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People v. Diaz, Senate Bill 914 and the Fourth Amendment

Caitlin Keane

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People v. Diaz, Senate Bill 914 and the Fourth Amendment

by
CAITLIN KEANE*

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I. Introduction

In January 2011, the California Supreme Court ruled in *People v. Diaz* that police officers do not need a warrant to search a portable electronic device incident to a lawful arrest.¹ Moreover, the officers need not have probable cause or even reasonable suspicion that the device contains evidence or other information pertinent to the crime of arrest.² The court justified its ruling by relying on United States Supreme Court precedent in the area of Fourth Amendment search and seizure doctrine, citing to well-known and decades-old cases for support.³ With the United States Supreme Court unwilling to clarify exactly how new technology should be dealt with under the Fourth Amendment, perhaps the high court of California did the best that it

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1. *People v. Diaz*, 244 P.3d 501, 511 (Cal. 2011).

2. *Id.* at 503.

3. *Id.* at 504.

could under the circumstances. If this was the case, the California legislature did not agree.

After the *Diaz* decision in January, Senator Mark Leno, a Democrat representing San Francisco, took matters into his own hands and drafted Senate Bill 914.⁴ In short, the bill would have overturned the Court's decision and required law enforcement to obtain a search warrant from a neutral magistrate before searching arrestees' portable electronic devices.⁵ The bill passed with overwhelming support from both political parties in the State Assembly and State Senate and needed only Governor Brown's signature or tacit approval to become law.⁶ Governor Brown vetoed the bill in October 2011, stating, "[t]he courts are better suited to resolve the complex and case-specific issues relating to constitutional search-and-seizure protections."⁷

This note will first provide a brief summary of Fourth Amendment search and seizure doctrine, specifically the warrant requirement and its existing exceptions. It will then discuss the current state of the law regarding searching portable electronic devices and suggest what approach the United States Supreme Court should adopt to resolve the confusion surrounding the issue. The second half of the Note will take a closer look at Senate Bill 914, including its legislative history, why it is necessary, and possible unstated reasons why it was vetoed. Lastly, the Note will argue that Governor Brown should not have vetoed Senate Bill 914 based on his given explanation, because the legislature, rather than the courts, should resolve complex technological issues.

II. Background

A cell phone is no longer merely a portable version of the landline telephones from previous generations.⁸ In fact, today's smartphones tend to more closely resemble a computer rather than a regular telephone.⁹ In addition to making phone calls, smartphones

4. S.B. 914, 2011-2012 Sess. (Cal. 2011) http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0901-0950/sb_914_bill_20110902_enrolled.pdf (last visited Nov. 11, 2012).

5. *See id.*

6. *Id.*

7. Governor Edmund Brown, *Veto Message* (Oct. 9, 2011), http://gov.ca.gov/docs/SB_914_Veto_message.pdf.

8. S.B. 914 § 1(b), 2011-2012 Sess. (Cal. 2011) http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0901-0950/sb_914_bill_20110902_enrolled.pdf (last visited Nov. 11, 2012).

9. *Id.*; Smartphones are defined as modern cell phones that "[provide] digital voice service... text messaging, e-mail, Web browsing, still and video cameras, MP3 players,

can access the Internet via mobile networks or a wireless hotspot, take pictures and videos, download and play music and videos, access bank accounts, provide navigation assistance, access a remote storage hard drive, and perform a myriad of other functions.¹⁰ Remarkably, new applications for smartphones even allow users to check the oil and tire pressure in their vehicles, along with turning on, locking, and unlocking the car.¹¹ Developers are currently working on cell phones that have all of the same capabilities as laptops, providing a convenient substitute for personal computers.¹² Moreover, with access to any remote storage drive or data sharing system such as iCloud, it is possible to access every file stored on a home computer or virtual network from anywhere with Internet access.¹³

DigitalBuzzBlog reports that an estimated 4 billion mobile phones were in use worldwide in 2011, and 1.08 billion of those phones were smartphones.¹⁴ In the United States alone, nine out of ten people are mobile phone subscribers.¹⁵ This number does not even include other portable electronic devices, such as iPads or tablets, which provide mobile Internet access without phone calling capabilities.¹⁶

Needless to say, mobile phones are widely used in society today and people are extremely dependent on them. Individuals and businesses alike have grown to depend on them for communicating important (and not so important) information on the go.¹⁷ With such a rapidly developing medium, it is not surprising that state and federal law have not kept up with the advancing technology. However, what

video viewing and often video calling. In addition to their built-in functions, smartphones can run myriad applications, turning the once single-minded cellphone into a mobile computer.” *Definition of: Smartphone*, PCMAG.COM, http://www.pcmag.com/encyclopedia_term/0,2542,t=Smartphone&i=51537,00.asp (last visited on Feb. 10, 2012).

10. *iPhone*, APPLE.COM, <http://www.apple.com/iphone/> (last visited Feb. 10, 2012).

11. *CES: Coming Soon: Control Car Functions from Smartphone with AutoBot*, CNET.COM, (Oct. 27, 2010, 10:16 AM), http://reviews.cnet.com/8301-13746_7-20020816-48.html.

12. *Smart Phone Functions Seep Into All Sectors*, PHYSORG.COM (Jan. 16, 2011), <http://www.physorg.com/news/2011-01-smart-functions-seep-sectors.html>.

13. *iCloud*, APPLE.COM, <http://www.apple.com/icloud/> (last visited Feb. 10, 2012).

14. *Infographic: Mobile Statistics, Stats & Facts 2011*, DIGITALBUZZBLOG (Apr. 4, 2011), <http://www.digitalbuzzblog.com/2011-mobile-statistics-stats-facts-marketing-infographic/>.

