IN THE SUPREME COURT OF THE STATE OF VERMONT

IN RE APPEAL OF APPLICATION FOR SEARCH WARRANT

Supreme Court Docket No. 2010-479

On Petition for Extraordinary Relief
From the Superior Court of Vermont, Chittenden Criminal Division

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SUR-REPLY BRIEF OF THE OFFICE OF THE DEFENDER GENERAL AS AMICUS CURIAE

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The question before this Court concerns judicial discretion. As petitioner for extraordinary relief, the State has failed to show that the judge's decision constitutes a usurpation or arbitrary abuse of judicial power or that it was a clear abuse of discretion or wrong as a matter of law. State v. Forte, 154 Vt. 46, 48, 572 A.2d 941, 942 (1990). The State also has failed to meets its additional burden of proving that it has no other avenue of relief.

The State has never responded to the question whether its proposed warrant was insufficiently particular or lacked the requisite probable cause; and thus, it avoids rebutting amici's contention that the judge's conditions were extremely reasonable and well within his discretion to impose given the constitutional deficiencies in the warrant application.[1] Defender General's brief at 11-31, 34; ACLU/EFF brief at 7, 14-23. The conditions here meet the requirements of a warrant under Vermont and federal law.

Although the State continues to summarily dismiss the significance of the Vermont Constitution, Article 11 controls the issues raised in this case. The Vermont Constitution goes farther than federal law in establishing a more central role for the judiciary to review and protect fundamental privacy rights. State v. Wood, 148 Vt. 479, 487, 536 A.2d 902, 907 (1987). The State does not contest this. See State's reply brief at 5-6. Article 11 also exceeds the protections provided under the Fourth Amendment by requiring that all searches and seizures in Vermont be conducted by the least intrusive

[1] Indeed, the State continues to evade this question by claiming that "concerns about the particularity of the warrant as written are properly addressed ex post facto, through a motion to suppress, as is done with all other warrants." State's reply brief at 2, n. 2. That review of warrants is primarily done after the illegal search has occurred is only because there is no procedural avenue for a law-abiding person or for a suspect of a crime to challenge a warrant's illegality until after the government abuse has occurred. See e.g., V.R.Cr.P. 41 (e), (f) (providing only ex post facto remedies).

means. See State v. Birchard, 2010 VT 57, ¶ 13, -- Vt. --, 5 A.3d 879, 885. The State concedes that this is true for warrantless searches, but illogically argues that a lower standard applies to searches and seizures conducted by warrant. No support is offered to justify this imbalanced treatment under Article 11. State's reply brief at 5-6. While the State is dismissive of the Vermont Constitution, the Court has the duty to decide these issues:

> It is the [] obligation of the [] Court, when state constitutional questions of possible merit have been raised, to address them.... If we breach this duty, we fail to live up to our oath to defend our constitution and we help to destroy the federalism that must be so carefully safeguarded by our people.

State v. Jewett, 146 Vt. 221, 500 A.2d 233 (1985) (internal quotations omitted).

I. THE JUDGE'S DISCRETION TO IMPOSE THE CONDITIONS RESTRICTING THE SCOPE OF THE SEARCH DERIVES FROM ARTICLE 11

Article 11 requires a broader and more demanding oversight role for the judiciary than that required by the Fourth Amendment. State v. Wood, 148 Vt. 479, 487, 536 A.2d 902, 907 (1987). In dismissing the significance of the Vermont Constitution, the State ignores "the central role of the judiciary in Article 11 jurisprudence" to protect against illegal searches and seizures, both *before* and *after* abuses by the police occur. State v. Savva, 159 Vt. at 86, 616 A.2d at 780; State's reply brief at 5-6. But the Court has "scrupulously maintained the principle-even in the face of contrary United States Supreme Court holdings under the Fourth Amendment-that Article 11 is intended to vest responsibility and authority in the judiciary to review and restrain overreaching searches and seizures by the government." In re C.C., 2009 VT 108, ¶ 21, 186 Vt. 474, 486, 987 A.2d 1000, 1007-1008 (Johnson, J., concurring) (internal citation omitted).

