US Supreme Court may permit unwarranted search of cellular phone contents

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On Tuesday, the Supreme Court of the United States heard oral arguments in two cases involving police searches of cell phones confiscated during arrests. The cases have important implications for privacy and democratic rights, as they will set the limit, or lack of a limit, on how far police can dig into one's stored personal information without a search warrant.

The court first heard argument in *Riley v. California*, concerning a police search of a college student's smart phone while he was placed under arrest for having an expired license plate on his car and for driving on a suspended driver's license. The police placed Riley under arrest and impounded his car. While taking an inventory of the car's contents, they uncovered two handguns and the phone, and looked into recent calls and text messages as well as pictures stored in its memory. Pictures from the phone connected Riley to a gang-related shooting for which he was subsequently convicted.

Next, the court heard arguments in *United States v. Wurie*, where Boston police confiscated and examined the flip phone of a suspected crack cocaine dealer who was placed under arrest. The police noticed that the phone was ringing and observed that the person calling was displayed as "my House." Police opened the phone and noted that the "wallpaper" consisted of a picture of a young black woman carrying a young child. Then they searched the phone's stored contacts to learn what telephone number was associated with the contact, "my House."

Subsequently, police ran a white pages search of the associated phone number and went to the address connected with it, which had a mailbox with the defendant's name on it. The woman and child pictured in the flip phone's wallpaper were at the residence, as was a handgun, some crack cocaine and a large quantity of cash. The defendant, Brima Wurmie, was convicted of charges relating to drug dealing and possession of the firearm.

In both the *Riley* and *Wurmie* cases, the defendants' convictions flowed from the evidence obtained by a warrantless search of their phones. The issue that the US Supreme Court considered was whether the searches violated the defendants' rights against unreasonable searches and seizures under the Fourth Amendment of the US Constitution.

The United States Courts of Appeals are split on this issue, and the various state supreme courts likewise have no uniform answer on point.

If the rule in *Riley* is upheld, law enforcement will have a green light to rummage through not only the cellular phones, but also the laptops, removable USB drives, tablet computers, etc., of anyone who runs a red light, jaywalks, fails to signal a turn or engages in virtually any other unlawful conduct, no matter how minor. Moreover, information taken in this manner is already being placed in law enforcement databases at the state and federal levels as part of a broader effort to "profile" the entire citizenry, a la Edward Snowden's revelations on ubiquitous and warrantless domestic spying.

In the *Wurie* case, the defendant prevailed in the lower court, the US Court of Appeals for the First Circuit. The First Circuit found that the police exceeded their authority in looking through Wurie's contacts to find the number associated with the name, "my House." The full opinion serves as a helpful refresher on Fourth Amendment law and the treatment of cell phones in various US courts, and is available here. A more succinct review of the relevant case law follows.

The Fourth Amendment to the US Constitution, part of the Bill of Rights, was designed to prevent abuses of

governmental power and to secure individual liberties. Given its abuse at the hands of the present justices of the US Supreme Court, the Fourth Amendment merits quoting in full:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

A search or seizure is presumptively unreasonable (and therefore unlawful) if it is conducted without a warrant. If an unlawful search produces evidence of a crime, courts will exclude such evidence at trial. However, in the 1969 case *Chimel v. California*, the US Supreme Court carved out an exception to the warrant requirement that allowed police to search and seize items within the "grab area" of a person being placed under arrest. This is the so-called "search incident to arrest" rule, and, according to a long list of subsequent cases, searches incident to arrest are only justifiable either (1) to look for weapons and thereby ensure an officer's safety, or (2) to prevent the imminent destruction of evidence of a crime.

Aside from the exceptions outlined above, police can conduct a warrantless search or seizure in "exigent circumstances"—for example, a search for evidence of the location of a kidnapping victim in immanent danger.

Based on the questions asked and statements made by the Supreme Court justices in Tuesday's oral arguments, the court may expand on these well-settled, limited exceptions to the Fourth Amendment's warrant requirement.

Conservative justice Anthony Kennedy, the usual "swing" vote on the court, mainly voiced concerns about police being able to obtain evidence and prosecute criminals who would use smart phones in their unlawful activities. It seemed at certain points as if he had forgotten that police could, after all, apply for a warrant and view potential evidence without any unconstitutional snooping.

The reactionary Antonin Scalia proposed a new rule that would allow warrantless searches of smart phones only to search for evidence of the crime for which the person was arrested. His stated aim was to avoid having a person having his iPhone searched for a seatbelt violation. Moderate liberal justice Ruth Bader Ginsburg seemed to share this as her primary concern, as did Obama appointee Elena Kagan. Such a rule as Scalia proposed, while perhaps seeming to strike a balance between the needs of law enforcement and privacy concerns, would represent a clear departure from established constitutional principles in a way that would greatly abrogate personal privacy.

The Obama administration put forward the position in both the *Riley* and *Wurie* cases that law enforcement should have broad authority to search a cell phone or other electronic device without a warrant. Given the administration's record of the unwarranted compiling of phone records, e-mails, ATM and banking information, and GPS data not only of US citizens, but even in some cases, of tapping the phones of foreign heads of state, this should come as little surprise.