15. *Statistics: The Growth of Mobile into 2011*, DIGITALBUZZBLOG, (Nov. 21, 2010), <http://www.digitalbuzzblog.com/mobile-statistics-2011-growth-of-mobile/>

16. *iPad*, APPLE.COM, <http://www.apple.com/ipad/> (last visited Feb. 10, 2012).

17. See *iPhone*, *supra* note 10.

is surprising—and alarming—is just how far behind the law is, and what this means for the privacy rights of billions of Americans.

Unfortunately, the Supreme Court’s recent actions suggest that it is in no hurry to take on the challenge of applying the Fourth Amendment’s search and seizure doctrine to twenty-first century technology. For example, in recent terms, the Supreme Court denied certiorari to both *State v. Smith* and *People v. Diaz*, leaving a split amongst the states as to whether warrantless searches of cell phones incident to arrest are constitutional under the Fourth Amendment.¹⁸ Additionally, although the Court could have provided guidance in the area of modern technology when it decided the case *United States v. Jones* this year, the opinion supplied very little direction.¹⁹

In *Jones*, the Court determined whether law enforcement’s attachment of a Global Positioning System (GPS) to a car was a “search” under the Fourth Amendment.²⁰ While the Court determined that attaching the device to the car was indeed a search, Justice Scalia’s plurality opinion did so by focusing on the physical trespass rather than the information electronically transmitted from the device.²¹ Because GPS technology involves the use of digital information, much like cell phones and other modern developments, the Court could have taken this opportunity to provide guidance as to when a warrant is necessary when dealing with novel technologies.²²

Justice Alito’s concurrence recognized the limitations in the plurality opinion, pointing out that the issue was actually the use of the information gathered from the GPS rather than the physical attachment of the device.²³ Furthermore, Justice Alito questioned whether the trespass theory used by the plurality would be of any help to future electronic searches that do not involve a physical

18. *State v. Smith*, 920 N.E. 2d 949 (Ohio 2009), *cert. denied*, 131 S.Ct. 102 (2010); *People v. Diaz*, 244 P.3d 501 (Cal. 2011), *cert. denied*, 132 S.Ct. 94 (2011).

19. *United States v. Jones*, 132 S. Ct. 945, 957 (2012).

20. *Id.* at 948.

21. *Id.* at 949.

22. *U.S. v. Jones: The Battle for the Fourth Amendment Continues*, HUFFINGTONPOST, (Jan. 24, 2012, 7:02 PM), http://www.huffingtonpost.com/john-whitehead/us-v-jones-surveillance-technology_b_1224660.html. “The Court should have clearly delineated the boundaries of permissible surveillance within the context of rapidly evolving technologies and reestablishing the vitality of the 4th amendment. Instead the justices relied on an ‘18th century guarantee against un-reasonable searches, which we believe must provide at a minimum the degree of protection it afforded when it was adopted.’” (quoting *Jones*, 132 S.Ct. at 953.).

23. *Jones*, 132 S.Ct. at 958–59 (Alito, Ginsburg, Breyer, Kagan, JJ., concurring).

intrusion.²⁴ The Supreme Court has previously ruled that, when interpreting the holding of a plurality decision, “the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.”²⁵ In this case, the rule appears to be only that attaching a GPS device to a car is indeed a search under the Fourth Amendment.

Jones provided the perfect opportunity to answer the increasingly important question regarding when cell phones and other portable electronic devices can constitutionally be searched and seized by the government. Unfortunately, the Court’s plurality avoided this issue to the best of its ability.²⁶ The plurality of Justices ignored the difficult issue of electronically transmitted information and instead reiterated what was already known: that a physical intrusion by the government onto an individual’s property is indeed a search under the Fourth Amendment.²⁷ With the Supreme Court currently unwilling to create a new rule for cell phones and other portable electronic devices, lower courts are left struggling to fit new technology into old Fourth Amendment precedent.

III. The Fourth Amendment Search and Seizure Doctrine

As a preliminary issue, it is important to recognize how cell phone searches fall within the purview of the Fourth Amendment. The text of the Fourth Amendment to the United States Constitution protects “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . .”²⁸ One way cell phones fit into the scope of the Fourth Amendment is under the “papers and effects” language. Depending on how advanced their technology, cell phones can hold or access an unlimited number of digital files, the equivalent of actual papers being scanned and uploaded onto a server.²⁹ The “paper” analysis is not limited to smartphones, as non-smartphones may still contain text messages and phone numbers.³⁰ This information is comparable to written address

24. *Id.*

25. *Marks v. United States*, 430 U.S. 188, 193 (1977) (citing *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (opn. of Stewart, Powell, and Stevens, J.J.)).

26. *See generally Jones*, 132 S.Ct. at 957.

27. *Id.*

28. U.S. Const. amend. IV.

29. *See iCloud*, *supra* note 13.

30. *The Evolution of Cell Phone Design Between 1983-2009*, WEBDESIGNERDEPOT.COM, <http://www.webdesignerdepot.com/2009/05/the-evolution-of-cell-phone-design-between-1983-2009/> (last visited Feb. 12, 2012), (showing that even non-

books and notes or letters of the Framers' era. Just because the papers are now in a digital form does not mean they exceed the scope of the Fourth Amendment's protections. It would have been impossible for the drafters to have included "digital information" in the text of the Fourth Amendment, because such technology was not conceived when the Amendment was ratified in 1791.³¹

The second way in which the Fourth Amendment covers cell phones is that the Amendment's protections extend beyond a person's physical effects and to instances where the person has a "reasonable expectation of privacy."³² In *Katz v. United States*, the Court held that conversations made inside a public phone booth were protected, stating, "[t]he Fourth Amendment protects people—and not simply 'areas.'"³³ If there is a reasonable expectation of privacy in a verbal conversation made inside a public phone booth, surely that expectation applies to information stored inside a private cell phone. In sum, whether textually or via case law, cell phones are within the Fourth Amendment's reach and are thus protected from unreasonable searches and seizures.

