convenience of movement.}\]

\[\text{MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 269 (11th ed. 2003).}\]


\[\text{133 See State v. Smith, 124 Ohio St. 3d 163, 2009-Ohio-6426, 920 N.E.2d 949, at ¶ 19}\]
The nature of the contained object is most often undeterminable without searching. It is unlikely that either arrestees or law enforcement agencies are interested in any physical “object” contained within a cell phone. Rather, the information, which is not an object, most acutely concerns law enforcement.

A cell phone also does not seem logically analogous to other “containers” because police know what cell phones “contain”—information. When opening a crumpled cigarette package, as in Robinson,\textsuperscript{134} or a brown bag, as in Acevedo,\textsuperscript{135} the officer does not know the nature of the substance within. The officer is unsure whether the object is intrinsically dangerous, if the contents will enable the arrestee to hurt himself or others, or if the contents of the container are an appropriate possession for an individual soon to be detained in a local jail. The Court was willing to permit searches incident to arrest in Robinson, even when not tied to any particularized suspicion, because of uncertainty concerning the nature of the object or substance in a container.\textsuperscript{136} The nature of a cell phone is fundamentally different from the “containers” contemplated and discussed by the Court in previous Fourth Amendment cases. Police already know the nature of a cell phone’s contents—digital photos, phone numbers, and other intangible personal data.

Furthermore, several cases have relied on unsupportive precedent in likening a cell phone to a container. Many cases involving cell phone searches that have classified cell phones as containers have relied, at least in part, on United States v. Finley.\textsuperscript{137} In Finley, the Fifth Circuit treated the phone searched as a container.\textsuperscript{138} But notably, the court in Finley did not engage in any analysis or expound upon the reasoning for classifying a cell phone as a container. The explanation for this classification is that the defendant in Finley conceded that the phone was a container.\textsuperscript{139} Therefore, the Fifth Circuit did not consider the alternative argument that a cell phone is not a container. The United States Supreme Court declined to review the case.\textsuperscript{140}

It is a practical reality that cell phone ownership is the rule rather than the exception in society.\textsuperscript{141} The widespread use of cell phones underscores

\textsuperscript{136} See Robinson, 414 U.S. at 235 n.5 (“The danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty, and not from the grounds for arrest.”).
\textsuperscript{137} United States v. Finley, 477 F.3d 250 (5th Cir. 2007), cert. denied, 549 U.S. 1353 (2007).
\textsuperscript{138} Finley, 477 F.3d at 260.
\textsuperscript{139} Id.
\textsuperscript{140} Finley v. United States, 549 U.S. 1353 (2007) (denying wirt of certiorari).
\textsuperscript{141} See Press Release, supra note 6.
the importance of classifying cell phones correctly under the Fourth Amendment in order to balance individuals' privacy interests with the practical needs of effective law enforcement. A cell phone is not a container for purposes of the Fourth Amendment, and should not be classified as such.

B. The Preservation of Evidence Exigency Due to Finite Memory is No Longer Persuasive

While no particularized suspicion is required for a search incident to arrest, there must be, at a minimum, the possibility of destruction of evidence or a threat to an officer's safety.142 Gant re-affirmed this requirement.143 Because the threat to officer safety is minimal in the cell phone context, destruction of evidence caused by the finite memory capacity of electronic devices is the justification courts have utilized for permitting searches.144

The finite memory exigency is the idea that as phone calls or messages are received, older phone calls and messages will be automatically deleted.145 The functional rationale for a device deleting the oldest information is that there is simply insufficient memory to retain all data, and new data is given priority. If courts used this factual assumption about the functional characteristics of particular electronic devices, this was likely a more reasonable assumption when the finite memory exigency was first articulated. However, technological developments have made this assumption less reasonable, especially for more technologically advanced devices.146

The first cases involving portable electronic devices often involved pagers with finite memories.147 Today, cell phones can store vast amounts of information. In fact, many phones are more analogous to computers in terms of the amount of personal data they can store. Courts even recognize that "the line between cell phones and personal computers has grown increasingly blurry."148 Given that cell phone memory, while not infinite, is

