

# SEARCH OF CLOSED CONTAINERS INCIDENT TO ARREST: IS A CELL PHONE JUST ANOTHER CONTAINER?

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Throughout the United States, practitioners have grappled for definitive answers regarding the limitations imposed on the police power to conduct a warrantless search of a closed container found on an arrestee's person or within the arrestee's "grabbable area." The answer to such a seemingly simple question has also remained debatable among New York practitioners, although the New York Court of Appeals appeared to have addressed the issue more than 30 years ago. In *People v. Gokey*, 60 NY 2d 309 (1983), the court held that the police may only search a closed container incident to arrest when they have a "reasonable belief" that a search of the container is necessary to protect themselves or to prevent the destruction of evidence.

The continued struggle to define the permissible scope of a search conducted by police incident to arrest may be attributable to the different conclusions reached by federal and state courts. Indeed, the New York Court of Appeals decision in *Gokey* may only have added to the nationwide dilemma because the court based its decision on the state constitution (Article I, Section 12) alone. Although it reads the same as the Fourth Amendment to the U.S. Constitution, the protections afforded to the accused under the framework of New York's Constitution differs from those afforded under its federal counterpart. Under federal law, a search incident to arrest of a closed container is currently permissible as long as the arrestee could realistically gain access to it, and requires no further consideration upon whether the police believed that the container contained a weapon or that evidence could be destroyed.

In the 21st Century, the issue surrounding these searches has become more complicated, given the existence of a ubiquitous container commonly known to many of us as the "cell phone." Under the federal standard, a majority of federal courts have upheld the warrantless search of cell phones when contemporaneously obtained by police incident to arrest. While New York's state courts have yet to address this issue, it appears that the court's continued adherence to *Gokey* would preclude such searches. Nonetheless, the United States Supreme Court may ultimately change the legal landscape for all courts dealing with cell phone searches incident to arrest, given that the issue is before the Supreme Court for decision this Term.

This article will review the current federal standard for a search incident to arrest of containers and how some federal and other state courts have addressed the search of a cell phone. In addition, this article will discuss the development of the law in New York of the right of police to conduct a search incident to arrest of a closed container and will also address whether that right includes the search of a cell phone incident to arrest, an issue which may be ripe for our courts.

## THE FEDERAL APPROACH

As most any third-year law student can tell you, a warrantless search is per se unreasonable unless there exists some well-delineated exception to the 4th Amendment's requirement of a search warrant. One of the well delineated exceptions is the search incident to arrest. One of the first cases to recognize the lawfulness of a search incident to arrest was *Weeks v United States*, [232 US 383](#) (1914). *Weeks* was the first Supreme Court case to enunciate the exclusionary rule as it applied in federal court. Not until 1961 would the Supreme Court make the exclusionary rule applicable to the states via the 14th Amendment. See *Mapp v Ohio*, [367 US 643](#) (1961). In *Weeks*, the Court acknowledged, albeit in dicta, that English and American law had always recognized the right of the government "to search the person of the accused when legally arrested to discover and seize the fruits or evidence of crime." *Weeks*, [232 US at 392](#).

Following *Weeks*, the Court in *Carroll v United States*, [267 US 132](#) (1925) expanded the scope of a permissible search incident to arrest. *Carroll* involved the illegal transportation of 68 bottles of whisky and gin secreted in the seats of an automobile during the Prohibition era. The Court held that "[w]hen a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution." *Id.* at 158.

That same year, the Court in *Agnello v United States*, [269 US 20](#) (1925), affirmed a previously assumed tenet of the 4th Amendment - that a house cannot be searched without a search warrant, except as incident to a lawful arrest therein. In *Agnello*, cocaine seized in the defendant's house pursuant to a search incident to arrest was admitted at trial despite the defendant having been arrested several blocks away. While acknowledging the lawfulness of a search incident to arrest of a defendant's person and the area under his control, the *Agnello* Court ruled that the admission of the cocaine was a violation of the 4th Amendment.