A. The Search Incident to Arrest Exception

The U.S. Supreme Court has held that searches performed without a warrant are "per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions."³⁴ One of these exceptions is the search incident to arrest, as established in *Chimel v. California*.³⁵ In *Chimel*, the U.S. Supreme Court ruled that upon a lawful arrest, officers were justified in searching the arrestee's person and the area within his "immediate control."³⁶ For a while, the justifications for the incident to the arrest exception seemed to differ in theory and in practice. Initially, these searches were allowed without a warrant in order to ensure officer safety, prevent escape,

smartphones have SMS capabilities); *Definition of SMS Text Messaging: What is SMS Messaging, Text Messaging?*, ABOUT.COM, <http://cellphones.about.com/od/phoneglossary/g/smsmessage.htm>, (last visited Feb. 12, 2012).

31. *Historic Documents*, USHISTORY.ORG, <http://www.ushistory.org/documents/amendments.htm#amend04>, (last visited Feb. 12, 2012)

32. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

33. *Id.* at 353. (majority opinion).

34. *Id.* at 347.

35. *Chimel v. California*, 395 U.S. 752, 763 (1969).

36. *Id.*

and preserve evidence.³⁷ A year later, however, the three justifications were downplayed in *United States v. Robinson*.³⁸ There, the Court held that, while the search was initially based on one of the *Chimel* justifications, whether a search incident to arrest is later found valid “does not depend on what a court may later decide was the probability . . . that weapons or evidence would in fact be found upon the person of the suspect.”³⁹ The Court reasoned that when an individual is lawfully arrested, the search of the arrestee is reasonable under the Fourth Amendment.⁴⁰ *Robinson* expanded law enforcement’s power in conducting searches incident to arrest, allowing officers to perform searches even when there was no present danger or risk of evidence destruction.⁴¹

Law enforcement held this power until recently, when the Court decided *Arizona v. Gant* in 2009.⁴² In *Gant*, the defendant was arrested for driving with a suspended license and placed in handcuffs in the back of a patrol car.⁴³ The police proceeded to search the vehicle and found drugs in the pocket of a jacket on the back seat of the car.⁴⁴ Although the search was incident to the arrest, none of the justifications enunciated in *Chimel* applied in this case.⁴⁵ The arrestee could not have destroyed evidence, reached for a weapon, or escaped from his position in the back of the police vehicle.⁴⁶ Justice Stevens wrote, “[i]f 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 the arrest exception are absent and the rule does not apply.”⁴⁷ Thus, while cases still cite to *Robinson’s* deferential ruling, it seems as if *Chimel’s* justifications are once again alive and well.⁴⁸

37. *Id.*

38. *United States v. Robinson*, 414 U.S. 218, 234 (1973).

39. *Id.* at 235.

40. *Id.*

41. *See Robinson*, 414 U.S. at 237.

42. *Arizona v. Gant*, 556 U.S. 332 (2009).

43. *Id.* at 335.

44. *Id.*

45. *Id.*

46. *Id.* at 337–38, 339.

47. *Id.* at 339.

48. Courts may still cite to *Robinson* because they understand that it is impractical to judge the searching officers’ decisions in hindsight. If the officers legitimately believed one of the *Chimel* justifications existed at the time of the search, courts may not want to punish them or the prosecution by looking to actual probability when determining the admissibility of the evidence recovered.

B. Case Law: When are Warrantless Cell Phone Searches Constitutional?

Without guidance from the United States Supreme Court, the district and state courts have naturally been all over the map trying to apply search incident to the arrest doctrine to cell phones and other novel technologies.⁴⁹ The majority of decisions find that law enforcement may constitutionally search cell phones incident to arrest without a warrant.⁵⁰ On the other hand, recent cases criticize the analysis of these decisions and make a compelling argument for considering warrantless cell phone searches a violation of the Fourth Amendment.⁵¹ Two cases, *United States v. Finley* and *Ohio v. State*, provide an example of how lower courts are grappling with applying old law to new technological situations.

In the 2007 case *United States v. Finley*, the Fifth Circuit Court of Appeals upheld a warrantless search of Finley's cell phone incident to an arrest for possession with intent to distribute methamphetamine.⁵² The court cited *Robinson*, stating that police officers "may also, without any additional justification, look for evidence of the arrestee's crime on his person in order to preserve it for use at trial."⁵³ Attempting to fit new technology into old precedent, the court then referred to the Supreme Court case *New York v. Belton*, which established the "container doctrine."⁵⁴ *Belton* held that, incident to arrest, "police may search containers, whether open or closed, located within the arrestee's reach."⁵⁵ Because the *Finley* court found the cell phone analogous to a container, the search was valid.⁵⁶

49. See generally *Smallwood v. State*, 61 So.3d 448, 462 (Fla. Dist. Ct. App. 2011); *People v. Diaz*, 51 Cal.4th 84,88 (2011); *Fawdry v. State*, 70 So.3d 626, 627 (Fla. Dist. Ct. App. 2011); *Gracie v. State*, 92 So. 3d 806 (Ala. Crim. App. 2011); *Hawkins v. State*, 307 Ga. App. 253, 253-54 (2010), cert. granted 290 Ga. 785 (2012); *State v. Carroll*, 762 N.W.2d 404, 406 (Wis. Ct. App. 2009), *United States v. Curtis*, 635 F.3d 704 (5th Cir. 2011); *United States v. Finley*, 477 F.3d 250 (5th Cir. 2007).