144 See, e.g., United States v. Murphy, 552 F.3d 405, 411 (4th Cir. 2009); United States v. Young, 278 F. App’x 242, 245-46 (4th Cir. 2008); United States v. Ortiz, 84 F.3d 977, 984 (7th Cir. 1996).
145 E.g., Ortiz, 84 F.3d at 984 (“Because of the finite nature of a pager's electronic memory, incoming pages may destroy currently stored telephone numbers in a pager's memory. The contents of some pagers also can be destroyed merely by turning off the power or touching a button.” (citation omitted)).
147 See, e.g., United States v. Meriwether, 917 F.2d 955, 957 (6th Cir. 1990).
certainly less limited than the capacities of the pagers of yore, a preservation of evidence rationale may be inappropriate.

As cell phones' capabilities increase, so do memory capacities and the tendency of individuals to use these capacities to store personal, often private, information. Newer phones, like the iPhone, can show "incoming and outgoing call histories, scan contact lists, read thousands of emails, view nearly limitless numbers of color photographs and movies, listen to voicemail at the touch of the button, and view the Internet websites . . . visited."\(^\text{149}\) A few courts have begun to acknowledge the growing capabilities of cell phones and the fact that they are a repository of personal information.\(^\text{150}\)

If the destruction of evidence exigency truly is a concern, there are alternatives that protect the rights of individuals while preserving evidence. While the phone is in the arrestee's possession, the information can be deleted or the phone itself destroyed. Once seized, the phone is beyond the arrestee's control and can simply be turned off.\(^\text{151}\) Officers could then obtain a search warrant and power up the phone, thereby preserving both the arrestee's Fourth Amendment privacy interests and eliminating the possible destruction of evidence.

### C. Cell Phone Searches Aid Law Enforcement

Notwithstanding that cell phones are not "containers" and the destruction of evidence exigency has become less tenable, evidence obtained from cell phones is valuable to law enforcement. Obviously, criminals can use cell phones to further their illicit motives.\(^\text{152}\) In these instances, cell phones provide both the means to a criminal's ends and a potential source of the criminal's undoing. The text messaging function of

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150 Park, 2007 WL 1521573, at *8 (“Unlike pagers or address books, modern cell phones record incoming and outgoing calls, and can also contain address books, calendars, voice and text messages, email, video and pictures. Individuals can store highly personal information on their cell phones, and can record their most private thoughts and conversations on their cell phones through email and text, voice and instant messages.” (internal citation omitted)); State v. Smith, 124 Ohio St. 3d 163, 169, 2009-Ohio-6426, 920 N.E.2d 949, 955 at ¶ 23 (“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.”).

151 See Smith, 124 Ohio St. 3d at 169, 2009-Ohio-6426, 920 N.E.2d at 955 at ¶ 23 (“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.”).

152 See, e.g., United States v. Slater, 971 F.2d 626, 637 (10th Cir. 1992) (“The search of his vehicle produced a large amount of cash, a semiautomatic pistol, and a cellular phone, each of which is a recognized tool of the trade in drug dealing.” (citation omitted)).
cell phones may be especially useful to law enforcement. In addition to serving as a convenient substitute for the more ephemeral spoken word, a text message provides a lasting record of the substance of a communication. One commentator, though not emphasizing the possible beneficial use of cell phone evidence, noted the value of information held in cell phones: "the iPhone stores tremendously more information—thereby providing law enforcement with access to information that the typical arrestee would otherwise be incapable of carrying in his pocket."\footnote{Gershowitz, supra note 149, at 41.}

