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Police routinely search suspects placed under arrest.¹ A search made incident to a valid arrest has long been recognized as exempt from the warrant requirement imposed by the fourth amendment.² Two rationales traditionally have been offered to justify this exemption: protection of the arresting officer from weapons concealed on the arrestee and the preservation of criminal evidence which the arrestee might seek to destroy. Last Term, however, the Supreme Court decided in two companion cases that an officer's power to conduct a personal search incident to a custodial arrest is absolute and not restricted to these rationales.

Defendant Robinson was stopped by a District of Columbia police officer for driving an automobile after revocation of his operator's permit and for obtaining a substitute permit by false representation. Robinson was placed in custody, advised of his rights and frisked by the arresting officer. During the frisk, the officer felt a bulge in Robinson's overcoat pocket; he reached into the pocket and removed a crumpled cigarette package containing small round objects. The of-


"Taylor suggests that there is "little reason to doubt that search of an arrestee's person and premises is as old as the institution of arrest itself." Id. at 28. "Neither in the reported cases nor the legal literature is there any indication that search of the person of an arrestee, or the premises in which he was taken, was ever challenged in England until the end of the nineteenth century...[and] the English courts gave the point short shrift." Id. at 29.

414 U.S. at 233 n.3.

² Weeks v. United States, 232 U.S. 383, 392 (1914); Agnello v. United States, 269 U.S. 20, 30 (1925). There are other exceptions to the warrant requirement. The first is a warrantless search of motor vehicles based upon probable cause to believe they are transporting contraband or criminal evidence. Originally developed during prohibition era to allow authorities to stop vehicles carrying illegal liquor, it has remained as a valid exception to the fourth amendment's warrant requirement. See Coolidge v. New Hampshire, 403 U.S. 443, 458-60 (1971); Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132, 153 (1925). See also State v. Lehman, 8 Wn. App. 408, 506 P.2d 1316 (1973). The second is a warrantless search because the defendant has consented to the search. See In re McNear v. Rhay, 65 Wn. 2d 530, 398 P.2d 732 (1965). For less common exceptions see C. Antieau, Modern Constitutional Law § 2.12 (1969); J. Cook, Constitutional Rights of the Accused: Pre-Trial Rights § 49 (1972).
ficer opened the package and discovered gelatin capsules, later found to contain heroin. At trial for possession of heroin, the capsules were introduced into evidence over the objection that they were the fruit of an illegal search; Robinson was convicted.3 The Court of Appeals for the District of Columbia Circuit, en banc, reversed the conviction, holding that the search of Robinson’s person had violated the fourth amendment.4

Defendant Gustafson was stopped by Florida police for weaving across the median stripe. Unable to produce his driver’s license, Gustafson was arrested for driving without a valid operator’s license and taken into custody. Before placing him in the squad car, the arresting officer conducted a frisk of Gustafson’s clothing but detected no suspicious objects. Upon completing the pat-down, the officer placed his hand in Gustafson’s coat pocket, extracted a Benson and Hedges cigarette box, opened the box and found marijuana cigarettes. At trial, the marijuana was introduced into evidence over Gustafson’s objection that the intensity of the search had violated the fourth amendment; Gustafson was convicted. The Supreme Court of Florida affirmed the conviction.5

In United States v. Robinson6 and Gustafson v. Florida,7 the Supreme Court reversed the District of Columbia Court of Appeals and affirmed the Florida Supreme Court, upholding in each case the validity of the search. This note will analyze the doctrinal consistency of these decisions with prior law of search and seizure incident to arrest. An evaluation of the Court’s rationale for its holdings also will be attempted, although the total absence of any discernable justification for

4. 471 F.2d 1082 (D.C. Cir. 1972). The court of appeals held that in a search incident to a traffic arrest, where there is no evidence of the offense to be preserved, the most intrusive search the Constitution will allow is a limited frisk for weapons, and even then only when the officer reasonably believes himself to be in danger. The court analogized the Robinson arrest to an investigative stop and held that in each case a search of the person must be no greater than necessary to uncover concealed weapons.
5. Gustafson was convicted at the trial court level for possession of marijuana. The Court of Appeal for the Fourth District of Florida reversed Gustafson’s conviction, holding that the search had violated the fourth and fourteenth amendments. Gustafson v. State, 243 So. 2d 615 (Ct. App. Fla. 1971). The Supreme Court of Florida reversed that decision, affirming the original conviction, State v. Gustafson, 238 So. 2d 1 (Fla. 1972).
expanding searches incident to arrest in either majority opinion makes such an evaluation difficult. The Court's holdings, nonetheless, are clear; a plausible justification for them will be suggested. Finally, this note will attempt to predict the future impact of Robinson and Gustafson on related search incident to arrest situations.

I. THE HOLDING

In both Robinson and Gustafson, the defendant was searched following an arrest for a "traffic" offense, a crime which does not inherently involve armed violence or evidence which can be concealed on the driver. Both defendants argued that while a weapons frisk may have been necessary as a precautionary measure during the traffic arrest, an officer who detects no suspicious objects during the frisk should not be permitted to rummage through the driver's pockets in exploratory fashion.

