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# The Private Search Doctrine and the Evolution of Fourth Amendment Jurisprudence in the Face of New Technology: A Broad or Narrow Exception?

## **Cover Page Footnote**

J.D. Candidate, 2017, The Catholic University of America, Columbus School of Law. I would like to thank Amanda Azarian and my parents, Kathy and David, for their love and encouragement. I would especially like to thank Daniel Zachem for his guidance, without which this Comment would not be possible.

# THE PRIVATE SEARCH DOCTRINE AND THE EVOLUTION OF FOURTH AMENDMENT JURISPRUDENCE IN THE FACE OF NEW TECHNOLOGY: A BROAD OR NARROW EXCEPTION?

Adam A. Bereston<sup>+</sup>

Justice Sotomayor asserted that technology “may ‘alter the relationship between citizen and government in a way that is inimical to democratic society.’”<sup>1</sup> In only the past several decades, technological advancement has had an immense impact on how our society functions. The emergence of the Internet, the smartphone, and the Global Positioning System (GPS) has changed the way we do business, communicate with each other, store and transmit information, and navigate the world.<sup>2</sup> The widespread use of technology has ushered in a new digital era, one that presents challenging new legal questions.<sup>3</sup> As a result, courts have re-examined our individual rights and redefined the scope of Constitutional protections arising out of police conduct.<sup>4</sup> The breadth of this scope is the primary focus of this Comment.

The Fourth Amendment of the United States Constitution establishes that

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be

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1. *United States v. Jones*, 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring) (quoting *United States v. Cuevas-Perez*, 640 F.3d 272, 285 (7th Cir. 2011) (Flaum, J., concurring)).

2. *See Riley v. California*, 134 S. Ct. 2473, 2484 (2014) (describing the pervasiveness of cell phones in American society).

3. *See id.* at 2485 (applying a different legal analysis when cell phone data is being searched rather than a physical item); *see also* Adam Lamparello & Charles E. MacLean, *Riley v. California: Privacy Still Matters, but How Much and in What Contexts?*, 27 REGENT U. L. REV. 25, 34 (2015)

[T]echnology cuts both ways. It gives individuals the ability to store a virtual treasure trove of information, much of it traditionally considered private under the Fourth Amendment, in an object no larger than the size of their hands. Technology, however, has also become an ‘important tool[] in facilitating coordination and communication among members of criminal enterprises.’

*Id.* (quoting *Riley*, 134 S. Ct. at 2493) (internal alterations omitted).

4. *See Riley*, 134 S. Ct. at 2485; Adam Charles Maas, *Instasearch: Fixing Fourth Amendment Jurisprudence as Applied to Instagram and Other Cyberspace Data Storage Providers*, 16 N.C. J.L. & TECH. ON. 202, 220 (2015) (“[T]he courts not only must define privacy expectations for various technologies, but they must also re-evaluate those decisions every decade or so to determine whether or not reasonable expectations have changed.”).

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.<sup>5</sup>

The first step in a Fourth Amendment analysis requires determining whether or not the Fourth Amendment is even implicated.<sup>6</sup> In other words, has a “search” occurred within the meaning of the Fourth Amendment? The method for answering this question has changed over time, evolving from a common-law trespass theory to an approach that also focuses on the individual.<sup>7</sup>

Recently, courts have struggled to consistently determine when and how the Fourth Amendment applies to police searches of items that have already been searched by a private party.<sup>8</sup> The answer to this question is governed by the “private search” doctrine, which states that when a private (i.e., non-governmental) party searches an item prior to the government’s search of that same item, the Fourth Amendment is not implicated, so long as the government does not exceed the scope of the private search.<sup>9</sup>

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5. U.S. CONST. amend. IV.

6. See, e.g., *Ruhren v. Spittal*, No. 1:15cv445 (AJT/JFA), 2015 WL 1112157, at \*3 (E.D. Va. May 14, 2015); see also *United States v. Jacobsen*, 466 U.S. 109, 113–16 (1984) (discussing the requirement of government action to constitute a “search” and “seizure” under the meaning of the Fourth Amendment).

7. See *infra* Section I.A.

8. See *United States v. Sparks*, 806 F.3d 1323, 1347 (11th Cir. 2015) (applying the “private search” doctrine, but finding that defendants did not have standing to contest a warrantless search because they had abandoned their cell phone); *United States v. Lichtenberger*, 786 F.3d 478, 480 (6th Cir. 2015) (applying the private search doctrine and finding an officer’s search of a defendant’s laptop computer to be unreasonable because the officer lacked “virtual certainty” regarding what he was going to see on the computer when he conducted the search); *Rann v. Atchison*, 689 F.3d 832, 838 (7th Cir. 2012) (applying the private search doctrine and finding no Fourth Amendment violation because the police were “substantially certain” their search of a defendant’s digital media devices would uncover child pornography after those devices had been previously viewed by the defendant’s wife and daughter); *United States v. Runyan*, 275 F.3d 449, 461–62 (5th Cir. 2001) (lamenting the lack of Supreme Court guidance regarding the scope of the private search doctrine and concluding that the police conduct in the case had violated the Fourth Amendment).

9. *Jacobsen*, 466 U.S. at 117. The Supreme Court has stated, [i]t is well-settled that when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of that information. Once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now nonprivate information.

*Id.* A significant justification for the private search exception to the exclusionary rule is the expected *non*-deterrence of private searchers. While an officer would presumably refrain from conducting an illegal search because he knows any evidence he uncovers will eventually be excluded at trial, this same knowledge “purportedly has little effect on a private individual[] ‘who is often motivated by reasons independent of a desire to secure criminal conviction and who seldom engages in searches upon a sufficiently regular basis to be affected by the exclusionary sanction.’” Monica R. Shah, Note, *The Case for a Statutory Suppression Remedy to Regulate Illegal Private Party Searches in Cyberspace*, 105 COLUM. L. REV. 250, 254–55 (2005) (quoting WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.8(b), at 219–20).

However, computers and other modern technological devices present a unique problem when applying the doctrine, given the sheer volume of information that these devices are capable of storing.<sup>10</sup> Several federal circuit courts have sought to address this issue, but their differing opinions have arguably created more uncertainty. These circuits are split over the scope of a permissible search, or in other words, how much of a device may be searched by the government after a search by a private party.<sup>11</sup> The Fifth and Seventh Circuits held that when a private party has searched only *part* of the entire device, the government may then search the *entire* device without implicating the Fourth Amendment.<sup>12</sup> On the other hand, the Sixth and Eleventh Circuits held that the government search is limited only to those individual files that were searched by the private party, and that anything exceeding the private search is unconstitutional absent a warrant.<sup>13</sup>

Given the lack of clarity for law enforcement regarding acceptable searches of computers, and for the public regarding the scope of their constitutional protections under the Fourth Amendment,<sup>14</sup> the Supreme Court should weigh in to resolve the circuit split. If it does, the Court should adopt the approach taken by the Fifth and Seventh Circuits, which would allow police to search the entire computer after a private party searches one or more individual files.<sup>15</sup>

Part I of this Comment introduces the Fourth Amendment as informed by its history and meaning at common law. It then traces the development of the Court's Fourth Amendment doctrine from an approach that focused primarily on an individual's property rights to one that is more concerned with an individual's personal rights. This Comment then briefly examines the privacy rights that are protected under the Fourth Amendment and the challenges that modern technology presents for those rights. Next, this Comment introduces the private search doctrine, examines how it applies to searches of physical items,

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(3d ed. 1996)). Accordingly, when evidence is discovered as a result of a private party's search, the typically powerful deterrence rationale of the exclusionary rule is not invoked. Furthermore, alternative remedies against the illegal private party searcher make exclusion of the evidence less necessary. *Id.*

10. See *Lichtenberger*, 786 F.3d at 488; see also Priscilla Grantham Adams, *Fourth Amendment Applicability: Private Searches*, Univ. of Miss. Sch. of Law, NAT'L CTR. FOR JUSTICE & THE RULE OF LAW 8 (2008), <http://www.olemiss.edu/depts/ncjrl/pdf/PrivateSearchDoctrine.pdf> ("Whereas the analysis of a case in which the Government searches a shoe box following a private search of the same one would have no problem classifying the Government's search as mere replication, it becomes less clear when the object searched is a computer.").

11. See *supra* note 8 and accompanying text.

12. *Runyan*, 275 F.3d at 465 ("[P]olice do not exceed the scope of a prior private search when they examine particular items within a container that were not examined by the private searchers"); *Rann*, 689 F.3d at 836–37 (adopting the holding of the Fifth Circuit in *Runyan*).

13. *Sparks*, 806 F.3d at 1336 (ruling that an officer's warrantless search of a video "exceeded—not replicated—the breadth of the private search"); *Lichtenberger*, 786 F.3d at 488 (concluding that an officer's search must "stay within the scope of [the] initial private search").

14. See *supra* note 8 and accompanying text.

15. *Lichtenberger*, 786 F.3d at 465; *Rann*, 689 F.3d at 837.

and reviews the analysis used by courts to identify whether a police search violated the Fourth Amendment. Furthermore, this Comment describes the circuit split that exists between the Fifth and Seventh Circuits, which adopt the broad view, and the Sixth and Eleventh Circuits, which adopt the narrow view. Part II of this Comment analyzes the different results that are produced by each approach. Next, it discusses a problem that arises when the private party acts under direction of a government agent to conduct a subsequent search. In Part III, this Comment argues that, should the Supreme Court be faced with resolving this circuit split, it should adopt the broad view because it is more in line with the underlying principles of the private search doctrine and the Fourth Amendment.

