States clash on warrantless searches of cellphones

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Not so long ago, personal computers existed only in science fiction. Then, scientists and technicians developed real personal computers, but they were bulky machines only available on a desktop. Now, most Americans carry a computer in their hands and pockets, a smartphone.

A "smartphone" does not just allow each of us to call and text virtually anyone, and contain only an address book of our family and friends, our business contacts and business prospects. For many, the smartphone contains intimate photographs, personal text messages and email, medical records, confidential business documents, even a diary of lives.

This library of personal information is not locked in a household safe or behind closed doors. We carry our smartphones as we walk down the street, drive to business meetings, and attend sporting events. And we commonly carry our smartphones as we are confronted by police officers and other government agents, such as customs or immigration officials. Can government agents rummage through this library of personal information - examining our emails, text messages, photographs, medical records - without getting a warrant?

Two state supreme courts recently came to diametrically opposed conclusions. Their analyses and conclusions regarding individual privacy illustrate a continuing national debate.

In May 2013, the Florida Supreme Court decided *Smallwood v. State of Florida*, 113 So.3d 724 (2013). Officers arrested Cedric Smallwood for robbery, and seized his cellphone. An officer searched the cellphone and found photographs relevant to the robbery investigation. Smallwood moved to suppress the search of his cellphone, arguing he had a reasonable expectation of privacy in the data in his cellphone. The trial court disagreed.

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The Florida Supreme Court noted the pivotal decision appeared to be *United States v. Robinson*, 414 U.S. 218 (1973), where officers had arrested Robinson for driving on a suspended license. After arresting Robinson, an officer searched a crumpled cigarette package in his pocket and discovered heroin. The Supreme Court held it was reasonable to search an arrestee, including any object in his possession, for evidence. *Robinson* did not require any individualized suspicion that the arrestee possessed relevant evidence. *Robinson* set a bright-line rule: An officer may search every person arrested for a weapon or evidence - the evidence could relate to the offense under investigation or any crime whatsoever. "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."

Was Smallwood's cellphone like the cigarette package? The Florida Supreme Court found *Robinson* distinguishable because of the vast amount of "private and secret

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Government
LA lags on three strikes resentencing
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U.S. Court of Appeals for the 9th Circuit
Conservatives maintain influence on 'liberal' court
It's been tough for the 9th U.S. Circuit Court of Appeals to shake its reputation as a liberal bastion, but outnumbered court conservatives continue to hold their own.

Mergers & Acquisitions
Dealmakers
A roundup of recent mergers and acquisitions and financing activity and the lawyers involved.

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Decline in filings affects courts and attorneys
For years, California courts saw more cases being filed. But since 2009, small claims and misdemeanor cases have declined, catching the attention of judges and attorneys.

Mergers & Acquisitions
Skadden, Wilson guide pharma buy
California attorneys advise Tokyo-based drugmaker Otsuka in $886 million purchase

Intellectual Property
Patent holders, defendants gear up lobbying effort in D.C.
As Congress and the Obama administration continue to debate how to limit patent litigation, several organizations with Silicon Valley connections are ramping up their lobbying efforts.

Google struggles for patent wins after Motorola buy
Google Inc. has taken its share of legal lumps following its acquisition of Motorola Mobility Holdings Inc. last year, with the latest blow coming in the form of a jury verdict loss against Microsoft Corp. late Wednesday.

Labor/Employment
New precedent gives workers fresh fuel for wage lawsuits
Hourly workers are filing more valuable wage lawsuits in California, where recent precedent has provided fresh ammunition to workers who say they weren't paid for their time.

Corporate
'Ag tech' company boom spawns crop of new legal issues
As food companies continue to face pressure to step up productivity while conserving water and other resources, companies are looking to new technology in areas such as crop and soil enhancement, fertilizers and water delivery.

Education

personal information" stored or which may be accessible through a cellphone, information no individual could have carried in his pocket in 1973: "Vast amounts of private, personal information can be stored and accessed in or through these small electronic devices, including not just phone numbers and call history, but also photos, videos, bank records, medical information, daily planners, and even correspondence between individuals through applications such as Facebook and Twitter."

To the dissent's argument the two containers differed only in the quantity of "things" each held, the *Smallwood* majority responded that argument "defies logic and common sense" - "[E]ven justices on this Court routinely use cellular phones to access Court email accounts, and highly confidential communications are received daily on these electronic devices. For the dissent to contend that a cellular phone does not carry information of a different 'character' than other types of personal items an individual may carry on his or her person is to ignore the plainly (and painfully) obvious."

The Florida Supreme Court concluded that allowing officers "to search an arrestee's cell phone without a warrant is akin to providing law enforcement with a key to access the home of the arrestee. ... We refuse to authorize government intrusion into the most private and personal details of an arrestee's life without a search warrant simply because the cellular phone device which stores that information is small enough to be carried on one's person."