Between 1925 and 1969, the Court wrestled with the doctrine of the search incident to arrest and its scope. In some cases, the Court upheld the seizure of evidence recovered as a search incident to the defendant's arrest where the evidence was seized contemporaneously and in the same place as the arrest. See *Marron v United States*, [275 US 192](#) (1927) (ledger seized from a closet in an illegal saloon); *Harris v United States*, [331 US 145](#) (1947) (sealed envelope containing forged documents from a desk drawer); *United States v Rabinowitz*, [339 US 56](#) (1950) (forged stamps found in the desk, safe and filing cabinets of defendant's one room office). In other cases, the Court held that evidence should not have been admitted since the officers had enough information and time to swear out a valid search warrant. See *Go-Bart Importing Co. v United States*, [282 US 344](#) (1931) (papers seized from a desk, safe, and other parts of an office of persons lawfully arrested was unlawful since no crime had been committed in the agents' presence and there was an abundance of information and time to secure a search warrant); *United States v Lefkowitz*, [285 US 452](#) (1932)(warrantless search of desk drawers and a cabinet incident to arrest was exploratory and seizure of books, papers and other articles therefrom was unlawful).

In 1969, however, the seminal case for the search incident to arrest exception to the warrant requirement was decided. *Chimel v California*, [395 US 752](#) (1969). In *Chimel*, the defendant was arrested in his home on an arrest warrant for the burglary of a coin shop. After arrest, police conducted a warrantless search of the defendant's entire three bedroom house for the fruits of the burglary and recovered evidence in rooms and in areas well beyond the room in which Chimel was seized. The Court held that the warrantless search incident to arrest of the defendant's person and the area from within which he might reasonably have obtained a weapon or destructible evidence was reasonable. However, since some of the evidence against Chimel was seized pursuant to the unreasonable search of the areas beyond his immediate control, that evidence had to be suppressed.

Four years later, the Supreme Court extended the search incident doctrine to include the search of a closed container found on the defendant's person in a search incident to arrest. *United States v Robinson*, [414 US 218](#) (1973)(crumpled cigarette package containing glassines of heroin following defendant's arrest for traffic violation). The rationale for upholding the search of the container in *Robinson*, however, seems to have gone beyond the justification for a search incident to arrest as enunciated in *Chimel*. Whereas the *Chimel* Court was concerned with the arrestee's access to a weapon or destructible evidence, the *Robinson* Court, relying on language from *Agnello*, provided additional authorization for a search incident to arrest.

The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted. *Id.* at [225](#) (quoting *Agnello v United States*, [269 US at 30](#)). The *Robinson* Court further held that the authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. 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. *Id.* at [236](#).

In effect, *Robinson* established two sets of rules for searching depending upon whether the container was found on the defendant's person or in an area within his immediate control. Under *Robinson* and its progeny, when law enforcement officers discover a personal effect on that person, such as papers, wallets, address books and the like, the officers may search that item to determine whether it has evidentiary value. *United States v Richardson*, [764 F2d 1514](#) (11th Cir 1985), *cert. denied*, *Crespo-Diaz v United States*, 474 US 952 (1985) (officers were entitled to search wallet and papers found on defendants' persons incident to their arrest); *United States v McFarland*, [633 F2d 427](#) (5th Cir 1980)(officer was entitled to read a piece of notebook paper removed from defendant's shirt pocket incident to his arrest); *United States v Castro*, [596 F2d 674](#) (5th Cir 1979), *cert. denied*, 444 US 963 (1979)(unfolding and reading of paper found in defendant's wallet was valid search incident to his arrest); *United States v Rodriguez*, [995 F2d 776](#) (7th Cir 1993) (photocopying contents of address book was a valid search incident to arrest). The search of a wallet incident to arrest has been repeatedly upheld. *United States v Molinaro*, [877 F2d 1341](#) (7th Cir 1989); *United States v Gardner*, [480 F2d 929](#) (10th Cir 1973); *United States v McEachern*, [675 F2d 618](#) (4th Cir 1982); *United States v Passaro*, [624 F2d 938](#) (9th Cir. 1980), *cert. denied*, 449 US 1113 (1981); *United States v Gay*, [623 F2d 673](#) (10th Cir 1980), *cert. denied*, 449 US 957 (1980).

