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## CRIMINAL PROCEDURE—"Can You Hear Me Now?": Warrantless Cell Phone Searches and the Fourth Amendment; *People v. Diaz*, 244 P.3d 501 (Cal. 2011)

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CASE NOTE

**CRIMINAL PROCEDURE—“Can You Hear Me Now?”:  
Warrantless Cell Phone Searches and the Fourth Amendment;  
*People v. Diaz*, 244 P.3d 501 (Cal. 2011)**

*Joshua Eames\**

INTRODUCTION

On April 25, 2007, Gregory Diaz was arrested for participating in the sale of ecstasy.<sup>1</sup> During questioning at the police station the arresting officer, without a warrant and more than ninety minutes after the initial arrest, took Diaz’s cell phone from the station’s evidence room and scrolled through the text message folder.<sup>2</sup> He discovered a message implicating Diaz in the sale, which led to Diaz confessing.<sup>3</sup> Both the trial and appellate courts denied Diaz’s motion to suppress the cell phone evidence, holding the search of the cell phone was incident to arrest and any evidence it turned up was “fair game.”<sup>4</sup> The California Supreme Court affirmed on the same grounds, concluding that because the cell phone was “immediately associated” with Diaz’s person, the search was valid.<sup>5</sup>

This kind of warrantless search is troubling given that a growing number of Americans rely heavily on the use and availability of their personal cell phones.<sup>6</sup> Within the last decade, the accessibility and proliferation of such devices has

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\* Candidate for J.D., University of Wyoming College of Law, 2013. I would like to extend my most sincere gratitude to all the *Wyoming Law Review* editors, and in particular Jared Miller and Kyle Ridgeway for all the long hours and effort they spent helping edit this note. I would also like to thank all my friends and classmates, in particular the Basement Kids, who provided an enormous amount of support and encouragement throughout this entire process. Most importantly, I would like to thank my fiancée, Melissa, for just being as awesome as she is and has been throughout this process; May 25th, 2012 could not come soon enough!

<sup>1</sup> *People v. Diaz*, 244 P.3d 501, 502 (Cal. 2011), *cert. denied*, 132 S. Ct. 94 (2011).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 502–03.

<sup>4</sup> *Id.* at 503; *infra* note 78 (quoting the specific language of the trial court).

<sup>5</sup> *Diaz*, 244 P.3d at 505–06 (citing *United States v. Robinson*, 414 U.S. 218 (1973)).

<sup>6</sup> *Wireless substitution: Early release of estimates from the National Health Interview Survey, January–June 2010*, NAT’L CTR. FOR HEALTH STATISTICS (Dec. 21, 2010), <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201012.htm>. During the first half of 2010, more than one in four Americans (26.6%) relied solely on their personal cell phones for communication as opposed to a landline, and 15.6% of households with a landline preferred to rely on their cell phones instead of their landline. *Id.*

grown tremendously.<sup>7</sup> The technology that powers cell phones has improved to the point where some are more analogous to personal computers, rather than a device merely capable of making a phone call.<sup>8</sup> Such phones are commonly referred to as “smartphones.”<sup>9</sup> A smartphone can store a wealth of highly personal information.<sup>10</sup> However, it has become a common practice, such as in *Diaz*, for the police to search an arrestee’s cell phone looking for evidence of criminal activity.<sup>11</sup> These searches create troubling concerns relating to a person’s privacy and freedom from unreasonable governmental intrusion as guaranteed by the Fourth Amendment.<sup>12</sup>

This case note criticizes the holding in *Diaz* for three reasons. First, by justifying the warrantless search of *Diaz*’s cell phone under the search incident to arrest exception, the court paid little more than lip service to the rationales underlying the exception, allowing the exception to (further) swallow both the warrant and reasonableness clauses of the Fourth Amendment.<sup>13</sup> Second, the court was oblivious to the significant privacy interests implicated by cell phones (specifically smartphones) having the ability to store immense amounts of personal information. Instead, the court relied on United States Supreme Court

<sup>7</sup> *U.S. Wireless Quick Facts*, INT’L ASS’N FOR THE WIRELESS TELECOMM. (CTIA), <http://www.ctia.org/advocacy/research/index.cfm/AID/10323> (last visited Apr. 6, 2012) (indicating that in December 2000 there were 109.5 million wireless service subscribers, or “connections,” in the United States, or 38% of the United States population; but by December 2010 that number had nearly tripled to 302.9 million “connections,” or 96% of the United States population).

<sup>8</sup> See *Smartphone Definition*, PCMAG.COM, [www.pcmag.com/encyclopedia\\_term/0,2542,t=Smartphone&ci=51537,00.asp](http://www.pcmag.com/encyclopedia_term/0,2542,t=Smartphone&ci=51537,00.asp) (last visited Apr. 6, 2012) (explaining that smartphones have the capabilities to “run myriad applications, turning the once single-minded cell phone into a mobile computer”).

<sup>9</sup> *Id.* (defining a smartphone as “[a] cellular telephone with built-in applications and Internet access [and] provide[s] digital voice service as well as text messaging, e-mail, Web browsing, still and video cameras, MP3 player, video viewing and often video calling”).

<sup>10</sup> *Cf.* *United States v. Arnold*, 454 F. Supp. 2d 999, 1003–04 (C.D. Cal. 2006), *rev’d*, 523 F.3d 941 (9th Cir. 2008), *opinion amended and superseded on denial of reh’g*, 533 F.3d 1003 (9th Cir. 2008).

[T]he information contained in a laptop and in electronic storage devices renders a search of their contents substantially more intrusive than a search of the contents of a lunchbox or other tangible object. A laptop and its storage devices have the potential to contain vast amounts of information. People keep all types of personal information on computers, including diaries, personal letters, medical information, photos and financial records.

*Id.*

<sup>11</sup> See *supra* notes 1–5 and accompanying text; *infra* note 22 and accompanying text.

<sup>12</sup> See *infra* notes 103–72 and accompanying text.

<sup>13</sup> See *infra* notes 112–27 and accompanying text; see also Wayne A. Logan, *An Exception Swallows A Rule: Police Authority To Search Incident to Arrest*, 19 YALE L. & POL’Y REV. 381, 383 (2001) (noting “the search incident exception has evolved to swallow the rule, so much so that the parameters and rationales originating the exception are now only vaguely recognizable in many decisions of courts across the land”).

cases handed down more than thirty years ago to justify its holding, the facts and circumstances of which do not compare to the facts in *Diaz*.<sup>14</sup> Third, the court failed to consider laptops as a more accurate analogy to modern cell phones in the context of warrantless searches.<sup>15</sup> In ruling as they did, the *Diaz* court effectively gave arresting officers great authority to rummage through an arrestee's personal information, regardless of whether that information is relevant to the crime being investigated.

#### BACKGROUND

The Fourth Amendment to the United States Constitution guarantees freedom from unreasonable searches and seizures by the government.<sup>16</sup> The operative word is “unreasonable.”<sup>17</sup> The United States Supreme Court has declared that searches without a warrant are “per se unreasonable.”<sup>18</sup> However, searches without judicial blessing can be found reasonable if they fall into a specifically delineated exception.<sup>19</sup>

#### *The Search Incident to Arrest Exception*

One exception is search incident to arrest as recognized in its modern form in *Chimel v. California*.<sup>20</sup> The search incident to arrest exception is not the only exception that allows police to search a person or place without a warrant, but “is

<sup>14</sup> See *infra* notes 128–63 and accompanying text.

<sup>15</sup> See *infra* notes 164–72 and accompanying text.

<sup>16</sup> U.S. CONST. amend. IV. The Fourth Amendment states:

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.

*Id.*

<sup>17</sup> See *Bash v. Patrick*, 608 F. Supp. 2d 1285, 1298 (M.D. Ala. 2009) (noting “[t]he most operative word in the [Fourth] amendment is . . . ‘unreasonable’”).

<sup>18</sup> *Katz v. United States*, 389 U.S. 347, 357–58 (1967). Additionally, Justice Harlan outlined when the Fourth Amendment protections come into play. *Id.* at 361 (Harlan, J., concurring). In order for a person to have a protectable privacy interest, there must be two questions asked and answered in the affirmative. *Id.* First, “a person [must] have exhibited an actual (subjective) expectation of privacy . . . .” *Id.* Second, “the expectation [must] be one that society is prepared to recognize as ‘reasonable.’” *Id.*

<sup>19</sup> *Id.* at 357–58.

<sup>20</sup> 395 U.S. 752, 755 (1969) (quoting *Weeks v. United States*, 232 U.S. 383, 392 (1914)). The Court explained the exception as follows:

What then is the present case? Before answering that inquiry specifically, it may be well by a process of exclusion to state what it is not. It is not an assertion of the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime.

