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Expert Analysis

Computer Searches: A ‘General’ Warrant Can No Longer Satisfy Requirements

The “Warrant Clause” of the Fourth Amendment provides that “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.” In a recent opinion requiring search warrants for “smart phones,” U.S. Supreme Court Chief Justice John G. Roberts expounded on the history behind the Fourth Amendment:

Our cases have recognized that the Fourth Amendment was the founding generation’s response to the reviled ‘general warrants’ and ‘writs of assistance’ of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity. Opposition to such searches was in fact one of the driving forces behind the Revolution itself.

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Riley v. California, 134 S. Ct. 2473, 2494 (2014).

Unfortunately, “general” warrants, authorizing “rummaging” searches without specification, are alive and well in the 21st Century. More often than not, such “general warrants” are relied upon to authorize “rummaging” searches of computers. Consider for one moment the following clause in a recent search warrant obtained and executed by a state prosecutor’s office here in New York City. In addition to business records, the search warrant sought: “Any and all computers, as that term is defined in Penal Law §156.00(1) also known as electronic devices, desktop CPUs, laptops, cell phones and tablets.” The warrant authorized the search of the entire contents of each and every computer found on the premises, without specification or limitation

with regard to the evidence sought or the crime to which that evidence related.

One commentator has noted that computers “are postal services, playgrounds, jukeboxes, dating services, movie theaters, daily planners, shopping malls, personal secretaries, virtual diaries and more.” Kerr, “Searches and Seizures in a Digital World,” 119 Harv. L. Rev. 531, 569 (2005). With so much of our modern lives contained within our computers, what then is the distinction

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between a “general warrant” authorizing a “rummaging” search through someone’s residence and a warrant, like the one above, authorizing a “rummaging” search of the entire contents of someone’s computer? As is becoming clearer to courts in New

York and around the country, there is absolutely no difference between the two.

The symmetry between “rum-maging” searches of homes and computers figured prominently in *United States v. Galpin*, 720 F.3d 436 (2013), a case in which the U.S. Court of Appeals for the Second Circuit reviewed an order denying suppression of child pornography recovered pursuant to a search warrant for “any computers.” The court noted the history of the Fourth Amendment as a bar to “general warrants,” and then zeroed in on whether the unspecified search of “any computers” met the amendment’s “particularity” requirement. The Second Circuit stated: “Where, as here, the property to be searched is a computer hard drive, the particularity requirement assumes ever greater importance. As numerous courts and commentators have observed, advances in technology and the centrality of computers in the lives of average people have rendered the computer hard drive akin to a residence in terms of the scope and quantity of private information it may contain. The potential for privacy violations occasioned by an unbridled exploratory search of a hard drive is enormous.” *Galpin*, 720 F.3d at 446. The court held that the search warrant for “any computers” violated the Fourth Amendment’s particularity requirement. *Id.* at 447.

In the recent case of *People v. English*, 52 Misc.3d 318 (Sup. Ct. Bronx 2016), the defendant was arrested for an attempted kidnapping. A search warrant was secured for the defendant’s cell phone as well as his residence, including authorization “to search the contents of any computer equipment.” *Id.* at 324. Relying in part on *Galpin*, the court suppressed evidence recovered pursuant to the computer search because it “lacked the requisite specificity” and “violated the Fourth Amendment’s proscription against general searches.” *Id.* It bears noting that *Galpin* and *English* are not aberrations, but rather part of a nationwide movement toward heightened scrutiny of computer search warrants and demanding particularity in computer search warrants. See, e.g., *Wheeler v. State*, 135 A.3d 282, 304 (Delaware 2016); *State v. Mansour*, 381 P.3d 930, 943 (Oregon 2016); *State v. Castagnola*, 46 N.E.3d 638, 659 (Ohio 2015); *State v. Henderson*, 854 N.W.2d 616, 632-34 (Nebraska 2014); see also *United States v. Otero*, 563 F.3d 1127, 1132-33 (10th Cir. 2009); *United States v. Zemlyansky*, 945 F. Supp. 2d 438, 458 (S.D. N.Y. 2013); *United States v. Hunter*, 13 F. Supp. 2d 574, 583-585 (D. Vt. 1998).

So then, what must a valid computer search warrant include to avoid being labeled the 21st Century equivalent of a “general warrant?” Here too, the *English* case provides the answer. In addition to granting the motion for the computer search,

the court denied a similar motion for the defendant’s “smart phone,” which the Supreme Court characterizes as a “mini-computer.” *Riley v. California*, 134 S. Ct. at 2489. The *English* court held that the “smart phone” warrant met the “particularity” requirement “in that it identified: (1) a specific offense for which the police had established probable cause; (2) the place to be searched (defendant’s cellphone); and (3) the items to be seized (numbers, text messages, picture messages, etc.) by their relation to the designated crimes... .” *English*, 52 Misc.3d at 322.

The “particularity” requirements set forth in *English* are simple and straightforward. Hopefully, with a new awareness that “general warrants” for computers will no longer pass constitutional muster, our courts will become more reluctant to authorize such warrants. That, in turn, may cause prosecutors to exercise more caution and regard for the rights of defendants when seeking to search their computers.



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