Constitutional Law—Warrants Required to Search Cell Phones Seized Incident to Arrest—*State v. Smith*, 920 N.E.2d 949 (Ohio 2009)

The Fourth Amendment to the United States Constitution guarantees that persons shall be free from searches that invade their reasonable expectation of privacy without a warrant issued on the basis of probable cause.[1] Search incident to an arrest represents one of four primary exceptions to the requirement for search warrants.[2] In *State v. Smith*,[3] the Supreme Court of Ohio confronted a modern question about the scope of searches incident to arrest: when police arrest a person with a cell phone, may the arresting officers search the information stored in the phone?[4] Concluding that a cell phone should not be characterized as a closed container, the Supreme Court of Ohio held that a cell phone's storage capacity creates and justifies a high expectation of privacy in the cell phone's stored information and the state may not invade that interest without a warrant.[5]

On January 21, 2007, the Beavercreek Police arrested Antwaun Smith prior

1. *See* U.S. CONST. amend. IV. The Fourth Amendment states, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches . . . shall not be violated, and no Warrants shall issue, but upon probable cause." *Id.* The Supreme Court has characterized the protection of a person's legitimate privacy interests from governmental invasion as a fundamental purpose of the Fourth Amendment. *See* United States v. Chadwick, 433 U.S. 1, 7 (1977).

2. *See* Chimel v. California, 395 U.S. 752, 763 (1969) (announcing modern understanding of search incident to arrest exception); Katz v. United States, 389 U.S. 347, 357 (1967) (noting searches conducted outside judicial process per se unreasonable subject to specifically established exceptions); *see also* James J. Tomkovicz, *Divining and Designing the Future of the Search Incident to Arrest Doctrine: Avoiding Instability, Irrationality, and Infidelity*, 2007 U. ILL. L. REV. 1417, 1419-29 (2007) (summarizing extensive history of search incident to arrest exception). The three other primary exceptions to the warrant requirement are: searches of objects in the "plain view" of an officer legitimately at a location, searches performed under exigent circumstances, and searches performed with consent. *See generally* Washington v. Chrisman, 455 U.S. 1 (1982) (holding "plain view" exception justified drug paraphernalia seizure in arrestee's room); Mincey v. Arizona, 437 U.S. 385 (1978) (permitting warrantless search with probable cause and belief evidence might be destroyed before warrant obtained); Amos v. United States, 255 U.S. 313 (1921) (recognizing Fourth Amendment rights may be waived). These exceptions are beyond the scope of this Comment.

3. 920 N.E.2d 949 (Ohio 2009).

4. *Id.* at 950. Few appellate courts have addressed the scope of warrantless searches of cell phones conducted incident to arrest. *See* United States v. Murphy, 552 F.3d 405, 411-12 (4th Cir. 2009) (relying on officer's need to preserve evidence to permit warrantless search incident to arrest); United States v. Finley, 477 F.3d 250, 259-60 (5th Cir. 2007) (relying on Supreme Court precedent concerning closed containers to hold cell phone searchable without warrant), *cert. denied* 549 U.S. 1353 (2007); *see also* United States v. Ortiz, 84 F.3d 977, 984 (7th Cir. 1996) (holding warrantless search incident to arrest of arrestee's pager for telephone numbers lawful), *cert. denied* 519 U.S. 900 (1996). As noted by the Supreme Court of Ohio, the Supreme Court of California is considering a case concerning the validity of a warrantless cell phone search. *See* 920 N.E.2d at 952 n.2 (citing People v. Diaz, 196 P.3d 220 (Cal. 2008)).

