PARTICULARITY REQUIREMENTS

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Florida Constitution: Article 1, SECTION 12.

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, ***particularly describing the place or places to be searched, the person or persons, thing or things to be seized****, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.*

United States Constitution: Fourth Amendment

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 persons or things to be seized.

Important Note: The conformity clause of Article 1, Section 12, mandates that Florida must follow the case law established by the United States Supreme Court in Fourth Amendment matters. In general, individual states can provide citizens with more protections than afforded by the United States Constitution, but not less. The Florida courts have frequently rejected rulings by the Unites States Supreme Court and imposed greater restrictions on police conduct than federal law requires. The Florida Constitution prohibits this and therefore, United States Supreme Court cases are the ultimate controlling authority. Please take note that the conformity clause has been in existence since 1982, so cases decided prior to that date may no longer be valid. See State v. Scott, 26 Fla. L. Weekly D22 (Fla. 3d DCA 2001).

F.S. 933.05. Issuance in blank prohibited

A search warrant cannot be issued except upon probable cause supported by

affidavit or affidavits, naming or describing the person, place, or thing to be searched ***and particularly describing the property or thing to be seized****; no search warrant shall be issued in blank, and any such warrant shall be returned within 10 days after issuance thereof.*

STATE CASES

North v. State, 32 So.2d 915 (Fla. 1948):

Facts: The State Attorney in Palm Beach County conducted a grand jury investigation concerning unlawful gambling. At the direction of the grand jury, the State Attorney applied for a search warrant. The property to be seized was described in the affidavit made by the State Attorney as "numerous slot machines, roulette wheels, and other gambling devices and games of chance such as are commonly used in gambling games." In the search warrant issued by the Circuit Judge the property was described as "gambling implements and devices used for the purpose of gaming and gambling." The defense argued that the State failed to meet sufficient particularity requirements.

Holding:

- The description was sufficient.

- The phrase "particularly describing the thing to be seized" must be given a reasonable interpretation consistent with the type or character of the property sought.

- "If the purpose be to seize, not specified property, but any property of a specified character, which, by reason of its character and of the place where and the circumstances under which it may be found, if found at all, would be illicit, a description, save as to such character, place, and circumstances, would be unnecessary and, ordinarily, impossible; as, for instance, where a search is ordered for dies for the counterfeiting of money, or for opium, or gambling devices, or lottery tickets, or intoxicating liquors, alleged to be held in possession unlawfully, and the same is true though the illegality may consist in the intended use rather than the mere possession of the property."

Carlton v. State, 449 So.2d 250 (Fla. 1984):

Facts: The police obtained a search warrant which authorized the search of the automobile and the seizure of "all controlled substances and other matters of things pertaining to or relating to said possessions and sale of controlled substance violations of chapter 893, Florida Statutes…" No restriction was placed on the officers as to what particular controlled substances were contemplated by the warrant's command although the affidavit supporting the warrant specifically identified two separate alleged cannabis transactions by the defendant inside the vehicle as the facts tending to establish probable

cause for issuance of the warrant.

Holding:

- The particularity requirement must be given a reasonable interpretation consistent with the type or character of the property sought.

- In most instances where a warrant is issued with the objective to seize and thus build a case against an individual for whom probable cause exists to suspect that individual of possessing and/or trafficking in a controlled substance, there is a high probability that the offense involves more than one particular controlled substance.

Discussion: In general the court is saying that if the police are looking for a particular type of contraband, the exact details of that contraband are not necessary.

Green v. State, 688 So.2d 301 (Fla. 1996):

Holding:

- Warrant authorizing seizure of "clothing" that suspect "was wearing the evening of" murder and "weapon" used in murder was facially overbroad where officers could not tell from warrant what items of clothing they were authorized to seize and description thus failed to rein in their discretion.

- Warrant was facially overbroad in failing to describe with particularity items to be seized even though officer who actually executed warrant had information not contained in warrant which would have allowed him to identify exact clothes sought by warrant, which were merely described in warrant as clothing that suspect was wearing on evening of murder.

- Facially invalidity of search warrant precluded application of good faith exception to exclusionary rule.

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State v. Eldridge, 26 Fla. L. Weekly D824 (Fla. 1st DCA 2002):

Facts: A county judge issued a search warrant authorizing a search of defendant's residence. Law enforcement officers executed the warrant, and found plastic bags suspected of containing methamphetamine, butane torches, glass pipes, ledger notebooks, plastic straws, and other drug paraphernalia. These items were seized and the State filed an information charging defendant with violations of the controlled substance laws. The warrant described the residence and incorporated the probable cause statement made in the affidavit. The purpose of the search was stated in the following terms in the opening recital contained in the warrant:

> And whereas, said facts made known to me have caused me to certify and find that there is probable cause to believe that certain laws to wit: laws

prohibiting the possession, distribution, and manufacturing of controlled substances to wit: methamphetamine, F.S. 893.13, have been and are being violated in or on certain premises, in Holmes County, Florida…

The part of the warrant that commanded the officers to conduct the search did not identify any particular item of property to be seized. Instead, it referred back to the description made in connection with the probable cause statement. The final paragraph of the warrant directed the officers to enter and search the premises "for the property described in this warrant."

Holding:

- In determining whether the particularity requirement of a search warrant has been satisfied in a given case, the courts may properly consider the purpose for which the search warrant was issued. If the object of the warrant is to seize specific items of property, those items must be described in detail. In contrast, if the object of the warrant is not to obtain specific items of property, but rather to obtain all property of a certain character, it is not necessary to describe a particular article of property. In such a case, the search warrant may simply define the nature of the property to be seized.

- For purposes of the particularity requirement of a search warrant, in view of the illicit nature of contraband, it may be described in less detail than other articles. Courts are the least demanding when the objects described are contraband. If the search warrant commands the seizure of contraband, it may describe the contraband by its general character.

- The use of the phrase "property described in this warrant" is plainly a reference to the earlier statement in the warrant that there is probable cause to conclude that the residence is being used to manufacture, possess, and distribute methamphetamine. Any law enforcement officer would readily understand that the warrant authorizes the seizure of contraband articles used in the possession, distribution, and manufacture of methamphetamine. That was the sole purpose of the warrant.

State v. Nuckolls, 617 So.2d 724 (Fla. 5th DCA 1993):

Holding:

- Paragraph of search warrant authorizing the taking of records pertaining to banks and all financial records relating to sale of motor vehicles was sufficiently particular, where that paragraph continued on to specify the exact documents, including bank statements, cancelled checks, cashier checks, bank drafts and monthly statements.

- Paragraph of search warrant calling for seizure of personnel records of named employees was sufficiently particular.

- Paragraph of search warrant specifying odometer statements, vehicle condition reports, and copies of title transactions and reassignments was sufficiently particular.

- Paragraph of search warrant listing numerous forms of computer data was sufficiently particular.

- Paragraph of search warrant allowing the taking of notary stamps and seals, typewriters, and typewriter balls was sufficiently particular.

- Paragraph of search warrant permitting seizure of documentary evidence, records, ledgers, notebooks, notes, telephone books, financial records and other documents tending to establish the identity of persons involved in commission of odometer fraud, title fraud, forgery and notary fraud was overbroad, and, therefore, items seized thereunder were properly suppressed.

