California Supreme Court Historical Society
2013 Student Writing Competition

Third Place Prizewinning Entry

"Is that a Laptop in your Pocket or Can I Search You? Why the Majority of Critics believe that all Smartphones are not Created Equal in spite of the California Supreme Court's Decision in *People v. Diaz*"

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Introduction

Imagine a scenario where a suspected murderer is plotting his next series of attacks. He has already killed multiple victims and has left numerous clues at the crime scenes from which the police have traced the violent events to the suspect, but it is not enough yet to convict. From an anonymous tip, the police have learned where and when the suspect is going to attack his next victim. The police set up a surveillance area to catch and stop the suspect in the act. As soon as the suspect is found brandishing a weapon and approaching his intended target the police swarm him and put him in restraints. As they begin to perform a lawful search of his person one officer finds a small pocketbook on his person. Upon further inspection, the book holds incriminating evidence linking the suspect to previous unsolved murders. The book holds victims' names, their addresses, details on how he went about the murders, and elements of the crime that only the murderer would know. If this same information was held on a cell phone, precedent in California would still find this a lawful search and seizure due to the search incident to arrest exception of the Fourth Amendment search and seizure doctrine's warrant requirement.[1] But there are many critics of the California Supreme Court who would believe it unlawful because the suspect's right to privacy was being violated, all because one simple change was made: the physical book was now an electronic device.[2]

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[1] People v. Diaz, 51 Cal. 4th 84, 101 (Cal. 2011).

[2] *See* Dr. 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. 572 (2012); Joshua Eames, Note, *Criminal Procedure—"Can You Hear Me Now?": Warrantless Cell Phone Searches and the Fourth Amendment; People v. Diaz, 244 P.3d 501 (Cal. 2011)*, 12 Wyo. L. Rev. 483 (2012); Leanne Andersen, Note, *People v. Diaz: Warrantless Searches of Cellular Phones, Stretching the Search Incident to Arrest Doctrine Beyond the Breaking Point*, 39 W. St. U. L. Rev. 33

In January 2011, the California Supreme Court ruled that a search warrant was not necessary for police to search a cell phone incident to a lawful arrest.[3] The Court held that the officers did not need probable cause or even reasonable suspicion that the mobile phone contained information pertinent to the crime of arrest.[4] The Court based its rationale on United States Supreme Court precedent in the area of Fourth Amendment search and seizure doctrine, but still has received criticism from academics and other outsiders because of the dated nature of the cases the Court based its decision on.[5] Most have pushed for the stance that the advancement of technology in mobile phones, allowing them to store massive amounts of information with the ability to access content not directly stored in a pocket-sized device, warrants the treatment of such mobile technological devices as laptops or other similarly large technological instruments.

This paper will explore the California Supreme Court's thought process in ruling that cell phones on one's person are under the search incident to arrest exception. It will go through the cases that the Court used in making its decisions and explain why such comparisons made sense even though those cases dealt with scenarios not dealing with technology. The prevailing academic argument that smartphones should be treated as laptops in warrantless search situations will be refuted. Finally, a suggestion on the appropriate limitations when searching a smartphone, which the Court did not discuss because the facts of the case did not make it an issue, will be proposed. At the end of this paper, not only will the California Supreme Court be shown to have made the only decision that it possibly could have made, but it will go further and support the Court's rationale in making the most sensible judgment possible, based on precedent,

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(2011); Caitlin Keane, Note, *People v. Diaz Senate Bill 914, And the Fourth Amendment*, 35 Hastings Comm. & Ent. L. J. 331 (2013).

[3] *Diaz*, 51 Cal. 4th at 101.

[4] *Id.*

[5] *See supra* note 2.

that makes it clear that no individual should expect to have any privacy away from their household and on their person when subject to a lawful arrest.

I. Background

On April 25, 2007, Gregory Diaz was arrested for participating in the sale of the narcotic Ecstasy during a Ventura County Sheriff's Department's controlled purchase.[6] During the questioning process of Diaz at the police station, the arresting officer took Diaz's cell phone from the station's evidence room, which was confiscated during the arrest and in police possession for ninety minutes after arrest, and scrolled through the phone's contents.[7] Without a warrant, Detective Fazio searched through Diaz's text message folder and discovered a message implicating Diaz in the sale of the six Ecstasy pills found on him.[8] Once the detective showed the message to Diaz, he then recanted his denial of guilt and admitted participating in the sale of Ecstasy.[9]

Defendant moved to suppress the fruits of the cell phone search, the text messages and statements made by him, arguing that the warrantless search violated the Fourth Amendment, but the trial court denied the motion.[10] The Court of Appeal affirmed the trial court's decision, holding the search of the cell phone was incident to arrest and any evidence the lawful search uncovered was proper.[11] The California Supreme Court affirmed on the same grounds,

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[6] Diaz, 51 Cal. 4th at 88-89.