*Id.*

by far the most common variety of police search practice.”<sup>21</sup> Additionally, courts that have addressed warrantless searches of an arrestee’s cell phone, including *Diaz*, have overwhelmingly done so under the search incident to arrest exception.<sup>22</sup>

In *Chimel*, police procured an arrest warrant for Chimel in connection with a burglary of a coin shop.<sup>23</sup> After they arrived at Chimel’s home and made the arrest, the officers disregarded Chimel’s protests and proceeded to “look around” without a search warrant.<sup>24</sup> The officers searched Chimel’s entire home, including the master bedroom, attic, and garage.<sup>25</sup> During their search, they found numerous coins and other related objects, all of which the State introduced into evidence despite Chimel’s objections.<sup>26</sup> The California Supreme Court upheld the search, determining it was constitutional as being “incident to a valid arrest.”<sup>27</sup>

After the United States Supreme Court recognized the search incident to arrest exception as a valid exception to warrantless searches, the Court outlined the justifications and scope of such a search:

When an arrest is made, it is *reasonable* for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the *officer’s safety* might well be endangered . . . . In addition . . . the arresting officer [may] search for and seize any evidence on the arrestee’s person in order to *prevent its concealment or destruction* . . . . There is ample justification . . . for a search of the arrestee’s person and the area ‘within his immediate control’—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.<sup>28</sup>

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<sup>21</sup> 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.2 (4th ed. 2004).

<sup>22</sup> See, e.g., *United States v. Flores-Lopez*, 607 F.3d 803 (7th Cir. 2012); *United States v. Murphy*, 552 F.3d 405 (4th Cir. 2009); *United States v. Zavala*, 541 F.3d 56 (5th Cir. 2008); *United States v. Finley*, 477 F.3d 250 (5th Cir. 2007); *Schlossberg v. Solesbee*, No. 10-6014-TC, 2012 WL 141741 (D. Or. 2012); *United States v. Quintana*, 594 F. Supp. 2d 1291 (M.D. Fla. 2009); *United States v. Wurie*, 612 F. Supp. 2d 104 (D. Mass. 2009); *United States v. Valdez*, No. 06-CR-336, 2008 WL 360548 (E.D. Wis. 2008); *United States v. Santillan*, 571 F. Supp. 2d 1093 (D. Ariz. 2008); *United States v. Park*, No. CR 05-375 SI, 2007 WL 1521573 (N.D. Cal. 2007); *Smallwood v. State*, 61 So. 3d 448 (Fla. Dist. Ct. App. 2011); *Fawdry v. State*, 70 So. 3d 626 (Fla. Dist. Ct. App. 2011); *Hawkins v. State*, 723 S.E.2d 924 (Ga. 2012); *State v. Smith*, 920 N.E.2d 949 (Ohio 2009); *State v. Carroll*, 778 N.W. 2d 1 (Wis. 2010).

<sup>23</sup> *Chimel*, 395 U.S. at 753.

<sup>24</sup> *Id.* at 753–54.

<sup>25</sup> *Id.* at 754.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 754–55.

<sup>28</sup> *Id.* at 762–63 (emphasis added).

Put simply, the Court justified warrantless searches incident to arrest in order to: (1) protect police from weapons, and (2) preserve destructible evidence.<sup>29</sup> Ultimately, the Court invalidated Chimel's conviction, holding the search of Chimel's entire house unreasonable because it went far beyond his person and the area within his immediate control.<sup>30</sup>

*Personal Property Immediately Associated with the Arrestee's Person*

Soon thereafter, the Court expanded the search incident to arrest exception.<sup>31</sup> In *United States v. Robinson*, police arrested Robinson for driving without a license.<sup>32</sup> The arresting officer conducted a pat down, during which he felt an object in Robinson's breast pocket.<sup>33</sup> The officer removed the object and found it to be a "crumpled up cigarette package," but could not determine its contents.<sup>34</sup> When he opened the package, the officer discovered fourteen heroin capsules.<sup>35</sup>

In upholding the search, the Court reasoned that after a lawful custodial arrest, the police have the authority to fully search the arrestee's body.<sup>36</sup> Moreover, the Court explained, police have such authority even without probable cause that the arrestee possessed weapons or destructible evidence.<sup>37</sup> More importantly, a court may not later question whether an officer had reason to believe he or she would have found either weapons or evidence on the arrestee.<sup>38</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 768.

<sup>31</sup> *United States v. Robinson*, 414 U.S. 218 (1973). In his dissent, Justice Marshall noted the search "[w]ent far beyond what was reasonably necessary to protect [officers] from harm or to ensure [Robinson] would not effect an escape from custody . . . [and] it therefore fell outside the scope of a properly drawn 'search incident to arrest' exception to the Fourth Amendment's warrant requirement." *Id.* at 259 (Marshall, Douglas, & Brennan, JJ., dissenting).

<sup>32</sup> *Id.* at 220 (majority opinion).

<sup>33</sup> *Id.* at 221–23.

<sup>34</sup> *Id.* at 223. The officer testified at trial, "[a]s I felt the package I could feel objects in the package, but couldn't tell what they were . . . I knew they weren't cigarettes." *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 235.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* The Court reasoned that:

A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment.

*Id.* (emphasis added).

Thus, when police conduct a lawful custodial arrest and search the arrestee, *Robinson* allows them to open and inspect containers they seize from the arrestee's person, without probable cause or reasonable suspicion that the item to be inspected contains evidence indicative of illegal activity.<sup>39</sup> This greatly expanded the search incident to arrest exception because when police make a lawful arrest, a search of the person is *automatically* reasonable as the arrest itself was a reasonable intrusion on a person's privacy interests.<sup>40</sup> Most relevant to the subject of this note, police may open and inspect any containers they find on the arrestee, regardless of the probability of them containing either weapons or evidence.<sup>41</sup>

### *Personal Property Within the Arrestee's Immediate Control*

The Court later distinguished between searches of property immediately associated with the person and searches of property within an arrestee's immediate control. In *United States v. Chadwick*, federal agents, unbeknown to the three defendants, used a drug-sniffing dog to get a hit on the defendants' footlocker after it was unloaded from a train in which two of the defendants had been traveling.<sup>42</sup> After the dog "hit," the agents waited for the defendants to place the 200-pound footlocker into the back of Chadwick's car.<sup>43</sup> At that time, the agents arrested all three and transported the defendants and the footlocker to the

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<sup>39</sup> *Id.* at 236; see also Adam R. Gershowitz, *Password Protected? Can A Password Save Your Cell Phone From A Search Incident To Arrest?*, 96 IOWA L. REV. 1125, 1132–33 (2011) (stating that *Robinson* "permit[s] police officers to open and search through all items on an arrestee's person, even if they are in a closed container, and even without suspicion that the contents of the container are illegal").

<sup>40</sup> See *supra* notes 37–39 and accompanying text.

<sup>41</sup> *Robinson*, 414 U.S. at 236. In subsequent cases, the Court expanded on *Robinson* by allowing the search of containers found in automobiles. See *Thornton v. United States*, 541 U.S. 615, 622–23 (2004) (allowing searches of an automobile's passenger compartment even when the arrestee was only "a recent occupant" of the automobile); *New York v. Belton*, 453 U.S. 454, 460–61 (1981) (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" and open and examine the contents of any container). However, the Court took a step back five years later in *Arizona v. Gant*, 556 U.S. 332 (2009). In *Gant*, the Court held that when an arrestee is in custody and cannot access his or her car to retrieve weapons or evidence at the time of the search, "both justifications for the search-incident-to-arrest exception are absent and the rule does not apply." *Gant*, 556 U.S. at 339.

<sup>42</sup> 433 U.S. 1, 3–4 (1977), *rev'd on other grounds* by *California v. Acevedo*, 500 U.S. 565 (1991); see *Commonwealth v. Pierre*, 893 N.E.2d 378, 382 (Mass. App. Ct. 2008), *aff'd* 902 N.E.2d 367 (Mass. 2009) ("*Acevedo*, although overruling *Chadwick* in part, affected only the automobile exception to the warrant requirement and legality of searches of closed containers therein . . . . It did not, therefore, alter the central tenet of *Chadwick* regarding search incident to arrest."); *United States v. Park*, No. CR 05-375 SI, 2007 WL 1521573, n.4 (N.D. Cal. 2007) (noting *Acevedo* "overrul[ed] *Chadwick* as to containers within a vehicle . . . . *Chadwick*'s holding that a search incident to arrest must not be too remote in time or place is still good law").