- Invalidation of portion of search warrant does not invalidate entire warrant.

Discussion: The objectionable language of the warrant "impermissibly left to the discretion of the investigating officers to determine which documents would tend to establish a crime." The specific language from the warrant concerning computers said, "Data stored on computer, including, but not limited to, magnetic media or any other electronic form, hard disks, cassettes, diskettes, photo optical devices and file server magnetic backup tapes. There was little discussion, however, about this paragraph of the warrant. An interesting point to note is the court's observation that the warrant would have clearly been appropriate in federal court and the Fourth DCA, but this court was bound by the opinion in Polakoff v. State. (see below) Therefore, even though the conformity clause of the Florida Constitution says we will follow the US Supreme Court precedent, there are still significant differences in the way the federal courts interpret Supreme Court precedent and the way the Florida courts interpret it.

State v. Hills, 428 So.2d 715 (Fla. 4th DCA 1983):

Holding:

- Description in search warrant "U.S. currency" was sufficient description of medium of exchange in cocaine transactions, absent knowledge of denominations and serial numbers of currency involved.

State v. Schrager, 472 So.2d 896 (Fla. 4th DCA 1985):

Holding:

- Contents of supporting affidavit cannot be considered in determining validity of a search warrant with regard to particularity requirement.

- Where items to be seized from a store inventory are described generically in a search warrant, two tests must be met:
  - evidence presented to magistrate must establish that there is reason to believe that a large collection of similar contraband is present on the premises to be searched;
  - evidence before magistrate must explain method by which executing agents are to differentiate contraband from rest of inventory.

- Description in search warrant of items of drug paraphernalia to be seized from record shop was adequate to differentiate between the contraband and rest of the inventory, even though location of contraband within store was not specified in the warrant, since remaining inventory, consisting primarily of records, tapes and related equipment was of a completely different nature than the contraband.

Discussion: This case cites numerous other appellate opinions on the issue of particularity. An important lesson from this case is that you cannot rely on the particularity of your affidavit to justify a weak warrant. The particularity of the place to be searched and the things to be seized must appear on the warrant itself.

Sims v. State, 483 So.2d 81 (Fla. 1st DCA 1986):

Holding:

- Description of items to be seized pursuant to search warrant, in connection with theft of building materials, was insufficient, where only item mentioned in warrant was blue wheelbarrow with no description to distinguish it from any other blue wheelbarrow.

State v. Showcase Products, Inc, 501 So.2d 11 (Fla. 4th DCA 1986):

Holding:

- Warrant ordering seizure of business records and equipment and listing a partial description of what those would include was not facially invalid on its face as authorizing a general exploratory search.

Discussion: This case provides a good discussion on how law enforcement has some leeway on complex white-collar crimes. The court adopted some excellent language from United States v. Wuagneux, 683 F.2d 1343 (11th Cir. 1982), which stated,

> "The complexity of an illegal scheme may not be used as a shield to avoid detection when the State has demonstrated probable cause to believe that a crime has been committed and probable cause to believe that evidence of this crime is in the suspect's possession." ... It is universally recognized

> that the particularity requirement must be applied with a practical margin of flexibility, depending on the type of property to be seized, and that a description of property will be acceptable if it is as specific as the circumstances and nature of activity under investigation permit. ... Accordingly, in cases such as the one before us involving complex financial transactions and widespread allegations of various types of fraud, reading the warrant with practical flexibility entails an awareness of the difficulty of piecing together the "paper puzzle."

Watson v. State, 509 So.2d 396 (Fla. 4th DCA 1987):

Holding:

- Search warrant was not so broad as to constitute general warrant; phrase "other evidence relevant to proving a felony" clearly referred to term "controlled substances."

State v. Nelson, 542 So.2d 1043 (Fla. 5th DCA 1989):

Holding:

- Where executing officer had valid and complete warrant in his possession and serves incomplete duplicate on defendant or searched premises, suppression should be denied absent showing of prejudice.

- Execution of search warrant without supporting affidavit was so fundamentally improper as to mandate suppression of evidence, irrespective of any showing of actual prejudice by defendant, where, although warrant had been properly issued, supporting affidavit, which alone had described premises to be searched, was thereafter removed and not physically attached at time of execution, nor served on defendant or premises.

Discussion: The gist of this case is that the executing officer must be in possession of the document which limits the scope of his search at the time of the search. If an attached affidavit provides the particularities, that affidavit must be available at the time of the search.

Johnson v. State, 660 So.2d 637 (Fla. 1995):

Holding:

- Under warrant authorizing seizure of blood-stained clothing and "hair, fiber, tissue, or any other items of forensic comparison value," the phrase "fiber…of forensic comparison value" was sufficiently precise to include unstained clothing.

- Even if phrase "any other items," in warrant authorizing seizure of blood-stained clothing and "hair, fiber, tissue, or any other items of forensic comparison value,"

authorized illegal general search, remainder of warrant was not thereby rendered invalid.

- Warrant authorizing seizure of "hair, fiber, tissue, or any other items of forensic comparison value" from suspect's apartment was not rendered invalid by exclusion from supporting affidavit of any mention that fibers had been gathered at scene of murder, as gathering fiber evidence was common object of any murder investigation.

Discussion: The court noted, "While we may have doubts about the validity of the language describing "any other items," we need not determine today whether this language authorized an illegal general search. Basically, the police did not find anything that was not properly authorized by the warrant, so it was a no harm-no foul situation.

Polakoff v. State, 586 So.2d 385 (Fla. 5th DCA 1991):

Holding:

- Warrants attempting to authorize a search for and seizure of a class or group of objects such as "documents" are too general and do not describe the thing or things to be seized with the required particularity.

- Documents involving loans to and interest payments from persons not named on search warrant were not contraband on their face, and their illegal character could be determined only by making calculations and by considering other facts such as the testimony of the borrowers.

FEDERAL CASES

Marron v. United States, 48 S.Ct. 74 (1927):

Holding:

- The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, noting is left to the discretion of the officer executing the warrant.

U.S. v. Rosa, --- F.3d ----, 2010 WL 4227428 C.A.2 (N.Y.),2010.

Search warrant on a child pornography investigation authorized the officer to search for the following property:

The property sought to be seized and searched is described as computer

equipment, electronic digital storage media included but not limited to floppy diskettes, compact disc, hard drives whether mounted in a computer or otherwise, video or audio tapes, video surveillance systems, video and digital camera systems, printing devices, monitors, firearms and any written and/or printed and/or electronic stored notes or records which would tend to identify criminal conduct and any personal papers or documents which tend to identify the owner, leasee or whomever has custody or control over the premises searched or the items seized.

Warrant's authorization of an uncircumscribed search of suspect's electronic equipment violated the Fourth Amendment's core protection against general searches because it provided the government with unrestrained access to electronic records of suspect's daily activities and private affairs; warrant was defective in failing to link the items to be searched and seized to the suspected criminal activity.

We agree with Rosa that the search warrant in this case lacked the requisite specificity to allow for a tailored search of his electronic media. The warrant was defective in failing to link the items to be searched and seized to the suspected criminal activity-i .e., any and all electronic equipment potentially used in connection with the production or storage of child pornography and any and all digital files and images relating to child pornography contained therein-and thereby lacked meaningful parameters on an otherwise limitless search of Rosa's electronic media.