[7] *Id.* at 89.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

concluding that because the cell phone was "immediately" associated with Diaz's person, the search was valid under the search incident to arrest exception.[12]

In today's society, people have become reliant, to the point of dependence, on the use and availability of their personal cell phones. Within the last decade, the accessibility and rise of mobile phones, and now prominently smartphones, has grown exponentially.[13] There are currently more than ninety-eight million smartphone users in the United States alone.[14] In 2011, the number of active cell phones exceeded the United States' general population.[15] There are six billion cell phones worldwide with over a billion of those qualifying as smartphones.[16] Such phones combine an address book, phone, global positioning device, and the utility of an internet-connected computer all in one pocket-sized device. A recent study showed that over half of adult Americans own a smartphone.[17] Americans use more than 1.1 billion gigabytes of mobile

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[12] *Id.* at *93.*

[13] *See* Nancy Perkins, *Smartphones—The Thing Most Business Professionals can't Live Without*, exploreB2B, https://exploreb2b.com/articles/smartphonesthe-thing-most-business-professionals-cant-live-without (last visited Jun. 20, 2013) (last year, over 712.6 million smartphone units were sold worldwide. For instance, there are at least 98 million smartphone users in the US alone. About 122.3 million handheld tablet PCs were sold by last year's end, says International Data Corporation. And as of 2010, more than 300,000 mobile apps were downloaded 10.9 billion times.)

[14] *Id.*

[15] *See* Cecilia Kang, *Number of cellphones exceeds U.S. population: CTIA trade group*, The Washington Post (Oct. 11, 2011, 7:54 AM) (the number of mobile devices rose 9 percent in the first six months of 2011, to 327.6 million — more than the 315 million people living in the U.S., Puerto Rico, Guam and the U.S. Virgin Islands. Wireless network data traffic rose 111 percent, to 341.2 billion megabytes, during the same period.).

[16] Cyrus Farivar, Talk is cheap: Cell phones hit six billion worldwide, ARS Technica (Oct. 12, 2012, 12:30 PM) http://arstechnica.com/business/2012/10/talk-is-cheap-six-billion-people-worldwide-have-cellphones/.

[17] Dara Kerr, *Over half of American adults own smartphones*, CBS News, (Jun. 6, 2013, 1:10 PM) http://www.cbsnews.com/8301-205_162-57588043/over-half-of-american-adults-own-smartphones/ (a Pew Research Center's Internet & American Life Project showed that over 56% of adults have some type of smartphone with another 35% owning a "feature" phone).

data while sending more than 2.273 trillion texts.[18] Cell phones and smartphones have become a huge part of our personal and professional lives.

II. The Progression of the Fourth Amendment Search and Seizure Doctrine

The Fourth Amendment to the United States Constitution reads that "[t]he 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 . . . ."[19] This language from the Fourth Amendment guarantees freedom from unreasonable searches and seizures by the government.[20] In addition, the United States Supreme Court has ruled that searches without a warrant are per se unreasonable, unless such searches fall within one of the accepted delineated exceptions.[21]

A. The Search Incident to Arrest Exception

The most commonly used exception is the search incident to arrest due to it being one of the typical types of police search practices.[22] This exception has been the preferred application by the courts when addressing the issue of warrantless searches of the arrested party's cell phone.[23]

In *Chimel*, police officers obtained an arrest warrant for Chimel in connection with a burglary of a coin shop.[24] When the officers arrived at the home of Chimel, they began to

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[18] Farivar, *supra* note 16.

[19] U.S. Const. amend. IV.

[20] Katz v. the United States, 389 U.S. 347, 357-58 (1967).

[21] *Id.*

[22] Chimel v. California, 395 U.S. 752, 755 (1969) (the modern rule was first recognized by the Court in this case).

[23] 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.2 (4th ed. 2004).

[24] *Chimel*, 395 U.S. at 753.

examine the interior of the home despite the protests of Chimel, and without a valid search warrant.[25] During the officer's search of the entire home, they found numerous coins and other valuables linked to the shop that was burglarized, which the State introduced into evidence despite the objections of the defendant based on an unlawful search and seizure.[26] The California Supreme Court upheld the search on the basis that it was deemed constitutional as being "incident to a valid arrest."[27]

The United States Supreme Court invalidated Chimel's conviction, holding the search of defendant's entire house unreasonable because it went far beyond his person and the area within his immediate control. [28] The Court's justification of the exception was to p*revent concealment or destruction of evidence* that is on one's person or in their control, as well as to remove any weapons that may be on the arrested person, which the search of Chimel's house did not fit within.[29] In the context of the California Supreme Court's decision in *Diaz*, the focus will be on the avoidance of the concealment and destruction of evidence purpose of the exception.

