IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Appellant, Respondent on Review, v. JAMES TYLER NIX, Defendant-Respondent, Petitioner on Review.	Linn County Circuit Court Case No. 07122775 CA A138483 SC S058751

PETITIONER'S BRIEF ON THE MERITS

Review of the Decision of the Court of Appeals
On Appeal from a Judgment
Of the Circuit Court for Linn County
Honorable RICK J. MCCORMICK, Judge

Affirmed with Opinion: June 23, 2010
Reversed and Remanded
Author of Opinion: Haselton, PJ
By: Haselton, Presiding Judge, Armstrong, Judge, and Deits, Senior Judge

BRONSON D. JAMES #033499
JDL Attorneys, LLP
610 S.W. Broadway, Ste 405
Portland, OR 97204
bj@jdlattorneys.com
Phone: (503) 808-9008
Attorney for Petitioner on Review

JOHN R. KROGER #077207
Attorney General
MARY H. WILLIAMS #911241
Solicitor General
DOUGLAS ZIER #804174
Assistant Attorney General
400 Justice Building
1162 Court Street NE
Salem, OR 97301
doug.zier@doj.state.or.us
Phone: (503) 378-4402
Attorneys for Respondent on Review

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Statement of the Case

This case concerns the warrantless search incident to arrest of data accessed via a Portable Data Storage Device (PDSD), in this case, a cellphone. Resolving this issue requires adapting twentieth century law, developed to govern a tangible world of physical objects, to twenty-first century technology, where the most valuable and private parts of our lives are contained in non-tangible digital data.

PDSDs are qualitatively different from physical containers that hold a finite amount of tangible objects. The information they access is too voluminous, and the privacy intrusion too great, to allow them to be treated like cigarette packs and purses.

The law inevitably lags behind technology and society. But it cannot languish forever. There comes a point where the law must move ahead, casting off the shackles of analogy to the past, to craft a new jurisprudence for a new society. Petitioner asks this court to do that in this case.

Questions Presented and Proposed Rules of Law

First Question Presented

Is the warrantless search of the entire data contents of a cell phone, without limit in scope or intrusiveness, lawful for purposes of Article I, section 9 of the Oregon Constitution under the search incident to arrest doctrine?

First Proposed Rule of Law

No. Because of the vast quantity, and quality, of information accessible on portable data storage devices like cellphones, warrantless searches incident to arrest must be limited in scope and intrusiveness. An unrestricted full data search demands the protections the warrant requirement affords.

Second Question Presented

Is the warrantless search of the entire data contents of a cell phone, in a laboratory and separated from a suspect, forty-minutes after arrest, lawful for purposes of Fourth Amendment under the search incident to arrest doctrine?

Second Proposed Rule of Law

Under those facts, the necessity underlying the federal search incident to arrest doctrine is not present. The warrantless search is unreasonable and therefore prohibited under the Fourth Amendment.

Summary of the Argument

The issue in this case is the warrantless search of the data contents of a PDSD. This brief will analyze the legality of that search under the principal exception relied upon by the state: search incident to arrest. In accord with *State v. Kennedy*, petitioner will focus first on the state constitutional analysis under Article I, section 9, then turn to the federal analysis under the Fourth Amendment.

At the outset, petitioner acknowledges that if this court equates a PDSD to a purse, a wallet, or a briefcase, then petitioner cannot prevail under Article I, section 9. For that reason, the first portion of the argument section below is not related to the law, but to the technology upon which this court will rule. It is petitioner's position that the technological capability of PDSDs renders any analogy to a purse or a wallet absurd. As a result, petitioner will argue that existing Article I, section 9 caselaw such as *State v. Owens* is inapplicable to this issue, and this court should announce a new jurisprudence for these devices.

If this court finds the search permissible under Article I, section 9, it must then evaluate the search under the Fourth Amendment. Petitioner will discuss the evolution of the exception under that amendment. Courts addressing the search of data have split sharply, depending on whether they categorized the

device as "personal" and therefore searchable under *United States v. Edwards*, and *United States v. Robinson*, or as "possessory" and therefore not searchable under *United States v. Chadwick*.

Petitioner will conclude by arguing that the ultimate determiner of the constitutionality of the warrantless search is the touchstone of reasonableness, not the rigid categories of *Edwards*, *Robinson*, and *Chadwick*. Here, the justification underlying the exception was absent, while the privacy invasion was potentially great. In that context, the search was unreasonable, and not permitted under the search incident to arrest doctrine.

Summary of the Historical and Procedural Facts

This case arises in the context of a state's appeal from a trial court's grant of defendant's motion to suppress. The historical facts were accurately set forth by the Court of Appeals:

> "On November 30, 2007, Albany Police Officer Jones was advised to watch for a specific car in which defendant, who was being investigated for drug-related crimes and was the subject of arrest warrants, was a passenger. The arrest warrants pertained to possession of a controlled substance, endangering the welfare of a minor, and a parole violation on a conviction for manufacturing of a controlled substance. Earlier that same day, another Albany officer, Parker, who had defendant under surveillance, had seen him engage in what appeared to be a "hand-to-hand" transaction for drugs-with that occurring immediately after, and apparently in direct response to, a call that defendant had received on his cellular telephone.[FN1]
>
> "Jones saw the car and initiated a lawful traffic stop. Defendant fled on foot, but, after a short chase, Jones successfully apprehended him.

> After arresting defendant, Jones conducted a patdown search, which revealed, among other things, 22 small clear plastic baggies commonly used to package drugs, over $370 in cash, and a cellular telephone. While Jones counted the cash, defendant's telephone rang "continually." At that point, based on defendant's criminal history, the items he found on defendant, and his knowledge of the ongoing investigation of defendant for drug-related crimes, Jones believed that he had probable cause to arrest defendant for delivery of a controlled substance.
>
> "While still at the scene of the stop and arrest, Jones contacted Parker and another Albany officer, Davis, who was also involved in the investigation of defendant, and described what he had discovered. Parker and Davis told Jones to deliver the cellular telephone to yet another Albany officer, Hurley, who was the department's crime analyst and had special training in the examination of cellular telephones. Hurley's expertise was required, Davis later testified, because of the risk that, in untrained hands, the telephone could be accidentally locked or the battery could discharge, which could also lock the telephone.
>
> "After defendant was arrested, Jones took the cellular telephone directly back to the police department and handed it to Hurley. That afternoon, Hurley searched defendant's cellular telephone and found text messages that he believed were drug related and images "consistent with methamphetamine." Hurley completed his examination of the cellular telephone within 40 minutes of defendant's arrest."

State v. Nix, 236 Or App 32, ___ P3d ___ (2010) (slip op at 1).

At trial, defendant moved to suppress the warrantless search of the data contents of his cell phone, citing Article I, section 9 of the Oregon Constitution, and the Fourth and Fourteenth Amendments to the United States Constitution. The state put on its evidence to establish the legality of the warrantless search, and relied on the 'incident to arrest' exception. The trial court granted defendant's motion and the state appealed.

On appeal, defendant raised two alternative bases in support of the trial court's ruling. The Court of Appeals refused to address those arguments on the merits, claiming they were not properly before the court pursuant to *Outdoor Media Dimension Inc. v. State of Oregon*, 331 Or 634, 659-60, 20 P3d 180 (2001). The Court of Appeals reversed the trial court in a written opinion.