## I. THE LEGAL HISTORY OF THE FOURTH AMENDMENT AND THE PRIVATE SEARCH DOCTRINE

### A. *The Evolution of the Fourth Amendment*

The Fourth Amendment is best understood through the lens of its property-based common-law origin.<sup>16</sup> The Framers of the Bill of Rights were likely influenced by *Entick v. Carrington*,<sup>17</sup> a 1765 English decision in which the court emphasized that any invasion on private property is a trespass that must be justified in law—typically, a government-issued warrant provides such a justification.<sup>18</sup> Consequently, *Entick* informed the Supreme Court’s initial approach to addressing Fourth Amendment issues,<sup>19</sup> which asked whether a

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16. See *United States v. Jones*, 565 U.S. 400, 405 (2012) (“The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to ‘the right of the people to be secure against unreasonable searches and seizures’; the phrase ‘in their persons, houses, papers, and effects’ would have been superfluous.”).

17. *Entick v. Carrington*, 95 Eng. Rep. 807 (K.B. 1765). This decision has been referred to as “a monument of English freedom undoubtedly familiar to every American statesman at the time the Constitution was adopted, and considered to be the true and ultimate expression of constitutional law” with regard to search and seizure. *Jones*, 565 U.S. at 405.

18. *Entick*, 95 Eng. Rep. at 817; see *Boyd v. United States*, 116 U.S. 616, 627 (1886) (“[I]t is . . . incumbent upon the defendants to show the law by which this seizure is warranted. If that cannot be done, it is a trespass.”).

19. The Supreme Court resurrected the *Entick* doctrine in the *Boyd* decision, reasoning, [t]he principles laid down in [*Entick*] affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man’s home and the privacies of life. *Boyd*, 116 U.S. at 630; see Richard G. Wilkins, *Defining the ‘Reasonable Expectation of Privacy’: An Emerging Tripartite Analysis*, 40 VAND. L. REV. 1077, 1083 (1987) (“*Entick* delineated the fundamental analysis that, even today, influences the outcome of a challenge to governmental authority to conduct a search: the essential inquiry balances public necessity with individual rights.”); see also Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 809 (2004) (noting that modern Fourth Amendment doctrine is largely predicated on property law principles).

physical intrusion on private property “would have been considered a ‘search’ within the meaning of the Fourth Amendment when it was adopted.”<sup>20</sup>

The Court consistently applied this approach until the 1960s, when the Warren Court shifted the analysis from a primarily property-based approach to one which emphasized the protection of individual rights.<sup>21</sup> This shift was in response to technological advancements, which presented situations that could not possibly have existed at the time the Fourth Amendment was drafted. In *Katz v. United States*,<sup>22</sup> Charles Katz argued that a public telephone booth was a constitutionally protected area, and thus, that the evidence obtained by attaching a recording device to the exterior of the booth was an invasion of privacy.<sup>23</sup> Moreover, Katz asserted that there did not need to be physical penetration into a constitutionally protected area to constitute a search and seizure under the Fourth Amendment.<sup>24</sup> Although the Court ultimately ruled in Katz’s favor, it rejected the narrow focus on “constitutionally protected areas” and the “right to privacy” as central concerns under the Fourth Amendment analysis, stating instead that the protections offered by the Fourth Amendment extend much further.<sup>25</sup>

Accordingly, in *Katz*, the requirement that the Fourth Amendment is only implicated when there is physical penetration by the government fell out of favor with the Court.<sup>26</sup> Instead, the Court added to this traditional common-law focus

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20. *Jones*, 565 U.S. at 405 (“Consistent with [Entick] . . . , Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century.”).

21. See *Katz v. United States*, 389 U.S. 347, 351 (1967) (“[T]he Fourth Amendment protects people not places.”); see also Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890) (discussing the evolution of common law protections of person and property); Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment “Search and Seizure” Doctrine*, 100 J. CRIM. L. & CRIMINOLOGY 933, 985–91 (2010) (discussing the evolution of the Fourth Amendment during the Warren era of the Supreme Court); Richard S. Julie, *High-Tech Surveillance Tools and the Fourth Amendment: Reasonable Expectations of Privacy in the Technological Age*, 37 AM. CRIM. L. REV. 127, 129–30 (2000) (describing the shift from the trespass-based theory to a “reasonable expectation of privacy” test). For a discussion on privacy and property theory under the Fourth Amendment, see David Steinberg, *Florida v. Jardines: Privacy, Trespass, and the Fourth Amendment*, 23 TEMP. POL. & CIV. RTS. L. REV. 91, 97–101 (2013).

22. 389 U.S. 347 (1967).

23. *Id.* at 349.

24. *Id.* at 349–50.

25. *Id.* at 350–51.

[The Fourth] Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person’s *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States.

*Id.*

26. See *id.* at 352–53.

on property by suggesting that what a person seeks to preserve as private may also be constitutionally protected, even in an area that is accessible to the public.<sup>27</sup> Justice Harlan, in his concurrence, fashioned a two-part test to determine whether a person has a reasonable expectation of privacy in the area searched by the government.<sup>28</sup> The test, which was subsequently adopted and applied by the Court in future cases, first asks whether the person exhibited an actual (subjective) expectation of privacy and, second, whether the expectation of privacy is one that society is prepared to recognize as reasonable.<sup>29</sup> In effect, the Court expanded the reach of Fourth Amendment protection, while still maintaining the warrant requirement.<sup>30</sup>

The conclusions reached by both the majority and Justice Harlan in *Katz* exemplified the evolution of Fourth Amendment jurisprudence in response to technological advancement. As new technology became available and the government began to use that technology to intrude into traditionally protected areas, the Court was forced to reconsider the parameters of a search under the Fourth Amendment and expand its Fourth Amendment analysis.<sup>31</sup>

The Court reached a similar result in the 2001 case of *Kyllo v. United States*.<sup>32</sup> In *Kyllo*, police officers used a thermal imager from the outside of the petitioner's home to detect radiation that the officers suspected was emanating from heat lamps used to grow marijuana inside the home.<sup>33</sup> In deciding this case, the Court acknowledged the relatively cloudy precedent governing the

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It is true that the absence of such penetration was at one time thought to foreclose further Fourth Amendment inquiry, for that Amendment was thought to limit only searches and seizures of tangible property. But the premise that property interests control the right of the Government to search and seize has been discredited. Thus . . . we have since departed from [this] narrow view. . . . We conclude that the underpinnings of [the cases invoking the "trespass" doctrine] have been so eroded by our subsequent decisions that the "trespass" doctrine there enunciated can no longer be regarded as controlling.

*Id.* (internal citations and alterations omitted).

27. *Id.* at 351.

28. *Id.* at 361.

29. *Id.*

30. *Id.* at 357 (“[T]he mandate of the Fourth Amendment requires adherence to judicial processes, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.”) (internal citations and alterations omitted).

31. See *Kyllo v. United States*, 533 U.S. 27, 33–34 (2001) (finding that the advance of technology has the power to “shrink the realm of guaranteed privacy.”).

32. 533 U.S. 27 (2001).

*Katz* involved eavesdropping by means of an electronic listening device placed on the outside of a telephone booth—a location not within the catalog (‘persons, houses, papers, and effects’) that the Fourth Amendment protects against unreasonable searches. We held that the Fourth Amendment nonetheless protected *Katz* from the warrantless eavesdropping because he ‘justifiably relied’ upon the privacy of the telephone booth.

*Id.* at 32–33 (quoting *Katz*, 389 U.S. at 353).

33. *Id.* at 29–30.



issue of whether the use of this technology violated the Fourth Amendment's protection against unreasonable search and seizure.<sup>34</sup> Under the traditional common law trespassory approach, visual surveillance of the outside of a home would not be a search implicating the Fourth Amendment.<sup>35</sup> However, in order to uphold the principles of Fourth Amendment protections as they existed at the time of adoption, the Court held that the use of thermal imagery constituted a search even though there was no *physical* intrusion into a constitutionally protected area.<sup>36</sup> Extending the reasoning in *Katz*, the Court concluded that there is a minimal expectation of privacy in the home that society is prepared to recognize as reasonable.<sup>37</sup> Importantly, the Court observed, "[t]o withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment."<sup>38</sup>

These cases illustrate the Court's willingness, and perhaps, the need, to expand the reach of Fourth Amendment protection to answer the constitutional questions posed by the advent of new technology.

### B. *The Fourth Amendment and Privacy*

#### I. *United States v. Jones*

After years of addressing the minimum level of privacy under the *Katz* reasonable expectation of privacy test, the Court eventually returned its focus to the common law roots of the Fourth Amendment.<sup>39</sup> In the 2012 case *United States v. Jones*,<sup>40</sup> the Court considered whether the placement of a GPS tracking device on a defendant's vehicle constituted a search within the meaning of the Fourth Amendment at the time it was adopted.<sup>41</sup> But instead of asking whether the defendant had a reasonable expectation of privacy in his vehicle's movements on the open road,<sup>42</sup> the Court simply found that the government's installation of the GPS tracker constituted a physical intrusion upon the

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34. *Id.* at 31 ("With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no. On the other hand, the antecedent question whether or not a Fourth Amendment "search" has occurred is not so simple under our precedent.") (internal citations omitted).

35. *Id.*; see *Boyd v. United States*, 116 U.S. 616, 628 (1886) ("[T]he eye cannot . . . be guilty of trespass."); see also *Goldman v. United States*, 316 U.S. 129, 134–36 (1942); *Olmstead v. United States*, 277 U.S. 438, 464–66 (1928) (holding that auditory intercepts of communication did not implicate the Fourth Amendment because no physical trespass occurred).

36. *Kyllo*, 533 U.S. at 34–35.

37. *Id.* at 34.

