Are Smartphones like Footlockers or Crumpled up Cigarette Packages - Applying the Search Incident to Arrest Doctrine to Smartphones in South Carolina Courts

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ARE SMARTPHONES LIKE FOOTLOCKERS OR CRUMPLED UP CIGARETTE PACKAGES? APPLIED SEARCH INCIDENT TO ARREST DOCTRINE TO SMARTPHONES IN SOUTH CAROLINA COURTS

I. INTRODUCTION

One evening Larry, a lawyer, is driving home from the office after a particularly long and taxing day. As Larry makes a turn, his BlackBerry begins to ring, and while reaching to retrieve it, he swerves into a lane of oncoming traffic, narrowly missing another car. Officer Pat, a patrolman, witnesses Larry’s erratic driving and decides to stop Larry’s vehicle.

When Officer Pat approaches the vehicle, Larry is visibly shaken, and his eyes appear red and bloodshot from a long day at work. Believing that Larry might be drunk, Officer Pat asks Larry if he was on his way home from a nearby bar. Larry becomes irate at this allegation, partly because of the lack of sleep and partly because Larry thinks the officer recognizes him and is giving him a hard time. Larry is a well-known plaintiff’s attorney who has represented various individuals in suits against the police department. Unfortunately for Larry, reckless driving is an arrestable offense, and Officer Pat has also had a very long day. Officer Pat, fearing for his safety and wanting to quiet Larry, places him under arrest.

After placing Larry in the back of the patrol car, Officer Pat returns to the vehicle and sees a BlackBerry lying in the passenger’s seat. Officer Pat wonders if Larry was not drunk but instead was reaching for his BlackBerry. Because texting while driving is unlawful in the state, Officer Pat picks up the device to see if Larry had received or sent any text messages at the time of the near accident. Instead of a text message inbox, an email from one of Larry’s partners at the firm is open on the home screen. Worst of all, it is an email about an upcoming civil suit against the city police for allegedly assaulting an arrestee.

The search incident to arrest doctrine allows officers to search containers in the space within an arrestee’s immediate control, and in the context of the automobile, officers may search when it is reasonable to believe that the officer may find evidence of the arrestable offense in the vehicle.\(^1\) Unfortunately for Larry, it appears as if Officer Pat’s search of Larry’s BlackBerry was within the lawful bounds of the search incident to arrest doctrine.

Although smartphones\(^2\) allow lawyers to practice from any place in the world and increase productivity,\(^3\) the search incident to arrest doctrine can turn

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2. PC Magazine defines smartphone in the following manner: A cellular telephone with built-in applications and Internet access. Smartphones provide digital voice service as well as any combination of text messaging, e-mail, Web browsing, still camera, video camera, MP3 player, video player, television and organizer. In addition to their built-in functions, smartphones have become application delivery platforms, turning the once single-minded cellphone into a mobile computer.
this invaluable tool into a traveling liability. The amount of information stored on and accessible by a smartphone is astonishing.4 Many large firms link BlackBerries to internal servers, allowing lawyers to remotely access firm-wide files on the go.5 Thus, for many lawyers it might seem disconcerting that a police officer can search an arrestee’s smartphone incident to arrest. Under current case law, however, this seems to be the logical result.6

Part II of this Comment begins with a discussion of the development of the Fourth Amendment and the search incident to arrest doctrine generally. Part II also includes a section discussing United States Supreme Court jurisprudence, as well as a section that discusses the application of the search incident to arrest doctrine in South Carolina. Because many courts have held that smartphones and their cell phone predecessors are containers, Part III of this Comment discusses the evolution of the Fourth Amendment in relation to containers specifically. Part III also includes a section on the origin of the container analysis, the origin of the container analysis as applied to cell phones and smartphones, and finally a section that applies the origin of the container analysis to computers, laptops, and smartphones. Lastly, Part IV offers a solution for courts facing the situation of an arrestee challenging a smartphone search under the search incident to arrest doctrine in South Carolina.


3. See Res. in Motion Ltd., BlackBerry Case Study: Law Firm Improves Productivity and Bottom Line Using BlackBerry and Onset Technology 1 (2004), http://www.onsettechnology.com/Data/Uploads/RIM%20-%20Mintz_Case_Study.pdf (stating that a BlackBerry equipped with email enhancement, billable hour software, and document reading software can create up to four hours of extra productivity per lawyer per week). As a result of increased productivity, 500 lawyers could generate an extra $40,000 in revenue per month. Id.

4. There are a number of BlackBerry applications that may be helpful to lawyers, including, among many others, databases of federal and state laws, full copies of federal procedural rules and the U.S. Constitution, a legal dictionary, software to manage and create documents, remote desktop software that allows remote access to a desktop via a BlackBerry, and software that allows billable hours tracking by project. See Nicole Black, BlackBerry Apps for Lawyers, The Daily Record, (Rochester, N.Y.), July 20, 2009, available at http://nylawblog.typepad.com/files/dr-7.20.09.pdf.

5. See Bruce MacEwen, Lawyer Responsiveness: How Small and Mid-Sized Firms Can Use Mobility to Become More Competitive in the Face of High Client Expectations 11 (2006), http://na.blackberry.com/solutions/industry/professional/LawyerResponsivenessWhitepaper.pdf ("Having remote access to documents via a document management system—is clearly [the] number one [most important feature of smartphones to enhance lawyer responsiveness] (cited by 46.1% of all respondents), especially if access to 'personal/network, drives,' an additional 33.3%, is aggregated with that response.").

II. DEVELOPMENT OF THE FOURTH AMENDMENT PROTECTIONS AND THE
SEARCH INCIDENT TO ARREST DOCTRINE

A. United States Supreme Court Jurisprudence and the Search Incident to
Arrest Doctrine Generally

1. The Evolution of the Fourth Amendment and the Move Away from
the Chimel Principle of Particular Justification

The text of the Fourth Amendment generally protects citizens from
warrantless searches and seizures by guaranteeing the following:

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. 8

However, there are numerous exceptions to the warrant requirement.9 In South
Carolina, the courts recognize the search incident to arrest doctrine as an
exception to the warrant requirement.10 It is also one of the most common
exceptions used by law enforcement officers in avoiding the Fourth
Amendment’s warrant requirement.11

The seminal case for the modern search incident to arrest exception is
Chimel v. California.12 In Chimel, police officers arrested a suspect in his home
for burglary.13 When the officers asked the suspect if they could search his
home, he declined, but they advised him that “on the basis of the lawful arrest”
they could perform a search without his consent.14 The officers subsequently
searched the entire house, including “the attic, the garage, and a small
workshop.”15 In some rooms the police conducted only a cursory search, but in
the master bedroom and sewing room, officers asked the arrestee’s wife to move

