

CJ341 Class Notes

Warrantless Seizure of Evidence

CJ341 – Cyberlaw & Cybercrime Lecture #18

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Overview of Topics

- Exceptions to Requirement for Warrant
- Consent
- Search Incident to Arrest
- Exigent Circumstances
- Inventory
- Stop and Frisk
- Mobility
- Plain View
- I.C.E.

Exceptions to Requirement for Warrant

- Long-standing view in jurisprudence:
 - ❑ Warrant not necessary IF
 - ❑ Owner of property agrees to search
- Issues
 - ❑ Does consent have *legitimate right to consent to search*?
 - ❑ *Expectation of privacy*
 - ❑ *Degree of ownership of property*



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Consent

- Who May Consent?
 - ❑ Employer
 - ❑ Parent
 - ❑ Spouse
 - ❑ Co-User
 - ❑ Third-Party Holder
- Notification of Right to Withhold Consent
- Limitations and Withdrawal of Consent

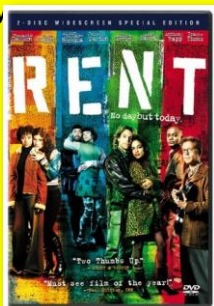


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Who May Consent?

- *Matlock 1974*: Common authority or sufficient relationship to premises or effects
- *Rith 1999*: Mutual use
 - ❑ Joint access
 - ❑ Control of property for most purposes
- Crucial test: expectation of privacy
 - ❑ Reduced in shared accommodations
 - ❑ But evidence of *rent* & of *security* strengthens expectation of privacy (see later slides)



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Private Employers

- Employer *not* acting as agent of LEO is free to search own property without suppression of evidence
- General acceptance of right of search
 - ❑ For area *not exclusively reserved for a particular employee*
 - ❑ Expect same rule for computers
- *Explicit policy* reducing expectation of privacy strengthens admissibility of evidence



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Public Employers

➤ SCOTUS: *O'Connor v. Ortega (1987)* established expectation of privacy for government employees

- ❑ But open office could reduce expectation
- ❑ Also affected by specific policy

➤ Policy effectiveness depends on

- ❑ Clear *enunciation* of limits to privacy (e.g., logon banner)
- ❑ Evidence that employees are *aware* of policy

➤ Problems

- ❑ Allowing private use of government computers
- ❑ Allowing unauthorized encryption



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Parent

➤ Closer relationship supports consent

➤ Parents' consent generally accepted by court

- ❑ But child must be "essentially dependent" on parent
- ❑ Payment of rent reduces authority to grant consent

➤ *US v. Durham (1998)*: Mother could not grant consent for search of son's computer

- ❑ Even though she owned some of equipment
- ❑ Because son *applied security* to system
- ❑ And he paid small amount of *rent*



Pietà marble sculpture by Michelangelo, 1498, in St. Peter's Basilica, Rome



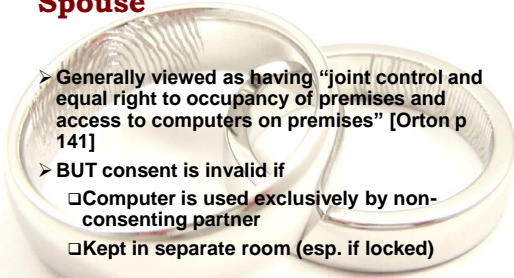
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Spouse

➤ Generally viewed as having "joint control and equal right to occupancy of premises and access to computers on premises" [Orton p 141]

➤ BUT consent is invalid if

- ❑ Computer is used exclusively by non-consenting partner
- ❑ Kept in separate room (esp. if locked)



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Co-User

➤ Shared use reduces expectation of privacy

➤ But still case law to develop on effects of

- ❑ Access controls
- ❑ Encryption

➤ Co-user *cannot* grant consent to *prima facie* private areas of computer



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Third-Party Holder

➤ If equipment or media left in possession of someone else, does that person have right to consent to search without warrant?