50. *Smallwood*, 61 So. 3d at 462; *Diaz*, 244 P.3d 501 at 511; *Fawdry*, 70 So. 3d at 630; *Gracie*, 92 So. 3d at 813; *Hawkins*, 307 Ga. App. at 253-54; *Carroll*, 762 N.W.2d at 411; *Curtis*, 635 F.3d at 714; *Finley*, 477 F.3d at 253.

51. See generally, *State v. Smith*, 124 Ohio St. 3d 163, 170-71 (2009); *United States v. Davis*, 787 F.Supp.2d 1165, 1172 (D. Or. 2011).

52. *Finley*, 477 F.3d at 253.

53. *Id.* at 259-60 (citing *Robinson*, 414 U.S. at 233-34).

54. *Finley*, 477 F.3d at 260 (citing *New York v. Belton*, 453 U.S. 454, 460-61 (1981)).

55. *Belton*, 453 U.S. at 460-61 (The Court further explained that a lawful arrest justifies this invasion of privacy.).

56. *Finley*, 477 F.3d at 260; (See *Smallwood v. State*, 61 So. 3d 448 (Fla. Dist. Ct. App. 2011)(applying the container doctrine to uphold cell phone search incident to the arrest.)

Two years later, the Ohio Supreme Court expressly rejected the Fifth Circuit's reasoning.⁵⁷ In *State v. Smith*, the court took a closer look at the *Belton* container doctrine, and found that it defined a container as "any object capable of holding another object," traditionally referring to physical objects.⁵⁸ The court decided it was illogical to apply this definition to cell phones and other similar electronic devices, which are "capable of storing a wealth of digitized information wholly unlike any physical object found within a closed container."⁵⁹

Additionally, the court looked to whether evidence preservation or officer safety was at stake when the officers searched the cell phone.⁶⁰ The burden was on the state to present evidence that the information on the phone was subject to "imminent destruction."⁶¹ When the state could not provide such evidence, the court reiterated the importance of the *Chimel* justifications and ruled the search unconstitutional.⁶²

C. *People v. Diaz*

People v. Diaz immediately followed *State v. Smith*, establishing a discrepancy between California and Ohio Fourth interpretations of Amendment law.⁶³ In *Diaz*, the defendant was arrested after participating in a police informant's purchase of ecstasy.⁶⁴ At the police station, a detective seized the defendant's cell phone and placed it with the other evidence.⁶⁵ After ninety minutes passed, the detective searched the phone and found an incriminating text message.⁶⁶ When the defendant filed a motion to exclude this evidence because the warrantless search violated his Fourth Amendment rights, the trial court ruled against him.⁶⁷

The California Supreme Court ruled that no warrant is necessary for cell phone searches incident to a lawful arrest, regardless of the

57. *Smith*, 124 Ohio St. 3d at 167) (quoting *Belton*, 453 U.S. at 460).

58. *Id.* at 167 (citing *Belton*, 431 U.S. at 460).

59. *Id.* at 168.

60. *Id.* at 169.

61. *Id.*

62. *Id.*

63. *Diaz*, 244 P.3d at 511.

64. *Id.* at 502.

65. *Id.*

66. *Id.* at 502–03.

67. *Id.* at 503.

lack of reasonable suspicion or probable cause.⁶⁸ In an attempt to comply with existing Fourth Amendment United States Supreme Court precedent, the *Diaz* court looked to *United States v. Robinson*, *United States v. Edwards*, and *United States v. Chadwick*, and decided the primary issue was whether the cell phone was “immediately associated with [the defendant’s] person.”⁶⁹ If so, the search was constitutional despite the fact that it was ninety minutes after the arrest.⁷⁰ If the cell phone was found to be property under the immediate control of the individual rather than “on his person,” then the ninety minute period removed the search from the incident to arrest category, and the search was unconstitutional without a warrant.⁷¹

Using language from the existing cases, the court held that the cell phone did fall into the “closely associated with his person” category.⁷² In doing so, the court expressly rejected the defendant’s argument that the character of the item should be taken into account when deciding the constitutionality of the search.⁷³ The *Diaz* majority noted that no United States Supreme Court decision ever held that the character of the item must be considered.⁷⁴

D. An Analysis and Criticism of *Diaz*

The three United States Supreme Court cases relied upon by the *Diaz* majority were decided decades before cell phones were even invented. In *Robinson*, incident to a lawful arrest, a police officer conducted a pat-down search on the arrestee and found a crumpled up cigarette package in his pocket.⁷⁵ When he opened the package, he found heroin capsules.⁷⁶ The United States Supreme Court upheld the search because the police officer had the authority to conduct “a full search of the arrestee’s person” under the incident to arrest

68. *Id.* at 502.

69. *Id.* at 505 (quoting *United States v. Chadwick*, 433 U.S. 1, 14-15 (1977)); (Even though the *Diaz* court was also looking at the more specific issue of remoteness in this case, when the search is no longer “incident to arrest,” it does not detract from the discussion on cell phone searches incident to the arrest generally.) *See also Robinson*, 414 U.S. at 234; *United States v. Edwards*, 415 U.S. 800, 802-803 (1974).

70. *Diaz*, 244 P.3d at 506.

71. *Id.* at 505-06.

72. *Id.* at 506.

73. *Id.*

74. *Id.*

75. *Id.* at 504 (citing *Robinson*, 414 U.S. at 222-23).

