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What is the Scope of Searches of Cell Phones Incident to Arrest? *United States v. Wurie* and the Return of *Chimel*

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WHAT IS THE SCOPE OF SEARCHES OF CELL PHONES INCIDENT TO ARREST? *UNITED STATES V. WURIE* AND THE RETURN OF *CHIMEL*

Benjamin Wahrer

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WHAT IS THE SCOPE OF SEARCHES OF CELL PHONES INCIDENT TO ARREST? *UNITED STATES V. WURIE* AND THE RETURN OF *CHIMEL*

Benjamin Wahrer*

I. INTRODUCTION

Americans can potentially be arrested for hundreds of nonviolent, minor offenses.¹ In fact in 2012, nearly 1 out of every 25 Americans was arrested.² Alarming, this figure is even higher among youths, with 1 out of every 3 expected to be arrested at least once by the time they turn 23.³ Once placed under arrest, an individual's expectation of privacy is severely reduced and law enforcement personnel traditionally have broad authority to search and seize anything found on the arrestee's person, no matter the nature of the arresting crime. For example, it is well-settled law that the arresting officer may search a vehicle,⁴ a pack of cigarettes,⁵ and even an arrestee's clothes once booked.⁶ In some states, arrestees may even be required to provide a DNA sample:⁷ but what about one's cell phone?

Over the past fifteen years, cell phone use has increased drastically within the United States. Moreover, individuals are no longer just using their cell phones to make phone calls. Over 91 percent of American adults have a cell phone, and 63 percent of these individuals use their phones to access the internet, with over 34

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1. See Mike DeBonis, *Here are 159 Minor Things D.C. Officers Can Arrest You For*, WASH. POST (Oct. 24, 2011, 5:15 PM), http://www.washingtonpost.com/blogs/mike-debonis/post/here-are-159-minor-things-dc-officers-can-arrest-you-for/2011/10/24/gIQA4mDRDM_blog.html; see also Mike DeBonis, *Thousands Arrested in D.C. for Expired Car Registrations Since 2009*, WASH. POST (Oct. 20, 2011, 12:47 PM), http://www.washingtonpost.com/blogs/mike-debonis/post/thousands-arrested-for-expired-car-registrations-in-dc-since-2009/2011/10/20/gIQAVzji0L_blog.html (explaining that in 2009 thousands of individuals were arrested for driving with expired tags or are driving an unregistered vehicle).

2. U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2012, at 1 (Fall 2013), available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/persons-arrested/arrestmain.pdf> (reporting that the estimated arrest rate for the United States in 2012 was 3,888.2 arrests per 100,000 people).

3. Donna Leinwand Leger, *Study: Nearly 1 in 3 Will Be Arrested by Age 23*, USA TODAY (Dec. 19, 2011, 12:18 PM), <http://usatoday30.usatoday.com/news/nation/story/2011-12-19/youth-arrests-increase/52055700/1> (analyzing data collected by the Bureau of Labor and Statistics between 1997 and 2008).

4. See *Arizona v. Gant*, 556 U.S. 332, 351 (2009).

5. See *United States v. Robinson*, 414 U.S. 218, 236 (1973).

6. See *United States v. Edwards*, 415 U.S. 800, 802 (1974).

7. See *Maryland v. King*, 133 S. Ct. 1958, 1980 (2013) (permitting warrantless seizures of DNA from individuals arrested for crimes of violence); see also *United States v. Rodriguez*, 995 F.2d 776, 778 (7th Cir. 1993) (search of address book valid search incident to arrest); *United States v. Molinaro*, 877 F.2d 1341, 1347 (7th Cir. 1989) (search of wallet valid search incident to arrest).

percent relying on their phones more than their laptops or desktops to go online.⁸ One study has estimated that there are over 326.4 million active wireless devices within the United States, with over 2.19 trillion text messages sent annually.⁹

Modern cell phones are essentially computers.¹⁰ Today, the majority of cell phone owners rely on their phones for e-mail, internet browsing, and messaging, rather than for traditional telephone calls.¹¹ Additionally, new technological developments have provided individuals with the ability to access their devices remotely. For example, both Apple and Android offer an application which allows users to remotely monitor and access live video and audio streams from the webcams on their computers or tablets from their phones.¹² In light of the vast amounts of private information stored on cell phones,¹³ the very real potential for abuse,¹⁴ and constantly evolving technological developments, should the courts still treat cell phones the same as wallets or packs of cigarettes for purposes of searches-incident-to-arrest?

In Part II, this Note examines the Supreme Court's Fourth Amendment jurisprudence concerning the ever-evolving search-incident-to-arrest exception. Particular focus will be devoted to *Chimel v. California*, in which the Supreme

8. Joanna Brenner, *Pew Internet: Mobile*, PEW INTERNET (Sept. 18, 2013), <http://pewinternet.org/Commentary/2012/February/Pew-Internet-Mobile.aspx>; see also *In US, Smartphones Now Majority of New Cellphone Purchases*, NIELSEN (June 30, 2011), <http://www.nielsen.com/us/en/newswire/2011/in-us-smartphones-now-majority-of-new-cellphone-purchases.html> (indicating that in 2011, 38% of Americans with mobile phones had smart phones).

9. *Wireless Quick Facts*, CTIA, <http://www.ctia.org/advocacy/research/index.cfm/aid/10323> (last updated Nov. 2013) (analyzing data collected through December 2012).

10. See *United States v. Kramer*, 631 F.3d 900, 903-04 (8th Cir. 2011) (holding that under federal law, a cell phone qualifies as a computer).

11. Eunice Park, *Traffic Ticket Reasonable, Cell Phone Search Not: Applying the Search-Incident-to-Arrest Exception to the Cell Phone As "Hybrid"*, 60 DRAKE L. REV. 429, 464 (2012) (noting that the "amount of data in text, e-mail messages, and other services on mobile devices has surpassed the amount of voice data in cell phone calls.").

12. See SKJM, LLC, *iCam-Webcam Video Streaming*, APPLE (Sept. 16, 2013), <https://itunes.apple.com/us/app/icam-webcam-video-streaming/id296273730?mt=8>; SKJM, LLC, *iCam-Webcam Video Streaming*, GOOGLE (Sept. 25, 2013), <https://play.google.com/store/apps/details?id=com.skjm.icam&hl=en>.

13. See Jana L. Knott, Note, *Is There an App for That? Reexamining the Doctrine of Search Incident to Lawful Arrest in the Context of Cell Phones*, 35 OKLA. CITY U. L. REV. 445, 464 (2010) ("[t]o put this immense storage capacity in perspective . . . today's smart phones are capable of storing up to thirty-two gigabytes of information."); see also Chelsea Oxton, Note, *The Search Incident to Arrest Exception Plays Catch Up: Why Police May No Longer Search Cell Phones Incident to Arrest Without a Warrant*, 43 CREIGHTON L. REV. 1157, 1162 (2010) (noting that "the iPhone 3GS is capable of storing about 220,000 copies of the complete text of Lewis Carroll's *Alice in Wonderland*."); Richard Wolf, *Your Cellphone: Private or Not?* USA TODAY (Sept. 9, 2013, 4:31 PM), <http://www.usatoday.com/story/news/nation/2013/09/09/your-cellphone-private-or-not/2788945/> (stating that 31% of Americans "seek medical information on their cellphones, and 29% use them for online banking."); see also *Smallwood v. Florida*, 113 So. 3d 724, 731-32 (Fla. 2013) (noting that "[v]ast amounts of private, personal information can be stored and accessed in or through [cell phones], including not just phone numbers and call history, but also photos, videos, bank records, medical information, daily planners, and even correspondence between individuals through applications such as Facebook and Twitter.").

14. See, e.g., *Newhard v. Borders*, 649 F. Supp. 2d 440, 443-44 (W.D. Va. 2009) (lawsuit filed against local police department alleging that police officer who seized a cell phone during an arrest shared sexually explicit pictures found on the phone with other officers and members of the public).