38. *Id.*

39. See *United States v. Jones*, 565 U.S. 400, 406 (2012) (declining to apply the *Katz* reasonable expectation of privacy test and reviving the trespass-based approach to Fourth Amendment search questions).

40. 565 U.S. 400.

41. *Id.* at 402.

42. *Id.* at 406.

defendant's property, and thus, the government's conduct was an unconstitutional search.<sup>43</sup> To support its conclusion, the Court reasoned that the *Katz* reasonable expectation of privacy test was merely "added to, not substituted for, the common-law trespassory test."<sup>44</sup> In other words, it found that a Fourth Amendment search can occur when the government physically intrudes upon a constitutionally protected interest with the object of securing evidence, even if a defendant would not have a reasonable expectation of privacy in that interest.<sup>45</sup> Despite the Court's groundbreaking revival of the trespass doctrine in *Jones*, the Court was not finished there, as the advent of new technology forced the Court to refine its Fourth Amendment jurisprudence even further.

## 2. *Riley v. California*

In *Riley v. California*,<sup>46</sup> the Court dealt with a challenge to the admissibility of evidence obtained through a warrantless search of a defendant's cell phone.<sup>47</sup> Concerned about the volume and intrusive nature of information available on cell phones,<sup>48</sup> the Court reasoned that "[m]odern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of [physical items like] a cigarette pack, a wallet, or a purse."<sup>49</sup> When considering whether an exception to the warrant requirement applied, the Court discussed a balancing test in which it considers "the degree to which [the search] intrudes upon an individual's privacy, and . . . the degree to which it is needed to promote a legitimate government interest."<sup>50</sup> The Court analyzed the various assertions by the government regarding the scope of a warrantless search of a cell phone, observing the key differences between a cell phone and ordinary physical

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43. *Id.* at 404–05.

44. *Id.* at 409; *see also* *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) (quoting *United States v. Knotts*, 460 U.S. 276, 286 (1983)) (Brennan, J., concurring) ("[T]hough *Katz* may add to the baseline, it does not subtract anything from the Amendment's protections 'when the Government *does* engage in [a] physical intrusion of a constitutionally protected area.'").

45. 565 U.S. at 407–08. On occasion, the Court has found that certain areas are not constitutionally protected, and thus, that government intrusion into those areas would not constitute a search. *See Jardines*, 133 S. Ct. at 1414 (finding that the "curtilage" of a home is a constitutionally protected area); *but see* *Oliver v. United States*, 466 U.S. 170, 180–81 (1984) (finding that open fields, or the land not immediately surrounding a home, are not constitutionally protected).

46. 134 S. Ct. 2473 (2014).

47. *Id.* at 2481.

48. *Id.* at 2478 ("[c]ell phones differ in both a quantitative and qualitative sense from other items that might be carried on an arrestee's person . . . cell phones can store millions of pages of text, thousands of pictures, or hundreds of videos."); *see also id.* at 2488 ("The United States asserts that a search of all data stored on a cell phone is 'materially indistinguishable' from searches of these sorts of physical items. That is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together.").

49. *Id.* at 2488–89.

50. *Id.* at 2484 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

items.<sup>51</sup> The Court, however, declined to extend an exception to the warrant requirement to cell phones as it has done to ordinary physical items because cell phones “differ in both a quantitative and qualitative sense” such that the privacy intrusion outweighs the promotion of government interests.<sup>52</sup>

The *Riley* decision sheds light on how the Court is likely to interpret the Fourth Amendment in future cases involving warrantless searches of digital information.<sup>53</sup> As cell phones contain “the privacies of life,” and given the Court’s willingness to allow warrantless searches of cell phones only under exigent circumstances and on a case-by-case basis, it is reasonable to predict that the scope of a warrantless search of a digital device will be interpreted narrowly.<sup>54</sup> However, it is worth observing that the Court analyzed the issue of police searches of cell phones in the context of a search incident to arrest only.<sup>55</sup> Thus, it is unclear whether the Court would retreat from this position when the cell phone search occurs in a different context by a private party.

### C. The Private Search Doctrine

The principal question that follows from this discussion is: what about when the information has been previously disclosed to a third party? In *United States v. Jacobsen*, the Court answered this by devising the private search doctrine, which holds that the Fourth Amendment is not implicated when the government subsequently searches an item that was previously searched by a private party.<sup>56</sup> The caveat to this doctrine is that the government may not exceed the scope of the search conducted by the private party without implicating the Fourth Amendment.<sup>57</sup> The reach of this scope, however, is the subject of a current circuit split.

The two approaches taken by the circuits are referred to as the “broad approach” and the “narrow approach.” The broad approach, as adopted by the Fifth and Seventh Circuits, states that when a party searches any part of a single

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51. *Id.* at 2489. (“The term ‘cell phone’ is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone”).

52. *Id.* at 2493.

53. *See id.* at 2495.

The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.

*Id.*

54. *See id.*; *see also* Mark Wilson, *Preparing for Another Computer Search Case at SCOTUS*, FINDLAW (May 26, 2015, 12:01 PM), <http://blogs.findlaw.com/technologist/2015/05/> (“Thanks to *Riley*, all of our old case law about searching physical containers is shifting in the circuit courts of appeal when it comes to computers.”).

55. *Riley*, 134 S. Ct. at 2485.

56. *See United States v. Jacobsen*, 466 U.S. 109, 115–17 (1984); *United States v. Lichtenberger*, 786 F.3d 478, 481–83 (6th Cir. 2015).

57. *Jacobsen*, 466 U.S. at 115–17.

unit, the privacy interests in the entire unit are frustrated, and thus, the unit may be searched in its entirety without implicating the Fourth Amendment.<sup>58</sup> The narrow approach, as adopted by the Sixth and Eleventh Circuits, states that when a party searches a part of the unit, only the privacy interests in those items viewed by the private party are frustrated, and the scope of any subsequent warrantless search must be limited accordingly.<sup>59</sup>

To understand how the Court applies the private search doctrine, it is helpful to first examine cases involving other physical items not including data files or technology. In the 1998 Fifth Circuit decision in *United States v. Paige*,<sup>60</sup> the court sought to answer the question of whether a private-party search of an attic was sufficient to render a subsequent warrantless police search of that attic valid under the Fourth Amendment.<sup>61</sup> In *Paige*, marijuana was discovered in the attic while home improvement contractors were repairing a roof.<sup>62</sup> The *Paige* court applied a two-part test to determine whether the search by the private party—the contractors in this case—implicated the Fourth Amendment.<sup>63</sup> The test was whether “the government knew of or acquiesced in the intrusive conduct of [the contractors], and [whether the contractors] intended to assist law enforcement efforts in conducting their search,” therefore implicating the Fourth Amendment.<sup>64</sup> Having found that the search by the contractors did not implicate the Fourth Amendment, the court turned to the question of whether the subsequent search by the police officer implicated the Fourth Amendment by exceeding the scope of the original search by the contractors.<sup>65</sup>

To make this determination, the court considered whether the initial intrusion by the private party was reasonably foreseeable.<sup>66</sup> If so, and the subsequent police intrusion did not exceed the scope of the intrusion by the private party, the Fourth Amendment would not be implicated.<sup>67</sup> However, if the private intrusion was not reasonably foreseeable, the subsequent police intrusion would

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58. *United States v. Runyan*, 275 F.3d 449, 463–65 (5th Cir. 2001); *Rann v. Atchison*, 689 F.3d 832, 837 (7th Cir. 2012); *see also*, *United States v. Odoni*, 782 F.3d 1226, 1238–39 (11th Cir. 2015) (finding that once a private party searches an object, the government does not violate the Fourth Amendment by replicating the same search); *United States v. Paige*, 136 F.3d 1012, 1020 (5th Cir. 1998) (finding that once a private party infringes upon a person’s expectation of privacy, no search occurs within the meaning of the Fourth Amendment if a police officer searches that same area).

59. *United States v. Sparks*, 806 F.3d 1323, 1336 (11th Cir. 2015); *Lichtenberger*, 786 F.3d at 489.

60. 136 F.3d 1012 (5th Cir. 1998).

61. *Id.* at 1014.

62. *Id.* at 1015–16.

63. *Id.* at 1017.

64. *Id.* at 1017–18.

65. *Id.* at 1018–19.

66. *Id.* at 1020.

67. *Id.*

implicate the Fourth Amendment.<sup>68</sup>

The court found that the intrusion into the attic by home improvement contractors while repairing a roof was reasonably foreseeable and held that the subsequent police intrusion was not a “search” within the meaning of the Fourth Amendment.<sup>69</sup> The appellant no longer possessed a reasonable expectation of privacy in the area searched by police because the privacy interest had already been frustrated by the initial private-party search.<sup>70</sup>

Similarly, in the Fifth Circuit case *United States v. Oliver*,<sup>71</sup> police obtained a cardboard box that contained documents, credit cards, and a laptop, belonging to the defendant, that was first searched by the defendant’s girlfriend before turning it over to police.<sup>72</sup> The police subsequently searched the contents of the box within the scope of the prior search by the defendant’s girlfriend.<sup>73</sup> Relying on *Paige*, the court held that it was reasonably foreseeable for the defendant’s girlfriend to search the box, and thus, the Fourth Amendment was not implicated by the subsequent police search.<sup>74</sup> Moreover, the court held that the government’s search of the contents of a notebook in the box did not implicate the Fourth Amendment, even though the defendant’s girlfriend had not previously performed such a search.<sup>75</sup> The court stated that the contents of the notebook were obvious and therefore did not exceed the scope of the private-party search because both the front cover and a loose piece of paper protruding from the notebook revealed information regarding the defendant’s illegal activity.<sup>76</sup>

In the Eleventh Circuit case of *United States v. Odoni*,<sup>77</sup> the co-defendants were convicted for their involvement in two investment-fraud schemes.<sup>78</sup> Upon

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68. *Id.*

69. *Id.* at 1021 (“In the instant case, both Paige’s conduct and the circumstances of the situation created a risk of intrusion into his garage’s attic that was reasonably foreseeable. . . . Accidents of this type, related to the task at hand and arising contemporaneously therewith, are reasonably expected to occur.”).