ARGUMENT

I. Petitioner does not challenge the legality of the seizure of his cellphone, rather, he challenges the warrantless search of its data contents

Before turning to the merits, it is important to distinguish what is not at issue in this case. First, petitioner had multiple outstanding warrants for his arrest, and does not dispute that the officers had legal authority to seize his person.

Second, petitioner does not dispute that at the time of his arrest, the officers could lawfully search his person for instrumentalities of escape, and evidence of the crime of arrest. In conjunction with that search, officers could lawfully seize items found. The record indicates that officers searched defendant, and found and seized a cellphone. Petitioner does not challenge the lawfulness of the seizure of that cellphone.

The sole issue in this case is what happened next. According to the facts as set forth by the Court of Appeals, the cellphone was removed from petitioner's control and taken to a police laboratory. There, forty minutes after petitioner's arrest, laboratory technicians examined the entire data contents of that phone without a warrant. It is the legality of that search – the warrantless search of the digital data – that petitioner challenges.

II. An overview of the current state of technology in Portable Data Storage Devices.

While this case involves a cell phone, the implications of this case and the application of any rule of law announced by this court will not be limited to cell phones, because a phone is but one of innumerable Portable Data Storage Devices (PDSDs). PDSDs store digital data in easily accessible, and transportable, packages. They include cell phones, CDs, DVDs, laptop and netbook computers, iPods, iPads, GPS systems, flash drives and external portable hard drives.

Before turning to the legal arguments it is necessary to first discuss these devices, their capabilities, and how they are being used. In addition, it is necessary to set out technology terms used to describe aspects of how these devices work.

The Court of Appeals held that

> "The premise of defendant's arguments is that cellular telephones are so special, indeed unique, in their character and capacity that they must be treated differently than other receptacles of possible evidence of crimes-including, for example, 'day-timers,' calendars, address books, letters, and even diaries-in a defendant's possession at the time of arrest. Ultimately, on a fully developed record, there could be some merit to that claim. But, even in this Wi-Fi age, it is hardly a self-evident-much less judicially noticeable-proposition, factually or legally."

State v. Nix, 236 Or. App. 32, 48, 237 P.3d 842, 852 (Or. Ct. App. 2010). The Court of Appeals was wrong.

The Oregon Evidence Code (OEC) 201(b) states:

> "A judicially noticed fact must be one not subject to reasonable dispute in that it is either:
>
> (1) Generally known within the territorial jurisdiction of the trial court; or
>
> (2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

All of the information concerning PDSDs and cellphones, their technological capabilities, their data storage capacities, and their usage, are all easily ascertained by reference to innumerable industry publications. In terms of the data they can store, that is simply a mathematical calculation that cannot be disputed in any manner. Petitioner submits the following information, and asks this court to take judicial notice of the facts presented.

a. Localized storage capacity

Any of the PDSDs referenced above are capable of storing digital information locally, meaning that the physical device is the repository of the information. It is when we are discussing localized storage that analogizing these devices to containers is arguably appropriate. However, the volume of information stored strains that analogy.

The base unit of measurement of all stored digital data is the bit, which is a binary value of 0 or 1. The byte, which is the smallest unit of data storage, is eight bits. Eight bits yields 2^8, or 256 permutations of 0 or 1 – that number is the amount necessary to store a single alphanumeric such as the letter "A."

In the early days of digital storage, space was measured in kilobytes (KB), or 1000 bytes. The standard 5.25" floppy disk in production in 1982 held 1185.5KB. That capacity was quickly replaced with the megabyte (MB), or 1,000,000 bytes. The 3.5" floppy disk in widespread use by 1987 held 1.44MB, or 1,440,000 bytes.

The number of bytes required to produce a digital document varies depending upon the program that created and stores the document. In addition to the text content, various packet and formatting bytes are lost to the program. A rough average of physical pages per megabyte, however, is provided in Table 1 (below).

Table 1: Average Pages of Data per MB[1]

Document Type	Pages per MB
Microsoft Word files	63
Email files	97
Microsoft Excel files	161
Lotus 1-2-3 files	280
Microsoft PowerPoint files	17
Text Files	662
Image Files	15

By the mid-1990's, the ubiquitous 3.5" floppy disk gave way to the CDROM as the industry standard for portable data. The standard 74-minute CDROM contained 333,000 sectors, each housing 2,048 bytes, for a total storage capacity of 650MB. One CDROM replaced over 450 3.5" floppy disks.

By the millennium, the DVD had supplanted the CDROM as the default removable storage mechanism. DVD storage varied upon the model of DVD drive reader; the most basic, DVD-1 contained 1.46 Gigabytes (GB), a Gigabyte equaling one billion bytes. The highest standard, DVD-18, contained 17.08 GB of data.

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[1] These estimates are industry standard and widely reproduced. See e.g., http://www.setecinvestigations.com/resources/techhints/Pages_per_Gigabyte.pdf

By the 1990's, along with CDs and DVDs, digital storage devices began to include cell phones, Personal Digital Assistants, and thumb drives. Those devices, too, grew in storage capacity at an astonishing rate. In 2007, when Apple launched the iPhone, the initial model held 4 GB of data. Three years later, Apple released the iPhone 4.0 which held 32 GB of data.

That number continues to grow. In 2009, data storage manufacturers announced the development of the next-generation data storage architecture for phones, SDXc (Secure Digital Extended Capacity). The iPad2, one of the first devices to employ SDXc, is available in a 64 GB configuration. And SDXc is expected to push iPhones and other smartphones into the area currently reserved for laptop computers: the terabyte. Smartphones with storage in the 1-2 TB range are expected within this decade. [2] To place that number in perspective, a 1 TB phone could contain all the data listed in Table 2 (below), *all at once*, and still only be three-quarters full:[3]

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[2] *See Smartphones, Meet the Terabyte* at http://www.thestreet.com/story/10464195/smartphones-meet-the-terabyte.html; and *Terabyte Capacity for Smartphones* at http://www.telecomasia.net/content/terabyte-capacity-smartphones-0

[3] Determining digital storage capacity is simply a mathematical calculation. To aid in that calculation, petitioner refers this court to a number of data storage computational aids online. *See e.g*, http://www.unitarium.com/data or http://www.lexbe.com/hp/Pages-Megabyte-Gigabyte.aspx

Table 2: Localized Data Capacity of 1 TB Devices

120 hours of DVD quality video (approx. 100 GB)
720 hours of audio recordings (approx. 100 GB)
22,200 high-res color photographs (approx. 100 GB)
6,300,000 pages of MS Word documents (approx. 100 GB)
160,000,000 pages of Excel spreadsheets (approx. 100 GB)
97 million emails (approx 100 GB)

With SDXc as the new storage architecture standard, individuals will truly have the capacity to store an entire lifetime's data in their pocket. Videos of one's wedding, the birth of one's children, and every family reunion and school performance will easily fit on the device. Assuming 10 one-minute voicemails a day, everyday each year, the phone will hold over eleven years of voicemail messages. If you took three photographs of your child everyday of his life, from birth through high-school graduation, they would all fit on the phone with room to spare. It would easily contain not just every document you authored, but every page of every document you have ever read. Finally, it would hold every email and text message you have ever received or sent – for your entire lifetime.

b. Cloud Data

Even though the capacity of localized storage strains traditional human conceptualizations of size, it is dwarfed by a cellphone's secondary storage mechanism: cloud data.