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7. For an excellent summary of Chimel and its progeny, see Gershowitz, supra note 6, at 32–36.
8. U.S. CONST. amend. IV.
9. Exceptions to the Fourth Amendment warrant requirement include search incident to
arrest, hot pursuit, stop and frisk, automobile exception, plain view doctrine, consent, and
10. Id.
11. See Gershowitz, supra note 6, at 32 (noting that the search incident to arrest doctrine is
perhaps the most common rationale for police to search without a warrant”).
13. Id. at 753.
14. Id. at 753–54.
15. Id. at 754.
contents of drawers from side to side so that the officers could view any potential items that came from the burglary.\textsuperscript{16} To determine if this search was unconstitutionally broad, the United States Supreme Court outlined circumstances in which police officers may search a suspect incident to a lawful arrest.\textsuperscript{17} The Court stated that officers may search an arrestee’s person to find weapons that the arrestee could use against an officer and to prevent the arrestee from destroying or concealing evidence.\textsuperscript{18} Moreover, the Court held that officers may conduct a search of “the area ‘within [the arrestee’s] immediate control’—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.”\textsuperscript{19} Because the search of the home went beyond the arrestee’s person and the area within his immediate control, the Court held that the search was unconstitutionally broad.\textsuperscript{20}

Subsequently, in United States v. Robinson,\textsuperscript{21} the United States Supreme Court addressed the question of whether police could search closed containers on an arrestee’s person.\textsuperscript{22} During a pat-down search conducted incident to an arrest for driving without a license, a police officer felt something in Robinson’s pocket but could not determine what it was.\textsuperscript{23} The arresting officer reached into Robinson’s pocket, pulled out a “‘crumpled up cigarette package,’” and found heroin inside it.\textsuperscript{24} On this set of facts, the Court held that an officer conducting a search incident to a lawful arrest may open and search through items on the arrestee’s person, including a closed container.\textsuperscript{25} Thus, the Court created a clear and easy to understand rule,\textsuperscript{26} but in so doing, it eroded Fourth Amendment protections by holding that a full search following a lawful custodial arrest “requires no additional justification.”\textsuperscript{27} as the Court seemed to require in Chimel.\textsuperscript{28}

The erosion of Fourth Amendment protections continued in New York v. Belton.\textsuperscript{29} In Belton, a police officer stopped a vehicle because the driver was speeding.\textsuperscript{30} Upon approaching the vehicle, the officer smelled marijuana and

\begin{itemize}
\item \textsuperscript{16} Id.
\item \textsuperscript{17} Id. at 762–63.
\item \textsuperscript{18} Id. at 763. Destroying or concealing evidence is the particularly relevant exception to the smartphone inquiry, as it is highly unlikely that a person could use a smartphone as a weapon, in any typical sense of the word.
\item \textsuperscript{19} Id.
\item \textsuperscript{20} See id. at 768.
\item \textsuperscript{21} 414 U.S. 218 (1973).
\item \textsuperscript{22} See id. at 236.
\item \textsuperscript{23} Id. at 220, 223.
\item \textsuperscript{24} Id. at 223.
\item \textsuperscript{25} See id. at 236 (holding that the inspection and removal of the heroin from the cigarette package was lawful as a search incident to arrest).
\item \textsuperscript{26} Gershowitz, supra note 6, at 34.
\item \textsuperscript{27} Robinson, 414 U.S. at 235.
\item \textsuperscript{28} See supra notes 17–20 and accompanying text.
\item \textsuperscript{29} 453 U.S. 454 (1981).
\item \textsuperscript{30} Id. at 455.
\end{itemize}
viewed a suspicious envelope; consequently, he arrested the occupants of the vehicle.\textsuperscript{31} While the passengers were standing in an area away from the vehicle, the officer searched the passenger compartment, found a jacket, unzipped a pocket of the jacket, and found cocaine.\textsuperscript{32} The United States Supreme Court praised the “straightforward rule, easily applied, and predictably enforced” articulated in \textit{Robinson} but observed that there was no straightforward rule to guide police officers on the “proper scope of a search of the interior of an automobile incident to a lawful custodial arrest of its occupants.”\textsuperscript{33} In creating a rule applicable to the vehicle context, the Court stated, “Our holding today does no more than determine the meaning of \textit{Chimel}’s principles in this particular and problematic context.”\textsuperscript{34} In order to provide police officers with a bright-line rule, the Court held that officers may search the entire passenger compartment of a vehicle when the occupant is under arrest and away from the vehicle and that this search of the vehicle may also include any containers in the vehicle.\textsuperscript{35}

While the Court in \textit{Belton} had already moved far away from the original rationale in \textit{Chimel}—to prevent arrestees from obtaining a weapon or destroying evidence—the Court stretched the principle of particular justification even thinner in \textit{Thornton v. United States}.\textsuperscript{36} In \textit{Thornton}, a man in a vehicle aroused a police officer’s suspicions by avoiding driving near the officer’s car.\textsuperscript{37} Consequently, the officer checked the plates on the vehicle and discovered that they were issued for a different car.\textsuperscript{38} Before the police officer could stop the vehicle, however, the suspect pulled into a parking lot, exited the automobile, and walked away from it before the officer approached him.\textsuperscript{39} After approaching the suspect, the police officer conducted, with the suspect’s consent, a pat-down search and discovered marijuana and cocaine in the suspect’s pocket.\textsuperscript{40} After the officer arrested the suspect for drug possession, the officer proceeded to search the passenger compartment of the suspect’s vehicle, discovering a handgun under the seat.\textsuperscript{41} Unlike the suspects in \textit{Belton}, the arrestee was neither in the vehicle when the police began the arrest procedure nor in the vehicle when he encountered the officer.\textsuperscript{42} Nonetheless, the Court held that a full-scale search of the passenger compartment incident to the arrest of a “recent occupant” of a vehicle” is constitutional.\textsuperscript{43} The Court reasoned that police officers need a “clear

\textsuperscript{31} Id. at 455–56.
\textsuperscript{32} Id. at 456.
\textsuperscript{33} Id. at 459.
\textsuperscript{34} Id. at 460 n.3.
\textsuperscript{35} Id. at 460.
\textsuperscript{36} 541 U.S. 615 (2004).
\textsuperscript{37} Id. at 617–18.
\textsuperscript{38} Id. at 618.
\textsuperscript{39} Id.
\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} See id. at 617–18.
\textsuperscript{43} Id. at 623–24.
rule, . . . not depend[ent] on differing estimates of what items [are] or [are] not within reach of an arrestee at any particular moment." In Thornton, the erosion of Fourth Amendment protection was at a high point—the Court almost completely replaced the limited Chimel rationales and principle of particular justification for the sake of a bright-line rule.

2. A Return to the Narrow Chimel Exceptions in the Vehicle Context?

In Arizona v. Gant, the United States Supreme Court's most recent discussion of the search incident to arrest doctrine in the vehicle context, the Court returned to the rationales in Chimel and rejected a broad reading of Belton. The case involved a suspect who was arrested, handcuffed, and placed in the back of a locked police car. After officers secured the suspect and locked him in the back of the patrol car, officers searched the suspect's car and found a jacket with cocaine in a pocket. The facts are somewhat similar to those in Belton, but in this case, the Court declined to follow the broad generalization underpinning Belton and the result that followed in Thornton—a vehicle search would be authorized incident to every arrest of a recent occupant of a vehicle, even if the passenger compartment of the vehicle was not within an area over which the recent occupant could exercise immediate control. The Court explained its departure from this rule:

The experience of the 28 years since we decided Belton has shown that the generalization underpinning the broad reading of that decision is unfounded. We now know that articles inside the passenger compartment are rarely "within 'the area into which an arrestee might reach,'" and blind adherence to Belton's faulty assumption would authorize myriad unconstitutional searches. The doctrine of stare decisis does not require us to approve routine constitutional violations.