Justice Rehnquist, writing for a majority of six in Robinson, rejected what he considered unnecessary restrictions on the authority to search arrested persons. Reviewing the decisional law on search incident to arrest, from Pollock and Maitland to the present, the majority found no support for the contention that at least one of the two traditional rationales for the authority to search a person incident to arrest must be present to justify a search in each case. A police officer's decision to search an arrestee is "necessarily a quick ad-hoc judgment;" its constitutionality should not depend, Justice Rehnquist asserted, on what a court may later decide was the probability that weapons or evidence would be found on the suspect. A search incident to a lawful custodial arrest is "reasonable" per se under the fourth amendment, the Court held, and an arresting officer is entitled during the course of the search to inspect any item found on the arrestee; any contraband or evidence of an unrelated criminal offense may be seized. Justice Stewart, concurring in Gustafson, approved a full search incident to arrest, but suggested that the fourth and fourteenth amendments may be violated by a full custodial arrest for a minor traffic offense. Justice Powell, concurring in both Robinson and Gustafson,

9. Id.
10. Id. at 236.
viewed the fourth amendment from a privacy perspective. He reasoned that because the constitutional guarantee of privacy is abated by the fact of arrest, an individual under custodial arrest retains no significant fourth amendment protection for the privacy of his person.12

Justice Marshall, writing for the dissent in both cases,13 strongly criticized the majority’s categorical approval of full searches incident to arrest. Characterizing the majority’s holding as an ill-advised departure from the traditional notion that courts must adjudicate reasonableness on a case by case basis, the dissent argued that the fourth amendment requires that police conduct “be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.”14 Attention to the details of arrest and search is necessary, the dissent continued, in order to determine first whether the arrest was effectuated for legitimate reasons rather than merely as a pretext to search the arrestee, and second whether the method of search was reasonable under the circumstances.15 Since a search incident to arrest has the sole objectives of uncovering weapons and preserving evidence of crime, the dissent would have limited the scope of the search accordingly. If, as in most traffic arrests, there is no evidence of crime to be preserved, a search will be reasonable only if made to uncover concealed weapons. The dissent therefore concluded that while the arresting officers in Robinson and Gustafson were justified in conducting a self-protective frisk of the prisoner, they were not justified in opening the cigarette packages unless they reasonably believed them to contain weapons.16

II. SEARCH INCIDENT TO ARREST AS AN EXCEPTION TO THE WARRANT REQUIREMENT

Robinson and Gustafson are the first Supreme Court opinions to consider whether a traffic arrestee may always be fully searched. In these two opinions, the Court has expanded the exemption from war-
rant requirements for searches incident to arrest from a narrow privilege, limited by protectionary and evidentiary objectives, to one that is virtually unlimited.

A. Background: A Standard of Reasonableness

In 1925, in *Agnello v. United States*, the Court outlined in broad fashion the right of police to conduct warrantless searches incident to arrest, stating that a search of the person arrested and the place of arrest is permitted "in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody . . . " Applying *Agnello* in *Marron v. United States*, the Court affirmed a conviction for illegal sale of liquor based upon business ledgers seized at the time and place of the defendant's arrest, because the ledgers were related to the crime for which the arrest was made and were subject to later destruction by the defendant if not immediately seized. While reiterating in subsequent cases the general authority to search the person and place incident to arrest, the Court has stressed that the privilege to search is to be strictly construed. Courts were to judge the reasonableness of a particular search in light of the "inherent necessities" existing at the time of arrest and to adjudicate reasonableness on a case by case basis.

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18. *Id.* at 30.
21. *Trupiano v. United States*, 334 U.S. 699, 708 (1948), quoted in note 64 infra. See also *Go-Bart Co. v. United States*, 282 U.S. 344, 357 (1930). A search will be valid only if the arrest was made with a proper warrant or the arresting officers possessed probable cause to arrest. In *Go-Bart*, prohibition agents, acting under color of an invalid arrest warrant and falsely claiming to have a search warrant, entered the company's office, placed two employees under arrest and made a general search of the premises which revealed records used to convict the defendants.
In decisions subsequent to *Agnello* and *Marron*, the Court developed specific standards by which lower courts may judge the reasonableness of incident searches. The arrest must be lawful and based upon probable cause.\(^2\) It must not be a mere pretext to search.\(^2\) The search must be contemporaneous with the arrest.\(^2\) Finally, the search of the arrest vicinity must be confined to that area within the arrestee's immediate control.\(^2\)

As the *Robinson* majority emphasized, however, these standards have not included any requirement that, before the search can be initiated, exigent circumstances must indicate a need to search. While some lower courts have taken the view that an officer may not conduct a full search following an arrest for a minor, nonviolent offense,\(^2\) the Supreme Court has never specifically required that reasonableness of an arrest search be gauged from the seriousness of the crime.

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23. *Rios v. United States*, 364 U.S. 253, 261–62 (1960) (courts must pay particular attention to the sequence of events surrounding the arrest and search to determine if there was sufficient probable cause to arrest; an arrest may not be justified by what a later search reveals). "[A] search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success." *United States v. Di Re*, 332 U.S. 581, 595 (1948) (footnote omitted).

24. "An arrest may not be used as a pretext to search for evidence." *United States v. Lefkowitz*, 385 U.S. 452, 467 (1932) (discussed in note 20 supra); *Jones v. United States*, 357 U.S. 493, 500 (1958) (federal officers' purpose in entering premises was to search for illegal distilling equipment, and not to arrest the defendant); *Abel v. United States*, 362 U.S. 217 (1960) (administrative arrest warrant for deportation proceedings may not be misused to search for criminal evidence).

25. *United States v. Edwards*, 94 S. Ct. 1234 (1974) (once an accused has been lawfully arrested and is in custody, the effects in his personal possession at the place of detention that were subject to search at the time and place of arrest may be searched and seized lawfully without a warrant even after a substantial time lapse—twelve hours—between book-in and search); *Preston v. United States*, 376 U.S. 364 (1964) (car towed to police station and searched there "soon after" driver's booking for vagrancy was unreasonable search because too remote in time and place from arrest); *Stoner v. California*, 376 U.S. 483 (1964): (warrantless search of hotel room for evidence of robbery which occurred two days prior to arrest held unreasonable).