U.S. v. Beckett, Slip Copy, 2010 WL 776049 C.A.11 (Fla.),2010.

"Contrary to Beckett's assertions, the government did not exceed the bounds of the search warrant when they searched the contents of his computers. The affidavits attached to the application for a search warrant of Beckett's house and computers adequately described the objective of the search. The investigation centered around allegations that Beckett had contacted minors through the internet and on his home computer in efforts to have the minors transmit nude photographs of themselves. The search warrant affidavit explained that a computer and its drives can store thousands of pages of information and that the pertinent information can be stored in any part of the computer under any title or heading. The warrant described with adequate particularity the items to be searched and the objectives of the search. We find that the search of Beckett's computers did not exceed the extent of the warrant. Accordingly, we affirm in this respect."

"the particularity requirement must be applied with a practical margin of flexibility, depending on the type of property to be seized, and that a description of property will be acceptable if it is as specific as the circumstances and nature of activity under investigation permit."

U.S. v. Triumph Capital Group, Inc., 211 F.R.D 31 (D.Conn 2002): **Computer**

A search warrant only needs to be specific enough to permit the executing officer to exercise reasonable, rational and informed discretion and judgment in selecting what should be seized.

A search warrant does not need to specifically identify every document to be seized.

A search warrant is sufficiently particular if it sets forth generic classifications of the items to be seized together with an illustrative listing which enables the executing officer to ascertain and identify with reasonable certainty the items that the magistrate has authorized him to seize.

Paragraph of search warrant which listed as items to be seized computer logs and file records on storage media of hard drive of laptop computer, including time and date or records associated with individual files which could indicate deletion or destruction of individual files or a deletion and restoration of the entire file system on the storage media, satisfied Fourth Amendment particularity requirement, where information in supporting affidavit limited search to evidence of specific crimes under investigation and a specific time period.

U.S. v. Hudspeth, 459 F.3d 922 (8th Cir. 2006): **Computer**

Language of warrant to search premises of business of which defendant was chief executive officer and affidavit in support of warrant sufficiently anticipated search of defendant's office computer, so as to permit search of computer pursuant to warrant; although warrant did not mention computers, warrant authorized search for any and all records or documents regarding business's sales, payables, inventory, customer lists, financial statements, and personnel files, officers involved in search testified they anticipated searching defendant's office computer pursuant to warrant, and federal agent's affidavit in support of warrant stated that state trooper had reason to believe business's sales were documented on computer-generated invoice.

"While the inclusion of the word "computer" would have specified one location among several where the officers might look for those items, its omission did not prevent the officers from searching Hudspeth's business computer for such records."

U.S. v. Adjani, 452 F.3d 1140 (9th Cir. 2006): **Computer**

"Computer files are easy to disguise or rename, and were we to limit the warrant to such a specific search protocol, much evidence could escape discovery simply because of

Adjani's (or Reinhold's) labeling of the files documenting Adjani's criminal activity. The government should not be required to trust the suspect's self-labeling when executing a warrant."

United States v. Hill, (9th Cir. 2006):

In child pornography prosecution, although search warrant was overbroad in authorizing a blanket seizure of defendant's computer equipment and files in the absence of an explanatory supporting affidavit, which would have documented the informed endorsement of the neutral magistrate, the exclusionary rule did not require the suppression of pornographic evidence within the scope of the warrant; the officers' wholesale seizure was flawed because they failed to justify it to the magistrate, not because they acted unreasonably or improperly in executing the warrant and the officers were motivated by considerations of practicality rather than by a desire to engage in indiscriminate fishing.

United States v. Brooks, 427 F.3d 1246 (10th Cir. 2005):

Warrant that authorized laboratory search of defendant's computer for child pornography images was not lacking in sufficient particularity because it did not describe specific search methodology that would be used in lab.

Search warrant authorizing laboratory search of computer implicitly limited search of text files for evidence related to child pornography when read in context and thus was not overbroad in violation of particularity requirement, even though warrant specifically limited search for images to those depicting "nude images of prepubescent males and or females engaged in sex acts" and did not expressly impose similar pornography-restricted limitation on search of text files.

United States v. Riccardi, (10th Circuit. Kan 2005):

Warrant authorizing the "seizure" of Mr. Riccardi's computer and the search of "all electronic and magnetic media stored within such devices" did not satisfy particularity requirements in child pornography case. Good faith exception applied.

"The underlying premise in *Carey* is that officers conducting searches (and the magistrates issuing warrants for those searches) cannot simply conduct a sweeping, comprehensive search of a computer's hard drive. Because computers can hold so much information touching on many different areas of a person's life, there is a greater potential for the "intermingling" of documents and a consequent invasion of privacy when police execute a search for evidence on a computer.... Thus, when officers come across computer files intermingled with irrelevant computer files, they may seal or hold the computer pending approval by a magistrate of the conditions and limitations on a further search of the computer.... Officers must be clear as to what it is they are seeking on the

computer and conduct the search in a way that avoids searching files of types not identified in the warrant. United States v. Walser, 275 F.3d 981, 986 (10th Cir.2001)"

U.S. v. Horn, 187 F.3d 781 (8th Cir. 1999):

Search warrant met Fourth Amendment particularity requirement in its descriptions of items to be seized, based on language authorizing search for and seizure of "[r]ecords, documents, receipts, keys, or other objects showing access to, and control of, the residence," and of "[a]ny and all envelopes, letters, records, documents, correspondence, videotapes, published materials, and other objects relating to contact with an unidentified woman in Texas who has two daughters 7 and 12 years of age and a son 10 years of age;" language was sufficiently particular to preclude exercise of any illegal discretion by executing officers.

U.S. v. Clough, 246 F.Supp. 2d 84 (D.Me. 2003)

Scope of search warrant authorizing seizure of any text documents or digital images on defendant's computers was excessive, in that, it contained no restrictions on search, no references to statutes, and no references to crimes or illegality.

Search warrant authorizing seizure of any text documents or digital images on defendant's computers was so facially deficient, i.e., it failed to particularly describe place to be searched or things to be seized, that executing officers could not reasonably have presumed it to be valid, so as to allow admission of evidence seized under warrant pursuant to good faith exception to exclusionary rule; anyone, including law enforcement officer, who bothered to read warrant would know immediately that it could not authorize seizure of every text document and every digital image, no matter how innocent.