B. Expansion of Exception to Property Immediately Associated with One's Person

The Court would soon expand the search incident to arrest exception to include personal property "immediately associated" with the arrested individual's physical presence.[30] In the landmark case that brought the expansion, police patted down Robinson and found a "crumpled up

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[25] *Id.* at 753-54.

[26] *Id.* at 754.

[27] *Id.* at 754-55.

[28] *Id.* at 768.

[29] *Id.* at 763-63 (emphasis added).

[30] United States v. Robinson, 414 U.S. 218 (1973).

cigarette package" in defendant's breast pocket while he was under arrest for driving without a license.[31] The officer opened the package and found fourteen heroin capsules within. The Court upheld the search, reasoning that after a lawful custodial arrest, the police have the authority to fully search the arrestee's body, and that they have this authority even without probable cause that the person arrested possessed weapons or evidence at risk of being lost.[32] Thus, *Robinson* allows police to open and inspect containers they seize from the arrestee's person, without probable cause or reasonable suspicion that the item to be inspected contains evidence indicative of illegal activity.[33]

This notion was expanded even further in another Supreme Court case that dealt with a search associated with a substantial period of time elapsing after the property had been confiscated and the arrested individual placed in custody.[34] Police officers arrested Edwards, who was found trying to break into a Post Office.[35] While Edwards was in custody, and ten hours after his lawful arrest, officers made the defendant change his clothes and searched his clothing suspecting that they might contain paint chips from the window through which he had tried to enter. Subsequent examination revealed that there were in fact paint chips matching the sample taken from the window.[36] The Supreme Court held that the search was valid "even

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[31] *Id.* at 221-23.

[32] *Id.* at 235. (The Court reasoned that a search of a person connection to a lawful custodial arrest was not only an exception to the warrant requirement but also a reasonable search under the Fourth Amendment, thus requiring no further justification.).

[33] *Id.* at 236*; see also Eames*, *supra* note 2, at 488 ("a search of a person is automatically reasonable as the arrest itself was a reasonable intrusion on a person's privacy interest.").

[34] U.S. v. Edwards, 415 U.S. 800, 805-806 (1974).

[35] *Id.* at 801.

[36] *Id.* at 801-02.

though a substantial period of time ha[d] elapsed" and the defendant had been arrested and placed in custody.[37] The Court's rationale was that a "reasonable delay in effectuating" a search until they reach the place of custody no more imposes upon the arrestee than a search that takes place at the time of the arrest.[38] The combination of this case, along with the previous reference to *Robinson*, promote a search incident to arrest where police officers have deference to reasonably conduct thorough searches of anything found on an individual's person as long as it is connected to a lawful arrest.

C. Personal Property Within the Arrested Individual's Immediate Control

Lastly, the Court distinguished between searches of property immediately associated with a person and searches of property within a person's immediate control. The Court held that officers could conduct searches of items found on an arrestee's person, so long as the search followed a valid custodial arrest, but items within an arrestee's immediate control could not be searched, unless any demand that necessitated a warrantless search existed at the time of arrest (such as a dangerous situation).[39]

In *Chadwick*, federal agents used a drug-sniffing dog to identify a footlocker unloaded from a train car as containing a "controlled substance."[40] The police waited for the first two defendants

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[37] *Id.* at 807-08.

[38] *Id.* at 805.

[39] *See Chadwick,* 433 U.S. at 15. The Court gave an example of when such an exigency would exist that would give police authority to search luggage if suspicion existed that there were explosives within its contents. *Id.* at 15 n. 9.

[40] *Id.* at 3-4, *rev'd on other grounds by* California v. Acevedo, 500 U.S. 565 (1991); *see* Commonwealth v. Pierre, 893 N.E. 2d 378, 382 (Mass. App. Ct. 2008, a*ff'd* 902 N.E.2d 367 (Mass. 2009) ("*Acevedo*, although overruling *Chadwick* in part, affected only the automobile exception to the warrant requirement and legality of searches of closed containers therein . . . . It did not, therefore, alter the central tenet of *Chadwick* regarding search incident to arrest."); United States v. Park, No. CR 05-375 SI, 2007 WL 1521573, n.4 (N.D. Cal. 2007)(noting *Acevedo* "overrul[ed] *Chadwick* as to containers within a vehicle . .

to load the footlocker into Chadwick's car before they arrested all three and transported the defendants along with the footlocker to the police station.[41] Around ninety minutes after the initiating of the arrest, the agents proceeded to open the footlocker, finding a large amount of marijuana.[42] They did all this without the use of a valid search warrant.[43] The Court found the warrantless search invalid, reasoning that "[o]nce law enforcement officers have reduced . . . personal property not immediately associated with the person of the arrestee to their exclusive control and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest."[44] Because the footlocker was in the trunk of the car,[45] rather than on the actual person being arrested, the property was considered as within the arrestee's immediate control rather than associated with the arrestee's person, and thus distinguished from *Robinson*.