5. 920 N.E.2d at 954-55 (discussing unique character of cell phones and associated privacy interests); *see infra* notes 26-30 and accompanying text (discussing other courts' analogies between cell phones and closed containers).

to a crack cocaine sale.[6] During Smith's arrest, the police seized and later searched his cell phone without a warrant or Smith's consent.[7] After his indictment, Smith filed a pretrial motion to suppress the evidence obtained by searching his cell phone.[8] During the trial, the court relied on *United States v. Finley*[9] to allow testimony regarding Smith's call records and phone numbers discovered during the search.[10] A jury found Smith guilty and the trial court imposed a sentence of imprisonment.[11]

Smith appealed to the Second Appellate District of the Court of Appeals of Ohio assigning five errors, including the trial court's failure to suppress the cell phone record evidence obtained from the search of his phone.[12] A divided court rejected Smith's contention that a search is unreasonable when police have ample opportunity to obtain a search warrant and fail to do so.[13] The court held that the trial judge properly admitted Smith's call records and address book containing an informant's number.[14] Because the trial court granted Smith's motion to suppress incriminating photographs obtained during the search, the appellate court did not consider other broader privacy interests

6. 920 N.E.2d at 950. An informant cooperating with the Beavercreek Police arranged for the purchase. *Id.* Subsequently, the state indicted Smith on criminal counts related to possession of, and trafficking in, cocaine. *Id.* at 951.

7. *Id.* at 950. The time of the police's search of Smith's phone is unknown. *Id.* The Supreme Court of Ohio noted that while "the record does not show exactly when [the police] first searched Smith's cell phone . . . at least a portion of the search took place when officers returned to the police station and were booking into evidence the items seized from the crime scene." *Id.* The Ohio Court of Appeals indicated that police searched Smith's phone some time prior to booking him into jail. State v. Smith, No. 07-CA-47, 2008 WL 2861693, at *1 (Ohio Ct. App. July 25, 2008). The call records and numbers found within the phone confirmed Smith's involvement with the informant. 920 N.E.2d at 950.

8. 920 N.E.2d at 951. After a hearing, the trial court ruled it would make its determination regarding admissibility upon an offer of the evidence. *Id.*

9. 477 F.3d 250 (5th Cir. 2007).

10. 920 N.E.2d at 951; *see also infra* notes 27-28 and accompanying text (discussing *Finley* reasoning). The trial court did not, however, allow the state to admit incriminating photographs that police found in the phone. 920 N.E.2d at 951. The appellate record does not describe the trial court's reasoning for admitting only the phone's call records and numbers that matched information from the informant. State v. Smith, No. 07-CA-47, 2008 WL 2861693, at *8 (Ohio Ct. App. July 25, 2008).

11. 920 N.E.2d at 951 (stating verdict at trial).

12. State v. Smith, No. 07-CA-47, 2008 WL 2861693, at *2 (Ohio Ct. App. July 25, 2008).

13. State v. Smith, No. 07-CA-47, 2008 WL 2861693, at *5 (Ohio Ct. App. July 25, 2008).

14. State v. Smith, No. 07-CA-47, 2008 WL 2861693, at *7-8 (Ohio Ct. App. July 25, 2008). Adopting the *Finley* approach, Judge Brogan characterized the search of Smith's phone as a search of Smith's person, noting that officers obtained Smith's phone "immediately from his person" and that the search was "substantially contemporaneous" to the arrest. *Id.* at *7; *see also infra* notes 27-28 and accompanying text (discussing *Finley* reasoning). Judge Fain concurred but relied on narrower grounds for holding the search reasonable. *See* State v. Smith, No. 07-CA-47, 2008 WL 2861693, at *8 (Ohio Ct. App. July 25, 2008) (Fain, J., concurring) (holding exigent circumstances justified reasonable search of phone's memory without waiting for warrant). Judge Donovan offered a third approach. *See id.* at *8-11 (Donovan, J., dissenting) (characterizing cell phone as possession within immediate control of accused deserving greater protection); *see also infra* notes 27, 29-30 and accompanying text (discussing *Park* reasoning that phones not associated with person because of immense storage capacity).

that Smith may have possessed in the contents of his cell phone.[15] The Supreme Court of Ohio reversed the Ohio Court of Appeals, refusing to analogize a cell phone to a closed container and maintaining that Smith had a protected privacy interest in the information stored in his phone, which could not be invaded during a search incident to arrest.[16]

