

## *Searching Pagers Incident to Arrest*

By Lisa A. Regini, J.D.

Special Agent Regini is a legal instructor at the FBI Academy.

Basic fourth amendment principles apply to the search of pagers and the retrieval of messages within them.

Law enforcement officers confront an explosion of rapidly changing technology used by criminals to facilitate their illegal activities. What is new today becomes commonplace overnight.

The proliferation in the use of paging devices by the innocent and criminal alike is one example. Often, law enforcement officers find these devices on or near an arrestee. Messages within pagers seized from suspects during an arrest may provide incriminating information or valuable leads. Only recently have trends emerged from court decisions that provide law enforcement with guidance on what may be done with pagers seized incident to arrest.

This article first addresses why most courts have concluded that electronic surveillance statutes do not govern the search of pagers incident to arrest. It then discusses the analysis courts have applied in reviewing the search of pagers seized incident to arrest. Generally, courts apply traditional fourth amendment search-and-seizure principles by first determining whether a search occurred and then addressing whether the search was reasonable.

### Interception vs. Retrieval of Communications

Upon lawfully seizing a pager incident to arrest, an officer initially must realize that the retrieval of alphanumeric or voice messages within a pager is not an interception of a communication, as defined in the federal electronic surveillance statute commonly referred to as Title III.<sup>1</sup> This statute applies to both federal and state officers and requires judicial approval in the form of an extraordinary court order for the nonconsensual interception of wire, oral, and electronic communications.<sup>2</sup> Many states have enacted similar electronic surveillance statutes, which must be at least as restrictive as the federal statute.<sup>3</sup>

Title III defines "intercept" as the "aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical or other device...."<sup>4</sup> To intercept a communication transmitted to a pager, often referred to as the use of a "clone pager," law enforcement must comply with Title III electronic surveillance procedures. Accordingly, the use of a clone pager to simultaneously receive the transmission emitted from the pager's service provider to the pager is subject to Title III requirements and possibly to state statutory provisions on electronic surveillance.<sup>5</sup> However, the courts have not found accessing messages transmitted to a pager by activating the pager itself to be an interception of a communication, because the transmission of the communication ceases when the pager receives the communication.<sup>6</sup>

Additionally, when an officer seizes a pager and retrieves the information within, most courts have concluded the officer did not acquire the contents of the communication by "electronic, mechanical or other device" as prescribed by the definition of intercept. Courts have found that simply activating the pager itself to access a message transmitted is not using another device to intercept the communication.<sup>7</sup>

In addressing the admissibility of evidence obtained as a result of retrieving messages from a pager,

courts have applied traditional fourth amendment search-and-seizure principles.<sup>8</sup> Recognizing the fourth amendment protection against unreasonable searches and seizures, courts first determine whether the party challenging the search of the pager had a reasonable expectation of privacy in the pager's contents. If the challenging party did not have an expectation of privacy, the fourth amendment is not implicated.<sup>9</sup> If the party is found to have an expectation of privacy in the pager's contents, courts consider whether retrieving the messages within the pager was reasonable under the fourth amendment.

### Expectation of Privacy in Pager's Contents

In determining whether an expectation of privacy exists in the contents of a pager, courts consider both the privacy interests of the sender of the communication and the interests of the possessor of the pager. For the sender, there is no expectation of privacy protected by the fourth amendment. However, the possessor of the pager does have an expectation of privacy in the pager's contents protected by the fourth amendment.

In *United States v. Meriwether*,<sup>10</sup> Drug Enforcement Administration agents seized a pager while executing a search warrant. An agent accessed the messages transmitted to the pager by pressing a button and called one telephone number that appeared repeatedly, along with the "911" emergency code. The agent spoke with an individual who wished to arrange the purchase of cocaine.

The caller appeared at the designated time and place and was arrested. The defendant moved to suppress evidence of his telephone number and all subsequent telephone conversations, alleging his fourth amendment rights were violated when the agent seized his telephone number from the pager. He argued that the seizure of his telephone number was not within the scope of the search warrant and that he had a reasonable expectation of privacy in the numbers he transmitted to the pager.

