



NACDL Fourth Amendment Center

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Device & Account Searches II

- Execution challenges
 - Timing
 - Ex Ante vs Ex Post
- *Franks* challenges
- Consent
- Account challenges
 - Pre-warrant seizures



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Challenge Execution

Motions & Hearings



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Timing



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- 31 days from pc to get a warrant = too long absent extenuating circumstances. Smith (2d Circ. 2020)(but good faith).
- Four factors to consider:
 - Length of delay
 - Importance of device
 - Property interest(reduced?)
 - Strength of justification for delay
- Phone seized incident to arrest but 34 days to get a warrant was too long- measured from the time the government developed PC. Tisdol (DC Ct. 2021)(no good faith because of Smith)

Execution

- Ex Ante restrictions are not feasible... Untrue- but who cares!
- Ex post examination of search warrant execution has always been possible. This is just a little more complicated.
- Christie – 10th Circuit



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Execution- Preliminary Issues

- Entitled to a hearing if they recover data outside the scope.
- What if they never finish execution by segregating data. How do you challenge the execution?



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Execution- Motions

- Require return/destruction of non-responsive property. Rule 41 (g) or 41 (j).
- US v Wey(SDNY), Ganas (2d cir), or P v Ford(NY)
- If all else fails use logic.



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Execution- Motions

- What do you do when they do it "correctly"?
- They give you the full extraction and identify responsive data and say they found nonresponsive data in "plain view"
 - You are entitled to a hearing
 - File an expert affidavit?



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Execution- Hearings

- Litigating two things
- Step 1 extraction limitations.
- Step 2 search/analysis limitations
- Step 3 should have already been litigated on the papers.



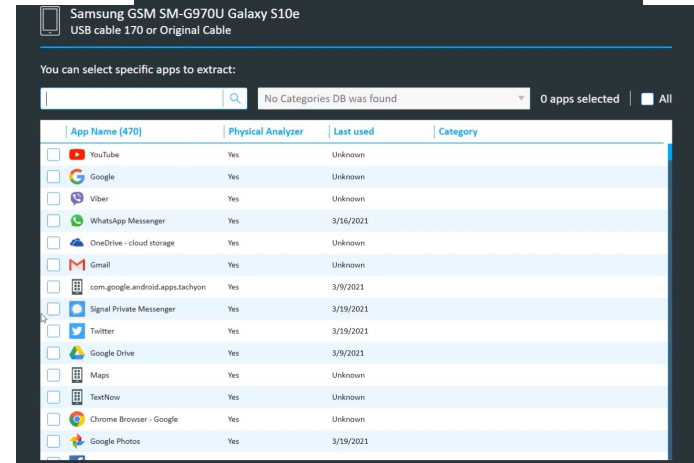
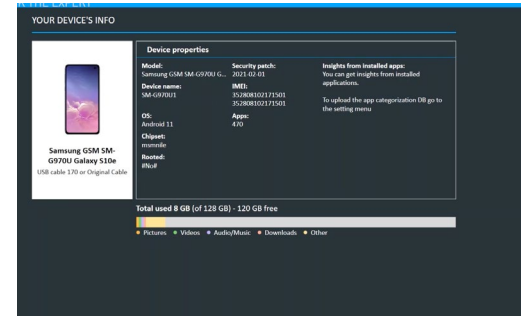
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Execution - Hearings Step 1

- Limits on type of extraction (e.g. logical vs file system vs physical)
- Limits on types of data extracted (ie they should have used a selective file system and targeted a particular app).

Execution- Hearings Step 1

- This is a hard argument with device searches but bad law based on generalizations about extractions not your case.
- It can be easier with account searches.



Execution – Hearings Step 2

- Search/analysis was a general rummaging and not targeted to the data in the warrant.
- Establish what they could do and didn't do to limit the search.



