

# The Rap Sheet

Katherine Fernandez Rundle

Miami-Dade State Attorney



1 September 2010

## POLICE-PROSECUTOR COORDINATING COMMITTEE

### Steering Committee:

Kristi Bettendorf, ASA, Chair  
State Attorney's Office  
(305) 547-0220  
e-mail:

KristiBettendorf@MiamiSAO.com

José Arrojo, Chief ASA  
State Attorney's Office  
(305) 547-0309  
e-mail: JoseArrojo@MiamiSAO.com

Naim R. Erched, Assistant Director  
Police Services  
Miami-Dade Police Department  
(305) 471-2625  
e-mail: nerched@mdpd.com

Frank Ledee, ASA  
State Attorney's Office  
(305) 547-0853  
e-mail: FrankLedee@MiamiSAO.com

Chief Fred Maas  
Sunny Isles Beach PD  
(305) 947-4440  
e-mail: mikegrand@mindspring.com

**Members of the Crimes  
Against Law Enforcement  
Officers Subcommittee are  
listed on the back page**

### IN THIS ISSUE:

### PAGE

Emailing Police Reports .....	1
Warrantless Searches Of Cell Phones .....	1-3
PPCC Sub-Committees .....	4

## The September Police-Prosecutor Coordinating Committee

meeting will be

**Wednesday, September 15<sup>th</sup> at 1 p.m.**

State Attorney's Office, 4<sup>th</sup> Floor Training Room

### Emailing Police Reports

Thus far, 15 police agencies have set up email boxes within the State Attorney's Office email system for the purpose of sending police reports to the SAO. However, 8 of these agencies have yet to utilize the procedure. While I guess it is possible that these agencies have not made an arrest in the past month, I don't believe this is the case. Remember, the designated person (who I presume will be someone in the Records Department of the agency) should forward to their email box copies of all police reports they receive and scan on cases where defendants have either been arrested or PTAed. In this way, SAO staff will be able to access these reports by use of the search function (by defendant's name or police case number) without having to request the reports from your agency. If anyone has any questions about the process in general, please feel free to call Kristi Bettendorf at 305-547-0220. If you have questions about the technical aspects of how the system works, please contact Hamilton Davies at 305-547-0532.

### WARRANTLESS SEARCHES OF CELL PHONES

Can a cell phone be searched without a warrant?

Yes, it is currently not unconstitutional in Florida to conduct a warrantless search of a cell phone incident to a lawful arrest under certain restrictions, but you risk suppression of the evidence.<sup>1</sup>

Why is there a risk of suppression, if it is not unconstitutional? The answer is that the state of the law is unsettled. The United States Supreme Court has not addressed this specific issue, there is no Florida state case law on point, and federal court decisions are in conflict. This means that, although there are more federal decisions upholding such searches than not, a judge in our jurisdiction is free to follow the majority or the minority if a motion to suppress based on the search is filed. The following overview may help you navigate through this debate.

<sup>1</sup> Individual police departments and agencies may have their own internal policies regarding the search of cell phones.

*Continued on next page*

### **IMPORTANT!**

Next PPCC meeting, **Wednesday, September 15, 2010, 1:00 p.m.**

State Attorney's Office • 1350 NW 12 Avenue • Miami FL 33136

All are invited to attend

*Continued from previous page*

A warrantless search is “per se unreasonable... subject only to a few specifically established and well-delineated exceptions.” *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). “Where there are exigent circumstances in which police action literally must be ‘now or never’ to preserve the evidence of the crime, it is reasonable to permit action without prior judicial evaluation.” *Roaden v. Kentucky*, 413 U.S. 496, 505 (1973). The exigent circumstance exception under which the searches of cell phones have been most upheld is the search incident to lawful arrest exception.

#### SEARCH INCIDENT TO ARREST EXCEPTION

Upon a lawful arrest, police may search the arrestee's person and the area within his immediate control. The search incident to arrest exception is justified by the need to remove weapons and prevent the concealment or destruction of evidence. *Chimel v. California*, 395 U.S. 752, 762-63 (1969).

An ideological crossroads regarding whether or not cell phones can be searched incident to arrest has emerged from the interpretations of two Supreme Court cases, *United States v. Robinson*, 414 U.S. 218 (1973) and *United States v. Chadwick*, 433 U.S. 1 (1977). In *Robinson*, an officer arrested the defendant for driving with a revoked license and searched him incident to arrest. The officer discovered a crumpled cigarette package on his person, searched it, and found heroin. The Supreme Court upheld the search as properly within the scope of a search incident to arrest. In *Chadwick*, in contrast, the police seized a foot locker from a defendant's car and searched its contents at the police station more than an hour later. The Supreme Court held that the warrantless search was unreasonable because the locker was not immediately associated with the arrestee's person and once the police exercised control over it and more than an hour had passed, the search was no longer incident to arrest.