Cloud data is not stored locally, at least not all of it. Rather, the physical device contains tags, or permanent conduits (i.e., saved encrypted passwords and account numbers) to data stored outside the physical device, on distributed systems shared across the internet. As one commentator summarized:

> "Experts have coined the term 'Web 2.0' to describe the shift in Internet usage from consumption to participation and metaphorically refer to this virtual platform as 'the cloud,' where users interact with Internet applications and store data on distant servers rather than on their own hard drives."

David A. Couillard, Note, *Defogging the Cloud: Applying Fourth Amendment Principles to Evolving Privacy Expectations in Cloud Computing*, 93 Minn L Rev 2205, 2205 (2009).

As recently noted by the Ninth Circuit:

> "The advent of fast, cheap networking has made it possible to store information at remote third-party locations, where it is intermingled with that of other users. For example, many people no longer keep their email primarily on their personal computer, and instead use a web-based email provider, which stores their messages along with billions of messages from and to millions of other people. Similar services exist for photographs, slide shows, computer code, and many other types of data. As a result, people now have personal data that are stored with that of innumerable strangers. Seizure of, for example, Google's email servers to

> look for a few incriminating messages could jeopardize the privacy of millions."

United States v. Comprehensive Drug Testing, Inc., 579 F3d 989, 1005 (9th Cir 2009). *See also*, Nick Antonopolous and Lee Gillam, *Cloud Computing: Principles, Systems, and Applications* v-vi (2010).

Freed from physical restrictions, cloud computing allows PDSDs and cellphones to achieve infinite data capacity. By distributing data storage outside the device, and using the local storage to house conduits and tags to that data, pulling it down to the device on demand, there is literally nothing that cannot be stored on a device that fits in one's pocket. And most new cellphone applications are utilizing this technology.

For the iPhone, for example, Bank of America, U.S. Bank, and all major financial institutions have applications which link the phone via cloud computing to the user's bank account, including full histories of deposits, payments, loans, credit, etc. GEICO, Allstate, and all major insurers have similar apps linking the phone to insurance account information. Finally, applications such as HealthCloud and GoogleHealth are designed to link the mobile device directly with offsite health records maintained by doctors and hospitals. The Oregon Health Sciences University is a leader in this area, having launched its own app in 2010. As OHSU explains:

> "The MyChart iPhone Application is an extension of OHSU's MyChart Web site, which provides users with 24-7 private and secure access to their health records via computer. The MyChart Web site has been available to OHSU patients since 2006. The mobile application launched in late 2010.
>
> " 'Health care information isn't something that is only required during regular business hours. Patients deserve round-the-clock access their records,' said Dr. Thomas Yackel, M.D., M.P.H., M.S., an assistant professor of medical informatics and internal medicine in the OHSU School of Medicine. 'We're excited about new technologies such as this which further expand patient/provider communications.'"

Need Health Care Info? OHSU Has an App for That available at http://www.ohsu.edu/xd/about/news_events/news/2011/01-20-need-health-care-info-oh.cfmContent-based information and coding information (last viewed 3/22/11).

c. The use of portable data devices has become mainstream.

The development of mobile data has represented one of the largest technological revolutions in human history. In 2002, roughly 16% of the world's population owned a cellphone. In just seven years, that number quadrupled:

> "By the end of 2009, there were an estimated 4.6 billion mobile cellular subscriptions, corresponding to 67 per 100 inhabitants globally (Chart 1). Last year, mobile cellular penetration in developing countries passed the 50 per cent mark reaching an estimated 57 per 100 inhabitants at the end of 2009. Even though this remains well below the average in developed countries, where penetration exceeds 100 per cent, the rate of progress remains remarkable. Indeed, mobile cellular penetration in

> developing countries has more than doubled since 2005, when it stood at only 23 per cent."

International Telecommunications Union, *Measuring the Information Society* ix (2010).[4]

For many, mobile data is replacing traditional methods of conducting one's life. Mobile banking, for example, is increasingly replacing brick-and-mortar bank branches. This is particularly true in developing countries. India, parts of central Asia, and large sections of Africa have bypassed the traditional infrastructure development of the West, and leapt straight into a cellular based model.

> "Across Africa, only 20 per cent of families have formal bank accounts, according to a World Bank survey. In Tanzania the percentage is as low as 5 per cent, and in Liberia 15 per cent.
>
> "But the proliferation of mobile telephone services around the continent has opened a new way to extend financial services * * * In the few countries where they have emerged, companies such as M-Pesa can use any phone or phone card to provide affordable services to customers wherever there is a mobile phone signal.
>
> " * * * * *
>
> "According to Mohsen Khalil, the World Bank's director of global ICT, Wizzit's operation is one of the most innovative approaches to mobile banking, since it specifically targets the poor. If this model works in South Africa, he says, the World Bank will help the company expand coverage within and beyond the country. 'We may be looking here at . . .

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[4] Report available at http://www.itu.int/ITUD/ict/publications/idi/2010/index.html).

> the most effective way to provide social and economic services to the poor.'

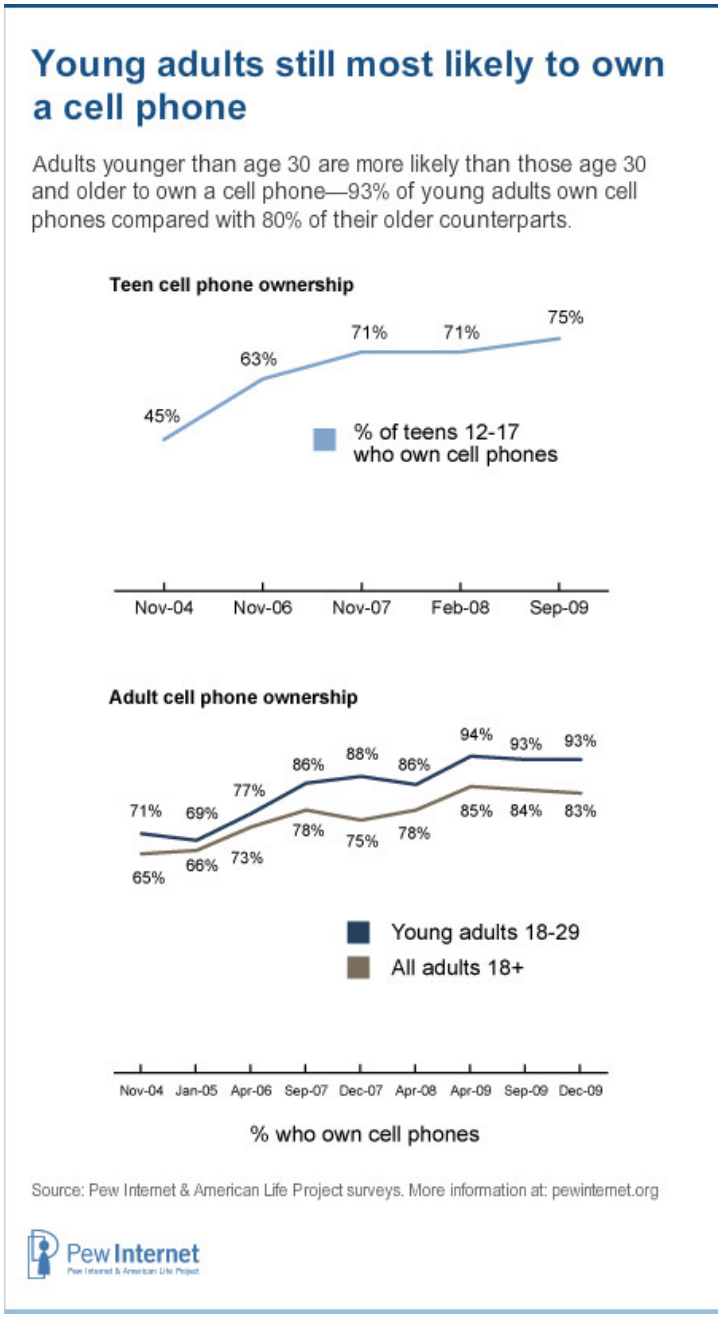
Mary Kimani, United Nations African Renewal, *A Bank in Every African Pocket*, 1-2 (2010).[5]