The United States Supreme Court announced the permissible scope of a lawful search incident to arrest under the Fourth Amendment in *Chimel v. California*.[17] A search is reasonable when it is justified by the arresting officer's need to protect his safety and to prevent the concealment or destruction of evidence.[18] The extent to which these justifications are present varies with the scope of the search—that is, whether the search is of an arrestee's person or an area within an arrestee's immediate control.[19] Similarly, the location of the search and the amount of time between the arrest and the search are both factors courts use to determine if a search was reasonable.[20]

15. State v. Smith, No. 07-CA-47, 2008 WL 2861693, at *7 (Ohio Ct. App. July 25, 2008) (acknowledging enormous amount of private information subject to cell phone searches).

16. *See* 920 N.E.2d at 951, 954-55; *see also infra* notes 32-36 and accompanying text (discussing court's refusal to classify cell phones as closed containers).

17. 395 U.S. 752 (1969).

18. Chimel v. California, 395 U.S. 752, 763 (1969) (recognizing justifications for searches incident to arrest limit scope of such searches); *see also* Tomkovicz *supra* note 2, at 1427-29 (suggesting two rationales authorizing searches incident to arrest intended to stabilize scope of exception). The *Chimel* Court concluded that ample justification exists for a search of an arrestee's person and the area within his or her immediate control, but no comparable justification exists for searching closed or concealed areas from which the arrestee could not gain possession of a weapon or destructible evidence. Chimel v. California, 395 U.S. 752, 763 (1969); *see also* United States v. Robinson, 414 U.S. 218, 224 (1973) (identifying two areas searchable incident to lawful arrest). The Court in *Robinson* made clear that officers performing a search incident to a lawful arrest need not articulate any additional suspicion to justify the search: the fact of the lawful arrest establishes the authority to search. United States v. Robinson, 414 U.S. 218, 235 (1973) (recognizing custodial arrest based on probable cause as reasonable and lawful intrusion under Fourth Amendment). The scope of the search incident to arrest exception has been criticized as being too broad, immunizing highly invasive searches from constitutional scrutiny. *See* Wayne A. Logan, *An Exception Swallows a Rule: Police Authority to Search Incident to Arrest*, 19 YALE L. & POL'Y REV. 381, 392-94 (2001) (discussing Court's search incident to arrest jurisprudence). Relying on similar justifications, the Court has upheld searches of items police seized during an arrest at a police station. *See* Illinois v. Lafayette, 462 U.S. 640, 645-47 (holding inventory search of contents of arrestee's shoulder bag reasonable under Fourth Amendment).

19. *See* United States v. Robinson, 414 U.S. 218, 224-26, 230-33 (1973) (tracing history of support for search of person and area of immediate control). The *Robinson* Court held that all searches of a person following a lawful arrest are reasonable under the Fourth Amendment, including inspection of a crumpled package of cigarettes containing heroin capsules. *Id.* at 235-36; *see also* Craig M. Bradley, *The Court's "Two Model" Approach to the Fourth Amendment: Carpe Diem!*, 84 J. CRIM. L. & CRIMINOLOGY 429, 430-32 (1993) (criticizing broad search authority granted under *Robinson*); Tomkovicz, *supra* note 2, at 1430-32 (discussing implications of expansion of authority to search area within arrestee's control).