70. *Id.* This, however, does not end the inquiry. Although there was no longer an expectation of privacy in the marijuana, the defendant still maintained a possessory interest. As such, the subsequent seizure of the marijuana had to be justified by a warrant or exception. In *Paige*, the court held that the warrantless seizure was justified under the plain view doctrine and thus, upheld the appellant’s conviction. *Id.* at 1023–24.

71. 630 F.3d 397 (5th Cir. 2011).

72. *Id.* at 402–03.

73. *Id.* at 403. At the time, the police were unaware of the prior private search. *Id.* The court rejected the significance of this point, stating “it is the private search itself, and not the authorities’ learning of such search, that renders a police officer’s subsequent warrantless search permissible.” *Id.* at 407.

74. *Id.* at 407.

75. *Id.* at 408.

76. *Id.*

77. 782 F.3d 1226 (11th Cir. 2015).

78. *Id.* at 1229.

his arrest at a London airport, co-defendant Paul Gunter's two mobile phones, laptop computer, and thumb drive were seized, among other things.<sup>79</sup>

After being copied by an IT Forensic Investigator, these items were first turned over to the City of London Police, before making their way into the hands of U.S. officials.<sup>80</sup> The data files were then reviewed without a search warrant.<sup>81</sup> Gunter moved to suppress evidence from the seized items, arguing that "the Fourth Amendment required the U.S. agents to obtain a warrant before searching his electronic data files, even if the files were lawfully seized in the United Kingdom and provided to U.S. officials by British authorities."<sup>82</sup>

The court first asked whether Gunter had an "objectively reasonable expectation of privacy in the data files when U.S. agents examined them."<sup>83</sup> Citing the Supreme Court's decision in *Jacobsen*, the court noted that a person no longer has a reasonable expectation of privacy after a third party has searched the object.<sup>84</sup> Relying on this reasoning, the court opined that Gunter did not have a reasonable expectation of privacy in his data files as the U.S. agents that searched them did not learn anything that had not previously been learned through the search by the British officials.<sup>85</sup> It is also important to note that there was no evidence in the record that the search by the British authorities was conducted under the direction of U.S. officials.<sup>86</sup>

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79. *Id.* at 1236.

80. *Id.*

81. *Id.*

82. *Id.* at 1237.

83. *Id.* at 1238. The court analyzed the search and seizure separately, recognizing that they "implicate two distinct interests." *See id.* at 1237–38 (differentiating the privacy interest implicated by the search from the possessory interest implicated by the seizure and explaining that a court "must analyze the search and the seizure separately, keeping in mind that the fact that police have lawfully come into possession of an item does not necessarily mean they are entitled to search that item without a warrant").

84. *Id.* at 1238 (reasoning that foreign government agents are akin to private parties under the private search doctrine).

85. *Id.* The court identified a distinction between the case at hand and *Jacobsen*. Specifically, in *Jacobsen*, the previous search was conducted by a private party, rather than a foreign official. However, the court concluded that the reasoning in *Jacobsen* applied in both instances, explaining that "the Fourth Amendment generally does not apply to the actions of foreign officials enforcing foreign law in a foreign country," and the key to the private search analysis is whether an otherwise reasonable expectation of privacy has been extinguished by a prior search. *Id.* at 1238–39.

Although the third party who conducted the prior search in *Jacobsen* was a private actor, the reasoning in *Jacobsen* applies with equal force when the third party who conducts the prior search is a foreign governmental official. . . . [I]n both cases, an entity other than a U.S. state or federal agent or official has already examined the object and its contents and therefore eliminated the individual's reasonable expectation of privacy in the contents.

*Id.* at 1238–39.

86. *See id.* at 1238–39. Had the U.S. officials directed the action of British authorities, the Fourth Amendment may have been implicated under an agency theory. *See infra* Section II.B.

*D. Circuit Courts Split Over the Application of the Private Search Doctrine to Technology*

*1. Broad View*

In *United States v. Runyan*, the Fifth Circuit adopted the broad approach when it applied the private search doctrine to data files.<sup>87</sup> In *Runyan*, while searching through the defendant's property to find her belongings, the defendant's ex-wife stumbled upon a black duffel bag that contained pornography, compact and computer disks, a camera with film, and Polaroid pictures, among other things.<sup>88</sup> Another search revealed a desktop computer, floppy disks, compact disks, and several ZIP drives.<sup>89</sup> The defendant's ex-wife opened about twenty compact disks and floppy disks, but did not view anything on the ZIP drives.<sup>90</sup> After determining that they contained child pornography, the ex-wife turned over many of these items to the police.<sup>91</sup> Officers subsequently examined several of the images stored on the containers they were given, including images from the ZIP disks that had not been previously viewed by the ex-wife.<sup>92</sup>

After being convicted of several child pornography-related charges, the defendant appealed, arguing that the pre-warrant evidence viewed by the police should have been suppressed because the police had exceeded the scope of the prior private-party search.<sup>93</sup> Determining that the defendant had a reasonable expectation of privacy in the evidence at issue,<sup>94</sup> a panel of Fifth Circuit judges held that a "search" for the purposes of the Fourth Amendment does not occur when police view an item that was previously searched by a private party, so long as the police do not exceed the scope of the private search.<sup>95</sup>

Thus, the essential questions in this case were twofold: whether the police exceeded the scope of the prior private-party search by the ex-wife (1) when they examined previously unsearched disks; and (2) when they examined more images on the individual disks than the private party.<sup>96</sup> The court acknowledged

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87. 275 F.3d 449, 465 (5th Cir. 2001).

88. *Id.* at 453.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 454.

93. *Id.* at 455, 460.

94. *See id.* at 458. The court noted the following factors as being dispositive: "whether Runyan had a possessory interest in the personal property searched, whether he exhibited a subjective expectation of privacy in that personal property, and whether he took normal precautions to maintain that expectation of privacy." *Id.*

95. *Id.* ("[A] police view subsequent to a search conducted by private citizens does not constitute a 'search' within the meaning of the Fourth Amendment so long as the view is confined to the scope and product of the initial search.") (quoting *United States v. Bomengo*, 580 F.2d 173, 175 (5th Cir. 1978)).

96. *Id.* at 460.

that under *Jacobsen*, the proper inquiry was “whether the government learned something from the police search that it could not have learned from the private searcher’s testimony and, if so, whether the defendant had a legitimate expectation of privacy in that information.”<sup>97</sup> However, the court recognized that there was not much existing precedent available to determine how the inquiry applies when determining whether a police search exceeds the scope of a private-party search.<sup>98</sup>

Regarding the first question, the court determined that where a private party has previously opened some containers but not others, the government’s search of an unopened container would exceed the scope of the private search, unless the government searcher was virtually, or “substantially,” certain of what she would find inside.<sup>99</sup> The “virtual certainty” requirement is met when a police officer has a degree of certainty equivalent to seeing the contraband in “plain view.”<sup>100</sup> In other words, if a container’s outward appearance leads an officer to infer that contraband is contained therein with such certainty that it is as if the contraband is essentially out in the open (*i.e.*, in plain view), the officer may search the container without a warrant.<sup>101</sup> The court determined that this rule best captured the doctrine laid out by the Supreme Court in *Jacobsen*.<sup>102</sup> As such, the warrantless police search of the disks not viewed by the ex-wife exceeded the allowable scope and the evidence obtained from those disks should have been suppressed.<sup>103</sup>

Regarding the second question, the court stated that a person’s privacy interest in a particular container is frustrated if it is opened and examined by private searchers.<sup>104</sup> As such, the court concluded, “police do not exceed the private

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Today, we address only . . . narrow questions: (1) whether a police search exceeds the scope of a private search when private searchers examine selected items from a collection of similar closed containers and police searchers subsequently examine the entire collection; [and] (2) whether a police search exceeds the scope of the private search when the police examine more items within a particular container than did the private searchers

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*Id.* at 461–62.

97. *Id.* at 460 (citing *United States v. Jacobsen*, 466 U.S. 109, 118–20 (1984)).

98. *Id.* at 461 (“[I]t is unclear from this court’s jurisprudence which of [the distinctions between the private search and the police search] are constitutionally relevant.”).

99. *Id.* at 463.

100. *See, e.g.*, *Texas v. Brown*, 460 U.S. 730, 750–51 (1983) (Stevens, J., concurring).

101. *Id.*

102. *Runyan*, 275 F.3d at 463.

103. *Id.* at 464.

104. *Id.*

Though the Supreme Court has long recognized that individuals have an expectation of privacy in closed containers, an individual’s expectation of privacy in the contents of a container has already been compromised if that container was opened and examined by private searchers. Thus, the police do not engage in a new ‘search’ for Fourth Amendment purposes each time they examine a particular item found within the container.



search when they examine more items within a closed container than did the private searchers.”<sup>105</sup> In other words, the fact that officers examined more images on the disks than the private searchers was not enough to warrant suppression of those images.