According to a 2010 study by the Pew Research Center's Internet and American Life Project, 82% of all American adults own a cellphone or smartphone. Amanda Lenhart, *Cellphones and American Adults* 2 (2010).[6] That number is only set to increase, as the usage by those under 30 is far greater, as show in Table 3 (below):

[5] Article available at http://www.un.org/ecosocdev/geninfo/afrec/newrels/214-cell-phone-banking.html (last viewed 3/24/11).

[6] Report available at http://pewinternet.org/~/media//Files/Reports/2010/PIP_Adults_Cellphones_Report_2010.pdf.

Table 3: Cellphone ownership by age



Additionally, for a growing segment of America, accessing information via a portable device has become the norm:

> "No longer just for communicating and planning while away from home or the workplace, the cell phone is increasingly a landline substitute. Recent

> research by the Pew Research Center suggests that 23% of Americans have only a cell phone available for making calls and another 17% have a landline but receive most of their calls on their mobile phone. For some subgroups, the findings are even more dramatic; nearly one-third (30%) of Hispanics and 49% of adults 25-29 are cell-only."

Id. at 13. So integral has the cellphone become to day-to-day living, that the same study found that 65% of all cellphone owners actually sleep with their phone. *Id*. at 11.

III. The search incident to arrest exception of Article I, section 9, does not authorize a full data search of portable data found on an arrestee.

It is undisputed in this case that the state reduced defendant's cellphone to its exclusive control. It is also undisputed that it subsequently searched the entire data contents of that phone, without a warrant, at least 40 minutes after the arrest, back at a laboratory.

In such a warrantless search, the state alone bears the burden to establish the circumstances of an exigency to the warrant requirement. *State v. Davis*, 295 Or 227, 241, 666 P2d 802 (1983) ("This power to search without a warrant and without arrest stems solely from the need of the officer to protect himself * * * from harm during the permissible investigation."). When a search is challenged, it is the state's burden to prove by a preponderance of the evidence that the police conduct was within the umbrella of exceptions to the warrant requirement. *State v. Paulson*, 313 Or 346, 351-52, 833 P2d 1278 (1992). *See*

also, State v. Bridewell, 306 Or 231, 257, 759 P2d 1054 (1988) ("[S]tate, whose burden it was, failed to establish an exigency excusing the obtaining of a warrant.").

a. The search incident to arrest exception of Article I, section 9 would authorize the search in this case if this court equates a PDSD to the equivalent of purse.

Article I, section 9, of the Oregon Constitution provides:

> "No law shall violate the right of the people to be secure in their person, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."

A search occurs under Article I, section 9 when a government agent invades a person's privacy interests. *State v. Wacker*, 317 Or 419, 425, 856 P2d 1029 (1993).

This court has held that the underlying purpose of the search incident to arrest exception, just as in the federal exception, is to locate dangerous items, means of escape, and to preserve evidence. *State v. Caraher*, 293 Or 741, 757-58, 653 P2d 942, 951 (1982). Despite the shared purpose however, the exception's application differs under the state and federal constitutions. In 1983 this court moved Article I, section 9 search incident to arrest jurisprudence away from the Fourth Amendment in analysis in *State v. Owens*, 302 Or 196, 729 P 2d 524 (1986). First, this court held that:

> "In order to justify a search, incidental to an arrest, the arrest must be for a crime, evidence of which reasonably could be concealed on the arrestee's person or in the belongings in his or her immediate possession at the time of the arrest. Thus, for example, if the person is arrested for a crime which ordinarily has neither instrumentalities nor fruits which could reasonably be concealed on the arrestee's person or in the belongings in his or her immediate possession, no warrantless search for evidence of that crime would be authorized as incident to that arrest. Of course, a pat-down or limited search for weapons to protect the officer or to prevent escape would be justified whenever a person is taken into custody."

Id. at 200.

This limitation of the search to evidence of the crime of arrest only, differs from the federal rule, as the court made clear:

> "In so doing, this court rejected *State v. Florance*, 270 Or 169, 527 P 2d 1202 (1974), which had adopted the federal rule for searches incident to arrest, as announced in *United States v. Robinson*, 414 US 218, 94 S Ct 467, 38 L Ed 2d 427 (1973), and *Gustafson v. Florida*, 414 US 260, 94 S Ct 488, 38 L Ed 2d 456 (1973)."

Id.

Further, this court rejected an analysis that differed based upon "which 'portable repositories' were worthy of constitutional protection and which were not." *Id*. This court clarified:

> "We are reluctant to embark upon the task of cataloguing items of personal property in the manner required by adherence to federal cases. We find that the focus on the character of the property searched has led to results which seem too frequently to turn upon fortuitous circumstances surrounding how one chooses to transport personal belongings and has resulted in failure of a more straightforward assessment of those

> individual protections against government intrusion which constitutions, both state and federal, seek to preserve."

Id. at 200-01. (internal citation omitted).

Thus, the Oregon Constitution authorizes the search incident to arrest of closed containers, wallets, purses, and personal effects found on or immediately associated with the arrestee, when it is reasonable to believe that evidence of the crime for which the person was arrested may be concealed there.

Finally, under Article I, section 9, the timing of the search is not critical. *Owens* noted that:

> "Another point relevant to an incidental search analysis under Article I, section 9, is that the search of 'effects' found on or carried by the arrestee is authorized even after these 'portable repositories' of personal effects have been removed from the arrestee's immediate control and are under the exclusive control of the police at the time of the search. It is enough that the arrestee had the personal effects in his or her possession at the time of the arrest; the police are not required to show that the arrestee retained possession at the time of the search.

Id. at 301-02.

Subsequent to *Owens*, Oregon courts have upheld the search incident to arrest of a wide variety of containers. *See e.g. State v. Anfield*, 313 Or 554, 560-61, 836 P2d 1337 (1992) (upholding the search of a black bag); *State v. Flores*, 68 Or App 617, 636-37, 685 P2d 999 (1984) (upholding the search of a change purse); *State v. Hite*, 198 Or App 1, 7, 107 P3d 677 (2005) (upholding the search of a backpack); *State v. Burgholzer*, 185 Or App 254, 260-61, 59 P3d 582 (2002) (upholding the search of cigarette pack); *State v. Rose*, 109 Or App 378, 381-82, 819 P2d 757 (1991) (upholding the search of a wallet).