20. *Compare* United States v. Edwards, 415 U.S. 800, 802-03 (1974) (holding lawful search of clothing at police station twelve hours after arrest), *with* United States v. Chadwick, 433 U.S. 1, 15 (1977) (holding unlawful search of luggage exclusively controlled by police conducted two hours after arrest), *abrogated on other grounds by* California v. Acevedo, 500 U.S. 565 (1982). *Edwards* and *Chadwick* may be distinguishable, however, because *Edwards* involved a search of the person, while *Chadwick* involved a search of a possession within an arrestee's immediate control. *See* United States v. Chadwick, 433 U.S. 1, 16 n.10 (1977). Searches of possessions within an arrestee's immediate control and searches of a person are not neatly divided

These justifications support the reasonableness of a search of a closed container incident to a lawful arrest.[21]

The United States Supreme Court has not expressly defined closed containers or when they should be associated with an arrestee's person as opposed to the area within an arrestee's immediate control.[22] Traditionally, the scope of a closed container search was limited to the physical objects the container held, but the development of digital devices has altered traditional, physical conceptions of containers.[23] Without clear guidance from the Supreme Court, lower courts have attempted to apply traditional legal rules to the new challenge of digital information.[24] The proliferation of cell phones in

categories. *See* Bradley, *supra* note 19, at 433-34 (noting apparent contradiction between *Robinson* and *Chadwick*); Matthew E. Orso, Article, *Cellular Phones, Warrantless Searches, and the New Frontier of Fourth Amendment Jurisprudence*, 50 SANTA CLARA L. REV. 183, 196, 200-06 (2010) (noting divide between characterization as search of person versus controlled possession in cell phone context); *see also supra* note 19 (discussing *Robinson* Court's treatment of search of cigarette package as search of person).

21. *See* New York v. Belton, 453 U.S. 454, 460 (1981) (holding lawful search of jacket pocket in backseat of vehicle incident to arrest). *Belton* not only created a bright-line rule that a passenger compartment is an area within the arrestee's control and police may search it without a warrant following a lawful arrest, but also that police may search all *containers* they find in the passenger compartment. *Id.* The Court described a container as "any object capable of holding another object . . . includ[ing] closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like." *Id.* at 461 n.4. Recently, and consistent with the *Chimel* justifications, the Supreme Court limited searches of a vehicle's passenger compartment incident to arrest to circumstances where the arrestee is within reaching distance of the compartment at the time of the search, or it is reasonable to believe the vehicle contains evidence of the offense of arrest. *See* Arizona v. Gant, 129 S. Ct. 1710, 1714 (2009). The *Gant* Court recognized the serious threat *Belton*'s authorization of searches of passenger compartments and any containers found within posed to the privacy of individuals, but nevertheless allowed searches of containers that might contain evidence of the crime for which police arrested the individual. *See id.* at 1720; *see also* Jason Hermele, Comment, Arizona v. Gant*: Rethinking the Evidence-Gathering Justification for the Search Incident to Arrest Exception, and Testing a New Approach*, 87 DENV. U. L. REV. 175, 185 (2009) (arguing *Gant* undermines Fourth Amendment protections with regard to evidentiary crimes).

22. *See supra* note 21 (discussing *Belton* footnote identifying closed containers found in vehicles); *see also* United States v. Chadwick, 433 U.S. 1, 15 (1977) (determining luggage associated with search of possession in control of person); United States v. Robinson, 414 U.S. 218, 235-36 (1973) (holding cigarette package associated with search of person). The Court has purposefully declined to create a distinction between types of containers for the purpose of Fourth Amendment protective analyses, stating instead that the protection varies based on the privacy interests an individual possesses in different circumstances. *See* United States v. Ross, 456 U.S. 798, 822-23 (1982).

23. *See* Orin S. Kerr, *Digital Evidence and the New Criminal Procedure*, 105 COLUM. L. REV. 279, 301-02 (2005) [hereinafter Kerr, *Digital Evidence*] (noting digital evidence alters relationship between size of space searched and information stored inside); Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 HARV. L. REV. 531, 541-43, 554 (2005) [hereinafter Kerr, *Digital World*] (discussing difference in defined limits to searches of homes or containers versus digital devices).

