The Fourth Amendment and Federalism: The Supreme Court Tussle Over the Two

*By Marc M. Harrold & Michael John Gorman**

This term, the Supreme Court will decide two cases on the Fourth Amendment. Both come from state supreme courts (Arizona and Virginia) and demonstrate a subtle but sizeable trend in state high courts to find greater individual protections in the Constitution, without first looking to their own charters of freedom. By finding those rights in the federal constitution, state courts are forcing the Supreme Court's hand. It is a needless game of chicken that good federalism can avoid.

Commonwealth of Virginia v. David Lee Moore

Tension between the federal government and the several states is nothing new. Indeed, it is expected in our system of dual sovereignty. What makes *Virginia v. Moore* revolutionary is its needless stretching of federalism's tight strings.

About the Case

In September 2003, a Portsmouth detective overheard radio chatter about a man known as "Chubs" driving around the city. The detective knew that "Chubs" was recently released from federal prison and had a suspended license. He radioed citywide for officers seeing "Chubs" to stop him. Two other detectives stopped "Chubs," later identified as David Moore, who in fact was driving on a suspended license. Although Virginia law mandated issuing a citation to Moore,[1] the detectives chose to arrest Moore. They handcuffed him, placed him in a squad car, and read him the *Miranda* warnings. While in custody, Moore also gave written consent to search his hotel room. There the detectives realized that, through miscommunication, neither officer had searched Moore at the scene of his arrest. So they searched him at the hotel room, finding crack cocaine and cash.

Moore admitted owning the crack. But at trial Moore moved to suppress evidence obtained from the search of his person, arguing that the search violated the Fourth Amendment, among others. The trial court denied Moore's motion and, at a bench trial, found him guilty of possession with intent to distribute.

On appeal, a panel of the Virginia Court of Appeals found that Moore's salvation lay in *Knowles v. Iowa*,[2] where the Supreme Court decreed that issuance of a citation for a traffic offense does not justify a full field search. In doing so, however, the panel may have ignored another Supreme Court case, *Atwater v. City of Lago Vista*,[3] where the Court permitted a field search for someone placed under custodial arrest for a traffic offense. It justified its tight embrace of *Knowles* by explaining that § 19.2-74 distinguished Moore's case from *Atwater*, because an officer cannot perform a custodial arrest for a traffic offense pursuant to § 19.2-75. Only a citation may be issued. And so, Moore's arrest and subsequent search were unconstitutional, making suppression "a logical and necessary extension of the decision in *Knowles*."[4]

The Commonwealth of Virginia moved for an en banc consideration and the court of appeals obliged. The full court reversed, holding that as long as the officers had probable cause to believe an offense occurred in their presence, they could arrest for that offense without offending the Fourth Amendment, despite Virginia law. Just because Virginia Code § 19.2-74 mandated a citation instead of an arrest did not create a *federal* constitutional violation and remedy. The court reinstated Moore's conviction. The Virginia Supreme Court reversed the en banc court of appeals, distinguishing *Atwater*. Because *Atwater* dealt with the validity of an arrest itself, not a subsequent search, the Virginia Supreme Court found its force was weak. Also, the court found that the officer in *Atwater* benefited from a state statute that gave complete discretion to arrest; because of §19.2-74, the officers in *Moore* did not. Because the detectives could not have made an arrest under state law, *Knowles* (and Virginia cases interpreting it) required suppressing the fruits of a full, field-type search. By the Virginia Supreme Court's handiwork, § 19.2-74 now had a federal constitutional patina; the remedy for violating it was suppression.

The U.S. Supreme Court has decided to weigh in on that conclusion.[5]

At the High Court

Besides the parties' briefs, the court benefited from briefs submitted by a modest set of seven amici. Virginia, along with its amici,[6] feared an uncertainty in Fourth Amendment jurisprudence. If each state could shellac constitutional varnish onto its statutes, the constitution actually loses its luster. Police officers, already perplexed by search and seizure standards, would become impotent in the field, having to determine when and how they can search after arresting.

Virginia also cried foul over its supreme court's encroachment on federal constitutional standards. Any groundswell to supply greater protection should come from state law sources (e.g., state constitutions), not from grafting state statutory standards onto federal constitutional analysis. Its own supreme court, the Commonwealth argued, had usurped federal authority.