In this case, defendant was arrested on outstanding warrants. In addition, police had been investigating defendant for distribution of controlled substances. Defendant agrees that the record establishes that probable cause for distribution existed at the time of his arrest, and that under the search incident to arrest doctrine the officers can search not only for evidence related to the crime of arrest, but to other crimes for which probable cause exists. Finally, defendant acknowledges that PDSDs can potentially contain evidence of narcotic distribution, such as financial records, photographs, and email and text communications.

Given that framework, if this court were to hold that a PDSD is nothing more than a purse – a very large purse, or a backpack with an unusually large capacity, then petitioner would be hard pressed to make a principled argument as to why the search was impermissible under Article I, section 9. In short, if this court holds that PDSDs differ in quantity, but not in quality, then petitioner most likely loses under the state constitutional analysis.

However, as shown above, PDSDs are qualitatively different. And it is because of the fundamental difference, between a container of tangible objects, and an access point to intangible digital data, that the existing Article I, section 9 caselaw should not control.

b. To preserve Oregon privacy protections enshrined in Article I, section 9, this court must move beyond categorizing PDSDs as indistinguishable from purses, and announce a new jurisprudence for digital data.

This court has rejected arguments that would tie privacy protections to archaic legal concepts that no longer fit modern society. In *State v. Campbell*, 306 Or 157, 168-170, 759 P2d 1040 (1988) this court invalidated the state's use of a radio transmitter to track a car's location. The state argued that older notions of property law controlled the constitutionality of the new technology. As this court summarized:

> "The state's second argument does not rest on the factual premise that the police observed with the transmitter what any member of the public could have observed. The argument, rather, is that only

> government actions that observe conduct or objects within 'protected premises' are searches, for, so the state argues, it is only within 'protected premises' that an individual has a privacy interest protected by Article I, section 9."

Campbell, 306 Or at 167.

This court rejected that argument, reaffirming that Article I, section 9 protects privacy:

> "This court's reference to 'protected premises' in *Louis* was intended to affirm that the recognition of privacy as the fundamental interest protected against government searches did not qualify the protection traditionally accorded to 'protected premises' such as houses under the older 'constitutionally protected area' analysis for identifying 'searches' under the Fourth Amendment and Article I, section. * * *
>
> "For a half-century, the United States Supreme Court defined a Fourth Amendment search as a physical trespass to a 'constitutionally protected area,' *i.e.*, a physical trespass to those 'areas' explicitly protected by the Fourth Amendment: persons, houses, papers, and effects.
>
> " * * * * *
>
> * * *[T]he notion that the interests protected against government searches by Article I, section 9, are limited to interests in certain 'protected premises' is unsustainable given this court's repeated recognition of privacy as the principal interest protected against unlawful searches. *See State v. Tanner, supra,* 304 Or. at 319, 745 P.2d 757; *State v. Owens, supra,* 302 Or. at 206, 729 P.2d 524; *State v. Elkins, supra,* 245 Or. at 288-92, 422 P.2d 250. Intrusions and technologically enhanced observations into 'protected premises' infringe privacy interests protected by Article I, section 9, but the question whether an individual's privacy interests have been infringed by an act of the police cannot always be resolved by reference to the area at which the act is directed."

Id. at 168-69.

Just as *Campbell* rejected the state's invitation to tie Article I, section 9 privacy to outmoded sources of legal analogy, so too should this court reject the invitation by the state here. Framing the search incident to arrest doctrine in terms of purses and backpacks no longer works. *Owens* spoke to physical containers that held other physical objects within. Such a container is constrained by its physicality. It can hold only so much. It is finite. And as such, the privacy intrusion in searching a physical container is also finite.

But PDSDs are not containers so much as portals. They themselves hold a vast amount of information, but also hold access to cloud information. They can hold anything, and are infinite. And, correspondingly, the privacy invasion of a full search of their contents is potentially infinite.

This court need not disavow or even modify *Owens* for petitioner to prevail in this case. This court need simply accept that *Owens* considered only physical containers holding physical objects, and did not speak to virtual objects such as data. *Owens* is not wrong, it is simply inapplicable to digital data searches.

To place the potential privacy invasion of a digital search into an *Owens* perspective, consider the following hypothetical:

HYPOTHETICAL

> A man builds a vast museum to himself, and fills it with all the tangible relics of his life. Every piece of his life is on display. He fills the

> museum's wings according to the periods of his life; pictures of his childhood, report cards and schoolwork in one wing. Another wing is dedicated to adulthood, it holds his wedding photographs, his love letters, his work product, and his finances. In a final wing, he places all the records of his growing age, pictures of grandchildren, his medical records, and his last will and testament.

Neither under *Owens*, nor any other jurisdiction's caselaw, would the police be authorized to search the entirety of the museum under the search incident to arrest doctrine. All jurisdictions would recognize that the privacy invasion is too great to permit such a search without a warrant. That privacy invasion does not diminish simply because technology has enabled the man to shrink his museum and hold it in his pocket.

This court has consistently held that, above all, searches incident to arrest are limited in time, space and intensity. *Owens*, 302 Or at 205, *see also State v. Caraher*, 293 Or 741, 759, 654 P2d 942 (1982). It is because traditional conceptions of space and intensity breakdown when we move from the tangible world to the digital, that this court should reject the search incident to arrest exception in the search of PDSDs.

Because of the vast amount of information accessible from such a device, and because the amount of that information will only increase as technology advances, the scope of the privacy invasion vastly eclipses the limited benefit of searching that information without a warrant.

To hold otherwise invites the search incident to arrest exception to become a proxy for exploratory searches of an entire lifetime's worth of private information on the hope that some parcel will incriminate a defendant. It would create the situation foreseen by (then) Judge Gillette:

> "The basic principle of *Elkins* is that an arrest allows only a limited search * * *.
>
> "If the rule were otherwise, an officer who desired to inculpate an arrested person in another crime, could seize everything in such person's immediate possession and control upon the prospect that on further investigation some of it might prove to have been stolen or to be contraband. It would open the door to complete temporary confiscation of all an arrested person's property which was in his immediate possession and control at the time of his arrest for the purpose of minute examination of it in an effort to connect him with another crime. Such a practice would be as much an exploratory seizure as one made upon an arrest for which no probable cause existed. Intolerable invasions of a person's property rights would be invited by an *ex post facto* authorization of a seizure made on groundless suspicion."

State v. Flores, 68 Or App 617, 633-34, 685 P2d 999 (1984) citing *State v. Elkins*, 245 Or. 279, 287-288, 442 P2d 250 (1966).

IV. The search incident to arrest exception to the Fourth Amendment does not authorize a full data search of a PDSDs in the exclusive control of the police.

Under the federal constitution, warrantless searches are *per se* unconstitutional unless the state establishes that the search conducted fell within one of the "jealously and carefully drawn" exceptions to the warrant requirement. *Katz v. United States*, 389 US 347, 357, 88 S Ct 507, 19 L Ed 2d

576 (1967) (footnote omitted). Here, the state seeks to justify the search under the Fourth Amendment's search incident to arrest exception.

a. The Fourth Amendment's search incident to arrest exception, unlike Article I, section 9, developed as a categorical approach, creating a series of "bright line" rules.

The United States Supreme Court repeatedly has reaffirmed that warrantless searches incident to arrest are justified by two – and only two – exigencies: "(1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial." *Knowles v. Iowa*, 525 US 113, 116, 119 S Ct 484, 142 L Ed 2d 492 (1998) (citing cases going back to *Weeks v. United States*, 232 US 383, 392, 34 S Ct 341, 58 L Ed 652 (1914)).