The widespread use also means that police officers will often be faced with situations in which they will have to make decisions whether or not to search.\footnote{Carl Milazzo, Searching Cell Phones Incident to Arrest: 2009 Update, The Police Chief, May 2009, available at http://policechiefmagazine.org/magazine/index.cfm?fuseaction=print_display&article_id=17809&issue_id=52009 (stating that cell phones "are so prevalent that it is rare to make an arrest today without encountering this form of evidence").} Police departments are aware of the potential value of cell phones as rich deposits of evidence. By example, several law enforcement publications address and frequently update information related to the lawful search of cell phones without a warrant.\footnote{See generally Clark, supra note 5, at 26; Milazzo, supra note 154.}

The cell phone as a repository of evidence of criminal activity is amplified by the multifarious functions cell phones are capable of performing.\footnote{See Clark, supra note 5, at 26 ("[O]fficers are likely to discover only one device, the cell phone, performing multiple functions, such as phone capability, texting, e-mailing, and Internet browsing.").} Again, the fact that one device can store such a vast array of different types and formats of personal information is persuasive justification for the protection of individuals’ privacy in cell phones. But the sword is double-edged because the very fact that so many functions can be performed by one device means that evidence is likely to be concentrated in one place, rather than discoverable in several places on the person and in the area within the arrestee’s immediate control.\footnote{See id. ("Recent technological developments have led to the consolidation of personal communication devices into one.").}

Because of the potential benefits of cell phone evidence to law enforcement, circumstances unique to particular situations may justify a phone search incident to arrest. The Court in \textit{Gant} acknowledged similar reasoning when referring to “circumstances unique to the vehicle context.”\footnote{Arizona v. Gant, 129 S. Ct. 1710, 1719 (2009).} In some respects, a cell phone is like a vehicle, and there are circumstances in which a warrant should not be required, just as there are “circumstances unique to the vehicle context.”\footnote{\textit{Gant}, 129 S. Ct. at 1719.} \textit{United States v. McCray} provides a useful example.\footnote{United States v. McCray, No. CR408-231, 2009 WL 29607 (S.D. Ga. Jan. 5, 2009).}
In *McCray*, when officers responded to a report of sexual activity, they observed a fourteen-year-old girl remaining in the defendant’s vehicle after the defendant had exited. She told officers that she had been “playing with [the defendant’s] thing” in exchange for money and food. During a consensual search of the vehicle, officers saw crack-cocaine, and during a post-arrest inventory search of the vehicle, officers discovered an obscene Polaroid photograph of a female. The police officers then searched the defendant’s phone for evidence of a sex crime with the minor by briefly viewing the phone’s stored images. After discovering obscene images of the minor stored on the phone, officers obtained a warrant for a more comprehensive search of the phone.

Given the nature of the situation and surrounding circumstances, it was not unreasonable to believe that the cell phone contained evidence of a crime. Based on the fact that police had already observed an obscene photograph, coupled with the report of sexual activity to which the officers were responding and the statements by the alleged victim, one could argue that the officers had reason to believe the phone might contain evidence of sexual acts with a minor.

Cell phones contain private information in various forms. Cell phones may also house digital evidence of criminal activity. Unfortunately, it is very difficult to limit the benefits of technological advancements to only those who use technology for law-abiding purposes. In consideration of situations like *McCray*, and given that cell phones hold such great evidentiary potential, their usefulness to law enforcement is a practical reality that cannot be ignored in crafting a standard for cell phone searches.

V. A STANDARD FOR CELL PHONE SEARCHES INCIDENT TO ARREST BASED ON *ARIZONA v. GANT*

*Gant* was an acknowledgment of practical reality. The Court recognized that objects in the passenger compartment of a vehicle are not “inevitably[] within the area into which an arrestee might reach.” With the recognition of this fact, the Court tied the search incident to arrest exception to the underpinning justifications of preservation of evidence and officer safety. But *Gant* also created an exception for searching a vehicle incident to the

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161 Id. at *1.
162 Id.
163 Id. at *1-2.
164 Id. at *2.
165 Id. at *4.
166 Id. at *2.
168 See id. at 1716.
arrest of a recent occupant if there is reason to believe the vehicle contains evidence of the crime of arrest. The Court grounded this addition to the search incident to arrest doctrine on the fact that there are “circumstances unique to the vehicle context.”