27. In light of the rationale developed to permit a warrantless search incident to arrest, and because traffic arrests do not normally involve a risk of violence, courts have been reluctant to uphold searches of traffic violators unless it could be shown that the arresting officer reasonably believed the driver to be armed. Since in the majority of traffic arrests there is no tangible evidence, other than perhaps the driver's license, to be preserved, a search of the driver would be reasonable only if made for self-protection.

In *People v. Marsh*, 20 N.Y.2d 98, 228 N.E.2d 783, 281 N.Y.S.2d 789 (1967), the defendant was arrested pursuant to a warrant for a speeding violation. Incident to the arrest, police searched the arrestee, taking from his pocket a book of matches found to contain evidence implicating him in a gambling ring. In reversing Marsh's conviction for gambling, the New York Court of Appeals held that an arrest for a traffic
B. Scope Limitations for Search Incident to Arrest: Place of Arrest

In its quest for a standard of reasonableness for arrest searches, the Court has faced the problem of defining the permissible scope of such searches. How widely or intrusively may police search and what may they seize?

In *Chimel v. California*, the Court defined the *spatial* scope of a permissible search. Police officers, after arresting the accused in his home for burglary of a coin shop, had conducted a warrantless search of his entire house, including attic and garage. Rejecting the prosecution's argument that the search was valid because conducted incident to arrest, the Court limited the scope of an incident search to the area within the immediate control of the arrestee. The Court defined the area within the arrestee's control as that area into which the arrestee might reach for a weapon or evidence of the crime.

offense does not provide police with the authority to search "unless the officer has reason to fear an assault or probable cause for believing that his prisoner has committed a crime." *Id.* at 786.

Similarly, in *People v. Superior Court of Los Angeles County*, 7 Cal.3d 186, 496 P.2d 1205, 1210–1214, 101 Cal. Rptr. 837, 842–46 (1972), the California Supreme Court held that marijuana seized during the search of a traffic arrestee could not be used as evidence. The California court concluded that the state has the burden of demonstrating the reasonableness of a search incident to arrest, a necessary element of which is either a belief that the arrestee was armed or else concealing destructible evidence. In Washington, the state has also been given the burden of "showing that the urgency of the situation made the chosen course imperative and permitted a search without a warrant within one of the exceptions." *State v. Smith*, 9 Wn. App. 309, 313, 511 P.2d 1390, 1393, *citing* *State v. Sanders*, 8 Wn. App. 306, 506 P.2d 892 (1973) (additional citation omitted).

The Tenth Circuit, in *United States v. Humphrey*, 409 F.2d 1055 (10th Cir. 1969), held that the driver of an automobile stopped for running a red light might be searched only if the circumstances attending the stop gave the officers probable cause to believe that the driver had committed a crime more serious than the traffic offense. In *Humphrey* the court stated:

We are in complete agreement with the prevailing federal and state authority which condemns the search of persons and automobiles following routine traffic violations. Such searches can only be justified in exceptional, on the spot circumstances which rise to the dignity of probable cause.

*Id.* at 1058. See also *United States v. Reid*, 415 F.2d 294 (10th Cir. 1969).

Even those courts which have consistently affirmed the legality of searches of drivers incident to traffic arrests have felt obliged to find that the officer was faced with threatening circumstances, no matter how slight. Thus, in *Mitchell v. State*, 482 S.W.2d 223 (Tex. Crim. App. 1972), the Texas Court of Criminal Appeals upheld a conviction for possession of marijuana found during the search of a driver stopped for running a red light. In its opinion the court stressed that because of the driver's hostile and abusive language toward the officer, a search of the driver for weapons was a reasonable, self-protective measure.

29. *Id.* at 763.
While the *Chimel* limitation applied only to a search of the vicinity of the arrest, and not to a search of the person of the arrestee, it clearly was derived from the original rationales for a warrantless search incident to arrest.\footnote{Id. at 762–63.} If the justification for a search is grounded on a need to disarm the arrestee and to prevent the destruction of evidence of the crime, then the search must be no broader than is necessary to accomplish these two objectives.\footnote{Id. at 767.} *Chimel* likewise is consistent with judicial statements that an arrest should not provide police with a broader power to search than would a search warrant specifically describing the place to be searched and the thing to be seized.\footnote{Id. at 762.}

C. **Scope Limitations for Searches of the Person: The Dissent’s Position**

The crucial issue in *Robinson* and *Gustafson* was not whether an officer has authority to search a traffic arrestee but whether he may conduct a full search of the person of the arrestee. Stated simply, should scope limitations similar to those applied to searches of the area surrounding the arrestee be applied to searches of the arrestee's person? In *Robinson* and *Gustafson* this inquiry was directed specifically at determining first whether the officers acted reasonably in removing the cigarette packages from the defendants' pockets and second whether their inspections of the contents of the packages were reasonable.

The issue raised by the officers' removal of the cigarette packages can properly be understood only in light of the stop and frisk doctrine of *Terry v. Ohio*.\footnote{392 U.S. 1 (1968).} In *Terry*, a plainclothes detective observed suspi-
cious behavior on the part of three men. Believing the men to be "casing a job, a stick-up," the officer approached the men, identified himself as a police officer and asked for their names. His suspicions not allayed by their mumbled responses, the officer spun one of them, Terry, around and patted down his outer clothing. Detecting a hard object, the officer removed a revolver from the overcoat pocket of the defendant. At trial, the gun was introduced into evidence over Terry's objection that the search had violated the fourth amendment; he was subsequently convicted.

