Journal of Criminal Law and Criminology

Volume 65 | Issue 4 Article 2

1975

Search and Seizure: Robinson v. United States, 414 U.S. 218 (1973), Gustafson v. Florida, 414 U.S. 260 (1973)

THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Copyright © 1975 by Northwestern University School of Law

Vol. 65, No. 4
Printed in U.S.A.

SEARCH AND SEIZURE

Robinson v. United States, 414 U.S. 218 (1973)
Gustafson v. Florida, 414 U.S. 260 (1973)

In *United States v. Robinson*[1] and *Gustafson v. Florida*[2] the Supreme Court held that when there is a lawful custodial arrest, a full search of the person arrested is not only an exception to the warrant requirement of the fourth amendment[3] but is also a "reasonable" search under that amendment. The absence of probable fruits or further evidence of the particular crime for which the arrest is made does not narrow the scope applicable to such a search.

Both *Robinson* and *Gustafson* involved violations of the motor vehicle laws which led to the arrest and subsequent search of the drivers. Robinson was driving a 1965 Cadillac when he was observed by officer Richard Jenks. Based on an investigation made four days earlier after a previous stop of Robinson, Officer Jenks had reason to believe that Robinson was driving with his license revoked; he therefore signaled Robinson to stop and placed him under arrest for "operating after revocation and obtaining a permit by misrepresentation."[4]

Following established police procedure for the District of Columbia, Jenks then began to search Robinson. During the pat down, Jenks felt an object in the heavy coat Robinson was wearing. The object did not feel like a gun and Jenks testified he had no particular indication that it was a weapon of any kind.[5] Jenks removed the object, however, and found it to be a crumpled cigarette pack which he then opened to examine the contents. Inside were fourteen gelatin capsules, later identified as containing heroin. This heroin seized from Robinson was admitted into evidence at the trial. Robinson was then convicted in the district court of possession and facilitation of concealment of heroin.

After remanding the case to the district court for an evidentiary hearing as to the exact scope of the search, the court of appeals reversed the conviction holding that heroin introduced in evidence against the respondent had been obtained as a result of a search which violated the fourth amendment to the United States Constitution.[6] The Supreme Court, however, found that a lawful custodial arrest authorized a full search of a person. The Court felt that the evidence obtained through such a search, even if unrelated to the specific crime for which the arrest was made, was properly admitted at trial.

Justice Rehnquist, writing for the majority in *Robinson,* noted that a search of a person incident to a lawful arrest is a traditional exception to the warrant requirement.[7] The majority admitted that disputes had arisen concerning the area surrounding the person which may be searched incident to his arrest, particularly since the establishment of the ex-

[1] 414 U.S. 218 (1973).
[2] 414 U.S. 260 (1973).
[3] U.S. CONST. amend. IV:
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.
[4] D.C. CODE ANN. § 40–302(d) (1967). This is an offense defined by statute of the District of Columbia which carries a mandatory minimum jail term, a mandatory minimum fine, or both.
[5] 414 U.S. 218, 241 (1973) (Marshall J., dissenting).
[6] United States v. Robinson, 471 F.2d 1082 (D.C. Cir. 1972).
[7] *See, e.g.,* Chimel v. California, 395 U.S. 752 (1969); United States v. Rabinowitz, 339 U.S. 56 (1950); Harris v. United States, 331 U.S. 145 (1947); Marron v. United States, 275 U.S. 192 (1927); Carroll v. United States. 267 U.S. 132 (1925). While these cases acknowledge the right of the police to search a person whom they have arrested, the issue before the Court has generally been the permissible area surrounding the person which may be searched, and thus, the Court's recognition of the right to search the person himself is not detailed or dispositive on the issue.

clusionary rule in *Weeks v. United States.*[8] They nevertheless found that the right to search the person arrested had been virtually unchallenged until the present case.[9] The Supreme Court had consistently recognized this general authority to search,[10] Justice Rehnquist argued, even in the most recent cases before it.[11] Since these cases not only recognized this type of search as an exception to the warrant requirement but also as an "affirmative authority to search," the majority felt that the cases clearly implied that the searches are also reasonable under the fourth amendment.[12]

The court of appeals had applied the "stop and frisk" standard of *Terry v. Ohio*[13] to a search incident to an arrest for a traffic violation. No further evidence could be obtained, and the only remaining rationale for the search, according to the court of appeals in *Robinson,* was to discover any weapons which might be concealed on the arrestee.[14] The Supreme Court, however, drew a sharp distinction between a stop and frisk situation and a full custody arrest. The *Terry* protective frisk could be made on less than probable cause and was a cursory procedure since the encounter between the officer and the person would be fleeting. In a full custody arrest, however, the person would be in contact with the officer for an extended period and the chance of serious harm resulting from a concealed weapon would be more pronounced.[15] These differences were so striking in the eyes of the majority that they disallowed any comparison of *Terry* with *Robinson.*

The *Robinson* majority disagreed with the court of appeals and the dissenting Supreme Court justices as to whether a search incident to an arrest must be limited to either 1) a search for concealed weapons, or 2) a search for fruits and instrumentalities of the crime for which the person was arrested. These two justifications for this exception to the warrant requirement appear in many Supreme Court opinions.[16] The passage discussed by the majority in *Robinson* comes from *Peters v. New York:*[17]

> the incident search was obviously justified 'by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime.' *Preston v. United States,* 376 U.S. 364, 367 (1964). Moreover, it was reasonably limited in scope by these purposes. Officer Laskey did not engage in an unrestrained and thorough going examination of Peters and his personal effects.[18]

The majority recognized these purposes as acceptable justifications for a search incident to

[8] 232 U.S. 383 (1914). This rule held that evidence seized in a search that violated the fourth amendment could be excluded from the subsequent trial of the person arrested.