United States v. Thorn, F.3d (8th Cir. 2004)

"The February warrant, which explicitly authorized the search and seizure of electronic storage media containing images of minors involved in sexual acts, was sufficient to provide the authority to examine the contents of the various computer-related media. *Citing U.S. v. Upham, 168 F.3d 532 (The extraction of unlawful images from within the computer and diskettes was therefore contemplated by the warrant."*

United States v. Aldahondo, F.Supp (D.P.R 2004)

- This opinion gives a good summary of particularity requirements in child pornography cases:
    - Furthermore, the use of the internet at interstate, as well, as international level, with the ensuing ramifications of the world wide web and new technologies that were never imagined by our Founding Fathers under the Constitution nor the Fourth Amendment, and particularly as to child pornography, do not easily contemplate the grounds for a probable cause

determination be constricted to an almost certainty of criminal activity as one depicted solely as a hardcopy of child pornography. *See* United States v. Upham, 168 F.3d 532, 535-36 (1st Cir. 1999) (warrant authorizing seizure of all computer software, hardware, disks, and disk drives from defendant suspected of child pornography offenses sufficiently particular, even though it did not restrict items to be seized to items related to suspected crimes because computer equipment instrumental); United States v. Dornhofer, 859 F.2d 1195, 1198 (4th Cir. 1988) (warrant authorizing search for child pornography materials sufficiently particular because warrant authorized seizure of materials depicting minors engaged in sexually explicit conduct as defined by statute). Search warrant was supported by probable cause upon evidence that internet address from which child pornography had been transmitted was registered to defendant, and of defendant's home address, provided sufficient nexus between defendant and transmission on grounds that the agent's affidavit that images depicted sexually explicit conduct involving children under the age of 16, even when there was no dispute that the magistrate did not view the images. U.S. v. Chrobak 289 F.3d 1043 (8th Cir. 2002).

- "Likewise, in United States v. Lacy, 119 F.3d 742, 746-47 (9th Cir. 1997) (warrant authorizing seizure of entire computer system sufficiently particular because more precise description of where child pornography images stored (hard drive or floppy disk) not possible), the Court upheld the validity of a search warrant even though it was supported by ten-month-old information, based on an "expert" agents' explanation that those who collect and distribute child pornography "rarely if ever" expunge sexually explicit material, securely storing it for a long time, usually in their own homes. *See also* United States v. Kimbrough, 69 F.3d 723, 727 (5th Cir. 1995) (warrants authorizing search for materials related to child pornography sufficiently particular because language in warrants properly limited executing officers' discretion by informing them of items to be seized); Guest v. Leis, 255 F.3d 325, 342 (6th Cir. 2001) (warrant authorizing seizure of computer sufficiently particular because of practical difficulty of distinguishing obscene from non-obscene material); United States v. Hall, 142 F.3d 988, 996-97 (7th Cir. 1998) (warrant authorizing search of suspect's home and computer sufficiently particular because warrant emphasized that items sought were related to child pornography); United States v. Koelling, 992 F.2d 817, 821-22 (8th Cir. 1993) (warrant authorizing search for child pornography materials sufficiently particular because warrant authorized seizure of materials depicting minors engaging in sexually explicit conduct described in statute, and chances low that any materials depicting child pornography protected by 1st Amendment); United States v. Hay, 231 F.3d 630, 636-38 (9th Cir. 2000) (warrant for search of computer and related materials for child pornography sufficiently particular because "no more specific description of the computer equipment sought was possible"); United States v. Campos, 221 F.3d 1143, 1147 (10th Cir. 2000) (warrant authorizing search of residence for child pornography sufficiently particular even though only 2 known images of child pornography on computer)."

- Numerous other issues are covered in this case as well.

U.S. v. Meek, 366 F.3d 705 (9th Cir. 2004)

- Warrant to search home and vehicle of defendant suspected for using internet to attempt to induce minor to engage in sexual activity was sufficiently specific to meet Fourth Amendment particularity requirement, where warrant authorized seizure of sexually explicit material or paraphernalia used to lower the inhibitions of children, sex toys, photography equipment, child pornography, material related to past molestation such as photographs, address ledgers including names of other pedophiles, journals recording sexual encounters with children, computer equipment, information on digital and magnetic storage devices, computer printouts, computer software and manuals, and documentation regarding computer use.

United States v. Sassani, 139 F.3d 895 (4th Cir. 1997):

> Unlike with murder weapons or drugs, when an offense concerns the use of hard copy or electronic files and documents a court cannot be sure which files will be relevant and the warrant may not be able to state as specifically what should be searched and seized. Therefore, courts have required less particularity in the warrant. *United States v. Torch*, 609 F.2d 1088, 1090 (4th Cir.1979). Courts have acknowledged the need for the use of generic terms in warrants seeking evidence of child pornography and have upheld more generally-worded warrants so long as the warrant limits the discretion of the officers conducting the search. *See Torch, supra*, 609 F.2d at 1090 (holding sufficient a warrant for "records, documents and writings related to the transportation, sale and distribution in interstate commerce of lewd, lascivious and filthy films"); *United States v. Layne*, 43 F.3d 127, 132-33 (5th Cir.1995) (upholding two warrants describing materials to be sought and seized as follows: "assorted pornographic videotapes; assorted pornographic magazines; assorted devices;" and, in the second warrant, "Child pornography; records of victims; drawings; pictures; computer disks, sexual devices; videotapes; child abuse books; magazines; audiotapes; and any other obscene or child pornographic material;" finding the warrants sufficiently limited officers' discretion in searching); *United States v. Kimbrough*, 69 F.3d 723, 727 (5th Cir.1995) (finding sufficiently particular warrants' authorization for seizure of " 'bills, correspondence, receipts, ledgers, Postal receipts and telephone records all of which show orders and deliveries to or from any known foreign or domestic distributer of child pornography' "); *United States v. Hurt*, 808 F.2d 707, 708 (9th Cir.1987) (finding warrant authorizing search for material depicting individuals under sixteen years of age engaged in "sexually explicit conduct" to be sufficiently particular to limit officer's discretion); *United States v. Jacobs*, 513 F.2d 564, 567 (9th Cir.1974) (finding sufficiently particular a warrant for "certain documents pertaining to the interstate shipment of obscene materials").
>
> In the case *sub judice*, the warrant listed among the items to be seized any computers, tapes, cassettes, cartridges, streaming tape, commercial software and hardware, computer disks, disk drives, monitors, printers, modems, tape drives, disk application programs, data disks and graphic interchange format equipment which could be used to depict, distribute, possess or receive child pornography. This listing directed the FBI agents to search those items in the home with direct connection to the alleged crime of the defendant: distribution and receipt of child pornography through the Internet by use of a computer. Courts have been clear that, in the case of child pornography, a warrant allowing seizure of a computer and all its associated printing, storage, and viewing devices is constitutional. The computer, applications, and various storage devices not only may contain evidence of distribution of child pornography, but are also the instrumentalities of the crime. *See Davis v. Gracey*, 111 F.3d 1472, 1480 (10th Cir.1997) (upholding seizure of computer and all files contained therein because probable cause supported seizure of computer as an instrumentality of the crime of distribution of obscene materials); *United States v. Kimbrough, supra*, 69 F.3d at 727 (upholding warrant allowing seizure of "hardware, computer disks, disk drives, monitors, computer printers, modems, tape drives, disk application programs, data disks, system disk operating systems, magnetic media-floppy disks, CD ROMs, tape systems and hard drive, other computer related operational equipment ... used to visually depict a minor engaging in sexually explicit conduct"); *United*

States v. Lacy, supra, 119 F.2d at 745 (allowing seizure of entire computer system, hardware and software, because "the affidavit in this case established probable cause to believe Lacy's entire computer system was "likely to evidence criminal activity").