The court rejected his claim that the seizure of the pager was not within the scope of the warrant. The court, however, noted that even if the warrant did not authorize the seizure of the pager, the defendant failed to establish a valid fourth amendment violation. The court concluded the defendant, by transmitting the telephone number into a paging receiver, voluntarily exposed this information to others and "...the Fourth Amendment does not protect a wrongdoer's misplaced trust that the one intended to receive a communication will actually receive it."<sup>11</sup>

*Meriwether* can be contrasted with cases in which the person in possession of the pager at the time it was seized has challenged the search. For example, in *United States v. Chan*,<sup>12</sup> police arrested the defendant for possession of heroin with intent to distribute. During a search conducted incident to Chan's arrest, officers seized a pager .

Shortly thereafter, an officer activated the pager's memory and retrieved messages that further incriminated Chan. Chan challenged the search, claiming he had a legitimate expectation of privacy in the pager's contents, which was violated by the government's warrantless search and retrieval of messages.<sup>13</sup>

The court agreed with the first part of Chan's argument and concluded Chan maintained an expectation of privacy with respect to the pager that is reasonable and thus protected by the fourth amendment.<sup>14</sup> Other courts have reached similar conclusions and found the fourth amendment protections extend to those who possess a reasonable expectation of privacy in the contents of a pager.<sup>15</sup> Once the defendant establishes a protected privacy interest in the contents of the pager, the burden shifts to the government to justify a warrantless intrusion into this protected area.

## Search Incident to Arrest

The authority of law enforcement officers to conduct a warrantless search incident to a custodial arrest has long been recognized.<sup>16</sup> This authority automatically flows from the existence of a lawful custodial arrest and does not depend on probable cause or reasonable suspicion that weapons or evidence are present.

Law enforcement's authority includes the power to perform a complete search of the arrestee and the area within the arrestee's immediate control for the purpose of locating weapons, means of escape, and evidence of any crime.<sup>17</sup> The need to protect the officer and to preserve evidence of criminal activity outweighs the privacy interests of the arrestee.

Also included within the scope of this search is the authority to search containers or other items of personal property on the arrestee or in the area within the arrestee's immediate control. This authority to search containers includes the right to open closed containers.<sup>18</sup> As stated by the Supreme Court, "...the justification for the search is not that the arrestee has no privacy in the container, but that the lawful custodial arrest justifies the infringement of any privacy the arrestee may have."<sup>19</sup>

The search of the area within the arrestee's immediate control is generally limited to the area within which the arrestee could gain possession of a weapon or destroy evidence.<sup>20</sup> This area has commonly been referred to as the "lunge" area. The search of the lunge area is permitted even when the defendant is in handcuffs or officers have otherwise restricted the arrestee's movement.<sup>21</sup>

Courts have placed limits on the time within which the search of the area within the arrestee's immediate control may be conducted. Generally, the search of the lunge area and the containers within that area must be conducted contemporaneous to the arrest.<sup>22</sup> For example, in *United States v. Chadwick*,<sup>23</sup> the U.S. Supreme Court held that a locked footlocker searched at the stationhouse 90 minutes after the arrest was too remote in time and not a valid search incident to arrest.

Courts have given officers greater flexibility when conducting a search of an arrestee's personal effects, such as clothing and wallets. For example, in *United States v. Rodriguez*,<sup>24</sup> officers discovered an address book during a search of the defendant incident to arrest. They photographed the contents of the address book and reviewed it at the stationhouse, well after the arrest.

The defendant argued that because the search of the book was conducted remotely in time and place from the arrest, the evidence derived from the search should be suppressed. The court rejected the defendant's argument, concluding the search of the defendant's personal property could have occurred at the arrest scene; thus, the defendant lost his expectation of privacy in items of personal property immediately associated with the arrestee and lawfully seized.<sup>25</sup> The reasonableness of the warrantless search of a pager and the retrieval of messages within it must be assessed within three possibilities: 1) reasonable as contemporaneous to arrest; 2) reasonable as lawfully seized incident to arrest, even if not searched contemporaneous to arrest; and 3) unreasonable, despite being lawfully seized, due to the delay in the search following the arrest. The primary factor in determining the reasonableness of the search of a pager appears to be the length of the delay between the arrest and the search.