<sup>43</sup> *Chadwick*, 433 U.S. at 4.

station.<sup>44</sup> Approximately ninety minutes after the arrest, the agents, without a search warrant, opened the footlocker and found a large quantity of marijuana.<sup>45</sup>

The Court rejected the argument that the search was valid as being incident to arrest for two reasons.<sup>46</sup> First, the footlocker was not immediately associated with the arrestee's person because it was in the trunk of Chadwick's car at the time of arrest.<sup>47</sup> The fact that the footlocker was in the trunk of a car, rather than on the arrestee's person, distinguished *Chadwick* from *Robinson*.<sup>48</sup> Second, the footlocker had been reduced to the exclusive control of the police prior to the warrantless search.<sup>49</sup> Therefore, the Court reasoned there was "no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence."<sup>50</sup> Furthermore, because no exigency existed to search the container at the time of arrest, once the container came under the exclusive dominion of the police, the warrant clause required police to obtain a search warrant.<sup>51</sup>

Thus, after *Chadwick*, officers could conduct searches of items found on an arrestee's person, so long as the search followed a valid custodial arrest.<sup>52</sup> However, items within an arrestee's immediate control are *not* searchable, unless an exigency existed at the time of arrest to necessitate a warrantless search.<sup>53</sup> If no such exigency exists, "once [police] have reduced luggage or other personal property not immediately associated with the [arrestee's person] . . . to their exclusive control . . . a search of that property is no longer an incident of the arrest."<sup>54</sup>

### *Personal Laptops Searched Incident to Arrest*

While the *Diaz* court did not mention the search incident to arrest exception with regard to laptops, it is nevertheless important because it provides assistance

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 4–5.

<sup>46</sup> *Id.* at 15.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 15–16.

<sup>52</sup> See *supra* notes 31–41 and accompanying text.

<sup>53</sup> See *Chadwick*, 433 U.S. at 15. In a footnote, the Court gave an example of when an exigency existed that would give police authority to search luggage or other personal property:

Of course, there may be other justifications for a warrantless search of luggage taken from a suspect at the time of his arrest; for example, if officers have reason to believe that luggage contains some immediately dangerous instrumentality, such as explosives, it would be foolhardy to transport it to the station house without opening the luggage and disarming the weapon.

*Id.* at 15 n.9.

<sup>54</sup> *Id.* at 15.



in determining whether cell phones are properly searchable incident to arrest.<sup>55</sup> Surprisingly, little case law deals with searches of laptops incident to arrest.<sup>56</sup> The vast majority of case law dealing with searches of laptops generally falls into one of two categories. The first, and most prevalent, deals with searches of laptops conducted at the border under the border exception to the warrant requirement.<sup>57</sup> The second deals with laptop searches conducted pursuant to a search warrant and issues surrounding the search; for example, whether the search warrant was overbroad.<sup>58</sup>

One court, however, has dealt with the search of an arrestee's laptop incident to arrest.<sup>59</sup> In *State v. Washington*, the defendant was arrested on suspicion of auto theft, and the arresting officer "noticed a black bag on the floor [of the defendant's car] near [his] feet," which contained a laptop computer.<sup>60</sup> Later, the arresting officer, believing the laptop to be stolen, directed another officer at the station, without a warrant, to search its files to determine the lawful owner.<sup>61</sup> The court held that the police had a right to seize the laptop as incident to a lawful arrest.<sup>62</sup> However, "[t]he subsequent search of the computer's files . . . did not fall under any of the exceptions to the warrant requirement."<sup>63</sup> The court noted that although the police had probable cause to believe the laptop was stolen, such a belief alone did not "authorize [them] to discount [the defendant's] claim of ownership and circumvent the warrant requirement" because such a search was necessarily a "search for evidence to incriminate [him]."<sup>64</sup> Therefore, the court held, the evidence obtained from the warrantless search of the defendant's laptop should have been suppressed.<sup>65</sup>

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<sup>55</sup> The majority opinion and the concurrence are devoid of any mention of computers, let alone laptops. See *People v. Diaz*, 244 P.3d 501 (Cal. 2011). The dissent mentions computers only when using the term "handheld computers" as an interchangeable term for both "mobile phone" and "smartphones." *Id.* at 513–17 (Werdegar & Moreno, JJ., dissenting).

<sup>56</sup> See Mathew E. Orso, *Cellular Phones, Warrantless Searches, and the New Frontier of Fourth Amendment Jurisprudence*, 50 SANTA CLARA L. REV. 183, 215 (2010) (conceding "[a] search of case law turns up a paucity of precedent regarding the search of laptops or other computers incident to arrest").

<sup>57</sup> See, e.g., *United States v. Cotterman*, 637 F.3d 1068 (9th Cir. 2011); *United States v. Pickett*, 598 F.3d 231 (5th Cir. 2010); *United States v. Villasenor*, 608 F.3d. 467 (9th Cir. 2010).

<sup>58</sup> See, e.g., *United States v. Burgess*, 576 F.3d 1078 (10th Cir. 2009); *United States v. LaFortune*, 520 F.3d 50 (1st Cir. 2008); *State v. Finesmith*, 406 N.J. Super. 510 (N.J. Super. Ct. App. Div. 2009).

<sup>59</sup> See generally *State v. Washington*, 110 Wash. App. 1012 (Wash. Ct. App. 2002).

<sup>60</sup> *Id.* at \*1.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at \*3.

<sup>65</sup> *Id.*

## PRINCIPAL CASE

In *People v. Diaz*, the defendant, Gregory Diaz, drove his passenger to a location where the passenger sold ecstasy to a police informant.<sup>66</sup> Senior Deputy Sheriff Victor Fazio used a wire on the informant to listen in on the sale.<sup>67</sup> Immediately following the sale, Deputy Fazio stopped Diaz's vehicle and arrested him for the sale of a controlled substance.<sup>68</sup> At the station, an officer seized a cell phone from Diaz's person and gave it to Deputy Fazio.<sup>69</sup> The cell phone was entered into evidence along with the other items confiscated from Diaz.<sup>70</sup> Later, Deputy Fazio interviewed Diaz regarding the sale, but Diaz denied that he knew the sale was going to take place.<sup>71</sup> Subsequently—ninety-three minutes after the initial arrest—Deputy Fazio took Diaz's cell phone from evidence, opened the text message folder, and found a message that stated “6 4 80.”<sup>72</sup> Deputy Fazio interpreted the message to mean “[s]ix pills of Ecstasy for \$80,” and Diaz confessed to participating in the sale when confronted with this information.<sup>73</sup> Consequently, Diaz was charged with selling a controlled substance.<sup>74</sup>

*Trial Court and Court of Appeal*

Diaz pleaded not guilty and sought to suppress the text message content from evidence.<sup>75</sup> He argued the search was a violation of the Fourth Amendment because Deputy Fazio failed to obtain a search warrant prior to examining the contents of his cell phone.<sup>76</sup> The trial court denied the motion, noting, because Diaz was lawfully arrested, a search of his person was warranted, and any evidence it turned up was “fair game.”<sup>77</sup> With the denial of his motion, Diaz withdrew his

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<sup>66</sup> 244 P.3d 501, 502 (Cal. 2011).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* The opinion failed to state where the cell phone was located on Diaz, the type of phone involved, and why Deputy Fazio neglected to seize the cell phone at the time of arrest. *See id.*

<sup>70</sup> *Id.* The other items seized upon arrest were six tabs of ecstasy and a small amount of marijuana. *Id.*

<sup>71</sup> *Id.* at 502.

<sup>72</sup> *Id.* The court noted that Deputy Fazio “had to manipulate the phone and go to several different screens to access the text message folder. He did not recall whether the cell phone was on when he picked it up to look through it.” *Id.* at 502 n.1.

<sup>73</sup> *Id.* at 502–03. Deputy Fazio was able to make such a connection “[b]ased on his training and experience.” *Id.*

<sup>74</sup> *Id.* at 503.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* This is the trial court's exact language:

The defendant was under arrest for a felony charge involving the sale of drugs. His property was seized from him. Evidence was seized from him . . . [I]ncident to the

not guilty plea and pleaded guilty to the transportation of a controlled substance.<sup>78</sup> The trial court placed Diaz on probation for three years.<sup>79</sup>

Thereafter, Diaz appealed the trial court's denial of his motion to the Second District Court of Appeal for California, which affirmed the decision.<sup>80</sup> Relying on *Robinson*, the court explained that because the cell phone was "immediately associated" with Diaz's person at the time of arrest, it was properly subjected to a delayed warrantless search.<sup>81</sup> The court rejected the argument that cell phones should be afforded greater constitutional protection because of their ability to store immense amounts of personal and private information.<sup>82</sup> The court noted:

Cell phones may contain personal information, but so do wallets, purses and the like. The fact that electronic devices are capable of storing vast amounts of private information does not give rise to a legitimate heightened expectation of privacy where, as here, the defendant is subject to a lawful arrest while carrying the device *on his person*.<sup>83</sup>

### *Majority Opinion*

The California Supreme Court began its analysis of the case by considering whether Diaz's cell phone was "personal property . . . immediately associated with [his] person."<sup>84</sup> If it was, then the subsequent search of its contents was a valid search incident to arrest as governed by *Robinson*.<sup>85</sup> However, if the cell phone

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arrest[,] search of his person and everything that that turned up is really fair game in terms of being evidence of a crime or instrumentality of a crime or whatever the theory might be. And under these circumstances I don't believe there's authority that a warrant was required.

*Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> See generally *People v. Diaz*, 81 Cal. Rptr. 3d 215 (Cal. Ct. App. 2008).

<sup>81</sup> *Id.* at 218 (emphasis added) (citing *United States v. Edwards*, 415 U.S. 800, 807 (1974) (holding "once . . . [an] accused is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant even though a substantial period of time has elapsed between the arrest and subsequent administrative processing") and *United States v. Robinson*, 414 U.S. 218, 235 (1973) (holding that items immediately associated with the arrestee's person are subject to search)).

<sup>82</sup> *Diaz*, 81 Cal. Rptr. 3d at 217, 218.

<sup>83</sup> *Id.* at 218 (emphasis added).

<sup>84</sup> *Diaz*, 244 P.3d at 505.

<sup>85</sup> *Id.*; see *supra* notes 31–41 and accompanying text. The court noted that under *Edwards*, 414 U.S. at 807, if a search of an arrestee's effects was valid at the time of arrest, the fact that a search of those effects did not actually occur until a substantial time after arrest is irrelevant. *Id.*

was not immediately associated with Diaz's person, then under *Chadwick* the subsequent search was invalid because it was "remote in time [and] place from the arrest" and "cannot be justified as incident to arrest."<sup>86</sup>

The court adhered to the former, with the majority, in a 5-2 decision, holding Diaz's cell phone was analogous to the cigarette package in *Robinson*.<sup>87</sup> Therefore, under *Robinson*, the majority concluded Deputy Fazio was free to inspect the contents of the "container" (i.e., Diaz's cell phone) that was "immediately associated with Diaz's person," without a search warrant.<sup>88</sup> The majority explicitly declined to consider the immense amount of private, personal information most cell phones can store.<sup>89</sup> In doing so, the court refused to accept the argument that they should focus on the "character" of the container.<sup>90</sup> Instead, the majority simply ruled because the cell phone was on Diaz's person at the time of the search, Deputy Fazio needed "no additional justification" to examine its contents.<sup>91</sup> The majority noted none of the cases it relied on "even hint[] that whether a warrant is necessary for a search of an item properly seized from an arrestee's person incident to a lawful arrest depends in any way on the character of the seized item."<sup>92</sup>

The majority also declined to distinguish between cell phones with low storage capacity and cell phones with high storage capacity.<sup>93</sup> The court opined that adopting a rule distinguishing between searchable and non-searchable cell phones, based solely on storage capacity, would be too problematic for officers in the field requiring "ad hoc determinations."<sup>94</sup> Furthermore, the court noted such determinations were specifically rejected in *Robinson*, in favor of a "straightforward, easily applied, and predictably enforced rule" that allows officers in the field to search an arrestee and any containers found on his or her person or immediately associated with it.<sup>95</sup>

In reaching its conclusion, the majority noted "a delayed warrantless search of personal property immediately associated with the person of an arrestee at the time of arrest is justified by the 'reduced expectations of privacy caused by the arrest.'"<sup>96</sup> In closing, the court noted that if the high court's decisions are

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<sup>86</sup> *Diaz*, 244 P.3d at 505.

<sup>87</sup> *Id.* at 505–06.

<sup>88</sup> *Id.* at 506.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* (citing *United States v. Robinson*, 414 U.S. 218, 235 (1973)).

<sup>92</sup> *Id.* at 507.

<sup>93</sup> *Id.* at 508.

<sup>94</sup> *Id.* at 508–09.

<sup>95</sup> *Id.* at 509 (citing *Robinson*, 414 U.S. 218).

<sup>96</sup> *Id.* at 511.

inapplicable to modern technology, such as cell phones, it is for the high court alone to re-examine those decisions.<sup>97</sup>

### *Dissent*

The dissent analogized the cell phone found on Diaz's person to the footlocker in *Chadwick*, rather than the crumpled cigarette package in *Robinson*.<sup>98</sup> The dissent reasoned that because cell phones can store "immense amounts of private information," they should be treated as being in the "arrestee's immediate control," and a court should not justify a delayed warrantless search merely because the cell phone happened to be located on the arrestee's person.<sup>99</sup> Additionally, the dissenters asserted that since a cell phone does not pose a safety risk to the officer, and because most information stored can "be obtained from a defendant's cellular provider," the *Chimel* justifications for a search incident to arrest are absent.<sup>100</sup> Therefore, the dissent concluded that when a cell phone comes under the "exclusive dominion of the police," and the arrestee is in custody, police should be required to seek and obtain a search warrant before searching the arrestee's cell phone.<sup>101</sup> The dissent reached its conclusion by recognizing that if the court gives police broad authority to "rummage at leisure" through an arrestee's cell phone, it would be allowing "a highly intrusive and unjustified type of search, one meeting neither the warrant requirement nor the reasonableness requirement of the Fourth Amendment."<sup>102</sup>

### ANALYSIS

*People v. Diaz* represents an unfortunate instance where a court upheld an unreasonable infringement of a person's Fourth Amendment right.<sup>103</sup> Concededly, a court is not free to disregard clearly applicable United States Supreme Court precedent, but attempting to fit a square peg into a round hole to justify the violation of a person's Constitutional rights is unacceptable—the *Diaz* court

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<sup>97</sup> *Id.* (citing *United States v. Chadwick*, 433 U.S. 1 (1977)). In a concurring opinion, the chief judge noted that "all courts must follow [the high court's] directly applicable precedents" and "when there are reasons to anticipate that [the high court] might reconsider . . . a rule of law . . . [t]he high court has reserved to itself alone the 'prerogative of overruling its own decisions.'" *Id.* at 512–13 (Kennard, Acting C.J., concurring) (citations omitted). Therefore, the court, and the concurrence, justified side-stepping the real issue that would have been dispositive in the case, which was whether the rule from *Robinson* was applicable to modern technology. *See id.* at 501–13.

<sup>98</sup> *See id.* at 518 (Werdegar & Moreno, JJ., dissenting).

<sup>99</sup> *Id.* at 516, 518.

<sup>100</sup> *Id.* at 514–15 (quoting *Chimel v. California*, 395 U.S. 752, 763 (1969)).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 518.

<sup>103</sup> *See generally id.*

did exactly that.<sup>104</sup> The *Diaz* majority found the cell phone was “immediately associated with [Diaz’s] person,” which allowed the court, applying *Robinson*, to validate the search of its contents.<sup>105</sup> In doing so, the majority perpetuated an ill-advised practice all too common among courts confronted with the warrantless search of an arrestee’s cell phone.<sup>106</sup> Regrettably, the majority in *Diaz* failed to take into account the social context when trying to reconcile the Fourth Amendment with emerging technologies.<sup>107</sup> The social context being that modern cell phones have the ability to store immense amounts of highly personal information.<sup>108</sup> Permitting warrantless searches of any arrestee’s cell phone allows police to leisurely fumble through the cell phone looking for evidence, without probable cause or reasonable suspicion that evidence of the crime of arrest will be found. Such unrestrained authority impermissibly exposes highly private information, criminal or not, to the eyes of a complete stranger.

This note criticizes the decision reached in *Diaz* for the following reasons. First, allowing the search of an arrestee’s cell phone as being incident to arrest stands in stark contrast to the justifications on which the exception was founded.<sup>109</sup> Second, the court upheld the search by analogizing *Diaz*’s cell phone to the cigarette package found in *Robinson*, but should have analogized the cell phone to the footlocker in *Chadwick* instead.<sup>110</sup> Finally, the court should have examined the cell phone as if it were a personal laptop and decided the case accordingly.<sup>111</sup>

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<sup>104</sup> See *Arizona v. Gant*, 556 U.S. 332, 348 (2009) (“We have never relied on *stare decisis* to justify the continuance of an unconstitutional police practice. And we would be particularly loath to uphold an unconstitutional result in a case that is so easily distinguished from the decisions that arguably compel it.”); BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 66–67 (1921) (“I do not mean, of course, that judges are commissioned to set aside existing rules at pleasure in favor of any other set of rules which they may hold to be expedient or wise. I mean that when they are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its discretion and its distance.”).

<sup>105</sup> See *supra* notes 84–88 and accompanying text.

<sup>106</sup> See, e.g., *United States v. Finley*, 477 F.3d 250, 259–60 (5th Cir. 2007) (holding police were permitted to search the defendant’s cell phone because it followed a valid custodial arrest); *Smallwood v. State*, 61 So. 3d 448, 448 (Fla. Dist. Ct. App. 2011) (holding *Robinson* allows the arresting officer to search containers found on a person incident to arrest).