Although Terry had not been under arrest at the time of the search, and consequently the search could not be justified as incident to arrest, the Court affirmed the conviction, reasoning that the officer had engaged in a limited weapons frisk for his own protection. Chief Justice Warren, writing for a majority of eight, held that when an officer investigates suspicious behavior with less than probable cause to arrest, and he reasonably believes a suspect to be armed and dangerous, the officer may frisk for weapons. Only if the officer feels what he believes to be a weapon during this pat-down may he reach beneath the outer garments and retrieve the object.

Terry emphasized that while an investigative stop is a lesser intrusion upon the individual's freedom of movement than is an arrest, it remains a seizure of the person under the fourth amendment. As such, to be justified any contemporaneous search of the person must be reasonable. Since the officer in Terry lacked probable cause to arrest, the Court concluded that a search under those circumstances could be justified only if made for a legitimate governmental interest. The Court found a sufficient governmental interest in the protection of police officers during investigation of suspicious activity, but stipulated that the scope of the search must be confined to that objective.

34. Id. at 6-7.
35. Id. at 30.
36. It is quite plain that the fourth amendment governs "seizures" of the person which do not eventuate in a trip to the stationhouse and prosecution for crime—"arrests" in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person.
37. Id. at 20-21.
38. And in determining whether the seizure and search were "unreasonable" our inquiry is a dual one—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 19-20.
In a companion case to *Terry, Peters v. New York*, the Court appeared to apply *Terry's* objective scope limitations to an actual arrest search. In *Peters*, an off-duty police officer surprised two men in what he suspected to be an act of burglary. The officer chased and caught one of them, Peters, and when Peters was unable to explain satisfactorily his presence in the building, the officer frisked him for weapons. Feeling what he thought could be a knife, the officer reached inside Peter's overcoat and removed a long cylinder which was found to contain burglary tools. Peters was convicted of possession of burglary tools.

Although the Court determined that the officer had probable cause to arrest Peters at the moment he seized him, the Court inquired into whether the scope of the search had been reasonable. Concluding that the officer first frisked Peters for weapons and removed only that object which he thought to be a weapon, the Court approved the search as "reasonably limited in scope by these purposes." The officer did not, the Court stated, "engage in an unrestrained and thorough going examination of Peters and his personal effects." Relying on *Terry*, the dissent in *Robinson* concluded that since both a frisk incident to an investigative stop and a search incident to a traffic arrest are defensive in purpose, no distinction between scope limitations in the two contexts should be made. Justice Marshall asserted that in neither *Robinson* nor *Gustafson* had the removal and inspection of the cigarette package been motivated by a defensive purpose. In *Robinson*, the officer had testified that he had extracted the object not because it felt like a weapon but because police regulations instructed an officer to examine all the contents of the arrestee's

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39. 392 U.S. 40 (1968). (*Peters* was decided together with *Sibron v. New York*.)
40. *Id.* at 67.
41. *Id.* This language from *Peters* was cited with approval in *Chimel*, 395 U.S. at 764.
42. *Robinson*, 414 U.S. at 252–55 (Marshall, J., dissenting). The dissent would not strictly confine all traffic arrest searches to *Terry* standards, but would allow for more intrusion if necessary in light of particular circumstances, as where "a suspect taken into custody may feel more threatened by the serious restraint on his liberty than a person who is simply stopped by an officer for questioning, and may therefore be more likely to resort to force," *Id.* at 254.
43. The dissent argued that once the officer had the cigarette package in his possession there was no further risk that the arrestee might extract a weapon from it and that opening the package did not further the protective purpose of the search. *Id.* at 255–56.
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pockets. In *Gustafson*, the officer had already conducted a thorough frisk of the arrestee and had detected no suspicious objects at the time he reached into the coat pocket and removed the cigarette package. Even if the officers had properly removed the objects believing them to be weapons, the dissent argued, the officers were foreclosed from inspecting their contents.

III. THE MAJORITY’S RATIONALE; CUSTODIAL ARREST IS ENOUGH TO JUSTIFY A FULL SEARCH OF THE PERSON BECAUSE . . . ?

Justice Rehnquist’s majority opinion is divided analytically into four parts. In part I of the opinion, Justice Rehnquist briefly examined the tangentially relevant Supreme Court decisions of the past 60 years, drawing two conclusions. First, the broadly stated rule [“that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment”] and the reasons for it have been repeatedly affirmed in the decisions of this Court since *Weeks v. United States* . . . nearly sixty years ago.

Second, these decisions “clearly imply that such searches also meet the Fourth Amendment’s requirement of reasonableness.” In part II of the opinion Justice Rehnquist attempted to distinguish *Terry v. Ohio* and, to a lesser extent, related scope limitation cases. Part III of the opinion explored the intent of the framers of the fourth amendment; Justice Rehnquist acknowledged for the first time in this section that “[v]irtually all of the statements of this Court affirming the existence of an unqualified authority to search incident to a lawful arrest

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44. In conducting a full field search, “even though [the officer] may feel something that he believes is not a weapon, he is instructed to take it out.” . . . The officer is taught to examine everything he has on him at the field search. Everything that we find in his pockets is examined to find out what exactly it is. *United States v. Robinson*, 471 F.2d 1082, 1088 (D.C. Cir. 1972) (citation omitted).

45. The dissent also argued that it would have been improper to open the cigarette package during an inventory search at the police station. *Robinson*, 414 U.S. at 258 n.7 (Marshall, Douglas & Brennan, JJ., dissenting).

46. 414 U.S. at 226.

47. *Id.* at 224.

48. *Id.* at 226.
are dicta." Then, in an unavailing attempt to buttress six decades of dicta, the majority opinion quoted at length from a century-old New Hampshire case and reviewed well-known treatises. Part IV of the majority opinion merely stated the holding.

