

**Fourth Amendment satisfaction:  
digital evidence ©**

Thomas K. Clancy

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**published search and seizure appellate ct. decisions**

**298 total**  
**203 Child**  
**Porn**

**68 %**

green - total cases

yellow - Child Porn

	STATE		FEDERAL	
		( )		( )
2010	24	(13)	23	(17)
2009	13	(10)	17	(16)
2008	13	(10)	17	(13)
2007	9	(5)	14	(9)
2006	17	(9)	14	(8)
2005	13	(8)	20	(15)
2004	14	(11)	6	(4)
2003	7	(6)	6	(6)
Pre-2003	31	(19)	40	(24)
<b>total</b>	<b>141</b>	<b>(91)</b>	<b>157</b>	<b>(112)</b>

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**applicability and satisfaction**

IN EVERY CASE, ....

**1. Does the 4th Apply?**

**2. Is it Satisfied?**

- "reasonable"
- Warrant Clause requirements

[3. Remedies?]

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**Amendment IV: what are the requirements of each clause ?**

**Reasonableness clause:**

The right of the people to be secure in their persons, houses, papers, and effects, against **unreasonable** searches and seizures, shall not be violated,

**Warrant clause:**

and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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**Digital Evidence Searches and Seizures**

**2. Is it satisfied?**

- two approaches to digital evidence



conceptual difficulties of applying traditional doctrines to digital evidence

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*What Is Reasonable?*

**The core 4th Amendment concept**

regulates:

- circumstances that justify initial intrusion
- scope of intrusion

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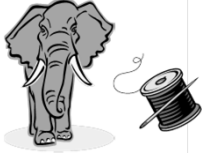
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**PLAIN VIEW**

scope of S/: determined by objects sought

requirements:

1. prior valid intrusion
2. observing object in plain view
3. incriminating character of object immediately apparent (has Probable Cause)
4. inadvertence requirement explicitly rejected



Horton v. California, 496 U.S. 128 (1990)

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some underlying concerns with Wholesale Seizures

1. Potential disruption and invasion of business, professional practice, personal lives
2. General Warrants -- principal vice Fourth Amendment was supposed to prohibit !

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where you come out is function of where you go in

Are computers containers or something "Special?"

view #1: Data are Documents / Container Analogy

view #2: "Special Approach" to S/ of data on computers




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two views: apply to *all* digital devices



Can police search Cell Phone incident to arrest?

- YES:** are containers – based on “binding” SCT precedent  
People v. Diaz, 244 P.3d 501 (Cal. 2011)
- NO:** are not containers and persons have “higher level of privacy” in info “they contain”  
State v. Smith, 920 N.E.2d 949 (Ohio 2009)

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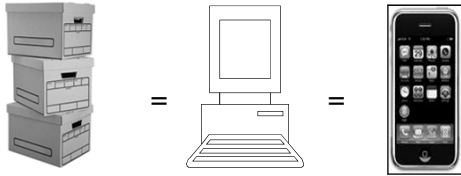
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View #1: Analogy to filing cabinets/containers

### Computer is Container

- cannot anticipate exact form of “records”

“no principled distinction” between digital & paper records



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Plain view & computers

### contents of unopened files

View#1

data IS analogous to document search: can look at all data to ascertain value

Permissible?

police open JPG file & observe child porn while executing S/W permitting examination of notes & records for evidence of unauthorized computer intrusions at NIH

Gray

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View #2: Rejects Document S/ Container Analogy

**"special approach"**



Premise -- writings & computers:

**fundamentally different, both in degree and in kind**

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**create new legal rules**

**1. initial intrusion:**

- (ex) must specify looking for computer /digital device

**2. scope of search:**

- (ex) require pre-authorization in warrant for manner of execution

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**special approach methodologies**

**1. technological:**

- limit searches based on technology

**2. legal: label digital devices as "special"**

- old rules don't apply
  - computer not a container
- get to create new legal rules to limit searches

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example of special approach

U.S. v. Payton, 573 F.3d 859 (9th Cir. 2008)

- FACTS: warrant for financial records in drug case – did not explicitly authorize s/ of computer

"It is true ... pay/owe sheets indicating drug sales were physically capable of being kept on Payton's computer."

HELD: search violated F/A

Need "Explicit judicial authorization for searches of computers"

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Example #2

"a warrant authorizing a search of the **text files** of a computer for documentary evidence pertaining to a specific crime will not authorize a search of **image files** containing evidence of other criminal activity."

People v. Carratu, 755 N.Y.S.2d 800 (S. Ct. 2003)  
(citing *Carey*)

- Excluded "unambiguously" named files (called "Fake ID" containing false ID documents) when warrant for files relating to sale of illegal cable TV access devices

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U.S. v. Comprehensive Drug Testing,  
621 F.3d 1162 (9th Cir. 2010)

majority: digital evidence is special category

- rejects plain view
- need prior approval in warrant for execution procedures




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Document Searches

*Andresen v. Maryland: warrant for --*



specific docs re -- lot 13 T

*Where can police look?*

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Andresen:

- upheld s/ of law office
- cannot use complex scheme to avoid detection when police have PC suspect has evidence

" Some innocuous documents will be examined, at least cursorily"

VS



officials & judges must assure S/ minimizes unwarranted intrusions upon privacy

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*traditional two step F/A approach*

1. is warrant properly issued ?

- *apply warrant clause requirements*

2. is execution proper?

- *no special rules for digital cases*
- *sole Q is R- apply Andresen/ Dalia / Grubbs*

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Warrant Clause or Reasonableness Clause?

*Dalia / Grubbs :*

reject view: warrants must specify manner of execution

executing officers decide how to execute warrant

Nonetheless, "the manner in which a warrant is executed is subject to later judicial review as to its reasonableness."

*U.S. v. Grubbs, 547 US 90 (2006)*

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Constitutional basis for mandating execution procedures?

*Andresen*: for document s/

- Permitted broad document search

Plain language: Warrant Clause requires --

- oath
- probable cause
- particular description of place to be s/

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### ranking containers

S Ct tried to distinguish among containers:

- luggage -- high expectation of privacy
- other containers did not "deserve full protection of F/A"

REJECTED

- language of F/A: "protects people and their effects, whether they are 'personal' or 'impersonal'"
- "impossible to perceive any objective criteria" for viable distinction:



"What one person may put into a suitcase, another may put into a paper bag."

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### is "Special approach" inconsistent with Supreme Court cases?

1. *U.S. v. Grubbs*, 547 U.S. 90 (2006)
2. *Dalia v. U.S.*, 441 U.S. 238 (1979)
  - reject implicit warrant issuance requirements
3. *Andresen v. Maryland*, 427 U.S. 463 (1976)
  - permits broad document search
4. *U.S. v. Ross*, 456 U.S. 798 (1982)
  - rejects distinctions between containers

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extended discussion in ---

Clancy, *The Fourth Amendment Aspects of Computer Searches and Seizures: A Perspective and a Primer*,  
75 Miss. L.J. 193 (2005)

Clancy, *The Fourth Amendment: Its History and Interpretation* (2d Ed. 2013)

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