

MICHAEL J. TONSING

New Techniques to Extract Evidence from Cellular Phones Create Dilemma for Courts, Prosecutors, and Criminal Defense Lawyers

As I was perusing the *San Francisco Chronicle* this morning, I spotted a story that prompted me to quickly get in touch via e-mail with the bylined staff reporter, Tom Abate, to see what else I could learn to pass along to you. It seemed to me he was on the trail of something many of you should be following, along with me.

The reporter was quite cordial and helpful. This morning's column drew heavily on his research and writing as well as on the leads he graciously gave me. His story (which can be found at www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/09/08/BUPA12OC2V.DTL&type=printable) revealed that a special detail in the San Francisco Police Department is working with what Abate calls a "new genre of cell phone extraction devices" in the department's efforts to solve crimes and gain convictions. In his article, Abate quoted a sergeant in San Francisco Police Department, Wayne



Hom—one of those involved in what Abate dramatically describes as a lab "deep in the bowels of San Francisco's Hall of Justice"—who states that information recovered from cell phones has been instrumental (no pun intended) in obtaining convictions in at least three recent cases, two robberies and one murder.

According to Abate's newspaper story, when conditions are right, police forensic investigators can now extract text messages, photos, and videos from cellular phones taken from suspects following an arrest. Given young people's tendency to use text messaging as a frequent substitute for a voice message, recovering such messages could have major implications for law enforcement.

Even ring tones can sometimes be recovered, and they can be of probative value. If a victim was present when the suspect received a phone call at the crime scene and the witness can identify the ring tone's "melody" with particularity, the tone could add significantly to the quantum of evidence. A ring tone could implicate or exculpate a suspect.

In his article, Abate reports an observation made by Robert Morgester, a California deputy attorney general and expert on the topic: since cell phone extraction devices became available in the past couple of years,

they have quickly become vital tools in solving crimes. Abate quoted Morgester as saying, "The reason why the cell phone is important is that you are carrying around a personal diary of who you talk to and often what you talked about. ... Youth today communicate through MySpace and texting."

Cell phone forensic extraction is a relatively new technology that grew out of a problem faced by consumers who switch cell phone carriers and want to load their old data into their new device, said Adi Ofrat, chief executive of Cellebrite,™ in speaking with Abate. (Cellebrite has offices in Israel and New Jersey and is apparently one of the vendors the San Francisco Police Department uses.) Ofrat claims that, since 2000, his 70-person company has sold more than 50,000 office-based cell phone data conversion systems to mobile phone carriers worldwide. "About one-and-a-half years ago we were approached by certain government agencies that said, 'We would like for you to provide us with XYZ,'" Ofrat said in a telephone interview with Abate.

In the *Chronicle* article, Sergeant Hom said that the law enforcement version of the cell phone extraction devices differs from commercial technology in one important regard: to protect the integrity of the evidence, the device used by the police can only read data and cannot write back to the cell phone.

Integrity of evidence aside, these developments set off a loud gong in every lawyer's head about the Fourth Amendment. Apparently, thus far, court decisions involving this new technology have not very often required search warrants before subjecting confiscated cell phones to forensic analysis. However, the decisions vary in their results and in their analyses.

As every first-year law student (and every "jailhouse lawyer") knows, the Fourth Amendment protects individuals against unreasonable searches and seizures. Thus, it has been repeatedly held that a search conducted without a warrant is "per se unreasonable ... subject only to a few specifically established and well-delineated exceptions." See, for example, *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). However, a "search incident to arrest" is an exception to the general rule against warrantless searches. See, for example, *United States v. Hudson*, 100 F.3d 1409, 1419 (9th Cir. 1996).



The justification courts most often use for permitting a warrantless search is law enforcement officers' need to seize weapons or other items that might be used to assault the officers or to effect an escape. Courts also cite the need to prevent the loss or destruction of evidence. Accordingly, as in *Hudson*, the government's success in securing a ruling that the search was within the exception hinges on the proximity in time between the search and the arrest.

