

# Police Prosecutor Update

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## FIFTH AMENDMENT CELL PHONE ENCRYPTION

On August 21, 2018, the Indiana Court of Appeals issued its decisions in Seo v. State, \_\_\_ N.E.3d \_\_\_ (Ind. Ct. App. 2018). Seo reported to law enforcement that she had been raped. As part of the investigation, she allowed the detective to open her encrypted smart phone (she decrypted it for him) and download its contents. After reviewing the contents of the forensic download, the detective determined that the rape investigation was no longer appropriate and, instead, recommended charges against Seo for stalking and harassing D.S. D.S. had received up to 30 calls and text messages from Seo every day from her cell phone number. Ultimately, he received calls from numerous different cell phone numbers, although the calls and messages appeared to be linked and to come from Seo. The detective suspected Seo was using a third party application to disguise the origin of her calls and messages by making it appear that they originated from different cell phone numbers.

Seo was charged with intimidation, theft and harassment and arrested. When she was arrested, she possessed the same smart phone that the detective had examined. She admitted the phone was hers, and it was seized as evidence. A few days later, Seo was charged with 13 counts of invasion of privacy, alleging she had violated a protective order prohibiting her from contacting D.S. The same day, the police obtained a warrant to search Seo's smart phone. Because the phone was locked, the court also ordered Seo "be compelled to unlock (via biometric fingerprint passcode, password or otherwise)" the phone or be subject to contempt of court. Through counsel, Seo informed the court that she would not comply with the order to unlock the phone. After a hearing, the court issued an order finding Seo in contempt. The court specifically found, "The act of unlocking the phone does not rise to the level of testimonial self-incrimination that is protected by the Fifth Amendment of the United States Constitution or by Article 1, Section 14 of the Indiana Constitution." Seo filed a motion to stay the court's order pending appeal, which the court granted. On appeal Seo argued that the court's order compelling her to unlock the phone violated the Fifth Amendment guarantee against self-incrimination.

In its ruling, the court of appeals described smart phones in revolutionary terms: "A smartphone is a trove of extremely personal information that is almost always embarrassing, and potentially, incriminating. A modern smartphone, . . . is truly as close as modern technology allows us to come to a device that contains all of its owner's conscious thoughts, and many of his or her unconscious thoughts, as well." By locking the smart phone, the owner sets in motion the device's encryption code which scrambles the information contained therein so that, if it were to be retrieved, it would be incomprehensible. By unlocking the phone, whether by password or fingerprint, the owner decrypts the information. "Thus, each time a user unlocks her phone, she is enabling the phone to recreate all of the information on the phone, taking what was once indistinguishable from random noise and deciphering it into the requested data." "Because compelling Seo to unlock her phone compels her to literally recreate the information the State is seeking, we consider this recreation of digital information to be more testimonial in nature than the mere production of paper documents." Therefore, the Court found the trial

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court's order compelled her to incriminate herself in violation of the Fifth Amendment. The Court also found that the fact investigators already had proof Seo owned the smart phone (and thus the fact that she unlocked it would not incriminate her any further) did not exempt the order from suppression because the state did not describe with reasonable particularity the digital files or evidence it sought to compel Seo to produce. It is, however, unclear how it would have changed the court's calculations if the state had been able to describe "discrete contents."

This decision drew a strong dissent. As it would surprise most smart phone owners that the phone is anything more than a sophisticated device that consolidates voice, email and text communications, keeps track of contacts, helps you book a ride with Uber, and nags you about your failure to exercise, rather than "a device that contains all of its owner's conscious thoughts," we should expect that this decision will be appealed. But for the moment, the rule is that a suspect cannot be compelled to turn over or to enter her cell phone passcode. There is room for debate whether the opinion would permit a court order based on a finding that police can describe with "reasonable particularity" the evidence they are looking for on the phone.