III. The Court's Rationale in People v. Diaz

. . C*hadwick's* holding that a search incident to arrest must not be too remote in time or place is still good law").

[41] *Id.* at 4.

[42] *Id.* at 4-5.

[43] *Id.*

[44] *Id.* at 15.

[45] In subsequent cases, the Court has expanded on Robinson by allowing the search of containers found in automobiles, though *Chad*wick was different because the search at issue was remote in time and place. *See* Thornton v. United States, 541 U.S. 615, 622-23 (2004) (permitting searches of an automobile's passenger compartment even when the arrested individual was only "a recent occupant" of the automobile); New York v. Belton, 453 U.S. 454, 460-61 (1981) (holding "that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of the arrest, search the passenger compartment of that automobile" and examine the inside of the contents of any container). The Court changed its position some years later in Arizona v. Gant, 556 U.S. 332 (2009). In *Gant*, the Court held that the search incident to arrest exception does not apply when the arrestee is in custody and cannot retrieve weapons or other property from that person's car at the time of the search. *Gant*, 556 U.S. at 339.

The California Supreme Court based its rationale predominantly on the United States Supreme Court precedent already discussed above.[46] The key question the Court had to answer was "whether defendant's cell phone was 'personal property . . . immediately associated with [his] person' like the cigarette package in *Robinson* and the clothes in *Edwards*." If the contents were associated with defendant's person then a delayed warrantless search of the phone's contents would be valid under the search incident to arrest exception governed by *Robinson*. If the phone was found not to be immediately associated with the defendant's person, then under *Chadwick* the subsequent search would be determined not to be justified as incident to arrest because it was "remote in time [and] place from the arrest" with "no exigency exist[ing]."[47]

IV. The Majority Opinion

In a 5-2 decision, the Court held that Diaz's cell phone was analogous to the cigarette package in *Robinson* and was deemed a valid warrantless search because the phone was immediately associated with Diaz's person.[48] Therefore, under *Robinson*, the majority concluded that Deputy Fazio was free to inspect the contents of the cell phone that was "immediately associated on Diaz's person" without a warrant even where no exigency existed and ninety minutes had passed.[49]

The Court refused to characterize the container at issue, here a defendant's cell phone, because the U.S. Supreme Court decisions that the Court based its holding on did not support the view that the character of the property, "including its capacity for storing personal information," factored into the validity of a warrantless search and seizure from an arrestee's person incident to

[46] *See supra* Part II.

[47] *Diaz*, 51 Cal. 4th at 93.

[48] *Id.*

[49] *Id.* at 94-95.

a lawful custodial arrest.[50] The Court also refused to differentiate between cell phones with low storage capacity and smartphones with high storage capacity because it would be too problematic for officers in the field to be required to make "ad hoc determinations" along with the fact that *Robinson* rejected determinations that analyzed the character of the item or container, favoring a bright line rule for officers to follow instead.[51] It noted that the defense failed to persuade the Court why cell phones should be exempt from the exception when other items, such as "photographs, letters [and] diaries," with information equally as personal and private as what could be found on a cell phone, have been subject to warrantless searches upon lawful arrest.[52] The majority also compared the fact that differing expectations of privacy based on a container being open or closed were irrelevant to the validity of a warrantless search, so too, should the differing expectations of privacy based on the level of information enclosed in an item be irrelevant to the ultimate determination of validity of the search.[53] This interpretation was the Court's way of staying true to its insistence that the item's character would not be a determinative factor in deciding a valid search.

The Court concluded noting that "a delayed warrantless search of personal property immediately associated with the person of an arrestee at the time of arrest is justified by the 'reduced expectations of privacy caused by the arrest.'"[54] The Court recognized that both *Edwards* and *Robinson* allowed for searches and seizures that were permissible at the time of the initial arrests to also be permissibly conducted at a later time when the accused arrives at

[50] *Id.*

[51] *Id.* at 96.

[52] *Id.*

[53] *Id.*(interpreting the Court's previous decision in Belton, 453 U.S. at 461).