## Search Contemporaneous to Arrest

The court generally have treated the warrantless search of a pager seized incident to arrest as a search of a closed container.<sup>26</sup> Thus, the activation of the pager's memory contemporaneous to arrest and the seizure of messages transmitted to it have been upheld.<sup>27</sup> As stated by the court in *Chan*:

[T]he general requirement for a warrant prior to the search of a container does not apply when the container is seized incident to arrest....The search conducted by activating the pager's memory is therefore valid.<sup>28</sup>

Rather than require law enforcement to stop and obtain a search warrant, courts recognize that the need to preserve evidence of criminal activity justifies the warrantless search of the pager seized incident to arrest.<sup>29</sup>

#### Search Removed from the Arrest

The remaining two possibilities concern the reasonableness of a delay in the search of a pager seized incident to arrest. When addressing the effect of a delay in the search of an item seized incident to arrest, courts have reached different conclusions. The outcome has depend-ed on whether the court characterizes the pager as personal property immediately associated with the arrestee, similar to a wallet, address book, or other nonpersonal property.<sup>30</sup> If found to be personal property associated with the arrestee, greater latitude is given to police concerning the time in which the pager's memory is activated and messages are retrieved.<sup>31</sup> If the pager is regarded as nonpersonal property and thus characterized simply as a container within the arrestee's lunge area, it must be searched contemporaneous to the arrest in order to be reasonable.<sup>32</sup>

For example, in *United States v. Chan*,<sup>33</sup> the court treated the pager as a container seized within the arrestee's lunge area. Because the pager's memory was accessed just minutes after the arrest and not remote in time, the search was valid.

However, in *United States v. Lynch*,<sup>34</sup> the court found the pager to be more like an item of personal property, such as a wallet or address book. Thus, it found the activation of the pager's memory to be reasonable, even if not contemporaneous to the arrest.<sup>35</sup> Due to the lack of agreement among the courts concerning the need to conduct the search of the pager contemporaneous to the arrest and to ensure the admissibility of evidence obtained as a result of accessing the pager's memory, good practice dictates activating the pager's memory as contemporaneous to the arrest as feasible. However, recognizing the less restrictive time constraints some courts have adopted for items immediately associated with the arrestee and the logic in the argument that a pager is an item personal in nature, accessing the pager's memory at a point in time more removed from the arrest still may be deemed reasonable. Nonetheless, it is recommended that a search warrant be obtained, if possible, when the search of the pager is not reasonably contemporaneous to the arrest.

For example, an officer arrests a subject and seizes the jacket the suspect is carrying. A search of the jacket's pockets produces a pager. At the stationhouse, the arresting officer turns over the pager to a detective who has been investigating the subject for his role in a drug distribution ring. The detective activates the pager, which reveals numbers that further incriminate the subject. Support exists for the reasonableness of this search and for the admissibility of evidence produced by the search because, by activating a pager lawfully seized incident to arrest, the detective was merely searching an item of personal property immediately associated with the arrestee.

The outer limit of when such a search can be conducted and still be considered as reasonable has not been delineated by the courts. It is likely at some point, however, that the delay between the arrest and the search of the pager would render the search unreasonable. For example, in *United States v. Edwards*,<sup>36</sup> a case that involved the seizure of personal property searched remote in time from the arrest, the court noted that a "reasonable delay" is appropriate. One federal court provided some guidance on the possible effect of an extended delay. In *United States v. Ortiz*,<sup>37</sup> a pager and a

wristwatch, which also served as an electronic telephone directory, were seized incident to arrest. After the arrest but while still at the scene, an officer activated the pager and retrieved the messages. The wristwatch/electronic telephone directory was taken to the stationhouse.

The next day, officers retrieved telephone numbers from the electronic directory. The court upheld the information retrieved from the pager as a reasonable search incident to arrest. However, it suppressed the information from the wristwatch due to the delay in the search.<sup>38</sup> A different analysis may be appropriate with respect to a pager that has a finite memory because of the possibility evidence will be lost if officers pursue a search warrant. Due to this exigency, a warrantless search may be reasonable if probable cause exists to search the pager. Unfortunately, federal courts have not addressed this issue.<sup>39</sup>

As a practical matter, the number of incoming messages relating to criminal activity will likely lessen after the arrest as others learn of the arrestee's status and stop paging the suspect. Thus, the most prudent course of action from both a legal and practical standpoint is to access the pager's memory as contemporaneous to the arrest as feasible.

