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Clear-Eyed Ruling On Cellphone Privacy From High Court

Law360, New York (June 25, 2014, 4:19 PM ET) -- In April 2014, the U.S. Supreme Court heard oral argument on two cases dealing with searches of cellphones incident to arrest, specifically, Riley v. U.S., No. 13-132, and U.S. v. Wurie, No. 13-212. The cases demonstrated how routine interactions with law enforcement could lead to the warrantless search of personal information stored on an arrestee's cellphone. The question was whether the court would endorse searches of cellphones incident to arrest without limitation, preclude such searches unless a warrant was obtained or require some alternative approach.

Bridget Rohde

On June 25, 2014, the Supreme Court provided crystal-clear guidance. Writing for a unanimous court, Chief Justice John Roberts held that law enforcement may not search digital information on a cellphone seized from an arrestee's person without first obtaining a warrant.[1] (Justice Samuel Alito concurred in the judgment).

Relevant Facts and Procedural History of Riley

Riley was stopped by a San Diego police officer for driving with expired tags. The officer then learned that Riley had a suspended license and impounded the vehicle. An inventory search revealed two guns under the vehicle's hood. Riley was arrested for possession of concealed firearms.[2]

In searching Riley incident to his arrest, the officer took and searched his cellphone, scrolling through text entries at the scene and noticing what he thought was indicia of gang association. He called in a detective specializing in gangs, who interviewed Riley, thought he recognized him as a member of a gang whom he suspected of a shooting and proceeded to view video clips and photographs on the cellphone.[3]

After being indicted in connection with the shooting, Riley moved to suppress the evidence seized from the warrantless search of his phone. The court denied the motion based on the search incident to arrest exception to the Fourth Amendment's warrant requiring, saying that "Cell phones do contain personal information, but really no more than wallets, purses and address books."[4] Riley was ultimately convicted and sentenced to 15 years to life.[5]

A California appellate court affirmed, holding that because Riley's "cell phone was immediately associated with his person when he was arrested," the search of the phone

was lawful. There was no need for any exigency for the police to search the phone.[6]

Riley's arguments to the U.S. Supreme Court as to why his cellphone should not have been searched incident to his arrest were simple and compelling: Searching the digital contents of a cellphone does not further the government interests justifying searches incident to arrest, specifically, protecting the arresting officer from harm and preventing the destruction of evidence. Moreover, such a search implicates privacy concerns by accessing a potentially vast quantity of sensitive personal information. Searching a phone is more akin to the abhorred general search of a home than a pat-down of an arrestee. Phones typically contain not only the contact information, texts and photographs that the government attempted to equate to the information historically found on a person in address books, family photos and letters, but voicemail, audio/video recordings, banking information and other private and sensitive information.[7]

Riley drew a very clear line in the sand: "Because the core purpose of the Fourth Amendment has always been to safeguard such personal and professional information from exploratory searches, this Court should hold that even when officers seize smart phones incident to lawful arrests, they may not search the phones' digital contents without first obtaining a warrant."[8]

The government relied upon case law governing search incidents to support a full search of a cell phone found on an arrestee's person. This included U.S. v. Robinson, with its "unqualified authority" to search an arrestee's person and objects or containers found on his person for evidence of crime.[9] The government asserted that the underlying purposes of the search incident exception had never "delimited" law enforcement's authority to search the objects on an arrestee's person.[10] (It nonetheless went to great lengths explaining why these justifications were present). The government also asserted that "[c]ell phones do not raise qualitatively different privacy concerns than items that the police have always had authority to search incident to arrest, such as letters, diaries, briefcases and purses."[11]

The government offered alternative approaches in the event the court were inclined to resolve the case on narrower grounds, saying it should at least permit a search incident when officers reasonably believe that a phone contains evidence of the offense of arrest.[12] Or, according to the government, the court could limit the scope of a search to "to the areas of the phone reasonably related to the crime of arrest, identifying the arrestee, and protecting officers."[13]

Relevant Facts and Procedural History of Wurie

In Wurie, after observing an apparent drug sale, a Boston police officer confronted the buyer and found two bags of crack. Another officer had followed the car in which Wurie was driving and arrested him. At the stationhouse, officers seized a number of items, including a flip phone that they noticed was receiving calls from "my house." The officers checked the call log, retrieved the number for "my house" and used this information to identify the street address for the house. They then got a search warrant for the house and seized drugs, a gun and ammunition.[14]

Wurie was charged with a gun-related offense and two drug offenses. He moved to suppress the evidence seized from his house, arguing that it was the fruit of the unconstitutional search of his cellphone's call log. The court denied his motion, relying upon Robinson.[15]