[9] The Court cites Agnello v. United States, 269 U.S. 20 (1925), as an example of the long recognition given by the courts to the right to search an arrested person:

> The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as well as weapons and other things to effect an escape from custody, is not to be doubted.

Id. at 30.

[10] *See* note 7 *supra.*

[11] Cupp v. Murphy, 412 U.S. 291 (1973); Adams v. Williams, 407 U.S. 143 (1972).

[12] 414 U.S. at 226.

[13] 392 U.S. 1 (1968). The test established in *Terry* is "whether the officer's action was justified at its inception and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* at 19. Applying this test, the Court in *Terry* held that a stop and frisk was the only action permissible by a police officer when he was merely stopping someone for a traffic violation since no evidence could be obtained. The only justification for any type of search was to protect the officer by seeking concealed weapons. Since this would ostensibly be the only purpose for a search when the person was arrested for a traffic offense, the court of appeals in *Robinson* extended the stop and frisk limitation to full custody arrests for traffic offenses.

[14] The court of appeals relied heavily upon Terry v. Ohio, 392 U.S. 1 (1968), Sibron v. New York, 392 U.S. 40 (1968), and Peters v. New York, 392 U.S. 40 (1968), to establish a scope limitation principle for permissible searches, i.e. the scope of the search incident to an arrest must be limited to the reason for which the arrest was made. For further discussion see Note, *Scope Limitations for Searches Incident to Arrest,* 78 YALE L.J. 433 (1969); and Note, *Searches of the Person Incident to Lawful Arrest,* 69 COLUM. L. REV. 866 (1969).

[15] 414 U.S. at 234.

[16] *See* Chimel v. California, 395 U.S. 752, 763 (1969); Preston v. United States 376 U.S. 364, 367 (1964).

[17] 392 U.S. 40 (1968).

[18] 392 U.S. at 67.

arrest, but did not consider it necessary to limit an officer to the use of one of these criteria to later justify his actions in searching a person under arrest. Even if these were the only permissible rationales for a police search, the majority would still permit a full search of the person placed under a full custody arrest because of the greater danger of concealed weapons.[19] The majority felt that this "is an adequate basis for treating all custodial arrests alike for the purposes of search justification."[20]

By permitting a full search after a traffic arrest, the Court sought to avoid a case by case review to determine if a challenged search met one of the two purposes enunciated by previous decisions as justifying a search incident to an arrest. The Court established a presumption of reasonableness for a full search by stating that if the arrest was lawful then "a search incident to the arrest requires no additional justification." [21] The Court would still be willing, however, to consider a claim from the person searched that the search was unnecessarily abusive or severe as in *Rochin v. California*[22] where the person arrested was forced to undergo a stomach pump process to recover evidence he had swallowed. But the Court considered that the search in *Robinson,* albeit thorough, was still reasonable.

Perhaps the strongest statement of the Court's reasoning came in the concurring opinion to both *Robinson* and *Gustafson* written by Justice Powell. His basic premise was that an "individual lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person." [23] The mere fact that a custodial arrest has been lawfully made justified the search for Justice Powell, and he viewed a further requirement of some additional independent justification for such a search simply as a frustration of law enforcement. Thus for Justice Powell the intrusion into the privacy of a person by virtue of a full custody arrest is so pervasive that any further intrusion through a full search is insignificant.[24]

Justice Marshall, with Justices Douglas and Brennan joining, wrote the dissent which focused clearly on the need for a neutral judicial determination on a case by case basis of the reasonableness of any search.[25] This principle, they contended, is in direct contrast with the desire of the majority to establish a per se rule of reasonableness of searches incident to arrest. In establishing a per se rule, the majority sought to avoid overruling the ad hoc decisions of police officers. The dissent contended, however, that review of such decisions fulfills the exact purpose of the fourth amendment by ensuring that quick police judgments are subject to control and review by the judiciary.[26]

In the vast majority of cases a judicial officer must determine beforehand if an invasion of a person's privacy is justified.[27] The cases where no warrant is required are based upon a "few specifically established and well-delineated exceptions." [28] One such recognized exception is a search incident to an arrest.[29] The dissent, however, was careful to point out that an exception to a warrant requirement alone does not preclude further judicial inquiry into the reasonableness of the search. On the contrary, they argued that since the search incident to arrest was an exception, the courts should look carefully to ensure that the search

[19] *See* Abel v. United States, 362 U.S. 217 (1960); Agnello v. United States, 269 U.S. 20 (1925).

[20] 414 U.S. at 235.

[21] *Id.*

[22] 342 U.S. 165 (1952).

[23] 414 U.S. at 237 (Powell, J., concurring).

[24] This statement of Justice Powell that no significant fourth amendment interests in a person's privacy remain after he has been subjected to a full custody arrest is sweeping and perhaps even hyperbolic. It is truly doubtful that Justice Powell would uphold a search that was abusive or excessively thorough when the arrest was made for a mere traffic offense, and no other facts led a police officer to expect more. Under facts different from *Robinson* or *Gustafson,* then, Justice Powell would probably give closer consideration to the rights of a person who has been arrested.

[25] *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971); Johnson v. United States, 333 U.S. 10 (1948); Go-Bart v. United States, 282 U.S. 344 (1931).