Standing squarely between the twin pillars of uniformity and proper constitutional order, the Commonwealth and its amici petitioned for a federal constitution without state law accessorizing. Otherwise, as the United States as amicus made clear, "[c]onstitutionalizing the myriad and often technical state restrictions on arrest [would risk] creating a 'bog of litigation.'"[7]

Moore was more optimistic about the legal system's ability to cope. The Virginia Supreme Court's decision, according to Moore, was grounded in the principles of the Fourth

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Amendment. It was consistent with the Supreme Court's search and seizure jurisprudence:

As the Court has written since time immemorial, the cornerstone of the Fourth Amendment is reasonableness. To be reasonable an arrest and search must be justified by a significant governmental interest. No significant governmental interest can exists because Virginia's legislature determined that a custodial arrest was unnecessary under the circumstances.

By that logic, Moore continued, traces of state law are always discernable in the federal constitutional analysis.[8] The Virginia Supreme Court did nothing novel. Far from usurping federal authority, the court followed it.

Oral Argument

Oral argument before the Supreme Court was contentious. Justice Ginsburg began the questioning by asking Virginia's deputy solicitor general whether the search would have been illegal if the detectives had followed state law (by issuing a summons).

"Yes," the deputy replied.

"So," Justice Ginsburg asked, "would you explain the logic to saying that when police violate State law, then the evidence can come in; but when they comply with State law, it can't?"

That exchange colored Virginia's remaining time. Justice Scalia wanted to know who has arrest authority (a federal janitor, for instance) and exactly what the Commonwealth wanted from the Court. The justices seemed interested in how state law should affect federal constitutional doctrine. Should the nature of the offense, defined under state law, color the analysis? Should there be any color in the black-and-white probable cause standard?

The United States was next. Justice Scalia asked the deputy solicitor general whether the federal janitor at the Justice Department could arrest.

"Well, certainly, Justice Scalia, such an individual wouldn't have positive law authority to engage in an arrest," the deputy responded.

"Just as this person here didn't have positive law authority to engage in an arrest." Justice Scalia retorted.

To the United States, that may have been, but that does not alter the proper analysis: reasonableness. In this arena, it is exemplified by the black-and-white probable cause standard. Positive law authority, weighted however, should be one consideration in that standard. Thus, no state color is necessary (or proper) according to the United States.

The justices peppered Moore's attorney, Thomas Goldstein, with practical considerations. Justice Breyer wanted to know why the Fourth Amendment must turn on trivial things when cases like *Whren v. United States* (garbage search) refused to go down that road. Justice Alito and the Chief Justice wanted to know where to draw the line. Was it at state statutes or perhaps at departmental policy? Goldstein did not bite at the distinction. He stayed focused on the singular theme that an illegal arrest, no matter how it is illegal, breeds an unreasonable search.

The justices also broached the question of whether a constitutional remedy was even appropriate. If Virginia did not provide an exclusion remedy for violating its statute, why should the Court? Goldstein answered, because the evidence flowed from unconstitutional conduct. In a broader sense, the Court's jurisprudence implicates state law in some, but not all, cases. But this case surely does, Goldstein said.

Needlessly Stretching the Tight Strings

Indeed, primary control over this case rested with the Virginia Supreme Court, which could have resolved it without resorting to the Fourth Amendment. Under principles of federalism and institutional legitimacy, the court should have looked to its law first. Virginia law, not the Fourth Amendment, should have been the harbor of Moore's salvation. Perhaps in the contours of the Virginia Constitution a remedy lay slumbering. But it remained undiscovered because the court jumped instead to the federal constitution. Why? In the past, that court has held that the state constitution—the charter of its sovereign character—offers no more protection than the Fourth Amendment.[9] In Virginia, one's sole recourse is to the federal constitution, because Virginia courts have so chosen. That is an unfortunate result, antithetical to principles of good federalism.

Federalism demands more of Virginia courts. It demands they reclaim the thrown of state constitutional analysis. It demands they look to the state constitution as the primary source of positive rights, before recourse to the federal constitution. The court should look there even if it is likely to find nothing. If the Virginia Constitution, after having been meaningfully interpreted, provided no relief here, then so be it. Proceed to the Fourth Amendment. In the end, the court should recognize that the result is immaterial so long as the analysis is not.[10]

Had the Virginia court interpreted its constitution, the case would have been over. Instead, the court jacked up the federal constitutional floor across the country. Enter the Supreme Court that now must explore legal propriety and national implications. It is a needless exercise.

