New Developments in Criminal Law

Cases that impact prosecution of child abuse

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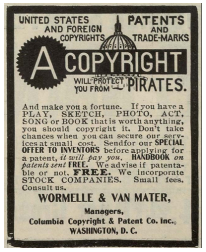
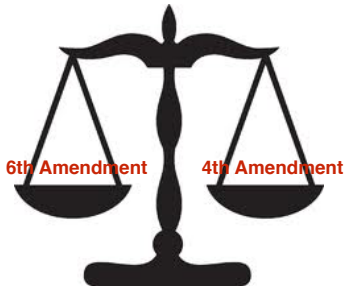


Attribution

- Many thanks to Joel Jacobson, Assistant Attorney General, New Mexico Attorney General's Office for his longtime contribution to the Crawford Outline available through NCPCA.
- For access to the Crawford Outline please make a request via www.ndaa.org



"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; **to be confronted with the witnesses against him**; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

–Sixth Amendment to the U.S. Constitution

Ohio v. Roberts

448 U.S. 56 (1980)

- The 6th Amendment does not bar admission of an unavailable witness's statement against a criminal defendant if the statement bears *"adequate indicia of reliability."*
- To meet that test, evidence must either:
  1. Fall within a "firmly rooted hearsay exception", or
  2. bear "particularized guarantees of trustworthiness."

Crawford v. Washington

541 U.S. 36 (2004)

- "Where **testimonial** statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protections to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'"
- "To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a *procedural* rather than a *substantive* guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."

What is Testimonial?

- Testimony is typically a "solemn declaration or affirmation made for the purpose of establishing or proving some fact."
- Affidavits, custodial examinations, prior testimony (w/o opp. for cross). "Statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."
- "Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."

Davis & Hammon

547 U.S. 813 (2006)

"These cases require us to determine when statements made to law enforcement personnel during a 911 call or at a crime scene are "testimonial" and thus subject to the requirements of the Sixth Amendment's Confrontation Clause."

Davis Facts

- 911 Call goes dead, dispatcher reverses the call.

Q: Hello
A: Hello
Q: What's going on?
A: He's here jumping on me again.
Q: Are there any weapons?
A: No, He's using his fists.
Q: Do you know his last name?
A: Davis
Q: Davis? Okay, what's his first name?
A: Adrian

Hammon Facts

- Police respond to late night domestic disturbance.
- Scene had calmed down, but evidence of altercation apparent.
- Police have Victim write affidavit (which implicates Hammon).
- Victim does not appear, over objection Officer testifies to Affidavit.

The Primary Purpose Test

"Statements are non testimonial when made in the course of police interrogation under circumstances objectively indicating that the **primary purpose** of the interrogation is to enable police assistance to *meet an ongoing emergency*. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the **primary purpose** of the interrogation is to *establish or prove past events* potentially relevant to later criminal prosecution."

Davis

- Describing events as they were happening.
- Call for help.
- Interrogation over phone in a non-tranquil environment.

"We conclude from all this that the circumstances of McCottry's interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency."

Hammon

- No emergency in progress.
- Victim separated from Offender
- Officer seeking to determine what happened (past-tense).

"Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime."

Giles v. California

554 U.S. 353 (2008)

Facts: Giles shot his ex-girlfriend 6 times outside the garage of his grandmother's house. No witnesses saw the shooting, but his niece heard the altercation and the gun shots. Both nice and grandma came outside to see Giles standing near Avie with a gun in his hand. Prosecutors introduced a 3 week old DV report, over objection, using forfeiture by wrongdoing rule.

"We consider whether a defendant forfeits his Sixth Amendment right to confront a witness against he when a judge determines that a wrongful act by the defendant made the witness unable to testify at trial."

Intent is Paramount

- Two forms of testimonial statements were admitted at common law even though they were unconfronted. 1) Dying declarations, and 2) Statements of a witness who was "detained" or "kept away" by the "means or procurement of the defendant."
- The forfeiture by wrongdoing exception requires that the defendant had in mind the particular purpose of making the witness unavailable.

Melendez-Diaz v. Massachusetts

557 U.S. 305 (2009)

Facts: After conducting forensic analysis on white powder found in Appellant's possession, the court admitted (over defense objection) affidavits reporting the results of the testing which showed the material seized by police and connected to defendant was cocaine.

The question presented is whether those affidavits are testimonial, rendering the affiants "witnesses" subject to the defendant's right of confrontation under the Sixth Amendment.