76. *Id.*

exception.⁷⁷ In *Edwards*, ten hours after the defendant was arrested for attempting to break into a post office, the police officers seized and searched the clothes he was wearing.⁷⁸ When the defense objected that the length of time between the search and the arrest was too great to be considered “incident to arrest,” the Court disagreed and upheld the search.⁷⁹ Finally, in *Chadwick*, the defendants had a large footlocker in the trunk of their car when federal agents lawfully arrested them.⁸⁰ Ninety minutes after the arrest, the agents searched the locker without a warrant and found contraband.⁸¹ The Court created the distinction upon which the *Diaz* court later relied: a search “of the person” ninety minutes after arrest can be upheld under the incident to the arrest exception, while such a search of “possessions within an arrestee’s immediate control” cannot.⁸² The Court ruled that the search of the footlocker was unconstitutional because it was a search “of the person.”⁸³

The majority of the *Diaz* court treated *Robinson*, *Edwards*, and *Chadwick* as controlling precedent to which it must strictly adhere.⁸⁴ In blindly following these cases, the court overlooked fundamental differences that weaken the power of the precedent itself.⁸⁵ For instance, the majority opinion abruptly dismissed the defendant’s suggestion of looking to the character of a cell phone simply because no United States Supreme Court case explicitly requires its character be taken into account.⁸⁶

Instead, the *Diaz* court tried to force this modern situation into the rigid framework of *Chadwick*, *Edwards*, and *Robinson* by analogizing a cell phone to a physical container, or even a cigarette package.⁸⁷ This is an absurd result. The legal system would not work

77. *Id.* (citing *Robinson*, 414 U.S. at 235).

78. *Id.* (citing *Edwards*, 415 U.S. at 801 (1974)).

79. *Id.* at 504–05 (citing *Edwards*, 415 U.S. at 807).

80. *Id.* at 505 (citing *Chadwick*, 433 U.S. at 4–5 (1977)).

81. *Id.*

82. *Id.* (citing *Chadwick* 433 U.S. at 15).

83. *Id.*

84. *Id.* at 506.

85. See Stuart Minor Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269, 272. (1999). (“Appellate opinions are only as robust as the facts on which they are based. When those facts evaporate, the opinion on which they rest is weakened as well.”); *But see Diaz*, 244 P.3d at 512 (Kennard, Baxter, Corrigan, and George, JJ., concurring) (“In my view, however, the recent emergence of this new technology does not diminish or reduce in scope the binding force of high court precedent.”).

86. *Diaz*, 244 P.3d at 506.

87. *Id.* at 506–07.

if lower courts never ventured beyond what was explicitly stated in Supreme Court decisions. As a practical matter, the United States Supreme Court cannot update its decisions every time society changes. Rather, lower courts must be awarded some flexibility in applying the law so that they can produce reasonable and rational holdings.

The dissenting opinion in *Diaz* recognized that existing and outdated Supreme Court precedent cannot be read so literally when applied to such a vastly different situation.⁸⁸ Justice Werdegar distinguished cell phones from regular containers by explaining, “[n]ever before has it been possible to carry so much personal or business information in one’s pocket or purse.”⁸⁹ Additionally, she noted that even United States Supreme Court precedent supports differentiating cell phones from other containers, which have been traditionally defined as being able to hold another object.⁹⁰ She further pointed out that the *Chimel* justifications of officer safety and evidence destruction are not applicable to cell phones like they are to normal containers or clothing.⁹¹

Werdegar argues that, even if the test the majority applied was correct (whether the search was “of the person” or “of the possessions within an arrestee’s control”), the majority erred in deciding that question.⁹² She stated that the information contained in the cell phone is “clearly distinct from the person of the arrestee,” and that while “[a]n individual lawfully arrested and taken into police custody necessarily loses much of his or her *bodily* privacy, [he] does not necessarily suffer a reduction in the *informational* privacy that protects the arrestee’s records.”⁹³

88. *Id.* at 513 (Werdegar, J., dissenting, quoting *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944)). (88. *Id.* at 104. In responding to the concurring opinion, the dissent wrote: “But where high court precedent is not on all fours with the case at bar, we also must remember that the language of Supreme Court decisions is to ‘be read in the light of the facts of the case under discussion’ and that ‘general expressions transposed to other facts are often misleading.’”).

89. *Id.* (Werdegar, J., dissenting).

90. *Id.* at 516-17 (Werdegar, J. dissenting) (quoting *Belton*, 453 U.S. at 460-61 n.4).

91. *Id.* at 514 (Werdegar, J., dissenting) (“Weapons, of course, may be hidden in an arrestee’s clothing or in a physical container on the person. But there is apparently no “app” that will turn an iPhone or any other mobile phone into an effective weapon for use against an arresting officer (and if there were, officers would presumably seek to disarm the phone rather than search its data files) . . . Once a mobile phone has been seized from an arrestee and is under the exclusive control of the police, the arrestee, who is also in police custody, cannot destroy any evidence stored on it.”).

92. *Id.* at 517 (Werdegar, J., dissenting).

93. *Id.* at 517-18 (Werdegar, J., dissenting).

The majority and concurring opinions in *Diaz* mistakenly attempted to force new facts into old law, and infringe upon Californians' privacy rights as a result. Justice Werdegar, while recognizing the state court's inability to overrule the United States Supreme Court, correctly realized the need to reevaluate existing doctrine in light of modern, evolving technology.