Court elucidated the modern guidelines to the exception.¹⁵ Part III examines recent cases that have struggled to accurately apply the doctrine put forth in *Chimel* to incidental searches involving arrestees' cell phones. Part IV explores *United States v. Wurie*,¹⁶ the most recent case which confronted this challenge. Part V analyzes how the First Circuit applied the objectives articulated in *Chimel* while providing additional justifications for why the exception should never apply in the context of cellular devices. In conclusion, Part IV of this Note briefly addresses recent developments involving *Wurie*.¹⁷

II. OVERVIEW OF THE SEARCH-INCIDENT-TO-ARREST EXCEPTION

The Fourth Amendment guarantees that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹⁸

In analyzing searches under the Fourth Amendment, the Supreme Court has held that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions.”¹⁹ While there are many different exceptions to the warrant requirement,²⁰ the most frequently invoked exception is the search-incident-to-arrest doctrine.²¹ In fact, searches incident to arrest are more common than searches based on warrants.²²

A. *Twin Aims of Chimel*

The United States Supreme Court approved the search-incident-to-arrest exception in *Chimel*.²³ In this case, the police went to the home of an individual

15. 395 U.S. 752 (1969).

16. *United States v. Wurie*, 728 F.3d 1 (1st Cir. 2013), *reh'g en banc denied*, 724 F.3d 255 (1st Cir. 2013), *cert. granted*, 134 S. Ct. 999 (Mem.) (2014).

17. In August 2013, the government filed its petition for *certiorari* with the Supreme Court of the United States. Petition for Writ of *Certiorari*, *Wurie*, 2013 WL 4404658 (Aug. 15, 2013) (No. 13-212). The Court granted *certiorari* in January, 2014. *Wurie*, 134 S. Ct. 999 (Mem.) (2014).

18. U.S. CONST. amend. IV.

19. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

20. See *Kansas v. Rupnick*, 125 P.3d 541, 547 (Kan. 2005) (explaining that the modern “recognized exceptions to the warrant requirement for searches and seizures include consent, search incident to lawful arrest; stop and frisk; probable cause plus exigent circumstances, the emergency doctrine, inventory searches, plain view or feel, and administrative searches of closely regulated businesses.”)

21. See Adam M. Gershowitz, *Password Protected? Can a Password Save Your Cell Phone from a Search Incident to Arrest?*, 96 IOWA L. REV. 1125, 1131 (2011) (noting that “the most common exception police invoke is the search-incident-to-arrest exception.”).

22. Cynthia Lee, *Package Bombs, Footlockers, and Laptops: What the Disappearing Container Doctrine Can Tell Us About the Fourth Amendment*, 100 J. CRIM. L. & CRIMINOLOGY 1403, 1428 (2010).

23. *Chimel v. California*, 395 U.S. 752, 762-63 (1969).

suspected of robbing a coin shop with an arrest warrant.²⁴ Once the suspect was given the arrest warrant, the police conducted a thorough search of the house, over the arrestee's objections, and items found during the search were later admitted into evidence at trial where the defendant was convicted.²⁵ In reversing the conviction, the Supreme Court held that, in the absence of a search warrant, the "scope of the search was . . . 'unreasonable' under the Fourth [Amendment]."²⁶ However, the Court did approve the warrantless search of an arrestee's person incidental to arrest and put forth two specific bases when such a search is permissible.²⁷ The first basis allows an officer "to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction."²⁸ The second permits arresting officers to search "the area into which an arrestee might reach in order to grab a weapon or evidentiary items."²⁹ In other words, the justifications for the search-incident-to-arrest exception are ensuring the safety of law enforcement and preserving evidence.³⁰

B. Search of Arrestee's Person

The boundaries of the search-incident-to-arrest doctrine were further defined in *United States v. Robinson*,³¹ where the Court applied the exception to a search of an arrestee's person.³² During a pat-down search following his arrest for driving with a revoked license, a police officer found heroin hidden in Robinson's cigarette package.³³ The Court held that the search of the cigarette pack was valid as a search-incident to a lawful arrest, and reinforced the twin aims articulated in *Chimel* by reiterating that the exception "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."³⁴ In fact, the decision in *Robinson* expanded the scope of the exception by establishing a bright-line rule allowing police officers to open and search containers found on arrestees, even if the officers have no reason to suspect that the containers might contain evidence of a crime,³⁵ because "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

24. *Id.* at 753.

25. *Id.* at 754.

26. *Id.* at 768.

27. *Id.* at 763.

28. *Id.*

29. *Id.*

30. *Id.*; see also *Thornton v. United States*, 541 U.S. 615, 620 (2004) (stating that the exception "was justified by the need to remove any weapon the arrestee might seek to use . . . and the need to prevent the concealment or destruction of evidence.").

31. 414 U.S. 218 (1973).

32. *Id.* at 223-24.

33. *Id.* at 223.

34. *Id.* at 234.

35. In other words, the Court held that law enforcement personnel were not required to provide any further justification for searching arrestees. For example, a police officer does not need to justify the search incident to arrest after the fact by demonstrating that "weapons or evidence would in fact be found upon the person of the suspect." *Id.* at 235.

a ‘reasonable’ search under that Amendment.”³⁶

A year later, the Court again addressed the search-incident-to-arrest exception in *United States v. Edwards*,³⁷ which involved an individual who was arrested on suspicion of burglary.³⁸ The morning after Edwards was arrested, law enforcement seized his clothing, believing that it might contain evidence connecting Edwards to the crime.³⁹ The Court held that the seizure of the arrestee’s clothing was valid because “the clothes could have been brushed down and vacuumed while Edwards had them on in the cell,” and thus the police were justified to “take, examine, and preserve them for use as evidence.”⁴⁰ The Court attempted to clarify its holding in *Robinson* by explaining that warrantless searches incident to arrest are permitted because of the “the reasonableness of searching for weapons, instruments of escape, and evidence of crime when a person is taken into official custody and lawfully detained.”⁴¹

In *United States v. Chadwick*,⁴² the Court placed limitations on the search-incident-to-arrest exception.⁴³ *Chadwick* involved several defendants who were arrested after getting off of a train from San Diego to Boston with a large footlocker that contained marijuana.⁴⁴ Federal agents arrested the defendants after a drug sniffing dog “signaled the presence of a controlled substance inside [the footlocker].”⁴⁵ After the defendants loaded the footlocker into a waiting car, federal agents placed them under arrest and seized the footlocker.⁴⁶ The agents conducted a warrantless search of the footlocker “an hour and a half after the arrests” even though “the footlocker remained under the exclusive control of law enforcement officers at all times.”⁴⁷ In reversing the defendants’ convictions, the Court held that the search was not a valid search-incident-to-arrest because the need to protect the arresting officers and preserve evidence was no longer a concern when the search did not happen until “more than an hour after federal agents had gained exclusive control of the footlocker and long after [defendants] were securely in custody.”⁴⁸

C. Searches of Vehicles

In *New York v. Belton*,⁴⁹ the Supreme Court continued to expand the contours of the search-incident-to-arrest exception in the context of a search of a vehicle passenger compartment.⁵⁰ The *Belton* Court concluded that when a police officer

36. *Id.*

37. 415 U.S. 800 (1974).

38. *Id.* at 801.

39. *Id.* at 802.

40. *Id.* at 806.

41. *Id.* at 802-03.

42. 433 U.S. 1 (1977), *abrogated by* *California v. Acevedo*, 500 U.S. 565 (1991).

43. *Id.* at 14-15.

44. *Id.* at 3.

45. *Id.* at 4.

46. *Id.*

47. *Id.*

48. *Id.* at 14-15.

49. 453 U.S. 454 (1981).