Subsequent federal court decisions have distinguished between searches of the person as in *Robinson* and searches of possessions within an arrestee's control such as the footlocker in *Chadwick*. Interestingly, regardless of whether or not a cell phone is found on the person of the arrestee, some courts have ruled that a cell phone should be considered as possessions within an arrestee's control because of the immense amount of private information that can be contained in a cell phone. See, e.g., *United States v. Park*, No. CR 05-375 SI, 2007 WL 1521573, (N.D.Cal. May 23, 2007), *State v. Smith*, 124 Ohio St.3d 163, 166-68, 920 N.E.2d 949 (2009); *United States v. McGhee*, 2009 WL 2424104 (D.Neb. 2009). See also, *United States v. Wall*, 2008 WL 5381412 (S.D.Fla.2008) (holding that a cell phone cannot lawfully be searched incident to arrest because it is analogous to a sealed letter). The majority of decisions, however, have had little difficulty in upholding the search of a cell phone incident to a lawful arrest. See, e.g., *United States v. Fuentes*, 2010 WL 724186 (C.A.11(Fla.); *United States v. Murphy*, 552 F.3d 405, 411 (4th Cir.2009); *United States v. Finley*, 477 F.3d 250, 259-60 (5th Cir.2007); *United States v. Wurie*, 612 F.Supp.2d 104, 110 (D.Mass.2009); *United States v. Santillan*, 571 F.Supp.2d 1093, 1102-03 (D.Ariz.2008); *United States v. Dennis*, 2007 WL 3400500 (E.D.Ky.).

#### TIMING AND SCOPE OF THE SEARCH

The Supreme Court's decision in *Arizona v. Gant*, 129 S.Ct. 1710, 1721 (2009), raised a timing issue for searches incident to arrest that could have widespread impact on the searches of cell phones. In *Gant*, the defendant was arrested for driving while license suspended. After the defendant was handcuffed and placed in the patrol car, police searched his vehicle and found cocaine in a jacket on the backseat. The Court held that the search was invalid and ruled that police may search a vehicle incident to arrest only when they have reason to believe that the arrestee could either access the vehicle and destroy evidence or that the vehicle contained evidence of the specific offense that was the subject of the arrest. This holding limited the broad reading of *New York v. Belton*, 453 U.S. 454, 460 (1981) which held that officers, incident to a lawful arrest of a car's recent occupant, can search the entire passenger compartment and any containers found within without a warrant.

At least two federal courts have already extended *Gant* beyond the vehicle context and disallowed the search of a cell phone found on an arrestee incident to arrest. See *United States v. McGhee*, 2009 WL 2424104 (D.Neb. 2009); *United States v. Quintana*, 594 F.Supp.2d 1291 (M.D.Fla.2009). In *McGhee*, the court ruled that the defendant was secured at the time of the search of the cell phone so there was no justification for the search based on the threat that he could gain possession of the cell phone. The court further ruled that, because the defendant was being arrested for a crime that had occurred approximately nine months before, it was not reasonable for the officers to believe a search of his cell phone would produce evidence related to the crime. Although *Quintana* was decided before the *Gant* decision was released, the court cited the comments of two of the Supreme Court Justices made during oral argument in *Gant*. The court in *Quintana* ruled that because the Trooper had arrested the defendant for driving with a suspended license, the Trooper's search of the cell phone had nothing to do with officer safety or with the preservation of evidence related to his arrest. The court disallowed the search as outside the proper scope of a search incident to arrest.

*Continued on next page*

*Continued from previous page*

A search incident to arrest must be “substantially contemporaneous” with the arrest. Even before the *Gant* decision, however, federal courts have disagreed over what is contemporaneous with arrest. In *United States v. Finley*, 477 F.3d 250, 260 (5th Cir.), *cert. denied*, 549 U.S. 1353 (2007), the court ruled that even though the police had transported Finley to the police station for booking, the search of his cell phone found on his person was still substantially contemporaneous with his arrest and therefore permissible. In *United States v. Wall*, 2008 WL 5381412 (S.D.Fla. 2008), in contrast, the court ruled that a warrantless search of a phone found on an arrestee’s person for text messages was not a lawful search incident to arrest because the search of the phone was conducted while the arrestee was being booked.

Similarly, an issue under debate even before the *Gant* decision was how much scope should be allowed to officers searching cell phones incident to arrest. In *United States v. Wurie*, 612 F.Supp.2d 104, 110 (D.Mass.2009), the court held that the search of a cell phone was limited and thus reasonable where officers confined their search to the call logs. But see, *Finley*, *supra* (declining to treat a cell phone differently than any other container).