United States v. Hill, F.Supp (C.D.CA 2004) **Computer**

- Warrant was not overbroad for allowing police to seize all storage media to examine later.
- Police were not required to preview computer disks on site before removing them from home.
- Police were not required to bring equipment to search site that would allow them to preview evidence before removing it from site.
- Police are free to hire experts to help them conduct a search.
- "Forcing police to limit their searches to files that the suspect has labeled in a particular way would be much like saying police may not seize a plastic bag containing a powdery white substance if it is labeled 'flour' or 'talcum powder.' There is no way to know what is in a file without examining its contents, just as the er is no sure way of separating talcum from cocaine except by testing it."

United States v. Gleich F.Supp (N.D. 2003) **Computer**

- Although Gleich contends that the February 6, 2003, search warrant needed to more specifically list which computer files were to be searched, the search warrant clearly identified that the computers were to be searched for "Photographs, pictures, visual representations, or videos in any form that include sexual conduct by a minor, as defined by N.D.C.C. 12.1-27.2-01(4)." The Court finds such a description is sufficient to meet the particularity requirement of the Fourth Amendment. See United States v. Koelling, 992 F.2d 817, 821 (8th Cir. 1993) (holding that when a warrant described the sought for material as defined by statute, the warrant meets the particularity requirement of the Fourth Amendment).
- As to the February 19, 2003, search warrant, Gleich advances the same argument. Once again, the search warrant itself clearly sets forth with particularity the type of items authorized by the search warrant -- "photographs, pictures, visual representations, or videos in any form that include sexual conduct by a minor, as defined by N.D.C.C. 12.1-27.2-01(1) and/or (4), or children posing for a camera. " Again, the Court finds that such a description is sufficient to meet the particularity requirement of the Fourth Amendment. See United States v. Koelling, 992 F.2d 817, 821 (8th Cir. 1993).
- While Agent Pfenning may have anticipated finding only one personal computer in Gleich's home, the Court does not read the search warrant so narrowly as to limit the search and seizure to only one computer. The February 6, 2003, search warrant clearly authorized law enforcement officers to search Gleich's home and personal computer and to seize the items that could contain "Photographs, pictures, visual representations, or videos in any form that include sexual conduct

by a minor, as defined by N.D.C.C. 12.1-27.2-01(4)" described in Exhibit A. All three personal computers were found in Gleich's home, and all three computers could have contained the items described in Exhibit A.

- The February 6, 2003, search warrant clearly authorized the search of the computer and the computer files contained within the computer and on the additional discs found at the Gleich residence. Any other interpretation of the search warrant would be nonsensical. Thus, the Court expressly finds that the February 6, 2003, search warrant authorized the forensic examination undertaken by Agent Erickson.

United States v. Campos, 221 F.3d 1143 (10th Cir. 2000): **Computer**

Facts: The defendant engaged in a chat room conversation with another individual in a gay and lesbian AOL chat room. When the other person logged on to the computer the next day, he was shocked to see that the defendant had emailed him several pornographic images, including two child pornography images. The concerned citizen copied the images to a disk and gave them to the FBI. Law enforcement agents obtained a warrant to search the defendant's home and computer. The warrant authorized the agents to seize computer equipment "which may be, or is used to visually depict child pornography, child erotica, information pertaining to the sexual activity with children or the distribution, possession, or receipt of child pornography, child erotica or information pertaining to an interest in child pornography or child erotica." It also authorized the seizure of books, magazines, films, and videos containing images of minors engaged in sexually explicit conduct. During the search they discovered a computer and seized it. An examination of the hard drive revealed the two images that had been transmitted to the complainant, six similar images of children engaging in sexually explicit conduct, and a copy of a newspaper article describing the conviction and sentencing of a defendant in Wisconsin federal court for possessing and transporting child pornography.

Holding:

- Warrant authorizing search of defendant's residence for evidence of child pornography was not required to be limited to search of defendant's computer for two images he sent to complainant, which authorities had already seen; warrant was not overly broad, as it did not authorize unfocused inspection of all of defendant's property, but was directed at items relating to child pornography, affidavit presented by FBI agent in support of warrant provided explanation of ways in which computers facilitated production, communication, distribution, and storage of child pornography, and FBI agent also explained why it was not usually feasible to search for particular computer files in person's home.

- In searching computers that contain intermingled documents, i.e., documents containing both relevant and irrelevant information, law enforcement officers must sort the documents and then search only the ones specified in a warrant, and

where the officers come across relevant documents so intermingled with irrelevant documents that they cannot feasibly be sorted at the site, the officers may seal or hold the documents pending a magistrate's approval of the conditions and limitations on a further search of the documents; the magistrate should then require the officers to specify in a warrant which type of files are sought.

Discussion: This court distinguishes its decision from United States v. Carey, 172 F.3d 1268 (10th Cir. 1999). In Carey, the officers obtained a warrant to search for evidence of illegal drug activity. During the search, the officer found child pornography and continued to look for more. The Carey court stated the officer should have obtained a second warrant because the focus of the investigations shifted. In this case, however, the officer did not expand the scope of their search.

United States v. Upham, 168 F.3d 532 (1st Cir. 1999): **Computer: Deleted Files**

Facts: In February 1997, U.S. Customs agents who were monitoring a "chat room" on the Internet, while engaged in an undercover investigation, received in Buffalo, New York a number of images depicting child pornography. Records of the Internet service provider showed that the computer from which the images had been sent was owned by Kathi Morrissey at an address in Costigan, Maine. Acting pursuant to a warrant, the agents conducted a search of Morrissey's home on March 21, 1997. Among the items seized and taken from the house were Morrissey's computer and a number of diskettes. Using a computer utilities program and the "undelete" function, the government was able to recover from the computer's hard disk and the diskettes some 1,400 previously deleted images of minors engaged in sexually explicit conduct. These images included the relatively small number of images that the agents had received in Buffalo in February 1997 from Morrissey's computer. The two questioned items on the warrant regarding items sought were:

> Any and all computer software and hardware, ... computer disks, disk drives....
>
> Any and all visual depictions, in any format or media, of minors engaging in sexually explicit conduct [as defined by the statute].

Holding:

- Search warrant listing any and all computer software and hardware, computer disks, and disk drives as items to be seized from defendant suspected of child pornography offenses was not overbroad, even though it did not restrict items to be seized to items related to the suspected crimes; images obtained off-site from computer, including information that had been deleted, could not have been easily obtained through on-site inspection.

- Search warrant authorizing seizure of any and all computer software and hardware, computer disks, and disk drives authorized search of information contained in computer; images were "inside" the computer or diskettes.

- Search warrant authorizing seizure of any and all computer software and hardware, computer disks, and disk drives authorized the recovery of previously deleted information through use of undelete key and using specialized utility program; recovery of deleted images was no different than decoding a coded message lawfully seized or pasting together scraps of a torn-up ransom note.

- By deleting computer images, defendant did not abandon them and surrender his right of privacy, for purposes of determining whether recovery of the deleted images violated Fourth Amendment.

Discussion: The court provides a good, common sense explanation as to why an off-premises search is necessary to find the questioned photos. Id. at 535.

United States v. Habershaw, 2001 WL 1867803 (D.Mass.)) **Computer**

- A search warrant authorizing a search of computer and all disks, etc… was not overbroad because when searching for child pornography, a warrant authorizing the seizure and search of the computer and all available disks was about the narrowest definable search and seizure reasonably likely to obtain the images.

