Supreme Court: Can't Search Cell Phones Incident to Arrest

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Yesterday, the Supreme Court issued a long-awaited opinion concerning searching cell phones incident to arrest. The Court ruled that the search incident to arrest exception to the warrant requirement doesn't apply to cell phones. North Carolina law previously allowed such searches, so the opinion is significant.

The facts of the cases. The Court ruled on two cases: *Riley v. California* and *Wurie v. United States.* The opinion is captioned with the *Riley* case name. *Riley* began with a traffic stop, which led to a gun arrest, which led to a phone search, which revealed evidence that linked the defendant to a shooting. *Wurie* began with a drug arrest, which led to a phone search, which revealed the location of the defendant's residence, which enabled officers to obtain and to execute a search warrant for the home, which led to the seizure of drugs and firearms.

The lower court rulings. Both defendants moved to suppress, arguing that the searches of their phones incident to arrest violated the Fourth Amendment. Both motions were denied at the trial level, and both defendants were convicted. On appeal, defendant Riley lost, while defendant Wurie won. The Supreme Court agreed to review the cases together.

The Supreme Court's ruling. The Court ruled 9-0 for the defendants. The lead opinion was written by Chief Justice Roberts. The Court stated that searches incident to arrest generally are justified (a) to ensure that the arrestee doesn't have a weapon, and (b) to prevent the arrestee from destroying evidence. But, it continued, cell phone searches don't implicate those concerns. "[O]fficers remain free to examine the physical aspects of a phone to ensure that it will not be used as a weapon," but the data on the phone doesn't pose a risk of physical harm. And there is little risk that the data on a phone will be destroyed by the arrestee. The Court indicated that an arrestee's phone may be seized while officer seek a search warrant. The prosecution argued that even seized phones could be locked or remotely wiped if not inspected immediately, but the Court found little reason to believe that these practices were prevalent or could be remedied by a search incident to arrest. Further, the risk of such practices can be managed by using Faraday bags and other tools. Thus, the Court found little justification for allowing phones to be searched incident to arrest.

On the other side of the ledger, the Court found a strong privacy interest militating against such searches. It noted that phones often contain vast quantities of data, making a search intrusive far beyond the mere fact of arrest itself and far beyond the level of intrusion associated with more traditional searches of pockets, wallets, and purses incident to arrest. Indeed, many phones can access data stored on remote servers, making a search extend far beyond the immediate area of the arrestee. Emphasizing the need to establish a clear and workable rule, the Court therefore categorically exempted cell phones from the search incident to arrest doctrine.

Comments. A few things struck me about the Court's ruling:

- One, the phone in *Wurie* was a flip phone, while the one in *Riley* was a smart phone. The Court's holding was not dependent on the capacity of the device, and seems certain to apply to other forms of electronic devices that are carried frequently, such as tablets and laptops. In fact, the Court at one point referred to phones as "minicomputers." More generally, the Court seemed to view the dawn of the digital age as a significant development for Fourth Amendment purposes. Combined with the Court's 9-0 vote against warrantless GPS

tracking in *United States v. Jones*, it seems that the Court may believe that emerging technologies require a new approach to the Fourth Amendment.

- Two, the Court acknowledged that in some cases, other doctrines might support a warrantless search of a phone. For example, if there were reason to believe that a violent crime were unfolding and that evidence of the crime was on the phone, exigent circumstances might support the search. And of course, officers may ask for consent to search an arrestee's phone.
- Three, still, this opinion likely will cut down on warrantless phone searches . . . and accordingly may increase the number of search warrants that are sought for phones. Officers should bone up on how to draft warrant applications in such cases, and the courts should prepare to see more applications and to handle more litigation over warrants.
- Four, the opinion suggests that data stored in "the cloud" is protected by the Fourth Amendment. One of the justifications that the Court provides for why cell phone searches are more intrusive than searches of physical objects is that phones may be connected to remote servers. For example, my iPhone is connected to Yahoo!'s servers so that I can access my email. If this feature makes phone searches more intrusive, it would seem to follow that the remote data is generally subject to an expectation of privacy. That suggestion is significant, as many courts have viewed such data as having no constitutional protection as a result of the third-party doctrine of *Smith v. Maryland.*
- Five, get ready for the debates over retroactivity and related issues.

What's your reaction to the decision?