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SPECIAL UPDATE

LAW ENFORCEMENT/POLICE AND PUBLIC EMPLOYERS

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SEARCH OF CELL PHONE INCIDENT TO ARREST

Last week the United States Supreme Court ruled on two cases which asked the question: whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested. The Court's answer: "Get a warrant."

Facts:

Riley v. California

Riley was stopped for expired tags, and in the course of the stop, the officer learned that his license had been suspended. Riley's car was impounded and an inventory search was conducted. Riley was arrested for possession of concealed and loaded firearms which were hidden under the car's hood. During the search incident to the arrest, the officer seized a cell phone from Riley's pants pocket. At the police station about two hours after the arrest, a detective "went through" the phone looking for evidence of gang affiliations. During the search of the phone, the police found a photograph of Riley standing in front of a car they suspected had been involved in a shooting a few weeks earlier. Riley was charged in connection with the earlier shooting. He moved to suppress all evidence obtained from his cell phone contending that the searched violated the Fourth Amendment. The trial court rejected his argument, the photographs were admitted, and he was convicted and sentenced to 15 years to life in prison.

United States v. Wurie

A police officer observed Wurie make an apparent drug sale from a car. He was arrested and taken to the police station, where police seized two cell phones from his person. One of the officers noticed that one of the phones was repeatedly receiving calls from a source identified as "my house" on the phone's external screen. The officers opened the phone and saw a photograph of a woman and a baby as the phone's wallpaper. They pressed a button to access the phone's call log, then another button to determine the phone number associated with the "my house" label. They used a directory to determine the location of the number, went to the building, observed a woman through the window who resembled the woman in the photograph on the phone. THEN they secured the apartment while obtaining a warrant. During the search police found and seized 215 grams of crack cocaine, drug paraphernalia, a firearm and ammunition, and cash. Wurie was charged with distribution of crack cocaine and being a felon in possession of a firearm and ammunition. He moved to suppress the evidence garnered from his cell phone, arguing that it was fruit of an unconstitutional search. The District Court denied his motion and he was convicted and sentenced to 262 months in prison.

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Analysis:

These two cases concern the reasonableness of a warrantless search incident to a lawful arrest. In its opinion the Court pointed out that warrantless searches incident to arrest occur with far greater frequency than searches conducted pursuant to a warrant.

In arriving at its decision that a warrant is required, the Court focused on 3 cases where the warrantless searches were found to be reasonable: (1) *Chimel v. California* (1969) 395 U.S. 752; (2) *United States v. Robinson* (1973) 414 U.S. 218; and (3) *Arizona v. Gant* (2009) 556 U.S. 332, 350.

In *Chimel v. California*, the Court held it is reasonable to search an arrestee for weapons and/or evidence that could be concealed or destroyed.

In *United States v. Robinson*, the Court held a custodial arrest based upon probable cause is a reasonable intrusion on Fourth Amendment Rights, and since that intrusion is lawful in the first place, a search incident to the arrest requires no additional justification. The Court so held even though the search was not related to disarming Robinson or discovering evidence, as Robinson had only been pulled over for driving with a revoked license. The search of the crumpled up cigarette pack found in his pocket was found reasonable because the officer could only tell that the contents were not cigarettes, but was unable to determine whether the contents were dangerous or not without opening the pack.

In *Arizona v. Gant*, the Court expanded *Chimel* to authorize police to search a vehicle when an arrestee is “unsecured and within reaching distance of the passenger compartment,” and added an independent exception for a warrantless search of a vehicle’s passenger compartment when it is “reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.”

Application of the law:

Applying *Chimel*, the Court found that once an officer had secured a phone and eliminated any potential physical threats (e.g., a razor blade between the phone and its case), the digital data on the phone could not endanger anyone, nor could it be destroyed.

Both California and the United States argued that information contained on cell phones may nevertheless be vulnerable to two types of evidence destruction unique to digital data - remote wiping and data encryption. The Court, however, addressed these concerns by pointing out at least two simple ways to fully prevent remote wiping: (1) Turn the phone off or remove its battery; or (2) if law enforcement is concerned about encryption or other potential problems, the Court suggested leaving the phone powered on and placing it in an enclosure that isolates the phone from radio waves. The Court called such a device a “Faraday bag,” and described it as a “sandwich bag made of aluminum foil: cheap, lightweight, and easy to use.”

Applying *Robinson*, the Court found that while the inspection of the contents of an arrestee’s pockets may not be any additional intrusion beyond the arrest as applied to physical items, this rationale cannot apply to digital data. The Court found that cell phones differ in both a quantitative and qualitative sense from other objects that might be kept on an arrestee’s person. The most notable distinguishing feature of modern cell phones is their immense storage capacity.

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Finally, the Court found that the *Gant* exceptions applied in unique circumstances with “reduced expectations of privacy” and “heightened law enforcement needs” that apply to motor vehicles. The Court voiced its concern that a *Gant* standard would prove no practical limit at all when it comes to cell phone searches, as it would in effect give “police officers unbridled discretion to rummage at will among a person’s private effects.” For example, an individual pulled over for speeding or reckless driving might have evidence on their phone that shows whether he was texting while driving.

Holding:

The Court stated: “Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans “the privacies of life.” The fact that technology allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought.” What must police do? Get a warrant.

However, the Court was careful to point out that this holding, of course, does not make the information on a cell phone immune from search; it simply determined that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest.

Riley v. California, (2014) 573 U.S. ____

http://www.supremecourt.gov/opinions/13pdf/13-132_8l9c.pdf