Arizona v. Gant

The U.S. Supreme Court's upcoming opinion in *Arizona v. Gant*[11] will re-examine the breadth and nature of one of the Fourth Amendment's most well-established exceptions: search incident to arrest.[12] The ruling has the potential to be a landmark. Besides affecting the Arizona state case, the ruling has the potential to affect one of the most well-established and enduring exceptions to the Fourth Amendment to the U.S. Constitution.[13]

The Facts

After receiving a tip about narcotics activity, two uniformed Tucson police officers went to a house where Rodney Gant answered the door.[14] The officers asked if the owner was home. Gant told them that he would be returning later in the afternoon. The officers left and ran a records check. They learned that Gant had a suspended driver's license and an outstanding warrant for driving on a suspended license.

Later that evening, the officers returned to the house. While they were at the residence, Gant drove up, parked in the driveway, and got out of the car. As he exited, an officer beckoned. Gant walked approximately eight to twelve feet towards the officer, who immediately placed him in handcuffs.

Gant was locked in the backseat of a patrol car, under the supervision of a police officer. The scene was "secure." The two officers then searched the passenger area of Gant's vehicle and found a weapon and a plastic baggie containing cocaine which led to criminal charges.[15]

The Arizona Supreme Court's Misinterpretation of Robinson and Re-insertion of Justification and 'Balancing' Analyses

In *Gant*, the Arizona Supreme Court held that "*Robinson* does not hold that *every* search following an arrest is excepted from the Fourth Amendment's warrant requirement."[16] This is true. First, a search incident to arrest is not "*every*" search that is performed post-arrest, but, instead is a search limited in scope to the suspect's person and open and closed containers within the wingspan or control of the arrestee.[17]

The Arizona Supreme Court then went on to state that "[o]nce those concerns are no longer present, however, the 'justifications [underlying the exception] are absent' and a warrant is required to search." The court cites two cases to bolster its holding; curiously both were decided prior to *Robinson*.[18] Contrary to what the Arizona Supreme Court says, *Robinson* "teaches" us that additional justification is not necessary, stating "[a] custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest *requires no additional justification*. It is the fact of the lawful arrest which establishes the authority to search…."[19]

The Arizona Supreme Court decided on a factual basis whether the "justification[s] [underlying the exception]"[20] were present, even though the U.S. Supreme Court has expressly held that no additional "justification" is needed. It is the status of the individual as one whom has been lawfully arrested (custodial arrest) that allows the police to perform the search.[21]

The Arizona Supreme Court also ignores another aspect of the *Robinson* holding: that the search incident to arrest doctrine is not only an *exception* to the Fourth Amendment, but is also a *per se* reasonable search under the Fourth Amendment.[22] As such, the type of balancing[23] the court engages in is unnecessary and prohibited because the U.S. Supreme Court has already determined that a search incident to arrest of a suspect who has been subject to lawful custodial arrest is *per se* reasonable.

Gant's Potential to Impact the Search Incident to Arrest Doctrine as Applied to Digital Devices

The progression of a great deal of Fourth Amendment caselaw can be seen in light of the emerging technologies that make up the fact patterns at issue. Automobiles,[24] helicopters,[25] buses,[26] public phone booths,[27] pen registers,[28] and portable thermal imaging devices[29] are all examples of how Fourth Amendment jurisprudence has evolved with how Americans live, travel, and communicate.

Currently, the law permits the police, pursuant to a lawful custodial arrest and without further justification (in other words based solely on the custodial arrest) to search the person of the arrestee and the area, including containers, (open or closed) within the reach or under the arrestee's control.[30] While it may seem intuitive that this search would be limited to a search for evidence, instruments of escape or items that could pose a danger to the arresting officers, *Robinson* rejects the need to articulate the particular reason police perform a search incident to arrest. The facts of *Robinson* are illustrative. In *Robinson*, the police officer, after arresting an individual for a revoked driver's license, searched a crumpled cigarette package and discovered heroin. There was no specific or additional justification[31] to search the crumpled cigarette package; it was searched because it was on the person of an arrestee. Nothing more. Nothing less.

As such, if digital devices (iPhones, iPods, Xboxes, laptops, the list is long and ever-expanding) are simply containers (as many courts have found them to be) then they can be searched incident to arrest if they are on the person of, or within the wingspan or under the control of, an individual subjected to lawful custodial arrest without additional justification, consistent with the U.S. Supreme Court's holding in *Robinson*.

While the *Gant* case does not specifically involve the search of a digital device, the ruling could have a major impact on searches of digital devices incident to arrest. If the U.S. Supreme Court limits the scope of *Robinson* by re-inserting a justification requirement the effect will be two-fold: specifically, the search of digital devices incident to arrest will be curtailed dramatically and, more generally, it will mark a dramatic shift in the application of one of the Court's most well-established Fourth Amendment doctrines.