On the other hand, “[u]nlike searches of the person, searches of possessions within an arrestee's immediate control cannot be justified by any reduced expectations of privacy caused by the arrest.” *United States v Chadwick*, [433 US 1](#), 16 n.10 (1977), abrogated on other grounds by *California v Acevedo*, [500 US 565](#) (1991). Rather, such warrantless searches are “conducted for the twin purposes of finding weapons the arrestee might use, or evidence the arrestee might conceal or destroy.” *United States v Maddox*, [614 F3d 1046](#), 1048 (9th Cir 2010), *citing Chimel*, 395 US at 762); *Cf. Arizona v Gant*, [556 US 332](#) (2009).

Relying on *Chimel* and *Robinson*, the Seventh Circuit, in *United States v. Garcia*, [605 F2d 349](#) (7th Cir 1979), *cert. denied*, 446 US 984 (1980), upheld the validity of a warrantless search of the defendant's luggage at the airport that occurred contemporaneously with, and incident to, her arrest for transporting heroin. Similarly, in *United States v Johnson*, [846 F2d 279](#) (5th Cir 1988), the Fifth Circuit upheld the search of a small zippered briefcase close to the defendant that was contemporaneous with his arrest for stealing U.S. mail. And, in *United*

*States v Herrera*, [810 F2d 989](#) (10th Cir 1987), the Tenth Circuit affirmed the search of a briefcase containing stolen U.S. mail, incident and contemporaneous to the arrest of defendant.

The warrantless search incident to arrest of a footlocker containing marihuana, despite there being probable cause to believe it contained contraband, was rejected in *United States v Chadwick*, [433 US 1](#) (1977). In *Chadwick*, the defendant had been arrested after placing the footlocker in a car but the footlocker was not searched until ninety minutes later when the defendant was in custody at the Federal Building in Boston. The Court held that there was no opportunity for the defendant to obtain a weapon from the double-locked footlocker or to destroy evidence and thus no exigency existed for the search.

In *New York v Belton*, [453 US 454](#) (1981) (*Belton I*), the Court, reversing the New York Court of Appeals, upheld the search of the pocket of a jacket found in the passenger compartment of a vehicle that was contemporaneous with, and incident to, the arrest of the defendant as reasonable under the 4th Amendment, despite the fact that the jacket was no longer in the “grabbable area” of the defendant.

More recently, in *Arizona v Gant*, [556 US 332](#) (2009), the Supreme Court backtracked somewhat and clarified its holding in *Belton*. The Court attempted to resolve any misconceptions about a search incident to arrest of the passenger compartment of a vehicle when the occupant of the vehicle has no realistic opportunity to access that compartment. The Court held that police may only search the passenger compartment of a vehicle incident to arrest when the occupant of the vehicle is within reaching distance of the compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense or arrest. *Id.*