- Conducting a sector by sector search of the computer including the deleted files did not exceed the scope of the warrant.

United States v. Upham, 168 F.3d 562 (1st Cir. 1999):

- Search warrant listing any and all computer software and hardware, computer disks, and disk drives as items to be seized from defendant suspected of child pornography offenses was not overbroad, even though it did not restrict items to be seized to items related to the suspected crimes; images obtained off-site from computer, including information that had been deleted, could not have been easily obtained through on-site inspection.

- Search warrant authorizing seizure of any and all computer software and hardware, computer disks, and disk drives authorized the recovery of previously deleted information through use of undelete key and using specialized utility program; recovery of deleted images was no different than decoding a coded message lawfully seized or pasting together scraps of a torn-up ransom note

United States v. Majors, 196 F.3d 1206 (11th Cir. 1999): **Fraud**

Holding:

- Due to peculiar nature of a charge of fraud, especially where corporations were

used as vehicles of fraud, application to search premises of one of defendants' corporations for "books, ledgers, receipts, invoices, business record, the identification of financial accounts and any other evidence" of mail and wire fraud violations, described with particularity the items to be seized as required by Fourth Amendment.

United States v. Hall, 142 F.3d 988 (7th Cir. 1998): **Computer Repair Shop**

Facts: The defendant took his computer to a repair shop. The next day, a repairman noticed some files with sexually explicit titles. He opened about five of them and noted that they all contained sexually explicit conduct involving children. The repairman called the police and was instructed to copy a few files to a disk to preserve as evidence. The police retrieved the disk, but did not look at its contents. When the defendant called to check on his computer, the repairman told him he had to order a part and it would be another week before he would finish the repair. The FBI was then notified and they took over the investigation. The agents subpoenaed AOL and verified that the defendant had an account that was listed at the same address as the defendant provided to the repair shop. The FBI then obtained a warrant to search the computer and the defendant's home. The warrant affidavit mentioned the files copied to the disk, but did not rely on them to establish probable cause. The warrant relied primarily on the statements from the repair shop employees. The FBI then asked the computer repair shop to delay returning the computer for an extra day so that their expert could view the contents pursuant to the warrant. When the defendant picked up his computer the next day at the shop, FBI agents confronted him in the parking lot (after he obtained the computer) and informed the defendant that he was being investigated for possessing child pornography. The defendant admitted he possessed the images and gave consent to search his home for more. The affidavit attached to the warrant specified that the agents could search for:

> *[h]ardware, computer disks, disk drives, internal modems, tape drives, disk application programs, data disks, system disk operating systems ... which may be, or are used to visually depict child pornography, child erotica, information pertaining to the sexual interest in child pornography, sexual activity with children or the distribution, possession or receipt of child pornography, child erotica or information pertaining to an interest in child pornography or child erotica....[c]omputerized or other materials and photographs depicting sexual conduct, whether between adults or between adults and minors*.

Holding:

Note: The first two bullet points deal with particularity. The rest deal with different issues, but I feel they are important enough to include in this section.

- Even if defendant preserved claim that search warrants were not written with sufficient particularity, warrants were sufficiently particular despite their apparent extension to any pornography, because items listed on warrants were qualified by

phrases that emphasized that items sought were those related to illegal child pornography.

- If detailed particularity in search warrant is impossible, generic language is permissible if it particularizes types of items to be seized.

- Viewing of files on defendant's computer by employee of company to which defendant took computer for repairs was private search, and thus Fourth Amendment was inapplicable to search and to employee's later description of pornographic evidence found on computer to law enforcement officials.

- When determining whether private citizen has acted as government agent, for Fourth Amendment purposes, question is whether, in light of all circumstances, person must be regarded as having acted as instrument or agent of state; court is to determine whether government knew of and acquiesced in intrusive conduct and whether private party's purpose for conducting search was to assist law enforcement efforts or further his own ends, and whether government offered private party a reward may also be considered.

- Police officer's act of asking repair company employee to copy files which employee found on defendant's computer, though constituting warrantless search, did not require suppression of evidence seized pursuant to subsequent warrants from computer or from defendant's apartment, as copied disk was never reviewed by law enforcement, nor was it used as basis of reasonable suspicion in affidavit supporting search warrants, and employee's statements provided independent source for warrants.

- Repair company's detention of defendant's computer for one extra day at request of Federal Bureau of Investigation (FBI) while FBI obtained search warrants for defendant's home and his computer files, based on company employee's discovery of pornographic materials on computer, was not unreasonable.

- Search warrants for defendant's computer and his residence were supported by probable cause, based on repair company employee's estimate that computer contained approximately 1,000 files with names indicative of child pornography, employee's statement that he viewed three to five files that depicted minors engaged in sexual activity, and expert information addressing common practices of child pornographers.

- Defendant knowingly possessed child pornography discovered on defendant's computer and disks, within meaning of statute prohibiting knowing possession of images, transported in interstate commerce, which contain visual depictions of minors engaged in sexually explicit conduct, where defendant downloaded files at issue and did not delete them.

Discussion: This is an excellent case to read when you encounter a computer repair shop case. The main lesson to be learned is not to make the repairman an agent of the government. Do not instruct him to look for more pictures. Get a sworn statement from him as soon as possible and get your warrant based upon his testimony. Do not delay, because the court may rule that the delay was unreasonable and thus, a 4th amendment violation.

United States v. Lacy, 119 F.3d 742 (9th Cir. 1997): **Computer**

Facts: The United States Customs Service was informed that child pornography from a Danish computer bulletin board system called BAMSE was being brought into the United States by computer. BAMSE's records indicated several people, including a caller from Seattle who identified himself as "Jim Bakker," had received material from BAMSE by telephone. "Bakker" had called BAMSE sixteen times and had downloaded six picture files containing computerized visual depictions known as GIFs. Customs agents traced the caller's phone number to an apartment occupied by a computer analyst named Scott Lacy. Telephone records reflected calls made from Lacy's telephone to BAMSE on the dates shown in BAMSE's records. A warrant was issued authorizing the search of Lacy's apartment and seizure of computer equipment and records, and documents relating to BAMSE. Customs agents seized Lacy's computer, more than 100 computer disks, and various documents. The computer hard drive and disks contained GIF files depicting minors engaged in sexually explicit activity. Lacy was indicted for possessing child pornography.

Holding:

- Warrants authorizing search of child pornography defendant's apartment and seizure of computer equipment and records was not overly general, even though warrants described computer equipment itself in generic terms and subjected it to blanket seizure; government knew defendant had downloaded computerized visual depictions of child pornography, but did not know whether images were stored on hard drive or on one or more of his many computer disks.

- In gauging search warrant's specificity, court considers whether probable cause exists to seize all items of particular type described in warrant, whether warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not, and whether government was able to describe items more particularly in light of information available to it at time warrant was issued.

Discussion: This case also discusses how 10-month-old information was not stale because the affiant explained that collectors of child pornography “rarely if ever” dispose of such material, and store it “for long periods” in a secure place, typically in their homes.