[26] 414 U.S. at 242 (Marshall, J., dissenting).

[27] *See* Katz v. United States, 389 U.S. 347, 356 (1967); Agnello v. United States, 269 U.S. 20, 33 (1925).

[28] Katz v. United States 389 U.S. 347 (1967).

[29] *See* note 7 *supra.*

meets the purposes for which the exception was initially granted.[30]

The dissent contended that the court of appeals' dual justifications for a police search were by no means novel. In *Barnes v. State*,[31] for example, the police arrested a person for a brake light violation and in the subsequent full search found a quantity of marihuana. The Supreme Court of Wisconsin held that since the person had been arrested, a frisk for weapons would have been reasonable. But they found the full search of the person violative of fourth amendment rights.

Federal courts have also recognized the limitations on a search incident to a traffic arrest. In *Amador-Gonzalez v. United States*[32] narcotics were discovered on the driver in a search following an arrest for a traffic offense. Judge Wisdom found this search unreasonable and cautioned that "fidelity to the Fourth Amendment commands that the exception not engulf the rule. The lawfulness of an arrest does not always legitimate a search." [33] Therefore, Justice Marshall felt that only a search to discover evidence or a search to disarm the arrestee justified an exception to the warrant requirement for searches incident to an arrest. He found support for this conclusion in the state and federal decisions which have limited searches incident to a traffic arrest to a protective frisk for concealed weapons.[34]

The dissent further said that the majority's desire to avoid case by case determinations of reasonableness was "misguided as a matter of principle." [35] They also felt it would not be successful on a practical level since a case by case determination would still have to be made to determine if the police improperly used a traffic arrest as a mere pretext for a search.[36] The police have broad discretionary powers in most cases either to issue a citation or to arrest a person. The decision to arrest will always be subject to judicial review, the dissent pointed out, to determine if the reasons for the arrest were legitimate or merely a pretext to search the person.

Justice Marshall rejected the blanket justification of a full search for a traffic-related arrest and stated that the search of Robinson could be broken down into three stages: the pat down, the removal of the cigarette pack,

[30] 414 U.S. at 243 (Marshall, J., dissenting). In Preston v. United States, 376 U.S. 364 (1964), the justification was clearly stated:

> The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime—things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest.

376 U.S. at 367.

The dissent argued that these two rationales are the only ones which could be used to justify a search. Even though Preston v. United States, 376 U.S. 364 (1964), and Chimel v. California, 395 U.S. 752 (1969), dealt primarily with searching the area surrounding the arrestee, the Court in those cases also considered the purpose of a search incident to arrest. The dissent in *Robinson* felt that only these purposes could justify any searches of the person or of the surrounding area.

[31] 25 Wis. 2d 116, 130 N.W.2d 264 (1964). *Accord,* State v. Curtis, 290 Minn. 429, 190 N.W.2d 631 (1971) (illegal right turn and defective taillights); State v. O'Neal, 251 Ore. 163, 444 P.2d 951 (1968) (*en banc*) (expired temporary license).

[32] 391 F.2d 308 (5th Cir. 1968). *Accord,* United States v. Humphrey, 409 F.2d 1055 (10th Cir. 1969).

[33] 391 F.2d at 313.

[34] It should be noted that some traffic offenses would, however, permit a full search of the individual. Typically when a driver is suspected of operating a motor vehicle under the influence of alcohol or drugs the officer would have a legitimate evidentiary purpose in subjecting the driver to a full search.

Likewise, if anything the officer notices during a stop for a traffic violation gives him probable cause to suspect other criminal activity, he would be authorized to search the persons. This type of situation has led some courts to establish a rule allowing a full search on a traffic offense, but Judge Wisdom, in Amador-Gonzalez v. United States, 391 F.2d 308 (5th Cir. 1968), stated that "when a case upholds the right to search incident to a traffic arrest, it is because facts became readily apparent to the officer which established probable cause." *Id.* at 317. Thus with no more indication of criminal activity or evidence than a traffic offense, many courts would not allow a search to go beyond a search for weapons even if the driver is placed under a full custody arrest.

However, there may also be some statutory violations of a non-traffic nature for which no evidence could be discovered by a search of the person and the dissent would contend that these, too, should be limited to a search for weapons only. An offense such as vagrancy would fall under this category.

[35] 414 U.S. at 248 (Marshall J., dissenting).

[36] United States v. Lefkowitz, 285 U.S. 452, 467 (1932). *See also* note 29 *supra,* where arrests for traffic offenses were seen as pretexts for a search.

and the examination of the contents of the pack. The pat down, he decided, was fully justified by *Terry* as a protective search of the individual. The removal of the cigarette pack was questionable since testimony showed that the officer had no fear that it was a weapon; yet, Justice Marshall seemed willing to admit that a full custody arrest may allow a more thorough investigation of the person arrested.[37] However, the dissent found no justification whatsoever for an examination of the contents of the pack. Even if a weapon were concealed in the pack the person could not utilize it since the pack was in the custody of the officer.[38] This was the crux of the case: the majority stated that no justification was needed for a full search beyond the fact of a valid custodial arrest; whereas, the dissent insisted that every search incident to an arrest must be justified by one of the purposes given to establish this exception to the warrant requirement.