<sup>107</sup> See Orin Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 831 (2004) (“Courts generally do not engage in creative normative inquiries into privacy and technological change when applying the Fourth Amendment to new technologies. For better or for worse, courts have tended to apply the same property-based principles to such cases that they have applied elsewhere.”).

<sup>108</sup> See *infra* notes 141–46 (stating that with the storage capability of modern cell phones, specifically smartphones, a person is able to hold thousands of personal pictures, documents, contacts, and text messages).

<sup>109</sup> See *infra* notes 112–27 and accompanying text.

<sup>110</sup> See *infra* notes 128–63 and accompanying text.

<sup>111</sup> See *infra* notes 164–72 and accompanying text.

*The Exception Swallows the Rule*

When the United States Supreme Court outlined the search incident to arrest exception in *Chimel*, it did so for two simple reasons: (1) to find weapons the arrestee might use, or (2) to preserve evidence that may be concealed or destroyed.<sup>112</sup> The Court was seeking to protect officers and ensure their safety and preserve evidence for trial. In the present context, it is difficult to conceive a cell phone as being a potential “weapon.”<sup>113</sup> Therefore, the only reasonable rationale to uphold a cell phone search as being incident to arrest would be to preserve evidence of criminal conduct.

However, this rationale also fails. To begin, Deputy Fazio’s actions following Diaz’s arrest and seizure of his cell phone exhibited a lack of concern that evidence was in danger of being lost.<sup>114</sup> First, Diaz was arrested and transported to the station with his cell phone still being left on his person.<sup>115</sup> Second, when the cell phone was finally seized at the station it was immediately put into evidence without any attempt to preserve evidence.<sup>116</sup> Third, it was left in the evidence room until Deputy Fazio began his questioning and took it out to look for evidence.<sup>117</sup> Finally, ninety-three minutes after the initial arrest when Deputy Fazio removed Diaz’s cell phone from evidence and rummaged through the text message folder, his sole purpose was investigatory, and not some last-ditch effort to “preserve evidence.”<sup>118</sup> These events plainly show that Deputy Fazio at no time believed time was of the essence to save valuable evidence.

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<sup>112</sup> See *Thornton v. United States*, 541 U.S. 615, 625 (2004) (Scalia & Ginsburg, JJ., concurring). Granted, the Court in *Robinson* went a step further and declared that once a person has been arrested, the authority to conduct a search is automatic and it is of no consequence whether the arresting officer actually had reasonable suspicion that the focus of the search (i.e. the arrestee or a container located on the arrestee) had either weapons or destructible evidence. See *supra* notes 36–41 and accompanying text. However, this “automatic searchability” rule is clearly inapplicable in the realm of cell phones because *Chadwick*, not *Robinson*, is the far more applicable rule of law for the reasons to follow. See *infra* notes 127–62 and accompanying text.

<sup>113</sup> See *People v. Diaz*, 244 P.3d 501, 514 (Cal. 2011) (Werdegar & Moreno, JJ., dissenting) (observing “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 (and if there were, officers would presumably seek to disarm the phone rather than search its data files)”; Chelsea Oxtton, Note, *The Search Incident To Arrest Exception Plays Catch Up: Why Police May No Longer Search Incident To Arrest Without A Warrant*, 43 CREIGHTON L. REV. 1157, 1209 (2010) (“[C]ell phones pose little, if any, threat to police officer safety. The mere content of text messages or any other data stored on a cell phone presents no danger of physical harm to police officers who affect arrests or others. Further, unlike bags, boxes, and luggage that could hold firearms or other dangerous weapons, cell phones are incapable of carrying such weapons.”).

<sup>114</sup> *Diaz*, 244 P.3d at 502.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

While most information stored on a cell phone could be deleted with a few strokes of the keypad, such a fact does not justify a warrantless search of an arrestee's cell phone for the following reasons. First, most cell phone providers retain call records for an extended period of time, as well as text-messaging records, but to a lesser degree.<sup>119</sup> Second, when it comes to other information that could be indicative of criminal conduct stored on a person's cell phone (i.e. pictures, emails, video, etc.), once an officer has the exclusive control of the cell phone sought to be searched and the arrestee is in custody, the destruction of such evidence becomes extremely difficult.<sup>120</sup>

There is technology available allowing a consumer to remotely erase data on a phone.<sup>121</sup> Therefore, it could be argued that an exigency does exist, because there are avenues in which a criminal suspect could wipe the incriminating evidence off their phone without actually having access to it. But to conduct the remote wipe, one must log on to an online account and initiate the wipe by sending a wireless signal to the phone, or contact the cellular provider's information technology (IT) department.<sup>122</sup> It is hard to believe police would allow an arrestee access to the Internet, or the chance to call the appropriate IT representative.<sup>123</sup>

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<sup>119</sup> The author sent an e-mail to Verizon Wireless to inquire about the length of time it retains text messaging records and call records. The following is the response:

Text message content is retained for a limited time (up to ten (10) days (240 hours)) from the date or time received at the message center. After that, the message content is deleted from our message center server and cannot be retrieved. Additionally, this information can only be obtained via a search warrant.

...

You are able to review call details via your online account for the last 12 months.

E-mail from Verizon Wireless Customer Service, to author (July 29, 2011) (on file with author). See also Orso, *supra* note 56, at 198–99 nn.68–69, 71 (noting “the simple fact that an item is a cellular phone does not alone create a ‘now or never’ situation in which police must act immediately to preserve evidence of a crime,” because it is consistent practice among several cellular providers, including Verizon, U.S. Cellular, and T-Mobile, to provide monthly statements of call records, and it is “standard practice in the industry” to retain text messaging records for roughly two weeks).

<sup>120</sup> See *infra* notes 121–25 and accompanying text.

<sup>121</sup> See Kim Komando, *Lost or Stolen Smartphone? Find and Erase it Remotely*, USATODAY (Nov. 12, 2009, 8:31 PM), [http://www.usatoday.com/tech/columnist/kimkomando/2009-11-12-lost-smartphones\\_N.htm](http://www.usatoday.com/tech/columnist/kimkomando/2009-11-12-lost-smartphones_N.htm) (describing the software available to remotely erase data for the iPhone, BlackBerry, Palm Pre, Android, and Windows Mobile).

<sup>122</sup> See *id.*

<sup>123</sup> See Mark Sutton, *Faraday Bags Help Secure Seized Mobile Devices*, ITP.NET (Aug. 26, 2011), <http://www.itp.net/585942-faraday-bags-help-secure-seized-mobile-devices>. To help alleviate the concern of data being lost, through either a remote wipe or some other method of data deletion, there are lightweight and cheap Faraday bags that a cell phone could easily be placed inside. See *id.* These bags are “constructed of silver, nickel and copper, which create a Faraday shield, an enclosure of conductive material which blocks external non-static electric fields such as mobile phone signals.” *Id.* Thus, if police departments equipped their officers with such inexpensive bags, the officers could very easily place the cellular device into these bags, and easily alleviate any concern that the digital evidence would be remotely wiped.



Even if a remote wipe was somehow conducted, mobile phone forensics, a subfield of forensics, is dedicated to data recovery and extraction.<sup>124</sup> Admittedly, deleted data overwritten with new data cannot be recovered through such forensics.<sup>125</sup> However, if data were remotely wiped from a cell phone while in police possession, the only people who have the capability to store new data are the officers themselves. It is inconceivable that those most interested in the preservation of evidence would endeavor to create such an obstacle.

In sum, by allowing warrantless searches of an arrestee's cell phone, the *Diaz* court expanded the search incident to arrest exception well beyond its originally intended scope, allowing the exception to effectively swallow the rule.<sup>126</sup> The rationales that originally supported the search-incident-to-arrest exception from *Chimel* are absent from the situation because there is no reasonable fear of a cell phone being a weapon, nor in losing evidence. Therefore, the arresting officer should be required to obtain a search warrant before examining the contents, instead of being granted great latitude in perusing its highly personal information looking for evidence.<sup>127</sup>

### *Why Robinson Cannot Control*

A cell phone is not analogous to a cigarette package. To suggest otherwise is to oversimplify the problem. In *Diaz*, the majority reached its decision primarily by finding *Diaz*'s cell phone to be personal property immediately associated with his person, and, therefore, subject to search when it was discovered at the station.<sup>128</sup> The majority found the cell phone analogous to the crumpled up cigarette package seized in *Robinson* because both items were discovered on the arrestee's person at the time of arrest.<sup>129</sup> It is uncontested that *Diaz*'s cell phone was found on his person, which without further scrutiny would put the case squarely within *Robinson*.<sup>130</sup> However, for the following reasons, *Robinson* cannot be used to govern warrantless searches of cell phones.

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<sup>124</sup> See generally Wayne Jansen & Rick Ayer, *Guidelines on Cell Phone Forensics*, NAT'L INST. OF STANDARDS AND TECH. (May 2007), <http://csrc.nist.gov/publications/nistpubs/800-101/SP800-101.pdf> (providing the guidelines that should be followed when conducting mobile phone forensics).