## **THE FEDERAL APPROACH TO CELL PHONES**

Many federal district courts have recently upheld the search of a cell phones incident to or contemporaneous with an arrest. *See e.g. United States v DiMarco*, 2013 US Dist LEXIS 16279, 2013 WL 444764, at \*10 (SDNY 2013)(noting that a “warrantless search of [a] cell phone would be lawful if...it was reasonable to conduct the search pursuant to the search incident to arrest exception.”); *See also United States v Nyuon*, 2013 WL 1339713 (D SD 2013); *United States v Curry*, 2008 WL 219966 (D Maine 2008); *United States v Stringer*, 2011 WL 3847026 (WD Mo 2011) *United States v Slaton*, 2012 WL 2374241 (ED Ky 2012); *United States v Gordon*, 895 F Supp2d 1011 (D Hawaii 2012); *United States v McCray*, 2009 WL 29607 (SD Ga 2009). Some courts have focused on the location of the phone at the time of arrest, making its proximity to the arrestee determinative in its analysis of whether the search incident to arrest exemption is applicable. *See United States v Gomez*, 807 F Supp2d 1134, 1148 (SD Fla 2011) (“Under that exception, the existence of probable cause to search the device, the potential loss of information, or the diminished expectation in call history data are inconsequential. What is consequential is the location that the device was found incident to arrest and the time that the search was conducted.”). Aside from location, courts have also steadfastly applied the traditional search incident to arrest analysis, requiring that the search of the cell phone be conducted within a reasonable period of time. *See e.g. United States v Gibson*, 2012 WL 1123146, at \*9–10 (N.D.Cal. April 3, 2012) (holding that the search of cell phone was not incident to arrest where search took place approximately one to two hours after arrest); *United States v. Lasalle*, 2007 WL 1390820 (D.Haw. May 9, 2007) (holding that search of cell phone was not incident to arrest where search was conducted “somewhere between two hours and fifteen minutes to three hours and forty-five minutes” after arrest); *United States v. Park*, 2007 WL 1521573, at \*8 (N.D. Cal. May 23, 2007) (finding that search of cell phone was not incident to arrest where search took place ninety minutes after arrest).

On the other hand, some district courts have suppressed evidence uncovered by police during a search of a cell phone's contents, even though the seizure of the cell phone was justified under the incident-to-arrest exception. In these cases, the courts have found that searching the content of the arrestee's cell phone was beyond the scope of the exception, and have required some showing of either the police officer's need to search for additional information related to the crime of arrest, safety concerns, or a need to prevent the destruction of evidence. See e.g. *United States v Quintana*, [594 F Supp.2d 1291](#) (MD Fla 2009) (finding that the police's search of the contents of an arrestee's phone was unrelated to the crime of arrest, and not justified under the incident to arrest exception ); *United States v McGhee*, 2009 WL 2424104 (D Neb 2009) (holding that police were not justified in conducting a warrantless search of a defendant's cell phone based solely upon the ground that it was incident to arrest); See also *United States v Park*, 2007 WL 1521573 (ND Cal 2007); *United States v Davis*, [787 F Supp2d 1165](#) (D Oregon 2011).

In the past decade, a handful of federal circuit courts have also addressed the issue and found that a cell phone is, in essence, a container, and as such, is subject to the traditional search incident to arrest analysis. In *Finley*, the Fifth Circuit made clear that cell phones seized from a defendant's person are akin to other personal effects (such as cigarette packs, wallets and pagers) and remain searchable "incident to arrest" through such time as the administrative processes incident to custody and arrest are completed. *United States v Finley*, 477 F3d 250 (5th Cir 2007). The court held that the search of general containers incident to arrest, including cell phones, falls within the unfettered powers of police to look for weapons or evidence related to the arrest without the need to obtain a warrant. *Id.* at 260 ("Police officers are not constrained to search only for weapons or instruments of escape on the arrestee's person; they 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."). Following the Fifth Circuit's lead, other sister courts have also loosely applied the traditional analysis to searches of cell phones incident to arrest. See e.g., *United States v Flores-Lopez*, [670 F3d 803](#) (7th Cir 2012); *United States v Curtis*, [635 F3d 704](#) (5th Cir. 2011), cert. denied, 132 US 191 (2011); *United States v Murphy*, [552 F3d 405](#) (4th Cir 2009); *Silvan v Briggs*, 309 Fed Appx 216 (10th Cir 2009); *United States v Rodriguez*, 2012 WL 6062118 (5th Cir 2012).