[54] *Id.* at 101.

detention, as police's judgment as to how and where to search the person under the Fourth Amendment does not require dissecting each step of the search.[55] The Court closed by addressing the dissent that if modern technology, such as cell phones, requires the reevaluation of the exceptions for warrantless searches, then it should be left to the high court alone to re-examine current precedent.[56]

V. Dissenting Opinion, Conflicting Cases and Privacy Supporters

The dissent likened the cell phone found on Diaz's person to the footlocker in *Chadwick*, rather than the crumpled cigarette package in *Robinson*.[57] The dissent rationalized that since cell phones can store enormous amounts of personal and private information, such devices should be treated as being in the "arrestee's immediate control" and a court should not justify a delayed warrantless search simply because the phone happened to be located on the individual's person.[58] The dissent also pointed out that because the cell phone would not pose a safety risk and because the police could acquire the information from the cellular provider, the justifications detailed in *Chimel* are lacking.[59] Therefore, the dissent concluded that when a cell phone is already under the domain of the police and the possessor of that phone is already in police custody, a warrant must be obtained before searching the cell phone.[60]

A. Cases Siding with the Rationale of the *Diaz* Dissent

[55] *Id.* at 100-01.

[56] *Id.* at 101.

[57] *See id.* at 111 (Werdegar & Moreno, JJ., dissenting).

[58] *Id.* at 108-11.

[59] *Id.* at 105-106 (citing *Chimel*, 395 U.S. at 763).

[60] *Id.*

The Ohio Supreme Court ruled on the warrantless search of cell phones under the incident to lawful arrest exception and provided a decision that closely fell in line with the dissent in *Diaz*.[61] In *State v. Smith*, the Court took a closer look at the *Belton* container doctrine, and found that it defined a container as "any object capable of holding another object," referencing physical objects specifically.[62] The Court noted that cell phones are neither address books nor laptop computers and that "their ability 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."[63] Because of that expectation, the Court held that police must obtain a warrant before intruding into the phone's contents.[64]

Smith held that the search incident to arrest exception doctrine did not apply due to the fact that there was no need to search the phone in order to protect the police or preserve evidence and also held that the failure to obtain a search warrant rendered the search unlawful.[65] The burden was on the state to present evidence that the information in the phone was subject to "imminent destruction," and because the Court found that that burden was not met, the Court found the search unconstitutional.[66]

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[61] *See* State v. Smith, 2009124 Ohio St.3d 163(Ohio 2009) cert. denied, 131 S. Ct. 102 (2010). The case arose when a woman was rushed to a hospital with a drug overdose. At the hospital, police asked her to call her dealer and arrange another purchase. She did so, calling Smith; police arrested Smith at the agreed-upon location, and seized his cell phone from his person. The police found the drugs in the immediate area. Sometime after the arrest, the police examined Smith's phone's call history and confirmed that this was the same phone the woman had placed her call to. *Id.* at 163-64.

[62] *Id.* at 167 (citing *Belton*, 431 U.S. at 460).

[63] *Id.*

[64] *Id.* at 169.

[65] *Id.*

[66] *Id.*

A federal court in California made a similar ruling in its conclusion that cell phones fell into the *Chadwick* line of reasoning and rejected a search conducted ninety minutes after arrest at the police station.[67] Police arrested Park on marijuana charges and transported him to the police station.[68] As the defendant was being booked, police removed his phone from his person and later investigated it on a suspicion that evidence of marijuana trafficking might be in the phone's contents.[69] The court ruled that cell phones should be considered possessions within the immediate control and not part of the person because of the technological character of the devices and the capacity for storing immense amounts of private information.[70]

B. California Legislature's Attempt at Rejecting *People v. Diaz*

State Senator Mark Leno of San Francisco introduced Bill 914 in February of 2011 in order to reverse the impact of *Diaz* on privacy rights of the people.[71] The express intent of the bill was to overturn the California Supreme Court's interpretation of the Fourth Amendment's exception to the warrant requirement under the search incident to an arrest in *Diaz*.[72] The bill passed unanimously in both houses, with a seventy to zero vote in the Assembly and thirty-two to four vote in the Senate.[73] The Legislature explained that people have a justifiable expectation of

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[67] United States v. Park, No. CR 05-375, 2007 WL 1521573, at *8 (N.D. Cal. May 23, 2007).

[68] *Id.* at *2.

[69] *Id.* at *2-*3.

[70] *Id.* at *8.

[71] Amy Graham, *California governor allows warrantless search of cell phones*, CNN (Oct. 11 2011, 12:01 PM) http://www.cnn.com/2011/10/11/tech/mobile/california-phone-search-veto.