Justice Rehnquist apparently intended to establish in part I that a full search of the person incident to a custodial arrest is traditional fourth amendment doctrine, but was relying upon opinion language which he later admitted to be only dicta. Part II is entirely defensive, an attempt to evade the Warren Court decisions imposing scope limitations on searches incident to a stop-and-frisk or to an arrest. Continuing this defensive posture in part III, Justice Rehnquist sought to shore up the conclusions reached in part I with very old lower court precedent while completely ignoring the far greater relevancy of more recent state court decisions. The end result is that only the holding in Robinson is clear; the rationale supporting the holding is undermined even by the majority opinion itself.

A. Arrest Distinguished from Stop

The Robinson majority rejected the application of Terry to arrest searches on two grounds: first, for the practical reason that a frisk is inadequate protection for an arresting officer, and second, because of the factual distinction that Terry did not involve a full arrest. The Robinson Court viewed the frisk limitations of Terry as devised exclusively for nonarrest encounters. While a stop may be relatively brief, the Court pointed out, a custodial arrest considerably prolongs the officer's contact with the accused. It is this danger of continued exposure which provides the "basis for treating all custodial arrests alike

49. Id. at 230.
50. Id. at 231, quoting Closson v. Morrison, 47 N.H. 482 (1867).
51. Justice Marshall, in dissent, questioned the utility of this historical inquiry: One need not go back to Blackstone's Commentaries, Holmes' Common Law, or Pollock & Maitland [all referred to in the majority opinion] in search of precedent for the approach adopted by the Court of Appeals. Indeed, given the fact that mass production of the automobile did not begin until the early decades of the present century, I find it somewhat puzzling that the majority even looks to these sources on the only question presented in this case: the permissible scope of a search of the person incident to a lawful arrest for violation of a motor vehicle regulation.
414 U.S. at 244.
52. See cases discussed in Robinson, 414 U.S. at 242 48 (Marshall, J., dissenting). See also cases discussed in note 27 supra.
for purposes of search justification." This continued exposure may provide the arrestee ample time to produce a weapon not discovered by a cursory frisk.

The distinction between a *Terry*-type stop and a full arrest is clearly discernible, the majority stressed, when one contrasts their respective legal consequences. An arrest, unlike a stop, is the initial stage of a criminal prosecution and "is inevitably accompanied by future interference with the individual's freedom of movement . . . ." By "subjecting the body of the accused to its physical dominion," the law assumes a control over the individual which necessarily diminishes fourth amendment protections. Justice Rehnquist repeatedly emphasized that it is the fact of custodial arrest which establishes the authority to search, without explaining why it should have this effect. If the permitted scope of a search incident to arrest is always greater than that of an investigative stop, the power to search varies with the degree to which police have seized the person; because an arrest involves a greater exertion of state authority over the individual than does a stop, the arrest carries with it a greater authority to search. The police need not show a necessity for a full search of the arrestee; the power to search is, under *Robinson*, a consequence of arrest.

According to the majority opinion in *Robinson*, the exception to fourth amendment protection for searches incident to arrest traditionally has been divided into two distinct analytical categories: search of

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The danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress and uncertainty, and not from the grounds for arrest. One study concludes that approximately 30% of the shootings of police officers occur when an officer stops a person in an automobile. Bristow, Police Officer Shootings —A Tactical Evaluation, 54 J. CRIM. L.C. & P.S. 93 (1963).

414 U.S. at 234 n.5.

54. 414 U.S. at 228, quoting *Terry*, 392 U.S. at 25–26:

[A]n arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons, and the interests each is designed to serve are likewise quite different. An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society's interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows.

Compare *Chimel*, 395 U.S. at 767 n.12:

And we can see no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require.

the arrestee's person and search of the arrest area. While the Court has dealt repeatedly with the constitutionality and permissible scope of area searches, Justice Rehnquist alleged that prior to Robinson no case had questioned the legality of searches of arrestees. Scope limitations and other criteria for reasonableness were developed to govern police conduct in searching arrest premises and therefore have no bearing on personal searches of arrested persons. Justice Rehnquist summarily refused to read language in Peters as imposing constraints on searches of an arrestee's personal effects, claiming that to do so would impose a "novel and far reaching limitation on the authority to search the person of an arrestee incident to his lawful arrest."

B. Custody and Privacy

The Robinson Court's authorization of a full personal search following any custodial arrest may be attributable in part to the very

56. 414 U.S. at 224.
57. Id. at 225. Justice Rehnquist did not mention Peters v. New York, 392 U.S. 40 (1968), see text accompanying notes 39-41 supra, which imposed a scope limitation on the search of a person already arrested "for purposes of constitutional justification." 392 U.S. at 67. See quotation in note 58 infra.
58. "Moreover, [the search] was reasonably limited in scope by these purposes. Officer Lasky did not engage in an unrestrained and thorough-going examination of Peters and his personal effects." Robinson, 414 U.S. at 229 quoting Peters, 392 U.S. at 67. Justice Harlan, concurring in Peters, wrote that he believed the second sentence above was not intended to impose scope limitations on an arrest search, but was "merely a factual observation." 392 U.S. at 77 (Harlan, J., concurring) (footnote omitted). quoted in Robinson, 414 U.S. at 229. Justice Douglas, also concurring in Peters, 392 U.S. at 69, reasoned that the arresting officer could "conduct a limited search of his person for weapons."