#### PRESERVATION OF EVIDENCE JUSTIFICATION

The Supreme Court has justified a warrantless search incident to a lawful arrest in part based on the need to preserve evidence from destruction by the arrestee. Courts are divergent on whether or not evidence contained within a cell phone is destructible evidence. Initially, courts accepted the argument by the government that cell phones were analogous to pagers in that they had finite memory and information could be erased in the time that it took officers to obtain a warrant. See, e.g., *United States v. Murphy*, 552 F.3d 405, 411 (4<sup>th</sup> Cir.)(2009); *United States v. Parada*, 289 F.Supp.2d 1291(D.Kan.2003). In *Murphy*, the court rejected the defendant’s argument that police officers must be required to ascertain the storage capacity of a cell phone before conducting a search as an unworkable and unreasonable rule. The court found that it is unlikely that police officers would have any way of knowing whether the text messages and other information stored on a cell phone will be preserved or be automatically deleted simply by looking at the cell phone. In *Parada*, the court upheld the search of a cell phone during the search of the subjects’ persons on the basis that the specific technology of the Motorola V3 “Razer” had an automatic delete function by which an owner could set the phone to purge all text messages which created sufficient exigency.

Technology is always a step ahead of the law. The argument that cell phones have limited memory and like pagers can be searched without a warrant to protect the evidence from being erased is case specific and may no longer be as persuasive an argument given the advancements in cell phone technology. A potentially more persuasive but as yet untested argument is what effect the new “kill switch” features on some phones may have on an officer’s ability to obtain a warrant before evidence is destroyed automatically or even remotely.

In addition to being a justification for a warrantless search incident to arrest, the imminent destruction of evidence can be the basis alone for a warrantless search. *Ker v. California*, 374 U.S. 23, 40, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963). A search may be conducted without a warrant when there is a threat that evidence will be destroyed before a warrant can be obtained. The police, however, must have an **objectively reasonable fear** that the evidence will be destroyed before a warrant can be obtained.

#### INVENTORY SEARCH EXCEPTION

A separate exception to the warrant requirement that can overlap with the search incident to arrest exception is the inventory search exception. When a suspect is brought to the stationhouse for booking, law enforcement may remove and itemize all property found on the person or otherwise in his possession without a warrant. *Illinois v. Lafayette*, 462 U.S. 640, 64 (1983). Such a search is reasonable if it is a good faith inventory search and not a subterfuge for an investigatory search. *Twilegar v. State*, 2010 WL 26512 at \*8 (Fla.2010)(citing *South Dakota v. Opperman*, 428 U.S. 364 (1976)). A search of the content of a cell phone, including phone numbers, photos, text messages, or other data stored in the memory of a cell phone, is beyond the scope of the purpose of the inventory search which is to inventory the person’s possessions. See *Wall*, 2008 WL 5381412, at \*4; *Park*, 2007 WL 1521573, at \*10-12.

Warrants for the search of cell phones can be obtained by contacting the Cyber Crimes Unit of the State Attorney’s Office, (305) 547-0837.

Brenda Mezick  
Assistant State Attorney  
Cyber Crimes Unit

All PPCC Sub-Committees, Chairs and members are listed below. Please contact any of the Co-Chairs or members if you have an issue to be addressed.

**CASE INTAKE SUBCOMMITTEE****CO-CHAIRS:**

Marie Jo Toussaint, ASA, SAO (305) 547-0255;  
e-mail: MarieJoToussaint@MiamiSAO.com  
Bart Armstrong, Police Legal Advisor  
Miami-Dade P.D. (305) 471-2550  
e-mail: barmstrong@mdpd.com

**Committee Members:**

Sgt. George Arango, MDPD  
Det. Paul Manzella, SIBPD  
Sgt. Ray Santiago, UMPS  
Lt. Efren Lopez, M-DPD

**COMMUNICATIONS SUBCOMMITTEE****CO-CHAIRS:**

Lt. Adrian Cummings, M-DPD (305) 375-5555;  
e-mail: arcummings@mdpd.com

**Committee Members:**

Lt. Gladys Amato, MPD  
Capt. Wendy Mayes-Sears, M-DCR  
Regla Dominguez, MBPD  
Ray Araujo, ASA, SAO  
Major Michael Mills, SMPD  
Major Kathy Katerman, NMBPD  
Oliver Spicer, Jr., M-DPD

**CRIMES AGAINST LEOs SUBCOMMITTEE****CO-CHAIRS:**

José Arrojo, ASA, SAO (305) 547-0309;  
e-mail: JoseArrojo@MiamiSAO.com  
Chief Steven Steinberg, Aventura PD (305) 466-8996;  
e-mail: SSteinberg@AventuraPolice.com  
David Waksman, ASA, SAO (305) 547-0445;  
e-mail: DavidWaksman@MiamiSAO.com  
Lt. Adrian Cummings, M-DPD (305) 989-9508;  
e-mail: arcummings@mdpd.com