### Conclusion

When the provisions of the Bill of Rights were drafted, such as the prohibition on unreasonable searches and seizures, little did the authors realize the technology that law enforcement would confront when pursuing criminal activity today. In the face of rapidly evolving technology, Congress has enacted, at times, legislation establishing the reasonableness standard for law enforcement activities. An example is the provisions of Title III governing the use of electronic surveillance.

However, when confronted with the vast amount of technology now used to facilitate criminal activity, and in the absence of such legislation, law enforcement still often must apply basic fourth amendment principles when assessing whether law enforcement action is a search and, if so, whether it is reasonable. The search of a pager and the retrieval of messages within its memory are no different.

### Endnotes

1 Title III of the 1968 Omnibus Crime Control Act (18 U.S.C. 2510-2522) established governing electronic surveillance, including the prohibition on the aural intercepti oral communications where there is a reasonable expectation of privacy, absent the c one of the parties or an extraordinary court order is obtained. In 1986, Congress pa Electronic Communications Privacy Act (ECPA) in the face of new technology not cover the earlier legislation. For example, communications transmitted in digital or elect

protected from unauthorized interception under the ECPA.

2 18 U.S.C. 2511.

3 A state's electronic surveillance statute can be more restrictive than the federal  
state and local officers should determine whether their statute, if one exists, prov  
protection to pagers than the federal statute.

4 18 U.S.C. 2510(4).

5 United States v. Suarez, 906 F.2d 977 (4th Cir. 1990).

6 United States v. Diaz-Lizaraza, 981 F.2d 1216 (11th Cir. 1993); United States v. M  
917 F.2d 955, 960 (6th Cir. 1990); United States v. Reyes, 922 F.Supp. 818 (S.D.N.Y.  
(definition of intercept requires the acquisition of the data simultaneously with th  
transmission, even if the intended recipient has not yet read the message).

7 United States v. Meriwether, 917 F.2d 955 (6th Cir. 1990); State v. Wojtyna, 855 P  
(Wash.App.Div.1 1993). But see, United States v. Reyes, 922 F.Supp. 818, 837 at n.2  
(S.D.N.Y. 1996).

8 One court concluded the search of a pager seized incident to arrest implicates Tit  
ECPA (18 U.S.C. 2701-2711), which governs access to and dissemination of information  
the possession of an electronic service provider. See United States v. Reyes, 922 F.  
(S.D.N.Y. 1996). In Reyes, the court concluded retrieving messages from within a pag  
constitutes accessing stored communications within the meaning of Title II. However,  
concluded that obtaining a search warrant, as required by the statute, was not neces

an exception to the warrant requirement existed. Reyes at 837.

This interpretation of Title II appears inconsistent with the plain meaning of the s  
legislative history. The statute limits access to and disclosure of communications  
within the possession of a service provider. Furthermore, legislative history indic  
intended to restrict access to and disclosure of such information in the same manner  
provided for financial records in the Right to Financial Privacy Act. See Tucker v.  
F.3d 688, 692 (4th Cir. 1996), citing S.Rep. No.541 reprinted in 1986 U.S. Code Cong  
AdminNews 3555.

9 United States v. Meriwether, 917 F.2d 955 (6th Cir. 1990), citing Katz v. United S  
U.S. 347 (1967); United States v. Chan, 830 F.Supp. 531 (N.D.Cal. 1993); United Stat  
Lynch, 908 F.Supp. 284 (D.Virgin Islands 1995).

10 917 F.2d 955 (6th Cir. 1990).

11 Meriwether at 959, citing Smith v. Maryland, 442 U.S. 735 (1979); State v. Wojtyn  
P.2d 315 (Wash.App.Div. 1 1993).

12 830 F.Supp. 531 (N.D.Cal. 1993).

13 Chan at 533.

14 Chan at 535.

15 United States v. Ortiz, 84 F.3d 977 (7th Cir. 1996); United States v. Lynch, 908  
287 (D.Virgin Islands 1995)("[i]t was reasonable for the defendant to consider the t  
numbers stored in the pager to be personal and private, and to expect them generally

governmental invasion"); *People v. Bullock*, 277 Cal.Rptr. 63 (1990).

16 *United States v. Robinson*, 414 U.S. 218 (1973); *Chimel v. California*, 395 U.S. 75 (1969); *New York v. Belton*, 453 U.S. 454 (1981).