50. *Id.* at 455.

lawfully arrests a vehicle occupant, the officer may “search the passenger compartment” as a “contemporaneous incident of that arrest.”⁵¹ The Court then concluded that “containers” found within the compartment may be validly searched under the exception.⁵² The Court defined the word container as “any object capable of holding another object.”⁵³ The Court went on to hold that the police may search the contents of a container found during such an arrest and explained that a container “may be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have.”⁵⁴

Recently, the Court limited the warrantless search exception in *Arizona v. Gant*,⁵⁵ where the Court again addressed the search-incident-to-arrest exception in the context of a search of an arrestee’s vehicle.⁵⁶ After the police arrested Gant for driving with a suspended license, they locked him inside a police cruiser. A subsequent search of Gant’s vehicle revealed cocaine and a gun.⁵⁷ The Court held that the search of the vehicle, conducted once Gant was handcuffed and secured in the back of a police cruiser, violated the Fourth Amendment.⁵⁸ The Court emphasized 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.”⁵⁹ Therefore, because Gant was handcuffed in the backseat of a police cruiser at the time of the search, the “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.”⁶⁰ In other words, *Gant* reinforced the rationale underlying *Chimel* because the Court held that the search-incident-to-arrest exception no longer applies once the arrestee is separated from any potential weapons or destructible evidence.⁶¹

In sum, the search-incident-arrest-doctrine applies as long as two requirements are met:

51. *Id.* at 460.

52. *Id.*

53. *Id.* at 460 n.4.

54. *Id.* at 461.

55. 556 U.S. 332 (2009).

56. *See id.* at 335.

57. *Id.* at 336.

58. *Id.* at 344.

59. *Id.* at 339.

60. *Id.* at 344.

61. *Id.* at 335. The Court also held that “circumstances unique to the vehicle context [can] justify a search incident to a lawful arrest when it is ‘reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.’” *Id.* at 343 (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring)). In other words, in the search of a vehicle incident to arrest, there are two possible justifications that the police can rely on. First, applying *Chimel*, police can search a “vehicle incident to a recent occupant’s arrest . . . when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.” *Id.* Second, the police can search a vehicle incident to arrest when they reasonably believe evidence of the crime charged might be discovered in the vehicle. *Id.* The Court found that neither of these justifications applied to the search at issue in *Gant*. *Id.* at 344.

First, there must be a lawful, custodial arrest, and second, the search must be substantially contemporaneous with the arrest. No further justification beyond the probable cause needed to arrest is necessary. The officer need not have probable cause to believe there is evidence of a crime on the person of the arrestee or within the arrestee's wingspan in order to search the arrestee or his wingspan.⁶²

Ultimately, the Supreme Court has afforded law enforcement a wide latitude of discretion for purposes of searches incident to a lawful arrest.

III. APPLICATION OF THE SEARCH-INCIDENT-TO-ARREST EXCEPTION IN CASES INVOLVING CELL PHONES

Courts applying the search-incident-to-arrest exception in the context of cellular phones have reached various conclusions. During the 1990s, many courts, relying on *Belton's* approval of searches involving "containers," found that the exception permitted law enforcement personnel to search the contents of pagers.⁶³ Likewise, the majority of courts that have addressed the issue have found that the search-incident-to-arrest exception applies with equal force to cell phones.⁶⁴ In upholding searches of cell phones as valid searches-incident-to-arrest, courts have relied on varying justifications. Some courts have relied on the rationale exemplified in *Edwards* and *Robinson*, which indicated that searches-incident-to-arrest were reasonable as long as they were conducted as a component of the arrest

62. Lee, *supra* note 22, at 1428-29 (footnotes omitted). Additionally, if the arrestee is in a vehicle or was recently in a vehicle, the police are permitted to search "containers in the passenger compartment of the car if the passenger compartment is within the arrestee's reaching distance at the time of the search or the officer has reason to believe there is evidence regarding the crime of arrest in the car." *Id.* at 1436-37.

63. See *United States v. Hunter*, No. 96-4259, 1998 WL 887289, at *3 (4th Cir. 1998) (per curiam) ("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."); *United States v. Ortiz*, 84 F.3d 977, 984 (7th Cir. 1996) ("[T]he information from the pager was admissible because the officers conducted the search of its contents incident to the arrest."); *United States v. Diaz-Lizaraza*, 981 F.2d 1216, 1222-23 (11th Cir. 1993) (finding the removal of the defendant's beeper from the truck, as well as its reactivation and use to be reasonable under the exception); *United States v. Reyes*, 922 F. Supp. 818, 833-34 (S.D.N.Y. 1996) (upholding the constitutionality of a warrantless search of the memory of a pager obtained from the backseat of a car); *United States v. Chan*, 830 F. Supp. 531, 536 (N.D. Cal. 1993) (applying *Belton* and finding that a "search conducted by activating the pager's memory is . . . valid" under the Fourth Amendment).

64. See *United States v. Butler*, F. App'x 217, 221 (5th Cir. 2012) (per curiam); *United States v. Flores-Lopez*, 670 F.3d 803, 809 (7th Cir. 2012); *United States v. Curtis*, 635 F.3d 704, 713-14 (5th Cir. 2011); *Silvan v. Briggs*, 309 F. App'x 216, 225 (10th Cir. 2009); *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. Finley*, 477 F.3d 250, 259-260 (5th Cir. 2007); *United States v. Gates*, 2008 WL 5382285, at *13 (D. Me. Dec. 19, 2008) *aff'd*, 709 F.3d 58 (1st Cir. 2013), *cert. denied*, 134 S. Ct. 264 (2013); *United States v. Curry*, 2008 WL 219966, at *10 (D. Me. Jan. 23, 2008); *United States v. Mercado-Nava*, 486 F. Supp. 2d 1271, 1277 (D. Kan. 2007); *United States v. Brookes*, CRIM 2004-0154, 2005 WL 1940124, at *3 (D. V.I. June 16, 2005); *United States v. Cote*, No. 03CR271, 2005 WL 1323343, at *6 (N.D. Ill. May 26, 2005), *aff'd*, 504 F.3d 682 (7th Cir. 2007); *People v. Riley*, D059840, 2013 WL 475242, at *6 (Cal. Ct. App. Feb. 8, 2013), *cert. granted sub nom. Riley v. California*, 2013 WL 3938997 (U.S. Jan. 17, 2014); *State v. James*, 288 P.3d 504, 512 (Kan. Ct. App. 2012); *Commonwealth v. Phifer*, 979 N.E.2d 210, 215 (Mass. 2012).

itself.⁶⁵ Other courts have focused on the need to preserve evidence.⁶⁶

A. Courts Upholding Warrantless Searches of Cell Phones Incident to Arrest

Dozens of courts have upheld the warrantless searches of cell phones incident to arrest. For example, in *United States v. Finley*,⁶⁷ the Fifth Circuit held that a search of the defendant's call records and text messages was a valid search-incident-to-arrest.⁶⁸ Finley was arrested when drugs were found in his vehicle after the local police and the DEA conducted a controlled drug purchase with an informant.⁶⁹ After Finley was arrested and his cell phone was seized, a police officer went through his cell phone and found calls and text messages which appeared to be related to drug transactions.⁷⁰ The court, relying primarily on *Robinson*, reasoned that law enforcement personnel are not "constrained to search only for weapons or instruments of escape on the arrestee's person; they may also, without any additional justification, look for evidence of the arrestee's crime on his person in order to preserve it for use at trial."⁷¹

Most recently, the Seventh Circuit thoroughly examined the issue of warrantless searches of cell phones in *United States v. Flores-Lopez*.⁷² Flores-Lopez was arrested during a drug sting operation and his phone, as well as two other phones found in his truck, was seized.⁷³ While still at the scene, "an officer searched each cell phone for its telephone number, which the government later used to subpoena three months of each cell phone's call history from the telephone company."⁷⁴ The court began its analysis by noting that "the potential invasion of privacy in a search of a cell phone is greater than in a search of a 'container' in a conventional sense . . . [because] a modern cell phone is a computer."⁷⁵

However, the court, applying the *Chimel* rationales,⁷⁶ then went on to explore several methods in which the defendant could have "wiped" the data from the cell phones after they had been seized.⁷⁷ Based on this "conceivable" possibility, and because the search of the cell phones was limited only to discovering their

65. See, e.g., *People v. Diaz*, 244 P.3d 501, 505 (Cal. 2011).

66. See *Murphy*, 552 F.3d at 411 (upholding the warrantless search of a cell phone because of the "manifest need . . . to preserve evidence") (citations omitted).

