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Courts Wrestle With Searches When the Evidence Is Digital

By JOHN R. EMSWILLER

For decades, investigators have known that if they enter a suspect's home with a search warrant to look for illegal guns and find sacks of cocaine lying on the coffee table, they can seize the drugs even though the warrant only gave them permission to look for the guns. That is because courts have said authorities can act on evidence of a second crime that was in their "plain view."

But how does the concept of plain view apply to the modern technology of a computer, which might have thousands of files that are easily scrolled, or a cellphone, which can contain all manner of incriminating pictures?

A recent ruling by the federal Ninth Circuit Court of Appeals addressed this question, and the decision could reshape what government investigators can -- and can't -- do when searching digital devices for evidence of crime.

The case involved the Justice Department's high-profile probe of a Northern California company suspected of supplying illegal steroids to professional athletes, including some baseball players.

Federal investigators obtained a warrant to search the computer records of a laboratory that in 2003 had tested hundreds of Major League Baseball players for steroid use. The warrant authorized obtaining the records of 10 players, whose identities haven't been disclosed.

But in the course of searching computer records for the 10 players, government investigators came across evidence of illegal drug use by others and argued they had a right to seize those records as well. The government said this evidence was in plain view once investigators started searching through the computer files.

That argument was "too clever by half," the Ninth Circuit ruled in August, in a 9-2 vote.

If every file on the computer has to be opened to find the specific evidence being sought under the search warrant, then every file would at some point be in "plain view," wrote Chief Judge Alex Kozinski, in the majority opinion.

But unlike walking into a room, searching a computer requires specific action -- opening directories and files. To allow investigators to search through every file, and act on any evidence of illegality they find there, "creates a serious risk that every warrant for electronic information will become, in effect, a general warrant, rendering the Fourth Amendment irrelevant," the court said.

The Fourth Amendment requires that to obtain a search warrant, government investigators must show a judge probable cause of a crime and "particularly" describe the place to be searched and the items to be sought. Legal scholars say this "particularity" requirement was aimed to prevent the wide-ranging, general searches of personal property that British authorities had power to conduct during the colonial period.

The Ninth Circuit, in its opinion, set out guidelines on how the government and lower courts should proceed. Magistrate judges, when issuing a search warrant, should insist that prosecutors waive the plain-view doctrine in cases of digital evidence. Sorting through digital evidence should be done by parties other than the case agents,

who should only be given material covered by the search warrant. Any evidence not covered by the search warrant would have to be returned to the owner or -- if it was illegal material, such as files of child pornography -- destroyed.

While the ruling directly affects federal law-enforcement efforts only in nine western states covered by the San Francisco-based appellate court, it could influence other jurisdictions and has raised concerns among law-enforcement officials and some legal scholars.

The ruling is "a dramatic decision" that will force investigators to ignore evidence of criminal wrongdoing they find in computer records, says Orin Kerr, a George Washington University Law professor and former Justice Department prosecutor. The decision could cause "tremendous disarray" for investigators, he adds.

The Ninth Circuit's new guidelines pose "immense issues for law-enforcement," says Jonathan Fairtlough, assistant head deputy of the high-tech crimes division of the Los Angeles District Attorney's office.

Still, some legal experts say the court rightly applied 18th-century constitutional law to investigations of 21st-century technology.

When it comes to electronic data, "jettisoning the plain-view doctrine is justifiable to protect the Fourth Amendment," says John Hueston, a former senior federal prosecutor and now a partner at Irell & Manella LLP.

The plain-view doctrine has evolved through a series of court decisions over the past 40 years as judges grappled with what to do when investigators, while executing a search warrant related to one crime, came across evidence of a second crime.

The Justice Department has declined to comment on the decision other than to say in a recent court filing that it is looking at appealing the ruling to the Supreme Court. That filing said the ruling "appears to conflict" in various ways with prior decisions by the Supreme Court and other appellate courts.

Even if the Justice Department decides not to appeal the case or the high court declines to consider it, legal experts say the conundrum likely won't go away. "Courts are struggling" in the area of computer searches, says Peter Henning, a law professor at Wayne State University. At some point, he says, "the Supreme Court has to deal with this."

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