Constitutional Law—Search-Incident-to-Arrest Exception to Prohibition Against Warrantless Searches Inapplicable to Cell Phone Searches—*Smallwood v. State*, 113 So. 3d 724 (Fla. 2013)

The Fourth Amendment to the U.S. Constitution prohibits searches and seizures conducted without prior approval by a judge or magistrate, but this general rule is subject to several exceptions.[1] One such exception allows a police officer to search a person in the course of a lawful arrest.[2] In *Smallwood v. State*,[3] the Florida Supreme Court considered whether the search-incident-to-arrest exception would apply to a police officer's search of photographs stored within a cell phone, where the officer finds the phone on the arrestee's person, but lacks a reasonable belief that the phone contains evidence of any crime.[4] Comparing such a search to the search of an arrestee's home office, the court held that the warrantless search of a cell phone under these circumstances is unconstitutional.[5]

On February 4, 2008, police officer Ike Brown arrested Cedric Tyrone Smallwood pursuant to a warrant arising from an armed robbery of a convenience store eleven days earlier in Jacksonville, Florida.[6] Officer Brown

1. 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." *Id.*; *see* Katz v. United States, 389 U.S. 347, 357 (1967) (affirming per se unreasonableness of searches conducted without judicial process). In *Katz*, the United States Supreme Court held that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Id.*; *see* Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971) (describing standard for justifying such exceptions). In *Coolidge*, the Court stated that those who seek an exception from the rule against warrantless searches bear the burden of showing why the exemption is necessary. *Id.* at 455.

2. *See* Chimel v. California, 395 U.S. 752, 762-63 (1969) (recognizing arresting officer may search to remove weapons and prevent concealment or destruction of evidence). In *Chimel*, police waited at Chimel's home until he arrived there, placed him under arrest, and then searched his entire three-bedroom house, including the garage, workshop, and attic. *Id.* at 753-54. The Court held that while warrantless searches of an arrestee's person and the area "within his immediate control" may be justified by concerns for officer safety or evidence preservation, "[t]here is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself." *Id.* at 763 (internal quotation marks omitted).

3. 113 So. 3d 724 (Fla. 2013).

4. *Id*. at 726. The court noted that Florida courts are bound by federal interpretations of the Fourth Amendment. *Id.* at 730; *see* FLA. CONST. art. I, § 12 (stating interpretation of section 12 shall conform to Supreme Court's interpretation of Fourth Amendment); *see also* State v. Daniel, 665 So. 2d 1040, 1047 n.10 (Fla. 1995) (noting Supreme Court decisions automatically modify Florida law to extent of any inconsistency).

5. *See* 113 So. 3d at 738.

6. *Id.* at 726. After the robbery, the store clerk told police the robber wore gloves and a mask. *Id.* The clerk recognized the robber's voice and, in a photo lineup, identified him as Smallwood, who had been a regular customer at the store. *Id.* On the day of the robbery, one witness observed the robber running from the

seized Smallwood's cell phone incident to the arrest.[7] Then, once Smallwood was secured in a police vehicle, Brown conducted a search of the phone's data and discovered five photographs relevant to the robbery.[8] Nothing in the record indicated that Brown's search was motivated by concerns about officer safety or destruction of evidence.[9]

At trial, defense counsel asserted that Brown's search of the phone's data violated Smallwood's constitutional right to privacy, arguing that a cell phone is functionally a mini-computer and that people have a reasonable expectation of privacy in such devices.[10] The prosecution countered that a phone is analogous to other items, such as a wallet or a container, that are searchable when found by an officer incident to a legal arrest.[11] Holding that the search of the cell phone was legal, the trial court rejected defense counsel's motion to suppress the photographs.[12] Brown testified at trial that he searched the phone for two reasons: to identify it as the phone Smallwood had used to call Brown earlier, and to determine whether it contained evidence.[13] A jury convicted Smallwood of robbery and possession of a firearm by a convicted felon.[14]

The First District Court of Appeal of Florida affirmed the conviction, rejecting Smallwood's claim that the phone search violated his Fourth Amendment right to privacy.[15] The court also voiced concern, however, that its

store into a field and climbing over a fence. *Id.* Another witness saw Smallwood as he was jumping over the fence, and observed that Smallwood was wearing gloves. *Id.*

7. *Id.* at 726-27.

8. *Id.* at 727. For example, one photograph showed Smallwood holding a bundle of money secured by a rubber band. *Id.* The arresting officer did not mention the seized phone in his report, nor did he mention the data found on the phone. *Id.* at 726-27. The officer did not reveal to the prosecutor that he had searched Smallwood's phone until just prior to the commencement of trial, roughly thirteen months after the arrest. *See id.* at 727.