In *Gustafson,* the companion case to *Robinson,* the petitioner was arrested for driving without a driver's license, which he had left at home. A full search of his person revealed a quantity of marihuana in a cigarette box in his pocket, and he was later prosecuted successfully for possession of narcotics. Again, as in *Robinson,* lawful arrest was the key which allowed a full search regardless of the fact that no evidence could exist or that the officer had no fear that the object seized was a weapon of any kind.[39] To justify this search, the majority cited its statement in *Robinson:*

> The authority to search a person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect.[40]

Thus, in the majority view, the presence of probable cause to arrest a person is sufficient reason to permit a full search of his person.

Again, Justice Marshall, with Justices Douglas and Brennan joining, wrote a dissent which pointed to the dual purposes which justify a search incident to arrest, one of which must be met in each such search. Considering the facts of *Gustafson,* the dissent found no evidentiary basis for the search since the arrest was made for driving without a license.[41] They

[37] Justice Marshall felt that a balance must be struck between those factors permitting a limited search and those allowing a fuller investigation of the person. In the former category he found that there was little reason to fear that a traffic offender will be armed, especially one who, as Robinson, had complied promptly with every police directive. These considerations favored a more circumscribed scope of search for a traffic arrest. However, in the latter category of factors favoring a fuller search he found that the dangers inherent in a full custody arrest provide a basis for allowing a more complete search to ensure that no weapons are concealed. Justice Marshall did not decide in the present case whether the removal of the cigarette case, with nothing more, was permissible since the police went beyond that action to delve into the contents of the pack itself. This latter intrusion made a pronouncement on the removal of the pack unnecessary.

[38] The dissent in the court of appeals sought to justify this examination of the contents of the pack as a protective measure since "if the package *had* contained a razor blade, or live bullets, the officer would have been alerted to search Robinson much more thoroughly since the possibility of there being other weapons concealed on his person would increase" 471 F.2d at 1118 (Wilkey J., dissenting) (emphasis in original). This line of reasoning was rejected by Chief Judge Bazelon of the court of appeals and was not adopted by the majority of the Supreme Court which authorized the search by the very fact of the custodial arrest.

The government also sought, on an alternative theory, to justify looking into the cigarette pack as an inventory search precedent to being placed in jail. This argument found no apparent favor with any member of the court since Robinson could have posted collateral and thereby avoided incarceration, thus eliminating the need for an inventory search. Even if an inventory search were required, moreover, it would not necessarily justify the police delving into the personal effects of the arrestee with a mere inventory purpose. *See* United States v. Mills, 472 F.2d 1231 (D.C. Cir. 1972).

[39] Gustafson had sought to distinguish his case from *Robinson* in order to make a stronger argument that the search was unreasonable. Gustafson contended that his case was different since there had been no prior contact between Gustafson and the police officer, as in *Robinson,* since the offense was trivial with no mandatory minimum sentence. Also, there were no police regulations here, as there were in *Robinson,* which required the officer to take Gustafson into custody. All of these factors were dismissed by the majority as irrelevant to the constitutional issue. "It is sufficient that the officer had probable cause to arrest the petitioner and that he lawfully effectuated the arrest, and placed the petitioner in custody." 414 U.S. at 264.

[40] 414 U.S. at 235.

[41] The state had argued in *Gustafson* that the officer had reason to suspect that the driver was intoxicated and that this would allow a full search

also found that the search for weapons had exceeded the scope allowed for a mere search for concealed weapons. Justice Marshall noted that even if the cigarette pack did contain a deadly weapon, it could not have done the officers any harm since the pack was in their possession. Thus, looking into the pack clearly failed, in the opinion of the dissent, to satisfy either ground for allowing a search incident to arrest.

These two decisions give the police broad power to search fully a person whom they arrest for any violation. The police do not need to tie the search to the justification of disarming the suspect or seeking evidence of the crime for which the person was arrested. Still, despite this rather broad authorization, there are some limits and uncertainties as to how far this decision will allow the police to go.

Those who disagree with this decision fear the great possibility for abuse. The police may make arrests for minor offenses in order to justify a full search of the person. This concern was shared by some members of the Court and was specifically discussed by Justice Stewart's concurring opinion in *Gustafson.* Justice Stewart noted that it appeared that Gustafson might have attacked as violative of his rights the fact that he was placed under a full arrest for such a minor charge.[42] Since no such claim was made, however, he affirmed the constitutionality of the full search that ensued. Justice Powell also recognized that a claim by Gustafson that the arrest was a mere pretext for a search would have presented a far different question for the Court.[43]

Thus, present throughout the opinions in these two cases is the realization of the possible abuse by police and an implied willingness to invalidate searches that were results of arrests made for minor offenses or merely as an avenue to enable the officer to search the person.[44] No such allegations reached the Supreme Court in these two cases, but such allegations may present a possible mode of attacking searches made after certain minor traffic arrests.

A continued requirement that the search be reasonable in nature would also limit the full search authorized by *Robinson* and *Gustafson.* The majority did take care to state that the search of Robinson "partook of none of the extreme or patently abusive characteristics which were held to violate the due process clause of the fourteenth amendment in *Rochin v. California.*"[45] Thus, although the lawfulness of the custodial arrest seems to give presumptive reasonableness to the scope of the search subsequent thereto, a standard of reasonableness in the nature of the search must also be met.

of the driver to discover evidence of that fact. *See* note 32 *supra.* Justice Marshall rejected this theory since Gustafson was not even charged with an offense involving intoxication.

[42] 414 U.S. at 266.

[43] 414 U.S. at 238, n.2. Justice Powell seems to feel that *any* arrest made as a pretext for a search would be invalid whether for a minor or serious offense. Justice Stewart speaks only of an arrest for a minor offense, yet he may be limiting himself to the facts of *Gustafson* and would arguably agree with Justice Powell that when any arrest is made as a mere pretext for a search, it must be held invalid.