Recently, the First Circuit rejected the search of a cell phone incident to arrest in *United States v Wurie*, 728 F.3d 1, 12 (1st Cir. 2013), cert. granted, 134 S.Ct. 999, 82 USLW 3104 (Jan. 17, 2014), creating a split among the circuits. In *Wurie*, the police had arrested the defendant after suspecting that he had engaged in a drug transaction. *Id.* Upon arriving at the police station, the police seized the defendant's two cell phones, a set of keys, and \$1,275 in cash. *Id.* at 2. While at the station, one of the defendant's cell phones began receiving calls from a number identified as "my house" on the external caller ID screen on the front of the phone, which was in plain view of the officers present. *Id.* Thereafter, the officer's opened the phone, and proceeded to review the phone's call log to determine the number associated with the incoming calls. *Id.* The officers were then able to identify the defendant's home address using the number retrieved from the call log. After further investigation, the police were able to confirm that the address was the defendant's. *Id.* After obtaining a warrant, the police searched the defendant's apartment, seizing 215 grams of crack cocaine, a firearm, ammunition, four bags of marijuana, drug paraphernalia, and \$250 in cash. *Id.*

The First Circuit held that the police's warrantless search of the defendant's cell phone was unreasonable, and distinguished a cell phone from other common containers. *Id.* at 8, citing *Flores-Lopez* at 806 ("[A] modern cell phone is a computer," and "a computer ... is not just another purse or address book."). The court noted that much of the information stored on cell phones is highly personal, and not akin to the general information that could be obtained in "a wallet, address book, briefcase, or any of the other traditional containers." *Id.* at 9. The court reasoned that cell phones have the capacity to store large amounts of highly personal information, such as "photographs, videos, written and audio messages (text, email, and voicemail), contacts, calendar appointments,

web search and browsing history, purchases, and financial and medical records.” *Id.* at 8. In this regard, the court stated that “what distinguishes a warrantless search of the data within a modern cell phone from the inspection of an arrestee’s cigarette pack or the examination of his clothing is not just the nature of the item searched, but the nature and scope of the search itself.” *Id.* at 9.

The court set a “bright-line” rule that a warrantless search of an arrestee’s cell phone inherently “exceeds the boundaries of the Fourth Amendment search-incident-to-arrest exception.” *Id.* at 1. The court explained that the search-incident-to-arrest exception does not authorize the warrantless search of data on a cell phone seized from an arrestee’s person, given that the government’s interest to protect arresting officers or preserve destructible evidence is not advanced by the search being conducted. *Id.* at 13. The court further noted that the search-incident-to-arrest jurisprudence has never sanctioned this type of a “general evidence-gathering search,” unless justified by exigent circumstances or any other exception to the warrant requirement. *Id.*

## **OTHER STATES’ APPROACH**

Two state supreme courts that have confronted the issue have refused to follow the general federal approach and rejected the *Robinson/Chimel* analysis, finding that because so much data concerning a person’s life can be stored on modern cell phones, a search of a cell phone should be distinguished from searches of other types of personal property. *Smallwood v State*, 113 So.3d 724, 732 (Fla Sup Ct 2013) (finding that “electronic devices that operate as cell phones of today are materially distinguishable from the static, limited-capacity cigarette packet in *Robinson*, not only in the ability to hold, import, and export private information, but by the very personal and vast nature of the information that may be stored on them or accessed through the electronic devices.”); *State v Smith*, 124 Ohio St3d 163, 169 (Oh Sup Ct 2009) (noting that a cell phone’s “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.”).

On the other hand, the Georgia Supreme Court recently ruled that a cell phone is “roughly analogous” to other containers and therefore the search of a cell phone incident to arrest was lawful. *Hawkins v State*, 290 Ga785 (Ga Sup Ct 2012) (“...the mere fact that there is a potentially high volume of information stored in the cell phone should not control the question of whether that electronic container may be searched.” *Id.* at 787. Interestingly, other state courts have appeared to uphold only limited searches of basic cell phone “call logs” when conducted incident arrest, emphasizing that the decisions do not “suggest that the assessment necessarily would be the same...in relation to a different type of intrusion into a more complex cellular telephone or other information storage device.” *Commonwealth v. Phifer*, 463 Mass. 790, 797 (Mass 2012); *Commonwealth v. Berry*, 463 Mass. 800, 807 (Mass 2012) (same).