The California Supreme Court considered the same issue in *People v. Diaz*, 51 Cal. 4th 84 (2011). After officers arrested Diaz for selling ecstasy, they seized and searched his cellphone, finding an incriminating text message. Diaz's motion to suppress the message was denied.

Diaz thus confronted the same factual and legal setting in *Smallwood*, but reached the opposite conclusion. The *Diaz* majority also turned to *Robinson*: The key question was "whether defendant's cell phone was 'personal property ... immediately associated with [his] person' like the cigarette package in *Robinson*." The dramatically different character of the items in issue - a cigarette pack and the computer/smartphone - made no difference. *Diaz* held the police may, without obtaining a warrant, view or listen to information stored on or accessible from a mobile phone carried by one arrested.

In dissent, Justice Kathryn Werdegar sought a re-consideration of the balance between governmental and privacy interests. On one side, the potential intrusion on private information in a mobile phone or handheld computer is "unique among searches of an arrestee's person and effects." On the other side, while a weapon may be hidden in that person's clothes, there is no app, Justice Werdegar noted, to turn a cellphone into an effective weapon. Further, once in the officer's hands, there is no danger any cellphone data will be destroyed. "At that point a search of its stored data would seem to require a warrant."

Which has the better argument? Neither *Smallwood* nor *Diaz* focused on another seminal Fourth Amendment decision, *Katz v. United States*, 389 U.S. 347 (1967). There, the Supreme Court was asked to determine whether attaching a recording device to the outside of a telephone booth - remember those? - without a warrant violated Katz's Fourth Amendment rights. The government recorded Katz's side of the telephone conversations, which showed illegal gambling.

Until *Katz*, whether the government violated an individual's privacy protected by the Fourth Amendment often turned on whether the government had physically intruded on a place in which that individual could claim a right to privacy. The government claimed Katz had no Fourth Amendment protection because the recording device was placed on the outside of the telephone booth.

The Supreme Court famously recast the issue presented - was the telephone booth a constitutionally protected area - by simply explaining, "the Fourth Amendment protects people, not places." Hence, the court observed, while an individual may cede his privacy even within his own home, he may retain protected privacy rights even in a public place: "No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication."

We have come a long way from the telephone booth. *Katz* recognized the protection of privacy based on whether the government physically entered a protected place was no longer adequate to protect legitimate expectations of privacy. Now, our telephone directories, our lists of friends, the letters they send, our financial records and photographs are no longer stored in a box in the attic of our homes. We carry this library of our lives in our smartphones, pocket computers, etc. While there may be good cause on occasion to permit the government to rummage through that library, the opportunity to rummage upon an individual's arrest for petty theft, drunk driving, passing a bad check or selling drugs is not the equivalent the right to rummage.

Enrollment in California law schools continues downward slide
When classes began at California law schools last month, almost 8 percent fewer first-year students were in the seats than the year before. A handful of schools experienced sharp drops.

Government
State-of-the-art Long Beach courthouse to open Monday
Rodent infestations, asbestos and earthquake danger are among the reasons judges, attorneys, public employees and the public at large can be relieved that the city's new courthouse is opening for business.

Judges and Judiciary
Former federal judge returns to Bird Marella
After stepping down from the federal bench in April, former U.S. District Judge A. Howard Matz is returning to the firm he helped found in the '80s.

Litigation
Toyota unintended acceleration trial centers on braking theories
In direct contradiction of testimony by plaintiffs' two experts, an expert for the automaker testified that a 66-year-old driver failed to depress the brake pedal before a crash that left her dead in 2009.

Solo and Small Firms
Weingarten Brown LLP
Driven by a lifelong desire to be his own boss, Alex M. Weingarten has built a 12-attorney business litigation firm that's regularly facing off against some of the biggest firms in the world.

Law Practice
August was unusually active for lateral moves
August has been known as a down time for lateral partner movements among law firms. But such activity nearly doubled this year.

Bankruptcy
California municipal bankruptcies pave the way for other states
In a legal world often governed by precedent, bankruptcy judges overseeing Chapter 9 cases have a tough task.

Securities
SEC makes first move to clarify new settlement policy
Chair Mary Jo White's announcement earlier this year that the SEC will abandon its decades-old no admit/no deny settlement policy raised a critical question: In what cases will the SEC require admission? By **Molly White**

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Criminal
States clash on warrantless searches of cellphones
Two state supreme courts -- Florida and California -- recently came to diametrically opposed conclusions on th
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The heightened concern with protecting privacy is evident in recent Supreme Court decisions rejecting the warrantless use of GPS tracking devices, drug-sniffing dogs on a home's front porch, and thermal imaging to determine heat use in a house. The California Supreme Court found no salient constitutional distinction between a cigarette package and a smartphone. The Florida Supreme Court disagreed.

Sometimes Florida gets it right.

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