9. 113 So. 3d at 727. The officer searched the phone's data only after securing Smallwood in a police vehicle, thereby separating Smallwood from his phone. *Id.* Because the phone was no longer in Smallwood's immediate control when the search occurred, the two *Chimel* justifications for warrantless searches incident to arrest—officer safety and evidence preservation—would not apply. *See* Chimel v. California, 395 U.S. 752, 762-63 (1969) (articulating justifications).

10. 113 So. 3d at 727. The defense drew a distinction between call log data and photographic data, suggesting photographic data generates a greater expectation of privacy. *See id.*

11. *Id.* at 727. The State asserted that if Smallwood had been carrying printed copies of the photographs in his pocket when he was arrested, the search would have been regarded as constitutional. *Id.* at 727-28.

12. *Id.* at 728.

13. *Id.*

14. 113 So. 3d at 728. For the robbery conviction, Smallwood's sentence was fifty years' incarceration with a ten-year mandatory minimum. *Id.* For the possession conviction, his sentence was fifteen years' incarceration with a three-year mandatory minimum. *Id.*

15. 113 So. 3d at 728-29; *see* Smallwood v. State, 61 So. 3d 448, 461 (Fla. Dist. Ct. App. 2011) (rejecting distinction between cell phones and items previously held searchable incident to arrest), *certifying questions to* 113 So. 3d 724 (Fla. 2013). The Flordia District Court of Appeal stated that it was bound by *United States v. Robinson*, 414 U.S. 218 (1973), which "permits searches incident to arrest of wallets, purses, date books, and other similar items" that may contain personal information. Smallwood v. State, 61 So. 3d 448, 460-61 (Fla. Dist. Ct. App. 2011), *certifying questions to* 113 So. 3d 724 (Fla. 2013). The appellate court indicated that what distinguishes cell phones from these other items is not "the personal nature of the data," but

ruling would extend the search-incident-to-arrest doctrine into territory prior courts could not have anticipated or intended, potentially making every arrest an occasion for police to search through medical information, banking records, work emails, and vast amounts of other data constituting the entirety of the arrestee's personal life.[16] In light of its concerns, the First District Court of Appeal of Florida certified, for review by the Flordia Supreme Court, the question of whether a police officer may "search through photographs contained within a cell phone which is on an arrestee's person at the time of a valid arrest, notwithstanding that there is no reasonable belief that the cell phone contains evidence of any crime[.]"[17]

Since the Supreme Court first acknowledged the constitutionality of warrantless searches incident to arrest, the permissible scope of such searches has, at different times, both expanded and contracted.[18] In *Chimel*, the Supreme Court announced two rationales for upholding the constitutionality of a warrantless search incident to an arrest: preventing the destruction or concealment of evidence, and enabling officers to remove any weapons that may be accessible to an arrestee.[19] The search-incident-to-arrest exception

rather a cell phone's vast storage capacity. *Id.* at 461. The court stated that it could find no basis in *Robinson* or subsequent cases for limiting the scope of a search incident to arrest based on this distinction. *Id.*

16. Smallwood v. State, 61 So. 3d 448, 461 (Fla. Dist. Ct. App. 2011), *certifying questions to* 113 So. 2d 724 (Fla. 2013). The court wrote:

> Modern cell phones can contain as much memory as a personal computer and could conceivably contain the entirety of one's personal photograph collection, home videos, music library, and reading library, as well as calendars, medical information, banking records, instant messaging, text messages, voicemail, call logs, and GPS history. Cell phones are also capable of accessing the internet and are, therefore, capable of accessing information beyond what is stored on the phone's physical memory. For example, cell phones may also contain web browsing history, emails from work and personal accounts, and applications for accessing Facebook and other social networking sites. Essentially, cell phones can make the entirety of one's personal life available for perusing by an officer every time someone is arrested for any offense. It seems this result could not have been contemplated or intended by the *Robinson* court.

Id.

17. Smallwood v. State, 61 So. 3d 448, 462 (Fla. Dist. Ct. App. 2011), *certifying questions to* 113 So. 3d 724 (Fla. 2013).

18. *See* Arizona v. Gant, 556 U.S. 332, 350 (2009) (noting "checkered" history of search-incident-to-arrest doctrine); *see also* Agnello v. United States, 269 U.S. 20, 39 (1925) (concluding search occurring blocks from arrest not justified as incident to arrest because too remote); Saby Ghoshray, *Doctrinal Stress or in Need of a Face Lift: Examining the Difficulty in Warrantless Searches of Smartphones Under the Fourth Amendment's Original Intent*, 33 WHITTIER L. REV. 571, 606-07 (2012) (arguing carving out exceptions to Fourth Amendment contrary to original intent). Ghoshray asserts that in focusing on limiting the permissible scope of warrants, the Constitution's framers relied upon an assumption that searches would not be conducted without a warrant. Ghoshray, *supra,* at 606. Ghoshray further argues that in allowing exceptions to the prohibition against warrantless searches by finding such searches "reasonable" under certain circumstances, courts have acted not to further the original purpose of the Fourth Amendment, but rather to "satisfy the needs of law enforcement's administrative responsibilities." *Id.* at 606-07.