The Court laid down the "proper extent" of a search incident to lawful, custodial arrest in *California v. Chimel*, where it invalidated the search following respondent's arrest of his "entire three bedroom house, including the attic, the garage, and a small workshop." 395 US 752, 754, 89 S Ct 2034, 23 L Ed 2d 685 (1969). Because "'[t]he scope of [a] search must be "strictly tied to and justified by" the circumstances which rendered its initiation permissible,'" the *Chimel* Court set forth a rule to ensure that searches incident to arrest are linked to, and do not exceed, the two exigency rationales that render them "imperative" in the first place. *Id*. at 761-62. Recognizing that weapons can be

used to effect an assault or escape and evidence can be destroyed or concealed only to the extent they are accessible to the arrestee, this Court held that authorities, incident to lawful, custodial arrest, may search only an arrestee's person and his area of "immediate control – … mean[ing] the area from within which he might gain possession of a weapon or destructible evidence." *Id*. at 763 (quotation marks omitted).

Chimel made clear that the operative time for assessing the exigencies justifying a warrantless search incident to arrest is the time of the search and, accordingly, held that authorities may search only the area that is within he arrestee's immediate control when the search is commenced. The Court explained in setting forth the area of immediate control test that "[a] gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested." *Chimel*, 395 US at 763. But the gun on a table or in a drawer is dangerous to the arresting officer only if the arrestee possibly can access it; thus a search of the table or drawer is justified under *Chimel* only if it is within the arrestee's immediate control at the time of the search.

Chimel marked a significant shift. Prior to *Chimel* searches incident to arrest were routinely expansive. In *Harris v. United States*, 331 US 145 67 S Ct 1098, 91 L Ed 1399 (1945) the court had approved the search of an entire four-

room house subsequent to arrest. *Chimel* greatly reduced the scope of the exception. *See e.g. Coolidge v. New Hampshire*, 403 US 443, 514, 91 S Ct 2022, 2062, 29 L Ed 2d 564 (1971) (noting *Chimel's* narrowing).

However, just four years after limiting the scope of searches incident to arrest, the pendulum began to swing towards expansion. In *United States v. Robinson*, 414 US 218, 94 S Ct 467, 38 L Ed 2d 427 (1973) the court upheld the search of a crumpled cigarette packet, found in the defendant's coat pocket following his arrest for driving without a license. *Id*. at 220-21. Lower courts had invalidated the search, reasoning that *Chimel* limited the search incident to arrest to evidence of the crime of arrest, and there was no potential evidence of that crime in the cigarette pack. *Id*. at 227. The Supreme Court reversed, stating:

> "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. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment.

Id. at 235.

Then, in *United States v. Edwards*, 415 US 800, 815, 94 S Ct 1234, 39 L Ed 2d 771 (1974), the Supreme Court recognized an exception to *Chimel's* contemporaneity requirement and authorized the warrantless search of a suspect's clothes that occurred ten hours after the arrest at the police station. In *Edwards*, the police took an arrestee's clothes to examine them for evidence of a crime. The court noted that the police had probable cause to believe the defendant's clothing was evidence, and held that taking such evidence "was and is a normal incident of a custodial arrest, and reasonable delay in effectuating it does not change the fact that Edwards was no more imposed upon than he could have been at the time and place of the arrest or immediately upon arrival at the place of detention." *Id.* at 805.

However, three years later in *United States v. Chadwick*, 433 US 1, 97 S Ct 2476, 53 L Ed 2d 538 (1977) the Court held that a search of a container is invalid under the search incident to arrest exception if the arrestee could not conceivably access it when it was searched. There, authorities arrested the defendants as they were loading a footlocker into a car's trunk and searched the footlocker at the stationhouse 90 minutes later. The Court rejected the contention that the warrantless search was incident to the arrests, reasoning that a search is not "incident to th[e] arrest either if the search is remote in time or

place from the arrest or no exigency exists." *Id*. at 15 (internal citation and quotation marks omitted) (emphases added).

The *Chadwick* court distinguished *Edwards* as follows, "[u]nlike searches of the person, *United States v. Robinson*, 414 U.S. 218 (1973); *United States v. Edwards*, 415 U.S. 800, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974), searches of possessions within an arrestee's immediate control cannot be justified by any reduced expectations of privacy caused by the arrest." *Id.* at 16 n. 10 (internal citations omitted). Because authorities had removed the footlocker to "their exclusive control" before searching it, "there [was] no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence." *Id*. at 15.

Chimel, *Roberton*, *Edwards* and *Chadwick* represented the high court's desire to create an easily applied categorical approach – a bright line rule for law enforcement. This desire for a bright line categorical approach to the search incident to arrest exception culminated in *New York v. Belton*, 453 US 454, 101 S Ct 2860, 69 L Ed 768 (1981).

In *Belton*, the court considered the search incident to arrest of a jacket. The officer affected a traffic stop of Belton, removed him from the car, arrested him, and ultimately searched a black leather jacket in the backseat. *Id*. at 456-57. Lower courts suppressed the fruits of the search, reasoning that the jacket

was not on Belton's person, and thus not a *Robinson* item, and had been reduced to police control upon his arrest and the seizure of the vehicle. Thus, under *Chadwick*, the warrantless search should have been invalidated. *Id*.

The high court reversed, and carved out the third "bright line" rule for the exception: a warrantless search of a vehicle of an arrested recent occupant is permissible. As the court said:

> "It is not questioned that the respondent was the subject of a lawful custodial arrest on a charge of possessing marihuana. The search of the respondent's jacket followed immediately upon that arrest. The jacket was located inside the passenger compartment of the car in which the respondent had been a passenger just before he was arrested. The jacket was thus within the area which we have concluded was 'within the arrestee's immediate control' within the meaning of the *Chimel* case. The search of the jacket, therefore, was a search incident to a lawful custodial arrest, and it did not violate the Fourth and Fourteenth Amendments."

Id. at 462-63.

Following *Belton*, the search incident to arrest exception broke down into three categorical approaches. First, pursuant to *Belton*, a search of a vehicle was categorically permissible. As the high court itself noted, lower courts applied *Belton* universally to allow the search of a vehicle under virtually any factual scenario. *See e.g. Thornton v. United States*, 541 US 615, 624, 124 S Ct 2127, 158 L Ed 2d 905 (2004) ("lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police

entitlement rather than as an exception justified by the twin rationales of *Chimel*." O'Connor, J. concurring).

Second, under *Robinson/Edwards*, a defendant's person, items found on his person at the time of arrest, or those items categorized as "personal" in nature could be searched incident to arrest. Under *Robertson* and *Edwards* federal courts upheld searches of purses, wallets, briefcases, and day timers. *See e.g. Curd v. City Ct of Judsonia, Ark.*, 141 F3d 839, 842 (8th Cir 1998) (upholding search of a purse); *United States v. McCroy*, 102 F3d 239, 240-41 (6th Cir 1996) (upholding search of a wallet); *United States v. Castro*, 596 F2d 674, 677 (5th Cir 1979) (upholding searching papers found in wallet); *United States v. Ivy*, 973 F2d 1184, 1187 (5th Cir 1992) (upholding search of a briefcase within defendant's reach); *United States v. Rodriguez*, 995 F2d 776, 778 (7th Cir 1993) (upholding search of day timer address book).