[72] *Id.*

[73] Trevor Timm, *Governor Brown Vetoes Warrant Protection for Cell Phones*, Electronic Frontier Foundation (Oct. 11, 2011) https://www.eff.org/deeplinks/2011/10/governor-brown-vetoes-warrant-protection-cell-phones.

privacy and that cell phones do not pose a threat to officer safety nor is there a risk of loss of evidence when in police custody.[74] The overturn of the impact of Diaz was short-lived as Governor Brown vetoed the bill, expressing his opinion that "[t]he courts are better suited to resolve the complex and case-specific issues relating to constitutional search-and-seizure protections,"[75] though it is debatable whether the courts or the Legislature is the more appropriate.

C. Proponents for Warrant Requirements for Police Searches of Cell Phones

Some academics have called attention to the majority's decision in *Diaz* as following outdated logic with flawed reasoning.[76] They warn that the *Diaz* holding gives police broad authority to look into people's phones unsupervised, allowing a highly intrusive and unjustified type of search, which neither meets the warrant requirement nor the reasonableness requirement of the Fourth Amendment.[77]

Some critics of *Diaz* have suggested that the Court missed out on taking account of the social context when trying to reconcile the Fourth Amendment with emerging technologies and analyzed the cell phone as if it were a laptop computer.[78] This seems to be the most common criticism because of the strides in technological advancement in cell phones that has the devices'

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[74] *Id.*

[75] *Id.*

[76] *See generally*, Ghoshray, *supra* note 2; Eames, *supra* note2; Andersen, *supra* note 2; *Keane, supra* note 2.

[77] Adam M. Gershowitz, *Can Police Search Your Cell Phone, and even Break your Password, during an* Arrest, 35 Nov. Champion 16, 43 (2011) (because password-protecting phones does little to curb police power, efforts should be undertaken to scale back law enforcement's wide authority to search the contents of cell phones incident to arrest.); Ghoshray, *supra* note 2, at 588-89; Eames, *supra* note 2, at 494; Andersen, *supra* note 2, at 52; *Keane, supra* note 2, at 342-43.

[78] Eames, *supra* note 2, at 495; Andersen, *supra* note 2, 46-47 (noting that cellular phones have similar storage capacity as recognized in the computer context to be sufficient to require a warrant as well as both have similar functionality).

functionality move closer and closer to the functionality of laptop computers. Other arguments include that the exception overtakes the rule, so as to go well beyond its originally intended scope and make the rule purposeless.[79]

Others still criticized the Court's judgment as not reflecting the original intent of the framers of the Fourth Amendment to not intrude upon the boundary of the individual's privacy through "unreasonable" searches and seizures.[80] This theory articulates that the framers might not have foreseen the rampant ability to arrest and intrude upon one's privacy through widened police authority and the accessibility of technology.[81] It is argued that the framers might never have envisioned that police would be violating the Constitution by conducting searches without a warrant because of the evolution of a modern construction of carving out numerous exceptions to warrantless searches that was contrary to the original intent.[82] Thus, the argument postulated "static and stale" law overcompensates for policing objectives at the price of privacy in not keeping up with technology that is providing new modes of societal norms and individual expression.[83]

VI. Analysis

Opponents to the *Diaz* decision and those following the rationale of the dissent focus on the character of the item itself, namely the cell phone, rather than focus on the location of the phone or the nature of the search. The *Diaz* Court was right in adhering to the Supreme Court because

[79] Eames, *supra* note 2, at 496-98 (stating that the over-broad application of the exception "swallows the rule").

[80] Ghoshray, *supra* note 2, at 595-599.

[81] *Id.* at 600.

[82] *Id.* at 606.

[83] *Id.* at 609.

the Court had refuted using the character of the property on a person as a determinative factor for validity of the warrantless search.[84] Wallets, purses and address books all possess personal information at some level similar to cell phones, while all are also carried on one's person. A defendant should not have any more heightened level of privacy for one personal item than another during lawful arrest when the only difference is capacity of that personal information.[85]

The Fifth Circuit held that a defendant's phone should not fall into the *Chadwick* category of possession under one's immediate control because the cell phone "was on the person at the time of his arrest."[86] The court cited *Robinson*, stating that police officers "may also, without any additional justification, look for evidence of the arrestee's crime on his person in order to preserve it for use at trial."[87] The court used the container doctrine established in *Belton*, finding that the search was valid because the phone was within reach, and analogous to a container, so that the warrantless search was valid.[88]

A federal court in Wisconsin provided a rational comparison of a common personal item like an address book to a cell phone.[89] The court recognized that the search of the phone was contemporaneous with the arrest, and the officer explained his concern for the possibility of the information on the phone being lost.[90] The court also noted that in a case where only the phone

[84] *Diaz*, 51 Cal. 4th at 96.