19. Chimel v. California, 395 U.S. 752, 762-63 (1969) (delineating scope of search-incident-to-arrest doctrine). Moreover, in *Coolidge*, the Court stated, "[t]hus the most basic constitutional rule in this area is that

permits an officer to search the interior of any container, whether open or closed, found within a permissible search zone, which includes the arrestee's person and the area from which the arrestee might be able to take possession of a weapon or destructible evidence.[20] The Court defined a "container" as "any object capable of holding another object."[21]

Since the *Chimel* decision, state and federal courts, asserting the need for bright-line rules police may rely upon when conducting arrests that require quick, ad hoc judgments, have upheld the constitutionality of warrantless searches even in cases where the arresting officer lacked a reasonable belief that a search would advance an interest in either officer safety or evidence preservation.[22] Relying on *New York v. Belton*—where the Court held that the

'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment[,] subject only to a few specifically established and well delineated exceptions.' The exceptions are 'jealously and carefully drawn.'" Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971) (internal citations omitted); *see also* Arizona v. Gant, 556 U.S. 332, 350 (2009) (noting *Chimel* overruled precedent and delineated modern scope of search-incident-to-arrest exception). In *Chimel*, the Court emphasized the importance of the search warrant requirement:

> Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals.

Chimel v. California, 395 U.S. 752, 761 (1969) (quoting McDonald v. United States, 335 U.S. 451, 455-56 (1948)). The Court also stated the scope of warrantless searches incident to arrest "must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Id.* at 762 (quoting Terry v. Ohio, 392 U.S. 1, 19 (1968)).

20. *See* New York v. Belton, 453 U.S. 454, 460-61 (1981) (holding lawfulness of custodial arrest justifies infringement of arrestee's privacy interest in container). Relying on *Chimel's* holding that a warrantless search incident to arrest is limited to the area within an arrestee's "immediate control," the *Belton* Court affirmed that such a container may be searched whether it is open or closed, so long as the container is within reach of the arrestee at the time of the arrest. *Id.* at 460-61.

21. New York v. Belton, 453 U.S. 454, 460 n.4 (1981); *see also* Thornton v. United States, 541 U.S. 615, 623-24 (2004) (holding constitutional search incident to arrest when arrestee "recent occupant" of vehicle).

22. *See* Dunaway v. New York, 442 U.S. 200, 213-14 (1979) (noting need for single standard police may rely upon in applying Fourth Amendment). In *Dunaway*, the Court determined that a uniform standard is "essential," as police have "limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Id.*; *see* United States v. Robinson, 414 U.S. 218, 235 (1973). In *Robinson*, the Court reasoned that all custodial arrests should be treated alike because all such arrests—even arrests for minor crimes such as driving with a revoked license—involve a danger to police officers because the arrestee may use a dangerous weapon to resist arrest. United States v. Robinson, 414 U.S. 218, 234-35 (1973). The Court also reasoned that the Fourth Amendment does not require police officers to analyze the constitutionality of each step in a search, as the determination of how and where to search must be a quick, ad hoc judgment. *Id.* at 235; *see* New York v. Belton, 453 U.S. 454, 458-59 (1981) (linking straightforwardness of *Robinson* holding to need for single standard police may rely upon). The Court acknowledged that allowing warrantless searches incident to arrest will sometimes allow searches where neither officer safety nor evidence preservation is a factor, but nevertheless upheld them. New York v. Belton, 453 U.S. 454, 461 (1981). The Court explained that "[a] highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions . . . may be 'literally

passenger compartment of a vehicle is searchable incident to a lawful arrest—state and lower federal courts have upheld as constitutional searches of an arrestee's vehicle where interests in officer safety and evidence prevention were irrelevant, evidenced by the arrestee being secured and handcuffed in the backseat of a patrol car.[23] In *United States v. Robinson*, the United States Supreme Court upheld the constitutionality of searches of personal items, such as a pack of cigarettes, found on an arrestee incident to a lawful arrest, even where the arresting officer has no reasonable belief that the search will uncover weapons or evidence related to the crime of arrest.[24] The Court held that in cases where a custodial arrest is supported by probable cause, no further justification is required to support a search of items on the arrestee's person incident to the arrest.[25]

impossible of application by the officer in the field.'" *Id.* at 458 (quoting Wayne R. LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 142); *see* Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307, 321 (1982) (suggesting benefits of bright-line rules) [hereinafter LaFave, *Bright Lines*]. In a different discussion, LaFave justifies bright-line rules as being more effective in protecting the rights guaranteed by the Fourth Amendment when he states, "as between a complicated rule . . . which well-intentioned police could be expected to apply correctly in only 75% of the cases, and a readily understood and easily applied rule which would bring about the theoretically correct conclusion 90% of the time, the latter is to be preferred over the former." LaFave, *Bright Lines*, *supra*.