67. 477 F.3d 250 (5th Cir. 2007).

68. *Id.* at 260.

69. *Id.* at 253-54.

70. *Id.* at 254.

71. *Id.* at 259-60.

72. 670 F.3d 803 (7th Cir. 2012).

73. *Id.* at 804.

74. *Id.* Flores-Lopez was convicted and sentenced to 10 years in prison. See *id.*

75. *Id.* at 805. The court also discussed new phone applications which allow individuals to access their "home computer's web-cam so that [they] can survey the inside of [their] home" remotely. *Id.* at 806. Reflecting on this functionality, the court found that, "[a]t the touch of a button a cell phone search becomes a house search, and that is not a search of a 'container' in any normal sense of that word" *Id.*

76. *Id.*

77. *Id.* at 808-09. The court explored several "conceivable, not probable" ways an individual could remotely wipe data from a cell phone once it has been seized. *Id.* The court focused heavily on "remote wiping," or the ability to press a "button on the cell phone that wipes its contents and at the same time sends an emergency alert to a person previously specified" *Id.* at 807.

telephone numbers, the court held that the search was reasonable as a search-incident-to-arrest.⁷⁸

B. Courts Rejecting the Warrantless Search of Cellphones Incident to Arrest

Recently, however, a small number of lower courts, relying on a variety of rationales, have held that searches of cell phones do not fall within the exception.⁷⁹ In *State v. Smith*,⁸⁰ the Ohio Supreme Court held that police must first obtain a warrant before searching an arrestee's cell phone.⁸¹ The court rejected the state's argument that a cell phone is a searchable "container," reasoning that objects falling under that definition "have traditionally been physical objects capable of holding other physical objects."⁸² The court also distinguished cell phones from pagers and address books finding that "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."⁸³ Consequently, the court found that the search-incident-to-arrest exception did not apply to searches of cell phones because neither of the justifications for the exception was applicable.⁸⁴ As a result, the court approached the issue by analyzing the reasonableness of the search,⁸⁵ and found that because individuals have a high expectation of privacy in the information stored within their cell phones,⁸⁶ the police were required to obtain a warrant before searching them.⁸⁷

78. *Id.* at 809. This holding seemed to rest partially on Seventh Circuit case law which permitted warrantless searches as long as they were not overly invasive. *See id.* at 807 (discussing *United States v. Concepcion*, 942 F.2d 1170 (7th Cir. 1991)).

79. *See United States v. McGhee*, No. 8:09CR31, 2009 WL 2424104, at *3 (D. Neb. July 21, 2009) (holding search of an arrestee's cell phone unreasonable because it did not "produce evidence related to the crime for which he was arrested[;]" there was no evidence that the phone "conceal[ed] contraband" or that it "present[ed] a risk of harm to the officers."); *United States v. Quintana*, 594 F. Supp. 2d 1291, 1300 (M.D. Fla. 2009) (finding the exception did not apply because "[t]he search of the contents of [d]efendant's cell phone had nothing to do with officer safety or the preservation of evidence related to the crime of arrest."); *United States v. Wall*, No. 08-60016-CR, 2008 WL 5381412, at *3 (S.D. Fla. Dec. 22, 2008) ("The search of the cell phone cannot be justified as a search incident to lawful arrest."); *United States v. Lasalle*, Cr. No. 07-00032 SOM, 2007 WL 1390820, at *7 (D. Haw. May 9, 2007) (holding that because the search of defendant's cell phone "was not roughly contemporaneous with his arrest, the 'search incident to arrest' exception does not apply to the search.").

80. 920 N.E.2d 949 (Ohio 2009).

81. *Id.* at 956.

82. *Id.* at 954.

83. *Id.* The court also rejected the idea of applying different rules based on the type of cell phone involved in the search reasoning that "it would not be helpful to create a rule that requires officers to discern the capabilities of a cell phone before acting accordingly." *Id.*

84. The court explained 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." *Id.* at 955.

85. The court noted that "[m]odern understandings of the Fourth Amendment recognize that it serves to protect an individual's subjective expectation of privacy if that expectation is reasonable and justifiable." *Id.* at 954 (citations omitted).

86. Although the court did not equate cell phones with computers, it found that there was a high expectation of privacy because of "their ability to store large amounts of private data," which provides "their users a reasonable and justifiable expectation of a higher level of privacy in the information they contain." *Id.* at 955.

87. *Id.*

Applying a different approach, a district court in California also held that the search-incident-to-arrest exception did not apply to searches of cell phones.⁸⁸ There, the court held “that for purposes of Fourth Amendment analysis cellular phones should be considered ‘possessions within an arrestee’s immediate control,’”⁸⁹ similar to the footlocker at issue in *Chadwick*, and not items associated with the person under *Robinson*.⁹⁰ As a result, once a cell phone is seized during an arrest and is under the exclusive control of the police, they are unable to search its contents until they obtain a warrant.⁹¹

Likewise, the Supreme Court of Florida recently held that *Robinson* did not control searches of cell phones incident to arrest.⁹² Instead, the court relied on *Gant* for the proposition that, “once an arrestee is physically separated from an item or thing, and thereby separated from any possible weapon or destructible evidence, the dual rationales for [the] search exception no longer apply.”⁹³ Therefore, according to the *Smallwood* court, although police are permitted to seize cell phones at the time of arrest to ensure that the device cannot be used as a weapon or destroyed, they are required to obtain a warrant before searching the actual contents of the phone.⁹⁴

IV. *UNITED STATES V. WURIE*: CRAFTING A BRIGHT LINE RULE AND APPLYING THE TWIN AIMS OF *CHIMEL*

In *United States v. Wurie*,⁹⁵ the First Circuit became the first federal appellate court to navigate the murky waters of the Supreme Court’s Fourth Amendment jurisprudence concerning the search-incident-to-arrest exception in the context of cellular devices while remaining loyal to the principles underlying the exception. In doing so, the court was able to articulate the subtle differences between the seminal decision in *Chimel* and the Supreme Court’s broad holding in *Robinson*. The court accomplished this not by relying solely on the nature of the search, but

88. *United States v. Park*, No. CR 05–375 SI, 2007 WL 1521573, at *9 (N.D. Cal. May 23, 2007) (declining to extend the “doctrine to authorize the warrantless search of the contents of a cellular phone—and to effectively permit the warrantless search of a wide range of electronic storage devices—as a ‘search incident to arrest’”).

89. *Id.* at *8 (citation omitted). The court reasoned that the search-incident-to-arrest exception could not apply because these types of searches “go far beyond the original rationales for searches incident to arrest, which were to remove weapons to ensure the safety of officers and bystanders, and the need to prevent concealment or destruction of evidence.” *Id.*

90. *Id.* at *7–8. The court justified relying on *Chadwick* because “[i]ndividuals 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.” *Id.* at *8. The court noted that, without express authorization from the Supreme Court, “[a]ny contrary holding could have far-ranging consequences.” *Id.*

91. *See id.* at *9.

92. *Smallwood v. Florida*, 113 So.3d 724, 732 (Fla. 2013). The Florida Supreme Court found that *Robinson* did not control because “cell phones of today are materially distinguishable from the static, limited-capacity cigarette packet in *Robinson*, not only in the ability to hold, import, and export private information, but by the very personal and vast nature of the information . . .” stored on them. *Id.*

93. *Id.* at 735.