In the course of reversing the denial of Wurie's motion to suppress, vacating convictions on two charges and remanding on another, the First Circuit reviewed the modern search incident to arrest case law and, concluding that courts have "struggled [to apply this doctrine] to the search of data on a cell phone seized from the person,"sought "to craft a

bright-line rule that applies to all warrantless cell phone searches, rather than resolving this case based solely on the particular circumstances of the search at issue."[16]

The circuit posited that the issue turned on "whether the government can demonstrate that warrantless cell phone searches, as a category, fall within the boundaries laid out by Chimel."[17] It observed that a cellphone more like a computer than a purse or address book, with immense storage capacity and containing "information … of a highly personal nature: photographs, videos, written and audio messages (text, email, and voicemail), contacts, calendar appointments, web search and browsing history, purchases, and financial and medical records," "much more personal … information than could ever fit in a wallet, address book, briefcase, or any of the other traditional containers that the government has invoked."[18]

The circuit held "that the search incident to arrest exception does not authorize the warrantless search of data on a cell phone seized from an arrestee's person, because the government has not convinced us that such a search is ever necessary to protect arresting officers or preserve destructible evidence."[19]

The Supreme Court's Opinion

The court addressed Riley and Wurie together, given the common question they raised: " how the search incident to arrest doctrine applies to modern cell phones, which are now such a pervasive and insistent part of daily life.[20] Rejecting the government's arguments, the court held that "officers must generally secure a warrant before conducting such a search,"[21] in keeping with Riley's position and the First Circuit's decision in Wurie.

The court first found that the digital data on a cellphone could not in and of itself be used to harm an arresting officer, quoting the First Circuit with approval and rejecting the government's justification that such a search would protect officers in indirect ways (such as by alerting them that the arrestee's confederates were on the way to the scene) as unsupported and a broadening of Chimel. The court noted the continuing availability of the exigent circumstances exception.[22]

The court also found the second Chimel factor to be lacking."[O]nce law enforcement officers have secured a cell phone, there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone." The court rejected the government's concerns regarding destruction of evidence by remote wiping and data encryption as another broadening of Chimel, and, in any event, a risk that could be addressed by in a number of ways, including turning off the phone, removing its battery or using a "Farraday bag."[23]

The most noteworthy aspect of the court's reasoning is likely its common-sense approach to the privacy concerns raised by a search incident of a modern cellphone, such as the one in Riley. In response to the government's argument that a search of data on a cellphone is "materially indistinguishable" from other items found on a person, the court stated: "That is like saying a ride on horseback is materially indistinguishable from a flight to the moon." There is both a quantitative and a qualitative difference between a cellphone and other items, with especially notable features being their immense storage capacity," "ability to store many different types of information" and "pervasiveness," as well as the sensitive nature of records akin to those previously found at home and the variety of private information. The fact that data accessible on a cellphone might not actually be stored on the phone itself was cited as yet another reason for the court's decision.[24]

As to the alternatives proposed by the government, the court found each to be flawed and to contravene its preference to provide clear guidance to law enforcement. Even a limited search of a call log, like in Wurie, was found not to be permissible.[25]

At the end of the day, despite the impact on law enforcement, the Supreme Court made the clear-eyed decision that a cellphone cannot be searched without first obtaining a warrant, unless of course there are exigent circumstances. As Justice Roberts wrote in closing, "Privacy has its costs." Nonetheless, privacy prevailed.

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[1] Riley v. California, 573 U.S. ___ (2014)

[2] See, e.g., U.S. Riley Br. at 1-2. U.S. Riley Br. refers to the brief submitted by the United States solicitor general, who appeared as amicus curiae in the Riley case and as appellant in the Wurie case.

[3] See id. at 2

[4] See id. at 3 (citing J.A. 23)

[5] See id. at 4.

[6] See U.S. Riley Brief at 4; see also Petitioner Riley Br. at 8.

[7] See Petitioner Riley's Br. at 10-13.

[8] Id. at 3.

[9] See, e.g., U.S. Riley Brief at 4 (citing Robinson, 414 U.S. 218, 225 (1973)).

[10] See id. at 4-5 (citing Chimel v. California, 395 U.S. 752 (1969).

[11] Id. at 6.

[12] Id. at 28.

[13] Id. at 30.

[14] See U.S. Wurie Br. at 2-4.

[15] Id. at 4-5.

[16] U.S. v. Wurie, 728 F.3d 1, 5-7 (1st Cir. 2013).

[17] Id. at 7.

[18] Id. at 8-9.

[19] Id. at 13

[20] Riley v. California, 573 U.S. ___ (2014) (slip op. at 8-9).

[21] Slip op. at. at 9-10.

[22] Id. at 10 -12.

[23] Id. at 12-14.

[24] Id. at16-22

[25] Id. at 22-24.

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