Thus, the Court returned to rationales outlined in Chimel, stating that "[p]olice may search a vehicle incident to a recent occupant's arrest only if the

44. Id. at 623.
45. See id. at 622–24.
47. See id. at 1719 ("Under this broad reading of Belton, a vehicle search would be authorized incident to every arrest of a recent occupant notwithstanding that in most cases the vehicle's passenger compartment will not be within the arrestee's reach at the time of the search. To read Belton as authorizing a vehicle search incident to every recent occupant's arrest would thus untether the rule from the justifications underlying the Chimel exception . . . ").
48. Id. at 1714.
49. Id.
50. Id. at 1719.
51. Id. at 1718.
52. Id. at 1723 (citation omitted) (quoting New York v. Belton, 453 U.S. 454, 460 (1981)).
arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of the arrest." 5\textsuperscript{53} While the Gant decision demonstrates a shift away from Belton and Thornton and a return to Chimel, the case affords a person little protection in the vehicle context if a container is within her reaching distance or if it is reasonable for the arresting officer to believe that the container may contain evidence of the arresting offense. 5\textsuperscript{4}

3. The Role of the Expectation of Privacy and the Evolution of the Fourth Amendment

The expectation of privacy is an implicit rationale behind the Fourth Amendment protection against warrantless searches. 5\textsuperscript{5} In order for the Fourth Amendment protection against unreasonable or warrantless searches to arise, there must be a justifiable expectation of privacy on the part of the individual in the area that the authorities search. 5\textsuperscript{6} In determining whether the Fourth Amendment was violated and whether the search incident to arrest doctrine applies, courts often examine whether a person had a reasonable expectation of privacy over the area that the person claims should be protected. 5\textsuperscript{7} If the person did not have a reasonable expectation of privacy over the area, then the Fourth Amendment and its protections are not even implicated. 5\textsuperscript{8}

The United States Supreme Court first stated the modern expectation of privacy underlying the Fourth Amendment in Katz v. United States, 5\textsuperscript{9} in which, unbeknownst to Katz, the FBI placed an electronic listening and recording system on the outside of a telephone booth from which he placed his calls. 5\textsuperscript{60} The issue in the case was whether the bugging of the phone booth constituted a "search" for Fourth Amendment purposes. 5\textsuperscript{61} In analyzing the issue, the United States Supreme Court stated that "the Fourth Amendment protects people, not places . . . . [W]hat [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." 5\textsuperscript{62} In a concurring

53. Id.
54. See id.
55. See New York v. Class, 475 U.S. 106, 112 (1986) ("T]he State's intrusion into a particular area . . . cannot result in a Fourth Amendment violation unless the area is one in which there is a 'constitutionally protected reasonable expectation of privacy.'" (quoting Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring))).
57. See, e.g., United States v. Carroll, 537 F. Supp. 2d 1290, 1299 n.9 (N.D. Ga. 2008) (discussing whether a defendant who voluntarily surrendered to law enforcement had a reasonable expectation of privacy in the contents of his BlackBerry that he brought with him).
58. See Class, 475 U.S. at 112.
60. Id. at 348.
61. See id. at 349-50.
62. Id. at 351-52.
opinion, Justice Harlan articulated the current two-prong standard used to
determine if a person has a reasonable expectation of privacy. The first prong is
subjective and requires that a person exhibit a belief of an actual expectation of
privacy, while the second prong is objective and requires that the expectation be
one that society recognizes as reasonable.

However, in United States v. White, Justice Harlan, in a dissenting opinion,
moved away from the subjective prong of the test that he articulated in Katz,
partly for fear of the government using technology to become an “Orwellian Big
Brother.” In White, the government wanted to introduce evidence obtained
from an electronic listening device on an informant who engaged in
conversations with White about narcotics. Law enforcement officers were
listening to these conversations through a radio transmitter attached to the
device. Based on advances in technology, as evidenced by the use of an
electronic listening device placed on the informant, Harlan began to see a
potential problem with the test that he articulated in Katz. The obvious problem
was that the government can influence the citizenry’s subjective expectation of
privacy. For example, if the government routinely conducts warrantless
searches of smartphones, then it would be likely that a citizen would no longer
have a subjective expectation of privacy in the contents of her smartphone,
because she would have been made aware that police officers routinely conduct
such searches. As a result, Justice Harlan proposed a new test to determine when
a warrant must be obtained before police may conduct a search. He stated that
courts should balance “the nature of a particular practice and the likely extent of
its impact on the individual’s sense of security . . . against the utility of the
conduct as a technique of law enforcement.” Where the intrusion into the
security and liberty interests of the individual are great, courts should require law
enforcement officers to obtain warrants before conducting searches.

63. Id. at 361 (Harlan, J., concurring).
64. Id.
66. Id. at 770, 786 (Harlan, J., dissenting).
67. Id. at 746–47 (plurality opinion).
68. Id. at 747.
69. See id. at 786 (Harlan, J., dissenting).
70. Id. (“The analysis must, in my view, transcend the search for subjective expectations or
legal attribution of assumptions of risk. Our expectations, and the risks we assume, are in large part
reflections of laws that translate into rules the customs and values of the past and present.”).
71. Id.
72. Id.
73. Id. at 786–87.
B. Applying the Search Incident to Arrest Exception in South Carolina

A recent and illustrative South Carolina search incident to arrest case is *State v. Freiburger.* The case involved a suspect who was stopped for hitchhiking. During a pat-down search incident to arrest, the officer discovered a revolver. The South Carolina Supreme Court stated, “Generally, a warrantless search is per se unreasonable and violates the Fourth Amendment prohibition against unreasonable searches and seizures.” However, the court noted that there are a number of exceptions to the Fourth Amendment protection and among them is the search incident to arrest exception. Citing *Chimel,* the court stated, “The rationale for such a warrantless search is that it is permissible incident to a lawful arrest because of legitimate concerns for the safety of the officer and to prevent the destruction of evidence by the arrestee.” In analyzing the facts of this case in light of the original *Chimel* rationale, the court concluded that the pat down search was lawful and “necessary to ensure [the officer’s] safety.” *Freiburger* is a fairly recent case, decided long after the United States Supreme Court began its move away from the *Chimel* principle of particular justification in *Robinson.* Nevertheless, the *Freiburger* court still rooted its reasoning in *Chimel’s* original justifications and thus remained true to the principle of particular justification.


75. *Freiburger,* 366 S.C. at 130, 620 S.E.2d at 739.

76. *Id.* The officer “testified that, although Freiburger had not been arrested at the time of the pat down search, he was going to be arrested for hitchhiking, or taken back to the jail.” *Id.* at 133, 620 S.E.2d at 741. The court subsequently held that the pat down search was lawful as a search incident to arrest. *Id.*

77. *Id.* at 131, 620 S.E.2d at 740 (citing Dupree, 319 S.C. at 456, 462 S.E.2d at 281).

78. *Id.* at 132, 620 S.E.2d at 740 (citing Dupree, 319 S.C. at 456, 462 S.E.2d at 281; State v. Ferrell, 274 S.C. 401, 409, 266 S.E.2d 869, 873 (1980)).

79. *Id.* at 132, 620 S.E.2d at 740–41 (citing Chimel v. California, 395 U.S. 752, 763 (1969)).

80. *Id.* at 133, 620 S.E.2d at 741.