However, in *United States v. Edwards*, 415 U.S. 800 (1974), the U.S. Supreme Court recognized an exception to the contemporaneity requirement and accepted the validity of the warrantless search of a suspect's clothes that had occurred at the police station 10 hours after the suspect was arrested. The police had taken the arrestee's clothes to examine them for evidence of a crime, and the Court noted that the police had had probable cause to believe the defendant's clothing was evidence. Therefore, the Court held that taking such evidence "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."

United States v. Chadwick, 433 U.S. 1 (1977) stands in direct contrast to *Edwards*. In the *Chadwick* case, officers had seized a locked footlocker at the time of an arrest and searched the locker just an hour later. Apparently, because it was a locked footlocker, the search was held to have violated the suspect's Fourth Amendment rights. The *Chadwick* Court distinguished this case from the *Edwards* ruling as follows: "Unlike searches of the person, *United States v. Robinson*, 414 U.S. 218 (1973); *United States v. Edwards*, 415 U.S. 800 (1974), searches of possessions within an arrestee's immediate control cannot be justified by any reduced expectations of privacy caused by the arrest." (The *Robinson* ruling had upheld the warrantless search of a cigarette case found on an arrestee.)

So, where does all this search and seizure law leave us with respect to cell phones that are confiscated from suspects at the time of their arrest? Apparently, it leaves us in a judicial quandary at the moment. In a case heard in the Northern District of California in May 2007, *United States v. Park* (for which only a Westlaw™ citation is currently available (2007 WL 1521573 (N.D. Cal.)), the court granted a motion to suppress evidence, ruling as follows:

[T]his Court finds ... that for purposes of Fourth Amendment analysis cellular phones should be considered "possessions within an arrestee's immediate control" and not part of "the person." *Chadwick*, 433 U.S. at 16 n. 10. This is so because modern cellular phones have the capacity for storing immense amounts of private information. Unlike pagers or address books, modern cell phones record incoming and outgoing calls,

and can also contain address books, calendars, voice and text messages, email, video and pictures. Individuals can store highly personal information on their cell phones, and can record their most private thoughts and conversations on their cell phones through email and text, voice and instant messages.

In effect, the *Park* court found a cell phone to be more analogous to a footlocker than to a pair of trousers. The court also found that the argument that the search was justified because of the need to protect the safety of the arresting officers to be unpersuasive. See also *United States v. Lasalle*, 2007 WL 1390820 (D. Hawaii May 9, 2007).

In *United States v. Curry*, a case heard in the District of Maine (for which only a Westlaw™ citation is currently available (2008 WL 219966 (D. Me.)), the magistrate judge who heard the motion to suppress seemed influenced heavily by the fact that the cell phone search in that case had occurred within less than a half-hour after the suspect's arrest (as opposed to three hours and 45 minutes after the arrest in *Park*) and concluded that, footlockers and clothing aside, the search was incidental to the arrest and therefore lawful.

In the only appellate case yet reported, the Fifth Circuit upheld the search of a cell phone that had been seized by police at a traffic stop, where the examination of the phone's contents took place at the home of a co-defendant to which the defendant was transported following his arrest. See *United States v. Finley*, 477 F.3d 250 (5th Cir. 2007).

Conclusion

The lines are even now becoming more clearly drawn in the Cyberian world of cellular phones, and one day it is probable that the U.S. Supreme Court will need to weigh in on the issue. The *Finley* court analogized seized cell phones to personal effects (like clothing and wallets); whereas the *Park* and *Lasalle* courts saw cell phones as more like possessions within a suspect's custody and control (such as closed containers and luggage), which could be searched without a warrant only if the search was "substantially contemporaneous" with the arrest.

Meanwhile, deep in the bowels of police departments everywhere, the tools to extract evidence from cell phones continue to change the game. Thus, the war between good and evil—and the war between freedom and repression—rages on. **TFL**

Michael J. Tonsing practices law in San Francisco. He is a member of the FBA editorial board and has served on the Executive Committee of Law Practice Management and Technology Section of the State Bar of California. He also mentors less-experienced litigators by serving as a "second chair" to their trials (www.Your-Second-Chair.com). He can be reached at mtonsing@lawyer.com.