[44] Given this possibility for abuse the solution advocated by the dissent would be to disallow any search not satisfying the stated purposes for allowing the incident search. The majority would rather determine if the arrest was made lawfully, i.e. not as a mere pretext, and then permit any search of the person thereafter.

[45] 342 U.S. at 165.

United States v. Edwards, 415 U.S. 800(1974). Cardwell v. Lewis, 417 U.S. 583 (1974). United States v. Matlock, 415 U.S. 164 (1974).

In addition to *United States v. Robinson,*[1] three more search-and-seizure cases in the October term 1973 illustrate the Supreme Court's internal struggle with the standards for warrantless searches. The majority seemed willing to expand the exceptions to the fourth amendment's warrant requirement. The dissent argued for continuing the narrow inter-

[1] 414 U.S. 218 (1973), *See,* Note, *Search and Seizure,* 65 J. CRIM. L. & C 448 (1974).

pretation of the exceptions for a search incident to an arrest,[2] an automobile search,[3] and third party consent to a search of property.[4]

In all three cases there was no danger to the arresting officer and no search for weapons. The police found evidence of the same crime for which the person was arrested. In all cases there was sufficient cause for the issuance of a search warrant, sufficient time to secure the warrant, and almost no possibility that the evidence would disappear while the police were obtaining a warrant.

In *United States v. Edwards,*[5] the defendant was lawfully arrested late one night, was charged with attempting to break into a post office, and was incarcerated. Police investigation at the scene indicated the possibility that evidence (paint chips from a window sill) might be on the defendant's clothing. The next morning the police gave the defendant a newly-purchased T-shirt and trousers in exchange for his clothing, which was then found to contain paint chips. This evidence was received at trial over the objection that the clothing and the results of its examination were inadmissible because the warrantless seizure of the clothing was invalid under the fourth amendment.

The Court of Appeals for the Sixth Circuit[6] agreed with the defendant. Relying on *Chimel v. California,*[7] the court maintained a narrow interpretation of the allowable search incident to an arrest. As exceptions to the fourth amendment's warrant requirement, such searches were justifiable only to remove weapons or seize evidence. Only the arrestee's person and the area within his immediate control could be searched.[8]

The Sixth Circuit said the facts of *Edwards* provided cause to believe there was evidence.[9]

> The clothing seized and searched certainly was within his immediate control and probable cause existed to believe that paint chips would be found on the clothing.
> Appellant's clothing could, therefore, properly have been the subject of a search incident to a lawful arrest because it was within the limited area defined in *Chimel.*[10]

But the court stated that the seizure of the clothing was *not substantially contemporaneous* with and confined to the immediate vicinity of the arrest.[11] It occurred after the administrative process and mechanics of arrest had come to a halt.[12] Ten hours was considered too long a delay.

The Sixth Circuit in *Edwards* specifically disagreed with the Second Circuit view in *United States v. Caruso.*[13] There, after continuous pursuit from the scene of the crime, the police apprehended the suspect and took him to the local police station where his clothes were removed, searched, and returned to him. After arraignment, he was given regular prison garb, and his own clothes were turned over to the F.B.I. for use as evidence. There was a total time lapse of about six hours between the moment of arrest and the final taking of his clothes by the F.B.I.

The Second Circuit upheld the seizure of clothing in *Caruso,* saying that "the clothes were constantly in sight, were taken on the person of the suspect at the time of arrest and were continuously in custody."[14] The court reasoned that these factors distinguished the situation from that in *Preston v. United States,*[15] which invalidated an automobile search which was not undertaken until the occupants had been arrested and taken into custody and the car had been towed to a garage. The *Preston* court stated that the search was too remote in time or place to have been incidental to an arrest:

> Once an accused is under arrest and in custody, then a search made at another place,

[2] United States v. Edwards, 415 U.S. 800, 809 (1974).
[3] Cardwell v. Lewis, 417 U.S. 583, 596 (1974).
[4] United States v. Matlock, 415 U.S. 164, 178 (1974).
[5] 415 U.S. 800 (1974).
[6] 474 F.2d 1206 (6th Cir. 1973).
[7] 395 U.S. 752 (1969).
[8] *Id.* at 762–63.
[9] 474 F.2d at 1210.
[10] *Id.*
[11] Several non-Supreme Court cases upheld the warrantless laboratory testing of the clothing of a jailed person, but the Sixth Circuit said that the time delay was not presented in those cases. 474 F.2d at 1210 n.1.
[12] 474 F.2d at 1211.
[13] 358 F.2d 184 (2d. Cir.), *cert. denied,* 385 U.S. 862 (1966).
[14] 358 F.2d at 185.
[15] 376 U.S. 364 (1964).

> without a warrant, is simply not incident to the arrest.[16]

In *United States v. Williams*,[17] the Fifth Circuit, like the Second Circuit in *Caruso*, upheld a seizure of clothing made several hours after the arrest. The court distinguished an earlier case[18] which had invalidated a search of clothing three days after the arrest.

Thus, in *United States v. Edwards*, the Supreme Court was faced with a developing split in the circuits over the time limits on a warrantless search incident to a valid custodial arrest. How contemporaneous must the search be? What circumstances can justify a delay in the search? Viewing the alternatives presented by the circuits, the Supreme Court clearly endorsed the Second Circuit's *Caruso* approach.