81. See United States v. Robinson, 414 U.S. 218, 235 (1973) (“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. . . . [W]e hold that in the case of a lawful custodial arrest a full search of the person is . . . a ‘reasonable search’ under [the Fourth] Amendment.”).

82. See *Freiburger,* 366 S.C. at 132–33, 620 S.E.2d at 740–41.
However, in *State v. Muquit*, the South Carolina Court of Appeals took a very broad view of the search incident to arrest doctrine. In that case a defendant was incarcerated at a detention center after being arrested for an armed robbery. After the arrest, police officers obtained a search warrant for the clothes the suspect wore during the robbery, which were being held at the jail. The trial court found that the search warrant was invalid because the warrant failed to list the jail as the place to be searched. The judge, however, concluded that the seizure of the clothes was valid, stating that the search warrant was unnecessary. The appellate court held that the search of the defendant’s clothing was valid incident to arrest. In support of this holding, the court cited *United States v. Edwards* and stated that a person’s expectation of privacy is greatly reduced when he is arrested and his property transfers to the custody of the state, even when a substantial amount of time has elapsed between an arrest and a search.

At the South Carolina federal appellate court level, the United States Court of Appeals for the Fourth Circuit recently examined *Arizona v. Gant* in *United States v. Majette*, a case in which the defendant was pulled over for a traffic offense and arrested for driving on a suspended license. The officer placed Majette in the back of a patrol car and searched his vehicle. During this search, the officer discovered drugs and drug paraphernalia, and Majette was subsequently charged with a drug related offense. The court undertook a straightforward application of *Gant*, noting that “police may search incident to arrest only the space within an arrestee’s immediate control” in order to stop the arrestee from obtaining a weapon or destroying evidence. Additionally, the court stated that in the automobile context, an officer can search the vehicle if the officer reasonably believes that the vehicle might yield evidence related to the offense for which the officer is arresting the defendant. Applying this reasoning

83. 381 S.C. 114, 671 S.E.2d 643 (Cl. App. 2009); see also *State v. Moultrie*, 316 S.C. 547, 551–52, 451 S.E.2d 34, 37 (Cl. App. 1994) (holding that a search that occurred immediately before arrest qualified as a valid search incident to arrest, even though typically a search incident to arrest occurs after arrest).
85. *Id.* at 117, 671 S.E.2d at 644–45.
86. *Id.* at 117, 671 S.E.2d at 645.
87. *Id.*
88. *Id.* at 118–20, 671 S.E.2d at 645–46.
91. 326 F. App’x 211 (4th Cir. 2009).
92. *Id.* at 212 (noting that the original reason for the stop was “impermissibly dark window tint”).
93. *Id.*
94. *Id.*
95. *Id.* at 213 (quoting *Arizona v. Gant*, 129 S. Ct. 1710, 1712–13 (2009)) (internal quotation marks omitted).
96. *Id.* (citing *Gant*, 129 S. Ct. at 1714).
to the facts of the case, the court held that the search was unreasonable because Majette was handcuffed and in the back of the patrol car during the search.\(^7\) Furthermore, the court found that the officer could not have reasonably believed that the vehicle contained evidence of Majette’s license suspension.\(^8\)

### III. The Evolution of the Search Incident to Arrest Doctrine as Applied to Containers—Crumpled up Cigarette Packages to the Smartphone

As discussed above, the search incident to arrest doctrine applies in many settings. Generally speaking, the analyses in these settings are similar with respect to searches of items found on the suspect’s person or in the suspect’s car. Typically searches conducted incident to arrest are limited to the arrestee’s person or an area within her immediate control and are based on the need to protect the officer from hidden weapons or prevent the destruction of evidence. However, as noted in Part II, this principle of particular justification was stretched thin in the cases that followed Chimel but was strengthened somewhat in Gant. With respect to smartphones, however, many courts have drawn analogies between cell phones and containers,\(^9\) which are potentially subject to different treatment under the search incident to arrest doctrine. The next sections discuss the origins of container searches, their application to smartphones, and the potential consequences in South Carolina courts.

#### A. Origins of the Container

Among many others, containers discussed in United States Supreme Court jurisprudence have included a crumpled up cigarette package on the arrestee’s person,\(^10\) a footlocker that had just been loaded into an automobile’s trunk,\(^11\) a suitcase in the trunk of a taxicab,\(^12\) and a brown paper bag in the trunk of an arrestee’s vehicle.\(^13\) These containers typically have fallen into one of two categories: containers immediately associated with the person of the arrestee, such as a wallet\(^14\) or an address book,\(^15\) and personal property located near an

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97. *Id.* (citing *Gant*, 129 S. Ct. at 1718–19).
98. *Id.*
99. *See infra* Part III.B.
102. Arkansas v. Sanders, 442 U.S. 753, 755 (1979), *overruled in part* by Acevedo, 500 U.S. 565. The *Acevedo* Court overruled *Chadwick* and *Sanders* only to the extent they required a warrant to search a closed container in an automobile. *See* 500 U.S. at 579. Thus, outside of the context of an automobile search, they are presumably still good law.
104. *See* United States v. Molinaro, 877 F.2d 1341, 1346 (7th Cir. 1989) (citing *Robinson*, 414 U.S. 218) (holding a search of a wallet found on an arrestee’s person valid incident to arrest).
arrestee, such as luggage. The two types of containers have received different treatment from the United States Supreme Court.

*United States v. Robinson* established the rule that when police officers discover a container, such as a crumpled up cigarette package, on an arrestee’s person during a search incident to arrest, the officers may open it without any additional justification. Specifically, in *Robinson*, the United States Supreme Court held that an officer conducting a search incident to lawful arrest can open and search through items on the arrestee’s person, even those in a closed container. Containers found on an arrestee’s person—like the crumpled up cigarette package—have come to be known as “containers immediately associated with the person of an arrestee.”

In contrast, in *United States v. Chadwick*, the United States Supreme Court took up the issue of how to treat containers located near the person of an arrestee. In *Chadwick*, federal narcotics agents suspected that a footlocker carried by two men onto a train leaving San Diego for Boston contained narcotics. When the men arrived in Boston, federal agents were waiting and released a drug-sniffing dog, which alerted the agents to the presence of marijuana in the footlocker. The suspects loaded the footlocker into the trunk of a waiting automobile and were subsequently arrested. The agents took possession of the car and drove it to the federal building where they opened the footlocker, which was locked with a regular trunk lock and a padlock. The officers discovered marijuana inside of the footlocker, and at trial, the defendant moved to have the marijuana evidence suppressed. The Court held that Fourth Amendment protections extend to containers outside of the home and that by placing personal affects inside of a double-locked footlocker, the suspects manifested an expectation of privacy no different than if they had locked the doors of their home. Lastly, the Court stated that there was no exigency

105. See United States v. Rodriguez, 995 F.2d 776, 778 (7th Cir. 1993) (citing Molinaro, 877 F.2d at 1346–47) (analogizing a search of an address book to the search of a wallet on an arrestee’s person and holding the search of the address book as valid incident to arrest).

106. See Chadwick, 433 U.S. at 13, 15 (holding that a footlocker is personal property not immediately associated with the person of an arrestee).


108. Id.

109. See 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.5(a), at 176 (3d ed. 1996) (“However, the Robinson search-incident-to-arrest authority was deemed to extend to containers on the person and containers such as a person which are ‘immediately associated’ with the person.” (footnotes omitted)).