<sup>125</sup> See Mike Bedford, *How to Restore Deleted Files and Recover Data from Damaged Disks: Overwritten Files and Scratched Discs*, TECHRADAR.COM (Feb. 13, 2010), [http://www.techradar.com/news/computing/how-to-restore-deleted-files-and-recover-data-from-damaged-disks-669475?artc\\_pg=3](http://www.techradar.com/news/computing/how-to-restore-deleted-files-and-recover-data-from-damaged-disks-669475?artc_pg=3) ("If [a] file has been truly deleted and then overwritten [with new data], the sad news is that you probably won't be able to retrieve it.").

<sup>126</sup> See *supra* notes 28–30 and accompanying text.

<sup>127</sup> See *supra* notes 66–97 and accompanying text.

<sup>128</sup> *People v. Diaz*, 244 P.3d 501, 505 (Cal. 2011).

<sup>129</sup> *Id.* at 505–06.

<sup>130</sup> See *supra* notes 37–41 and accompanying text; see also *United States v. Flores-Lopez*, 670 F.3d 803, 805 (7th Cir. 2012) (noting such "is a fair literal reading of . . . *Robinson* . . . [b]ut . . . [*Robinson*] did not reject the possibility of categorical limits to the rule laid down in it").

The majority in *Diaz* failed to appreciate five fundamental differences between a pack of cigarettes and a cell phone. These differences, if properly considered, should have led the court to conclude that the search incident to arrest exception, as interpreted in *Robinson*, does not apply to cell phones. First, cell phones are not “containers” in the traditional sense; that is, the intangible character of cell phone data precludes its use as a weapon or capable of holding evidence that can be physically destroyed. Second, modern cell phones are capable of accessing almost limitless amounts of data. Third, “cloud” technology means that to a growing extent cell phone contents are only available by linking wirelessly to a remote cellular relay tower. Fourth, cell phone searches potentially expose to public scrutiny almost limitless information of the most private nature. Finally, the central role of technology in the lives of ordinary Americans heightens the expectation of privacy owners have in the content of their cell phones. When viewed as a whole, these characteristics of cellular technology demonstrate that the application of *Robinson* to cell phone searches is woefully inadequate to safeguard precious privacy interests protected by the Fourth Amendment.

First, cell phones are not “containers” in the sense that courts have understood that term in previous search cases. Since *Robinson* was decided, the vast majority of searches that have been found within its holding were searches for tangible evidence or containers capable of holding tangible objects.<sup>131</sup> Examples of “containers” to which *Robinson* has been applied include address books,<sup>132</sup> purses,<sup>133</sup> and wallets.<sup>134</sup> Moreover, the United States Supreme Court has explicitly defined a container as being “any object capable of holding another object.”<sup>135</sup> Cell phone contents by contrast are limited to digital data, the intangible nature of which renders it unavailable for use as a weapon or as evidence that can be physically destroyed.

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<sup>131</sup> See Adam M. Gershowitz, *The iPhone Meets The Fourth Amendment*, 56 UCLA L. REV. 27, 36 (2008) (“For many years, the only evidence found as a result of such searches [incident to arrest] was tangible physical evidence, such as drugs or illegal weapons.”); BLACK’S LAW DICTIONARY 1592–93 (9th ed. 2009) (defining “tangible” as “1. Having or possessing physical form . . . 2. Capable of being touched and seen; perceptible to the touch; capable of being possessed or realized . . . .”); but see generally *United States v. Ortiz*, 84 F.3d 977 (7th Cir. 1996) (upholding the search of a pager incident to arrest, but for reasons to follow a pager is equally incapable of being analogized to a cell phone).

<sup>132</sup> See *United States v. Rodriguez*, 995 F.2d 776, 778 (7th Cir. 1993) (holding “the search of [defendant’s] wallet and the photocopying of the contents of the address book were permissible as a search incident to arrest”).

<sup>133</sup> See *Hinkel v. Anchorage*, 618 P.2d 1069, 1071 (Alaska 1989) (holding “that [defendant’s] purse was property immediately associated with her person and, therefore, was properly searched incident to her arrest”).

<sup>134</sup> See generally *United States v. Passaro*, 624 F.2d 938 (9th Cir. 1980) (upholding the “seizure of defendant’s wallet when he arrived at his initial place of detention following his lawful arrest, the search of its contents, and the photocopying of documents contained in the wallet”).

<sup>135</sup> *New York v. Belton*, 453 U.S. 454, 460 n.4 (1981).

Therefore, the original justifications for the search incident to arrest exception applicable to containers holding tangible contents cannot logically be applied to cell phones.

Second, the intangibility of cell phone contents renders modern cell phones capable of accessing enormous amounts of data.<sup>136</sup> When confronted with a cell phone, the officer who operates it is not merely opening a container in which other tangible evidence is to be found. Instead, he or she is opening a portal giving them access to a wealth of intangible data and information.<sup>137</sup> For example, one of the most popular smartphones today is Apple's iPhone 4, which has access to 32GB of built-in memory.<sup>138</sup> In simple terms, that is the equivalent of storing more than 670,000 document pages, 22,900 photographs, 15,300 MP3 audio files, or 72 hours of video.<sup>139</sup> Moreover, consumers can increase their cell phone's built-in memory by up to 32GB of additional data by purchasing expendable memory sticks.<sup>140</sup> The enormous potential for built-in storage alone renders *Robinson* woefully inadequate for cell phones.

Third, cloud technology further undermines application of *Robinson* to cell phone searches. Cloud computing allows cell phone users "to carry[] out data storage and processing *outside* mobile devices."<sup>141</sup> The data are stored in a remote server rather than on the phone itself and are only accessible by the cell phone when it communicates with a remote cellular tower. In other words, the cell phone is "simply [a] *terminal*[]" . . . only intended to provide a more convenient way of accessing services in the cloud."<sup>142</sup> Thus, the cloud gives cell phone users access to

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<sup>136</sup> See BLACK'S LAW DICTIONARY 879, 1336 (9th ed. 2009) (defining intangible as being "[s]omething that lacks a physical form . . ." and intangible property as "[p]roperty that lacks a physical existence").

<sup>137</sup> See *supra* note 73 (explaining that in the present case, Detective Fazio admitted that he had to go through several screens before gaining access to the text message folder).

<sup>138</sup> Zach Epstein, *Apple's iPhone 4 Still Top-Selling Smartphone at AT&T, Verizon in September*, BGR.COM (Oct. 11, 2011, 10:00 AM), <http://www.bgr.com/2011/10/11/apples-iphone-4-still-top-selling-smartphone-at-att-verizon-in-septembet/>; *iPhone 4S Technical Specifications*, APPLE, <http://www.apple.com/iphone/specs.html> (last visited Apr. 11, 2012).

<sup>139</sup> *Number of Photos, Songs, Documents, and Video Hours a SanDisk Cruzer USB Flash Drive can Hold*, SANDISK, [http://kb.sandisk.com/app/answers/detail/a\\_id/462/-/number-of-photos,-songs,-documents,-and-video-hours-a-sandisk-cruzer-usb-flash](http://kb.sandisk.com/app/answers/detail/a_id/462/-/number-of-photos,-songs,-documents,-and-video-hours-a-sandisk-cruzer-usb-flash) (last visited Apr. 11, 2012).

<sup>140</sup> See *Sandisk First to Ship 32 Gigabyte MicroSDHC Card*, SANDISK (Mar. 22, 2010), <http://www.sandisk.com/about-sandisk/press-room/press-releases/2010/2010-03-22-sandisk-first-to-ship-32-gigabyte-microsdhc-card> (announcing the release of the "world's highest-capacity removable memory card for mobile phones," capable of holding 32GB of additional data).

<sup>141</sup> Xiaopeng Fan et al., *A Survey of Mobile Cloud Computing*, BIZ 2.0 BLOG (May 1, 2011, 4:42 PM), <http://blog.naver.com/PostView.nhn?blogId=victorikoh&logNo=140128773111> (emphasis added).

<sup>142</sup> *Id.* (emphasis added).

data and information, via an Internet connection, that is not even on their phone. Therefore, since such information is not even on the cell phone it *cannot possibly be* on the user's person, and thus, *Robinson* cannot apply.