> [O]nce the defendant is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant even though a substantial period of time has elapsed between the arrest and subsequent administrative processing on the one hand and the taking of the property for use as evidence on the other.[19]

The Supreme Court decided the *Edwards* case perfunctorily by referring to *United States v. Robinson*.[20] Searches incident to custodial arrests were determined to be an exception to the warrant requirement,[21] and this exception:

> has traditionally been justified by the reasonableness of searching for weapons, instruments of escape and evidence of crime when a person is taken into official custody and lawfully detained.[22]

Writing for a majority of five, Mr. Justice White did not discuss whether reasonableness needs to be established in each arrest situation. He did not compare the *Robinson* situation in which there could be no further evidence discovered and in which the officer admitted that he was not searching for weapons. Apparently, the only problem deserving discussion was the delay in an otherwise justifiable search.

The facts of *Caruso* and *Edwards* facilitated the Court's upholding the later seizure of the clothing. A contemporaneous search would have involved stripping the arrestee in a public place[23] or leaving him naked overnight in a cell.[24] The Court's answer was simple: "searches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention."[25]

In response to the defendant's argument that the police had plenty of time to obtain a search warrant, the Court re-iterated an earlier holding that the test is " 'not whether it was reasonable to procure a search warrant, but whether the search itself was reasonable. . . .' "[26] The time period during which an

[16] 376 U.S. at 367.

[17] 416 F.2d 4 (4th Cir. 1969).

[18] Brett v. United States, 412 F.2d 401 (5th Cir. 1969). The defendant's clothes were taken from him shortly after arrival at the jail, as was the custom, and were held in routine jail custody for ordinary safekeeping for three days. They were searched, and incriminating evidence was found. The majority held that the "search was not incident to an arrest, because it was not even close to contemporaneous. . . ." *Id.* at 405.

[19] 415 U.S. at 807.

[20] 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 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 it is also a 'reasonable' search under that Amendment.
United States v. Robinson, 414 U.S. at 235, cited in United States v. Edwards, 415 U.S. at 803 n.3.

[21] The Court cites *Robinson*, Chimel v. California, 395 U.S. 752, 755 (1969), and Weeks v. United States, 232 U.S. 383, 392 (1914).

[22] 415 U.S. at 802–03.

[23] United States v. Caruso, 358 F.2d at 185–86.

[24] United States v. Edwards, 415 U.S. at 805.

[25] 415 U.S. at 803, The Court cites Abel v. United States, 362 U.S. 217 (1960), in which the defendant was arrested at a hotel and decided to take the property with him to the place of detention.

[26] 415 U.S. at 807, quoting from Cooper v. California, 386 U.S. 58, 62 (1967). These same words appear in United States v. Rabinowitz, 339 U.S. 56, 66 (1950). In *Cooper* the accused was arrested and his car was impounded and searched a week later without a warrant. The search and seizure were upheld, as the *Edwards* Court pointed out, because they were
closely related to the reason petitioner was arrested, the reason his car had been impounded,

"incident search" may be conducted apparently extends far beyond what laymen would consider the "arrest."

> [I]t seems to us that the *normal processes* incident to arrest *and custody* had not been completed when Edwards was placed in his cell on the night of May 31. With or without probable cause, the authorities were entitled at that point in time not only to search Edwards' clothing but also to take it from him and keep it in official custody. There was testimony that this was the *standard practice* in the city. (emphasis added)[27]

Again, taking the prisoner's clothes

> was and is a *normal incident* of a custodial arrest and reasonable delay in effectuating it does not change the fact that Edwards was no more imposed upon than he could have been at the time and place of the arrest or immediately upon arrival at the place of detention. (emphasis added)[28]

The Supreme Court majority defined the "arrest procedure" broadly enough to include any of the routine practices at the station house. This decision does not subject the arrestee to searches other than those to which he could have been subjected at the time of the arrest.

If the police clearly understand the limits of a search at the moment of the initial encounter with an arrestee, then this ruling does not require any new instructions to police. Indeed, the decision endorses whatever searches are already routine, normal processes involved in keeping the arrestee in custody. It eliminates the necessity of obtaining a warrant.

In *Edwards,* a warrant would clearly have issued. However, the decision expands approval of searches arising from an emergency situation (the initial encounter, when evidence could well disappear) to include non-emergency situations in which the evidence could not disappear while the police were obtaining a warrant. The way is laid open, as it was in *Robinson,* for pretextual arrests—perhaps for a traffic violation—and later searches of person and clothes "with or without probable cause"[29] to believe the clothes contain any evidence or weapons. There simply needs to be a valid arrest.

In *Cardwell v. Lewis,*[30] the police secured an arrest warrant at 8 a.m., anticipating an interview with a murder suspect at 10 a.m. the same morning. After a day of questioning, the suspect was formally arrested late in the afternoon. The police took his car keys and claim check and arranged to have his car towed from the public commercial lot to a police impoundment lot.

The next day a warrantless examination revealed that a tire matched the cast of a tire impression made at the scene of the crime and that paint scrapings were not different from foreign paint on the fender of the victim's car. In habeas corpus proceedings, both the federal district court and the Sixth Circuit reversed the conviction because the seizure and examination of the car violated the fourth amendment.

The Supreme Court reversed, concluding that no fourth amendment rights were invaded by the police examination of the exterior of the car (the tire and the paint). When probable cause existed, as it concededly did in this case,[31] the examination of the exterior of the car was not unreasonable and did not require a warrant;[32] nor did the seizure require a warrant.