Analysts are Witnesses

- "There is little doubt that the documents at issue in this case fall within the 'core class of testimonial statements.'"

Michigan v. Bryant

562 U.S. 344 (2011)

Facts: Police discover Covington mortally wounded via GSWs in a gas station parking lot. They arrive before EMTs and asked what happened, who shot him, and where. Victim implicates Appellant. Trial happened prior to *Crawford* and *Davis*. Statements admitted as excited utterance.

"Were Covington's statements to police testimonial, and therefore implicate *Crawford*?"

Defining "Ongoing Emergencies"

- The relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individual's statements and actions and the circumstances which the encounter occurred.
- Things to consider: scope of the threat (DV vs. Public), type of weapon (Gun v. Fists), victim's medical condition (Scratches v. GSWs), formal vs. informal questioning.

Bullcoming v. New Mexico

131 S.Ct. 2705 (2011)

Facts: Bullcoming hits a car and flees. Upon capture he fails a field sobriety test, and refuses a breathalyzer. A warrant for BAC is issued. Analysis reveals .20 BAC. State calls a surrogate witness because actual analyst is on unpaid leave. Documents admitted as business record. Trial is post *Crawford* but pre *Melenez-Diaz*.

"Does the Confrontation Clause permit the prosecution to introduce a forensic laboratory report containing a testimonial certification, made in order to prove a fact at a criminal trial, through the in court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification?"

Reports are Testimonial & Surrogates Aren't Enough

- "[T]he analysts who write reports that the prosecution introduces must be made available for confrontation even if they possess 'the scientific acumen of Mme. Curie and the veracity of Mother Teresa."
- There were several aspects of the testing which could bear fruit for the defense, and having a surrogate testify denies the defendant an opportunity to cross on those areas.

Clark v. Ohio

137 Ohio St. 3d 346 (2013)

Facts: 3 year old's preschool teacher (Whitley) notices L.P. with a bloodshot and bloodstained eye, and asks "what happened." L.P. said "I fell." He was asked "How did you fall and hurt your face?" L.P. said "I fell down." On arriving in the brighter light of the classroom Whitley saw "red marks, like whips of some sort" on L.P.'s face. She got the attention of the lead teacher (Jones), who said we need to bring him to the supervisor (Cooper). Jones asked L.P. "Who did this, what happened to you?" L.P. said "Dee, Dee." Upon bringing L.P. to Cooper, Cooper said whoever saw this first needs to report it. Whitley called 696-KIDS.

Clark v. Ohio

DCFS sends a social worker to question L.P. Meanwhile Appellant shows up, denies responsibility and leaves with L.P. The next day a social worker locates the children (little sister A.T. and L.P.) at Appellant's mother's house. A.T. had bruising, burn marks, swollen hand, and a pattern of sores on her hairline. L.P. had bruising in various stages of development and abrasions consistent with having been struck by a linear object.

Clark v. Ohio

At trial, L.P. is declared incompetent to testify. 7 witnesses are able to testify about L.P.s statement's to them about what happened, and who did it. (Police, Social Worker, DCFS Intake, Whitley, Jones, Grandma, and Great Aunt). Convicted of all but one charge, and sentenced to 28 years.

Appellant claims his 6th Amendment rights were violated by allowing those witnesses to testify about L.P.'s statements. Reversed by court of appeals. State appealed as to Whitley and Jones. Ohio Supreme Court agreed with lower court. SCOTUS hears the case March 2, 2015.

Ohio Supreme Court

The issue in this case is whether the trial court violated Clark's constitutional right to confront witnesses against him when it admitted a hearsay statement that 3 1/2 y/o L.P. made to his preschool teacher, Jones, in response to questions asked about injuries to his eye and marks to his face observed upon his arrival at a preschool day care.

Ohio Supreme Court Analysis

1. L.P. is unavailable because he was declared incompetent to testify.
2. Are L.P.'s statement's "testimonial?"
   A. Court considers Jones an agent of the state for purposes of law enforcement. (therefore not private citizen analysis, but LEO analysis).
   B. Circumstances objectively indicate that no ongoing emergency existed and the primary purpose was to establish or prove past events potentially relevant to a later prosecution.