Relying on Justice Harlan's concurring opinion, and without mentioning the other four concurring opinions, Justice Rehnquist completely ignored the second sentence quoted from Peters, above, and summarily dismissed the remaining sentence with his "novel limitation" language. See discussion at note 59 infra.
59. 414 U.S. at 229. Justice Rehnquist's "novel limitation" terminology is highly questionable even on the basis of authority quoted in the Robinson opinion. See id. at 232, quoting from People v. Chiagles, 237 N.Y. 193, 197, 142 N.E. 583, 584 (1923), wherein Chief Justice Cardozo imposed scope limitations 50 years before Robinson: "[T]he search being lawful, he retains what he finds if connected with the crime." (emphasis added) See also 414 U.S. at 225, quoting from Agnello v. United States, 269 U.S. 20, 30 (1925), decided 48 years before Robinson:

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 its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted. (emphasis added). Agnello clearly imposed the two traditional scope limitations—self-protection and preservation of evidence—in 1925.
nature of custody itself. A person in custody is afforded fourth amendment protections only marginally greater than those afforded penitentiary inmates, even though his guilt has yet to be established. A traffic offender who is lodged in jail to await posting of bond may be subjected to shake-down searches, solitary confinement and other rigors of prison life. Lower courts have consistently upheld the constitutionality of such treatment, stressing that it is the prisoner’s status qua prisoner which restricts his fourth amendment protections.60

The assumption that constitutional privilege may be affected by an individual’s custodial status has played a major role in prior Court decisions. Thus, in Miranda v. Arizona,61 which established the right to remain silent and have counsel present during custodial interrogation, the Court held that the fifth amendment’s privilege against self-incrimination requires extraordinary procedural safeguards whenever police question an individual “in custody”; otherwise, the voluntary nature of the confession or communication is suspect. Whereas Miranda perceived custody as a status demanding added protection for fifth amendment rights, Robinson views custody as the threshold beyond which fourth amendment protections wane.

In Katz v. United States,62 involving warrantless wiretaps, the Court departed from the traditional concept that the fourth amendment protected only persons and property from physical trespass; fourth amendment protections must be observed, Katz concluded,
whenever and wherever an individual has a "reasonable expectation of privacy." The reasonableness of such an expectation by a person held in custody might well be questioned. Acceptance of an interpretation of the fourth amendment as providing constitutional protection for privacy expectations would offer an analytical justification for the lesser protection afforded persons in custody. The majority, however, relied less upon this reasoning than did Justice Powell.63

C. The Adequacy of the Majority's Rationale

The Court's justification for distinguishing Terry and for permitting a full search of an arrestee—the increased danger that supposedly arises from extended proximity with the arrestee—is less than persuasive. Certainly in Terry, where three men appeared to be planning a daylight robbery, there was far more likelihood that the suspects were armed and dangerous than was apparent during the arrests of Robinson and Gustafson. If the Supreme Court felt obliged in Terry to limit and restrict the scope of a search of suspects whose actions posed a potentially serious danger to the community, it seems incongruous that during an arrest for a traffic offense entailing little danger the Court would automatically permit an unlimited search of the arrestee.

Justice Rehnquist offered no authority to support his contention that the court traditionally has treated searches of the arrestee and searches of the arrest area as analytically distinct. While it is true that the Court has dealt most often with factual patterns involving evidence seized from the area around the arrestee, there is no indication in prior opinions that an individual may always be searched simply because he is under arrest. On the contrary, in past opinions the Court has stated expressly that the exemption from the warrant requirement is for the sake of necessity,64 to the extent that Robinson relied

63. "I believe that an individual lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person." Robinson, 414 U.S. at 237 (Powell, J., concurring). See also Charles v. United States. 278 F.2d 386, 388 (9th Cir. 1960):
To say that the police may curtail the liberty of the accused but refrain from impinging upon the sanctity of his pockets except for enumerated reasons is to ignore the custodial duties which devolve upon arresting authorities. Custody must of necessity be asserted initially over whatever the arrested party has in his possession at the time of apprehension.
64. A search or seizure without a warrant as an incident to a lawful arrest has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the time of the arrest. But there must be something
on lawful arrest alone as legitimizing a full search of the arrestee, it is inconsistent with precedent.65

The weakest element in the Court's analysis is its treatment of the right of police to inspect items found on the arrestee. Under the "plain-view" doctrine, police may seize any item of evidence or contraband which is discovered inadvertently during the course of a lawful search.66 The item must be clearly visible, however, and its incriminating character "immediately apparent."67 As enunciated in Coolidge v. New Hampshire:68

Of course, the extension of the original justification is legitimate only when it is immediately apparent to the police that they have evidence before them; the "plain-view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.

Gustafson clearly seems to contradict this rule; the discovery of the marijuana came only after a purposeful examination of an otherwise innocent looking cigarette package. Robinson complies better with the "plain-view" doctrine since the officer detected the suspicious contents of the cigarette package as he first held the package; he was alerted to the contraband without an exploratory investigation on his part. In neither Robinson nor Gustafson did the majority articulate the parameters of the "plain-view" doctrine in the context of traffic arrests. The majority's blanket assertion that police are entitled to inspect items found on the arrestee could lead, as the dissent recognized, to obvious abuses.69

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65. See 414 U.S. at 242–48 (Marshall, J., dissenting); see note 27 supra.
67. Id. at 466. For an interesting application of the "plain-view" doctrine, see Nicholas v. State, 502 S.W.2d 169 (Tex. Crim. App. 1973), where arresting officers who had neither knowledge nor suspicion of an offense related to photographic negatives, made deliberate efforts to examine the negatives, and only then did the officers become aware that the films might be evidence of a crime. The examination of the negatives violated the "plain-view" rule because the incriminating character of the negatives was not "immediately apparent."
68. 403 U.S. 443, 466.
69. Robinson, 414 U.S. at 257 (Marshall, J., dissenting);
One wonders if the result in this case would have been the same were respondent
D. Other Possible Justification

The Court neglected to emphasize the most logical argument supporting full searches of arrested persons—that the individual will be fully searched at the stationhouse anyway. The inventory or book-in search, applicable to all arrestees, is a notorious feature of custodial administration and, according to recent Supreme Court dicta, is a reasonable search under the fourth amendment. The majority might have stressed that a search which is legitimate at the jail can be considered no less legitimate simply because it is conducted at an earlier state of custody. It would seem inconsequential to the arrestee's interests where or when the search is made, and arrest searches would eliminate the arrestee's opportunity to dispose of incriminating evidence or to produce a dangerous weapon on the way to the stationhouse.