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Execution – Hearings Step 2

The screenshot displays a data analysis application interface. The top navigation bar includes 'File', 'View', 'Tools', 'Cloud', 'Extract', 'Python', 'Plug-ins', 'Report', 'Help', and a 'What's new?' button. The main content area is divided into three panels:

- Left Panel (Facebook Takeout):** Contains a search bar and a list of analyzed data categories: Calls (16), Contacts (2822) (301), Location Related (969), Media (8532), Messages (1117), Chats (1117), Social Media (46550), Facebook Takeout (46550), User Accounts & Details (1), and User Accounts (1). Below this is a 'Data files' section with Documents (3), Text (3), and Uncategorized (1236).
- Center Panel:** Features a timeline graph for the years 2009 to 2020. Below the graph is a table with columns: Created, Last Modified, Type, Related event, Source, and Participants. A dropdown menu is open for the 'Type' column, showing options: Select All, Check In (478), Like (31920), Post (10011), Reaction (3332), Recommendation (6), Share (133), and Update (670). The table lists various events, including 'Check In' and 'Takeout'.
- Right Panel (Social Media):** Displays details for a specific event. The 'Details' tab is active, showing information such as Source (Facebook Takeout), Account (Heather Correy Mahalik), Author (Heather Correy Mahalik), Title (Heather Correy Mahalik was traveling to Tel Aviv, Israel from Newark Liberty International Airport with Lee Papathanasiou and Thomas Papathanasiou Jr.), Created (1/10/2020 7:59:38 PM(UTC+0)), Last Modified, Platform, Position, Reactions, Comments, Shares, Status (Check in), Type, URL, Privacy, Extraction (Legacy), and Source file. The 'Participants' section lists Lee Papathanasiou and Thomas Papathanasiou Jr. The 'Body' section is also visible.

Red circles highlight the 'Search' bar in the top right and the 'Translate' button in the Social Media panel.

Case Examples

- People v. Prinzing
 - Cop investigating cp/csam
 - False claims that searching for viruses in image files
 - Viruses are executables
- United States v. Carey
 - Plain view
 - Kept searching



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Franks

Motions & Hearings



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Common Franks Issues

- Cops say data means something it doesn't.
- Cops lie about ability to parse out data in order to obtain a broader warrant.
- Cops lie about technology they are using and what the search entails.



Franks Motion

- **Your burden** to show a government official made material misrepresentation
- Requires an **offer of proof** not just contrary factual claims.
- Government cannot avoid a hearing by providing explanations in their reply!
- But a court may excise claimed misrepresentations.



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Franks Hearing

- Your burden
- Defense must call witnesses
 - Call your experts and witnesses don't worry about the lying cops(usually)
- Prosecution can call their own witnesses to counter yours
 - The lying cops
 - "Experts"



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Franks Hearing

- Your burden = preponderance of evidence to show misstatement or omission was:
 - Intentional
 - Reckless
 - Grossly negligent
- If you meet that burden court can then again decide whether it is “material” to probable cause



Consent Searches

Electronic Devices



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The Issues

- 1 Authority to consent
- Deception in the request
- Scope of the search



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Apparent Authority



Deception

- Lying is okay... but the ability to lie “is not boundless”.
- However, this is a “totality of circumstances” *State v. Bailey*, 989 A.2d 716 (2010).
- *Pagan-Gonzalez v. Moreno*, 919 F.3d 582, 598 (1st Cir. 2019).
 - False claim of authority
 - False claim of urgent need for action



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Scope Of Consent

- Reasonableness is finally in your favor!
- “objective’ reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?” Florida v. Jimeno, 500 U.S. 248, 251 (1991).



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Scope of Consent

What they were told would happen...