94. *Id.*

95. 728 F.3d 1 (1st Cir. 2013).

instead by relying on the nature and the *scope* of the search.⁹⁶

A. *Facts and Background*

While performing routine surveillance in South Boston on September 5, 2007, a detective with the Boston Police Department observed Brima Wurie drive into a convenience store parking lot, pick up another man, Fred Wade, and engage in what appeared to be a drug sale in his vehicle.⁹⁷ Subsequently, the detective and another officer stopped Wade after he exited the vehicle, searched him, and found “two plastic bags in his pocket, each containing 3.5 grams of crack cocaine,” which Wade said he had bought from “B,” a drug dealer.⁹⁸ The detective then notified a third police officer who was following Wurie in his car and, once Wurie parked and exited the car, the officer arrested him and brought him to the police station.⁹⁹

At the police station, the police seized two cell phones, keys, and \$1,275 in cash from Wurie.¹⁰⁰ Before Wurie was booked, two police officers noticed that one of Wurie’s cell phones “was repeatedly receiving calls from a number identified as ‘my house’ on the external caller ID screen on the front of the phone.”¹⁰¹ Subsequently, the officers opened Wurie’s phone and, upon opening it, discovered that the background wallpaper was a picture of a black woman holding a baby.¹⁰² The officers then pressed a button and searched Wurie’s call history which showed that the incoming calls had all originated from the number listed as “my house.”¹⁰³ After pressing a second button, the police were able to determine the telephone number associated with the contact for “my house,” and an officer was then able to determine an address in South Boston associated with that number by typing it into an online search directory.¹⁰⁴

Based on this information, the police read Wurie a new set of *Miranda* warnings and several officers went to the address in South Boston associated with the “my house” contact.¹⁰⁵ Looking through the windows of the apartment, the officers observed a black woman who looked similar to the woman whose picture was found on Wurie’s phone, and the police entered the apartment using Wurie’s keys to freeze¹⁰⁶ it while they procured a search warrant.¹⁰⁷ Once the warrant was obtained, the police searched the apartment and found “215 grams of crack cocaine, a firearm, ammunition, four bags of marijuana, drug paraphernalia, and \$250 in

96. *See id.* at 9.

97. *Id.* at 1.

98. *Id.* at 1-2.

99. *Id.* at 2.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. Freezing a location refers to the police securing it before they obtain a search warrant so evidence cannot be hidden or destroyed. *See United States v. Dessesauere*, 429 F.3d 359, 363 (1st Cir. 2005) (explaining that the police conduct a freeze “to secure a location to prevent its occupants from destroying evidence while a search warrant is being obtained”).

107. *Wurie*, 728 F.3d at 2.

cash.”¹⁰⁸ Wurie was subsequently charged with “with possessing with intent to distribute and distributing cocaine base and with being a felon in possession of a firearm and ammunition.”¹⁰⁹

At trial, Wurie filed a motion to suppress the evidence obtained through the warrantless search of his cell phone,¹¹⁰ which the district court denied on stipulated facts.¹¹¹ Wurie was eventually found guilty of all counts, and sentenced to over 21 years in prison.¹¹²

B. Analysis on Appeal

The starting point for the First Circuit’s analysis on appeal was the premise that the Supreme Court has always favored the development of clear standards that law enforcement personnel can follow easily.¹¹³ With this in mind, the court sought to “craft a bright-line rule that applies to all warrantless cell phone searches, rather than resolving this case based solely on the particular circumstances of the search at issue.”¹¹⁴

The opinion, written by Judge Stahl, next addressed the government’s primary argument¹¹⁵ that the search was reasonable under a “literal reading of the *Robinson* decision.”¹¹⁶ The court noted that, under the government’s proffered interpretation of the Supreme Court’s Fourth Amendment jurisprudence, the police would have “broad latitude to search any electronic device seized from a person during his lawful arrest, including a laptop computer or a tablet device such as an iPad.”¹¹⁷ In other words, “the government’s proposed rule would give law enforcement automatic access to a ‘virtual warehouse’ of an individual’s ‘most intimate communications and photographs’”¹¹⁸ The court rejected this argument and

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *See id.* at 6; *see also* *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979) (noting that in the context of the Fourth Amendment, police officers should be guided by “[a] single, familiar standard” because they do not have the “time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront”); *Thornton v. United States*, 541 U.S. 615, 623 (2004) (rejecting “inherently subjective and highly fact specific” guidelines for police officers working in the field); *New York v. Belton*, 453 U.S. 454, 458 (1981) (noting that “highly sophisticated set[s] of rules . . . may be literally impossible [to apply] by the officer in the field”) (citations and internal quotation marks omitted).

114. *Wurie*, 728 F.3d at 6.

115. The court articulated the government’s argument as:

(1) Wurie’s cell phone was an item immediately associated with his person, because he was carrying it on him at the time of his arrest . . . ; (2) such items can be freely searched without any justification beyond the fact of the lawful arrest; (3) the search can occur even after the defendant has been taken into custody and transported to the station; and (4) there is no limit on the scope of the search, other than the Fourth Amendment’s core reasonableness requirement.

Id. at 7 (citations omitted). Basically, parts (1) and (2) rely on a “literal reading of the *Robinson* decision,” while parts (3) and (4) rely on *Edwards*. *Id.* (citation and internal quotations omitted).

116. *Id.*

117. *Id.*

118. *Id.* at 9 (citation omitted).

explained that such an approach “fail[ed] to account for the fact that the Supreme Court has determined that there are categories of searches undertaken following an arrest that are inherently unreasonable because they are never justified by one of the *Chimel* rationales.”¹¹⁹

The court noted that, although the Supreme Court has never required the constitutionality of a search-incident-to-arrest to turn on the type of item involved in the search, it has required the scope of the search to be proportionate with the purpose of the exception.¹²⁰ In other words, the court read *Gant* and *Chadwick* as requiring some correlation between the search and the principles underlying the exception.

The court found that the searches involved in *Robinson* and *Edwards* had this necessary correlation. The court noted that the search in *Robinson* preserved destructible evidence while also potentially protecting officer safety because the officer did not know what was inside the cigarette package.¹²¹ Likewise, the search of the arrestee’s clothing in *Edwards* also preserved destructible evidence.¹²² Therefore, the searches in both cases “were the kinds of reasonable, self-limiting searches that do not offend the Fourth Amendment, even when conducted without a warrant.”¹²³ Consequently, the court held that the proper approach was to examine whether searches of data contained on cell phones could “ever be justified” in light of the guidelines laid out under *Chimel*.¹²⁴

119. *Id.* at 7. These “inherently unreasonable” searches conducted following an arrest were the searches at issue in *Gant* and *Chadwick*. See discussion *supra* Parts II.B-C. As noted above, the search in *Gant* was held unreasonable because the arrestee was already handcuffed in the back of a police cruiser when the search of his vehicle took place, leading the Court to conclude that the justifications for the search-incident-to-arrest exception did not apply. See *Arizona v. Gant*, 556 U.S. 332, 344 (2009). Likewise, the exception did not apply to the search of the footlocker in *Chadwick*, which took place more than an hour after the arrest occurred. See *United States v. Chadwick*, 433 U.S. 1, 15 (1977), *abrogated by California v. Acevedo*, 500 U.S. 565 (1991).

120. See *Wurie*, 728 F.3d at 9. The court explained that “what distinguishes a warrantless search of the data within a modern cell phone from the inspection of an arrestee’s cigarette pack or the examination of his clothing is not just the nature of the item searched, but the nature and *scope* of the *search itself*.” *Id.* (first emphasis added). The court’s support for this proposition is primarily derived from language in *Gant* which requires “the scope of a search incident to arrest to be commensurate with its purposes, which include protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy.” *Id.* (citations omitted) (quoting *Gant*, 556 U.S. at 339) (internal quotation marks omitted).