The Seventh Circuit followed the Fifth Circuit’s approach in the case of *Rann v. Atchison*.<sup>106</sup> In *Rann*, the defendant was convicted of sexual assault and possession of child pornography.<sup>107</sup> On appeal, the defendant asserted that he received ineffective assistance of counsel when his attorney did not seek to suppress evidence obtained from a ZIP drive and camera memory card.<sup>108</sup>

The defendant’s biological daughter provided police with the memory card from the camera that the defendant had used to photograph her.<sup>109</sup> Her mother turned over a computer ZIP drive.<sup>110</sup> Both items contained child pornography.<sup>111</sup> The defendant argued that the police officers exceeded the scope of the private search because there was no evidence that either the victim or her mother knew that the items contained images of child pornography before the police viewed them.<sup>112</sup> Thus, the government’s action violated the Fourth Amendment.<sup>113</sup>

Reiterating the inquiry laid out in *Jacobsen* and recited in *Runyan*, the court reasoned that “individuals retain a legitimate expectation of privacy even after a private individual conducts a search, and ‘additional invasions of privacy by the government agent must be tested by the degree to which they exceeded the scope of the private search.’”<sup>114</sup> The court specifically cited to *Runyan*, explaining that “a search of any material on a computer disk is valid if the private party who conducted the initial search had viewed at least one file on the disk.”<sup>115</sup>

The Seventh Circuit adopted the reasoning in *Runyan* after finding it persuasive.<sup>116</sup> Accordingly, the court determined that the police search of the

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*Id.* at 464–65 (internal citations omitted).

105. *Id.* at 464.

106. 689 F.3d 832 (7th Cir. 2012).

107. *Id.* at 833.

108. *Id.*

109. *Id.* at 834.

110. *Id.*

111. *Id.*

112. *Id.* at 836.

113. *Id.*

114. *Id.* (quoting *United States v. Jacobsen*, 466 U.S. 109, 115 (1984)).

115. *Id.* (citing *United States v. Runyan*, 275 F.3d 449, 465 (5th Cir. 2001)).

116. *Id.* at 837.

We find that *Runyan*’s holding strikes the proper balance between the legitimate expectation of privacy an individual retains in the contents of his digital media storage devices after a private search has been conducted and the “additional invasions of privacy by the government agent” that “must be tested by the degree to which they exceeded the scope of the private search.”

*Id.* (citing *Jacobsen*, 466 U.S. at 115).

data files did not exceed the scope of the private search.<sup>117</sup> Moreover, the court relied on the lower court's factual finding that it was likely that the mother had compiled the images onto the disk herself after downloading them from the family computer and therefore was aware of the content of the digital files turned over to police.<sup>118</sup>

Even if the police had searched the data files more thoroughly than the private searchers, the search was still permissible under the *Runyan* rationale because the mother and victim knew what the memory card and ZIP disk contained when they turned them over to the police, and, therefore, the police could be substantially certain that they contained child pornography.<sup>119</sup> As a result, the search did not violate the Fourth Amendment.<sup>120</sup>

## 2. Narrow View

The Sixth Circuit adopted a different approach in *United States v. Lichtenberger*.<sup>121</sup> In that case, the defendant was arrested for failing to register as a sex offender.<sup>122</sup> Following his arrest, the defendant's girlfriend hacked into his password-protected computer, as she was suspicious of the fact that the defendant would never let her use his computer.<sup>123</sup> After gaining access, she began opening folders until she eventually found several images of child pornography.<sup>124</sup> She contacted police who then came to her house and asked her to show the officer the images she had found.<sup>125</sup> The defendant's girlfriend clicked on random thumbnail images.<sup>126</sup> After identifying the images as child pornography, the officer seized the laptop and several other items belonging to the defendant.<sup>127</sup> At trial, the girlfriend testified that she was unsure whether the pictures she showed the officer were the same pictures she had previously opened.<sup>128</sup>

In considering whether the officer's warrantless search was permissible, the court noted that "the government's ability to conduct a warrantless follow-up

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117. *Id.* at 837–38.

118. *See id.* ("These findings were reasonable based on the trial testimony. S.R. testified that she knew Rann had taken pornographic pictures of her . . . . Both women brought evidence supporting S.R.'s allegations to the police; it is entirely reasonable to conclude that they knew that the digital media devices contained that evidence.") *Id.* at 838.

119. *Id.* at 838 (citing *Runyan*, 275 F.3d at 463).

120. *Id.*

121. 786 F.3d 478 (6th Cir. 2015).

122. *Id.* at 479.

123. *Id.* at 479–80.

124. *Id.* The defendant's girlfriend testified that "she viewed approximately 100 images of child pornography saved in several subfolders." *Id.* at 481. The police officer, however, viewed only four to five photographs during the subsequent warrantless search. *Id.*

125. *Id.* at 480.

126. *Id.*

127. *Id.* at 481.

128. *Id.*

search . . . is expressly limited by the scope of the initial private search.”<sup>129</sup> Most importantly, the court focused on the fact that in *Jacobsen*, the police search did not violate the Fourth Amendment because there was a “virtual certainty” that the police officer would find what the previous private-party search revealed.<sup>130</sup>

The court explained that the proper first step is to determine the scope of the private search, and then determine if the officer’s subsequent search exceeded that scope.<sup>131</sup> In ascertaining the relevant scope, it must be determined how much information the government stands to gain and the certainty of what the government will find.<sup>132</sup> The court cited to *Riley*’s balancing test, which weighs the intrusion upon an individual’s privacy against the promotion of legitimate government interests to determine whether to exempt a search from the warrant requirement.<sup>133</sup> However, when the item is a cell phone or another similar electronic device, the scales seriously tip in favor of the individual’s privacy interest because the usual justifications for a warrantless search are no longer present,<sup>134</sup> especially given the sheer volume of information that these devices may carry.<sup>135</sup>

Because of the volume of information available on these devices, the court ultimately concluded that the officer could not have been “virtually certain” that his search of the laptop would not tell him anything more than the defendant’s girlfriend already told him.<sup>136</sup> The defendant’s girlfriend admitted that she could

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129. *Id.* (citing *United States v. Jacobsen*, 466 U.S. 109, 116 (1984)).

130. *Id.* at 482–83 (citing *United States v. Jacobsen*, 466 U.S. 109, 118–20 (1984)).

131. *Id.* at 485 (citing *United States v. Jacobsen*, 466 U.S. 109, 122 (1984)). In holding that the officer in this case exceeded the scope of the initial private search, the court focused on “the extensive privacy interests at stake in a modern electronic device like a laptop and the particulars of how [the officer] conducted his search when he arrived at the residence.” *Id.*

132. *Id.* at 485–86 (citing *United States v. Jacobsen*, 466 U.S. 109, 119–20 (1984)) (“Under the private search doctrine, the critical measures of whether a governmental search exceeds the scope of the private search that preceded it are how much information the government stands to gain when it re-examines the evidence and, relatedly, how certain it is regarding what it will find.”).

133. *Id.* at 487 (“[W]e generally determine whether to exempt a given type of search from the warrant requirement by assessing . . . the degree to which it intrudes upon an individual’s privacy and . . . the degree to which it is needed for the promotion of legitimate governmental interests.”) (internal alterations removed).

134. *Id.* at 487.

Neither of these rationales has much force with respect to digital content on cell phones. On the government interest side, we have previously concluded that the two risks identified—harm to officers and destruction of evidence—are present in all custodial arrests. There are no comparable risks when the search is of digital data. In addition, we have regarded any privacy interests retained by an individual after arrest as significantly diminished by the fact of the arrest itself. Cell phones, however, place vast quantities of personal information literally in the hands of individuals. A search of the information on a cell phone bears little resemblance to the type of brief physical search considered in our prior cases.

*Id.* (quoting *Riley v. California*, 134 S. Ct. 2473, 2484–85 (2014)).

135. *Id.* at 487–88; *see also Riley*, 134 S. Ct. at 2489–91.

136. *Lichtenberger*, 786 F.3d at 488.

not remember if the photographs she showed the officer were the same ones and from the same folder that she had accessed before, and similarly, the officer stated he may have asked her to open files that she had not previously opened.<sup>137</sup> Accordingly, the court suppressed the evidence gathered from the subsequent warrantless search conducted by the police.<sup>138</sup>

The Eleventh Circuit, in *United States v. Sparks*,<sup>139</sup> similarly adopted the narrow approach.<sup>140</sup> In *Sparks*, the defendants left their cell phone containing hundreds of images and videos of child pornography at a Walmart store.<sup>141</sup> A Walmart employee recovered the phone and viewed all of the pictures and one video contained in a photo album on the phone.<sup>142</sup> The employee then showed the photo album to her then-fiancé, Mr. Widner, before turning it over to law enforcement.<sup>143</sup> Upon turning the phone over to police, Mr. Widner showed the police the images that he and his fiancée had previously viewed.<sup>144</sup> A police detective subsequently viewed the pictures within the same photo album that the employee and Mr. Widner viewed.<sup>145</sup> Additionally, the detective viewed two videos within the same photo album, only one of which was previously viewed by the private parties.<sup>146</sup> Thereafter, a police officer submitted an application for a search warrant based on the detective's determination that the phone contained images of what the detective believed was child pornography.<sup>147</sup> The defendants were indicted for possession and production of child pornography.<sup>148</sup> At trial, the defendants filed a motion to suppress the cell phone evidence, arguing that the detective's search of the cell phone exceeded the scope of the private party search.<sup>149</sup> The trial court denied the motion and the defendants appealed.<sup>150</sup>

The Eleventh Circuit upheld the trial court's ruling.<sup>151</sup> With regard to the photographs and the first video, the court held that the detective did not exceed

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137. *Id.* at 488–89 (discussing the “very real possibility” that the police officer would exceed the scope of the girlfriend's search and pointing out that the officer “could have discovered something *else* on Lichtenberger's laptop that was private, legal, and unrelated to the allegations prompting the search—precisely the sort of discovery the *Jacobsen* Court sought to avoid in articulating its beyond-the-scope test”).