IV. Senate Bill 914

Recognizing the impact of the *Diaz* decision on the privacy rights of the people of California, Senator Mark Leno of San Francisco introduced Senate Bill 914 in February of 2011.⁹⁴ The explicit intent behind the bill was to “reject as a matter of California statutory law the rule under the Fourth Amendment . . . announced by the California Supreme Court in *People v. Diaz*.”⁹⁵ The bill passed unanimously in both houses, with a seventy to zero vote in the Assembly and thirty-two to four vote in the Senate.⁹⁶ Despite the overwhelming bipartisan support, and to the dismay of many Californians, Governor Brown vetoed Senate Bill 914 in October.⁹⁷ The bill would have added Section 1542.5 to the California Penal Code, prohibiting “the search of information contained in a portable electronic device” without a warrant.⁹⁸ The legislature broadly defines a “portable electronic device” to include “any portable device that is capable of creating, receiving, accessing, or storing electronic data or communications.”⁹⁹ It is clear that the lawmakers wished to protect not only cell phones, but also any future technology warranting the same expectation of privacy.

Section 1 of the bill states, “[t]he right of privacy is fundamental in a free and civilized society,” and emphasizes the capability of portable electronic devices to store “an almost limitless amount of

94. *Documents associated with SB 914 in the Session*, CALIFORNIA STATE SENATE, http://info.sen.ca.gov/cgi-bin/postquery?bill_number=sb_914&sess=CUR&house=B&site=sen, (last visited Feb. 13, 2012).

95. S.B. 914, 2011-2012 Sess. (Cal. 2011) http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0901-0950/sb_914_bill_20110902_enrolled.pdf (last visited Nov. 11, 2012).

96. *See Diaz*, 244 P.3d at 502-03.

97. Brown, *supra* note 7.

98. S.B. 914, 2011-2012 Sess. (Cal. 2011) http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0901-0950/sb_914_bill_20110902_enrolled.pdf (last visited Nov. 11, 2012). (Discussing how many phones are linked to the Internet and have access to servers and computers anywhere in the world).

99. *Id.* at § 2(b).

personal and private information.”¹⁰⁰ Using the language from *Katz*, the legislature further argues that people using these devices “have a reasonable and justifiable expectation of privacy” not only in the information held within the device, but also in the information they can reach via the Internet.”¹⁰¹ Additionally, the legislature explains that cell phones do not pose a threat to officer safety, and seizing the phone until a warrant is issued can preserve any evidence at risk of deletion.¹⁰² In addressing these concerns, the legislature is challenging the court’s legal analysis by pointing out that the necessary *Chimel* justifications are not present in these cases.¹⁰³

A. Support and Opposition

Unsurprisingly, Senate Bill 914 had strong supporters and opponents in both the criminal justice and civil liberty realms.¹⁰⁴ The following groups supported the bill on the record: the California Newspaper Publishers Association, the American Civil Liberties Union (“ACLU”), the First Amendment Coalition, California Attorneys for Criminal Justice, Californians Aware, California Broadcasters Association, Compline, LLC, the Electronic Frontier Foundation, and Legal Services for Prisoners with Children.¹⁰⁵ Arguments made by these groups promote the dissenting opinion in *Diaz* and the majority opinion in *Smith*.¹⁰⁶ The ACLU posited that searching a cell phone “opens a window into every aspect of . . . private life” including, “political views, financial information, romantic relationships, and medical information.”¹⁰⁷ The newspaper groups supported Senate Bill 914 for fear that warrantless searches of

100. *Id.* at § 1(a)-(b).

101. *Id.* at § 1(b).

102. *Id.* at § 1(e).

103. *Gant*, 556 U.S. at 337-38. (Explaining that *Chimel* justifications are once again necessary in executing a search incident to the arrest.); *You, and Your Smart Phone, Have a Right to Privacy*, CALIFORNIA PROGRESS REPORT (June 21, 2011), <http://www.californiaprogressreport.com/site/you-and-your-smart-phone-have-right-privacy>. (Though the bill seeks to overrule the application of the search incident to the arrest exception to cell phones, it does not treat all other exceptions alike. Leno made sure to leave the “exigent circumstances” warrant exception intact, explaining that cell phone searches without a warrant are permitted when “there is an immediate threat to public safety or the arresting officer.”)

104. *Bill Analysis*, SENATE RULES COMM. 2011-2012 Ses. (2011), available at http://info.sen.ca.gov/pub/11-12/bill/sen/sb_0901-0950/sb_914_cfa_20120104_133534_sen_floor.html (last visited Nov. 11, 2012).

105. *Id.* at 8.

106. *Id.*

107. *Id.* at 8-9.

their electronic devices would reveal otherwise protected source information.¹⁰⁸

On the other hand, all of the groups officially opposing the bill were in the realm of law enforcement, including: the California District Attorney's Association, the California Peace Officers Association, the California State Sheriff Association, the Los Angeles County District Attorney's Office, the Peace Officers Research Association of California, and the San Bernardino County Sheriff's Office.¹⁰⁹ The Peace Officers Research Association argued that overturning the *Diaz* decision would "restrict their ability to apply the law, fight crime, discover evidence . . . and protect the citizens of California."¹¹⁰

B. The Veto

Governor Brown's veto message to the legislature was succinct:

"I am returning Senate Bill 914 without my signature. This measure would overturn a California Supreme Court decision that held that police officers can lawfully search the cell phones of people who they arrest. The courts are better suited to resolve the complex and case-specific issues relating to constitutional search-and-seizure protections."¹¹¹

Senator Leno responded by calling the veto message "incoherent" and reiterated the importance of protecting privacy rights in smartphones, which store a vast amount of private information.¹¹² Leno also noted that the legislature has "every right to revisit a decision by the court," and that it is the legislature's duty to make the laws and the judiciary's job to interpret them.¹¹³ Other bill supporters have released similar statements, including First Amendment

108. *Id.* at 9–10 (Article 2 of the California Constitution and section 1040 of the California Evidence Code protect journalists from forced disclosure of certain information. Journalist groups contend that these protections would be useless if their electronic devices could be searched without a warrant incident to the arrest.).