23. *See*, *e.g.*, United States v. Hrasky, 453 F.3d 1099, 1102-03 (8th Cir. 2006) (upholding warrantless vehicle search one hour after arrestee secured in police car and handcuffs); United States v. Weaver, 433 F.3d 1104, 1106-07 (9th Cir. 2006) (upholding warrantless search ten to fifteen minutes after arrestee secured in handcuffs in patrol car); United States v. White, 871 F.2d 41, 44 (6th Cir. 1989) (upholding search occurring after arrestee secured in handcuffs in patrol car); *see also* Russell Cooper, Comment, *A Smarter Rule for Smarter Phones: Why SILA Does Not Protect Our Smartphones and Why the California Legislature Should*, 44 MCGEORGE L. REV. 363, 369-71 (2013) (noting Supreme Court has seemingly diverged from *Chimel* principles). *But see* Arizona v. Gant, 556 U.S. 332, 351 (2009) (limiting search of vehicle incident to arrest). *See generally* Thornton v. United States, 541 U.S. 615 (2004) (Scalia, J., concurring) (noting numerous cases upholding vehicle searches conducted after arrestee secured in handcuffs in car). In *Gant*, the Court attributed the broad reading of *Belton* to Justice Brennan's dissent wherein Brennan opined that the *Belton* holding rests on a "fiction . . . that the interior of a car is *always* within the immediate control of an arrestee who has recently been in the car." Arizona v. Gant, 556 U.S. 332, 341 (2009) (quoting New York v. Belton, 453 U.S. 454, 466 (1981)) (internal quotation marks omitted).

24. *See* United States v. Robinson, 414 U.S. 218, 235 (1973) (upholding search of cigarette pack incident to arrest). In *Robinson*, the Court held that where an arrest is supported by probable cause, that arrest is reasonable under the Fourth Amendment, and therefore a search conducted incident to that arrest is also reasonable. *Id.* at 235; *see* Tracey Maclin, *Justice Thurgood Marshall: Taking the Fourth Amendment Seriously*, 77 CORNELL L. REV. 723, 792 (1992) (detailing Justice Marshall's concerns with *Robinson*). Maclin writes, "*Robinson*'s naked assertion that authority to arrest justifies a search of a private container that poses no danger to the officer, or to the integrity of the arrest, is hard to square with traditional Fourth Amendment principles." Maclin, *supra*, at 792; *see* Kelly A. Deters, Note, *The "Evaporation Point":* State v. Sykes *and the Erosion of the Fourth Amendment Through the Search-Incident-to-Arrest Exception*, 92 IOWA L. REV. 1901, 1913 (2007) (asserting *Robinson* exempts police from warrant requirement). Deters argues that in allowing searches where neither of the *Chimel* rationales apply, the *Robinson* holding allows warrantless searches even where no grave emergency justifies them, thereby eroding the Fourth Amendment. Deters, *supra*, at 1913.

25. *See* United States v. Robinson, 414 U.S. 218, 235 (1973) (upholding search of cigarette pack incident to arrest); *see also* Thomas Y. Davies, *Denying a Right by Disregarding Doctrine: How* Illinois v. Rodriguez

Recently, in *Arizona v. Gant*, the Supreme Court explicitly rejected the broad interpretation of *Belton* that served as a basis for many courts to uphold vehicle searches where evidence preservation and officer safety were not factors.[26] The *Gant* court held that a search of a vehicle's passenger compartment incident to an arrest is permissible only where the arrestee is within reaching distance of the compartment at the time of the search or where there is reason to believe evidence of the offense of arrest is located within the compartment.[27] The Supreme Court has not addressed the issue of whether the search-incident-to-arrest exception would apply to the search of a cell phone found on an arrestee's person.[28] Among those state courts and lower federal courts that have addressed the issue, holdings have varied.[29] Some courts have analogized the cell phone to other searchable items—such as a container or a

Demeans Consent, Trivializes Fourth Amendment Reasonableness, and Exaggerates the Excusability of Police Error, 59 TENN. L. REV. 1, 43 n.169 (1991) ("Justice Rehnquist's rationale for *Robinson* is strange . . . . If authority alone can make a search constitutional, regardless of an evaluation of cause for the search, then what is really being asserted is that the arrested person has lost any reasonable expectation of privacy under . . . *Katz*.").