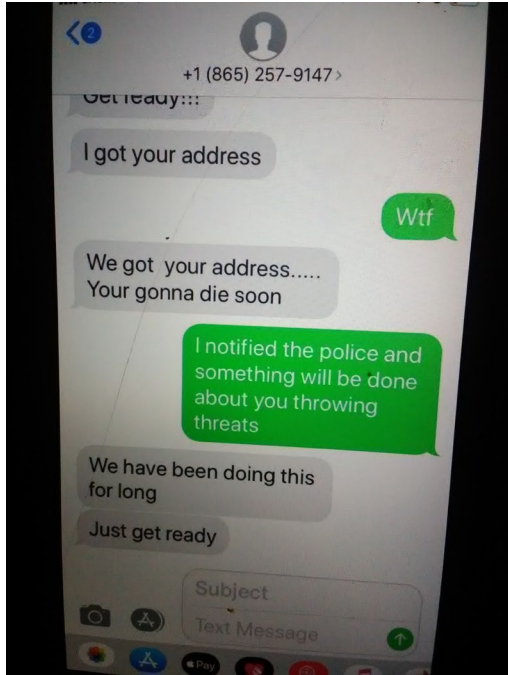


What happens



Scope of Consent

Look the text messages...



Not consent to look at photos



Scope of Consent

- Don't worry about their "consent" forms... Express oral limitations are not overridden by subsequent forms. See *United States v. Turner*, 169 F.3d 84 (1st Cir. 1999).
- But read their consent forms!

CONSENT TO SEARCH
(See JAGMAN 0170)

I, _____, have been advised that inquiry is being made in connection with _____ I have been advised of my right not to consent to a search of [my person] [the premises mentioned below]. I hereby authorize _____ and _____, who [has] [have been] identified to me as _____ to conduct a complete search of _____ Position(s) _____ my [person] [residence] [automobile] [wall locker] [_____] located at _____

I authorize the above listed personnel to take from the area searched any letters, papers, materials, or other property which they may desire. This search may be conducted on _____ Date _____

This written permission is being given by me to the above named personnel voluntarily and without threats or promises of any kind.

Signature

WITNESSES

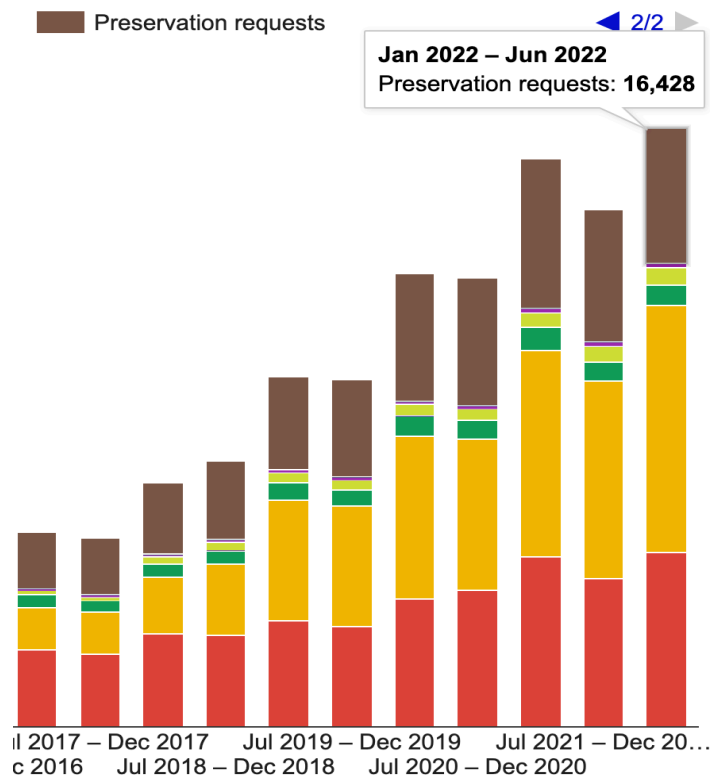
Warrantless Search Accounts



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Preservation Letters

- SCA 18 USC 2703(f)
- *Ganias* – “freezing” or retaining data is a seizure
- Must have PC at time of the freezing of the data
- *US v Perez* – must show “but-for” cause





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