[85] Eames, *supra* note 2, at 492.

[86] United States v. Finley, 477 F.3d 250, 253 (5th Cir. 2007).

[87] *Id.* at 259-60 (citing Robinson, 414 U.S. at 223-34).

[88] *Id.* at 260 (citing Belton 453 U.S. at 460-61); (accord Smallwood v. State, 61 So. 3d 448 (Fla. Dist. Ct. App. 2011) (applying the container doctrine to uphold a cell phone search incident to arrest).

[89] U.S. v. Valdez, No. 06-CR-336, 2008 WL 360548 (Feb. 8, 2008).

[90] *Id.* at *3.

address book and call history had been accessed, privacy concerns are not implicated.[91] In holding that the case was valid, the court analogized this cell phone case to a case where the Seventh Circuit upheld police seizing a defendant's personal address book and made photocopies following his arrest as a valid warrantless search in an attempt to preserve the evidence.[92]

Other opinions focusing on the intent of the framers in protecting privacy not being achieved by the current implementation of the warrant requirement exceptions contradict the critique that the U.S. Supreme Court decisions are outdated. The framers' intent could not be conceived in a way that fits with the current advancement in technology society has achieved, just as Supreme Court precedent is proffered as decisions that deal with low-tech issues that are not modern enough to deal with technology as advanced as smartphones. It is best to allow the law to progress as it has, by having the law follow technology and adapt to it using current precedent.

A. Connectivity Justifies Less Expectation of Privacy in One's Smartphone

With the increasing connectivity and accessibility of our mobile phones and smartphones, the expectation of privacy may be lowering more and more. With GPS tracking now on every phone, how much privacy can one expect from a device that is constantly sending and receiving communications. Especially now, with recent news of reports that broke that the National Security Agency had been helping itself to data from just about every major American Internet company, how can one claim privacy of any device with Internet capabilities.[93] It is at least possible to participate in online culture while limiting this horizontal, peer-to-peer exposure. Some believe that "it is practically impossible to protect your privacy vertically — from the

[91] *Id.*

[92] *Id.* at 2.

[93] Ross Douthat, Your Smartphone Is Watching You, The New York Times (Jun. 8, 2013) http://www.nytimes.com/2013/06/09/opinion/sunday/douthat-your-smartphone-is-watching-you.html?_r=1&.

service providers and social media networks and now security agencies that have access to your every click and text and e-mail."[94] It would seem that personal property that one would really have a claim to privacy would be wallets and letters where at least the individual can keep track of that private information. After the recent NSA leak, can one really claim an expectation of privacy because your phone contains so much personal information.

B. No Matter How much the Detractors Push – A Smartphone is not a Laptop

A major attack by critics of the *Diaz* decision is that smartphones are so advanced that their character and functionality equate it to a laptop. This logic is faulty because even with how advanced smartphones have become, the two are fundamentally different.[95] People use smartphones for the generation of office documents, and while it is useful to view such documents on a smartphone, creating them can prove to be less than ideal. While business professionals can and do use smartphones for answering emails and other professional tasks, smartphones cannot "entirely replace a desktop or laptop [computer]," because both do things functionally better than the other.[96] As some have tried to market smartphones with "laptop

[94] *Id.* ("every looming technological breakthrough, from Google Glass to driverless cars, promises to make our every move and download a little easier to track. Already, Silicon Valley big shots tend to talk about privacy in roughly the same paternalist language favored by government spokesmen. 'If you have something that you don't want anyone to know,' Google's Eric Schmidt told an interviewer in 2009, 'maybe you shouldn't be doing it in the first place.'"

[95] *See generally* Colin Steele, 'Mobile' for laptops is not the same as 'mobile' for smartphones and tablets, http://www.brianmadden.com/blogs/guestbloggers/archive/2013/06/25/mobile-for-laptops-is-not-the-same-as-mobile-for-smartphones-and-tablets.aspx (last visited Jun. 25, 2013) (contrasting how functionally a laptop computer is significantly different from smartphones and tablets because one is an extension of desktop computing while the other is something completely different.).

[96] Perkins, supra note 13 (seven percent of business owners forgo taking their laptop on a business trip relying solely on their smartphone and seventy-nine percent of business owners use their smart phone as their primary phone, but with all their technological advancement they still are not capable of replacing a laptop completely).

shells" as replacements for laptops, they have commercially failed so far, because they are not as powerful as standard computer processors with much higher processing speeds.[97]

Physically, a smartphone and a laptop are polar opposites. Even the smallest laptops are not transportable in a person's pocket or average size woman's purse. The only time a laptop would be on an individual's person would be if the person happened to be carrying the device in a backpack or similar bag. The few laptop cases that have been involved in search incident to arrest exception cases dealt with the key aspect of the location of the laptop being too far away from the arrestee to be associated with the arrestee's person.[98] A smartphone would be much more likely to be on an individual's person, and thus immediately associated with a person, than a laptop that more likely would be only under an arrestee's immediate control and not subject to the incident to arrest exception. This key difference shows just how similar a cell phone is to other items located on a person (wallet, address book, etc.) rather than a laptop that would be on a person far less often.