111. Id. at 4, 15.

112. Id. at 3.

113. Id. at 3–4.

114. Id. at 4.

115. Id. at 4–5.

116. Id. at 5.

117. Id.

118. Id. at 11.
justifying the search because the search was remote in time and place from the arrest and the police officers had reduced the footlocker to their exclusive control.\(^{119}\) Therefore, the Court found that the warrantless search of the footlocker was unreasonable.\(^{120}\)

In a similar case, \textit{Arkansas v. Sanders},\(^{121}\) the United States Supreme Court extended its finding of an increased expectation of privacy in footlockers and luggage.\(^{122}\) In that case, police officers received a tip from an informant about a suitcase in the trunk of a car.\(^{123}\) Subsequently, the officers stopped the car on a highway and searched the suitcase.\(^{124}\) Prosecutors argued that a search of the suitcase was permissible because the suitcase was in an automobile.\(^{125}\) However, the Court held that the expectation of privacy in a suitcase taken from a car on a highway is no different than the expectation described \textit{Chadwick}.\(^{126}\) The Court reasoned that the purpose of a suitcase is to "serve as a repository for personal items when one wishes to transport them."\(^{127}\)

In sum, the United States Supreme Court has held that containers that fall into the category of containers immediately associated with the person, such as the cigarette package in \textit{Robinson}, may be searched automatically incident to arrest without additional justification. In contrast, containers that fall into the category of personal property near an arrestee, such as the luggage in \textit{Chadwick} and \textit{Sanders}, may be searched to preserve evidence or protect the officer. However, the Court has held that searches incident to arrest of footlockers and luggage are often unreasonable because it is easy for police to secure and preserve their contents. Moreover, individuals have a heightened expectation of privacy in the contents of footlockers and luggage.

\textbf{B. Smartphones as Containers in South Carolina}

Whether the warrantless search of a smartphone is constitutional could be determined by how South Carolina courts categorize a smartphone—that is, whether smartphones are analogous to footlockers or to wallets. If a South Carolina court finds that a smartphone is analogous to a footlocker, as in \textit{Chadwick}, then the search will be subjected to more stringent requirements. This would require that an officer be able to articulate some reasonable rationale related to a chance that evidence in the phone could be destroyed or that a search was needed to protect the safety of the arresting officer.\(^{128}\) If the officer chooses

\(^{119}\) \textit{Id.} at 15.
\(^{120}\) \textit{Id.} at 15–16.
\(^{121}\) \textit{442 U.S. 753 (1979), overruled in part by California v. Acevedo, 500 U.S. 565 (1991).}
\(^{122}\) \textit{Id.} at 764–65.
\(^{123}\) \textit{See id.} at 755.
\(^{124}\) \textit{Id.}
\(^{125}\) \textit{Id.} at 762.
\(^{126}\) \textit{Id.} at 764–65.
\(^{127}\) \textit{Id.} at 764.
\(^{128}\) \textit{See State v. Smith, 920 N.E.2d 949, 956 (Ohio 2009).}
to seize the smartphone, she would have to obtain a warrant before conducting a search if no other exigent circumstances exist. however, if a South Carolina court finds that a smartphone is analogous to a wallet or address book, it would seem that police may search a smartphone incident to arrest without additional justification.

Two cases illustrate the different results that follow based upon the categorization of a cell phone as analogous to a footlocker or a wallet. in United States v. Finley, the United States Court of Appeals for the Fifth Circuit upheld a district court’s denial of the defendant’s motion to suppress call records and text messages retrieved from his cell phone. In reaching its decision, the court reasoned that a cell phone or pager is personal property “immediately associated” with the arrestee, thus treating cell phones and pagers similar to wallets or address books.

However, in United States v. Park, the United States District Court for the Northern District of California granted a defendant’s motion to suppress a warrantless search of his cell phone. In reaching the decision, the court applied Chadwick’s reasoning. The court then compared laptops to modern cell phones because, like laptops, “modern cellular phones have the capacity for storing immense amounts of private information.” The court stated that persons have lesser privacy interests in address books or pagers found on their persons, which contain less personal information. Because the search of the cell phone’s contents was not based on exigent circumstances, the court held that the search did not qualify under the search incident to arrest exception and stated that the officers should have obtained a warrant before conducting a search.

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129. See id.
130. 477 F.3d 250 (5th Cir. 2007).
131. Id. at 260.
132. Id. at 260 n.7 (quoting United States v. Chadwick, 433 U.S. 1, 15 (1977)); see also United States v. Brookes, No. CRIM 2004-0154, 2005 WL 1940124, at *3 (D.V.I. June 16, 2005) (upholding a search of a cell phone and analogizing a pager and cell phone to a wallet or address book); United States v. Cote, No. 03CR271, 2005 WL 1323343, at *6 (N.D. Ill. May 26, 2005) (citing United States v. Rodriguez, 995 F.2d 776, 778 (7th Cir. 1993)) (upholding search of cell phone and analogizing it to a wallet or address book as items immediately associated with the person of the arrestee).
135. Id. at *5, *12.
136. Id. at *6, *8.
137. Id. at *8.
138. Id. at *9.
139. Id. at *8.
1. Early Pagers and Cell Phones as Wallets and Address Books—Lowered Expectation of Privacy

Even when courts have held that a person has a reasonable expectation of privacy in the contents of a cell phone, the courts have found that the search incident to arrest exception trumps the privacy expectation. In *United States v. Chan*, a federal district court analogized a pager to a personal address book and stated that individuals have a "reasonable expectation of privacy in the contents of [a] pager’s memory." The defendant argued that the court should follow *Chadwick*, but the court declined to recognize *Chadwick* as controlling. The court based its holding on the fact that in *Chan* the search of the pager was not remote in time and space to the arrest and the pager was seized as a result of a search of the defendant’s person, whereas in *Chadwick*, the footlocker was seized from the trunk of a car, and the search of the footlocker was remote in time and space. Consequently, the court in *Chan* held that the warrantless search of the pager was permitted under the search incident to arrest doctrine.

In another early electronic container case, *United States v. Ortiz*, the United States Court of Appeals for the Seventh Circuit justified a warrantless search of a pager. The court based this finding on the fact that incoming calls could destroy stored phone numbers. Consequently, when early pagers are analogized to address books, they fit comfortably within an original *Chimel* rationale—a warrantless search is permitted to preserve evidence. The courts in *Chan* and *Ortiz* made two important proclamations: the search incident to arrest doctrine trumps an expectation of privacy in older electronic containers, and early electronic containers should be treated no differently than any other container.

2. Shaky Ground: The Modern Cell Phone–Container Analogy

In terms of functionality, early cell phones were similar to an address book or letter in an envelope found on an arrestee’s person. For example, text messaging is similar to sending and receiving a letter, and reading a text message

140. 830 F. Supp. 531 (N.D. Cal. 1993).
141. Id. at 534–35.
142. Id. at 535–36 (citing United States v. Chadwick, 433 U.S. 1, 12–15 (1977)).
143. Id.
144. Id. at 536.
145. 84 F.3d 977 (7th Cir. 1996).
146. Id. at 983–84.
147. Id. at 984 ("Because of the finite nature of a pager’s electronic memory, incoming pages may destroy currently stored telephone numbers in a pager’s memory. The contents of some pagers also can be destroyed merely by turning off the power or touching a button.").
149. See *Ortiz*, 84 F.3d at 984; *Chan*, 830 F. Supp. at 534–36.
is analogous to reading the contents of a letter.\textsuperscript{150} However, the function analogy becomes harder to draw with a modern cell phone’s capabilities because access to a text message inbox or outbox on a cell phone is analogous to reading hundreds of short letters or even eavesdropping on a real-time conversation.\textsuperscript{151} Consequently, the function seems similar—both are forms of written communication—but the sheer volume of real-time communication is incomparable. Moreover, most Americans likely would have a heightened expectation of privacy in the context of a real-time conversation through text messaging,\textsuperscript{152} making the analogy between a modern cell phone and a wallet or address book tenuous.

