

Common Fourth Amendment issues in Child Pornography cases.

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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)
total	141	(91)	157	(112)

applicability issues

situations where amendment does not apply

1. P2P investigations (see tab #3)
2. disclosures to third parties (see tab #3)
3. private search doctrine
 - hackers
 - private repair persons
 - unhappy spouses

Does the Amendment apply?

A. need Government Intrusion:

"Search" ←

B. Intrusion must invade reasonable expectation of privacy

private search doctrine

1. purely private activity
2. govt activity replicates private

Private Searches and Seizures

Part #1: F/A applies only to gov't activity

S. Ct. test: totality of circumstances

- turns on % of Gov't participation in private party's activities


two-part test of many lower courts:

- did gov't know or acquiesce in private party's conduct
- was private party's purpose to assist law enforcement or own ends

Computer searches and seizures: private searches

1. Computer Technicians

- F/A inapplicable --- when performing repair work
 - (ex) United States v. Grimes, 244 F.3d 375 (5th Cir. 2001)
- agency found: expanding S/ upon police request
 - viewing additional files
 - copying entire hard drive
 - (ex) U.S. v. Hall, 142 F.3d 988 (7th Cir. 1998)



2. Hackers

"Unknownuser" obtained access via Trojan horse program attached to picture he posted to news group frequented by persons interested in porn. Pic downloaded; After finding child porn, Unknownuser reported to law enforcement

case #1: truly unknown -- private S/



FBI agent thanked & added:

"If you want to bring other information forward, I am available."

case#2: -- mere expression of gratitude

not agency relationship --- otherwise any thanks transforms subsequent S/ into gov't S/

Case #3 ??

After case #2, FBI agent told Unknownuser –

- could not ask him to S/ for more cases
 - * would be gov't agent
 - * make info unusable
- feel free to send additional info obtained
- no prosecution for hacking



Fourth Circuit: proverbial "wink and nod"
U.S. v. Jarrett, 338 F.3d 339 (4th Cir. 2003)

The Gov't Replicates Private Search --- F/A Inapplicable

- F/A applies only to extent gov't exceeds scope of private S/

Rationale: Private search eliminates Reasonable expectation of Privacy

U.S. v. Jacobsen, 466 U.S. 109 (1984)

"context" in which object found may lead some courts to find no REP

- by replicating Private search, may be no REP in part of object NOT examined by Private searchers

hypothetical

Folder: "Kid Sex"

files:

- littlegirls.under16.sexual intercourse
- littlegirls.under15.sexual intercourse
- littlegirls.under14.sexual intercourse
- littlegirls.under13.sexual intercourse
- littlegirls.under12.sexual intercourse
- littlegirls.under10.sexual intercourse
- littlegirls.under9.sexual intercourse

- P/S opens 16, 15, 14 -- finds young girls engaged in sexual intercourse
- Gov't opens 13 to 9 -- **Is 13 to 9 a SEARCH?**

Is scope of P/S exceeded when police open more files than preceding P/S ?

VIEWS:

- **YES: exceed P/S when police open container P/S did not**
- **Opening additional files not determinative**

Rationale of view #2:

police knew w/ *substantial certainty* what was inside
based on e.g.,

- statements of P/S-ers
- replication of P/S
- expertise

⇒ got no additional Knowledge and no new REP frustrated

Application of view #2:

U.S. v. Runyan, 275 F.3d 449 (5th Cir. 2001)

- wife gave data storage devices to police
- wife examined some files on floppy disks, CDs; none on ZIP disks
- gov't examined all

Runyan Ruling:

A. police exam of disks not examined by P/S/ exceeded scope of P/S:

* no substantial certainty all disks had child porn

B. Did *not* exceed scope of P/S when examined more files on each disk than P/S:

* merely examined "container" more thoroughly

"police do not exceed P/S when they examine more items w/n closed container than did P/Sers"

probable cause:
some recurring issues

- sufficiency of description
- establishing possession
 - viewing vs. downloading
 - link to house
- use of profile information
- staleness

child pornography --

descriptions in warrant applications

- Is image sexually explicit?

- Does image depict real child?

"Child Pornography"

- visual depiction (photo, film, video, digital)
- of **sexually explicit conduct**
- **using minor** (under 18) engaging in the conduct
or
- digital or computer-generated image that is, or is indistinguishable from, a minor
or
- created or modified to appear that identifiable minor is engaging in act

18 U.S.C. § 2252A CP Prevention Act

"Sexually explicit conduct"

- **Sex acts**
 - Actual or simulated
 - sexual intercourse (genital-genital, oral-genital, anal-genital, or oral-anal, between persons of same or opposite sex)
 - bestiality
 - masturbation
 - sadistic or masochistic abuse*or*
- "Lascivious exhibition" of genitals or pubic area

"Lascivious Exhibition"

■ Nudity not required

U.S. v. Knox, 32 F.3d 733 (3rd Cir. 1994)

■ Six factors + others appropriate to case

U.S. v. Dost, 636 F. Supp. 828 (S.D. Cal. 1986)

U.S. v. Hill, 459 F.3d 966 (9th Cir. 2006)

"Lascivious Exhibition"

■ Test: Six non-exclusive factors: *Dost*

- Focal point -- genitals or pubic area?
- Setting sexually suggestive?
- Child in unnatural pose or inappropriate clothing?
- Child fully or partially clothed, or nude?
- Suggest coyness or willingness to engage in sexual activity?
- Intended to elicit sexual response in viewer?