IV. THE IMPACT OF ROBINSON

To the extent that Robinson unqualifiedly permits searches of lawfully arrested persons, it will require courts to dismiss motions to suppress which allege only that the search was not for protective or evi-

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71. It would appear that this justification had been urged on the court of appeals, but not in the Supreme Court. Why the majority did not seize upon this justification is unclear. The dissent rejected this possible justification, reasoning first that stationhouse inventory searches are legitimized because of a governmental interest in keeping contraband of all types out of jail; because minor offenses are bailable, however, if an arrestee will never enter jail, a stationhouse search often may never occur. Second, the dissent argued that even if an inventory search contemporaneous to booking did occur, it would have been sufficient simply to remove all of the arrestee's possessions without examining their contents. Hence, the cigarette package should not have been opened and examined even at the stationhouse. Robinson, 414 U.S. at 258 n.7.
dentary objectives. Because the test for a reasonable search can be reduced, under Robinson, to a simple determination of the legality of the arrest, courts must pay particular attention to the circumstances of the arrest, especially the sequence of events leading to and including the arrest and search and the possibility of pretext arrests.

A. Custody Must Still Precede the Search

Robinson adheres strictly to the requirement that custodial arrest must precede the search. As a practical matter, however, the sequence of arrest and search may be elusive. Although Robinson does not authorize a search retroactively where the officer's decision to effect a custodial arrest came only after searching a detainee and finding incriminating evidence, if probable cause to arrest existed prior to the search, it is unlikely that the officer's abuse could be established. Thus, in practice every person stopped for a minor traffic offense could be fully searched. If the search reveals contraband or other evidence, the officer may assert that the person was under custodial arrest at the time. If the search yields nothing, the officer can issue a citation and allow the driver to proceed. So long as the officer had probable cause to arrest and the discretion to take the person into custody, the decision to implement that discretion could well occur subsequent to a full search.

72. However, where the record clearly establishes that the custodial arrest occurred after the warrantless search of the person or automobile, Robinson reasoning will not apply. See State v. Shoemaker, 11 Wn. App. 187, 191, 522 P.2d 203, 205–06 (1974) (footnote citing Robinson omitted):

The initial contact with the defendants involved a defective taillight. While the driver was detained to discuss this defect, a custodial arrest was not made prior to entry of the vehicle. There being no arrest, no search could have been performed incident to an arrest.

73. Some courts have liberally construed the authority to search and have not required in every instance that the defendant be under formal arrest at the time of the search. See United States v. Riggs, 474 F.2d 699 (2d Cir. 1973).

On the subject of sequential arrests where the accused is under arrest for one offense and police conduct a search which yields evidence of a second offense, it is generally conceded that it is unnecessary to place the defendant under arrest a second time. In Adams v. United States, 399 F.2d 574 (D.C. Cir. 1968), then Circuit Judge Burger challenged the concept of what he called "divisible arrest." He stated:

The reason for requiring probable cause for an arrest is to protect against arbitrary interference with liberty. When the condition of custody already exists, however, the constitutional requirement of an arrest on probable cause would be totally superfluous—a sheer ritual serving no legitimate protective function. Id. at 581 (Burger, J., concurring).
B. Pretext Arrests

Neither Robinson nor Gustafson considered the issue of pretext arrests since both defendants conceded the legality of their arrest.\(^74\) In each case the majority noted that a custodial arrest for the particular traffic offense was not an extraordinary or unusual procedure.\(^75\) Justice Rehnquist implied, however, that an irregular or contrived custodial arrest is invalid authority for a Robinson-type search.\(^76\)

Because municipal codes often permit custodial arrest for minor and even trivial offenses,\(^77\) the risk of pretext arrests is heightened. It is conceivable that in those instances where there is insufficient probable cause to secure a search warrant, police could arrange to arrest a suspect for violating a leash law or for running a stop sign solely to invoke Robinson's "unqualified authority" to search the arrestee.

C. The Impact of Robinson on Searches of Motor Vehicles Incident to the Driver's Arrest

Since the evidence in both Robinson and Gustafson was seized during a search of the person of the arrestee, the Court was not required to decide whether a search of an automobile following the driver's arrest is always permissible. Until this question is answered, some courts may interpret Robinson strictly as allowing only a search of the driver.\(^78\) Other courts, seeking to uphold the seizure of evidence

\(^74\) Justice Stewart, concurring in Gustafson, pointed out that, had the defendant not conceded the legality of his arrest, a persuasive claim might have been made that a custodial arrest for a minor traffic offense violates the fourth and fourteenth amendments. Gustafson, 414 U.S. at 266.

In State v. Shoemaker, the Washington Court of Appeals stated in dictum that an arrest for a defective tail light would not justify a search of the vehicle, noting: "The evidence of the crime, defective equipment, was in plain sight and no entry of the vehicle was justified." 11 Wn. App. 187, 192, 522 P.2d 203, 206 (1974).