In a representative modern cell phone text messaging case, \textit{United States v. Finley}, the Fifth Circuit treated text messages like the contents of any other container\textsuperscript{153} because the cell phone was an item immediately associated with the arrestee’s person.\textsuperscript{154} After a controlled drug purchase, police searched Finley, found a cell phone, searched the phone, and found text messages related to drug use and trafficking.\textsuperscript{155} Finley argued that the search of his cell phone was unlawful and that his cell phone could be seized but not searched.\textsuperscript{156} The court held that “Finley had a reasonable expectation of privacy in the call records and text messages on the cell phone and that he therefore ha[d] standing to challenge the search.”\textsuperscript{157} However, the court concluded that the search was lawful, citing the rationales articulated in \textit{United States v. Robinson} and \textit{New York v. Belton}

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\textsuperscript{150} At the most basic level, a letter and a text message are both a written form of communication exchanged between two people.

\textsuperscript{151} Text messages are exchanged in real time and responses are often received in a matter of seconds, as would occur in an in-person conversation or a conversation on the phone, whereas a letter is sent through the mail, which results in a much more delayed response. Moreover, people send far more text messages per day than letters. According to a Nielsen Mobile Survey, “[f]or the second quarter of 2008, U.S. mobile subscribers sent and received on average 357 text messages per month,” which constitutes almost 12 text messages per day. Marguerite Reardon, \textit{Americans Text More Than They Talk}, CNET NEWS, Sept. 22, 2008, http://news.cnet.com/8301-1035_3-10048257-94.html. Moreover, “American teenagers sent and received an average of 2,272 text messages per month in the fourth quarter of 2008, according to the Nielsen Company—almost 80 messages a day, more than double the average of a year earlier.” Katie Hafner, \textit{Texting May Be Taking a Toll}, N.Y. TIMES, May 26, 2009, at D1.

\textsuperscript{152} See, e.g., United States v. Park, No. CR 05-375 SI, 2007 WL 1521573, at *8 (N.D. Cal. May 23, 2007) (“Individuals can store highly personal information on their cell phones, and can record their most private thoughts and conversations on their cell phones through email and text . . . “).

\textsuperscript{153} See United States v. Finley, 477 F.3d 250, 260 (5th Cir. 2007).

\textsuperscript{154} See id. at 260 & n.7 (quoting United States v. Chadwick, 433 U.S. 1, 15 (1977)).

\textsuperscript{155} Id. at 253–54. For example, one text message read, “‘Call Mark I need a 50,’” a likely reference to purchasing $50 worth of some narcotic. Id. at 254 n.2. Another read “‘So u wanna get some frozen agua,’” a likely reference to “‘ice,’ a common term for methamphetamine.” Id.

\textsuperscript{156} Id. at 260.

\textsuperscript{157} Id. at 259.
and in effect holding that the text messages in an electronic container are no different than the contents of any other container.158

Another illustrative modern cell phone case is United States v. Wurie.159 In Wurie, police observed a cocaine transaction in a parking lot, arrested Wurie for distributing crack cocaine, and seized two cell phones upon searching Wurie at the police station.160 Officers examined the call logs of one of the cell phones, and when the phone rang, they flipped it open and observed a ""wallpaper"" of a young woman and a baby.161 The police then found the phone number associated with "my house" in the call log.162 They traced the number through a Web site, which gave them an address.163 After obtaining a search warrant, officers searched the residence and found crack cocaine, a gun, drug paraphernalia, and cash.164 On appeal, Wurie sought to suppress the evidence resulting from the cell phone information.165 Using Finley as an example, the United States District Court for the District of Massachusetts stated, "It seems indisputable that a person has a subjective expectation of privacy in the contents of his or her cell phone."166 The court further noted that many other courts have held that the search incident to arrest exception applies to searches of the contents of cell phones.167 Focusing on the limited search of Wurie's cell phone and citing cases where wallets were searched incident to arrest, the court held that the search was reasonable, stating that there was no difference between a warrantless search of a cell phone and a warrantless search of other containers.168 The court suggested an analogy between wallets and cell phones, and also held that a limited and cursory search of a cell phone was reasonable and that the expectation of privacy was trumped by the search incident to arrest exception.169

160. Id. at 106.
161. Id.
162. Id.
163. Id. at 106–07.
164. Id. at 107.
165. Id. at 105.
166. Id. at 109.
168. Id. at 110 ("I see no principled basis for distinguishing a warrantless search of a cell phone from the search of other types of personal containers found on a defendant's person that fall within the . . . exceptions to the Fourth Amendment's reasonableness requirements.").
169. Id. at 109–10.
C. A New Analogy: Smartphones as Luggage, Computers, or Laptops—A Heightened Expectation of Privacy

More recently, courts have recognized that one of the problems with extending the search incident to arrest exception to smartphones is that "the line between cell phones and personal computers has grown increasingly blurry."\(^{170}\) Moreover, courts recognize that smartphones are very different from early cell phones and hold greater amounts of personal information.\(^{171}\) A smartphone now resembles a mobile computer more than an early cell phone, and while courts have often applied the search incident to arrest doctrine to cell phones,\(^{172}\) they have not applied it to computers.\(^{173}\) Moreover, when comparing the type and volume of information contained on a smartphone to that stored on a computer and considering the heightened level of expectation of privacy in information stored on a computer,\(^{174}\) the similarities are obvious.\(^{175}\) Implicit in this rationale is the fact that a laptop is more analogous to luggage than to a wallet, because searching a laptop may reveal the same type and volume of highly personal information that would be revealed by searching luggage. As a result, if a court analogizes a smartphone to a laptop, it is proper that the smartphone also be analyzed under the footlocker and luggage analysis. Thus, in order to predict how a smartphone should be analyzed, it is important to examine how computers are currently treated.


\(^{171}\) Id. at *8 & n.6 (distinguishing "modern cell phones" from earlier cell phones and taking note that the phones in this case were T-Mobile Sidekick IIIs, with capabilities such as email, texting, address books, cameras, instant messaging, and Internet access). The court also noted that "[I]ndividuals can store highly personal information on their cell phones, and can record their most private thoughts and conversations on their cell phones through email and text." Id. at *8.

\(^{172}\) See, e.g., United States v. Finley, 477 F.3d 250, 259-60 (5th Cir. 2007) (concluding that although the defendant had a reasonable expectation of privacy in the contents of his cell phone, the search of his phone was lawful); Wurie, 612 F. Supp. 2d at 109 ("Decisions of district courts and Courts of Appeals (often analogizing cell phones to the earlier pager technology) trend heavily in favor of finding that the search incident to arrest or exigent circumstances exceptions apply to searches of the contents of cell phones.").