24. When holding searches incident to arrest lawful, courts have attempted to analogize technological devices to other physical objects. *Compare* United States v. Ortiz, 84 F.3d 977, 983-84 (7th Cir. 1996) (electronic pager), *with* United States v. Rodriguez, 995 F.2d 776, 778 (7th Cir. 1993) (address book), *and* United States v. Passaro, 624 F.2d 938, 943-44 (9th Cir. 1980) (wallet). These analogies rely on the premise that a technological object is simply a *closed container* of data, and a person's privacy interest is in the container rather than having separate and distinct privacy interests in the container and the data stored in it. *See* United States v. Chan, 830 F. Supp. 531, 534-35 (N.D. Cal. 1993). As containers associated with the arrestee, pagers, address books, and wallets are subject to lawful searches incident to arrest. *See* United States v.

the United States has sparked several disputes regarding the lawfulness of searches of phones made incident to arrest.[25]

Courts considering the lawfulness of searches of cell phones incident to arrest typically classify cell phones as closed containers.[26] Two approaches have emerged, however, to determine if a cell phone should be associated with the arrestee's person or treated as an item in the arrestee's possession.[27] When police arrest an individual carrying a cell phone, courts following the *Finley* approach will uphold the police's search of the information stored in the phone, because such courts consider the phone to be part of the arrestee's person.[28] Courts following the *Park* approach do not accept the search incident to arrest exception as a foundation for searching a cell phone, because those courts consider the phone a possession within the control of the arrestee.[29] Although the *Park* court recognized the evidence-destruction justification for these searches, it concluded that seizing the phone was sufficient to prevent

Robinson, 414 U.S. 218, 235 (1973).

25. *See, e.g.*, United States v. Rodriguez-Alejandro, 664 F. Supp. 2d 1320 (N.D. Ga. 2009); United States v. Curry, Criminal No. 07-100-P-H, 2008 WL 219966, at *1 (D. Me. Jan. 23, 2008); United States v. Lasalle, Cr. No. 07-00032 SOM, 2007 WL 1390820, at *1 (D. Haw. May 9, 2007). Law enforcement personnel regularly use devices to extract the digital information stored within cell phones to investigate crimes. *See* Tom Abate, *Police Probe Cell Phones to Thwart Criminals*, S.F. CHRON., Sept. 8, 2008, at D1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/09/08/BUPA12OC2V.DTL (describing forensic technology to extract existing and deleted text messages, contacts, and pictures). Cell phone search cases will likely increase in frequency because of the number of cell phone users. *See* Press Release, CTIA-The Wireless Ass'n, CTIA-The Wireless Association Announces Semi-Annual Wireless Industry Survey Results (Oct. 7, 2009), http://www.ctia.org/media/press/body.cfm/prid/1870 (announcing fourteen million user increase between 2008 and 2009, resulting in 246 million users).

26. *See, e.g.*, United States v. Wurie, 612 F. Supp. 2d 104 (D. Mass. 2009); United States v. James, No. 1:06CR134 CDP, 2008 WL 1925032, at *1 (E.D. Mo. Apr. 29, 2008); United States v. Fierros-Alvarez, 547 F. Supp. 2d 1206 (D. Kan. 2008). Some commentators have rejected the classification of cell phones as closed containers. *See* Adam M. Gershowitz, *The iPhone Meets the Fourth Amendment*, 56 UCLA L. REV. 27, 38-39 (2008) (highlighting failure to recognize conceptual difference between searching physical containers and electronic equipment); *see also* Kelly A. Borchers, Note, *Mission Impossible: Applying Arcane Fourth Amendment Precedent to Advanced Cellular Phones*, 40 VAL. U. L. REV. 223, 256-63 (2005) (arguing analogy to closed containers inadequate and too simplistic); Bryan Andrew Stillwagon, Note, *Bringing an End to Warrantless Cell Phone Searches*, 42 GA. L. REV. 1165, 1195-1200 (2008) (rejecting analogy because cell phones do not contain objects providing basis for justification of searches).

