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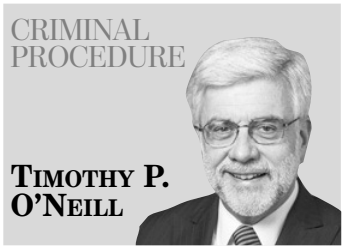
Unanimous high court decision recognizes rights in the digital age



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What was the blockbuster criminal decision of the U.S. Supreme Court's last term? Undoubtedly it was *Riley v. California*, No. 13-132 (June 25), which held that the police presumptively need a warrant to search digital information on a cellphone seized from a person who has been arrested.

But it was not just the result reached by Chief Justice John G. Roberts Jr.'s opinion that was extraordinary. It was the fact that the court's decision was unanimous as to the result; only Justice Samuel A. Alito Jr. filed a separate opinion concurring in part of the judgment. *Riley*'s impact will be immense and could very well reach digital privacy issues far beyond cellphones.

Riley concerned two separate cases. In one, the arrestee's smartphone was searched without a warrant. The police discovered various photographs and videos. These were used to link the defendant to a street gang. This led to his being convicted of attempted murder.

The companion case dealt with an older, much less sophisticated flip phone. Here, the police used the phone's call log to link the arrestee to drug and firearms offenses. In each case, the defendant asserted that the warrantless search by the police violated the Fourth Amendment.

Roberts begins by noting the general rule that all searches and seizures must be performed pursuant to a warrant. However, the court has long recognized a warrant exception in the case of searches incident to a lawful arrest. This is illustrated by two cases.

In *Chimel v. California*, 395 U.S. 752 (1969), the court held that, pursuant to an arrest, the police could automatically search both the arrestee and the area within his immediate control for the twin purposes of officer safety and to prevent the destruction of evidence.

Later in *U.S. v. Robinson*, 414 U.S. 218 (1973), the court emphasized that an arrest automatically entitled the police to make a complete search of the arrestee's person. It is irrelevant what the charge is. Moreover, the search may include the interiors of any containers found on the person; in *Robinson*, police were allowed to look into a cigarette package, where they found drugs.

The government in *Riley* argued that the cellphone was a container essentially no different from the cigarette pack in *Robinson*, and consequently, the police should be allowed to search its contents. But the court said "That is like saying that a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from Point A to Point B, but little else justifies lumping them together."

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The court emphasized that there is both "a quantitative and a qualitative" difference between cellphones and items such as purses, wallets or cigarette packs.

In fact, what we call a cellphone is actually a "minicomputer." Cellphones could just as easily be called cameras, video players or libraries. The *Robinson* rule is a narrow intrusion on privacy since it is limited to what people can physically carry. But the "immense storage capacity" of the cellphone dramatically alters the scope of *Robinson*: "Indeed, a cellphone search would typically expose to the government far more than the most exhaustive search of a house."

The court closes by emphasizing that cellphone information is not immune from a police search; it is just that a search warrant is generally necessary even when the phone is seized pursuant to arrest. Unless exigent circumstances are present, the court holds that the answer to what police must do before searching a cellphone seized incident to arrest "is accordingly simple — get a warrant."

The Fourth Amendment traditionally is an area of the law that severely splits the Roberts court. See *Herring v. U.S.*, 555 U.S. 135 (2009) (5-4 decision limiting scope of exclusionary rule); *Maryland v. King*, 569 U.S. __ (2013) (5-4 decision allowing DNA samples to be taken from people merely arrested for serious crimes); *Florida v. Jardines*, 569 U.S. __ (2013) (5-4 decision holding that a drug-dog sniffing within a home's curtilage is a search which requires a warrant and probable cause).

So how did such a split court render an essentially unanimous opinion?

Riley is unique for being able to bring together the usual pro-defense justices with those of a more libertarian, "get government off our backs" bent. The poster boy for this trend has been Justice Antonin G. Scalia.

Over the past decade, he has been vociferous in his insistence that government has no business snooping into a person's private life without a warrant. Examples of this can be found in his pro-defense positions in *King* and *Jardines*, as well as the use of thermal imagers in homes (*Kyllo v. U.S.*, 533 U.S. 27 (2001); installation of GPS devices on cars (*Jones v. U.S.*, 132 S.Ct. 945 (2012); and *Terry* stops based on anonymous tips (*Prado Navarette v. California*, decided April 22). (For a fascinating discussion of this side of Scalia, see Bruce Allen Murphy's new book "Scalia: A Court of One" (2014), 442-444, 477-480.)

But the other reason for the unanimity can be traced to the court's decision that an arrest is reasonable for any offense, regardless of how minor. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001). This means that even the most minor traffic violation can legally support an arrest.

A government victory in *Riley* would have meant that all of us — you, me and the nine justices — could conceivably have had our smartphones searched for driving 1 mph over the speed limit. This result obviously hit too close to home to all the justices.

It is difficult to predict the impact of *Riley*. But it is a welcome indication that the court views the digital world as unique. *Riley* may well be a landmark of Fourth Amendment law.