121. *Id.* at 9.

122. *Id.*

123. *Id.* at 9-10. Unfortunately, the majority did not fully explain what they meant by “self-limiting.” The majority appears to be reasoning that searches of “wallets, address books, purses, and briefcases” all fall within this category because the search cannot go beyond the scope of the physical object itself and because they “are all potential repositories for destructible evidence and, in some cases, weapons.” *Id.* at 10. On the other hand, because of the powerful capabilities and immense storage capacities of modern cell phones, there is no constraint on the amount and nature of information that law enforcement can access during a cell phone search. Therefore, these types of searches are more akin to “general, evidence-gathering searches” similar to the searches found unconstitutional in *Chadwick* and *Gant*. *Id.*

124. *Id.* In other words, the case “turns on whether the government can demonstrate that warrantless cell phone searches, as a category, fall within the boundaries laid out in *Chimel*.” *Id.* at 7.

C. *The First Aim of Chimel: Protecting Officer Safety*

Interestingly,¹²⁵ the government did not argue in *Wurie* that “cell phone data searches are justified by a need to protect arresting officers.”¹²⁶ The court noted that this principle was not implicated by the search of cell phones because the only contents of a phone are data, and “data [can] not harm” the police.¹²⁷ As a result, the court spent little time addressing the first principle put forth in *Chimel*.

D. *The Second Aim of Chimel: Preserving Destructible Evidence*

The government did suggest that the search at issue was “arguably necessary to prevent the destruction of evidence” because of the possibility that the “calls on Wurie’s call log could have been overwritten or the contents of his phone remotely wiped if the officers had waited to obtain a warrant.”¹²⁸ However, for three reasons the court rejected the preservation of evidence principle as support for warrantless searches of cell phones. First, the court noted that after having seized the cell phone, law enforcement “can simply turn the phone off or remove its battery,” rendering remote wiping impossible by disconnecting the phone from its network.¹²⁹ Second, if for some reason the police do not want to turn the phone off, they can “put the phone in a Faraday¹³⁰ enclosure,” thereby shielding it from receiving signals and making it impossible to remotely wipe the device.¹³¹ Lastly, the court found that the police have the capability to “mirror (copy) the entire cell phone contents, to preserve them should the phone be remotely wiped.”¹³² As a result, in comparison to the serious privacy concerns involved in the search of cell phones, the court found these “slight and truly theoretical risk[s] of evidence destruction . . . insufficient.”¹³³

The court also addressed the government’s arguments that the principles outlined in *Chimel* should be disregarded in favor of the approach put forth in *Robinson*. First, the government attempted to argue that *Robinson* held that the government was not required to show in each case “whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest.”¹³⁴ However, the First Circuit rejected this argument, stating that the *Robinson* “holding was predicated on an assumption” that there were potential dangers involved in all custodial arrests, making it reasonable for the

125. The government’s omission of this argument seems somewhat odd in light of the discussion in *Flores-Lopez*, as mentioned by the court, which notes that an individual can “buy a stun gun that looks like a cell phone.” *Unites States v. Flores-Lopez*, 670 F.3d 803, 806 (7th Cir. 2012) (citations omitted).

126. *Wurie*, 728 F.3d at 10.

127. *Id.*

128. *Id.* at 10-11 (internal quotation marks omitted).

129. *Id.* at 11.

130. See Cindy Murphy, *Cellular Phone Evidence Data Extraction and Documentation*, MOBILE DEVICE FORENSICS, <http://mobileforensics.files.wordpress.com/2010/07/cell-phone-evidence-extraction-process-development-1-1-8.pdf> (last visited Feb. 8, 2014) (explaining that Faraday bags are “radio frequency shielding cloths which are specifically designed” to isolate phones).

131. *Wurie*, 728 F.3d at 11.

132. *Id.* (citation and internal quotation marks omitted).

133. *Id.*

134. *Id.* (quoting *United States v. Robinson*, 414 U.S. 218, 235 (1973)).

police to search an arrestee without having to worry about the chances that they would find a weapon or destructible evidence.¹³⁵ Where the court had already found that searches of cell phone data did not involve risks of lurking weapons or destructible data, the government's reliance on *Robinson* was distinguishable.¹³⁶ Moreover, the court noted that it was not "suggesting a rule that would require arresting officers or reviewing courts to decide" whether each individual search was justified under *Chimel*.¹³⁷ Instead, the court reiterated that it was suggesting a bright-line rule that "warrantless cell phone data searches are *categorically* unlawful under the search-incident-to-arrest exception."¹³⁸

The government's second argument focused on a footnote from *Chadwick* which noted that searches of the person are "justified by . . . reduced expectations of privacy caused by the arrest."¹³⁹ According to the government's reading, this footnote essentially made *Chimel* irrelevant because it "establish[ed] an unlimited principle that searches of items carried on the person require no justification whatsoever beyond a lawful arrest."¹⁴⁰ However, the court also rejected this argument. Judge Stahl found that the *Chadwick* footnote concerning an arrestee's reduced expectation of privacy was intended to reference language in *Robinson* which explained that "because the 'custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment[,] . . . a search incident to the arrest requires no additional justification."¹⁴¹ The court reasoned that *Chadwick* did not change the justifications for the exception because *Robinson* reiterated that the authority to search incident to arrest is "based upon the need to disarm and to discover evidence."¹⁴² Further, Judge Stahl explained that the Supreme Court could not have "envisioned a world in which the vast majority of arrestees would be carrying on their person an item containing not physical evidence but a vast store of intangible data . . . that is not immediately destructible and poses no threat to arresting officers" when they decided *Robinson* and *Chadwick*.¹⁴³

Lastly, the court noted that the search at issue in *Wurie* was not invasive, as it only involved a search of the arrestee's call log and home screen, but the "Supreme Court's insistence on bright-line rules in the Fourth Amendment context" made it "necessary for all warrantless cell phone data searches to be governed by the same

135. *Id.* at 12. As the Court explained in *Chadwick*, the "potential dangers lurking in all custodial arrests make warrantless searches of items within the 'immediate control' area reasonable without requiring the arresting officer to calculate the probability that weapons or destructible evidence may be involved." *United States v. Chadwick*, 433 U.S. 1, 14-15 (1977) (citations omitted), *abrogated by California v. Acevedo*, 500 U.S. 565 (1991).

136. *See Wurie*, 728 F.3d at 12. Because the court found that neither *Chimel* rationale was ever implicated during a search of a cell phone incident to arrest, the court reasoned that *Robinson*'s assumption that all searches incident to arrest involve the risk of evidence being destroyed or a threat to officer safety was "incorrect in the case of cell phone data searches." *Id.*

137. *Id.*

138. *Id.*

139. *Chadwick*, 433 U.S. at 16 n.10.

140. *Wurie*, 728 F.3d at 12.

141. *Id.* (quoting *United States v. Robinson*, 414 U.S. 218, 235 (1973)).

142. *Id.* (quoting *United States v. Robinson*, 414 U.S. 218, 235 (1973)).