\(^75\) Robinson, 414 U.S. at 223 n.2; Gustafson, 414 U.S. at 265 n.3.

\(^76\) Robinson, 414 U.S. at 221 n.1.

\(^77\) See Seattle, Wash., Code § 21.70.140 (1958), which provides that violations of the traffic code such as speeding, overtime parking, running a stop sign, hauling manure in the business district, standing in truck loading zones, and embracing another while driving are punishable by fine and/or imprisonment (not to exceed $500 or six months or both). Id. § 12.02.060 provides that a police officer may arrest a person without a warrant if the officer has probable cause to believe that the person has violated an ordinance in the officer's presence, or not in his presence if the violation involved bodily harm or property damage or the threat of either and the officer reasonably believed that immediate arrest was necessary to prevent escape or further injury.

Search Incident to Custodial Arrest

from an automobile, may cite Chimel's authorization of a search of the area within the arrestee's control as validating a search of the vehicle.

Those Court cases dealing with evidence taken from an automobile following the driver's arrest have fallen into two categories. The first category encompasses vehicle searches involving probable cause to believe that the vehicle contains contraband or criminal evidence. The second category covers noninvestigative searches made to inventory the contents of impounded vehicles.

Because of the mobility of motor vehicles and the fact that they can be quickly moved out of the jurisdiction in which police must seek a warrant, the Court has recognized that police may stop a vehicle and conduct a warrantless search if there is probable cause to believe the contents of the vehicle "offend against the law." If probable cause exists to search at the moment the stop is made, police may search for criminal material at that time or later when the vehicle is impounded.


82. In Chambers v. Maroney, 399 U.S. 42, 52 (1970), the Court held that if probable cause to search existed prior to impoundment then it continues after impoundment and authorizes the warrantless search of the vehicle, even though the exigent circumstances no longer compel an immediate search. Compare Coolidge v. New Hampshire, 403 U.S. 443, 462 (1971), in which the Court implied through dicta that a warrantless search of a vehicle must be premised on exigent circumstances and necessities. Coolidge referred to Carroll as permitting searches of impounded vehicles only if there was probable cause to search at the time of the driver's arrest or the seizure of the vehicle.

In Cooper v. California, 386 U.S. 58 (1967), police arrested the defendant for a narcotics violation and seized his automobile as required by state law for forfeiture.
The vehicle may be stopped and searched regardless of whether the driver is to be arrested. Since it is the ambulatory nature of vehicles and the element of probable cause to search which calls for exemption from the warrant requirement, these decisions do not support interpreting Robinson as allowing a vehicle search based solely upon the driver's arrest for a traffic violation. 83

The analysis is different, however, where the search of the driver reveals evidence that the vehicle may contain contraband. Does the discovery of narcotics on the driver, for example, give probable cause to believe that the vehicle is transporting narcotics, and therefore permit a search of the vehicle? Under Chimel, the discovery of contraband or criminal evidence on the driver may provide police with authority to search the vehicle since it is within the arrestee's control and may contain destructible evidence of the crime. A Chimel vehicle search, based on fruits of a Robinson personal search, could be made without need to show that probable cause existed before the stop. If, on the other hand, the search of the driver uncovers no criminal material, an investigative search of the vehicle would be unreasonable unless made to prevent the arrestee from securing a weapon.

If the driver is arrested and police legally take custody of the vehicle then police may conduct an inventory search of the vehicle in order to safeguard its contents. While this search is not investigative in nature, police may seize any criminal material which is inadvertently discovered during the search. Robinson should have no impact on the legality of inventory searches of impounded vehicles.

83. The Washington Court of Appeals in State v. Shoemaker, 11 Wn. App. 187, 191, 522 P.2d 203, 207 (1974), strictly limited the right of the state patrol to search a vehicle incident to a traffic arrest (stop for defective tail light): "Even if there had been an arrest, on the facts then known to the officers, no search of the vehicle would have been justified."
IV. CONCLUSION

The question of the constitutionality of a full search of the person incident to custodial arrest had not been presented to the Supreme Court prior to Robinson and Gustafson. In upholding full arrest searches, Justice Rehnquist's majority opinion attempted to overcome the traditional scope limitations placed on such searches. Previous decisions had authorized a warrantless search of the arrestee's person and the immediately surrounding area only insofar as required to further the arresting officer's need for self-protection and duty to preserve evidence; as neither of these two justifications was present in the factual situations presented, the continued validity of traditional limitations on the scope of search deserved careful analysis.

The majority's attempt to circumvent these limitations is not persuasive. Justice Rehnquist simply rejected limitation of searches to accomplishment of these two purposes as "novel," a description inconsistent with language in prior cases, some of which he had quoted in the Robinson opinion. Moreover, justifying governmental intrusions upon personal liberties by arguing that since such intrusions are not prohibited they must be permissible seems to put the matter backwards. Justice Rehnquist also painstakingly distinguished Terry, which placed strict limitations on the scope of stop-and-frisk searches, but summarily dismissed its companion case, Peters, which was more in point. Lost in all this defensive maneuvering was the offering of any positive justification for a full search of the arrestee incident to a custodial arrest.

While result oriented decisions are not uncommon in the Supreme Court, the absence of a reasoned justification for the Robinson and Gustafson holdings may diminish their future impact. Most courts are wary of warrantless searches and carefully scrutinize any asserted justifications. This judicial skepticism, developed through decades of fourth amendment decisions, should survive the Court's decisions last Term; a prosecutor attempting to extend further the scope of incident searches will have to look beyond Robinson and Gustafson for a justification.

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