Fourth, modern cell phone technology creates greater privacy concerns when compared to traditional "containers."<sup>143</sup> As one court put it, no matter how minor the offense, the arrestee "is at risk of having [their] most *intimate* information viewed by [the] arresting officer."<sup>144</sup> Call logs, text messages, pictures, e-mails, Internet browsing history, appointment calendars, audio and video recordings, electronic documents, and user location information are all fair game if *Robinson* were to be applied to cell phones.<sup>145</sup> Given the fact a cell phone can store vast amounts of highly private information, as well as give access to even more information via cloud computing, a person has an extremely high expectation of privacy in the contents thereof.<sup>146</sup> The actual contents might include business trade secrets, bank account numbers, passwords, entire conversations, or video portrayals of the most intimate human conduct. In one troubling case, a warrantless police search revealed sexually explicit photos of the arrestee and his girlfriend.<sup>147</sup> An officer later revealed the materials to others in the police department, merely for their "viewing enjoyment."<sup>148</sup> Even more troubling, cell phone searches may expose recordings of the owner's private thoughts—quite literally giving the police access to what is inside the owner's mind.<sup>149</sup> In sum, the character of cell phone contents, coupled with the potential exploitation of highly private information by police, strongly weighs against application of *Robinson* in cell phone search cases.

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<sup>143</sup> See *United States v. Flores-Lopez*, 670 F.3d 803, 805 (7th Cir. 2012) ("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 . . ."); *State v. Smith*, 920 N.E.2d 949, 955 (Ohio 2009) (recognizing cell phones' "abilit[ies] 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") (emphasis added).

<sup>144</sup> *Schlossberg v. Solesbee*, No. 10–6014–TC, 2012 WL 141741, at \*4 (D. Or. 2012) (emphasis added).

<sup>145</sup> See *id.*

<sup>146</sup> See, e.g., *United States v. Zavala*, 541 F.3d 562, 577 (5th Cir. 2008); *Schlossberg*, 2012 WL 141741 at \*4; *United States v. Burgard*, No. 10-CR-30085 DRH, 2011 WL 353520, at \*5 (S.D. Ill. 2011); *United States v. Quintana*, 594 F. Supp. 2d 1291, 1299 (M.D. Fla. 2009); *United States v. Park*, No. CR 05-375 SI, 2007 WL 1521573, at \*8 (N.D. Cal. 2007); *Fawdry v. State*, 70 So. 3d 626, 630 (Fla. Dist. Ct. App. 2011); *Smallwood v. State*, 61 So. 3d 448, 461 (Fla. Dist. Ct. App. 2011); *Hawkins v. State*, 723 S.E. 2d 924, 926 (Ga. 2012); *State v. Smith*, 920 N.E.2d 949, 955 (Ohio 2009).

<sup>147</sup> *Schlossberg*, 2012 WL 141741, at \*4 (citing *Newhard v. Bowers*, 649 F. Supp. 2d 440, 444 (W.D. Va. 2009)).

<sup>148</sup> *Id.*

<sup>149</sup> See also *Flores-Lopez*, 670 F.3d at 806 (describing the iPhone application iCam, "[which] allows [a person] to access [their] home computer's webcam so that [they] can survey the inside of [their] home while . . . a thousand miles away. . . . [Thus,] [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 . . .").

The failure of the court in *Diaz* to appreciate the characteristics of cell phones that clearly distinguish them from a pack of cigarettes—the intangibility of cellular data, the lack of a “container” in which to store weapons or evidence, the access to boundless data, the emergence of cloud computing, the remote storage of cellular contents, the highly private nature of the contents, the central role of cell phones in modern life—reveals a catastrophic flaw in the *Diaz* court’s logic. Accordingly, *Robinson* cannot govern the search of an arrestee’s cell phone. More specifically, the search incident to arrest exception to the Fourth Amendment warrant requirement should not be applied to cell phones, and a warrant should be required for cell phone searches. A primary goal of the Fourth Amendment is “to curb arbitrary exercises of police power . . . .”<sup>150</sup> By allowing police to search an arrestee’s cell phone simply because it was on one’s person, absent either of the original justifications of the search incident to arrest exception, is indeed arbitrary.

### *Why Chadwick Should Control*

The situation presented in *Diaz* is more appropriately controlled by the considerations presented in *Chadwick*.<sup>151</sup> *Diaz*’s cell phone, even though found on his person, should have been characterized as within his immediate control, thus invalidating the warrantless search that took place ninety-three minutes later.<sup>152</sup> Such a conclusion becomes obvious when one reduces the digital, intangible items capable of being carried in a cell phone to tangible form. If the mountain of information contained in a cell phone, especially smartphones, were instead in tangible form, it would be *impossible* for *any* person to carry it “on their person.”<sup>153</sup> However, such information could potentially be stored in a large receptacle, such as the 200-pound luggage footlocker in *Chadwick*, but not directly on their person.<sup>154</sup> A cell phone is far more analogous to *Chadwick*’s footlocker because of both objects’ vast storage capacities, rather than to *Robinson*’s cigarette package.<sup>155</sup> Accordingly, in *Chadwick*, the Court noted that “once [police] have reduced luggage or other personal property not immediately associated with the [arrestee’s] person . . . to their exclusive control . . . a search of that property is

<sup>150</sup> *United States v. Jones*, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring).

<sup>151</sup> *See supra* notes 42–54 and accompanying text; *see also* *People v. Diaz*, 244 P.3d 501, 518 (Cal. 2011) (Werdegar & Moreno, JJ., dissenting).

<sup>152</sup> *See supra* note 54 and accompanying text.

<sup>153</sup> *See infra* note 162.

<sup>154</sup> *See* *Schlossberg v. Solesbee*, No. 10–6014–TC, 2012 WL 141741, at \*3 (D. Or. 2012) (“In order to carry the same amount of personal information contained in many of today’s electronic devices in a container, a citizen would have to travel with one or more large suitcases, if not file cabinets.”).

<sup>155</sup> *See* *United States v. Park*, No. CR 05-375 SI, 2007 WL 1521573, at \*9 (N.D. Cal. 2007) (holding that “due to the quantity and quality of information that can be stored on a cellular phone, a cellular phone should not be characterized as an element of individual’s clothing or person, but rather as a ‘possession[] within an arrestee’s immediate control [that has] fourth amendment protection at the station house’”) (citation omitted).

no longer an incident of the arrest.”<sup>156</sup> Thus, once Diaz’s cell phone had been seized at the station house and placed in evidence, Deputy Fazio should have been required to procure a search warrant before rummaging through its contents looking for evidence.

The *Diaz* majority noted that courts for years have upheld searches, incident to arrest, of items such as purses,<sup>157</sup> pagers,<sup>158</sup> wallets,<sup>159</sup> and address books<sup>160</sup> that hold information very similar to cell phones.<sup>161</sup> However, by allowing searches of cell phones simply because they can fulfill similar functions is extremely misguided. With the growing capabilities of cell phones, the amount of highly personal information capable of being stored dwarfs that which can be stored on any of the previously mentioned items.<sup>162</sup> To allow warrantless searches of modern cell phones simply because searches of items capable of holding similar information have been upheld would be unduly overbroad. While cell phones store similar information such as address books, wallets, etc., the big distinguishing factor is cell phones are able to hold the information stored in not just one of these items, but all of them and more.<sup>163</sup>

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<sup>156</sup> *United States v. Chadwick*, 433 U.S. 1, 15 (1977).

<sup>157</sup> *See supra* note 133 and accompanying text.

<sup>158</sup> *See United States v. Ortiz*, 84 F.3d 977, 984 (7th Cir. 1996) (holding that “officers [must] have the authority to immediately ‘search’ or retrieve, incident to a valid arrest, information from a pager in order to prevent its destruction . . . [b]ecause of the finite nature of a pager’s electronic memory, incoming pages may destroy currently stored telephone numbers in a pager’s memory”).

<sup>159</sup> *See supra* note 132 and accompanying text.

<sup>160</sup> *See supra* note 132 and accompanying text.

<sup>161</sup> *People v. Diaz*, 244 P.3d 501, 509 n.10 (Cal. 2011).

<sup>162</sup> *See supra* notes 8–9. Even basic cell phones have the ability to store hundreds of contacts, as well as call and text-messaging records. *See United States v. Flores-Lopez*, 670 F.3d 803, 806 (7th Cir. 2012) (“Even the dumbest of modern cell phones gives the user access to large stores of information.”). Regardless, 33% of American adults currently own a smartphone. Aaron Smith, *Smartphone Adoption and Usage*, PEW INTERNET AND AM. LIFE PROJECT (Jul. 11, 2011), <http://pewinternet.org/Reports/2011/Smartphones.aspx>. Moreover, smartphone users recently dominated the number of basic cell phone users. *Smartphone Users Became More Dominant than Basic Mobile Phone Users*, TECHGEEZE (Mar. 8, 2012), <http://www.techgeezee.com/2012/03/smartphone-users-became-more-dominant-than-basic-mobile-phone-users.html>. Therefore, it is reasonable to use the storage capability of a smartphone as the appropriate variable when comparing it to the storage capability of the above-mentioned items and their contents.

