CELL PHONES, SEARCH INCIDENT TO ARREST, AND THE SUPREME COURT

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The Supreme Court will soon decide whether police, pursuant to the "search incident to arrest" rule, may search a cell phone found on a person lawfully arrested.[1] Under the search incident to arrest doctrine, police can search an arrestee for weapons and evidence that the arrestee might try to conceal or destroy without any particularized suspicion.[2] The two justifications for this rule – (1) officer safety and (2) evidence preservation – mark the limits of police authority to search incident to arrest.[3] Indisputably, a cell phone does not contain weapons or other objects that might harm the arresting officer; therefore, searching a cell phone incident to arrest can only be justified as a measure to preserve evidence. Lower courts are divided on the validity of such searches.[4] This Perspective offers some thoughts on factors that may affect the Justices' analysis.

Prosecutors will likely contend that law enforcement officers have an unquestioned power to search and seize any item, including closed containers, found on the arrestee. As the argument goes, this power dates back to the common law and has been repeatedly approved by the Court. Though a few of the Justices posit the importance of history when deciding Fourth Amendment issues,[5] the history of the search incident to arrest rule will not control the outcome on this issue.

To be sure, the common law permitted an officer to seize weapons or stolen property from the arrestee's person.[6] From this general rule, the Court began to

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[1] *See* United States v. Wurie, 728 F.3d 1 (1st Cir. 2013), *cert. granted*, 82 U.S.L.W. 3104 (U.S. Jan. 17, 2014) (No. 13-212).

[2] Chimel v. California, 395 U.S. 752, 763 (1969). The search incident to arrest rule not only permits the police to search the *person* of the arrestee, but also to search the *area* into which an arrestee might reach for a weapon or evidentiary item. *Id*.

[3] Preston v. United States, 376 U.S. 364, 367 (1964).

[4] *Compare Wurie*, 728 F.3d at 1, *with* United States v. Flores-Lopez, 670 F.3d 803 (7th Cir. 2012); United States v. Finley, 477 F.3d 250 (5th Cir. 2007).

[5] In *Wyoming v. Houghton*, the Court stated that a historical inquiry is the starting point for Fourth Amendment analyses. *See* 526 U.S. 295, 299 (1999) (Scalia, J.). The Court explained that it would "inquire first whether the [challenged] action was regarded as an unlawful search or seizure under the common law when the Amendment was framed." *Id.*

[6] *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV.

recognize the power of police "to search the person of the accused . . . to discover and seize fruits or evidence of crime" subsequent to a lawful arrest.[7] The Court repeated this proposition so many times that it began referencing an "unqualified" police power to search incident to arrest by the 1970s.[8] Indeed, the Court in *Maryland v. King* recently relied on these prior opinions to state that "[t]he validity of the search of a person incident to a lawful arrest has been regarded as settled from its first enunciation, and has remained virtually unchallenged."[9] This conclusion, however, presents a problem, for as Justice Rehnquist recognized in *United States v. Robinson*, "[v]irtually all of the statements of this Court affirming the existence of an unqualified authority to search incident to a lawful arrest are dicta."[10] In other words, the Court has *never* expressly held that police have an "unqualified authority" to search a person incident to arrest.[11]

Allowing cell phone searches based upon an "unqualified" authority to search incident to arrest also is flawed because such a search may reveal extensive private information. In the 1970s, a search of an arrestee's wallet or purse might have revealed a small amount of private information, such as photos or personal documents. By contrast, a cell phone contains vast amounts of personal data about its owner. Modern cell phones are "sophisticated computers that fit in our pockets . . . contain[ing] a remarkable amount of information about who we are, what we know, and what we have done."[12] Likening the search of an arrestee's cell phone to the seizure of a stolen document from an arrestee's coat pocket by an eighteenth-century constable is a false analogy. Not only might a cell phone search incident to arrest reveal vast amounts of information unrelated to the reason for arrest, but such a search "can take days or weeks when conducted in a computer lab by a trained forensic analyst,"[13] quite unlike the brief time it might take a constable to analyze a seized document. If the Fourth Amendment is not to become a historic relic, its protections must adapt and expand to address the technological and scientific advances that have changed the world. As Professor Orin Kerr has observed, "searching a person meant one thing in 1973

547, 627 (1999).

[7] Weeks v. United States, 232 U.S. 383, 392 (1914).

[8] United States v. Robinson, 414 U.S. 218, 225 (1973).

[9] Maryland v. King, 133 S. Ct. 1958, 1970-71 (2013) (quoting *Robinson*, 414 U.S. at 224).

[10] *Robinson*, 414 U.S. at 230.

[11] *See* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.2(c) (5th ed. 2012) ("[N]either the prior decisions of the Supreme Court nor the 'original understanding' evidence [regarding the Fourth Amendment] conclusively establishes whether the 'general authority' to search the person incident to arrest is 'unqualified.'").

[12] Orin S. Kerr, *Foreword: Accounting for Technological Change*, 36 HARV. J.L. & PUB. POL'Y 403, 405 (2013).