Davis v. Gracey, 111 F.3d 1472 (10th Cir. 1997): **Computer Equipment**

Facts: (Quoted from opinion) Mr. Davis operated the Oklahoma Information Exchange, a computer bulletin board system. Computer users could subscribe to the bulletin board, dial in using a modem, then use the system to send and receive messages via e-mail, access the Internet, utilize on-line databases, and download or upload software. According to Mr. Davis, approximately 2000 subscribers used his bulletin board.

In April 1993, the Oklahoma City Police Department received an anonymous tip that Mr. Davis was selling obscene CD-ROMs from his business premises. On three different occasions, an undercover officer purchased "adult" CD-ROMs directly from Mr. Davis. During one of these visits, Mr. Davis mentioned to the officer that he operated a bulletin board, and that similar pornographic images could be accessed by dialing in to the bulletin board. The officer never actually saw the computer equipment used to operate the bulletin board. In his affidavit for a search warrant, the officer did not mention the possibility that a bulletin board was being operated on the premises, or the possibility that this bulletin board could be used to distribute or display pornographic images. A judge determined that two CD-ROMs acquired from Mr. Davis were obscene, and issued a warrant to search his business premises for pornographic CD-ROMs and "equipment, order materials, papers, membership lists and other paraphernalia pertaining to the distribution or display of pornographic material in violation of state obscenity laws set forth in O.S. Title 21-1024.1." Aplee. supp. app., vol. I at 45.

Several officers, including defendants Anthony Gracey and Mark Wenthold, conducted the search at Mr. Davis' business. During the search, the officers discovered the bulletin board. Attached to it were CD-ROM drives housing sixteen CD-ROM discs, including four discs identified by Mr. Davis to the officers as containing pornographic material. The officers believed from the configuration of the bulletin board computers that the files accessible via the bulletin board included files from the four pornographic CD-ROMs. The officers called for assistance from officer Gregory Taylor, who was reputed to be more knowledgeable about computers than they were. He confirmed that the pornographic CD-ROMs could be accessed via the bulletin board. The officers seized the computer equipment used to operate the bulletin board, including two computers, as well as monitors, keyboards, modems, and CD-ROM drives and changers. The seizure of this computer equipment is the subject of the federal proceedings in this case.

At the time of the seizure, the computer system contained approximately 150,000 e-mail messages in electronic storage, some of which had not yet been retrieved by the intended recipients. The hard drive of the computer system also contained approximately 500 megabytes of software which had been uploaded onto the bulletin board by individual subscribers. Mr. Davis intended to republish this "shareware" on a CD-ROM for sale to the public. Mr. Davis had previously published three such compilations of shareware on CD-ROM.

Mr. Davis, Gayla Davis, John Burton, and TSI Telecommunications Specialists, Inc., > (FN1) filed the instant suit in federal court alleging claims under > 42 U.S.C. § 1983 for violation of First and Fourth Amendment rights, and under the Privacy Protection Act

(PPA), > 42 U.S.C. §§ 2000aa--> 2000aa-12, and the Electronic Communications Privacy Act (ECPA), > 18 U.S.C. §§ 2510-> 2711. The crux of the complaint is that the seizure of the equipment was illegal because the warrant was not sufficiently particular and because the seized computer system contained e-mail intended for private subscribers to the bulletin board, and software intended for future publication by Mr. Davis. Plaintiffs contend these stored electronic materials were outside the scope of the warrant, and are protected by several congressional enactments.

Original defendants in this suit included the City of Oklahoma City, the Oklahoma City Police Department, and several officers of the Oklahoma City Police Department who executed the search and seizure of the computer equipment. The municipal entities were dismissed from the case. Plaintiffs do not dispute that their only remaining claims are against the officers in their individual capacities. The district court entered summary judgment for the officers, holding that
their reliance on a valid warrant entitled them to qualified immunity on the constitutional claims, and entitled them to the statutory good faith defenses contained in the PPA and ECPA.

Holding:

- Failure timely to return seized material which is without evidentiary value and which is not subject to forfeiture may state constitutional or statutory claim. Since plaintiffs made no allegation that defendant officers are persons with authority to return materials once seized, their claim fails as to that issue.

- Search warrant which directed police officers to search for equipment pertaining to distribution or display of pornographic material in violation of state obscenity laws was sufficiently particular, and encompassed computer equipment used to access and copy pornographic files.

- Search warrant which directed police officers to search for equipment pertaining to distribution or display of pornographic material in violation of state obscenity laws was not overly broad, as description included only that equipment directly connected to suspected criminal activity, not wide range of equipment used for purposes unrelated to suspected criminal activity, and it did not encompass all equipment one might expect to find at legitimate business.

- If executing officers flagrantly disregard limitations of search warrant, otherwise constitutional warrant might be transformed into general search. The officers in this case were careful to only take that equipment directly related to the distribution of pornography. They left most of the equipment alone.

- Search warrant which directed police officers to search for equipment pertaining to distribution or display of pornographic material in violation of state obscenity laws, which was supported by probable cause based on defendant's sale of pornographic CD-ROMs to undercover officer, was not invalidated merely

because officers knew about defendant's computer bulletin board, through which pornography was also distributed, but did not include this knowledge in affidavit supporting warrant.

- Incidental temporary seizure of stored electronic materials did not invalidate seizure of computer within which they were stored, pursuant to valid search warrant which directed police officers to search for equipment pertaining to distribution or display of pornographic material in violation of state obscenity laws; computer was more than merely container for files, it was instrumentality of crime.

- Fact that given object may be used for multiple purposes, one licit and one illicit, does not invalidate seizure of object when supported by probable cause and valid warrant.

- Seizure of container is not invalidated by probability that some part of its innocent contents will be temporarily detained without independent probable cause.

- Police officers were entitled to seize all of defendant's computer equipment involved in crime of distributing obscenity, not just CD-ROMs and CD-ROM drives, pursuant to search warrant which directed police officers to search for equipment pertaining to distribution or display of pornographic material in violation of state obscenity laws.

- Police officers' reliance on valid warrant when seizing computer equipment involved in crime of distributing obscenity entitled them to qualified immunity on Fourth Amendment claims of equipment owner, his related businesses, and several users of e-mail on his bulletin board, in > § 1983 action.

- Privacy Protection Act (PPA) did not authorize private suit against municipal police officers, who seized plaintiff's computer equipment pursuant to valid search warrant, in their individual capacities; accordingly, Court of Appeals lacked subject matter jurisdiction over PPA claim. Privacy Protection Act of 1980, § 106, > 42 U.S.C.A. § 2000aa-6.

- Municipal police officers who seized computer equipment pursuant to valid warrant, which resulted in incidental seizure of stored electronic communications, qualified for statutory good faith defense under Electronic Communications Privacy Act (ECPA), as matter of law.

Discussion: This case is full of interesting issues concerning the liability of police officers for violating the Privacy Protection Act and the Electronic Communications Privacy Act. The officers in this case escaped liability based upon their good faith reliance on a valid search warrant, but a careful review of the opinion will demonstrate

the various pitfalls awaiting officers who do not thoroughly do their homework prior to a search or seizure of such equipment. One important observation of the court was that the computer seized was seized because it was an instrumentality of the crime, not because of its content. The court specifically rejected the defense claim that the police needed probable cause concerning the contents of the computer prior to seizing it. The court noted that the police never attempted to look at the contents of the computer and they would have needed a second warrant to do so under the circumstances.