<sup>163</sup> *See supra* note 9; *supra* notes 138–40 and accompanying text. As previously noted, 32GB can store more than 670,000 typical Word document pages, 22,900 photographs, 15,300 MP3 audio files, 72 hours of video, or some combination thereof. *Supra* note 139 and accompanying text. To properly compare the storage capability of a smartphone to that of items traditionally searched incident to arrest, one would need a purse capable of holding 1020 compact discs (15,300 MP3 files divided by fifteen tracks), a wallet capable of holding 22,900 pictures, or an address book capable of holding 670,000 pages of information. *See id.* Additionally, consumers can use expendable memory sticks capable of holding upwards of an additional 32GB, potentially doubling the above comparison. *See supra* note 140 and accompanying text.

### *Laptops*

In addition to the above critiques of the *Diaz* decision, a more fitting analogy for cell phones, and more specifically smartphones, is a laptop computer.<sup>164</sup> Had the *Diaz* court considered such a fit, it would have helped guide the answer to the question of whether *Robinson* or *Chadwick* governed. As the technology and storage capabilities of modern cell phones continue to grow, they become increasingly similar to laptop computers.<sup>165</sup> Therefore, the *Diaz* majority should have taken the applicable authority governing the searches of laptops, as well as other relevant characteristics, into consideration when it decided the case. The reason for analogizing an arrestee's cell phone to a personal laptop, rather than a cigarette pack, is because laptops generally warrant greater protection under the Fourth Amendment.<sup>166</sup> Consequently, because laptops and cell phones have grown technologically indistinguishable as they have advanced, they should be examined similarly.<sup>167</sup>

As mentioned, courts have had little occasion to confront the issue of laptop searches incident to arrest.<sup>168</sup> Such a fact could reasonably lead one to presume that such searches are and will be frowned upon by the bench.<sup>169</sup> Likewise, some law enforcement agencies specifically advise their officers to only seize a person's laptop and not search its contents because of the uncertainty surrounding

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<sup>164</sup> See *supra* notes 8–10 and accompanying text (analogizing a cell phone to a laptop helps counter the argument that cell phones are searchable incident to arrest under *Robinson* merely because they are similar in size to a cigarette package).

<sup>165</sup> See *Flores-Lopez*, 670 F.3d at 804 (“[A] modern cell phone *is* a computer.”).

<sup>166</sup> See *State v. Smith*, 920 N.E.2d 949, 955 (Ohio 2009) (recognizing that because laptops “have the ability to transmit large amounts of data in various forms,” they “are entitled to a higher expectation of privacy”); see also *United States v. Arnold*, 454 F. Supp. 2d 999, 1004 (C.D. Cal. 2006) (observing that because laptops can “contain vast amounts of information . . . a search of their contents [is] substantially more intrusive”).

<sup>167</sup> *Contra Smith*, 920 N.E.2d at 955 (stating “cell phones are neither address books nor laptop computers. They are more intricate and multifunctional than traditional address books, yet they are still, in essence, phones, and thus they are distinguishable from laptop computers”). The main distinction between laptops and smartphones used to be the latter's ability to make phone calls, but with the growing use of internet video calling technology on personal laptops, the distinction has grown increasingly blurry. See Orso, *supra* note 56, at 213 (noting “some people now use their personal computers and laptops instead of phones, communicating orally through services like Skype”).

<sup>168</sup> See *supra* notes 56–58 and accompanying text.

<sup>169</sup> See Orso, *supra* note 56, at 224 (arguing that because “there is a dearth of search incident to arrest jurisprudence regarding laptops or personal computers, various factors indicate that many courts would invalidate such searches . . . if the only basis for the search is that it was incident to arrest . . .”). Therefore, “[f]or computers and smart phones alike, courts should require that police obtain a warrant before examining the contents of these devices.” *Id.*

whether such devices are searchable incident to arrest.<sup>170</sup> In sum, the sources that have considered laptop searches indicate that because a laptop can store immense amounts of personal information and also send and receive such information in various forms, it deserves a greater amount of protection from warrantless searches incident to arrest.<sup>171</sup>

Therefore, because cell phones are becoming technologically indistinguishable from laptop computers, they too should be afforded the same amount of heightened protection.<sup>172</sup> Yet the *Diaz* majority failed to take this into account when determining whether the search of *Diaz*'s cell phone was permissible as incident to arrest. The *Diaz* majority simply held because cell phones are "containers" generally found on the person, they are subject to being opened and searched as decided in *Robinson*. Conversely, personal laptops cannot be carried on the person due to their size, and are generally found within an arrestee's immediate control, perhaps in some sort of case near the person, or maybe in the trunk of a person's car. If the *Diaz* majority had taken this into consideration, it would have aided them in determining that *Chadwick* was the better analogy to govern the outcome.

#### CONCLUSION

The Fourth Amendment was enacted to allow the people "to be secure in their persons" from the awesome power of the state.<sup>173</sup> While there are circumstances to justify certain warrantless searches, searching an arrestee's cell phone is simply not one of them. Since emerging technologies are inherently ever evolving, such as cell phones, courts should tread with the utmost caution when police concerns and efficiency are met with such technologies.<sup>174</sup> However, the *Diaz* majority

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<sup>170</sup> See Joshua A. Engel, *Doctrinal Collapse: Smart Phones Cause Courts to Reconsider Fourth Amendment Searches of Electronic Devices*, 41 U. MEM. L. REV. 233, 252 n.107 (2010) (stating "an FBI manual recommends seizing computers and then obtaining a warrant" because "[c]ourts have not addressed whether electronic media with the vast storage capacity of today's laptop computers may be searched incident to arrest"). Additionally, the Tampa Police Department has recognized that the "seizure of computer equipment . . . is an emerging area of the law," and has informed its officers "there are almost no circumstances in which a computer should be examined by seizing officers," and officers should "not operate the computer in any way." TAMPA POLICE DEP'T, STANDARD OPERATING PROCEDURES, SEC. 338: SEIZURE OF COMPUTER EQUIPMENT (Nov. 22, 2011), [http://www.tampagov.net/dept\\_police/Files/publications/TPD\\_SOP.pdf](http://www.tampagov.net/dept_police/Files/publications/TPD_SOP.pdf).

<sup>171</sup> See *supra* notes 165, 169.

<sup>172</sup> See *supra* note 8.

<sup>173</sup> See *supra* note 16 and accompanying text.

<sup>174</sup> See *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2742 (2012) (Alito, J., & Roberts, C.J., concurring).

In considering the application of unchanging constitutional principles to new and rapidly evolving technology, this Court should proceed with caution. We should make every effort to understand the new technology. We should take into account the possibility that developing technology may have important societal implications that



failed to so tread the waters.<sup>175</sup> Instead it jeopardized California citizens' rights by granting the police of California great authority to impermissibly violate a person's fundamental right of privacy.<sup>176</sup>

Absent justifiable rationales for circumventing the Warrant Clause, a court, responsible for weeding out violations, should not give protection to those who did the violating.<sup>177</sup> Regrettably, due to a lack of understanding of cell phones and their capabilities, the *Diaz* majority gave police such protection. The majority in *Diaz* should have recognized that the justifications governing searches incident to arrest were wholly absent from the situation, and accordingly suppressed the evidence.<sup>178</sup> They should have seen that when the intangible contents of a cell phone are re-conceptualized into tangible form, not even Hercules himself could have carried them "on his person."<sup>179</sup> Accordingly, they should have recognized that the only plausible conclusion was that *Diaz's* cell phone was within his immediate control, and the delayed warrantless search was unjustified when *Diaz's* cell phone came under the exclusive control of Deputy Fazio. Consequently, Deputy Fazio should have been required to obtain a search warrant bolstered by probable cause and specifying the parameters of the search as decided by a neutral and detached magistrate.<sup>180</sup> The *Diaz* majority, for the above reasons, failed to properly decide the case, and in doing so failed the citizens of California.

will become apparent only with time. We should not jump to the conclusion that new technology is fundamentally the same as some older thing with which we are familiar.

*Id.*

<sup>175</sup> See *supra* notes 84–97 and accompanying text.

<sup>176</sup> Recently, the California legislature recognized this obvious violation and almost unanimously passed a bill (102 votes for, 4 against), which would have effectively overturned the *Diaz* decision. See 2011 CA S.B. 914 (Sep. 9, 2011). However, the Governor of California vetoed the bill. See 2011 CA S.B. 914 (Oct. 9, 2011).

<sup>177</sup> *Weeks v. United States*, 232 U.S. 383, 392 (1914), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which the people of all conditions have a right to appeal for the maintenance of such fundamental rights.

*Id.*

<sup>178</sup> See *supra* notes 112–27 and accompanying text; see also *Arizona v. Gant*, 556 U.S. 332, 339 (2009) (noting that when "both justifications for the search-incident-to-arrest exception are absent" the exception "does not apply").

<sup>179</sup> See *supra* notes 151–63 and accompanying text.

<sup>180</sup> See *United States v. Johnson*, 333 U.S. 10, 13–14 (1948).

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime . . .

*Id.*