The State effectively urges the Court to abandon long-standing precedent in favor of a new framework, which fashions an extremely narrow role for the judiciary when reviewing and issuing warrants and which relies on judicial review ex post facto to vindicate Article 11 rights. This is incompatible with Article 11 and the Court's duty to uphold the fundamental constitutional rights provided therein. State v. Wood, 148 Vt. 479, 487, 536 A.2d 902, 907 (1987); State v. Lussier, 171 Vt. 19, 24, n.1, 757 A.2d 1017, 1021, n.1 (2000).

The State dismisses the significance of the Court's adoption of the least intrusive means analysis under Article 11 by arguing that this analysis applies only to warrantless searches and seizures. State's reply brief at 5. The State, however, fails to explain why this is so or to provide any support for the proposition that Article 11 sets a lower standard for searches and seizures by warrant than for warrantless ones. Id. at 5-6. Instead, the authority relied upon by the State shows that the Court has extended the least intrusive means analysis to searches and seizures by warrant. Id. at 6.

In State v. Birchard, the Court held that the least intrusive means analysis includes warrant searches. 2010 VT 57, ¶ 13, -- Vt. --, 5 A.3d 879, 885. Accord State v. Morris, 165 Vt. 111, 115, 680 A.2d 90, 93 (1996) (noting that the warrant clause of the Vermont Constitution is the "foremost line of protection" for individual privacy). Other decisions by the Court establish that the least intrusive means analysis is an underlying principle for all searches and seizures under Article 11. See State v. Bauder, 2007 VT 16, ¶ 37, 181 Vt. 392, 924 A.2d 38 ("Where, as here, the sole justification for dispensing with the fundamental safeguard of personal liberty represented by the warrant requirement is law-enforcement efficiency, we have consistently ruled in favor of liberty."); State v. Lussier,

171 Vt. 19, 33-34, 757 A.2d 1017, 1027 (2000) (holding that "the focus of any cost-benefit analysis concerning application of the exclusionary rule should be on the individual constitutional rights at stake"). At least one other jurisdiction that has adopted the least intrusive means analysis has held that it applies to all searches and seizures conducted under its state constitution. State v. Kaluna, 520 P.2d 51, 58-59 (Haw. 1974).

The warrant only provides for the least intrusive means of government invasion into protected privacy interests *if* the judge has the discretion to review the proposed warrant to ensure that the necessary prerequisites for its issuance are satisfied. State v. Quigley, 2005 VT 128, ¶ 11, 179 Vt. 567, 570, 892 A.2d 211, 216. Otherwise, the protections provided by the warrant requirement are a nullity. State v. Bauder, 2007 VT 16, ¶ 37, 181 Vt. 392, 924 A.2d 38. Should the requirements for obtaining a warrant to search a computer or other electronic media be reduced to a particularity and probable cause standard so low that it would permit an expansive and overbroad search then the protections intended to be provided by the warrant would be rendered meaningless. See United States v. Villamonte-Marquez, 462 U.S. 579, 601 (1983) (Brennan, J., dissenting) ("[I]t is a non sequitur to reason that because the police in a given situation claim to need more intrusive and arbitrary enforcement tools than the Fourth Amendment has been held to permit, we may therefore dispense with the Fourth Amendment's protections.").

The particularity and probable cause requirements for a warrant; therefore, vindicate the fundamental rights guaranteed by the Vermont Constitution. Strict enforcement of these requirements ensure that the police can employ no less intrusive means to intrude upon an individual's privacy rights. A warrant requirement that does not incorporate the least intrusive means analysis relegates fundamental Article 11 privacy

rights to a status less secure than other constitutional and non-constitutional rights. See Nadine Strossen, The Fourth Amendment In The Balance: Accurately Setting The Scales Through The Least Intrusive Alternative Analysis, 63 N.Y.U. L. Rev. 1173, 1176 (1988) (citing the First Amendment, Due Process, common law tort and anti-trust statutes as examples where the least restrictive means analysis has also been used).

The State is asking the Court to fundamentally alter the warrant review and issuance process so that it is tipped in favor of the police. But the balance between competing interests of privacy rights and public safety has already been struck by the Vermont Constitution. Article 11 rules in favor of privacy and liberty interests. "Constitutional rights are not based on speculations. Whatever frightening scenarios may be imagined by police officers or appellate judges, the Framers of our Constitution struck a balance between individual privacy and the intrusive power of government, a balance that we have a duty to protect." State v. Boyea, 171 Vt. 401, 423, 765 A.2d 862, 877 (2000) (Johnson and Dooley, JJ., dissenting).