Arguments of the Parties (and Amici)

- State of Ohio
- United States
- National District Attorneys Association and State of New Mexico
- American Professional Society on the Abuse of Children (APSAC)
- 44 Other States

Other New Cases

- McCarley v. Kelly, 759 F.3d 535 (6th Cir. 2014)- Neither child's nor therapists' perspective mattered, rather the perspective of the LEO who arranged the meeting did.
- U.S. v. Liera-Morales, 579 F.3d 1105 (9th Cir. 2014)- Federal Agent who arranged recording of mother's conversation with kidnappers did so to ensure safety and assist in rescue mission.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

–Fourth Amendment to the U.S. Constitution

A Brief History of SCOTUS & the 4th Amdmt

Olmstead v. U.S.

277 U.S. 438 (1928)

- Bootlegging Investigation
- Phone Calls intercepted by attaching wires into public telephone pole wires.
- "The intervening wires are not a part of his house or office, anymore than the highways along which they are stretched."

Katz v. U.S.

389 U.S. 347 (1967)

- Public Phone Booth Wiretap
- 4th protects people, not simply areas…cannot depend upon presence or absence of physical intrusion…
- J. Harlan (concurring), A person has a constitutionally protected Reasonable Expectation of Privacy

Kyllo v. U.S.

533 U.S. 27 (2001)

- Indoor Marijuana Operation
- Police use thermal imaging to detect heat lamps (for growing pot).
- "Obtaining by sense enhancing tech. any info. regarding the interior of the home not otherwise obtainable w/o physical intrusion = search."

U.S. v. Jones

132 S.Ct. 945 (2012)

Whether the attachment of GPS to a vehicle, and subsequent use of the device to monitor the vehicle's movements on public streets, constitutes a search or seizure within the meaning of the 4th Amdmt.

Jones was Owner/Operator of a DC nightclub.

Joint FBI/DC Metro investigation into narcotics trafficking.

Surveillance, Video monitoring, Pen Register, and Wiretap on cellphone provided information to apply for warrant for GPS on vehicle.

U.S. v Jones

Warrant was issued authorizing installation of GPS on car in D.C. within 10 days.

Day 11 GPS installed in Maryland.

4 Weeks of monitoring provided ample information to support indictment for conspiracy to posses and possession with intent to distribute +5 k of cocaine, and +50 g cocaine base.

Hung Jury. Another indictment, Guilty, Life in Prison.

U.S. v Jones

Conviction Reversed by D.C. Court of Appeals, SCOTUS granted cert.

A car is undoubtedly an “effect” for purposes of the 4th Amendment.

Day 11 + Maryland = warrantless / Triggers 4th Amendment

Government physically occupied private property for purposes of obtaining information.

DC Court of Appeals decision is **Affirmed**.

Jones Takeaways

- Execute the search warrant in the time/manner authorized.
- Physical intrusion of vehicle in public areas to insert a tracking device triggers 4th Amendment scrutiny.

U.S. v. King

133 S.Ct. 1958 (2013)

2003: Home Invasion -> Mask -> Gun -> Rape = Suspect Not Caught

2009: King arrested in MD for menacing a group of people w/ shotgun.

MD allows collection of DNA (buccal swab) during booking for violent crimes.

CODIS hit for the 2003 Rape.

Charged with the rape, convicted, LWOP

U.S. v King

- CA of MD reversed saying buccal swab was warrantless seizure. SCOTUS grants cert.
- "A buccal swab is far more gentle process than a venipuncture to draw blood. It involves but a light touch on the inside of the cheek; and although it can be deemed a search within the body of the arrestee, it requires no 'surgical intrusions beneath the skin.' The fact that an intrusion is negligible is of central relevance to determining reasonableness, although it is still a search as the law defines."

U.S. v King

- "In some circumstances (special law enforcement needs), diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable."
- The validity of the search of a person incident to a lawful arrest has been regarded as settled…and has remained virtually unchallenged."

U.S. v King

- "The fact of lawful arrest, standing alone, authorizes a search."
- Here the Government's interest in preventing crime by arrestees is both legitimate and compelling.
- Buccal Swab incident to arrest is a reasonable search that can be considered routine booking procedure.
- Court of Appeals of MD is **Reversed**.

Riley v. CA v. Wurie

134 S.Ct. 2473 (2014)

- Riley was stopped for expired tags. Officer learns license is suspended.
- Car is impounded. Inventory search conducted. Reveals 2 loaded handguns. Riley is arrested.
- Incident to arrest, Riley is searched. "Bloods" paraphernalia found along with cell phone.