17 *United States v. Robinson*, 414 U.S. 218 (1973) (search of crumpled cigarette pack incident to arrest); *Chimel v. California*, 395 U.S. 752 (1969), *United States v. Ort* 977, 984 (7th Cir. 1996) (an officer's need to preserve evidence is an important law component of the rationale for permitting a search of a suspect incident to arrest).

18 Generally, the authority to conduct a warrantless search of containers extends to containers. The courts have not agreed on whether this includes locked containers. *States v. Tovolacci*, 895 F.2d 1423 (D.C.Cir. 1990) (warrantless search of locked suitcase reasonable, as the arrestee could have gained access to a weapon or destroyed evidence).

19 *New York v. Belton*, 453 U.S. 454 (1981).

20 *Chimel v. California*, 395 U.S. 752 (1969); *United States v. Knight*, 58 F.3d 393 (9th Cir. 1995) (warrantless search of hotel suite and seizure of documents from desktop valid if search occurred contemporaneous to the arrest and the documents were within the reach of the arrestee).

21 *New York v. Belton*, 453 U.S. 454 (1981); *United States v. Nohara*, 3 F.3d 1239 (9th Cir. 1993) (search of bag valid as contemporaneous to arrest even when defendant under control in handcuffs at time of search); *United States v. Turner*, 926 F.2d 883 (9th Cir.), cert. denied, 508 U.S. 103 (1991). But see *United States v. Gorski*, 852 F.2d 692 (2d Cir. 1988).

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

23 433 U.S. 1 (1977).

24 995 F.2d 776 (7th Cir. 1993), cert. denied, 114 S.Ct. 1117 (1994).

25 Rodriguez at 778. See also, United States v. Edwards, 415 U.S. 800 (1974); United States v. Molinaro, 877 F.2d 1341 (7th Cir. 1989) (warrantless search of arrestee's wallet, after arrestee was handcuffed and placed in vehicle, valid).

26 United States v. Chan, 830 F.Supp. 531 (N.D.Cal 1993).

27 United States v. Ortiz, 84 F.3d 977 (7th Cir. 1996); United States v. Lynch, 908 F.Supp. 284 (D.Virgin Islands 1995); United States v. Chan, 830 F.Supp. 531 (N.D.Cal. 1993).

28 Chan at 536.

29 United States v. Ortiz, 84 F.3d 977, (7th Cir. 1996) (officers must have the authority to immediately "search" or retrieve, incident to a valid arrest, information from a pager to prevent its destruction as evidence); United States v. Lynch, 908 F.Supp. 284 (D.Virgin Islands 1995).

30 United States v. Lynch, 908 F.Supp. 284, 287 (D.Virgin Islands 1995) (the retrieval of telephone numbers from a pager falls either under Chadwick and its progeny, requiring a warrant, or under Robinson and its progeny, in which a warrant is not required).

31 United States v. Lynch, 908 F.Supp. 284 (D.Virgin Islands 1995).

32 United States v. Chan, 830 F.Supp. 531 (N.D.Cal. 1993).

33 Id.

34 Lynch at 289.

35 The court noted, for example, the pager was seized while attached to the arrestee  
it "...could be characterized as part of his person for purposes of a search incident  
Lynch at 289, n.5.

36 415 U.S. 800 (1974).

37 United States v. Ortiz, 84 F.3d 977 (7th Cir. 1996).

38 Ortiz at 984.

39 In United States v. Lynch, 908 F.Supp. 284 (D.Virgin Islands 1995), the governme  
the search of a pager was valid due to the existence of exigent circumstances. The g  
noted that as messages are transmitted to the pager, numbers that exceed the memory  
are erased. The court declined to address this issue because it found the search val  
to arrest. One state court has upheld the warrantless search of a pager based on exi  
circumstances. In People v. Bullock, 277 Cal.Rptr. 63 (1991), the court found that t  
probable cause to believe the pager contained evidence of criminal activity, as the  
arrested for drug trafficking and the pager is an "instrument commonly used in selli  
Bullock at 66. Thus, the warrantless search of the pager was reasonable due to the r  
evidence would be lost because of the pager's finite memory.

---

[ [1997 Issues](#) ] [ [Law Enforcement Bulletin](#) ] [ [Publications](#) ] [ [FBI Home Page](#) ]