27. *See* United States v. Finley, 477 F.3d 250, 259-60 (5th Cir. 2007) (holding search of cell phone associated with arrestee's person lawful); United States v. Park, No. CR 05-375 SI, 2007 WL 1521573, at *1, *9 (N.D. Cal. May 23, 2007) (holding search of cell phone classified as possession within arrestee's immediate control unlawful). Because both approaches classify cell phones as closed containers, the court will determine the lawfulness of the search incident to arrest based on how it associates the phone with the arrestee—that is, whether the phone is a part of the arrestee's person or the phone is a possession within the arrestee's immediate control. *See* Orso, *supra* note 20, at 203-05 (noting ideological divide between *Finley* and *Park* approaches).

28. *See* United States v. Finley, 477 F.3d 250, 259-60 (5th Cir. 2007) (noting full search of arrestee and containers on arrestee reasonable under Fourth Amendment). The court rejected the applicability of *Chadwick*, because the cell phone was on the arrestee's person at the time of his arrest and did not fit into the category of property not immediately associated with the person. *Id.* at 260 n.7.

29. *See* United States v. Park, No. CR 05-375 SI, 2007 WL 1521573, at *8 (N.D. Cal. May 23, 2007) (relying on cell phones' ability to store massive amount of personal information).

destruction of evidence stored in it.[30]

In *State v. Smith*, the Supreme Court of Ohio sought to answer the question of whether police officers may search the data stored in an arrestee's cell phone incident to the arrest without a warrant.[31] Recognizing that the reasonableness of any search is fact-driven, the court first attempted to classify cell phones for the purposes of a Fourth Amendment analysis.[32] Accepting a physical and tangible conception of containers, the court rejected the comparison between cell phones and closed containers because cell phones can store large amounts of digital information unlike any physical object found in a container.[33] Deciding that cell phones defy easy categorization, the court did not analogize them to other objects that contain information with defined expectations of privacy but instead attempted to determine the legitimate expectation of privacy cell phone owners have in the information stored in their phones.[34] Because a phone can store large amounts of personal and private information, the Supreme Court of Ohio concluded that a cell phone owner's higher expectation of privacy in the stored information is reasonable and justifiable.[35] By conceptually separating the cell phone from the information stored within it, the court held that while police may seize a phone from an arrestee in order to meet the state's need to collect and preserve evidence, police may not search the

30. *See* United States v. Park, No. CR 05-375 SI, 2007 WL 1521573, at *8-9 (N.D. Cal. May 23, 2007) (refusing to extend *Chimel* beyond its original rationales without guidance from higher courts); *see also supra* note 18 and accompanying text (discussing *Chimel* and search incident to arrest justifications).

31. *See* 920 N.E.2d at 952 (stating issue under review).

32. *See id.* Noting that neither the United States Supreme Court nor any other state supreme court had ruled on the reasonableness of a warrantless cell phone search made incident to an arrest, the court discussed the two leading cases on the issue: *Finley* and *Park*. *Id.* at 952-53. In its discussion of *Finley*, the Supreme Court of Ohio found it notable that the defendant conceded that a cell phone was a closed container. *Id.* at 953; *see also supra* notes 26, 28 and accompanying text (discussing classification of cell phones as closed containers). The Supreme Court of Ohio focused on the *Park* court's reasoning that a modern cell phone is akin to a laptop computer—a device in which an individual has significant privacy interests. 920 N.E.2d at 953.

33. *See* 920 N.E.2d at 954. The court buttressed its physical approach by considering objects courts have traditionally classified as containers and relying on the Supreme Court's definition of container in *Belton* as an object capable of holding another object. *Id.*; *see also supra* note 21 (quoting *Belton* Court's footnote description of container). The Supreme Court of Ohio recognized that other courts have likened electronic devices to closed containers, but suggested that these cases failed to consider *Belton*'s definition of a container and discussed the technological differences between early electronic devices and modern cell phones. 920 N.E.2d at 954.