26. Arizona v. Gant, 556 U.S. 332, 350-51 (2009). In *Gant*, police arrested the defendant for driving with a suspended license and on an outstanding warrant for driving with a suspended license. *Id.* at 336. The arrest occurred about ten to twelve feet from the defendant's car. *Id.* Then, once the defendant was sitting in the back of the patrol car and wearing handcuffs, officers searched his car and found a gun and a bag of cocaine. *Id.* The Court noted that in the years following the *Belton* decision, law enforcement officers have operated with the understanding that the search-incident-to-arrest exception allows all searches incident to a valid arrest, even where the justifications of officer safety and evidence preservation do not apply. *See id.* at 341; *see also* New York v. Belton, 453 U.S. 454, 468 (1981) (Brennan, J., dissenting) ("Under the approach taken today, the [search] would presumably be [held constitutional] even if Officer Nicot had handcuffed Belton in the patrol car before placing [him] under arrest, and even if his search had extended to . . . inaccessible containers.")

27. Arizona v. Gant, 556 U.S. 332, 350-51 (2009). The Court rejected the assumption that underlays the *Belton* decision—that warrantless vehicle searches incident to an arrest are always constitutional—stating, "blind adherence to *Belton's* faulty assumption would authorize myriad unconstitutional searches." Id. at 351.

28. 113 So. 3d at 738. Even if the Supreme Court had ruled on this particular issue, given the ever-changing technology and changes in societal behavior and expectations, that rule would likely need to be revisited in the near future. *See* Eunice Park, *Traffic Ticket Reasonable, Cell Phone Search Not: Applying the Search-Incident-to-Arrest Exception to the Cell Phone as "Hybrid*," 60 DRAKE L. REV. 429, 478-94 (2012) (proposing, given technological advances, hybrid rule balancing Fourth Amendment rights with search-incident-to-arrest exception origins) .

29. *See* Charles E. MacLean, *But, Your Honor, a Cell Phone Is Not a Cigarette Pack: An Immodest Call for a Return to the* Chimel *Justifications for Cell Phone Memory Searches Incident to Lawful Arrest*, 6 Fed. Cts. L. Rev. 37, 39-40 (2012) (noting majority of courts addressing issue have upheld constitutionality of warrantless cell phone searches incident to arrest). A vocal minority, however, has not. MacLean, *supra*. In *Newhard v. Borders*, police conducted a warrantless cell phone search incident to arrest and discovered nude pictures of the arrestee and his girlfriend in "sexually compromising positions." *See* 649 F. Supp. 2d 440, 444 (W.D. Va. 2009); *see also* H. Morley Swingle, *Smartphone Searches Incident to Arrest*, 68 J. MO. B. 36, 36 (2012) (narrating *Newhard* facts). Allegedly, the pictures were subsequently shared with several other officers and members of the public. Newhard v. Borders, 649 F. Supp. 2d 440, 444 (W.D. Va. 2009). In a subsequent civil suit claiming the officers violated the arrestee's constitutional rights, the court granted these officers qualified immunity from liability, finding that the arrestee's constitutional right to be free from a search of the phone was not "clearly established" when it occurred. *Id.* at 448.

pager—and therefore held the phone searchable.[30] Other courts, relying on *Gant*'s stricter adherence to the principles of *Chimel*, have held these searches unconstitutional in cases where neither evidence preservation nor officer safety is a factor.[31]

In *State v. Smallwood*, the Florida Supreme Court answered the question of whether the warrantless search of data stored on a cell phone is constitutional even where the officer does not reasonably believe the data includes evidence of the crime of arrest.[32] The court began its analysis by distinguishing the facts of the case at bar from the facts in *Robinson*, and specifically distinguished the crumpled pack of cigarettes held searchable in *Robinson* from a modern cell phone.[33] The court reasoned that modern cell phones, unlike static items such as cigarette packs, have the ability to store vast quantities of personal and private information and can provide access to remote data; for example, one iPhone application allows users to remotely access a home computer webcam.[34]

30. *See*, *e.g.,* United States v. Finley, 477 F.3d 250, 260 (5th Cir. 2007) (upholding warrantless search of cell phone); United States v. Cole, No. 1:09-CR-0412-ODE-RGV, 2010 WL 3210963, at *17 (N.D. Ga. Aug. 11, 2010) (concluding cell phone "container" for purposes of automobile exception); United States v. Deans, 549 F. Supp. 2d 1085, 1094 (D. Minn. 2008) (concluding search of cell phone data lawful); *see also* Margaret M. Lawton, *Warrantless Searches and Smartphones: Privacy in the Palm of Your Hand?*, 16 U. D.C. L. REV. 89, 118 ("Treating cell phones and smartphones like traditional containers—at least with regards to the data stored on the phones—is consistent with Supreme Court precedent, which has broadly defined 'containers' and which has not distinguished between "worthy and unworthy 'containers.'"). Lawton argues that the distinction between cell phones and other containers is quantitative, rather than qualitative. Lawton, *supra*, at 117-18.