Mr. Justice Blackmun, speaking for the plurality,[33] distinguished automobile searches from searches of a private home or office, stressing that the "primary object of the Fourth Amend-

and the reason it was being retained. . . . It would have been unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right, even for their own protection to search it. 386 U.S. at 61.

[27] 415 U.S. at 804.

[28] 415 U.S. at 805.

[29] 415 U.S. at 804, quoted in text accompanying footnote 22.

[30] 417 U.S. 583 (1974).

[31] The district court had found that at 8 a.m. there was probable cause to believe that the suspect's car had been used in the commission of the crime.

[32] 417 U.S. at 592.

[33] Mr. Justice Powell's concurrence on other grounds dilutes the significance of the plurality opinion. Mr. Justice Powell would limit federal collateral review of a state prisoner's fourth amendment claims solely to the question of whether the defendant was provided a full and fair opportunity to litigate his claim in the state courts. 417 U.S. at 596.

ment was determined to be the protection of privacy," [34] and that the "right of privacy . . . is the touchstone of our inquiry." [35] The mobility of automobiles justified searches under the special exigency exception to the warrant requirement of the fourth amendment. Furthermore, "[o]ne has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects." [36]

The issue then was

> whether the examination of an automobile's exterior upon probable cause invades a right of privacy which the interposition of a warrant requirement is meant to protect.[37]

In finding the probable cause search reasonable, the plurality distinguished this search from previous *un*reasonable car searches by saying that this search involved the *exterior* of the car and not personal effects.[38] The decision thereby upheld the search as not invading privacy.

The plurality opinion further held that "[u]nder the circumstances of this case, the seizure itself was not unreasonable." [39] Since the police could have examined the car on the spot, they could also seize it in order to facilitate the examination—as here where they needed the lab facilities to make a cast of the tire. The Court relied on *Chambers v. Maroney*.[40] In that case the police, acting on information supplied by a service station attendant and bystanders, arrested four men in an auto shortly after an armed robbery. The car was taken to the police station from the highway, "a public place where access was not meaningfully restricted." [41] A later warrantless search produced incriminating evidence, which was admitted in evidence.

The *Chambers* Court did not justify the search as incident to the arrest. Rather, it cited *Carroll v. United States*,[42] and upheld the search of the car because of its mobility. Given that there was probable cause to search the car for guns and stolen money, the *Chambers* Court saw no difference under the fourth amendment between (1) seizing and holding a car before presenting the issue of probable cause to a magistrate and (2) carrying out an immediate warrantless search.

The *Cardwell* plurality conceived of the *Cardwell* facts as being essentially the same as the *Chambers* facts: the seizure was justified by the "same considerations of exigency, immobilization on the spot, and posting a guard. . . ." [43] Indeed, the plurality argued that the *Cardwell* facts presented even more necessity for immediate seizure, since there was some possibility that the arrestee's lawyer or family might try to remove the car once they realized that the man was under arrest.

It was irrelevant that for several months the police had had probable cause to search the car. It was irrelevant that the police could easily have secured a warrant during the previous months or even during the interrogation of the suspect. In short, the search and seizure were justified by the existence of probable cause and by what the plurality conceived to be exigent circumstances.

The dissenting opinions in both *Edwards* and *Cardwell* were written by Mr. Justice Stewart, joined by Justices Douglas, Brennan, and Marshall. Both dissents emphasized the same considerations: there was plenty of time for the police to obtain a warrant, there was no possibility that the evidence would disappear. The issue was considered to be whether the government met its "burden of showing that the circumstances of this seizure brought it within one of the 'jealously and carefully drawn' exceptions to the warrant requirement." [44]

The dissent argued that the government failed to meet this burden. More specifically, the dissent in *Edwards* argued that the incident exception should not be extended to include searches conducted a full ten hours after the arrest. "[T]he mere fact of an arrest does not allow the police to engage in warrantless searches of unlimited geographic or temporal scope." [45]

[34] 417 U.S. at 589.
[35] 417 U.S. at 591.
[36] 417 U.S. at 590.
[37] 417 U.S. at 589.
[38] 417 U.S. at 591.
[39] 417 U.S. at 593.
[40] 393 U.S. 42 (1970).
[41] *Id.*
[42] 267 U.S. 132 (1925).
[43] 417 U.S. at 594-95.
[44] United States v. Edwards, 415 U.S. at 809.
[45] *Id.* at 810.

In *Cardwell,* the dissent argued that the automobile exception should be limited to situations involving a moving automobile, not to situations in which there was "no reasonable likelihood that the automobile would or could be moved. . . ." [46] The *Cardwell* facts presented no more of an emergency at the time of the arrest than had existed for the previous hours or even months. The suspect had been aware for several months that the police were investigating him. Soon after the crime, the police suspected that the car had been used to push the victim's car over an embankment. No prosecution spokesman, including the Solicitor General as amicus curiae, proffered any "satisfactory reason . . . for the failure of the law enforcement officers to have obtained a warrant. . . ." [47]

The dissent characterized the plurality approach as talismanic. The *Cardwell* dissent cited *Coolidge v. New Hampshire* [48] (on which the defendant had unsuccessfully relied): "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." [49] Similarly, in *Edwards,* the dissent argued that an arrest should not function as a talisman to justify searches at a much later time.

United Statesh v. Matlock,[50] involved yet another exception to the warrant requirement: the consent to the warrantless search of property. After the defendant was arrested in the front yard, police requested consent to search the house—not from the defendant, but from a Mrs. Graff, the 23-year-old daughter of the lessees. She consented to the search, which included the bedroom she said was jointly occupied by the defendant and herself. The police found $4,995 in a diaper bag in the only closet in the room.