\(^{173}\) See infra notes 175–79 and accompanying text.

\(^{174}\) Park, 2007 WL 1521573, at *8 ("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." (quoting United States v. Arnold, 454 F. Supp. 2d 999, 1003-04 (C.D. Cal. 2006), rev'd, 523 F.3d 941 (9th Cir. 2008), amended by 533 F.3d 1003 (9th Cir. 2008))).

\(^{175}\) See Matthew E. Orso, Cellular Phones, Warrantless Searches, and the New Frontier of Fourth Amendment Jurisprudence, 50 SANTA CLARA L. REV. 183, 213 (2010). Smartphones allow users to place calls, send text messages, email, browse the Web, take pictures, listen to music, watch video, and maintain financial records. See id. A home or business computer allows a user to perform all of the same functions but requires the user to remain in one location.
There are few cases to date addressing the situation where police have searched a laptop incident to arrest or without a warrant,176 with the exception of border search cases where law enforcement searched laptops without any reasonable suspicion under the border search doctrine.177 Typically in order to search a computer, police obtain a separate warrant,178 a blanket warrant or affix an affidavit to the warrant specifically including the computer or computer records,179 or consent of the computer’s owner to search the computer (which must be more than general consent to search the home or premises).180 Thus, if a South Carolina court found that a smartphone resembles a computer rather than an early cell phone, then the court also would hold that smartphones should be analyzed under a stricter luggage-type analysis.

1. Smartphones More Closely Resemble Computers than Early Cell Phones

Courts have not directly confronted the issue of how to treat laptops and smartphones. In many cases, police take the safe approach and obtain separate search warrants for the smartphones.181 Consequently, the discussion among courts that does exist is often in the form of dicta because the issue is not dispositive in the case.182 In other cases, courts have not had to address the issue because only a preliminary search of the phone was conducted before police obtained a search warrant.183 Nonetheless, these cases demonstrate that law

176. See id. at 215.
177. See, e.g., United States v. Arnold, 523 F.3d 941, 942, 947 (9th Cir. 2008) ("Arnold has failed to distinguish how the search of his laptop and its electronic contents is logically any different from the suspicionless border searches of travelers’ luggage that the Supreme Court and we have allowed."). amended by 533 F.3d 1003 (9th Cir. 2008). The border search doctrine allows law enforcement officers to search containers at the border without "particularized suspicion." Id. at 945.
180. See United States v. Carey, 172 F.3d 1268, 1274 (10th Cir. 1999) (holding that consent to search the apartment did not allow police to search the computer because the warrant gave permission to search only the "premises and property located at 3225 Canterbury #10").
181. See, e.g., Saferstein, 2009 WL 1162863, at *2 (noting that after obtaining several other search warrants, FBI agents obtained a separate warrant for "a laptop computer, Apple iPhone, and Apple iPod"); United States v. Lemke, Crim. No. 08-216(1) (DWF/RLE), 2008 WL 4999246, at *7 (D. Minn. Nov. 19, 2008) (noting that police obtained a warrant for an iPhone found on the person of an arrestee).
183. See, e.g., id. (stating that two computers and an iPhone were seized during a search and that after a preliminary search, the officer obtained a separate search warrant for the iPhone and computer).
enforcement officers are taking precautionary steps by treating smartphones like laptops and computers when applying for search warrants.  

2. Potential Guidance from Courts in Determining How to Analyze the Smartphone Issue

In United States v. Carroll,

a suspect was charged with possession of marijuana. Carroll sought to suppress evidence obtained from a search of his BlackBerry, which was obtained when he, accompanied by counsel, went to the police station to surrender voluntarily. When he surrendered, Carroll had a backpack, in which the officers found a BlackBerry. They then examined and recorded the BlackBerry’s contacts list. A United States District Court concluded that Carroll’s expectation of privacy was relevant to determining whether the search of his BlackBerry without a warrant was lawful but chose not to decide the issue. The court acknowledged that “other courts [had] reached varying conclusions on whether searches of an arrestee’s mobile phone is a lawful search incident to arrest, and if so, how far that lawful search may extend.” However, the court declined to answer the question and asked for more briefing from the parties because neither had fully briefed the issue. Carroll declined to have an evidentiary hearing, and a magistrate judge denied Carroll’s motion to suppress the evidence obtained from the BlackBerry. In a straightforward analysis, the magistrate judge held that the backpack was within Carroll’s reach, placing it within the Chimel principle of particular justification and allowing law enforcement officers to conduct a warrantless search to prevent the arrestee from obtaining a weapon or destroying evidence. Moreover, the magistrate judge distinguished Park, in which the search of a cell phone after arrest was held to be unconstitutional, because in Park, the search occurred an hour and a half after the arrest, while in Carroll, the search was contemporaneous with the arrest.

184. See id.
186. Id. at 1293.
187. Id. at 1294.
188. Id.
189. Id.
190. Id. at 1299 n.9, 1300.
191. Id. at 1299. As evidenced by the interchangeable use of the terms BlackBerry and mobile phone, the Carroll court seemed to treat a BlackBerry like any other mobile phone or early cell phone. See id. at 1299–300. One potential reason for this lack of distinction was that the court saw no difference between the two devices. Another explanation, however, is that the court was not forced to address this question because the search was limited to only the contacts list, which is also a function of early cell phones. See id. at 1294, 1299.
192. Id. at 1300.
193. Id. at 1301–02.
194. Id. at 1301 (citing Chimel v. California, 395 U.S. 752, 763 (1969)).
195. Id. at 1302.
In United States v. Murphy, law enforcement officers searched a cell phone with functions presumably similar to those of a smartphone. The defendant made several arguments that attempted to draw distinctions between older cell phones and more modern cell phones—similar to the distinction today between a typical cell phone and a smartphone. Murphy was convicted of narcotics and currency-related offenses after police stopped the vehicle he was riding in for speeding. Murphy argued that the evidence obtained from the warrantless search of the phone should be suppressed because there was no evidence that the information on the phone was volatile in nature and, therefore, no threat that the evidence would be destroyed. The United States Court of Appeals for the Fourth Circuit disagreed, reasoning that the need to preserve evidence justifies the retrieval of call records and text messages without a warrant during a search incident to arrest. Murphy also argued that police officers should be able to search only cell phones with small storage capacities without a warrant and that cell phones with large storage capacities should be precluded from any search incident to arrest. The court simply rejected this argument as unworkable because it would not be possible for an officer to differentiate between a cell phone with a large storage capacity and a cell phone with a small storage capacity. Moreover, the court stated that information on a cell phone with a large storage capacity could still be volatile because even those phones have limited storage space and an incoming call or message could destroy valuable evidence.