United States v. Layne, 43 F.3d 127 (5th Cir. 1995): **Computer**

Facts: The defendant's adopted children told law enforcement agents that the defendant had shown them pornographic material while he sexually assaulted them. The agents executed a first warrant seeking "assorted pornographic videotapes; assorted pornographic magazines; assorted devices." While executing the first warrant, they found material indicating an interest in child pornography and the defendant told them that he had "European-type pornography" in a storage facility in another city. The second warrant specified "Child pornography; records of victims; drawings; pictures; computer disks, sexual devices; videotapes; child abuse books; magazines; audiotapes; and any other obscene or child pornographic material."

Holding:

- First warrant, which specified "assorted pornographic videotapes; assorted pornographic magazines; assorted devices" satisfied requirement of particularity because the officers relied on the best information which had been provided to them by the children to specify what they would be searching for. Under these circumstances, the information in the warrant was sufficiently particular to limit the officers' discretion.

- The second warrant was sufficiently particular because the officer were sufficiently guided in their discretion to know what items could be seized and the words needed no expert training or experience to clarify their meaning.

- No First Amendment rights were implicated by the search because it was issued to seize evidence corroborating a victim's testimony and not because of the ideas contained in the material.

Discussion: The court relied heavily on United States v. Hurt, 808 F.2d 707 (9th Cir. 1987) in forming its opinion. The Hurt opinion approved language authorizing the search of material depicting children under the age of 16 engaged in "sexually explicit conduct." The Layne court also noted than when First Amendment rights are implicated, there is a heightened particularity requirement.

United States v. Dornhofer, 859 F.2d 1195 (4th Cir. 1988): **Child Pornography**

Facts: The government operated a sting operation called Operation Looking Glass which set up a Hong Kong company which solicited orders for child pornography from those suspected of being consumers of child pornography. The defendant ordered Lolita Sex and Children Love, two child pornography magazines. The government agents obtained an anticipatory search warrant and subsequently searched the defendant's home upon delivery of the package. The warrant permitted the seizure of "various books, magazines, photographs, negatives, films and/or video cassettes depicting minors engaged in sexually explicit conduct as defined in 18 U.S.C. 2256." They also found and seized evidence later offered to show predisposition, including a notebook made by the defendant that included pictures of nude children, four novels (Horny Balling Daughter, In Heat Daughter, Daughter loves to Suck, and The Family Comes Together) and several magazines (Fifteen, Teenage Sex, Teenager, Sweet Little Sixteen, Teen Splitters, and Young and Naked).

Holding:

- Search warrant which permitted seizure of material depicting minors engaged in sexually explicit conduct as defined by specifically cited statute was sufficient ly specific to satisfy Fourth Amendment; statute referred to in warrant specifically defined "sexually explicit conduct."

- Seizure of child pornography from defendant's apartment which was not specifically mentioned in search warrant was not improper; other evidence seized could be used to show defendant's predisposition toward child pornography as well as his lack of mistake when he ordered child pornography covered by warrant.

Discussion: This case basically says that officers can seized similar fact evidence during search for contraband as long as it is visible from a place they had a right to be. The court noted that "Once the privacy of the dwelling has been lawfully invaded, it is senseless to require police to obtain an additional warrant to seize items they have discover in the process of lawful search."

United States v. Carey, 172 F.3d 1268 (10th Cir. 1999): **Computer**

Facts: Police officers executed an arrest warrant charging the defendant with a drug offense. During the execution of the warrant, he consented to a search of his apartment. The consent form stated, "to have conducted a complete search of the premises and property located at …" It further stated, "I do freely and voluntarily consent and agree that any property under my control…may be removed by the officers…if said property shall be essential in the proof of the commission of any crime in violation of the Laws of the United States…" Armed with this consent, the officers searched his home. In addition to finding drug evidence, they also discovered and took two computers, which they believed would either be subject to forfeitures of evidence of drug dealing. After bringing the computers to the police station, the officers obtained a search warrant allowing them to

search the files on the computers for "names, telephone numbers, ledger receipts, addresses, and other documentary evidence pertaining to the sale and distribution of controlled substances." During the subsequent search of the computer, the detective did not find any relevant text file, but he did find "JPG" image depicting child pornography. He then continued to search for more "JPG" files and found numerous other such images. The defendant argues that the search of the computer exceeded the scope of the warrant.

Holding:

- Seizure of images of child pornography, beyond the first, from defendant's computer hard drive was not authorized by the warrant, and since the images were in closed files, they were not in plain view, but, instead were seized pursuant to a general, warrantless search, where warrant permitted only the search of the computer files for "names, telephone numbers, ledgers, receipts, addresses, and other documentary evidence pertaining to the sale and distribution of controlled substances," it was the contents of the files and not the files themselves which were seized, and it was evident from police officer's testimony that each time he opened a "JPG" file after the first, he expected to find child pornography and not material related to drugs.

- Under the "plain view doctrine," a police officer may properly seize evidence of a crime without a warrant if: (1) the officer was lawfully in a position from which to view the object seized in plain view; (2) the object's incriminating character was immediately apparent, i.e., the officer had probable cause to believe the object was contraband or evidence of a crime; and (3) the officer had a lawful right of access to the object itself.

- Consent defendant gave to the search of his apartment did not carry over to the contents of his computer files, where the arresting officer sought permission to search only the "premises and property located at" a specified address; seizure of the computer was permitted by the consent to remove property that shall be essential to the proof of any crime, but the agreement did not permit the officer to open the files contained in the computer.

- In search of computers held in law enforcement custody and which contain intermingled documents, law enforcement must engage in the intermediate step of sorting various types of documents and then only search the ones specified in a warrant, and where officers come across relevant documents so intermingled with irrelevant documents that they cannot feasibly be sorted at the site, the officers may seal or hold the documents pending approval by a magistrate of the conditions and limitations on a further search through the documents, and the magistrate should then require officers to specify in a warrant which type of files are sought.

- Where officers had removed defendant's computers from his control, there was no exigent circumstance or practical reason to permit officers to rummage through all of the stored data regardless of its relevance or its relation to the information specified in a warrant specifying evidence relating to sale and distribution of controlled substances.

Discussion: The detective and prosecutor made just about every conceivable argument to justify the search for "JPG" files, but the appellate court shot down each one. It is important to note, however, that in the next to last paragraph of the majority's opinion, the court stated, "Having reached that conclusion, however, we are quick to note these results are predicated only upon the particular facts of this case, and a search of computer files based on difference facts might product a different result. Please note that the footnotes in this opinion provide citations to several other helpful opinions.

United States v. Wiegand, 812 F.2d 1239 (9th Cir. 1987): **Computer Porn**

Holding:

- A warrant to search for film portraying the sexual exploitation of children is not defective because the possibility exists that a tiny fraction of the material seized might by protected by the First Amendment.

United States v. Sawyer, 799 F.2d 1494 (11th Cir. 1986): **Fraud**

Holding:

- In cases involving pervasive scheme to defraud, all business records of enterprise may properly be seized.

United States v. Kane, 450 F.2d 77 (5th Cir. 1971):

Holding:

- Evidence not described in a valid search warrant but having a nexus with the crime under investigation may be seized as the same time the described evidence is seized.