At a suppression hearing, the district court held that where consent by a third person is relied upon as justification for a search, the government must show, *inter alia,* not only that (1) it reasonably appeared to the officers that the person had authority to consent but also that (2) the person had actual authority to permit the search. The court found that the government failed to prove the latter requirement, namely, that Mrs. Graff had actual authority to permit the search. This failure resulted from the court's exclusion of testimony about comments by Mrs. Graff and the defendant that they were married and shared the room. The Seventh Circuit affirmed.

The Supreme Court reversed by a 5–3 vote. The Court cited *Schneckloth v. Bustamonte*[51] for the general proposition that proper consent voluntarily given validates a warrantless search; it cited *Frazier v. Cupp*[52] and *Coolidge v. New Hampshire*[53] for the proposition that the consent of one who possesses common authority over, shares the mutual use of, or bears other sufficient relationship to the premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared.[54]

The district court followed these general principles but excluded the evidence which would have demonstrated that Mrs. Graff did have the requisite authority to consent. The court excluded Mrs. Graff's out-of-court statements that she and the defendant regularly slept in the east bedroom and testimony that at various times and places both Mrs. Graff and the defendant had represented themselves as husband and wife.

The Supreme Court held that this testimony should not have been excluded at the suppression hearing. Standards of admissibility at trial differ essentially from standards at proceedings in which a judge alone receives evidence and gives it "such weight as his judgment and experience counsel." [55] The Court referred to Rule 104(a) [Preliminary Questions] of the proposed Federal Rules of Evidence, which frees the judge from rules of evidence except for rules of privilege.[56] The Court also cited *Brinegar v. United States,*[57] which upheld the admission at a suppression hearing of evidence which would have been inadmissible at the trial itself.

[46] 417 U.S. at 598.
[47] 417 U.S. at 598 n. 2.
[48] 403 U.S. 443 (1971).
[49] 417 U.S. at 597, citing *Coolidge,* 403 U.S. at 461–62.
[50] 415 U.S. 164 (1974).
[51] 412 U.S. 218 (1973).
[52] 394 U.S. 731 (1969).
[53] 403 U.S. 443 (1971).
[54] 415 U.S. at 170–71, including n. 7.
[55] *Id.* at 175.
[56] *Id.* at 173–74.
[57] 338 U.S. 160 (1949).

The Court was convinced that the government had made the requisite showing of appropriate third party consent, but nevertheless remanded the issue to the district court for their consideration of the weight of the evidence.

The facts of the case made the decision seem reasonable: there was no reason to doubt that the statements were made or to doubt the truthfulness of the statements.[58] But it is not clear whether this holding would apply in situations where the testimony was more suspect. It is not clear whether the Court intends to reverse any and all exclusions from suppression hearings.

To Mr. Justice Douglas, in his dissenting opinion, the issue was not whether Mrs. Graff had authority to consent, or even whether her out-of-court statements were improperly excluded at the suppression hearing; rather, the issue was whether the police should have obtained a warrant. Justice Douglas pointed out that the police rummaged throughout the entire house at three different times during the day.[59]

The district court found (and the government did not contest) that there was no emergency, that the searches were not incidental to the arrest, and that there was adequate time to obtain a search warrant. To Justice Douglas this finding was crucial.

> This search is impermissible because of the failure of the officers to secure a search warrant when they had the opportunity to do so.[60]

Even when there is probable cause to search, police must obtain a warrant except in very narrowly prescribed circumstances.

Historically the warrant requirement sought to interpose a magistrate between the overly-zealous police and the citizen. The magistrate would limit the scope of the search, thus controlling unrestrained rummaging under the "feared general warrant," [61] a threat which the fourth amendment was intended to eliminate.

In emphasizing the traditional purpose of the warrant requirement, Justice Douglas's dissent echoed the dissents in *Edwards* and *Cardwell*. The magistrate presumably protected the citizen from unreasonable and overly-extensive searches; the slight inconvenience of obtaining the warrant paled beside the fundamental right of privacy.

The other dissent in *Matlock* was written by Mr. Justice Brennan, joined by Mr. Justice Marshall. The argument was the same as Justice Brennan's dissent in *Schneckloth v. Bustamonte,* namely, that one cannot be said to have consented voluntarily to a search unless one is made aware that he had a constitutional right not to be searched. As applied to the *Matlock* facts, this principle means that before the evidence can be admitted, the court must determine that Mrs. Graff consented "knowing that she was not required to consent." [62]

In these three search and seizure cases, the majority members of the Court demonstrated their inclination to expand three exceptions to the fourth amendment's warrant requirement. *Edwards* expanded the time limits of a search incident to an arrest; it allowed a search even without reference to probable cause or to the emergency by which the usual incident search was justified. *Cardwell* expanded the probable cause search of an automobile to include a situation of questionable exigency—a situation in which the police had hours and even months to secure a warrant. *Matlock* reversed the exclusion of testimony at a suppression hearing; the Court thus facilitated justification of a search by consent of a third party in circumstances where the police could easily have secured a warrant. The majority consistently rejected the dissents' arguments in all three cases that when the police have time to secure a warrant, they must.

[58] 415 U.S. at 175.
[59] The appeal involved only the evidence found in the first search.
[60] 415 U.S. at 180.
[61] *Id.* at 187.
[62] *Id.* at 188.