➤ Problematic case law: contradictions

➤ *US v. James (2003)*:

- ❑ Court ruled search of data CDs invalid because
- ❑ Owner did not intend to give 3rd party authority to grant consent for search
- ❑ But note that CDs were in *sealed envelope*

➤ *US v. Falcon (1985)*:

- ❑ Cassette tape labeled "confidential/do not play"
- ❑ Court ruled tape *admissible without warrant*

❑ Argued holder could have played tape any time

➤ **CONCLUSION:** best to proceed with warrant to avoid risk of suppression



Notification of Right to Withhold Consent

➤ Is consent to search voluntary?

➤ Federal system imposes burden of proof on government using *preponderance of evidence*

➤ Other jurisdictions may be more exigent

- ❑ E.g., requiring "clear and convincing evidence"



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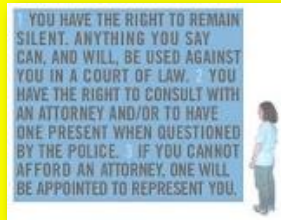


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Factors affecting judgement of voluntary consent:

- Age/intelligence of suspect
- Being advised of constitutional rights (Miranda warning)
- Custody or detention (and length)
- Physical punishment or deprivation (sleep, food)
- Generally, advising person that warrant will be sought if consent not granted is acceptable



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Limitations and Withdrawal of Consent

- Consent for search may be withdrawn at any time
- Area of search may be limited
- Continuing to search after withdrawal or in unauthorized areas leads to suppression of evidence
- Does breaking access protection or encryption violate restrictions on unwarranted search?
 - ❑ In physical world, breaking locks or sealed containers has led to suppression
 - ❑ But no *damage* when breaking security so evidence *may* be accepted by court



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Search Incident to Arrest

- General principle allows search and seizure of evidence at time of arrest
 - ❑ Purpose: prevent destruction of evidence
 - ❑ Therefore expect same rule for digital evidence
- Particularly useful for seizing cell phones and PDAs
 - ❑ May contain useful data
 - ❑ E.g., phone lists, calendars, call logs



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Exigent Circumstances (1)

- Probable cause
- Exigent circumstances defined essentially by
 - ❑ Imminent destruction of evidence
- BUT
 - ❑ Allows for seizure of computer
 - ❑ But NOT for search
 - ✓ Need separate warrant for search



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Exigent Circumstances (2)

- *US v. Reed (1991)* established requirements for admitting evidence obtained under warrantless search with claim of exigency
 - ❑ Must demonstrate degree of urgency
 - ❑ Amount of time required for getting warrant would seriously interfere with process of ensuring justice
 - ❑ Evidence in danger of destruction or removal
 - ❑ Danger to officers or evidence at crime scene
 - ❑ Suspect's awareness of anticipated seizure of evidence
 - ❑ Ease of destruction of evidence by suspect



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Exigent Circumstances (3)

- *US v. David (1991)*
 - ❑ LEO observed suspect deleting data from PDA
 - ❑ Seized device and scanned names
 - ❑ Court admitted evidence
 - ❑ But exigency ended as soon as PDA was seized
- *US v. Ortiz (1996)*: court ruled that search of pager was warranted because of risk of data loss as batteries failed
- *US v. Romero-Garcia (1997)*: search of laptop computer was not warranted by fear of battery failure (would not normally destroy data)
- Best practice: if device seized under exigent circumstances, obtain a warrant using probable cause to justify search that will ensure evidence is accepted in court *unless data are evanescent*



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Inventory

- Normally associated with searching vehicles to list all evidence present
- Booking search catalogs possessions of suspect at time of arrest
- Might permit LEO to search computer or electronic device to determine *identity* of suspect
- But should not use as basis for extensive forensic analysis: get a warrant



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Stop and Frisk

- LEO may search suspect for weapons
- May seize computing device during search
- BUT should not search computer without warrant



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Mobility

- Vehicle's mobility serves as exigent circumstance justifying immediate search without warrant
- Could therefore reasonably seize a computer found in such a search
- But Orton argues that this view could not justify search of computing devices
- And there is no current case law supporting such a procedure