143. *Id.*

rule.”¹⁴⁴ Therefore, the court held that “the search-incident-to-arrest exception does not authorize the warrantless search of data on a cell phone seized from an arrestee’s person because . . . such a search is [never] necessary to protect arresting officers or preserve destructible evidence.”¹⁴⁵ As a result, Wurie’s conviction was vacated and the case was remanded to the district court.¹⁴⁶

E. Judge Howard’s Dissent

In dissent, Judge Howard argued for a more fact-specific approach and rejected the “all-or-nothing approach adopted by the majority.”¹⁴⁷ For Judge Howard, the bright line rule endorsed by the majority ignored the “nuances and variations” involved in every individual arrest.¹⁴⁸ In Wurie’s case, Howard contended that the police officer’s limited search of his call log for a single phone number was far less intrusive than other searches that had previously been upheld.¹⁴⁹ Judge Howard noted that “the police did not browse through voluminous data in search of general evidence” or access “applications containing particularly sensitive information,” but only “conducted a focused and limited search of Wurie’s electronic call log.”¹⁵⁰ To Judge Howard, this limited search for a telephone number was no different than “search[ing] for phone numbers kept in a wallet or an address book,” and thus there was no justification for the validity of the search to “turn solely on whether the information is written in ink or displayed electronically.”¹⁵¹

Moreover, Judge Howard contended that the fact that “Wurie received repeated calls from ‘my house’ in the span of a few minutes after his arrest” provided an additional justification for the search.¹⁵² According to Judge Howard, these calls gave law enforcement a valid reason to search the phone as Wurie’s “failure to answer these phone calls could have alerted [his] confederates to his arrest, prompting them to destroy further evidence of his crimes.”¹⁵³ Ultimately, Judge Howard’s position was that the new bright line test was “premature” based on the facts of the case and that under the existing case law, the search of Wurie’s phone was constitutional.¹⁵⁴

144. *Id.* at 12-13.

145. *Id.* at 13.

146. *Id.* at 14.

147. *Id.* at 17 (Howard, J., dissenting).

148. *Id.* at 18.

149. *Id.* at 15.

150. *Id.* at 16.

151. *Id.* at 16-17. The majority could respond to this point by noting that searches of wallets and address books are “self-limiting,” while searches of cell phones are not. *See id.* at 9-10. While the majority never defines precisely what it means by “self-limiting,” as Judge Howard hypothesizes, it seems to “refer[] to the danger that cell phones, because of their vast storage capabilities, are susceptible to general, evidence-gathering searches.” *Id.* at 20 (Howard, J., dissenting) (citations and internal quotation marks omitted).

152. *Id.* at 17.

153. *Id.*

154. *Id.* at 22.

V. THE TWIN AIMS OF *CHIMEL* AND THE NEW BRIGHT LINE RULEA. *How Wurie Faithfully Applied the Principles Underlying Chimel*

The majority was correct in determining that *Robinson* should not be controlling in the context of cellular phone searches. Since the Supreme Court authorized the search-incident-to-arrest exception in *Chimel*, it has repeatedly reiterated that the purpose of the exception is “for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use . . . [and] to search for and seize any evidence on the arrestee’s person in order to prevent its concealment or destruction.”¹⁵⁵ In fact, in every prominent case involving the exception, the Court has explicitly referred back to these principles and reiterated that they remain the foundation of the exception.¹⁵⁶ Most recently, the Court once again explicitly stated that the scope of the search incident to a lawful custodial arrest must be “commensurate with its purposes.”¹⁵⁷ In the absence of either of these purposes, the exception does not apply, and even the broad holding contained in *Robinson* cannot preserve the reasonableness of the search.

While the First Circuit spent the majority of its analysis distinguishing *Robinson*, it did briefly outline why the justifications from *Chimel* did not apply.¹⁵⁸ However, there are several more compelling reasons which demonstrate that point. First, although individuals could potentially purchase weapons that resemble cell phones,¹⁵⁹ once the phones are seized by the police, they are no longer a threat to officer safety.¹⁶⁰ Second, cell phones are easily distinguishable from traditional

155. *Chimel v. California*, 395 U.S. 752, 762-63 (1969).

156. See *Arizona v. Gant*, 556 U.S. 332, 335 (2009) (holding that “[t]he safety and evidentiary justifications underlying *Chimel*’s reaching-distance rule determine *Belton*’s scope”); *New York v. Belton*, 453 U.S. 454, 460 (1981) (interpreting the boundaries defined in *Chimel* in the context of a vehicle search and holding that “when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile”); *United States v. Chadwick*, 433 U.S. 1, 15 (1977), *abrogated by California v. Acevedo*, 500 U.S. 565 (1991) (“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.”); *United States v. Edwards*, 415 U.S. 800, 806 (1974) (“When it became apparent that the articles of clothing were evidence of the crime for which Edwards was being held, the police were entitled to take, examine, and preserve them for use as evidence.”); *United States v. Robinson*, 414 U.S. 218, 234 (1973) (“The 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.”).

157. *Gant*, 556 U.S. at 339.

158. See *supra* Parts IV.C-D.

159. See, e.g., ‘*Mobile Phone*’ Guns Destined for Britain, DAILY MAIL, <http://www.dailymail.co.uk/news/article-7451/Mobile-phone-guns-destined-Britain.html> (last visited Feb. 16, 2014) (describing a .22 caliber gun disguised as a mobile phone).

160. See *Smallwood v. Florida*, 113 So. 3d 724, 735 (Fla. 2013) (explaining that once the cell phone has been seized “there [is] no possibility that [the defendant] could use the device as a weapon”); *United States v. Wall*, No. 08-60016-CR, 2008 WL 5381412, at *3 (S.D. Fla. Dec. 22, 2008) (“The content of a text message on a cell phone presents no danger of physical harm to the arresting officers or others.”), *aff’d*, 343 F. App’x 564 (11th Cir. 2009) (per curiam).

“containers” capable of concealing weapons or contraband. According to the *Belton* Court, a container is an “object capable of holding another object.”¹⁶¹ Unlike a wallet, cigarette pack, or a purse, phones are not “containers” that can hold weapons or objects which could threaten an arresting officer’s safety.¹⁶² As the First Circuit succinctly pointed out, police officers searching a cell phone know “exactly what they would find therein: data” and “data could not harm them.”¹⁶³ The lack of foundation for this argument likely explains why courts allowing searches of cell phone incident to arrest have ignored officer safety as a justification and have focused primarily on the second aim underlying *Chimel*.¹⁶⁴

As the First Circuit emphasized, beyond the act of just seizing the phone,¹⁶⁵ there are several simple and straightforward steps that law enforcement personnel can take in order to ensure the preservation of any potential evidence on a cell phone and to protect it from “remote wiping” once it has been seized.¹⁶⁶ More importantly, this justification is seriously flawed because it ignores the fact that, in the context of cellular phones, permanently deleting evidence is extremely difficult. For example, “phone companies, almost universally, keep call and text messaging records so that information from the phone can later be retrieved.”¹⁶⁷ Although these companies may not keep this information for very long periods of time,¹⁶⁸ it is certainly preserved long enough for the police to secure a warrant in the rare occasion when an arrestee is able to successfully remotely wipe his or her phone. Moreover, while the Seventh Circuit was unwilling to invalidate the search at issue in *Flores-Lopez* because it was “conceivable” that the phone could be wiped

161. *Belton*, 453 U.S. at 460 n.4.

162. See *United States v. McGhee*, No. 8:09CR31, 2009 WL 2424104, at *3 (D. Neb. 2009) (finding that the defendant’s “cell phone did not present a risk of harm to the officers” once it had been seized); *Ohio v. Smith*, 920 N.E.2d 949, 954 (Ohio 2009) (explaining that a container is a “physical object[] capable of holding other physical objects” and that because cell phones do not contain physical objects, only “digitized information,” they are not a “container for purposes of a Fourth Amendment analysis”).

163. *United States v. Wurie*, 728 F.3d 1, 10 (1st Cir. 2013).

164. See *Knott*, *supra* note 13, at 463 (arguing that “[i]n the context of cell phones, the justification of officer safety simply does not apply”); see also *Park* *supra* note 11, at 456 (explaining that “[d]espite the prominence of officer safety as an exigency justifying the warrantless search incident to arrest generally, courts have not raised officer safety as a basis for a cell phone search”); Charles E. MacLean, *But, Your Honor, a Cell Phone is Not a Cigarette Pack: An Immodest Call for a Return to the Chimel Justifications for Cell Phone Memory Searches Incident to Lawful Arrest*, 6 FED. CTS. L. REV. 37, 48 (2012) (noting that “there is apparently no ‘app’ that will turn an iPhone or any other mobile phone into an effective weapon for use against an arresting officer”).