109. *Id.* at 8.

110. *Id.* at 10.

111. Brown, *supra* note 7.

112. *California governor allows warrantless search of cell phones*, CNNTECH, (Oct. 11, 2011), http://articles.cnn.com/2011-10-11/tech/tech_mobile_california-phone-search-veto_1_cell-phones-smartphone-text-messages?_s=PM:TECH.

113. *Brown vetoes bill to limit cell phone searches*, SFGATE, (Oct. 11, 2011), <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/10/10/BA3H1LFOQ6.DTL>.

Coalition Executive Director Peter Scheer.¹¹⁴ An unsatisfied Scheer criticized Brown's logic in passing the responsibility back to the courts when they already gave their "final word" on the matter.¹¹⁵ Other critics are skeptical of Brown's honesty in the message, and wonder if the decision was made purely because of his close relationship with law enforcement.¹¹⁶ Many law enforcement groups, including those that publicly and vigorously opposed Senate Bill 914, donated large amounts of money to Governor Brown's campaign.¹¹⁷

Perhaps the most persuasive argument against Governor Brown's reasoning is that it is just plain wrong; the legislature is actually "better suited" than the California Supreme Court to apply Fourth Amendment protections to novel technologies like cell phones. Law Professor and Fourth Amendment scholar Orin Kerr strongly supports this position, concluding, "Governor Brown has it exactly backwards" in his veto justification.¹¹⁸ The following section analyzes Professor Kerr's argument that legislatures, rather than courts, are the correct forum for deciding Fourth Amendment cases dealing with new technology.

V. The Legislature is the Correct Venue for Resolving Modern Technological Issues Under the Fourth Amendment

Governor Brown mistakenly asserts that the judiciary is the best forum for determining how to apply search and seizure issues to new technology.¹¹⁹ Although the courts may be competent in upholding and applying past precedent in other areas, new technology creates a difficult challenge, as it is rapidly changing and increasingly ubiquitous in modern society. For the following reasons, the

114. *Brown vetoes bill limiting cellphone searches by police*, FIRST AMENDMENT COALITION, (Oct. 10, 2011), <http://www.firstamendmentcoalition.org/2011/10/brown-vetoes-bill-limiting-cellphone-searches-by-police/>.

115. *Id.* (Peter Scheer comments on Brown's veto, saying, "The courts have already addressed the specific issue of searches of cell phones following arrest. The California Supreme Court's decision is the final word, not the beginning of a judicial debate.").

116. *Calif. Governor Veto Allows Warrantless Cellphone Searches*, WIRED.COM, <http://www.wired.com/threatlevel/2011/10/warrantless-phone-searches/>.

117. *Id.* (citing *Contributions to BROWN, JERRY*, FOLLOWTHEMONEY, http://www.followthemoney.org/database/StateGlance/contributor_details.phtml?&c=116678&s=CA&y=2010&summary=0&so=a&p=1#sortable, (Last visited, Feb. 13, 2012).) (Seven police unions have donated a combined \$160,000 to Brown.).

118. *Governor Brown Vetoes Bill on Searching Cell Phones Incident to Arrest*, THE VOLOKH CONSPIRACY, (Oct. 10, 2011), <http://volokh.com/2011/10/10/governor-brown-vetoes-bill-on-searching-cell-phones-incident-to-the-arrest/>.

119. Brown, *supra* note 7.

California legislature is the correct forum to decide whether cell phone searches incident to arrest are constitutional under the Fourth Amendment: 1) the California Supreme Court majority incorporated outdated notions of technology in *Diaz*, and 2) the California legislature is a superior investigatory body than the California Supreme Court.

A. Technology in *People v. Diaz*

As discussed earlier in this Note, the court in *Diaz* applied United States Supreme Court search and seizure doctrine from the 1970s when confronted with a twenty-first century case involving cell phones.¹²⁰ While the court believed it made perfect legal sense to do so, the concept seems illogical from a real world, common sense perspective. The California legislature took the opportunity to enact legislation using modern notions of privacy and technology. The court decided the issue in an outdated way and the representatives disagreed with its decision. Governor Brown should not have vetoed Senate Bill 914 given the *Diaz* court's illogical application of old Fourth Amendment doctrine to cell phones.

The very nature of the court system necessitates that the decisions courts make occur "ex post facto"; that is, courts decide issues by looking at events that have already occurred, rather than predicting what could happen in the future.¹²¹ Superior courts can only decide Fourth Amendment technology cases after: 1) the government used such technology to conduct a search, 2) the search produced evidence that led to an arrest, and 3) the arrestee moved to suppress the evidence gathered.¹²² Only after the superior court resolves an issue can the case move to the court of appeals, and only after that, can the California Supreme Court choose to exercise its discretionary review over the matter.¹²³ Thus, it can take years from the actual occurrence of an issue before the state high court issues a decision.

Applying such a slow-moving system to rapidly changing technology is irrational. It does little good for the court to create a search rule regarding a technology that is now obsolete.¹²⁴ If the

120. *Diaz*, 244 P.3d at 506.

121. Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 868 (2004).

122. *Id.*

123. Cal. Const. art. VI, § 12.

124. See Kerr, *supra* note 121, at 869. ("By the time the courts decide how a technology should be regulated, however, the factual record of the case may be outdated, reflecting older technology rather than more recent developments.").

technology at issue is no longer being used, the court's decision is only helpful for predicting how the court will treat the current technology in the future. In other words, where the issue involves a rapidly changing medium such as cell phones, court precedent is only useful to the extent the technology still applies in the future.