31. *See, e.g.,* United States v. McGhee, No. 8:09CR31, 2009 WL 2424104, at *3 (D. Neb. July 21, 2009) (granting motion to suppress where neither officer safety nor evidence preservation justified warrantless phone search); United States v. Quintana, 594 F. Supp. 2d 1291, 1300 (M.D. Fla. 2009) (concluding warrantless search of cell phone incident to arrest exceeded doctrine's scope); United States v. Park, No. CR 05-375 SI, 2007 WL 1521573, at *8 (N.D. Cal. May 23, 2007) (asserting warrantless searches of cell phones incident to arrest exceed doctrine's rationales); *see also* Cassie M. Weathersbee, Note, *A Constitutional Ringtone: Cell Phones and the Search Incident to Lawful Arrest Warrant Exception Post* Gant, 6 CHARLESTON L. REV. 807, 819 (2012) (arguing cell phones not inherently dangerous to officer or subject to destruction of evidence justification). Weathersbee states, "neither officer safety nor destruction of evidence are a problem with cell phones." Weathersbee, *supra*, at 819. Weathersbee explains:

> Remote wipe functions only operate if there is an internet connection or signal reaching the phone. If the phone is powered off, the battery removed, or the phone placed in a container that blocks cell phone signals and internet connections, the phone cannot receive the command to clear data. If destruction of evidence is an issue, an officer can seize the phone, power it off, transport it to the police station, and place it in a container capable of blocking all signals. The officer could then obtain a search warrant and electronically pull the data from the phone while still in the protective container.

Id.

32. *See* 113 So. 3d at 726.

33. *Id.* at 732 (holding *Robinson* not controlling because cell phones materially distinguishable from static, noninteractive containers). The court stated that a modern cell phone is computer-like, and computers are unique because they "hold so much personal and sensitive information touching on many private aspects of life." *Id.* (quoting United States v. Flores-Lopez, 670 F.3d 803, 805 (7th Cir. 2012)).

34. *Id.* at 732.

The court stated that permitting a warrantless cell phone search incident to arrest is comparable to permitting a search of the arrestee's home.[35] The court said analogizing a pack of cigarettes to a handheld, interactive, computer-like device is like analogizing a single-cell organism to a person, adding that the differences between these items are blatant and significant.[36] Accordingly, the court held that the ruling in *Robinson* did not control the outcome of the case at hand.[37]

The court further reasoned that the principles articulated in *Chimel* and affirmed in *Gant*—that a warrantless search incident to arrest is justified only by an interest in either officer safety or evidence preservation—did not justify the search in this case, where the cell phone's contents were examined after the phone had been separated from Smallwood.[38] The Constitution permitted police to take possession of a phone in this case because the phone was on Smallwood's person at the time of the arrest.[39] Once police had secured the phone, however, there was no longer any chance that Smallwood could use the phone as a weapon or destroy any evidence stored within it.[40] Therefore, the rationales justifying warrantless searches evaporated and the subsequent warrantless search of the phone's data was held unconstitutional.[41] The court concluded that the mere fact that a device is small enough for a person to carry does not authorize government intrusion into the vast amount of personal information that may be stored on the device.[42]

The interests at stake in this case can be understood by examining the dissent, which argues that the majority's reasoning, if consistently applied, will "transform the traditional understanding of the right of the police to inspect items found on the person of an arrestee."[43] This focus on the rights of

35. *Id.* at 738. The court stated, "indeed, many people now store documents on their equipment that also operates as a phone that, twenty years ago, were stored and located only in home offices, in safes, or on home computers." *Id.* at 732.

36. *See* 113 So. 3d at 732 (recognizing differences between cigarette pack and cell phone obvious and expansive).

37. *Id.*

38. *See id.* at 735-36 (holding search unjustified).

39. *See id.* at 735 (justifying seizure of phone as incident to arrest).

40. *See* 113 So. 3d at 735.

41. *See id.* at 736, 740 (holding search of data in phone unconstitutional).

42. *See id.* at 738 (emphasizing enormous scope of information potentially accessible if cell phone searched).