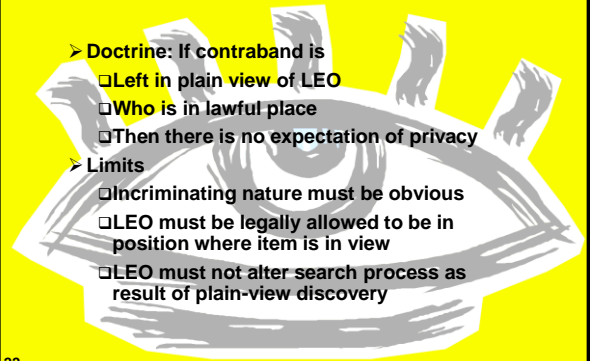


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Plain View (1)

- Doctrine: If contraband is
 - ❑ Left in plain view of LEO
 - ❑ Who is in lawful place
 - ❑ Then there is no expectation of privacy
- Limits
 - ❑ Incriminating nature must be obvious
 - ❑ LEO must be legally allowed to be in position where item is in view
 - ❑ LEO must not alter search process as result of plain-view discovery



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Plain View (2)

- So cannot exceed limits of warrant when searching computer even if plain-view item such as file-name suggests crime
- If protocol in warrant specifies searching all files, may log child porn as long as search continues through all files
- If protocol in warrant specifies searching all files but only for business fraud data, may NOT open file suspected to contain child porn
- So if new evidence of a different crime is discovered in plain view, *get a warrant to change search protocol.*



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Plain View (3)

- *US v. Carey (1999)*
 - ❑ Narcotics investigation of computer disk
 - ❑ Officer's discovery of 1st child porn image accepted in court
 - ❑ But *subsequent* discoveries suppressed – unlawful search beyond terms of warrant
- *US v. Gray (1999)*
 - ❑ LEO conducting file-by-file search
 - ❑ Discovered child porn
 - ❑ Immediately *applied for warrant* to search of child porn
 - ❑ Court ruled that not only was officer correct but also that had other child porn been discovered in systematic examination of all files, those images would have been admissible also



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Immigration & Customs Enforcement (ICE)



- Homeland Security Act of 2002
 - http://www.dhs.gov/xabout/laws/law_regulation_rule_0011.shtm
- Established Department of Homeland Security (DHS)
 - <http://www.dhs.gov/index.shtm>
- Combined many US law enforcement and regulatory agencies
 - http://www.dhs.gov/xabout/history/editorial_0133.shtm
- US Customs Service and Immigration and Naturalization Service contributed to
 - Immigration and Customs Enforcement (ICE) <http://www.ice.gov/>
 - Customs and Border Protection <http://www.cbp.gov>



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Border Searches (1)



- Border guards can search & interrogate anyone entering USA
 - http://www.dhs.gov/xlibrary/assets/ice_border_search_electronic_devices.pdf
- Not subject to 4th Amendment restrictions
 - Need not ask traveler for consent
 - May examine any electronic device on demand
 - May seize and keep devices "reasonable time"
- Very few people have their digital info searched or seized

See Kabay, M. E. (2011). "Search and seizure: No Fourth-Amendment Rights at Borders."
< <http://www.networkworld.com/newsletters/sec/2011/090511sec1.html> >

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Border Searches (2)



Cases cited by Customs & Border Patrol

- 2004: Canadian traveler carrying software stolen from U.S. firm convicted of violating EAR trying to sell restricted software to PRC
- 2005: traveler showing extreme nervousness carrying child pornography on laptop computer & CDs
- 2006: currency smuggler – info on laptop about "cyanide and nuclear material"
- 2006: student carrying information on IEDs, a picture of himself reading his will, and pictures of Al-Qaida terrorists
- 2007: visitor acting strangely had laptop computer with "violent jihadist materials" – recruiter for terrorist groups

See Kabay, M. E. (2011). "Justifying spontaneous computer seizures."
<http://www.networkworld.com/newsletters/sec/2011/090511sec2.html>

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Now go and study



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