Under the third category, when the search was directed not against the suspect's person, but against his possessions, or items deemed "possessory" *Chimel* and *Chadwick* controlled the analysis. Under *Chimel* and *Chadwick*, if those possessory items posed no safety risk to the officers, once they were reduced to police custody, the rationale for the search incident to arrest exception terminated, and any search of their contents were governed by the warrant requirement.

b. In *Arizona v. Gant* the United States Supreme Court retreated from a bright line categorical approach to the search incident to arrest, in favor of a case specific reasonableness standard.

In *Arizona v. Gant*, ___ US ___, 129 S Ct 1710, 173 L Ed 2d 485 (2009) the high court reexamined the search incident to arrest doctrine, and retreated from the hard categorical approach of *Belton*, marking a swing in the pendulum back to a more limited view of the scope of a search incident to an arrest.

The officers encountered Gant as he left his car, having previously determined that Gant had a suspended driver's license. They arrested and handcuffed him, and placed him in the back of a police car. Gant, 129 S Ct at 1715. After securing him, the police searched Gant's car.

The high court ruled the search impermissible, repudiating lower court expansion of the search incident to arrest exception. First, the high court reestablished the exception's tie to the twin *Chimel* rationales:

> "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-a result clearly incompatible with our statement in *Belton* that it 'in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests."'453 US, at 460, n. 3, 101 S Ct 2860. Accordingly, we reject this reading of *Belton* and hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the

> arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search."

Id. at , 1719.

Second, *Gant* clarified that the search incident to arrest doctrine is not controlled by rigid application of categories, but by the touchstone of reasonableness:

> "[The *Chimel*] limitation, which continues to define the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy. See *ibid.*(noting that searches incident to arrest are reasonable '*in order to* remove any weapons [the arrestee] might seek to use' and '*in order to prevent* [the] concealment or destruction' of evidence (emphasis added)). If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply."

Id. at 1716.

The precise effect of *Gant* on the *Robinson*/*Edward*/*Chadwick* spectrum is uncertain, although several commentators have questioned the continued validity of applying *Robinson* and *Edwards* to all personal effects. *See e.g.*, Matthew E. Orso, *Cellular Phones, Warrantless Searches, and the New Frontier of Fourth Amendment Jurisprudence*, 50 Santa Clara L. Rev. 183, 207-08 (2010) ("Gant raised a timing issue for searches incident to arrest that could have widespread impact on searches of all containers, * * * [I]t is difficult to see why measuring a search's scope based on the time of search rather than the

time of arrest should be limited to a scenario involving the search of an automobile incident to arrest."); Chelsea Oxton, *The Search Incident to Arrest Exception Plays Catch Up: Why Police May No Longer Search Cell Phones Incident to Arrest Without A Warrant*, 43 Creighton L Rev. 1157, 1207-08 (2010) ("In light of the Supreme Court rejecting a broad reading of the *Belton* rule, courts should rethink whether it is appropriate to broadly interpret the *Belton* decision's denotation of a container to encompass such modern technological devices as cell phones. Decisions that relied on *Belton* are now subject to reexamination in light of *Gant*.").

c. Jurisdictions are split on whether a PDSD is a personal item or a possessory item.

Whether a PDSD is a personal item, akin to *Edwards* clothing, or a possessory item, akin to a *Chadwick* footlocker, has sharply split the few jurisdictions that have weighed in on the issue.[7] The Fifth Circuit classified a PDSD in the defendant's pocket as a *Robinson*/*Edwards* item:

> "Likewise, *United States v. Chadwick,* * * * is inapplicable. *Chadwick* held that,
>
> > '[o]nce law enforcement officers have reduced *luggage or other personal property not immediately associated with the person of the arrestee* to their exclusive control, and there is no longer any

[7] Petitioner acknowledges that unpublished opinions are not favored. However, the limited number of cases on this subject necessitate that petitioner refer this court to unpublished opinions to outline the general discussion occurring in federal courts.

> 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.'
>
> "* * * Finley's cell phone does not fit into the category of 'property not immediately associated with [his] person' because it was on his person at the time of his arrest."

United States v. Finley, 477 F.3d 250, 263 (5th Cir 2007).

Several other courts, too, have treated a PDSD as a personal item under *Edwards*/*Robinson*, and allowed the warrantless search of data, often citing *Finley* as support. *See e.g.*, *United States v. Young*, 278 F App'x 242 (4th Cir 2008); *United States v. Mercado-Nava*, 486 F Supp 2d 1271 (D Kan 2007); *United State v. Brookes*, 2005 WL 1940124 (D VI 2005).

The first break with *Finley* came from the Northern District of California in U*nited States v. Park*, 2007 WL 1521573 (N D Cal May 23, 2007).

In *Park*, the court noted the unique nature of cell phones:

> "[T]his Court finds, unlike the *Finley* court, that for purposes of Fourth Amendment analysis cellular phones should be considered 'possessions within an arrestee's immediate control' and not part of 'the person.' *Chadwick*, 433 US at 16 n. 10. This is so because modern cellular phones have the capacity for storing immense amounts of private information. Unlike pagers or address books, modern cell phones record incoming and outgoing calls, and can also contain address books, calendars, voice and text messages, email, video and pictures. 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, voice and instant messages.
>
> "Any contrary holding could have far-ranging consequences. At the hearing, the government asserted that, although the officers here

> limited their searches to the phones' address books, the officers could have searched any information-such as emails or messages-stored in the cell phones. In addition, in recognition of the fact that the line between cell phones and personal computers has grown increasingly blurry, the government also asserted that officers could lawfully seize and search an arrestee's laptop computer as a warrantless search incident to arrest. As other courts have observed, 'the information contained in a laptop and in electronic storage devices renders a search of their contents substantially more intrusive than a search of the contents of a lunchbox or other tangible object. 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.' *United States v. Arnold,* 454 F Supp 2d 999, 1004 (CD Cal 2006).
>
> " * * * *
>
> "The searches at issue here go far beyond the original rationales for searches incident to arrest, which were to remove weapons to ensure the safety of officers and bystanders, and the need to prevent concealment or destruction of evidence. *See generally Chimel v. California,* 395 US 752, 89 S Ct 2034, 23 L Ed 2d 685 (1969). Inspector Martinovich stated that he initiated the searches because 'evidence of marijuana trafficking and/or cultivation might be found in each of the cellular telephones.' * * *. Officers did not search the phones out of a concern for officer safety, or to prevent the concealment or destruction of evidence. Instead, the purpose was purely investigatory. Once the officers lawfully seized defendants' cellular phones, officers could have sought a warrant to search the contents of the cellular phones."

Park, 2007 WL 1521573 at 8.

Similarly, the issue has split the only two state supreme courts to consider the matter. In *State v. Smith*, the Ohio Supreme Court rejected the invitation to liken a cellphone to a *Robinson* cigarette pack, noting that the

United States Supreme Court has always implied that a container is something that holds other *tangible* objects:

> "The state argues that we should follow *Finley* and affirm the court of appeals because the trial court was correct in its conclusion that a cell phone is akin to a closed container and is thus subject to search upon a lawful arrest. We do not agree with this comparison. Objects falling under the banner of 'closed container' have traditionally been physical objects capable of holding other physical objects. Indeed, the United States Supreme Court has stated that in this situation, 'container" means 'any object capable of holding another object.' *New York v. Belton* * * * One such example is a cigarette package containing drugs found in a person's pocket, as in *United States v. Robinson* * * *.