Riley Facts

- Officer looks in phone and notices "CK" repeatedly.
- 2 hours after arrest, Gang Det. looks through phone finds incriminating evidence linking Riley to an earlier shooting.
- Convicted, 15 - Life.
- California Case

Wurie Facts

- Wurie is observed selling drugs from his car. Arrested and brought back to station. 2 cell phones found.
- Flip Phone keeps ringing. Caller is “my house.”
- Police open phone, see photo of woman and baby as wallpaper.
- Access call log, find “my house,” gather phone number. Use online phone directory to find address.

Wurie Facts

- Police go to building, see Wurie’s name on mailbox, and woman in window who resembles the photo from phone.
- Get search warrant, execute, find 215 g of crack cocaine, marijuana, drug paraphernalia, firearm and ammo, and cash.
- Charged with distribution, possession with intent, felon with gun.
- Moves to suppress, Denied, Convicted, 262 months.
- 1st Circuit reversed. SCOTUS granted cert.

Riley/Wurie Analysis

- How search incident to arrest doctrine applies to modern cell phones.
- Remember *King* (buccal swab) analysis.
- *Chimel*, *Robinson*, and *Gant* Trilogy
- *Robinson* regarded any privacy interests retained by individual after arrest as significantly diminished by the fact of the arrest itself. Cell phones, however, place vast quantities of personal information literally in the hands of individuals.

Cell Phones are Computers

- Digital data on a cell phone cannot itself be used as a weapon to harm an arresting officer to effectuate escape.
- Once an officer has secured a phone and eliminated any potential physical threats (um.. hidden razor blades), data on the phone can endanger no one.
- But what about *Robinson*?

Chimel Rationale 1

- But what about **officer safety**? Text messages telling confederate help is on the way?
- Strong Government interest in officer safety, but no evidence presented to suggest this concern is based on actual experiences.
- Plus this would broaden *Chimel* concern that arrestee himself might grab weapon and use it against an officer or to effectuate an escape.

A Glimmer of Hope?

- "To the extent dangers to arresting officers may be implicated in a particular way in a particular case, they ar abetter addressed through consideration of case-specific exceptions to the warrant requirement, such as the one for **exigent circumstances**."

Chimel Rationale 2

- What about **destruction of evidence**? Like remote wiping or encryption?
- Once law enforcement secures a phone, there is no longer a risk that the arrestee **himself** will be able to delete incriminating evidence.
- Gov't concerns regarding remote wiping are actions of **third parties**, data encryption is even further afield. "We have been given little reason to believe either problem is prevalent."

Chimel Rationale 2

- Besides, opportunities for officers to search password protected phones before data becomes encrypted is quite limited since it happens either as default or at the push of a button.
- Remote wiping can be fully prevented by disconnecting a phone from the network, or Faraday bag use.

In the End…

- "We cannot deny that our decision today will have an impact on the ability of law enforcement to combat crime. Cell phones have become an important tool in facilitating coordination and communication among members of criminal enterprises, and can provide valuable incriminating information about dangerous criminals. Privacy comes at a cost."
- Officers must generally secure a warrant before conducting a search.
- CA is **reversed**; First Circuit is **affirmed**.

Commonwealth v. Gelfgatt

11 N.E. 3d 605 (2014)

- Indicted on a bunch of white collar/tech crimes for diverting funds to himself through a real estate scheme.
- Arrested upon receipt of a $1.3 mil payoff. Search warrant recovers multiple hard drives, laptops, desktops, and other storage media.
- All data on the computers were encrypted with "DriveCrypt Plus" software.

Commonwealth v. Gelfgatt

- Defendant tells police “everything is encrypted and no one is going to get it.” And, that he uses encryption for privacy purposes.
- CW files motion to compel decryption.
- Denied, Mass Supreme Court transferred case sua sponte.
- Can defendant be compelled…to provide his key to seized encrypted digital evidence despite…the 5th Amendment and Art. 12 of Mass Declaration of Rights?

The 5th Amendment Implication

- 5th Amdmt does not proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a **testimonial** communication that is incriminating. (Fisher v. U.S, 425 U.S. 391)
- So is the act of inputting numbers/letters a testimonial communication that triggers 5th Amdmt protection?

The 5th Amendment Implication

- **Testimonial** depends on whether the Gov’t compels the individual to disclose “the contents of his own mind” to explicitly or implicitly communicate some statement of fact.
- 5th is not triggered where Gov’t seeks to compel an individual to be the source of real or physical evidence (blood sample, voice/ handwriting exemplar, lineup, breathalyzer, etc…) because the individual is not required to disclose any knowledge he might have or speak his guilt.