There are also unique circumstances for courts and law enforcement to consider in the cell phone search context. First, a cell phone is not a container in the same sense that an opaque bag, a crumpled cigarette package, or even luggage is a container. Cell phones do not hold or hide objects the nature of which is unknown to law enforcement; cell phones hold data. Second, some cell phones have developed to a point—and continue to rapidly develop—where an argument for the preservation of evidence exigency based on finite memory is less convincing. Third, cell phones are capable of performing various functions, as well as storing tremendous amounts of personal information; protecting people’s privacy in their phones is a weighty concern. Finally, cell phones can be used to carry on illicit activities and frustrate the enforcement of the law. The technology that connects us to one another can be used for antisocial purposes. Given that prior decisions dealing with the issue of warrantless searches of cell phones have relied on Belton, perhaps this area of Fourth Amendment jurisprudence should be re-examined in light of Gant.

At least one court presciently noted the importance of cell phone search issues and the potential for guidance from the Supreme Court in Gant. In United States v. Quintana, a police officer stopped a motorist traveling ninety miles per hour on a stretch of highway with a posted speed limit of seventy miles per hour. After detecting the “odor of raw marijuana,” the officer radioed for backup. The driver denied having marijuana and consented to a search of the vehicle. A particular duffel bag had an especially strong odor of marijuana, but the police found none. The defendant explained, when asked, that he occasionally smoked marijuana. The officer arrested the defendant after learning, via radio, that the defendant’s license had been suspended for failure to pay a traffic fine. While in custody, the defendant’s cell phone rang repeatedly; without seeking the defendant’s permission, an officer removed the phone from the defendant’s pocket and called the last incoming number. After speaking on the phone, the officer

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169 See id. at 1719.
170 Id.
173 Id. at 1295.
174 Id.
175 Id.
176 Id.
177 Id.
178 Id.
began to look through its contents, especially the photographs, in hopes of finding an explanation for the marijuana odor.\textsuperscript{179} The photographs depicted what the officers believed to be a "'grow house.'"\textsuperscript{180} This led officers to the address on the defendant's license, where several marijuana plants were, in fact, discovered.\textsuperscript{181}

The court pointed out that other cases upholding the search of phones incident to arrest were predicated on arrests for drug offenses, where one might expect evidence of trafficking.\textsuperscript{182} In contrast, the defendant in \textit{Quintana} was arrested for driving with a suspended license, an offense for which there could be no evidence in the phone.\textsuperscript{183} The court in \textit{Quintana} predicted that the Supreme Court would provide guidance in \textit{Gant}, which was undecided at the time.\textsuperscript{184} The \textit{Quintana} court concluded that the search of the phone furthered neither the goal of officer safety nor preservation of evidence, and thus, was not justified by the search incident to arrest exception.\textsuperscript{185}

The standard the Court applied in \textit{Gant} for the search incident to arrest seems to be the best approach in serving people's Fourth Amendment privacy interests and the needs of law enforcement in adapting to a more mobile and connected society, of which criminals are members. As illustrated by \textit{Quintana}, the standard would operate somewhat differently in the cell phone context than \textit{Gant} did in the vehicle context.\textsuperscript{186} A search of a cell phone will almost never reveal a weapon that could be used to harm police officers. The only danger to officers posed by a cell phone is the ability of an arrestee to call for assistance from confederates.\textsuperscript{187} This is a highly improbable danger, as the officers will be able to observe and thwart