Similar to the approach undertaken by the Georgia Supreme Court, the California Court of Appeals also upheld a search of a defendant’s cell phone incident to arrest, which led to the discovering of incriminating evidence unrelated to the initial defendant’s initial detention. *Riley v. California*, 2013 WL 475242, (Cal. Ct. App. 2013), *cert granted*, 134 S.Ct. 999, 82 USLW 3082 (Jan. 17, 2014). In *Riley*, the defendant was a suspect in a shooting that had taken place three weeks earlier. *Id.* at \*1. The police had stopped the defendant’s vehicle, because the vehicle’s registration tags had expired. *Id.* At such time, the police also learned that the defendant was driving with a suspended driver’s license. *Id.* The police then began an inventory search of the vehicle, deciding that the defendant’s car would be impounded as a result of the defendant’s driving with a suspended license. *Id.* at \*2-3. During the inventory search, the police located multiple firearms under the hood of the defendant’s car. *Id.* The defendant was placed under arrest, and confiscated his cell phone, which was purportedly located inside his pocket. At headquarters, the police searched the defendant’s phone on two separate occasions, discovering

incriminating text messages and photographs that linked the defendant to being a gang member and participant in the alleged shooting. *Id.*

The California Court of Appeals held that the search incident to arrest exception permitted the warrantless search of the defendant's smartphone, given that the cell phone was "immediately associated" with his "person" when he was stopped by police. *Id.* at \*6. The court explained the search of the defendant's cell phone incident to arrest was permissible, irrespective of whether an exigency existed. *Id.* The court also reaffirmed the trial court's finding, noting that the search of the defendant's cell phone fell into the category of a booking search, the scope of which is very broad. *Id.*

## SUPREME COURT OF THE UNITED STATES

On January 14, 2014, the United States Supreme Court granted certiorari in *Wurie* to decide "whether the Fourth Amendment permits the police, without obtaining a warrant, to review the call log of a cellphone found on a person who has been lawfully arrested." 134 S.Ct. 999, 82 USLW 3104 (Jan. 17, 2014). On the same day, the Court also granted certiorari in *Riley v. California* to decide whether police had violated the 4th Amendment by searching the contents of the accused's cell phone on two separate occasions without a warrant, and well after the defendant had been taken into custody. 2013 WL 475242, (Cal. Ct. App. 2013), *cert granted*, 134 S.Ct. 999, 82 USLW 3082 (Jan. 17, 2014). The Court's decision in these companion cases will hopefully provide guidance on the permissible scope of searches incident to arrest when dealing with today's electronic devices, and provided some insight as to whether all cell phones are "common containers" that can be subjected to the traditional analysis of this warrant exemption.

## NEW YORK'S APPROACH

With this federal and state line of cases in perspective, let us look at how the courts of our state have currently analyzed the search of a closed container incident to arrest. The New York Court of Appeals followed the Supreme Court's holding in *Robinson* when it decided *People v De Santis*, [46 NY2d 82](#) (1978), *cert. denied*, *De Santis v New York*, 443 US 912 (1979). In *De Santis*, the Court upheld the warrantless search of a suitcase at the airport incident to the arrest of a passenger who was believed to be transporting marijuana. The search occurred in an airport police substation after the defendant was arrested with his suitcase at a luggage carousel. The court acknowledged the search incident to arrest as justified by a need to protect the safety of the arresting officer, to deprive the arrestee of any potential means of escape or the ability to destroy the evidence of a crime, citing *Chimel*. *Id.* at 87. The Court went further, however, holding:

[b]ut the practical impetus for allowing these searches lies in the fact that the arrest itself constitutes such a major intrusion into the privacy of the individual that the encroachment caused by a contemporaneous search of the arrestee and his possessions at hand is in reality de minimus. *Id.*

In *People v Smith*, [59 NY2d 454](#) (1983), the Court of Appeals began to diverge from the *Chimel/Chadwick* search incident doctrine when it acknowledged, in dicta, that because the defendant was wearing a bulletproof vest when he was arrested for jumping a turnstile, the search of a briefcase he had been carrying was lawful, despite the search occurring in a nearby location. The Court stated:

[t]here must, however, be circumstances at the time of the arrest justifying the search. Although probable cause to believe that the person arrested has committed a crime will justify the search of his person [citation omitted], it will not necessarily justify the search of a container accessible to him. *Id.* at 458.

In *People v Gokey*, [60 NY2d 309](#) (1983), following on the heels of *Smith*, the Court made clear that under the New York Constitution, police must possess a “reasonable belief” that a search incident to arrest of a closed container is necessary to protect the safety of the arresting officer or to protect evidence from destruction or concealment. Notably, this differs with the federal standard set forth in *Chimel*, which requires no separate belief that container holds a weapon or means of escape. The *Gokey* Court did not define “reasonable belief” and it is unclear if “reasonable belief” is equivalent to reasonable (probable) cause, the threshold level of suspicion necessary for an arrest.

The *Gokey* standard has been strictly construed by several courts. For example, in *People v Rosado*, [214 AD2d 375](#) (1st Dept 1985), the search incident to arrest of a little change pouch which was recovered from the defendant’s pocket following his arrest for a narcotics sale was deemed unlawful since there was no exigency for a search. Likewise, in *People v Hendricks*, [43 AD3d 361](#) (1st Dept 2007), defendant was arrested for trespass in a public housing building. When defendant was searched, police recovered a box cutter and a large sum of currency in one pants pocket. In the other pants pocket, police recovered a folded up paper bag which they searched and found 32 small baggies of crack/cocaine. The hearing court suppressed the crack/cocaine, finding that neither of the *Gokey* standards had been met. The Appellate Division affirmed the hearing court. In *People v Evans*, [84 AD3d 573](#) (1st Dept 2011), the First Department suppressed a gun, marihuana and brass knuckles recovered from a backpack defendant was carrying when he was arrested along with two others for smoking marihuana. The backpack was searched incident to defendant’s arrest while he was in handcuffs and the court held there was no exigency for the search, citing *Gokey*. In *People v Warner*, [94 AD3d 916](#) (2d Dept 2012), the Second Department suppressed a loaded gun and knife found in defendant’s purse after she was arrested for Theft of Services in the subway. The Court held that the People had failed to demonstrate that the search was justified to ensure the officers’ safety or to prevent the destruction of evidence. In addition, the Court noted that the defendant was handcuffed at the time of the search and the bag was no longer in her control. Finally, very recently in *People v Diaz*, [2013 Slip Op. 03937](#), 2013 WL 2395581 (1st Dept. 2013), the First Department reversed a conviction for burglary based on the trial court’s admission of pliers and unused garbage bags found in a backpack in the defendant’s control at the time of arrest. The Court found that the defendant was handcuffed at the time of the search and the backpack was no longer in his control. Even if the backpack were not in the exclusive control of the police, the People failed to establish that the police had a reasonable belief that the backpack contained evidence which might pose a threat to them or could be destroyed.

There does not appear to be any published decision in New York directly relating to the police’s search of a cell phone incident to arrest. Given the stricter New York standard, as set forth in *Gokey*, it is unlikely that a search incident to arrest of a cell phone, even if conducted contemporaneously while the arrestee is able to access it, would be permissible, unless the People could show a reasonable belief that the cell phone contained evidence (data) related to the arrest which could be destroyed. Indeed, it is noteworthy that the Appellate Division, Second Department has previously ruled that a parole officer's search of a defendant's cell phone was unreasonable, although recovered from the defendant contemporaneously at the time of his arrest for possession of a weapon. The court explained that the search was not reasonably designed to lead to evidence of a parole violation and, thus, violative of the defendant's right to be secure against unreasonable searches. *People v. LaFontant*, 46 A.D.3d 840 (2d Dept 2007).