165. MacLean notes that while the exception certainly “supports *seizure* of the arrestee’s cell phone,” it “does not support *search* of the internal memory of the arrestee’s cell phone absent a warrant.” MacLean, *supra* note 164, at 49.

166. See *Wurie*, 728 F.3d at 11. In terms of the availability of devices which can prevent “remote wiping,” a quick internet search reveals several vendors selling Faraday Enclosures. For example, one describes its product, available for \$59.00, as follows: “[t]he small size and low cost of the STP1100 puts rapid and secure collection of wireless devices in the hands of every officer in the field for transport to their lab for further investigation.” *Forensics: STP1100*, RAMSEY ELECS., <http://ramseytest.com/product.php?pid=21> (last visited Feb. 16, 2014).

167. *Knott*, *supra* note 13, at 465. According to *Knott*, phone companies such as AT&T “not only keep[] the call logs of each cell-phone user on an account but also keep[] records indicating the numbers to which all text messages were sent.” *Id.*

168. *Id.* (stating that the standard practice in the industry is to keep this information for two weeks).

remotely,¹⁶⁹ the First Circuit attacked the accuracy of this claim by noting that if these types of threats were actually genuine, then it is “difficult to understand why the police do not routinely use these evidence preservation methods, rather than risking the loss of the evidence during the time it takes them to search through the phone.”¹⁷⁰ Consequently, if *Chimel*’s twin purposes remain the foundation to the search-incident-to-arrest doctrine, then the First Circuit was correct in holding that law enforcement personnel must obtain a warrant before searching a cell phone seized during a lawful arrest.

B. *Too Soon for a Bright Line Rule?*

Although warrantless searches of cell phones cannot be justified under *Chimel*, the First Circuit may have been hasty in establishing this new bright line rule under the facts of *Wurie*. As Judge Howard aptly points out, the majority may have glossed over several significant facts in the case because of their fixation on establishing a clear rule that law enforcement can easily follow in the field.¹⁷¹ For example, the majority only addresses in a footnote the fact that the search was prompted by repeated calls to *Wurie*’s phone; Judge Stahl argues that the risk of *Wurie*’s partners destroying the drugs as a result of his failure to answer his cell phone was “mere speculation.”¹⁷² Moreover, the majority acknowledges that the search of *Wurie*’s cell phone itself was not particularly invasive, and yet still held that the search was unconstitutional because “it is necessary for all warrantless cell phone data searches to be governed by the same rule.”¹⁷³ Still, the type of fact-specific, subjective approach favored by the dissent would leave the law enforcement community without clear guidelines to follow in the context of searches of cell phones incident to arrest.¹⁷⁴ A balancing test could potentially leave police officers unsure of when to conduct warrantless searches of phones and when to wait for warrants while risking the suppression of valuable evidence at trial if they guess wrong.¹⁷⁵ Moreover, establishing a bright line rule barring all warrantless searches of cell phones incident to arrest removes the risk that the

169. *United States v. Flores-Lopez*, 670 F.3d 803, 809 (7th Cir. 2012).

170. *Wurie*, 728 F.3d at 11.

171. *See id.* at 6.

172. *Id.* at 11 n.11. Judge Stahl also notes that “the risk of destruction . . . attaches to the evidence that the arrestee is actually carrying on his person—not to evidence being held or guarded elsewhere by a co-conspirator.” *Id.* In other words, the fact that others might have acted on *Wurie*’s silence was not sufficient to justify the search of his cell phone.

173. *Id.* at 13.

174. *See Gershowitz supra* note 21, at 1145 (pointing out that “[i]n its search-incident-to-arrest jurisprudence, the Court has long endorsed bright-line rules that will be workable for police on the street”); Mark L. Mayakis, *Cell Phone - A "Weapon" of Mass Discretion*, 33 CAMPBELL L. REV. 151, 164 (2010) (contending that “law enforcement officials need to have a bright-line rule that is relatively easy to apply during the split-second judgments that their profession requires”).

175. *See Knott supra* 13, at 470 (noting that “[b]ecause the phone will be searched only after a warrant has been obtained, evidence recovered from the phone is less likely to be suppressed at a subsequent trial,” leading law enforcement to work more efficiently); *see also* Joshua S. Levy, *Towards a Brighter Fourth Amendment: Privacy and Technological Change*, 16 VA. J.L. & TECH. 499, 513 (2011) (noting that “[c]learly delineated rules can also prevent the demoralization of police and prosecutors, since evidence will not be suppressed due to Fourth Amendment standards decided *post hoc*”).

police will access sensitive private information without first going through the proper channels.¹⁷⁶ In the end, although the facts of *Wurie* may not be the strongest, the First Circuit's decision still effectively applies the twin aims of *Chimel* while safeguarding individuals from the threat of more intrusive searches into the vast amount of personal, private information stored on cell phones in the future.

VI. CONCLUSION

Last August, the government filed its petition for *certiorari* with the Supreme Court,¹⁷⁷ contending that the First Circuit's new bright line test directly conflicts with the Court's decisions in *Robinson* and *Edwards*,¹⁷⁸ and the Court granted *certiorari* in January, 2014.¹⁷⁹ The Court has recently been highly divided on Fourth Amendment cases,¹⁸⁰ making it difficult to accurately predict how it might rule. While the trend of close decisions will likely continue, civil rights advocates are hopeful that the Court seizes this opportunity to rule that warrantless searches of cell phones are inherently different than searches of cigarette packs.¹⁸¹ As the First Circuit thoroughly demonstrated, the assumptions that guided the Court's decision in *Robinson* are inapplicable in the context of cell phones because neither *Chimel* rationale is implicated. No matter the Court's decision, the ruling is sure to have a lasting impact for both law enforcement personnel and an American citizenry that is increasingly reliant on cellular phones.¹⁸²

176. See Levy, *supra* note 175, at 513 (explaining that “[i]n the Fourth Amendment context, such rules enable police to know precisely how far they can intrude while conducting an investigation and, importantly, where they cannot intrude”); Kevin Wempe, Comment, *United States v. Flores-Lopez: Protecting Privacy Rights in Cell Phone Searches Incident to Arrest*, 62 U. KAN. L. REV. 195, 220 (2013) (arguing that, in order “[t]o better protect individual privacy” decisions regarding cell phone searches “should be left to an unbiased magistrate rather than an officer whose duty is detecting crime”); *Newhard v. Borders*, 649 F. Supp. 2d 440, 444 (W.D. Va. 2009) (example of allegations involving alleged law enforcement abuse stemming from a cell phone search).

177. Petition for Writ of Certiorari, *United States v. Wurie*, 2013 WL 4404658 (Aug. 15, 2013) (No. 13-212).

178. *Id.* at 11. The government also argued in the alternative that, “[i]f it were thought that cell phones justified an exception to *Robinson*'s rule, *Gant*'s reasoning would support the search of the contents of a cell phone where . . . the police have reason to believe that it might contain or lead to evidence relevant to the offense of arrest. *Id.* at 18.

179. *United States v. Wurie*, 728 F.3d 1 (1st Cir. 2013), *reh'g en banc denied*, 724 F.3d 255 (1st Cir. 2013), *cert. granted*, 134 S. Ct. 999 (2014).

180. For example, many of the Courts recent Fourth Amendment cases have been close 5-4 decisions. See, e.g., *Maryland v. King*, 133 S. Ct. 1 (2013); *Missouri v. McNeely*, 133 S. Ct. 1552 (2013); *Florida v. Jardines*, 133 S. Ct. 1409 (2013); *Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 132 S. Ct. 1510 (2012).

181. See Julian Hattem, *Groups Tell Court to Set Limits on Phone Searches*, THE HILL (Mar., 11, 2014, 4:14 PM), <http://thehill.com/blogs/ballot-box/200479-groups-tell-court-to-set-limits-on-phone-searches>.

182. See *supra* Part I.