In Murphy, the court seemed to acknowledge that there are differences between various cell phones, such as storage capacity, which impact the

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196. 552 F.3d 405 (4th Cir. 2009).
197. See id. at 409–12. It is not clear from the opinion what type of cell phone was searched. However, this case is very recent, and based on the defendant’s argument that a distinction should be made between cell phones with large storage capacities and cell phones with small storage capacities, presumably his cell phone fit into the former category rather than the latter. See id. at 411. This categorization would be analogous to smartphones and similar modern cell phones. Although Murphy did not provide the court with any evidence that his cell phone had a large storage capacity, the court assumed that it did for the purpose of its analysis. Id.
198. See id. at 411 ("Murphy argues that whether a cell phone may be searched without a warrant can be determined only upon the officers ascertaining the cell phone's storage capacity."). The court discussed the storage capacity of cell phones and the volatility of the information on the cell phone. Id. Volatile means that evidence on the phone could be destroyed by unexpected incoming calls or messages, as was the case with early cell phones and pagers with very limited storage capacities. See id.
199. Id. at 407. In the course of the investigation following the stop, Murphy provided several false names and was arrested for obstruction of justice. Id. at 408.
200. Id. at 409–11.
201. Id. at 411.
202. Id.
203. Id.
204. Id.
probability that evidence on the phone could be destroyed.\textsuperscript{205} However, the court was also very dismissive of these distinctions.\textsuperscript{206} In spite of this, the smartphone analysis is much more complex than merely drawing conclusions based on a phone's storage capacity. Smartphones hold more information than early cell phones and, more importantly, hold information different from the information on early cell phones—information similar to what persons store on their personal computers.

In \textit{United States v. McCray},\textsuperscript{207} a United States magistrate judge examined issues surrounding the search of a cell phone’s camera function,\textsuperscript{208} a common feature of modern cell phones and smartphones.\textsuperscript{209} The defendant, whom police “charged with sexual exploitation of children and possession of child pornography, . . . filed a motion to suppress images found in his mobile phone at the time of his arrest.”\textsuperscript{210} Officers were called to an apartment complex, responding to reported sexual activity occurring in a vehicle.\textsuperscript{211} After police discovered McCray with a fourteen-year-old female, officers spotted two rocks of crack cocaine in the vehicle’s ashtray in plain view and placed McCray under arrest.\textsuperscript{212} While searching the vehicle further during the inventory process, police discovered a Polaroid of a naked adult female, and based on the picture and the cocaine, police suspected that McCray may have used his cell phone’s camera to take pictures of the minor female or for drug dealing activity.\textsuperscript{213} Without a warrant, an officer accessed the phone’s photo directory and discovered several lewd images of the minor female.\textsuperscript{214}

After citing \textit{Robinson} for the proposition that police may search the arrestee’s person to preserve evidence,\textsuperscript{215} the court cited a number of cases where other courts extended the search incident to arrest doctrine to electronic storage devices.\textsuperscript{216} The court emphasized that the officer only “briefly reviewed the images stored in the phone’s memory.”\textsuperscript{217} Moreover, relying on \textit{Finley}, the court stated that a cell phone is a container that stores information “that may have

\textsuperscript{205} See id. (discussing the distinctions between cell phones with large and small storage capacities).

\textsuperscript{206} See id.


\textsuperscript{208} Id. at *2. The district court adopted the magistrate judge’s report. Id. at *1.


\textsuperscript{210} McCray, 2009 WL 29607, at *1.

\textsuperscript{211} Id.

\textsuperscript{212} Id.

\textsuperscript{213} Id. at *2.

\textsuperscript{214} Id.

\textsuperscript{215} Id. (citing United States v. Robinson, 414 U.S. 218, 226 (1973)).

\textsuperscript{216} Id. at *3. The court noted that “[m]ore recent cases have treated mobile telephones and digital cameras in the same manner.” Id.

\textsuperscript{217} Id. at *4.
great evidentiary value" and that the information contained on a cell phone "might easily be destroyed." The court concluded that "incident to a person’s arrest, a mobile phone or beeper may be briefly inspected to see if it contains evidence relevant to the charge for which the defendant has been arrested," analogizing a brief search of a cell phone to thumbing through an address book or papers. The court acknowledged that the issue of "whether a cell phone (a kind of computer capable of storing vast amounts of data) may be subjected to a comprehensive search incident to a defendant’s arrest for a sample traffic violation” would be a more troublesome question. Nonetheless, the court’s strained analogy between a brief search of the camera function of a cell phone and a search of an address book demonstrates the court’s view of modern cell phones as containers immediately associated with the person of an arrestee.

IV. CONCLUSION: SUGGESTED SOLUTIONS IF THE SMARTPHONE AND SEARCH INCIDENT TO ARREST DOCTRINE ARISES IN SOUTH CAROLINA

A. Implications for the Future and a Recommendation for South Carolina Courts

South Carolina courts may follow a restrictive approach when dealing with smartphones, as have a few of their counterparts throughout the country. For example, in State v. Smith, the Ohio Supreme Court held that modern cell phones and smartphones do not qualify as closed containers under the Fourth Amendment because, like all electronic containers, cell phones do not “actually have physical objects within [them],” as required by Belton. Based on this reasoning, the court found that cell phones and smartphones cannot be searched without a warrant absent a need to protect the safety of the officer or protect evidence from “imminent destruction,” which was in line with the Chimel principle of particular justification and the Chadwick rationale. In Smith, the court held that the warrantless search was impermissible because at least a portion of the search occurred while police officers had reduced the phone to their exclusive control, eliminating the danger that the arrestee could destroy evidence on the phone. This situation is analogous to the search of the footlocker in Chadwick. The court also rejected analogies of cell phones and smartphones to address books and laptop computers, stating that cell phones “are

218. Id.
219. Id. at *4 & n.4.
220. Id. at *4 n.4.
221. 920 N.E.2d 949 (Ohio 2009).
222. Id. at 954 (citing New York v. Belton, 453 U.S. 454, 460 n.4 (1981)).
223. Id. at 955. In this case the court stated that Smith’s phone was not a smartphone but stated that “Smith’s cell phone had phone, text messaging, and camera capabilities.” Id. at 954. The court went on to call Smith’s phone a “modern ‘standard’” phone. Id.
224. Id. at 950, 955.
more intricate and multifunctional than traditional address books, yet they are still, in essence, phones, and thus they are distinguishable from laptop computers.\textsuperscript{225} However, the court stated that even though “cell phones cannot be equated with laptop computers,” the ability of modern cell phones and smartphones “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.”\textsuperscript{226} This is similar to the heightened expectation of privacy individuals have in a footlocker, as discussed in Chadwick and Sanders. Consequently, Smith demonstrates the possibility that a South Carolina court could hold that even basic modern cell phones, and certainly smartphones, give rise to a heightened level of expectation of privacy, similar to that in the footlocker in Chadwick.

In the broader search incident to arrest context, the Fourth Circuit has demonstrated that it will apply a straightforward analysis of Arizona v. Gant. The Gant decision signifies a return to the original rationales in Chimel and does so in large part on expectation of privacy grounds.\textsuperscript{227} If Gant signifies a return to a Fourth Amendment rooted in the expectation of privacy, then courts may place more weight on the expectation of privacy people have in their smartphones, as did the Ohio Supreme Court in Smith.

If the issue arises in South Carolina, South Carolina courts should follow the United States Supreme Court’s return to the expectation of privacy underpinnings in the Fourth Amendment and a narrow view of the search incident to arrest doctrine in Gant. In doing so, South Carolina courts should keep in mind the heightened expectation of privacy people have in their smartphones, with a view towards the Chadwick analysis, as did the Ohio Supreme Court in Smith.

\textit{Justin M. Wolcott}

\textsuperscript{225} Id. at 955.
\textsuperscript{226} Id.
\textsuperscript{227} See Arizona v. Gant, 129 S. Ct. 1710, 1720 (2009) (“A rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals.”).