[13] *Id*.

and means something quite different today."[14]

When the Court considers whether police may search a cell phone found on a person lawfully arrested, it is also likely to address the scope of the officer's authority to search for evidence. In *Chimel v. California*, the controlling precedent on the search incident to arrest rule, the Court explained that "it is entirely reasonable for the arresting officer to search for and seize *any* evidence on the arrestee's person in order to prevent its concealment or destruction."[15] Four years after *Chimel*, the Court in *United States v. Robinson* announced a categorical rule regarding an officer's authority to examine containers found on the arrestee:

> 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.[16]

In other words, under *Chimel* and *Robinson*, the scope of police authority to search for evidence is not limited to a search for evidence related to the crime of arrest. The police can search for "*any evidence*" to prevent its concealment or destruction.[17]

More recently, the Court in *Arizona v. Gant* defined the scope of an officer's authority to search a vehicle incident to a recent occupant's arrest.[18] There, the Court ruled that police may only search a vehicle, and any container therein, if the arrestee is unsecured and has access to the interior of the vehicle, or "when it is reasonable to believe that evidence of the *offense of arrest* might be found in the vehicle."[19] The second part of *Gant*'s holding limits an officer's authority to search for "evidence of the *offense of arrest*."[20] This narrows the language used in *Chimel*, which allowed an officer to search for "any evidence," whether related to the arrest or not. When addressing whether the search of a cell phone found on the arrestee is valid, it is unlikely the Court will adopt *Gant*'s narrower rule because this rule fails to provide clear guidance to the officer in the field. The *Gant* approach would require case-by-case judgments on whether a phone is likely to contain evidence related to the crime of arrest. Such case-by-case judgments would invite judicial second-guessing regarding the officer's decision to search. Finally, the *Gant* framework conflicts with *Robinson*'s categorical rule that:

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[14] *Id.*

[15] Chimel v. California, 395 U.S. 752, 763 (1969) (emphasis added).

[16] United States v. Robinson, 414 U.S. 218, 235 (1973) (considering whether an officer could lawfully search a cigarette package found in the coat pocket of a person arrested for driving with a revoked license).

[17] *Chimel*, 395 U.S. at 763 (emphasis added).

[18] Arizona v. Gant, 556 U.S. 332, 335 (2009).

[19] *Id.* at 335 (emphasis added).

[20] *Id.*

> A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search.[21]

The Court is likely to confine *Gant*'s narrower rule to the context of automobile searches and reaffirm an officer's power to search for any evidence as recognized in *Chimel* and *Robinson*. Even if the Court adopts *Gant*'s limitation and holds that cell phones may only be searched for evidence related to the crime of arrest, however, Professor Adam Gershowitz's submission to this *Perspective* convincingly argues that the *Gant* framework will not prevent police from searching cell phone data even after making an arrest for a minor crime.[22] According to Professor Gershowitz, the proliferation of photography capabilities, text messaging, and social media applications provide police ample cause to believe that evidence related to the crime of arrest is likely to be found on an arrestee's cell phone.[23] As Gershowitz observes, "Police can reasonably believe evidence of many low-level crimes might be found on the phone. Thus, the *Gant* doctrine will allow widespread rummaging by the police."[24]

Finally, the Justices likely will cite *Maryland v. King*[25] in support of cell phones searches incident to arrest. *King* held that persons arrested for serious crimes could be subject to suspicionless searches to obtain DNA samples for forensic testing.[26] The Court ruled that DNA searches serve the government's important interest in accurately identifying arrestees.[27] According to the Solicitor General, *King*'s reasoning supports cell phone searches incident to arrest. "Like a DNA test, the search of a cell phone's call log can provide 'metric[s] of identification used to connect the arrestee with his or her public persona, as reflected in records of his or her actions that are available to the police.'"[28] Although the result in *King* was divisive[29] and has been subjected to criticism,[30] *King* supports searching cell phones incident to arrest.

Indeed, *King* embodies the position taken by Justice Powell forty years ago

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[21] *Robinson*, 414 U.S. at 235.

[22] Adam M. Gershowitz, *Why* Arizona v. Gant *Is the Wrong Solution to the Warrantless Cell Phone Search Problem*, 94 B.U. L. REV. ANNEX 9 (2014).

[23] *Id.*

[24] *Id.* at 11.

[25] Maryland v. King, 133 S. Ct. 1958 (2013).

[26] *Id.* at 1979-80.

[27] *Id.* at 1970-74.

[28] Petition for a Writ of Certiorari at 19, United States v. Wurie, No. 13-212 (2013).

[29] *See King*, 133 S. Ct. at 1980 (Scalia, J., dissenting) (writing an acerbic dissent that was joined by three other Justices).

[30] *See* Tracey Maclin, Maryland v. King*:* Terry v. Ohio *Redux*, 2013 SUP. CT. REV. (forthcoming); Erin Murphy, *License, Registration, Cheek Swab: DNA Testing and the Divided Court*, 127 HARV. L. REV. 161 (2013).

in *United States v. Robinson* that "an individual lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person."[31] According to Justice Powell, once a lawful arrest occurs, any privacy interest protected by the Fourth Amendment "is subordinated to a legitimate and overriding governmental concern."[32] Powell argued that "a valid arrest justifies a full search of the person, even if that search is not narrowly limited by the twin rationales of seizing evidence and disarming the arrestee."[33] Justice Powell concluded that search incident to arrest is reasonable because an arrestee's privacy "is legitimately abated by the fact of arrest."[34]

Like Powell's opinion in *Robinson*, *King* is based on the view that lawful arrest negates an arrestee's privacy interests. In his dissent in *King*, Justice Scalia remarked that "most Members of the Court" are not quite ready to "just come out and say that any suspicionless search of an arrestee is allowed if it will be useful to solve crimes."[35] As this Author has predicted previously,[36] however, that result is coming. Upholding searches of cell phones found on an arrestee takes the Court another step closer to that outcome.

[31] United States v. Robinson, 414 U.S. 218, 237 (1973) (Powell, J., concurring).

[32] *Id.*

[33] *Id.*

[34] *Id.* at 238.

[35] Maryland v. King, 133 S. Ct. 1958, 1982 n.1 (2013) (Scalia, J., dissenting).

[36] Maclin, *supra* note 30.