Endnotes

1 Va. Code Ann. § 19.2-74 (Michie 2007).

2 525 U.S. 113 (1998).

3 532 U.S. 318 (2004).

4 Moore v. Commonwealth, 609 S.E.2d 74, 79 (Va. 2005).

5 Virginia v. Moore, 128 S. Ct. 28 (2007).

6 The Commonwealth was joined by a gaggle of its sister states who spent considerable time stressing the "profound consequences" that follow from the Virginia Supreme Court's decision. Among these are: a constitutional remedy that varies state-to-state; potential for conflicting judgments among the states and between state courts and the Supreme Court of the United States; and, a general misapprehension of search and seizure standards.

7 Brief of United States as Amicus Curiae, Virginia v. Moore, No. 06-1082, at 5 (filed Nov. 2007) (citing Wyoming v. Houghton, 526 U.S. 295, 305 (1999)).

8 For example, the Supreme Court has held that "[s]tate law determines the validity of arrests without warrant." Johnson v. United States, 333 U.S. 10, 15 n.5 (1948*); see also* Michigan v. DeFillippo, 443 U.S. 31 (1979).

9 El-Amin v. Commonwealth, 607 S.E.2d 115, 116 n.3 (Va. 2005), interpreting Va. Const. art. I, § 10 (Virginia's search and seizure analog).

10 To see which states have recognized that truism of proper federalism, see Michael J. Gorman, *Survey: State Search and Seizure Analogs*, 77 Miss. L.J. 417 (2008).

11 162 P.3d 640 (Ariz. 2007).

12 This article specifically discusses the justification question addressed by the Arizona Supreme Court in *United States v. Gant*. The court also discusses (among others) *Chimel v. California*, 395 U.S. 752 (1969) and *New York v. Belton*, 453 U.S. 454 (1981). Full discussion of these cases, and their respective doctrines, is outside the scope of this short article. For example, in *Thornton v. United States*, the Supreme Court ruled that the rule of *Belton* is not limited to situations where the officer makes contact with the occupant

while the occupant is inside the vehicle—"*Belton* governs even when an officer does not make contact until the person arrested has left the vehicle." Thornton v. United States, 541 U.S. 615, 617 (2004).

13 As indicated, herein, U.S. Supreme Court precedent has established that search incident to lawful arrest is not only an exception to the Fourth Amendment but is also a per se reasonable search under the Fourth Amendment.

14 Arizona v. Gant, 143 P.3d 379 (2006).

15 *Id.*

16 *Id.*

17 "[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that vehicle." New York v. Belton, 453 U.S. 454, 460 (1981). Further, "[i]t follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach." *Id*.

18 United States v. Robinson, 414 U.S. 218 (1973). The Arizona Supreme Court curiously cites to *Preston v. United States*, 376 U.S. 364 (1964) and *Chambers v. Maroney*, 399 U.S. 42 (1970), both decided after *Robinson*. The court cites to these cases for propositions that were rejected in *Robinson* in a circular-logic fashion.

19 *Robinson*, 414 U.S. at 235.

20 Arizona v. Gant, 143 P.3d 379 (2006) (internal citations omitted).

21 In theory, the Arizona Supreme Court could have asserted that individuals are afforded more protection in a state criminal matter due to Arizona State Constitution (if such protections exist); this was not at issue in this case.

22 *Robinson*, 414 U.S. at 235 ("…and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under [the Fourth Amendment].")

23 The traditional balance between the government's need to intrude upon the protected interest of an individual (protected interest determined by the two-pronged test (objective/subjective) to establish a reasonable expectation of privacy.)

24 Carroll v. United States, 267 U.S. 132 (1925).

25 Florida v. Riley, 488 U.S. 445 (1989).

26 Florida v. Bostick, 501 U.S. 429 (1991).

27 Katz v. United States, 389 U.S. 347 (1967).

28 Smith v. Maryland, 442 U.S. 735 (1979).

29 Kyllo v. United States, 533 U.S. 27 (2001).

30 *See generally* New York v. Belton, 453 U.S. 454 (1981). If the U.S. Supreme Court, in *Gant*, limits the scope of its *Belton* ruling, like a limitation of the scope of the *Robinson* ruling, this also could have a dramatic impact in the context of the search incident to arrest doctrine and digital devices. Again, a full discussion of *Belton*, and other search incident to arrest cases, is outside the scope of this article.

31 It does not appear that it was searched specifically for evidence, instruments of escape or weapons.