\begin{itemize}
\item \textsuperscript{179} \textit{Id.} at 1295-96.
\item \textsuperscript{180} \textit{Id.} at 1296.
\item \textsuperscript{181} \textit{Id.}
\item \textsuperscript{182} \textit{Id.} at 1299.
\item \textsuperscript{183} \textit{Id.} at 1295. The Supreme Court has utilized similar logic, holding that the preservation of evidence exigency is no longer applicable if, by the nature of the suspected offense, further evidence cannot possibly be discovered. See Knowles v. Iowa, 525 U.S. 113, 118 (1998) ("Once [the defendant] was stopped for speeding and issued a citation, all the evidence necessary to prosecute that offense had been obtained. No further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car.").
\item \textsuperscript{184} See \textit{Quintana}, 594 F. Supp. 2d at 1300.
\item \textsuperscript{185} \textit{Id.} at 1300.
\item \textsuperscript{186} \textit{Id.}
\item \textsuperscript{187} The argument has been made that the danger posed by a cell phone is very limited. The possibility of an arrestee using the phone to strike an officer is still a possibility. Bryan Andrew Stillwagon, \textit{Note, Bringing an End to Warrantless Cell Phone Searches}, 42 Ga. L. Rev. 1165, 1196 (2008). Of course, even if an officer does not seize the phone to avoid this threat, the possibility of being struck with an object is a risk posed by all physical objects.
\end{itemize}
any such attempt. This danger can also be avoided by simply seizing the phone.\textsuperscript{188}

Also, as discussed earlier, some cell phone memory is not so limited as to present a realistic possibility that incoming information will delete incriminating evidence on the phone.\textsuperscript{189} There is, however, the realistic possibility that an arrestee would attempt to delete incriminating information on his or her cell phone. Seizing the phone can readily prevent this.\textsuperscript{190}

Therefore, according to the standard announced in \textit{Gant}, in the context of the search incident to arrest exception, officer safety and preservation of evidence concerns can be totally assuaged by seizure of the phone upon arrest. But just as there are "circumstances unique to the vehicle context,"\textsuperscript{191} there may be circumstances unique to the cell phone context. If officers have reason to believe evidence of the crime of arrest is in the cell phone, then a search is not unreasonable.\textsuperscript{192} As the \textit{Quintana} court mentioned, drug trafficking cases may present a situation in which a cell phone search incident to arrest is justified.\textsuperscript{193} For example, when a pager is used to set up a controlled substances transaction, searching the cell phone or pager might even be beneficial in supplementing the probable cause as to whom the police should arrest.

CONCLUSION

As society changes, the law must adapt to the needs created by those changes. Our legal values and our commitment to the principles embodied in the Constitution, however, need only to be applied so as to provide substantive protection to individual rights through objective standards. Technological advances will continue to present challenges to the law.

\textsuperscript{188} \textit{Id.}

\textsuperscript{189} \textit{See supra} Part IV.B.

\textsuperscript{190} At least one writer for law enforcement has noted particular concern with service providers and deletion: "Of particular concern with respect to the preservation of evidence is the ability that service providers offer to some customers enabling them to remotely destroy data on their cell phones." Clark, \textit{supra} note 5, at 29.

\textsuperscript{191} \textit{Arizona v. Gant}, 129 S. Ct. 1710, 1719 (2009).

\textsuperscript{192} \textit{See State v. Smith}, 124 Ohio St. 3d 163, 170, 2009-Ohio-6426, 920 N.E.2d 949, 956 at ¶ 27 ("While there may be some instances in which a warrantless search of a cell phone is necessary to identify a suspect, we do not address this argument here, because the officers in this case did not, in fact, rely upon the call records and phone numbers to identify the suspect.").

\textsuperscript{193} \textit{United States v. Quintana}, 594 F. Supp. 2d 1291, 1300 (M.D. Fla. 2009) ("Where a defendant is arrested for drug-related activity, police may be justified in searching the contents of a cell phone for evidence related to the crime of arrest, even if the presence of such evidence is improbable. In this case, however, Defendant was arrested for driving with a suspended license. The search of the contents of Defendant's cell phone had nothing to do with officer safety or the preservation of evidence related to the crime of arrest.").
Inherent in these advances is the reality that both socially beneficial and socially undesirable uses will result. Rules providing for both the protection of individual rights, especially those of constitutional dimension, and the need for effective law enforcement will best serve the interests of society and its constituent members. A *Gant*-like standard for cell phone searches incident to arrest considers both interests.