34. 920 N.E.2d at 954-55. The court specifically noted that cell phones are multi-functional tools that contain address books—entitled to a lower expectation of privacy—but are also like laptop computers capable of transmitting and storing large amounts of data—entitled to a higher expectation of privacy. *Id.* at 955. The court did not believe it would be helpful to police officers to create a rule that would require them to determine the capabilities of the phone before knowing if a search incident to arrest would be lawful. *Id.* at 954.

35. *See id.* at 955. In contrast, the dissent focused on the character of the information obtained—a digital address book—and its similarity to a physical address book, which police may validly search, to conclude that the search was reasonable. *See id.* at 957 (Cupp, J., dissenting) (noting only address book and call records admitted into evidence).

information stored within the phone without a warrant.[36]

The Supreme Court of Ohio took a bold step for privacy by recognizing cell phone owners' privacy interest in the information stored in their phones and protecting that information from warrantless searches.[37] Unlike other courts considering searches of cell phones incident to arrest, the Supreme Court of Ohio focused on separating arrestees' interest in their phones from their interest in the information stored in their phones.[38] To achieve the separation, the Supreme Court of Ohio relied on the United States Supreme Court's definition of a container in a footnote to its 1981 decision in *New York v. Belton*[39] and concluded that a cell phone is not a container.[40] The Supreme Court of Ohio then used this separation to side-step an analysis of the search of the phone in favor of an analysis of the search of the information stored within the phone, using the search incident to arrest justifications the United States Supreme Court announced in *Chimel*.[41] By doing so, the Supreme Court of Ohio has foreclosed any search incident to arrest of a cell phone's information, even as the United States Supreme Court has demonstrated its willingness to re-evaluate the standards courts use to judge the reasonableness of searches incident to arrest.[42]

A cell phone is an electronic device capable of storing information and facilitating communication.[43] The Supreme Court of Ohio, however, mistakenly relied on a purely physical definition of a container to conclude that a cell phone is not a container.[44] The court correctly recognized the diverse

36. *See id.* at 955 (majority opinion).

37. *See id.* at 950 (protecting information stored in phone from broad search incident to arrest exception); *see also* Gershowitz, *supra* note 26, at 40-41 (addressing amount of information stored on cell phones and iPhones); Stillwagon, *supra* note 26, at 1171-73 (discussing cultural transformation resulting from development of phones' functions and its implications).

38. *See* 920 N.E.2d at 955 (concluding information stored in phone entitled to higher expectation of privacy than phone itself); *see also* United States v. Finley, 477 F.3d 250, 260 (5th Cir. 2007) (holding both seizure of phone and search of information lawful incident to arrest); United States v. Curry, Criminal No. 07-100-P-H, 2008 WL 219966, at *10 (D. Me. Jan. 23, 2008) (recognizing interest in phone's information but focusing search incident to arrest analysis on phone); United States v. Lasalle, Cr. No. 07-00032 SOM, 2007 WL 1390820, at *7 (D. Haw. May 9, 2007) (analyzing search incident to arrest by time of search of phone). At least one commentator agrees that separating the phone from the information stored in it is a necessary distinction. *See* Borchers, *supra* note 26, at 259 (suggesting reasons for recognizing distinct interests when analyzing searches of technological devices).

39. 453 U.S. 454 (1981).

40. *See* New York v. Belton, 453 U.S. 454, 461 n.4 (1981) (providing examples of containers). In *Belton*, the Court suggested that a container is any object that is capable of holding another object. *Id.*; *see also supra* note 21 (discussing *Belton*).

41. *See supra* notes 18-19 and accompanying text (explaining permissible scope of searches incident to arrest announced by *Chimel*).

42. *See supra* note 21 (discussing Supreme Court's redefinition of permissibility of passenger compartment searches in *Gant*).

43. *See* Stillwagon, *supra* note 26, at 1170-72 (summarizing history of development and functionality of cell phones).

