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Device & Account Searches II

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



Challenge Execution

Motions & Hearings



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Timing



- 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



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?



Execution-Motions

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



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?



Execution-Hearings

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



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 <u>hard</u> argument with <u>device searches</u> but bad law based on generalizations about extractions not your case.
- It can be <u>easier</u> with <u>account</u> <u>searches</u>.

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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.



Execution – Hearings Step 2

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				Off to Our SKO!				

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



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.



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"



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





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



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).



Scope of Consent

What they were told would happen...

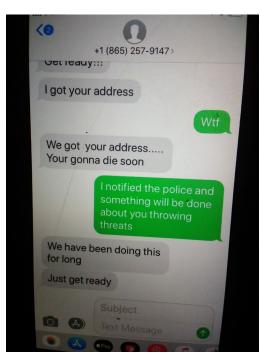
What happens





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			
not to consent to a s	earch 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) [reside	nce] [automobile] [wall locker] [] located at			
I authorize the abov	e listed personnel to take from the area searched any letters, papers, materials, or			
other property whic	h they may desire. This search may be conducted on Date			
	240			
This written permis threats or promises	sion is being given by me to the above named personnel voluntarily and without of any kind.			
	Signature			
WITNESSES				

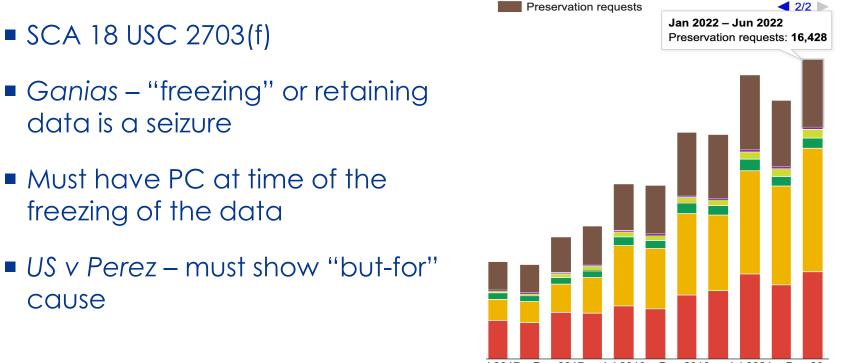
Warrantless Search

Accounts



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Preservation Letters



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- Fourth Amendment Tenter o o o sthaxter@nacdl.org

4ac@nacdl.org