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Conducting Warranted Searches Without a Warrant

By Gregory Ward and Tyler Atkinson

Why is a cell phone like a cigarette package?

The Mad Hatter couldn't have asked a more perplexing riddle — but the California Supreme Court has offered its answer. In *People v. Diaz* (Jan. 3, 2011, No. S166600) 2011 DJDAR 109, the state Supreme Court recently ruled that data on a cell phone found on an arrestee's person, like a cigarette package found on the person, may be searched without a warrant and without probable cause.

In *Diaz*, a police informant purchased Ecstasy from a seller in a vehicle driven by the defendant. A deputy sheriff arrested the defendant for conspiracy to sell drugs and found a cell phone on his person. While the defendant was in custody, and without a warrant, the deputy sheriff accessed the text message folder of the cell phone by manipulating the phone and going through several different screens. The officer found a message that read, "6 4 80," which he believed to be code for "[s]ix pills of Ecstasy for 80 dollars." The officer showed the message to the arrestee, who then admitted his participation in the drug sale.

The defendant sought to suppress the fruits of the cell phone search as illegal under the Fourth Amendment to the U.S. Constitution. The trial court, Court of Appeal, and now the state Supreme Court, all ruled that the search was valid under U.S. Supreme Court precedent.

At the heart of the controversy is the Fourth Amendment's prohibition against warrantless searches and seizures. Under this prohibition, unless an exception applies, police officers cannot gather or search for evidence without a warrant issued by a neutral magistrate, and any fruits derived from a warrantless search can be suppressed at trial.

After acknowledging that warrantless searches are *per se* unreasonable, the Court in *Diaz* found the search was permissible as a search incident to lawful arrest. Under this exception, police may conduct a warrantless search of a person in lawful custody, including a search of objects found on that person. In *Diaz*, the Court held that, under U.S. Supreme Court precedent, this exception is absolute, and permits a search of *any* item found on the arrestee's person, regardless of its character, the arrestee's expectation of privacy in the item, or the reasonableness of the search under the circumstances. Although cell phones often contain voluminous private data, the state Supreme Court found that there is no room to read the high court's rulings in a way that would exclude these devices from the exception.

In reaching its conclusion, the Court relied primarily on three U.S. Supreme Court cases decided in the mid-1970s. The state Supreme Court found that the earliest of the three cases, *United States v. Robinson* (1973) 414 U.S. 218, created a bright line rule that permits warrantless searches of objects in the arrestee's "immediate possession."

In *Robinson*, a police officer arrested a man for driving with a revoked driver's license. During a pat-down of the driver, the officer found a crumpled cigarette package in the man's breast pocket. Noticing that the package contained objects that did not feel like cigarettes, and curious as to what it did contain, the officer looked inside and found heroin capsules.

In holding that the warrantless search was valid, the U.S. Supreme Court stated that a custodial arrest based on probable cause is "a reasonable intrusion under the Fourth Amendment; the intrusion being lawful, a search incident to the arrest requires no additional justification." The lawful arrest establishes the authority to search, and a full search of the person pursuant to an arrest is not only an exception to the warrant requirement but also *per se* a reasonable search under the Fourth Amendment.

Notably, the dissent in *Robinson* bemoaned the fact that the majority had apparently established a bright line rule — a departure from decades of case-by-case inquiry into whether a warrantless search is reasonable.

The Court in *Diaz* then looked to *United States v. Edwards* (1974) 415 U.S. 800, a case in which the "search incident to lawful arrest" exception was found to apply even well after an arrest. In *Edwards*, a suspect was arrested for breaking into a post office. The next morning, investigators seized his clothes and examined them for paint chips from the crime scene. The U.S. Supreme Court permitted the warrantless search and seizure despite the passage of time because the clothes were in the man's immediate possession at the time and place of his arrest.

The question of what constitutes "immediate possession" was addressed in *United States v. Chadwick* (1977) 433 U.S. 1, a case in which the high court ruled *against* a warrantless search. In *Chadwick*, police searched an arrestee's footlocker after it had already been lawfully seized at the time of the arrest. The Court ruled that because the footlocker was not "immediately" on the person of the arrestee, the search was not permitted. The Court further commented that an arrestee has "reduced expectations of privacy" in belongings on his person. This reduction of privacy expectations did not apply to items located away from his person.

In light of these opinions, the state Supreme Court concluded that when someone is lawfully arrested there is no limitation on the search of items located on the person and that cell phones must be treated as any other object.

Only one other state supreme court has addressed this issue and it held that searches of cell phones are not permitted by the "search incident to lawful arrest" exception. In *State v. Smith* (Ohio 2009) 920 N.E.2d 949, the court found that unless there is a risk that the data will be lost or there is a threat to public safety, a warrant must be issued before a search can be conducted on cell phone data.

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Both the majority in *Smith* and the dissent in *Diaz* argue that because cell phones are so fundamentally different from any object the U.S. Supreme Court could have considered over 30 years ago, any bright line rule established back then no longer has validity. Rather, these devices frequently contain an enormous amount of personal data, including videos, pictures, and messages, and therefore implicate a considerably heightened privacy expectation.

Further, the *Diaz* dissent asserts that while an arrestee has a reduced expectation of privacy in his or her person, there should not necessarily be a similar reduction in the *informational* privacy enjoyed as to the data stored on any electronic device, such as a phone. Indeed, one might question whether much of the data available on a smartphone is even in the phone, let alone on the person, at the time of an arrest. When data is stored on remote servers it is often not duplicated in the memory of the device used to access it (such as a cell phone). Is the search of such data the search of the person as recognized by *Robinson*?

Also, the U.S. Supreme Court recently expressed its concern about giving police "unbridled discretion to rummage at will among a person's private effects." In *Arizona v. Gant* 2009 DJDAR 5611, the Supreme Court found it appropriate to revisit an earlier decision of the Court authorizing searches of all objects found in the vehicle of a person at the time of arrest. The Court said that its earlier decision had been read too broadly and held that once an arrestee has been secured, objects in the vehicle may be searched without a warrant only if it is reasonable to believe that evidence of the offense might be found.

Given the broad scope of the *Robinson* ruling, the amount of personal information that may now be stored on, or accessed by, an electronic device carried on the person, the expectation of privacy in that information, and the split of opinion between state high courts, the riddle appears to be ready for U.S. Supreme Court review. Perhaps a cell phone and a cigarette package are not alike at all, and the correct answer is the same as that offered by the Mad Hatter to the riddle he posed to Alice: "I haven't the slightest idea."

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