II. THE CONDITIONS IMPOSED IN THIS CASE ARE PART AND PARCEL OF THE PARTICULARITY AND PROBABLE CAUSE REQUIREMENTS OF ARTICLE ELEVEN AND THE FOURTH AMENDMENT

The State asserts that the conditions imposed in this case are unrelated to probable cause or particularity. See State's Reply Brief at 2. The conditions, however, were crafted to pass the seized data through finer and finer evidentiary sieves, allowing the state to sift through the entirety of the seized storage ensuring that *only evidence supported by the supplied probable cause and the particularity set in the warrant* make its way to court. They were well within the judge's discretion to impose.

A. Restricting use of plain view ensures that constitutional protections are not subsumed by a narrow exception to the warrant requirement

At the outset, Condition 1 acts as a backstop to the rest of the process. By disallowing the use of plain view doctrine to seize data that is not responsive to the warrant, Condition 1 ensures that the plain view doctrine does not become the exception that subsumes the requirement itself. Digital searches involve the exposure and inspection of an enormous amount of non-relevant data. United States v. Comprehensive Drug Testing, 621 F.3d 1162, 1177 (9th Cir. 2010). If every bit of data stored on a massive hard drive is subject to inspection by the police, a forensic technician, or a specialized search program and the plain-view doctrine may be invoked to seize any evidence of any crime, every digital search warrant becomes, in essence, a general warrant. See State v. Martin, 2008 VT 53, ¶ 10, 184 Vt. 23, 33, 955 A.2d 1144, 1149-1150 (prohibiting general warrants inhibits "unchecked discretion in agents of the state to search, seize, or arrest").

Even scholars who fundamentally oppose the Comprehensive Drug Testing decision have acknowledged that the plain view doctrine is incompatible with the reality of digital search procedure. Commenting on the briefs filed in this case, Professor Orin Kerr, who expressed his dissatisfaction with the Comprehensive Drug Testing decision in Ex Ante Regulation of Computer Search and Seizure, 96 Va. L. Rev. 1241 (2010), noted that "some of the briefing by the amici argues that computers require special rules because of the invasiveness of computer searches. I basically agree with that, and have argued at length that the plain view exception should not apply to computer searches." Orin Kerr, "Vermont Supreme Court Hears Oral Argument in Challenge to Ex Ante Restrictions on Computer Warrants," http://volokh.com/2011/06/22/vermont-supreme-

court-hears-oral-argument-on-case-about-ex-ante-restrictions-on-computer-warrants/ (last visited July 7, 2011).

There is substantial consensus among scholars that the plain view doctrine should not apply, or at least should be dramatically restricted in digital searches, because it will swallow the warrant requirement whole. See e.g., Orin Kerr, Searches and Seizures in a Digital World, 119 Harv. L. Rev. 531, 566 (2005) ("Narrowing or even eliminating the plain view exception may eventually be needed to ensure that warrants to search computers do not become the functional equivalent of general warrants."); James Saylor, Computers as Castles: Preventing the Plain View Doctrine from Becoming a Vehicle for Overbroad Digital Searches, 79 Fdm. L. Rev. 2809, 2811-2812 (2011) ("[I]ts wholesale adoption has led to an impermissible dilution of the probable cause and particularity standard, as well as the exclusionary rule."); Wayne Jekot, Computer Forensics, Search Strategies, and the Particularity Requirement, 7 U. Pitt. J. Tech. L. & Pol'y 2, 44 ("In the computer context...the particularity requirement has seemingly been abandoned."). Eliminating the plain view doctrine has no effect on warrant procedure. Instead, limiting its application acknowledges the practical necessity of over-seizure. Kerr, Searches and Seizures in a Digital World, 119 Harv. L. Rev. at 583. The abrogation of plain view "respect[s] law enforcement interests by granting the police every power needed to identify and locate evidence within the scope of a warrant" while "protect[ing] privacy interests by barring the disclosure of any evidence beyond the scope of a valid warrant." Id.