138. *Id.* at 491.

139. 806 F.3d 1323 (11th Cir. 2015).

140. *Id.* at 1335–56.

141. *Id.* at 1329.

142. *Id.* at 1330–31.

143. *Id.* at 1331.

144. *Id.* at 1331.

145. *Id.* at 1331–32.

146. *Id.* at 1332.

147. *Id.* at 1332–33.

148. *Id.* at 1330.

149. *Id.* at 1333.

150. *Id.*

151. *Id.* at 1335.

the scope of the private party search even if his search was more thorough.<sup>152</sup> However, the court found that the detective exceeded, rather than replicated, the scope of the private party search when he viewed the second video that the Walmart employee and Mr. Widner never viewed.<sup>153</sup> The court raised doubts about whether the detective's viewing of the second video would be approved under *Riley*, considering the Supreme Court's concerns that cell phones contain "the privacies of life" and have tremendous storage capacity that allow them to store many different types of information.<sup>154</sup> Therefore, the court adopted the narrow approach, holding that "[w]hile [the] private search of the cell phone might have removed certain information from the Fourth Amendment's protections, it did not expose every part of the information contained in the cell phone."<sup>155</sup>

Nonetheless, the court found no reversible error in the trial court's denial of the motion to suppress because the affidavit used to secure the search warrant was based only on descriptions of the pictures and video previously searched by the Walmart employee and her fiancé.<sup>156</sup> The affidavit did not include any reference to the detective's review of the second video.<sup>157</sup>

## II. THE CIRCUIT SPLIT HAS CREATED CONSIDERABLE UNCERTAINTY AS TO HOW THE PRIVATE SEARCH DOCTRINE SHOULD BE APPLIED IN FUTURE CASES

### A. *The Broad and Narrow Views Rely on the Same Rationale, but Produce Conflicting Results*

The *Lichtenberger* court asserted that its application of the *Jacobsen* private search doctrine was in line with its sister circuits,<sup>158</sup> and specifically cited to the Fifth and Seventh Circuits' discussion of the proper scope of a police search under the private search doctrine.<sup>159</sup> However, the *Lichtenberger* court missed a key difference between its approach and that of the circuits to which it cited.

It is true that the relevant inquiry under *Jacobsen* is whether the police obtained information in which the expectation of privacy had not already been frustrated.<sup>160</sup> Similar to the Sixth Circuit in *Lichtenberger*, the Fifth and Seventh

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152. *Id.* at 1336.

153. *Id.*

154. *Id.* (citing *Riley v. California*, 134 S. Ct. 2473, 2494–95 (2014)).

155. *Id.*

156. *Id.* at 1336–37.

157. *Id.* at 1336.

158. *United States v. Lichtenberger*, 786 F.3d 478, 489 (6th Cir. 2015).

159. *Id.* ("We are not alone in our approach to these modern considerations under the Fourth Amendment. Our sister circuit courts have placed a similar emphasis on virtual certainty in their application of *Jacobsen* to searches of contemporary electronic devices.")

160. *United States v. Runyan*, 275 F.3d 449, 461 (5th Cir. 2001) (citing *United States v. Jacobsen*, 466 U.S. 109, 118–20 (1984)) ("Thus, *Jacobsen* directs courts to inquire whether the government learned something from the police search that it could not have learned from the private

Circuits reasoned that a police officer's search exceeds the scope of the previous private-party search if the officer examines the entire collection of what is turned over, rather than limiting the search to only those items searched by the private party.<sup>161</sup> An exception exists when police officers can be virtually certain about what they will find when searching an item not previously searched by the private party.<sup>162</sup> Therefore, when the scope of the search includes items not previously searched by a private party, the search is impermissible as soon as the police learn something they could not have known based on the private search.<sup>163</sup>

The key difference between the broad and narrow view is how the courts treat a search by police officers of content contained within a single item, when only some of that content has been previously searched by a private party. The "virtual certainty" test enunciated in *Lichtenberger* would appear to bar such a search, but the court in *Runyan* expressly permitted it.<sup>164</sup> While *Sparks* did not present the issue of police searches of additional items because it involved only additional files within a single item, the Eleventh Circuit did not permit a search of any files within the single item that were not previously searched by the private party.<sup>165</sup> Thus, while the analysis in *Sparks* is more limited than the other circuit court cases, it is clear that the *Sparks* court sided with the court in *Lichtenberger* by adopting the narrow approach.<sup>166</sup>

The court in *Runyan* explained that a search does not become problematic under the Fourth Amendment when police officers search an item more thoroughly than the private party.<sup>167</sup> The court used a helpful analogy to closed

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searcher's testimony and, if so, whether the defendant had a legitimate expectation of privacy in that information.").

161. *Id.* at 465; *Rann v. Atchison*, 689 F.3d 832, 836–37 (7th Cir. 2012).

162. *Runyan*, 275 F.3d at 463.

Thus, under *Jacobsen*, confirmation of prior knowledge does not constitute exceeding the scope of a private search. In the context of a search involving a number of closed containers, this suggests that opening a container that was not opened by private searchers would not necessarily be problematic if the police knew with substantial certainty, based on the statements of the private searchers, their replication of the private search, and their expertise, what they would find inside. Such an "expansion" of the private search provides the police with no additional knowledge that they did not already obtain from the underlying private search and frustrates no expectation of privacy that has not already been frustrated.

*Id.*

163. *Id.* at 463–64 ("A defendant's expectation of privacy with respect to a container unopened by the private searchers is preserved unless the defendant's expectation of privacy in the contents of the container has already been frustrated because the contents were rendered obvious by the private search.").

164. *See United States v. Lichtenberger*, 786 F.3d 478, 489 (6th Cir. 2015); *Runyan*, 275 F.3d at 465.

165. *United States v. Sparks*, 806 F.3d 1323, 1336–37 (11th Cir. 2015).

166. *See id.*

167. *Runyan*, 275 F.3d at 464.

containers, explaining that “[i]n the context of a closed container search, this means that the police do not exceed the private search when they examine more items within a closed container than did the private searchers.”<sup>168</sup> Applying this to digital files, the *Runyan* court concluded that police officers do not exceed the scope of the prior search when they examine more files on the previously searched disks than the private parties.<sup>169</sup>

Similarly, the Seventh Circuit adopted the reasoning laid out by the court in *Runyan* and held that a search does not violate the Fourth Amendment when the police can be substantially certain as to the contents of the digital files because the private parties who previously searched them knew their contents.<sup>170</sup> Moreover, the Seventh Circuit agreed that even if the police officers more thoroughly searched the digital files, and viewed files that the private parties had not previously viewed, they still did not exceed the scope of the prior private-party search under *Runyan*.<sup>171</sup>

Thus, while the Fifth, Sixth, Seventh, and Eleventh Circuits are all in agreement over the impermissibility of a police search of data files where the private party has not previously searched any of its contents, only the Sixth and Eleventh Circuits limit police searches of data files (or a container as the Fifth Circuit analogized) to only those specific items which the private party previously searched.<sup>172</sup> As a result, the outcome differs depending on whether the unit previously searched is each individual data file, as the Sixth and Eleventh Circuits require, or if the entire “container” is fair game once a part of it has been searched, as the Fifth and Seventh Circuits make clear.<sup>173</sup> Each approach can be broken down into separate definitions of “unit.” The difference between these definitions is essential to understanding the circuit split.

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168. *Id.* “[A]n individual’s expectation of privacy in the contents of a container has already been compromised if that container was opened and examined by private searchers. . . . Thus, police do not engage in a new ‘search’ for Fourth Amendment purposes each time they examine a particular item found within the container.” *Id.* at 465.

169. *Id.* at 465.

Because we find that the police do not exceed the scope of a prior private search when they examine particular items within a container that were not examined by the private searchers, we accordingly determine that the police in the instant case did not exceed the scope of the private search if they examined more files on the privately-searched disks than Judith and Brandie had. Suppression of any such files is therefore unnecessary.

*Id.*

170. *Rann v. Atchinson*, 689 F.3d 832, 838 (7th Cir. 2012).

171. *Id.*

172. Compare *Runyan*, 275 F.3d at 465; and *Rann*, 689 F.3d at 838; with *United States v. Sparks*, 806 F.3d 1323, 1336 (11th Cir. 2015); and *United States v. Lichtenberger*, 786 F.3d 478, 488–89 (6th Cir. 2015).

173. Orin Kerr, *Sixth Circuit Creates Circuit Split on Private Search Doctrine for Computers*, VOLOKH CONSPIRACY (May 20, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/20/sixth-circuit-creates-circuit-split-on-private-search-doctrine-for-computers/>.

### 1. *The Single Unit*

The Fifth and Seventh Circuits defined the unit as the entire computer.<sup>174</sup> Once a private party has searched even a single file or folder within that computer, the expectation of privacy in the entire computer has been frustrated, and the police can then search the entire computer without exceeding the scope of the private-party search.<sup>175</sup> This is defined as the broad view because when the unit is the entire computer, it encompasses potentially far more information than if the unit is defined as a single folder or file. The broad view thereby makes all information on the computer available, rather than only information within the single folder or file.<sup>176</sup>

### 2. *The Single File*

When the “unit” is defined as a single file, a much more narrow line is drawn regarding what privacy interests have and have not been frustrated.<sup>177</sup> As the Sixth and Eleventh Circuits explained, this narrow view defines the unit as being only the file that the private party viewed.<sup>178</sup> The police, therefore, would be unreasonable in conducting a warrantless search of any data outside of that individual file.<sup>179</sup> It is easy to see how this definition of “unit” is a far more limiting take on the private search doctrine. Under this approach, the Fourth Amendment reasonable expectation of privacy exists in each individual file.<sup>180</sup> The information outside of this individual file unsearched by any private party remains sheltered under the umbrella of Fourth Amendment protection.<sup>181</sup> Conversely, the same information would be available under the Fifth and Seventh Circuit’s broad view once the expectation of privacy in the single file

174. See *Runyan*, 275 F.3d at 465 (analogizing the files on a disk to items within a container for purposes of broadly defining the unit); *Rann*, 689 F.3d at 838 (concurring with *Runyan*).