43. *See id.* at 742 (Canady, J., dissenting) (criticizing majority decision as intrusive of police rights). Rather than focus on the two rationales articulated in *Chimel*, the dissent instead emphasized the need for the search of arrestees to discover evidence of the crime. *See id.*; *see also* United States v. Robinson, 414 U.S. 218, 224-25 (1973) (asserting English and American law recognizing search of arrestee to discover "fruits" of crime). In *Robinson*, the Court cited *Chimel* and restated the two rationales, but the Court also drew from other cases, such as *Agnello v. United States*, 269 U.S. 20 (1925). *See* United States v. Robinson, 414 U.S. 218, 225-26 (1973) (outlining search and seizure jurisprudence). In *Agnello*, federal agents arrested a suspect in his apartment on a drug charge and proceeded to search an apartment several blocks away where one of the suspect's alleged co-conspirators lived. Agnello v. United States, 269 U.S. 20, 29 (1925). The Court stated

police—rather than the arrestee's rights under the Fourth Amendment—turns the proper analysis on its head.[44] The Fourth Amendment's drafters considered the right of privacy too important to entrust it to law enforcement officers.[45] Accordingly, the Fourth Amendment allows warrantless searches only when circumstances make such a search reasonable.[46] The majority, following in the footsteps of *Gant*, was correct to strictly adhere to principles of *Chimel* and to reject a line of reasoning that would further empower police to conduct warrantless searches even in situations where neither officer safety nor evidence prevention justifies them.[47]

The rulings in *Belton* and *Robinson* arguably serve an important purpose: avoiding a legal framework requiring that police work through a complex analysis to determine the constitutionally permissible scope of a contemporaneous search.[48] The bright-line rules announced in these cases, however, have served as a pretext for police to subvert the rights guaranteed by the Fourth Amendment.[49] As Justice O'Connor observed, "lower court

that warrantless searches of "persons lawfully arrested while committing crime" and of the place of the arrest, are justified "in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody." *Id*. at 30. This language is dicta, however, as the *Agnello* court goes on to explain why this justification does not apply to a search occurring several blocks from the place of arrest. *See id.* at 30-31 (concluding search occurring blocks away too remote to justify as incident to arrest). In *Robinson*, the Court overruled the holdings of both *Agnello* and *Chimel*, and concluded: "[s]ince the statements in the cases speak not simply in terms of an exception to the warrant requirement, but in terms of an affirmative authority to search, they clearly imply that such searches also meet the Fourth Amendment's requirement of reasonableness." United States v. Robinson, 414 U.S. 218, 226 (1973) (emphasizing reasonableness of searches). This logic seems based on a faulty assumption that the Court's interpretation of the Fourth Amendment has been consistent; it is more likely that the language characterizing searches incident to arrest as exceptions reflects one interpretation, and the language characterizing searches incident to arrest as affirmative authority reflects another. *Contra id*. (assuming consistent interpretation of Fourth Amendment). "[T]he traditional understanding of the right of the police to inspect items found on the person of the arrestee," is in line with the latter interpretation, but not the former. 113 So. 3d at 742 (Canady, J., dissenting).

44. *See* Arizona v. Gant, 556 U.S. 332, 349 (2009) (discussing police-oriented consequences of broad reading of search incident to arrest). In *Gant*, the Court reasoned that law enforcement's reliance on an overly broad reading of the search-incident-to-arrest doctrine does not outweigh the interests of individuals in their constitutional rights. *See id*. (outlining police training and policy establishing police entitlement). The *Gant* Court stated that as a result of this interpretation of the search-incident-to-arrest doctrine, "[c]ountless individuals guilty of nothing more serious than a traffic violation have had their constitutional right to the security of their private effects violated." *See id.* at 349.

45. *See supra* note 19 and accompanying text (discussing purpose of Fourth Amendment).

46. *See supra* note 19 and accompanying text (discussing narrow justifications for warrantless searches).

47. *See* Ghoshray, *supra* note 18, at 606 (emphasizing purpose of Fourth Amendment to protect individual rights).

48. *See* Dunaway v. New York, 442 U.S. 200, 213-14 (1979) (determining uniform standard "essential"). In *Dunaway*, the Court stated that police have "limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Id.*; *see* LaFave, *Bright Lines*, *supra* note 22, at 320-21 (discussing importance of drawing bright lines).

49. *See supra* note 29 and accompanying text (discussing divergence in court holdings on cell phone searches incident to arrest); *see also* Swingle, *supra* note 29, at 36 (using *Newhard* to introduce examination of law regarding warrantless cell phone searches). The *Newhard* case presents a stark example of how bright-line

decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel v. California*."[50] Arguably, this case and others like it influenced the Supreme Court to revisit the search-incident-to-arrest doctrine by granting certiorari in *United States v. Wurie*, a decision that will hopefully provide clearer rules and bring the doctrine into closer compliance with the *Chimel* rationales.[51] In particular, the reasoning of the *Robinson* ruling seems inconsistent with *Chimel*, because neither officer safety nor evidence preservation would normally justify the warrantless search of the contents of a cigarette pack once the pack has been separated from the arrestee.[52] If *Robinson* is modified or overruled, this will eliminate the need for courts to make arbitrary distinctions, as the Florida Supreme Court did, between items searchable under *Robinson*—such as cigarette packs—and items not searchable.[53]

