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City Attorney Mara Elliott
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Sent via email

Re: Seizure of Protestors' Cell Phones

Dear Sheriff Gore, District Attorney Stephan, Chief Nisleit, and City Attorney Elliott,

We understand that San Diego county jails have refused to return phones to some individuals who were arrested at a protest in downtown San Diego on August 28th, nearly a month ago. It appears this is not the result of isolated decisions by individual officers. Instead, jails have apparently adopted either a written or de-facto policy of seizing protesters' cell phones and refusing to return them upon release, either on their own or at the request of the District Attorney's office or San Diego Police Department. As part of this policy, sheriff's deputies are apparently failing to log the seizure of protesters' phones, making it difficult if not impossible for them to be retrieved after booking. We further understand San Diego Police Department officers have been taking phones from arrestees before they are booked in at the jail and while they are being detained in patrol cars, entering no record of the seizures. If such a policy or practice exists, it violates protestors' Fourth Amendment and due process rights, and it should be immediately repealed and repudiated. The county jails or police should also immediately return any cell phones that have been seized from protesters who have been released, or to explain why this is not possible.

We understand a significant number of protesters have been released without charges or have had their charges quickly dismissed.[1] There is no legitimate reason for the jails or police to maintain

[1] See Greg Moran, "City Attorney Elliott Says Protesters Arrested for Nonviolent Offenses Won't be Prosecuted," *San Diego Union-Tribune*, June 10, 2010,

possession of phones belonging to these individuals. "Continued official retention of legal property with no further criminal action pending violates the owner's due process rights." *People v. Lamonte*, 53 Cal. App. 4th 544, 549 (1997). "The general rule is that seized property other than contraband, should be returned to its rightful owner once the criminal proceedings have terminated." *United States v. LaFatch*, 565 F.2d 81, 83 (6th Cir. 1977); *United States v. Wilson*, 540 F.2d 1100 (D.C. Cir. 1976) ("[I]t is fundamental to the integrity of the criminal justice process that property involved in the proceeding, against which no Government claim lies, be returned promptly to its rightful owner.").

If there is probable cause that specific phones belonging to individual protesters contain evidence of a crime, it might have been permissible for the jails or police to retain those particular phones long enough to seek a warrant, but by maintaining possession of those phones for nearly a month, the jails have converted what may have been a legitimate investigation into a series of unreasonable seizures in violation of the Fourth Amendment.

A seizure that is "lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests." *United States v. Jacobsen*, 466 U.S. 109, 124 (1984). The unreasonable infringement on protesters' right to possession of their cell phones is compounded by the continued failure to provide any indication of when individuals may expect their phones to be returned. To "allow an unlimited period of seizure without judicial intervention … would nullify the seizure portion of the search and seizure clause of the fourth amendment." *United States v. Dass*, 849 F.2d 414, 416 (9th Cir. 1988).

To determine whether a seizure is reasonable, courts balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *United States v. Place*, 462 U.S. 696, 703 (1983). "[I]f the individual's interest outweighs the government's, an extended seizure may be unreasonable." *United States v. Pratt*, 915 F.3d 266, 271 (4th Cir. 2019). Seizing cell phones for prolonged or indefinite periods of time constitutes a particularly severe intrusion on protesters' Fourth Amendment interests because of the highly personal nature of the information stored on cell phones, and because of the centrality and ubiquity of cell phones in daily life. Like computers, cell phones "are relied upon heavily for personal and business use. Individuals may store personal letters, e-mails, financial information, passwords, family photos, and countless other items of a personal nature in electronic form on their" cell phones." *United States v. Mitchell*, 565 F.3d 1347, 1351 (11th Cir. 2009) (holding it unreasonable to wait three weeks to seek a warrant to search a computer, even when there was probable cause that the computer contained child pornography).

We are aware of no countervailing interests that could make it reasonable for the government to wait weeks or longer to seek a warrant or to delay returning individuals' phones. If there are extenuating circumstances we are unaware of, please let us know. However, if there is no "persuasive justification for the delay in obtaining a search warrant for [protesters'] phone[s]" the delay would constitute an unreasonable seizure for each protester whose phone has not been returned. *Pratt*, 915 F.3d at 272–73. A simple lack of diligence in determining whether to seek a warrant does not provide the kind of justification the jails or police would need, nor would a policy requiring the systematic refusal to return people's property. *See id.* at 273 (holding "a 31-day delay violates the Fourth Amendment where the government neither proceeds diligently nor presents an overriding reason for the delay."); *see also Dass*,

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https://www.sandiegouniontribune.com/news/courts/story/2020-06-10/elliott-says-protesters-arrested-for-nonviolent-offenses-wont-be-prosecuted (accessed September 21, 2020).

849 F.2d at 415 (government violated the Fourth Amendment when delaying seven to twenty-three days in seeking warrants after removing packages from the mail when dog sniffs indicated the presence of marijuana); *People v. Link*, 26 Cal. App. 4th 1272, 1278–79 (1994) (holding that "a delay of up to 48 hours [in seeking a warrant for seized property] should be tolerable (if otherwise justified under the circumstances)" but noting "the presence of probable cause does not entitle the executive to seize property indefinitely before obtaining a magistrate's review of the legality of the seizure."). Needless to say, even if the circumstances justified the decision to refuse to return protesters' property within a day or two, the jails or police would need considerably stronger justification to withhold the phones for weeks or longer. Again, we are aware of no such justification.

For the foregoing reasons, any policy providing for the continued seizure of protesters' cell phones after their release from county jails likely violates protesters' due process rights and the Fourth Amendment. We therefore respectfully request that the jails or police immediately return any cell phones that have been seized from protesters who have been released, or to explain the severe extenuating circumstances that would justify continued seizure. If the phones have indeed be seized pursuant to a policy requiring jail officials or police to refuse to return them, please confirm that the policy has been in place, and that it has now been repealed. We hope to resolve this matter without litigation, but we are prepared to litigate to defend protesters' rights if necessary.

Thank you for your attention, and please let us know if you have any questions.

Sincerely,

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