175. See *Runyan*, 275 F.3d at 465; *Rann*, 689 F.3d at 838.

176. See *supra* note 173 and accompanying text.

177. See *Lichtenberger*, 786 F.3d at 489; *Sparks*, 806 F.3d at 1336 (defining the unit as the individual files opened by the private party).

178. See *Lichtenberger*, 786 F.3d at 489; *Sparks*, 806 F.3d at 1336.

179. *Lichtenberger*, 786 F.3d at 488.

[N]ot only was there no virtual certainty that [the officer’s] review was limited to the photographs from [the private party’s] earlier search, there was a very real possibility [the officer] exceeded the scope of [the private party’s] search and that he could have discovered something *else* on Lichtenberger’s laptop that was private, legal, and unrelated to the allegations prompting the search . . . .

*Id.*

180. See *supra* note 177 and accompanying text;

In *Lichtenberger*, the court seemed to suggest that folders on a computer are separate containers for the purpose of determining the scope of the private search. In the Seventh and Fifth circuits, however, the device—i.e., the computer—is the container, meaning the whole file system of the computer is fair game during a search.

Wilson, *supra* note 54.

181. See *supra* note 177 and accompanying text.



had been frustrated.<sup>182</sup> Thus, whether the unit is defined as the entire physical device or as something less (e.g., data, a file, or a folder) determines the amount of information protected by the Fourth Amendment during a subsequent warrantless police search.<sup>183</sup>

*B. Confusion Exists over the Scope of Agency after the Initial Private-Party Search*

Another important inquiry that cannot be overlooked is whether the police officer directed the private party to conduct the search. Upon review of the Sixth Circuit's analysis in *Lichtenberger*, it appears that the scope of this direction is somewhat convoluted.<sup>184</sup> The Supreme Court made clear in *Jacobsen* that the protections of the Fourth Amendment do not extend to searches or seizures "effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official."<sup>185</sup> Therefore, the Fourth Amendment is implicated when a private individual acts as an agent of the government.<sup>186</sup>

In *Lichtenberger*, the Sixth Circuit dismissed the lower court's inquiry into the agency of the initial private search, saying that this inquiry is only relevant if a government agent directed the initial private search.<sup>187</sup> The focus, therefore,

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182. *Rann v. Atchison*, 689 F.3d 832, 836–37 (7th Cir. 2012); *United States v. Runyan*, 275 F.3d 449, 465 (5th Cir. 2001).

183. *See Kerr*, *supra* note 173.

184. *Id.*

185. *United States v. Jacobsen*, 466 U.S. 107, 113 (1984) (quoting *Walter v. United States*, 447 U.S. 649, 662 (1980)); *see also Adams*, *supra* note 10 ("A private search extinguishes an individual's reasonable expectation of privacy in the object searched; once this has occurred, the Fourth Amendment does not prohibit governmental use of this non-private information.").

186. *See, e.g., United States v. Soderstrand*, 412 F.3d 1146, 1153 (10th Cir. 2005); *United States v. Steiger*, 318 F.3d 1039, 1045 (11th Cir. 2003); *United States v. Grimes*, 244 F.3d 375, 383 (5th Cir. 2001); *United States v. Jarrett*, 338 F.3d 339, 345 (4th Cir. 2003).

The Supreme Court has not clearly indicated the circumstances under which the government is considered responsible for private conduct, offering only the vague guideline that the result "necessarily turns on the degree of the Government's participation in the private party's activities, a question that can only be resolved 'in light of all the circumstances.'"

Benjamin Holley, *Digitizing the Fourth Amendment: Limiting the Private Search Exception in Computer Investigations*, 96 VA. L. REV. 677, 680 (2010) (quoting *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 614–15 (1989)); *see also United States v. Pervaz*, 118 F.3d 1, 6 (1st Cir. 1997) (quoting *United States v. Attson*, 900 F.2d 1427, 1433 (9th Cir. 1990)) ("[A] party is subject to the fourth amendment only when he or she has formed the necessary intent to assist in the government's investigative or administrative functions"); Joshua Lisk, *Is Batman a State Actor?: The Dark Knight's Relationship with the Gotham City Police Department and the Fourth Amendment Implications*, 64 CASE W. RES. L. REV. 1419, 1430 (2014) (discussing the application of the private search doctrine to private searches conducted solely for the assistance of law enforcement).

187. *United States v. Lichtenberger*, 786 F.3d 478, 485 (6th Cir. 2015) ("Agency is relevant to Holmes' initial search because government involvement at that stage would remove the case from

should be on the actions of the government agents, and whether they exceeded the scope of the initial private search.<sup>188</sup> In an earlier case, the Sixth Circuit stated that “to trigger Fourth Amendment protection under an agency theory, ‘the police must have instigated, encouraged, or participated in the search,’ and ‘the individual must have engaged in the search with the intent of assisting the police in their investigative efforts.’”<sup>189</sup> Therefore, the Fourth Amendment is implicated when an initial private search is conducted at the direction of a police officer.

*Lichtenberger* asserted that the correct analysis under *Jacobsen* is to first determine whether the actions of the police officer “remained within the confines of the initial private search.”<sup>190</sup> However, this sheds little light on whether the Fourth Amendment is implicated during a *subsequent* search when an officer, acting within the confines of the initial private search, reveals more information than was previously uncovered when he directs the private party to reproduce the initial search. In other words, what happens when the private party conducts a subsequent search with the intent of assisting police officers in their investigative efforts, and uncovers additional information from what was initially discovered? Under *Lichtenberger*, the answer is unclear.<sup>191</sup>

### 1. Agency Theory and the Narrow View

The agency issue demonstrates the unworkability of the narrow view. Assume that a police officer does everything reasonably within his power to limit the secondary search to only what the private party previously viewed. This could be accomplished, for example, by telling the private party, “show me what you saw.” The scope of the secondary search would thus be in the hands of the private party, albeit at the direction of the government.

The courts would therefore be tasked with relying on the actions and accounts of the private citizen in determining the reasonableness of police conduct. The narrow “single file” view makes this an arduous fact-finding exercise by the court to determine whether the private citizen can recall if the files shown to the police officer were the exact files searched during the initial private search.<sup>192</sup> This becomes patently more onerous when hundreds or thousands of files exist across many different subfolders.<sup>193</sup> Under this view, if the private citizen cannot recall which images she viewed during the initial search, the secondary search by the private citizen under the direction of the police would be

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*Jacobsen*’s ambit entirely. . . . And agency is relevant to an after-occurring search analysis where the court determines that the after-occurring search exceeds the scope of the initial private search.”).

188. *Id.* at 485.

189. *United States v. Robinson*, 390 F.3d 853, 872 (6th Cir. 2004) (quoting *United States v. Lambert*, 771 F.2d 83, 89 (6th Cir. 1985)).

190. *Lichtenberger*, 786 F.3d at 485.

191. Kerr, *supra* note 173.

192. *Id.*

193. See, e.g., *Lichtenberger*, 786 F.3d at 481.

impermissible despite the fact that the police officer arguably took all reasonable steps to limit the secondary search to only those items in which the expectation of privacy had already been frustrated.<sup>194</sup>

## 2. Agency Theory and the Broad View

Assuming the search occurs within the same physical device (i.e., a single computer), the broad view avoids the aforementioned problem entirely.<sup>195</sup> When the privacy interest in the entire device has been frustrated, there is no need to untangle the particular facts to determine whether the police search was limited to only the files that the private party initially searched; rather, the courts adopting this view have stated that the privacy interest in the entire device has already been frustrated once the private party views at least one file in that device.<sup>196</sup> As such, whether the private party searched more files during the secondary search to assist police than she did during her initial search is not dispositive.<sup>197</sup> The only relevant agency issue that must be resolved under the broad view is whether the government directed the *initial* search by the private party—a much simpler fact-finding exercise than the exercise required by the narrow approach.<sup>198</sup>

### III. THE BROAD VIEW BEST CAPTURES THE SPIRIT OF THE FOURTH AMENDMENT

#### A. Practical Considerations of the Broad View

The split created by the Fifth and Seventh Circuits on the one hand, and the Sixth and Eleventh Circuits on the other, calls for a resolution by the Supreme Court in the near future. As technology continues to develop and become an integral part of our daily lives, police and courts must have clear direction to avoid actions that violate the Constitution.<sup>199</sup>

Should the Supreme Court be faced with such an opportunity, it should uphold the Fifth and Seventh Circuits' decisions and establish the rule that a warrantless police search of a container or data file not previously searched by a private party implicates the Fourth Amendment unless the police can be substantially certain of the item's contents based on information, knowledge, and expertise.<sup>200</sup>

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194. See *id.* at 487–88.

195. See *Rann v. Atchison*, 689 F.3d 832, 838 (7th Cir. 2012); *United States v. Runyan*, 275 F.3d 449, 465 (5th Cir. 2001).