As it stands today, the court is correct in its view that neither of the *Chimel* rationales, when applied to the search of a cell phone incident to an arrest, renders such a search reasonable.[54] To the extent that a phone can be used as a weapon—a dubious proposition today—this concern disappears once the phone has been separated from the arrestee.[55] As for the destruction or concealment of evidence, this concern is also irrelevant once an arrestee's access to the

rules create unnecessary moral hazards for law enforcement. *See* Newhard v. Borders, 649 F. Supp. 2d 440, 447-49 (W.D. Va. 2009) (using rigid rule in granting immunity to police officer). In this case, the apparent existence of a "bright-line rule" allowed officers to disregard an arrestee's constitutional rights. *See id*. at 447 (finding it unnecessary to address whether police officer's conduct violated Constitution).

50. Thornton v. United States, 541 U.S. 615, 624 (2004) (O'Connor, J., concurring in part). O'Connor's statement can be seen as a possible response to the dissent in *Smallwood*, specifically the assertion that there is a "right of the police to inspect" items found on an arrestee's person. *Cf.* 113 So. 3d at 742 (Canady, J., dissenting) (emphasizing police right to search instead of person's right to exemption from search without warrant).

51. *See* MacLean, *supra* note 29, at 63 (explaining how current search-incident-to-arrest doctrine departs from *Chimel* rationales).

52. *See* Deters, *supra* note 24, at 1913 (writing *Robinson* allows search exception when neither officer safety nor evidence preservation at issue); *see also* Maclin, *supra* note 24, at 791-92 (discussing dissonance between traditional Fourth Amendment principles and *Robinson* ruling).

53. 113 So. 3d at 742 (Canady, J., dissenting) (recognizing items other than cell phones containing sensitive personal information searchable incident to arrest). The dissent argues that although the storage capacity of a cell phone far exceeds the storage capacity of items held searchable incident to arrest, "there is no reason to believe that the *character* of the cell phone information is necessarily of a more sensitive nature than is the information contained in other types of items that may be found on an arrestee's person." *Id.* It may be true that a thorough search of an arrestee's cell phone is more likely to uncover sensitive personal information than a thorough search of an arrestee's wallet, but whether this theoretical likelihood applies to actual cell phone searches incident to arrest, where the search is limited to the time-limited conditions of an arrest, is another question. *Id.*

54. *See* Weathersbee, *supra* note 31 at 819 (asserting neither officer safety nor preservation at issue when searching cell phones).

55. *See* MacLean, *supra* note 29, at 48-49 (arguing cell phone not dangerous weapon to officer). MacLean writes, "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." *Id.*

phone has been blocked.[56] However, technology is advancing so rapidly that it is hard to predict how the *Chimel* rationales might apply to future iterations of handheld electronic devices.[57]

In *Smallwood*, the Florida Supreme Court confronted the issue of whether a warrantless cell phone search conducted incident to an arrest is constitutional even where the officer lacks any reasonable belief that the phone contains evidence of the crime. Although the court was correct to hold that such searches are not justified by either a concern for officer safety or concern for evidence preservation—and are therefore unconstitutional—precedent unfortunately required the court to reach this conclusion by drawing a somewhat arbitrary distinction between cell phones and other items capable of storing sensitive personal information. Any clarity provided by this ruling is likely to be short-lived, as advances in technology will likely create new occasions to revisit the scope of the search-incident-to-arrest doctrine regarding cell phones.

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56. *See* Weathersbee, *supra* note 31, at 819 (explaining police may counter threat of remote memory wipe); *see also* MacLean, *supra* note 29, at 50 (listing police maneuvers to disrupt remote memory wipe). MacLean describes a device—a Faraday enclosure—which can prevent someone from remotely accessing a confiscated cell phone to destroy evidence. *See* MacLean, *supra* note 29, at 50. MacLean writes, "[a] reusable Faraday enclosure large enough to hold a single cell phone is available to law enforcement agencies and others for as little as thirty dollars." *Id.*

57. *See* Park, *supra* note 28, at 479 (speculating regarding significance of court treatment of cell phones). Park says the way courts treat cell phones will have ramifications for other devices, such as touchscreen tablet computers (for example, iPads). *Id.* at 479. Park proposes that warrantless cell phone searches incident to arrest should be limited to data reasonably related to the reason for arrest, and limited presumptively to text messages, call logs, and e-mail logs. *Id.* at 480-83. However, texting and email are only two modes of communication enabled by cell phones—conceivably law enforcement and courts will have to consider the rule's applicability to social media such as Facebook and Twitter. *Id.*