Foregone Conclusion Exception

- Here, it isn't as simple as blood/voice, inputting the password acknowledges ownership. But **foregone conclusion** exception provides that an act of production does not involve testimonial communication where the facts conveyed already are known to the Gov't, such that the individual "adds little or nothing to the sum total of Gov't information." *Fisher*
- Gelfgatt already admitted ownership to police therefore decryption password is not a testimonial communication protected by the 5th Amdmt.
- **Reversed and Remanded**

In Re: A Nextel Cellular Telephone,

2014 WL 2898262 (D.Kan.)

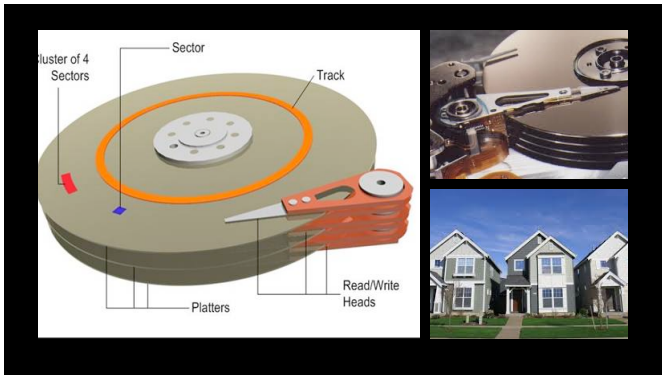
- This is the fallout from *Riley* and it is beginning to really impact the way we do business. We really need to be working with our LEO on crafting better affidavits which will withstand this level of scrutiny.
- Request for search warrant by DEA after seizing 7 bags of methamphetamine and finding phone with suspect.
- "Request permission to conduct a full and complete forensic telephone examination, including a search of contact lists, calendars, stored image and video files, internet history, SMS and MMS text messaging, and other data related to drug sales, cultivation, and distribution."

Search Methodology & 4th Amdmt.

- The Methodology as written in the request for SW…
- SW Probable Cause and Particularity Requirements serve 2 purposes:
  1. Magistrate scrutiny is intended to eliminate searches not based on Probable Cause.
  2. Those searches deemed necessary should be as limited as possible, therefore no "general warrant" shall issue.

A Deeper Look at Particularity

- The particularity requirement first mandates that warrants describe with particularity the place to be searched. "The test for determining the adequacy of the description of the location to be searched is whether the description is sufficient to enable the executing officer to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that another premises might be mistakenly searched." U.S. v. Lara-Solano, 330 F.3d 1288 (10th Cir. 2003)



A Deeper Look at Particularity

- In addition to the places to be searched, the warrant must also describe the things to be seized with sufficient particularity. This is to avoid a 'general exploratory rummaging of a person's belongings,' and was included in the Fourth Amendment as a response to the evils of general warrants.
- The description must be confined in scope to particularly described evidence relating to a specific crime for which there is demonstrated probable cause.
- Warrant must describe the things to be seized with sufficiently precise language so that it informs the officers how to separate the items that are properly subject to seizure from those that are irrelevant.

Application in the Digital Era

- *Riley*- "Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.' The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought."
- *10th Circuit*- The modern development of the personal computer and its ability to store and intermingle a huge array of one's personal papers in a single place increases law enforcement's ability to conduct a wide-ranging search into a person's private affairs. Warrants for computer searches must affirmatively limit the search to evidence of specific federal crimes or specific types of material. U.S. v. Otero, 563 F.3d 1127 (2009)

The Facciola Decisions

- In re Search of Black iPhone
- In re Search of Odys Loox
- In the Matter of the Search of Apple iPhone, IMEI xxxxxxx

Two Systemic, Fatal Issues

1. As written, the methodology will result in the over seizure of data and indefinite storage of data that it lacks probable cause to seize.
2. It is so broad that it appears to be nothing more than a 'general, exploratory rummaging in a person's belongings.'

- The court is therefore asking the Gov't to explain, with particularity, it's "methodology for determining, once it is engaged in the search, how it will determine which blocks should be searched for data within the scope of the warrant."

The Future of Affidavits

- "The Gov't should not be afraid to use terms like MD5 hash values, metadata, registry, write blocking and status marker, nor should it shy away from explaining what kinds of third party software are used and how they are used to search for particular types of data."