196. See *Rann*, 689 F.3d at 838.

197. See *id.*

198. *Adams*, *supra* note 10, at 2 (“[There are] two critical factors in making a determination as to whether an individual was acting as a government agent: (1) whether the government knew of and acquiesced in the intrusive conduct, and (2) whether the private actor’s purpose was to assist law enforcement rather than to further his own ends.”); see also *supra* Section II.B.1.

199. See, e.g., *Runyan*, 275 F.3d at 465.

200. *Id.* at 463.

Accordingly, warrantless police searches of more data files within the same device than were searched by the previous private party should fall under the protection of the private search doctrine and thus, should not implicate the Fourth Amendment.<sup>201</sup>

The first part of this rule is in accord with the Fourth Amendment because it preserves a person's expectation of privacy in an item unopened by a private searcher "unless the defendant's expectation of privacy in the contents of the [item] has already been frustrated because the contents were rendered obvious by the private search."<sup>202</sup> Moreover, the second part of this rule, allowing a more thorough police search than that of the private party, is consistent "with the objectives underlying the warrant requirement and the exclusionary rule."<sup>203</sup>

*B. The Problems Associated with the Narrow View Illustrate the Broad View's Superiority.*

Under the narrow "single file" approach, police would exceed the scope of the prior private search, in violation of the Fourth Amendment, whenever they happened to find an item that the private party did not.<sup>204</sup> This would lead police to be reluctant when conducting a subsequent search for fear that they will discover important evidence that will be subject to suppression simply because the private searcher did not happen to discover that evidence during his or her initial search.<sup>205</sup>

The *Runyan* court explained the pernicious effect this would have on police conduct: "[This] approach would over-deter the police, preventing them from engaging in lawful investigation of containers where any reasonable expectation of privacy has already been eroded."<sup>206</sup> Further, police would expend

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[U]nder *Jacobsen*, confirmation of prior knowledge does not constitute exceeding the scope of a private search. In the context of a search involving a number of closed containers, this suggests that opening a container that was not opened by private searchers would not necessarily be problematic if the police knew with substantial certainty, based on the statements of the private searchers, their replication of the private search, and their expertise, what they would find inside.

*Id.*

201. See *id.* at 464; *Rann*, 689 F.3d at 838; *United States v. Simpson*, 904 F.2d 607, 610 (11th Cir. 1990).

202. *Runyan*, 275 F.3d at 464.

Moreover, this rule discourages police from going on 'fishing expeditions' by opening closed containers. Any evidence that police obtain from a closed container that was unopened by prior private searchers will be suppressed unless they can demonstrate to a reviewing court that an exception to the exclusionary rule is warranted because they were substantially certain of the contents of the container before they opened it.

*Id.*

203. *United States v. Runyan*, 275 F.3d 449, 465 (5th Cir. 2001).

204. *Id.*

205. *Id.*

206. *Id.*; see, e.g., *Illinois v. Andreas*, 463 U.S. 765, 772-73 (1983)

unnecessary time obtaining warrants because confirming the private citizen's testimony regarding the initial search would subject police to a potential Fourth Amendment violation should they accidentally stumble upon evidence that the private searcher did not view.<sup>207</sup>

In contrast, the broad view makes clear to police that they do not offend the Fourth Amendment if they conduct a more thorough search of the container than the private searcher, so long as they can confirm that the private searcher viewed at least one item in that container.<sup>208</sup> It is for these reasons that the broad view is the more sensible approach.

### C. Police Conduct and Reasonableness

The Supreme Court has repeatedly stated that the focal point of Fourth Amendment analysis is the reasonableness of the government conduct.<sup>209</sup> One need not look any further than the factual underpinnings of the Sixth Circuit decision in *Lichtenberger* to see how the narrow view obscures the definition of reasonableness in the context of police searches.<sup>210</sup> In *Lichtenberger*, the private

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(holding that any standard must be (1) workable for application by trained police officers, (2) reasonable, and (3) objective, rather than dependent on the belief of individual police officers).

207. *Runyan*, 275 F.3d at 465. For a discussion of the warrant issue as it relates to the search for contraband on computers, see Thomas K. Clancy, *The Fourth Amendment Aspects of Computer Searches and Seizures: A Perspective and A Primer*, 75 MISS. L.J. 193, 198–99 (2005).

208. See *Runyan*, 275 F.3d at 464; *Rann v. Atchison*, 689 F.3d 832, 837 (7th Cir. 2012).

209. See e.g., *Heien v. N. Carolina*, 135 S. Ct. 530, 540 (2014) (finding a police officer's mistake of law justified under the Fourth Amendment because it was reasonable); *Florida v. Jimeno*, 500 U.S. 248, 250 (1991) ("The touchstone of the Fourth Amendment is reasonableness."); *Illinois v. Rodriguez*, 497 U.S. 177, 183 (1990) (analyzing the reasonableness of police conduct and determining that "[w]hat [a defendant] is assured by the Fourth Amendment . . . is not that no government search of his house will occur unless he consents; but that no such search will occur that is 'unreasonable'"); *Graham v. Connor*, 490 U.S. 386, 395 (1989) (determining that the issue of whether police used excessive force must be analyzed under the reasonableness standard of the Fourth Amendment); *Maryland v. Garrison*, 480 U.S. 79, 88 (1987) (holding that despite police officers' mistake of fact, their actions did not violate the Fourth Amendment because they were reasonable); *Terry v. Ohio*, 392 U.S. 1, 19 (1968) ("[T]he central inquiry under the Fourth Amendment [is] the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security."); *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949) (focusing on the reasonableness of police action); *Carroll v. United States*, 267 U.S. 132, 158–59 (1925) (finding that the validity of a search turns on the police officer's reasonableness). Reasonableness is

[T]he fundamental command of the [Fourth] Amendment and this imprecise and flexible term reflects the framers' recognition that searches and seizures were too valuable to law enforcement to prohibit them entirely but that they should be slowed down. Reasonableness is the measure of both the permissibility of the initial decision to search and seize and the permissible scope of those intrusions.

Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977, 977 (2004); see Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 198 (1993) ("According to the Court, the central meaning of the Fourth Amendment is 'reasonableness.'").

210. See *United States v. Lichtenberger*, 786 F.3d 478, 480–81 (6th Cir. 2015).

citizen viewed approximately one hundred photographs on the laptop during the initial private search.<sup>211</sup> When the police officer arrived, he requested the private citizen show him what she had found.<sup>212</sup> The citizen began clicking on random thumbnail images, showing the officer approximately four to five images in total.<sup>213</sup> Upon recognizing the images as child pornography, the officer immediately instructed the private citizen to shut down the laptop.<sup>214</sup> The court ruled that the subsequent warrantless search by the police officer violated the Fourth Amendment because the private citizen could not be certain that the four to five images she showed the officer were among the same images she initially searched on her own.<sup>215</sup>

It is difficult to see, however, the unreasonableness of the police action in this instance. The officer, upon being informed that the laptop contained several contraband images, and seemingly in an effort to confirm the testimony by the private citizen to obtain probable cause for a warrant, instructed the private citizen to show him what she had found.<sup>216</sup> In so doing, it can be inferred that the officer likely assumed that any expectation of privacy had been extinguished by the private search.<sup>217</sup> The officer viewed *only* four to five of the one hundred photographs previously searched and requested the laptop be shut down immediately after confirming the private citizen's testimony of the existence of contraband.<sup>218</sup>

Confirming a private citizen's testimony of the presence of illegal contraband in order to obtain a warrant, especially when severely limited in scope as compared to the initial search, is hardly unreasonable government conduct. The narrow view provides Fourth Amendment protection for each individual file that the private party did not search, but this view greatly inhibits seemingly reasonable police conduct.<sup>219</sup> When a private searcher cannot be certain whether the images shown to police are among the same images viewed during the initial private search, otherwise reasonable police conduct would be held unreasonable, therefore upsetting the traditional understanding of reasonableness that has historically been the touchstone of Fourth Amendment jurisprudence.<sup>220</sup> The narrow view adds a virtual certainty requirement that is wholly unfamiliar to the

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211. *Id.* at 481.

212. *Id.* at 480.

213. *Id.*

214. *Id.*

215. *Id.* at 489 (“All the photographs [the private citizen] showed [the officer] contained images of child pornography, but there was no virtual certainty that would be the case. The same folders could have contained, . . . for example, explicit photos of Lichtenberger himself: legal, unrelated to the crime alleged, and the most private sort of images.”).

216. *Id.* at 480.

217. See discussion *supra* Section I.C.

218. *Lichtenberger*, 786 F.3d at 480–81.

219. See discussion *supra* Section II.A.2.

220. See *supra* note 209 and accompanying text.

Fourth Amendment.<sup>221</sup> The aforementioned factual quandary created by this demanding standard may very well signal the death of the private search doctrine. The broad view, contrastingly, upholds the historically-understood definition of reasonableness, permitting the police conduct described above when it can be proved that the private citizen searched at least one of the images on the laptop computer.<sup>222</sup>

#### IV. CONCLUSION

The rapid growth of technology presents courts with challenging new legal questions due to the amount of information that many of these devices are capable of storing.<sup>223</sup> These developments make it ever more important that police and citizens alike understand the privacy protections offered by the Fourth Amendment. The Fifth, Sixth, Seventh, and Eleventh Circuits have weighed in on this issue and reached different conclusions regarding the proper scope of a police search that follows on the heels of a private-party search. To resolve this conflict, the Supreme Court should adopt the broad view, which states that the police may constitutionally search an entire device when a private party has previously searched any part of that device. As illustrated by the Fifth and Seventh Circuits, this view most accurately captures the spirit of the private search doctrine and the scope of Fourth Amendment protection.

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221. *See supra* note 209 and accompanying text.

222. *See discussion supra* Section II.A.1.

223. *See supra* notes 48, 51 and accompanying text.