B. Conditions requiring segregation and redaction avoid impermissible general rummaging

Conditions 2 through 4 ensure that the initial exposure of the data is made under conditions that respect the particularity requirements of Article 11. P.C. 3. Data must be segregated and redacted such that only information that is responsive to the search warrant is used. This must be done by a third party who will not disclose non-responsive information to the investigating officers. Id. These provisions speak directly to the particularity requirement, which prohibits "general, exploratory rummaging in a person's belongings," Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971), and also "assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." Maryland v. Garrison, 480 U.S. 79, 84 (1987). The conditions anticipate that many files will have to be opened and examined to identify the few that are responsive to the warrant. See Comprehensive Drug Testing, 621 F.3d at 1177. The requirement of using someone other than the investigating officer reconciles the reality of substantial overseizure of data with the requirement that a warrant not authorize general "rummaging."

C. Conditions narrowing the search reflect the probable cause requirement

Conditions 5 and 6 provide that the forensic team investigating the data must pursue only evidence of the crime under investigation. P.C. at 4. This condition is a manifestation of the probable cause requirement. Comprehensive Drug Testing, 621 F.3d at 1177. The conditions are designed only to reveal evidence of crimes for which there is probable cause. Because powerful digital forensic tools allow "one-click" searching for particular types of evidence, restriction as to their use is certainly appropriate. See e.g., Steve Bunting and William Wei, EnCase Digital Forensics: EnCase Digital Examiner Study Guide, 318-324 (2006). Expanding the scope of a digital search is so easy that

digital forensic technicians are cautioned to ensure that they do not inadvertently extend a search into impermissible subject matter. Id. at 323.

D. Conditions requiring the return or destruction of data address the illegal search and seizure of material beyond the scope of the warrant

Conditions 7-10 are required to ensure that non-responsive data is returned to its owner. V.R.Cr.P. 41 (e) requires that unlawfully seized property be returned on motion and prohibits the use of this property in any subsequent hearing or trial. The conditions are merely an affirmation of the rights provided by Rule 41. See State v. Wetherbee, 2004 VT 101, ¶ 22, 177 Vt. 274, 283, 866 A.2d 527, 534. In requiring the return and the destruction of non-responsive data, the conditions also effectuate the constitutional probable cause and particularity requirements of a warrant. The ease with which massive amounts of private data can be duplicated and stored, without any time restriction, necessitates a provision limiting the scope of the investigation by assuring that seized data is not warehoused for perpetual scrutiny.

III. FAILURE TO ACCOUNT FOR THE QUALITATIVE AND QUANTITATIVE DIFFERENCES BETWEEN ELECTRONIC MEDIA AND PHYSICAL PROPERTY RENDERS A SEARCH WARRANT FOR THIS MEDIA IMPERMISSIBLY GENERAL AND OVERBROAD

The State misconstrues amicus' argument as to why the distinction between electronic media and physical property is necessary to take into account in an Article 11 analysis. It is not that this media deserves special refuge from governmental intrusion because of its unique nature or that it is entitled to greater privacy protections. State's reply brief at 3-4. Rather, amicus asserts that the privacy interests in the data contained in computers and electronic media should be subject to the *same* protections afforded in

tangible property contexts. Defender General's brief at 21-24, 28-31. In assessing the proper scope of a police search of a computer, the judge must take into consideration the size and kind of data involved to determine whether the supplied probable cause and stated particularity are sufficient to uphold Article 11 and Rule 41 privacy guarantees.

This is not a "new" framework as claimed by the State, but one that ultimately demands that the "old" framework of adequate probable cause and particularity be followed. Without limits on the scope of the search and seizure of electronic media, every warrant issued for these devices threaten to be impermissibly overbroad and general. The State argues that not all computer searches necessarily amount to a general warrant. State's reply brief at 3. But this is only true if the warrant includes sufficient restrictions and protocols to limit the search and seizure of material supported by probable cause and sufficient particularity. Permitting a wholesale search of the data stored therein would indeed amount to an illegal general warrant. United States v. Hunter, 13 F. Supp. 2d 574, 584 (D. Vt. 1998) (search not general because of screening procedure that limited "invasion of confidential or privileged or irrelevant material").

CONCLUSION

For the reasons asserted above and in amicus' previously submitted brief, the Defender General requests that the State's petition for extraordinary relief be denied and that the court's conditions imposed on the warrant be affirmed. The matter should be remanded to correct and clarify that the conditions apply to all electronic media identified in the warrant and are not limited to devices belonging to Mr. Eric Gulfield.

Dated on July 11th, 2011 in Montpelier, Vermont.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the above brief submitted under Rule 32(a)(7)(B) was typed using Microsoft Office Word 2003 and the word count is 2,917.

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