U.S. v. Miller

2014 WL 3671062 (E.D. Mich.)

- LEO executes search warrant w/r/t guns and drugs. During search LEO discover hidden surveillance system and a control room which had drugs, video monitoring equipment, money, safe, and a gun.
- While searching this room 1 Det. picks up, and turns on a digital camera. Discovers an image of two young girls engaging in sexual acts. He turns off camera, logs the item on the SW as seized. But it's forgotten at the house. Other digital media devices are seized.
- Next day (Oct 2), apply for SW for child sexual abuse images based on discovery and prior conviction for sex assault of 6 y/o granddaughter.

Motion to Suppress Fruits

- Oct 4 apply for 3rd SW to review previously collected media. Exam reveals a lot of CSE evidence.
- Jan 9, FBI applies for 4th SW to examine home surveillance camera.
- At trial, Defendant argues that initial search of digital camera exceeded scope of SW, violated his REP, and violated 4th Amdmt.

Scope of Search Warrant #1

- The Detective's brief exam off camera is consistent with an authorized narcotics search. The camera was discovered in "control room" among drugs, scales, and a loaded gun. Given the proximity to evidence of illicit activity, **it was objectively reasonable for an officer to believe the camera might be related to or contain a record of the kind of activity that prompted the SW.**
- The SW authorized a search for evidence that would establish D's ownership or control of the residence. **A reasonable officer might surmise that a camera might contain photographs that would establish this.**

Does *Riley* Apply Here?

- **Factually** distinguishable because Riley dealt with warrantless search, here we have a valid SW.
- **Legally** distinguishable because a camera doesn't raise the same concerns as a smart phone, storage size, types of data stored, amount of use, etc…
- Motion **denied**.

U.S. v. Keith (Nov. 2013)

- Charged with distribution and possession of CSE 18 U.S.C. 2252(a)
- Moved to suppress all evidence seized as a result of the search warrant.
- Search Warrant was based on two sources of information:
  1. NCMEC CyberTipline Report
  2. Staples employee finds file names while fixing computer.

NCMEC & AOL Inc.

FP is an automated program that scans images sent, saved, or forwarded from an AOL email account. AOL has a database of more than 100,000 hash values of pictures meeting the definition of child sexual abuse images. If the IDFP hits on a hash value within the database, the email is captured, AOL terminates the users email account (pursuant to its terms of service). Next, AOL generates a report and an email to send to NCMEC's CyberTipline (pursuant to statutory requirement). The report includes the captured email, the attached file, the user's account information, and the IP address of the user at the time of the email.

NCMEC & AOL Inc.

CyberTipline was launched in 1998 as a way for online users, members of the public, and internet service providers a way to report suspected child sexual exploitation. The reports can be made online or via the hotline number. By statute, NCMEC must forward any report to the appropriate local law enforcement agency. Once a report is made, an analyst opens the file to determine if the photo meets the definition of child sexual abuse images. The IP address and the email address provided in the report is then run through publicly available online tools to determine the geographic location of the user. Law Enforcement uses NCMEC's secure VPN to access the report and the images.

Private or Gov't Search?

- Remember the 4th Amdmt only applies to Government Searches not Private Searches.
- Whether a party is acting as agent of the Gov't has 3 factors:
  1. Extent of Gov't role in instigating or participating;
  2. Degree of control Gov't exercises over search and party;
  3. Extent to which private party aims to primarily help Gov't or serve its own interests. (U.S. v. Silva, 554 F.3d. 13 (1st Cir 09)

AOL and *Silva* Factors

- None of the Silva factors are met. AOL is not required to monitor for these images, rather to report if they find them. Gov't exercises no control over AOL's monitoring of its network. AOL is motivated by its own private interests in seeking to deter these images in its network.

NCMEC and *Silva* Factors

- NCMEC's search was for the sole purpose of helping law enforcement.
- Through Congressional authorization and funding of CyberTipline, the Gov't instigates these searches. Statute requires NCMEC to send information to federal law enforcement and encourages reporting to state and foreign law enforcement agencies.
- NCMEC receives federal grant funds $.