PC statements in CP cases

Search warrant must establish:

1. Is image sexually explicit?

2. Does image depict real child?

Affiant's statement --- image appears to be real child is sufficient

E.g., U.S. v. Love, 516 F.3d 580 (7th Cir. 2008)
(estimated age of person depicted)

"Sexually explicit conduct"

■ **Sex acts -- no need to describe further**

■ **Actual or simulated**

- sexual intercourse (genital-genital, oral-genital, anal-genital, or oral-anal, between persons of same or opposite sex)
- bestiality
- masturbation
- sadistic or masochistic abuse

or

■ **"Lascivious exhibition" of genitals or pubic area -- must describe**

sufficiency of description of sexual conduct

State v. Nuss, 781 N.W. 2d 60 (Neb. 2010)

affidavit: images "appeared to be CP"

- did not describe
- images not attached

HELD: no PC to issue warrant but good faith applied

- Neb statute: lists types of "Sexually Explicit" conduct --

(ex) masturbation, intercourse --- listing such acts suffices

cases on sufficiency of description of "lasciviousness" in warrant application

United States v. Hill,
459 F.3d 966 (9th Cir. 2006)

United States v. Genin,
594 F. Supp. 2d 412 (S.D. N.Y. 2009)

Excellent summary of case law

- append pics
- detailed descriptions of activity

sufficiency of allegations of possession

viewing vs. possession

- new Fed Law: access with intent to view
- most states: require possession

When is affidavit sufficient to establish PC that suspect possesses CP on home computer?

"viewing"

- Feds :
"knowingly accesses with intent to view"
18 U.S. C. sec. 2252A(5)(A)
- States: most have not followed
- Wisconsin: mere viewing = possession

State v. Mercer, 782 N.W. 2d 125
(Wis. App. 2010)

Cache Memory

Just because it isn't downloaded...

- to speed up repeat viewing of previously visited website, computers **automatically** make copy of data from visited websites in form of "temporary Internet files" and store data in "cache"
- automatic -- no user prompt needed
- images can be reviewed and manipulated even when only in cache files

typical claim *at trial*

did not know images automatically downloaded to computer

Possession ?

Possession requires awareness [knowledge] that one has the object -- can one avoid that element because user ignorant about computers?

PC allegations vs. evidence to convict

- PC -- merely have to show PC computer has CP
- at trial -- must show "knowing" possession

even if suspect unaware of automatic downloading, police still have PC contraband on computer

probable cause to believe "mere" member of website has CP on computer?

considerations:

- does site have both legal / illegal materials? -- if so, less likely probable cause exists
- what if site has only illegal materials?
 - most courts: mere membership = probable cause
 - *some* courts: not enough –

U.S. v. Shields, 458 F.3d 269 (3rd Cir. 2006) (collects cases)

additional info beyond membership

- site focus is clearly CP
- evidence of actual downloading of child porn
- automatic transmission as part of site's services
- use of suggestive screen names /email addresses

(ex) Littlebuttsue ; Littleitgirly

more PC evidence

- prior convictions for sex offenses involving children or child porn
- possession of child erotica

U.S. v. Hansel, 524 F.3d 841 (8th Cir. 2008)

nexus to home?

problem: police have --

- screen name
- get IP address
- then subscriber info listing name, billing address of subscriber

Where is computer that has pics?

nexus to home:

"common sense" suspect has them in home

- its a place of privacy
- it has access to internet

E.g., State v. Samson, 916 A.2d 977 (Me. 2007)

allegations in warrants about
internet child pornography collectors

no typical profile ----

- Store images on computer media
- Collect as many images as they can
- Tend to organize collections
- Keep collection for long time

Why CP Retained Long Periods

- Initial collection difficult to obtain – illegal
- Social stigma
- Images used for trading, or as currency
- Emotional value
- Addiction?
- Kept in secret and secure places
 - in private homes, for example

overcoming staleness

judicial recognition collectors keep CP long period of time --- overcomes staleness

- U.S. v. Morales-Aldahondo, 525 F.3d 115 (5th Cir. 2008)
(3 years since last download)
- U.S. v. Perrine, 518 F.3d 1196 (10th Cir. 2008)
(111 days after chat room/images displayed on web cam)
- State v. Felix, 942 So. 2d 5 (Fla. App. 2006)
(about 6 months after email sent)
- Mehring v. State, 884 N.E.2d 371 (Ind. 2008)
(collects authorities)

Overcoming Staleness

statements in affidavit RE:

- Deleted files – ability to recover
- Protracted activity / continuing conduct, rather than one-time download
- Info from ISP when account last accessed

nexus: is the suspect a collector?

need some evidence suspect is collector

Ellis v. State, 971 A.2d 379 (Md. App. 2009)
(affirming striking profile material from warrant affidavit)

- previous slides indicate maybe collector
- PLUS assertion by affiant what collectors do is sufficient
See U.S. v. Paull, 551 F.3d 516 (6th Cir. 2009)