In regard to government’s concern over the electronic destruction of evidence, it is important to note that there is currently software on the market that allows for remote wiping of iPhones, iPads, laptops and other internet accessible devices should the device fall into the wrong hands. By using software, such as MobileMe for iPhones, a person can remotely wipe passwords, cached credit card numbers, banking information and any other data that exist on an internet accessible device. Thus, in any investigation or arrest in which an internet

accessible device is seized by police, it is at least theoretically possible to destroy the data without touching the digital device. Whether such evidence could be forensically recovered is unclear. Plainly then, destruction of evidence (data) becomes a very real possibility and not simply a concept drawn from a futuristic sci-fi film. It is also entirely conceivable that such software will be factory-installed at some point and therefore not only beneficial to computer geeks and IT experts, but to criminals as well.

As courts and the public become aware of the capacity for remote wiping, the destruction of evidence as a justification for a search incident to arrest of a cell phone, may be alive and well in New York. The Seventh Circuit, in *United States v Flores-Lopez*, [670 F3d 803](#), ruled that the possibility that data could be wiped was sufficient to justify the search incident to arrest, since police are not in a position to analyze the likelihood of remote wiping in a particular situation. Conversely, the Court in *United States v Wurie*, [– F3d – 2013 WL 2129119](#) (1st Cir 2013), acknowledged the possibility of remote wiping and rejected it as being preventable by law enforcement and therefore unlikely.

It is easy to conceive of situations where police might have a reasonable belief that a cell phone seized incident to arrest would contain data that could be destroyed. If, for example, Apple or AT&T, which sells the iPhone, began packaging their phones with remote wiping software, arguably, the police should be able to search that iPhone seized incident to arrest since there would be a reasonable belief that data/evidence could be destroyed. It seems that the police would also need a reasonable belief that the phone contained “evidence” of the crime for which the defendant was being arrested or another crime. Thus, if a defendant were simply arrested for a VTL crime, it is unlikely the police would have a reasonable belief that his iPhone, with remote wiping software, contained “evidence,” even if all the data on his phone could be wiped with the click of a button. On the other hand, if a defendant were arrested after a long term narcotics investigation involving text messages or e-mails sent to an undercover officer, the search incident to arrest of his iPhone might be fully justified under *De Santis* and *Smith*.

Even without the prospect of remote wiping, a strong argument might be made that the call log/call history in a cell phone might be destroyed if the phone is turned off, the battery becomes drained, or the battery is removed in accordance with the standard vouchering process. Thus, in an appropriate case where a defendant’s call log would be probative, a search incident to arrest of the cell phone for the limited purpose of viewing the call log might be upheld.

## CONCLUSION

New York courts, unlike their federal counterparts, appear reluctant to authorize the search incident to arrest of a container when the justification for the search is unrelated to the arrest crime. At present, the Court of Appeals seems especially willing to protect individual privacy when technology is involved, as evidenced by *People v Weaver*, [12 NY3d 433](#) (2009) where the Court rejected the prolonged use of a warrantless GPS device attached to a suspect’s vehicle.

However, if evidence relating to the crime of arrest, such as inculpatory emails, text messages, or child pornography, were reasonably believed to be on an arrestee’s cell phone and if that evidence were readily capable of destruction by remote wiping, there is a reasonable possibility the New York courts would countenance a search of that phone incident to arrest. After all, the scope of protection that everyone is guaranteed should not depend on the size of the nearby filing cabinet. A modern cell phone is in part, a hand held filing cabinet with a large storage capacity.