Few cases make it to the United States Supreme Court because the Court can pick and choose from thousands of cases throughout the country.¹²⁵ This limits the number of cases lower courts can look to for guidance and is especially problematic for courts such as the *Diaz* court, which felt constrained to follow United States Supreme Court precedent extremely narrowly. As Stuart Benjamin explains, “[a]ppellate opinions are only as robust as the facts on which they are based. When those facts evaporate, the opinion on which they rest is weakened as well.”¹²⁶ Thus, when there is a limited amount of outdated Fourth Amendment technology cases, lower courts are left struggling to fit new technology into old precedent.

Legislatures differ greatly from courts in that they do not have to wait before they can act.¹²⁷ This means that legislatures can regulate a new technology while it is still relevant to society.¹²⁸ Though Senate Bill 914 was passed in the legislature the same year that *Diaz* was decided, the bill was able to use practical knowledge and real world implications in formulating its approach.¹²⁹ In doing so, the legislature did not ignore existing Fourth Amendment doctrine; instead, the text clearly indicates that the legislature wanted to comply with the Amendment in affording Californians the privacy rights they are entitled.¹³⁰

While court decisions cannot be quickly reversed if an approach does not work, legislative bodies can test various regulatory approaches and change law relatively quickly.¹³¹ The legislature has more flexibility and freedom in regulating changing technologies in the Fourth Amendment search and seizure context than the courts. “[C]onsideration of doctrine, history, and function teach that. . . courts should place a thumb on the scale in favor of judicial deference

125. See *supra* note 123.

126. Benjamin, *supra* note 85.

127. Kerr, *supra* note 121, at 870 (“[R]ecent history suggests that legislatures usually act at a surprisingly early stage, and certainly long before the courts.”)

128. *Id.*

129. See S.B. 914, 2011-2012 Sess. (Cal. 2011) http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0901-0950/sb_914_bill_20110902_enrolled.pdf (last visited Nov. 11, 2012).

130. *Id.*

131. Kerr, *supra* note 121 at 859.

when technology is in flux, and should consider allowing legislatures to provide the primary rules governing law enforcement investigations involving new technologies.”¹³²

B. The Legislature is a Superior Investigative Body

Legislatures can spend a significantly longer amount of time than courts learning about new technologies before they enact a regulation.¹³³ Judges usually have a limited time to consider “a brief factual record, narrowly argued legal briefs, and a short oral argument.”¹³⁴ Because of the time and resource restriction, attorneys and judges often turn to “the crutch of questionable metaphors” to aid their understanding of complex technological issues.¹³⁵ These metaphors, often incorrectly applied, can confuse judges down the line and lead to misapplied holdings.¹³⁶

Legislatures, on the other hand, hold multiple hearings in different committees, consult poll results, and receive input from many independent groups.¹³⁷ In the hearings, “legislators analyze, consult, debate, and hear testimony from both private and public interests on every bill.”¹³⁸ Additionally, the entire legislative process is publicly scrutinized, providing a check on the legislature.¹³⁹ The legislature is also more in touch with the people of the state they represent. Therefore, in addition to the ability to gather more information on the technology itself, the legislature can incorporate society’s views on the matter. In sum, the legislature has many more informational resources at its disposal than the California Supreme Court.

C. What the Future Holds

With Senate Bill 914 vetoed, it will remain dead unless the legislature can overturn the veto with a 2/3 vote in each house.¹⁴⁰

132. *Id.* at 805.

133. *Id.* at 875.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *AssemblyMember*, CALIFORNIA STATE CAPITOL MUSEUM, <http://www.capitolmuseum.ca.gov/Citizens.aspx?Content2=1060&Content3=1070> (Last visited March 1, 2012).

139. Samantha Trepel, *Digital Searches, General Warrants, and the Case for the Courts*, 10 YALE L.J. & TECH. 120, 140–41, 143 (2007).

140. *Legislative Process*, CALIFORNIA STATE SENATE, <http://senate.ca.gov/legislativeprocess#step5>, (last visited March 1, 2012).

Senator Leno has announced that he will try to override the veto next year.¹⁴¹ Looking at the numbers alone, the high passage rate the first time around bodes well for overriding the veto. Eventually the United States Supreme Court will have to grant certiorari to resolve the issue, unless it decides to leave the question up to each individual state.

VI. Conclusion

The California legislature abided by the constitution and relevant United States Supreme Court law when it drafted Senate Bill 914 to overrule the California Supreme Court. Governor Brown's veto was based on the assumption that the courts are the appropriate venue for making determinations involving new technology. This note argues that the governor's statement is incorrect.

When technology is rapidly changing, courts struggle with applying old precedent to new technology. Because the United States Supreme Court can only hear so many cases every year, cases on point with relevant facts are difficult to find. This leaves lower courts, such as the *Diaz* court, at a loss when trying to apply Fourth Amendment search and seizure doctrine to cell phone technology in 2011.

The legislature, on the contrary, is able to regulate technology before it becomes obsolete. While abiding by the constitutional rules, the legislature is able to draft legislation that is both relevant to society at the time and flexible when the law changes. Senate Bill 914 should not have been vetoed, as the California legislature is the more appropriate place to determine whether a warrantless cell phone search incident to arrest is a violation of the Fourth Amendment.

141. *Smart Phones and Privacy*, PRIVACYREVOLT!, (Nov. 28, 2011), <http://consumercal.blogspot.com/2011/11/smart-phones-and-privacy.html>.