**Committee Members:**

Lt. Lazaro Artime, Hialeah PD  
Det. Robert Garland, M-DPD  
Susan Leah Dechovitz, ASA, SAO  
Audrey Frank-Aponte, ASA, SAO  
Danny Formosa, Coral Gables PD  
Lt. Jerome Berrian Jr., MBPD  
Sgt. Carlos Arguelles, M-DPD, City of Doral  
Captain Luis Bazo, M-DPD, Police Administrative Bureau  
Abbe Rifkin, ASA, SAO  
Lt. Willie Hill, Pinecrest PD  
Ofcr. Roger Ruano, Corrections  
Det. Norma Dieppa, CGPD  
Ofcr. Nelson Delgado, VGPD

**JUVENILE SUBCOMMITTEE****CO-CHAIRS:**

Leon Botkin, ASA (305) 637-1300  
e-mail: LeonBotkin@MiamiSAO.com  
Olanike Adebayo, M-DPD, Legal Unit  
e-mail: OAdebayo@mdpd.com

**Committee Members:**

Capt. Ian Moffett, M-DSBPD  
Ellen Skidmore, SAO

**PAWNSHOP SUBCOMMITTEE****CO-CHAIRS:****Committee Members:**

Det. Melissa DeJong, CGPD  
Pat Kiel  
Jonah Dickstein, ASA

**DOMESTIC CRIMES SUBCOMMITTEE****CO-CHAIRS:**

Leah Klein, ASA, SAO (305) 547-0132;  
e-mail: LeahKlein@MiamiSAO.com  
Major Grace O'Donnell (M-DPD) (305) 418-7206  
e-mail: gmodonnell@mdpd.com

**Committee Members:**

Carrie Soubal, SAO  
Sgt. Jed Burger, Domestic Crimes Unit, MBPD  
Sarah Poux, MBPD

**RAP SHEET SUBCOMMITTEE****CO-CHAIRS:**

Kristi Bettendorf, ASA, SAO (305) 547-0220  
e-mail: KristiBettendorf@MiamiSAO.com

**Committee Members:**

Ed Griffith, SAO

**ROLL CALL/RIDE-ALONG SUBCOMMITTEE****CO-CHAIRS:****Committee Members:**

Shana Belyeu, ASA, SAO  
Audrey Frank-Aponte, ASA, SAO  
Brenda Mezick, ASA, SAO

**TRAINING SUBCOMMITTEE****CO-CHAIRS:**

Lt. Adrian Cummings, M-DPD, Court Services (305) 989-9508;  
e-mail: arcummings@mdpd.com  
Susan Dechovitz, ASA, SAO; 547-0309  
e-mail: SusanDechovitz@MiamiSAO.com  
Tom Headley, ASA, SAO; 547- 547-0186  
e-mail: TomHeadley@MiamiSAO.com

**Committee Members:**

Capt. Ian Moffett, M-DSBPD  
Chief Van Toth, Hialeah Gardens PD  
Sgt. Lynnisse Jones-Curry, M-DPD  
Capt. Luis Bazo, M-DPD  
David Waksman, ASA, SAO  
Det. David Adlet, EPPD  
Oliver Spicer, Jr., M-DPD  
Ofcr. Chad Rosen, Surfside PD  
Shana Belyeu, ASA, SAO  
Barry Mankes

**OPERATIONS SUBCOMMITTEE****CO-CHAIRS:**

Major Kathy Katerman, NMBPD, (305) 948-2929,  
kathy.katerman@nmbpd.org  
Dreama Oliver, SAO, Administrator, Felony Operations,  
(305) 547-0307, dreamaoaliver@miamiSAO.com

**Committee Members:**

Bill Altfield, ASA, SAO  
Jay Pollen, MPD

**LIAISON SUBCOMMITTEE****CO-CHAIRS:**

Kathleen Hoague, SAO, (305) 547-0522;  
e-mail: KathleenHoague@MiamiSAO.com  
Maria Diaz, SAO, (305) 547-0331;  
e-mail: MariaDiaz@MiamiSAO.com  
Lt. Adrian Cummings, M-DPD (305) 375-5555;  
e-mail: arcummings@mdpd.com

Current and back issues of the *Rap Sheet* are posted on the State Attorney's Office web site:

<http://www.MiamiSAO.com>

Subscribe online by sending an e-mail to: [RapSheet@MiamiSAO.com](mailto:RapSheet@MiamiSAO.com)