44. *See* 920 N.E.2d at 954 (relying on *Belton*'s physical definition of container). The literal reading of

types of information that cell phones may contain, but the lawfulness of a search incident to arrest does not turn on what police find during the search or the volume of evidence that police may discover.[45] A search is unlawful when it is unreasonable, because no justifications for it exist.[46] The Supreme Court of Ohio focused on the information stored in the phone and failed to examine the circumstances of the search when assessing its reasonableness.[47]

The Supreme Court of Ohio was correct to attempt to create a bright-line rule for police to follow when they arrest an individual with a cell phone—a rule that would not require officers to engage in complex, on-the-spot analyses of the capabilities of a phone prior to the search.[48] In the context of digital information, blanket prohibitions on searches may create unnecessary barriers to otherwise lawful searches.[49] Application of *Smith* will result in this problem because even though the court recognized some cell phone functions are akin to physical objects that police may validly search incident to an arrest, it failed to consider these functions when creating its bright-line rule.[50] By prohibiting all searches of cell phones incident to lawful arrest, the Supreme Court of Ohio has effectively protected the technologically advanced arrestee's address book, even though its physical-world counterpart is not similarly protected.[51]

In Ohio, it is now unlawful for police to search an individual's cell phone without a warrant, even if police lawfully arrested the individual. Police are limited to seizing the phone and waiting to obtain a warrant before they may search any of the information stored in it. The Supreme Court of Ohio

Belton fails to consider that electronic devices may also be viewed as containers of electronic information. *See* Kerr, *Digital World*, *supra* note 23, at 538-39 (describing digital storage devices); *see also*, Gershowitz *supra* note 26, at 36 (noting advancing technology changes conceptions of containers); *supra* notes 22-23 and accompanying text (discussing Supreme Court's treatment of closed containers).

45. 920 N.E.2d at 955 (noting cell phones contain digital address books and store large amounts of data); *see also* Arizona v. Gant, 129 S. Ct. 1710, 1721, 1723 (2009) (recognizing evidence-gathering justification for searches of vehicles incident to arrest); United States v. Robinson, 414 U.S. 218, 236 (1973) (recognizing reasonableness of search based on arrest); *supra* notes 18-21 and accompanying text (discussing justifications for searches incident to arrest).

46. *See supra* notes 18-21 and accompanying text (identifying justifications for lawful searches).

47. *See* 920 N.E.2d at 954-55 (focusing on arrestee's subjective expectation of privacy in information). The court only made passing reference to the *Chimel* justifications for searches incident to arrest before examining whether an arrestee's subjective expectation of privacy in his phone is reasonable. *See id.* at 952 (discussing search incident to arrest exception).

48. *See* 920 N.E.2d at 954 (noting unhelpfulness of requiring police officers to know phone's capabilities before acting).

49. *See* Kerr, *Digital Evidence*, *supra* note 23, at 289, 292-306 (discussing difficulty applying physical world Fourth Amendment rules to digital evidence).

50. *See* 920 N.E.2d at 955 (recognizing cell phones contain digital address books akin to traditional address books).

51. *See* United States v. Rodriguez, 995 F.2d 776, 778 (7th Cir. 1993) (upholding search of address book seized incident to arrest). The *Smith* court could have avoided similar inequities by creating a rule specifying the types of information stored in a phone that police may search incident to a lawful arrest. *See* Orso *supra* note 20, at 187-88, 193 (suggesting distinction between types of stored information useful tool to protect privacy during searches).

acknowledged and protected separate and distinct privacy interests in the information stored in an arrestee's cell phone by relying on the United States Supreme Court's footnote definition of a physical container in *Belton*. The court's reasoning for separating these interests is unlikely to be persuasive to other courts facing similar issues because it focuses too heavily on a thirty-year-old description of a container in order to divorce a phone from the information stored in it. The court was mindful of advancing technology when it created its rule prohibiting warrantless searches of cell phones incident to arrest. As technology continues to develop and people transition to increasingly digital lives, however, a likely result of this decision is to prohibit otherwise legitimate searches incident to arrest even as it protects against unreasonably intrusive searches.

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