C. Suggestion on the Search Limitation of Cell Phones for Police

The California Supreme Court never addressed a limitation on what police officers should be allowed to search on an arrestee's cell phone because limitation of the search was never at issue in *Diaz*. Detective Fazio's search of the defendant's cell phone was within the text message

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[97] *See* Tim Bajarin, *Why Your Smartphone Will Be Your Next PC*, Time Tech (Feb. 25, 2013) http://techland.time.com/2013/02/25/why-your-smartphone-will-be-your-next-pc/.

[98] *See* People v. Reese, No. Co65511, 2011 WL 4347024 (Sept. 19, 2011). This case focused on a laptop being confiscated from the passenger side of the car during an arrest of the defendant for having an outstanding arrest warrant for check fraud. The issue was that *Gant* had just been decided after the incident, where a search could only be conducted without a warrant in a car if the arrestee is within reaching distance of the passenger compartment. The search was declared still valid under *Davis* where evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule. *Id.* at *1-*5; *See also* State v. Washington, 110 Wash. App. 1012, *1-*3 (Wash. Ct. App. 2002). The court decline upholding a warrantless search of a laptop where the laptop was on the floor of defendant's car in a bag.

folder only when evidence linking Diaz to the Ecstasy pills was found.[99] The officers did not utilize the connectivity feature of the phone.[100] Had the officers possibly used the wireless features of the phone to check content not within the phone, such as email that could be accessed from multiple devices or Internet webpages, then it would have been appropriate for the Court to intervene and apply a limiting rule. If and when the issue ever comes up, the best course of action that the deciding court should take is to limit searches of the phones to the content within the phone's physical memory, just as an officer would have access to all the contents within a container.[101] If there was a key with an address on the key, police would not have the ability to use the key and access the house to conduct a warrantless search, so by the same rationale, an officer should not be able to use a smartphone to access outside information that is not "content" within the smartphone's memory.

VII. Conclusion

The California Supreme Court made the decision to follow the highest court of the land's law textually and not allow for the character of the item to determine if it is something ineligible under the "search incident to arrest" when the item is something found directly on the individual being arrested. The Court correctly found no insinuation by the United States Supreme Court that the character or complexity of the property plays any factor in determining whether that personal property is subject to a permissible warrantless search or not. As much as antagonists of the California's Supreme Court's stance on smartphones and cell phones in general want to compare the pocket-sized devices to laptops, they are different both in functionality and use. Smartphones are almost always found on the arrestee's person when police officers conduct a

[99] *Diaz,* 51 Cal. 4th at 89.

[100] *Id.*

[101] *See Belton*, 453 U.S. at 466-67 (officer has valid access to all contents within a container if it falls under a qualified incident to arrest exception).

warrant search of the device, which makes them no different in their applicability from a notebook, wallet, address book, or other item that can fit in one's pocket or purse. By definition, it is something that provides accessibility that is both compact and portable. It is because of the nature of the smartphone, how it is used and its transportability, that such devices should be available to be searched without a warrant when in conjunction with a lawful arrest of an individual. Because of the item's functionality, it should be limited to only contents within the phone without a mobile connection, so that the only thing officers are searching are the actual contents.

Though smartphones have advanced in ways that they share common functionality with laptops, such as accessing the Internet and for entertainment purposes, laptops still provide utility unavailable to smartphones. Smartphones are likely to be used on-the-go, whereas it is impossible to simultaneously walk and use a laptop. Laptops are also more likely to be away from the physical person on a desk at home or in one's car, unless the person happens to be carrying one using a backpack or messenger bag. The fact that a phone is likely to be in one's pocket while a laptop is more likely to be on a person's desk makes it clear why a cell phone and a laptop are not comparable. Laptops are not involved in disputed search incident to arrest exception cases because they rarely are on an arrestee's person during a lawful custodial arrest, whereas a smartphone being on one's person is commonplace. It is the nature of the item's use and not the character or functionality of it that determines whether it is associated with the arrestee or only in the arrestee's immediate control. Thus, if someone is under lawful arrest, that person should have no expectation of privacy in anything physically on that person including any type of smartphone.