Staples Saves the Day

- If the SW information regarding NCMEC was excised from the warrant, the Staples information would have been enough. Therefore the motion is denied.
- This is bad precedent for NCMEC CyberTipline Reports in this jurisdiction.
- But see *US v. Ackerman*

US v. Ackerman

2014 WL 2968164 (July 2014)

On April 22, 2013 AOL's IDFP detected a match on a hash value associated with a child sexual abuse image sent from Defendant's email account. The aforementioned process was triggered, and the Defendant's location was Kansas. The Kansas ICACTF solicited the help of DHS. The DHS Agent reviewed the image and began his investigation. A subpoena for the IP Address was issued on April 22, 2013. Results revealed Defendant's wife's information, and that Defendant was an authorized contact on the account. On May 22, a preservation letter to AOL was issued for Defendant's user account. A search warrant was also issued for Defendant's home that same week. Incriminating evidence was found during the search.

U.S. v. Ackerman

- In a non-custodial interview, two LEOs informed Defendant about the search just executed at his house. Defendant told the LEOs he knew the search warrant must have been about "child pornography." Defendant was indicted for distribution of child sexual abuse images.

Souza (similar to Silva)

- " A search by a private person becomes a government search if the government coerces, dominates, or directs the actions of a private person conducting the search." *United States v. Souza*, 223 F.3d 1197, 1201 (10th Cir. 2000) (quotation marks and citation omitted). To determine whether a search by a private person becomes a government search, there is a two-part inquiry: "1) whether the government knew of and acquiesced in the intrusive conduct, and 2) whether the party performing the search intended to assist law enforcement efforts or to further his own ends." *Id.* (citing *Pleasant v. Lovell*, 876 F.2d 787, 796 (10th Cir. 1989)).

Taking *Keith* Apart

This court finds the *Keith* court's reasoning as to whether NCMEC's conduct constitutes government action inapplicable here. Not only does the Court disagree with several of the *Keith* court's factual conclusions, but the *Keith* decision employed a three-part test required by the First Circuit. This Court must employ the Tenth Circuit's two-part test. Although the elements are similar, it appears that the Tenth Circuit requires more specific government involvement in the knowledge or the participation of the search.

Taking *Keith* Apart

Going through a number of previously decided cases on this issue, the court finds a trend that a Government agent was present at the time of the "private" search. The court finds that there was no law enforcement agent present at the time of the NCMEC search, that NCMEC has no law enforcement agent employees, law enforcement is not party to any report, and cannot even access the report until it is completed by NCMEC. There is accordingly no evidence that a government agent affirmatively encouraged, initiated, or instigated NCMEC's review of AOL's report.

Taking *Keith* Apart

With regard to the second part of the test, the evidence demonstrates that NCMEC is a private, non-profit corporation with the mission of reuniting families with missing children, reducing child sexual exploitation, and preventing child victimization. NCMEC operates its CyberTipline to provide the public a way to report suspected child sexual exploitation. Although NCMEC's CyberTipline also benefits law enforcement, the Court must determine whether the private party had a "legitimate, independent motivation" in performing the search. And the Court answers this question in the affirmative. Mr. Shehan testified that the CyberTipline was created to provide a central location to report information regarding child sexual exploitation.

Taking *Keith* Apart

Regarding the second issue about whether NCMEC (if a Gov. Actor) exceeded AOL's scope of search. The court found that NCMEC was not, but assuming arguendo it were, the court did a good analysis of two SCOTUS cases. In Walter v. United States 447 U.S. 649 (1980) a package containing 8-millimeter film was mistakenly delivered to a private company. The employees of the private company opened the package and found boxes of film which had labeling on its side, suggesting obscene material on the film. The other relevant case is United States v. Jacobsen 466 U.S. 109 (1984). In that case, a private party (FedEx) opened a box that had been damaged during transport and discovered what appeared to be illegal drugs. The private party then put the contents of the box back inside and contacted the DEA. The DEA then opened the box and removed the illegal drugs.

A Split Among the Courts

- This court found the facts closer to Jacobsen than Walter. "The key issue is determining the degree to which NCMEC's actions exceeded the scope of AOL's search. In this case, a hash value is significantly different than a label on a file. A label does not tell you anything about the file—except for what the file may contain. In contrast, a hash value is much more specific. A hash value that matches AOL's database conveys that the image is that of child pornography.
- "The Court concludes that AOL's search was not a government search. In addition, NCMEC's search was not a government search. And, alternatively, even if NCMEC's search could be considered a government search, NCMEC's search did not exceed the scope of AOL's search in such a way that would be constitutionally significant."

New Developments in Criminal Law

Cases that impact prosecution of child abuse

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