

Search Warrants for Digital Devices

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JUNE 2019

What Are We Talking About?

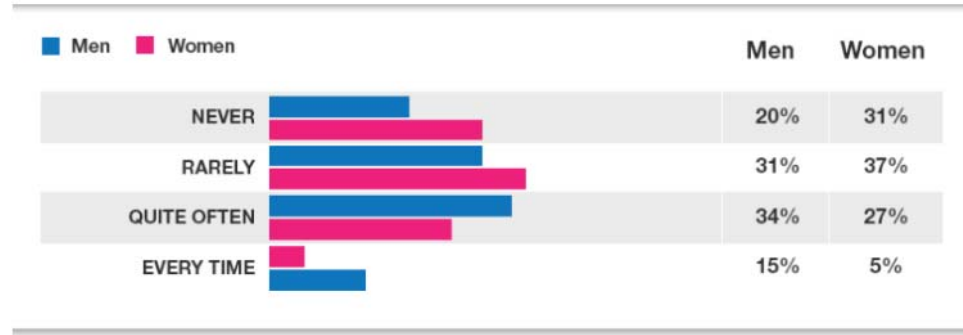
Yes

- ▶ Search warrants for cell phones
- ▶ Search warrants for computers
- ▶ Probable cause
- ▶ Scope and particularity
- ▶ Execution of search warrants

No

- ▶ Search warrants for cell phone records
- ▶ Search warrants authorizing GPS tracking
- ▶ Wiretap warrants
- ▶ Warrantless searches of devices
- ▶ Authentication and other evidence issues

How Often Do You Use Your Phone on the Toilet?



Source: BankMyCell 2018

The State of the Law



Nexus Between Phone and Crime

- ▶ Review Scenario 1



Nexus Between Phone and Crime

- ▶ State v. Moats, 168 A.3d 952 (Md. Ct. App. 2017): The warrant was properly issued. Although the application was "devoid of specific facts linking the crimes and the cell phone," the court noted the prevalence of cell phones, "the expertise and experience of the affiant police officer," and the fact that "by definition," the crime of drug distribution requires at least two participants and communication between them.

Nexus Between Phone and Crime

- ▶ Factors to consider
 - ▶ Direct evidence that the phone was used to commit or to document the crime
 - ▶ Nature of the offense
 - ▶ Whether the offense involved more than one perpetrator
 - ▶ The applicant's training and experience
 - ▶ The age of the suspect

Lack of Specific Reference to Devices

- ▶ Review Scenario 2



Lack of Specific Reference to Devices

- ▶ United States v. Fulton, 914 F.3d 390 (5th Cir. 2019). Relying on a previous case in which it had described a cell phone as “a mode of both spoken and written communication [that] . . . served as the equivalent of records and documentation of sales or other drug activity,” the court ruled that the defendant’s cell phone was the “functional equivalent” of a ledger and so was properly seized.

Lack of Specific Reference to Devices

- ▶ State v. Dean, 388 P.3d 24 (Ariz. Ct. App. Div. 2 2017). “Because of the privacy interests at stake in computers, and the large amount of personal information available therein, we . . . conclude that a warrant that does not specify that officers intend to search a computer is not sufficiently particular to authorize such a search.”

Limiting the Scope of Searches to Certain Files/Locations

- ▶ Review Scenario 3



Limiting the Scope of Searches to Certain Files/Locations

- ▶ Com. v. Dorelas, 43 N.E.3d 306 (Mass. 2016). The court stated: “In the physical world, police need not particularize a warrant application to search a property beyond providing a specific address . . . [as] it would be unrealistic to expect them . . . to identify [beforehand] which specific room . . . or container . . . will contain the objects of their search. . . . However, in the virtual world, it is not enough to simply permit a search to extend anywhere the targeted electronic objects possibly could be found, as data possibly could be found anywhere within an electronic device.” Yet the court ruled that “[c]ommunications can come in many forms including photographic . . . So long as such evidence may reasonably be found in the file containing the defendant’s photographs, that file may be searched.”

Limiting the Scope of Searches to Certain Files/Locations

- ▶ “Ex ante” restrictions vs. “ex post” review
- ▶ Possible limitations
 - ▶ By file type, e.g., pictures, text messages, call logs, location data, spreadsheets
 - ▶ By time file is created, e.g., any files created or received between time X and time Y
 - ▶ By keyword, e.g., all files containing the victim’s name or nickname
 - ▶ By connection to offense, e.g., any evidence of offense X

Plain View vs. Second Warrant

- ▶ Review Scenario 4



Plain View vs. Second Warrant

- ▶ United States v. Carey, 172 F.3d 1268 (10th Cir. 1999): The additional 200+ images were unlawfully seized, as the officer's "suspicions changed" after opening the first pornographic image. From then on, the officer "expected to find child pornography and not material related to drugs." In effect, the officer "temporarily abandoned" his search for evidence of drug activity in order to conduct a five-hour warrantless search for child pornography. Such a search required a new warrant.

Plain View vs. Second Warrant

- ▶ Factors to consider
 - ▶ Whether the officer changed the course of his or her search upon encountering evidence of the unexpected crime
 - ▶ Whether the officer prioritized examining files that were likely to contain evidence of the unexpected crime
 - ▶ How much time the officer spent retrieving evidence of the unexpected crime

Locked Devices

- ▶ Review Scenario 5



Locked Devices

- ▶ G.A.O.L. v. State, 257 So.3d 1058 (Fla. Dist. Ct. App. 4th Dist. 2018). The Fifth Amendment prohibits compulsory self-incrimination. Producing a passcode is a testimonial act because it discloses information and “probes into the contents of an individual’s mind.” Thus, a court cannot require a suspect to reveal a passcode unless the foregone conclusion doctrine applies, i.e., unless the state already knows what “data [is] shielded by the passcode.” In this case, the State could not “identify what evidence lies beyond the passcode wall with reasonable particularity,” so the doctrine did not apply.”

Locked Devices

- ▶ Most courts agree re what's testimonial
 - ▶ Passwords/passcodes are testimonial
 - ▶ Biometric identifiers are not testimonial
- ▶ Courts disagree re when the foregone conclusion doctrine applies
 - ▶ When it is clear that the suspect knows the password/passcode?
 - ▶ When it is clear what data is behind the password/passcode?

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