State v. Smith, 124 Ohio St 3d 163, 167-68, 920 NE 2d 949, *reconsideration denied*, 124 Ohio St 3d 1478, 921 NE 2d 248 and *cert. denied*, 131 S Ct 102, 178 L Ed 2d 242 (2010).

The Ohio Supreme Court went on to hold that because of their technical capabilities, cellphone were entitled to greater privacy protections than physical containers:

> "Modern understandings of the Fourth Amendment recognize that it serves to protect an individual's subjective expectation of privacy if that expectation is reasonable and justifiable * * * Given their unique nature as multifunctional tools, cell phones defy easy categorization. On one hand, they contain digital address books very much akin to traditional address books carried on the person, which are entitled to a lower expectation of privacy in a search incident to an arrest. On the other hand, they have the ability to transmit large amounts of data in various forms, likening them to laptop computers, which are entitled to a higher expectation of privacy.
>
> " * * * * *

> "[A cellphone'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. Once the cell phone is in police custody, the state has satisfied its immediate interest in collecting and preserving evidence and can take preventive steps to ensure that the data found on the phone are neither lost nor erased. But because a person has a high expectation of privacy in a cell phone's contents, police must then obtain a warrant before intruding into the phone's contents."

Id. at 169.

Reaching the opposite conclusion, the California Supreme Court, in a sharply divided plurality opinion, held cellphones to fall under the *Edwards*/*Robinson* framework:

> "Under these decisions the key question in this case is 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 it was, then the delayed warrantless search was a valid search incident to defendant's lawful custodial arrest. If it was not, then the search, because it was 'remote in time [and] place from the arrest,' 'cannot be justified as incident to that arrest' unless an 'exigency exist[ed].' * * *
>
> "We hold that the cell phone was 'immediately associated with [defendant's] person' * * *, and that the warrantless search of the cell phone therefore was valid. As the People explain, the cell phone 'was an item [of personal property] on [defendant's] person at the time of his arrest and during the administrative processing at the police station.' In this regard, it was like the clothing taken from the defendant in *Edwards* and the cigarette package taken from the defendant's coat pocket in *Robinson,* and it was unlike the footlocker in *Chadwick,* which was separate from the defendants' persons and was merely within the 'area' of their 'immediate control.'"

People v. Diaz, 51 Cal 4th 84, 93, 244 P3d 501 (2011).

Of note, however, is that the majority opinion in *Diaz* represents only a single justice. The remaining four justices of the plurality concurred in the result, not our of agreement with its principles, but out of deference to the United States Supreme Court:

> "I join the majority rather than the dissent because the United States Supreme Court has cautioned that on issues of federal law all courts must follow its directly applicable precedents, even when there are reasons to anticipate that it might reconsider, or create an exception to, a rule of law that it has established. * * * The high court has reserved to itself alone 'the prerogative of overruling its own decisions.'"

Id. at 103 (concurring).

d. This court should hold that PDSDs are not the equivalent of clothing under *Edwards,* and a full data search 40 minutes after arrest, outside the suspect's presence, must be governed by the warrant requirement.

A PDSD, with all the data in can access, and all the privacy expectations accompanying that data, is not the constitutional equivalent of a crumpled cigarette pack. If this court wishes to continue the categorical analysis of *Robinson*, *Edwards* and *Chadwick*, this court should adopt the reasoning of *Park* and *Smith* in holding that PDSDs are *Chadwick* items, and a search remote from the arrest in not permitted.

But ultimately the categories that have built up around the fourth amendment cannot blindly control. As the high court has said:

> "But this effort to decide whether or not a given 'area,' viewed in the abstract, is 'constitutionally protected' deflects attention from the

> problem presented by this case. For the Fourth Amendment protects people, not places.

Katz v. United States, 389 US 347, 351, 88 S Ct 507, 511, 19 L Ed 2d 576 (1967). The touchstone of the analysis is always the reasonable expectation of privacy. *Oliver v. United States*, 466 US 170, 171, 104 S Ct 1735, 80 L Ed 2d 214 (1984).

The exceptions to the warrant requirement are just that – exceptions. They represent the outlier, not the norm. Those exceptions "have been jealously and carefully drawn, and search incident to a valid arrest is among them." *Jones v. United States*, 357 US 493, 499, 78 S Ct 1253, 1257, 2 L Ed 2d 1514 (1958).

The applicability of an exception does not rest upon rigid categories, but upon its reasonableness, and its fundamental purpose.

> "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted."

Bell v. Wolfish, 441 US 520, 99 S Ct 1861, 60 L Ed 2d 447 (1979).

The fundamental purpose behind the search incident to arrest exception, as Justice Frankfurter stated, is necessity:

> " * * * In plain English, the right to search incident to arrest is merely one of those very narrow exceptions to the 'guaranties and immunities which we had inherited from our English ancestors, and

> which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case.' * * *
>
> " * * * Its basic roots, however, lie in necessity. What is the necessity? Why is search of the arrested person permitted? For two reasons: first, in order to protect the arresting officer and to deprive the prisoner of potential means of escape, * * * and, secondly, to avoid destruction of evidence by the arrested person."

United States v. Rabinowitz, 339 US 56, 70 S Ct 430, 94 L Ed 653 (1950).

When that necessity is not present, a search under the exception is no longer reasonable. As the court held in *Gant*:

> "If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply.

Gant, 129 S Ct at 1716.

In this case, the necessity underpinning the exception was not present. The officers had complete control of the PDSD, and had removed defendant from the area entirely. Defendant could not retrieve the device, and there was no legitimate threat that he could destroy evidence contained inside it. Accompanying the non-existent necessity, the potential scope of the intrusion was great. The officers did not perform a limited, or targeted search, or restrict their intrusion into the PDSD's data contents. The scope of the search was no less expansive than the search of *Chimel's* home.

Chimel drew a line. Even though evidence of Chimel's crimes might likely have been contained in his home, to allow such an expansive search

every time a suspect is arrested would have allowed the exception to swallow the rule, and would have disregarded the privacy interests at issue. Today, Chimel's PDSD would likely contain more information than his physical home did. The search of a PDSD today is just as unreasonable and intrusive as the search of a home was 1969. It must, therefore, be governed by the protections of the warrant requirement.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays this court reverse the decision of the Court of Appeals, and affirm the decision of the trial court suppressing the data contents of petitioner's cellphone.

Respectfully submitted,

/s/ Bronson James

_____

Bronson D. James OSB #033499
JDL Attorneys, LLP

Attorneys for Defendant-Respondent
James Tyler Nix

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 10,923 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner-Respondent's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on April 1, 2011.

I further certify that I directed the Petitioner-Respondent's Brief on the Merits to be served upon Doug Zier, attorney for Plaintiff-Appellant, on April 1, 2011, by having the document electronically delivered to:

Douglas Zier #804174
Assistant Attorney General
1162 Court Street NE
Salem, OR 97301
Phone: (503) 378-4402
Attorney for Plaintiff-Appellant

Respectfully submitted,

/s/ Bronson James

Bronson D. James OSB #033499
JDL Attorneys, LLP

Attorney for Defendant-Appellant
James Tyler Nix