4th Amendment Applicability:
Private Searches

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Objectives:

1. Restate principle of Private Search doctrine

2. Distinguish btwn private party & govt agent

3. Analyze parameters of computer S/S under PSD
   - Determine what constitutes “replication”
   - Assess issues concerning E/P in data
Individuals have a right under the Fourth Amendment of the United States Constitution to be free from unreasonable searches and seizures by the government. 

**U.S. CONST. amend. IV.**

Before reaching the issue as to the lawfulness of a warrantless police intrusion, a determination must be made as to whether the intrusion was even a search as contemplated by the Fourth Amendment. 

*See, United States v. Miller,* 152 F.3d 813, 815 (8th Cir. 1998).

A search or seizure carried out by a private individual, even if it is unreasonable, does not implicate the Fourth Amendment. 


In order to be considered a search under the Fourth Amendment, the governmental intrusion must infringe on a legitimate expectation of privacy. 

*See, e.g., United States v. Miller,* 152 F.3d at 815.

The Supreme Court adopted the two-part test set forth by Justice Harlan in *Katz v. United States,* 389 U.S. 347 (1967) (Harlan, J., concurring) to determine whether the person’s expectation of privacy is legitimate: (1) the person must hold an actual, subjective expectation of privacy, and (2) society must be prepared to recognize that expectation as objectively reasonable. 


**Notes:**
The right of the people to be free from unreasonable searches and seizures procribes only governmental action; it is wholly inapplicable “to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.”


In _Jacobsen_, the Court found that the package, which had previously been opened by the Federal Express employees and remained unsealed, could no longer support any expectation of privacy.


The Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to the Government, even if the information is revealed on the assumption that it will be used only for a limited purpose.


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The Court in *Jacobsen* noted that even if the white powder was not visible to the agent before he removed the tube from the box, there was a virtual certainty that nothing else of significance was in the box, and a manual inspection of the tube and its contents would not tell him anything other than what he had already been told by the FedEx employee. It follows that since the Government could rely on FedEx employees’ testimony regarding the contents of the package, it hardly infringed on the respondents’ privacy for the agents to reexamine the contents of the open package by brushing aside a crumpled newspaper and picking up the tube. The only advantage gained by the government by doing so was “merely avoiding a risk in the flaw in the employees’ recollection, rather than further infringing the respondents’ privacy.”


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PRIVATE CITIZEN OR GOVERNMENT AGENT?

Although a wrongful search or seizure conducted by a private party does not violate the fourth amendment, a private citizen’s actions may in some instances be considered state action. 


**GENERAL PRINCIPLE:**
Determining the existence of an agency relationship between the Government and the private party conducting the search turns on the degree of the Government’s involvement in the private party’s activities. This is done on a case-by-case basis, viewing the totality of circumstances.


**Notes:**
While no agency relationship can be found if the Government did not know of or
acquiesce to the search by the private party, it is generally held that something more
than “mere knowledge and passive acquiescence by the Government” is required.
United States v. Jarrett, 338 F.3d 339, 345 (4th Cir. 2003); United States v. Ellyson, 326
F.3d 522, 527-38 (4th Cir. 2003); United States v. Smythe, 84 F.3d 1240, 1242-43 (10th Cir.
1996); United States v. Koenig, 856 F.2d 843, 850 (7th Cir. 1988); People v. Wilkinson, 78
Cal.Rptr.3d 501, 511 (2008).

Notes:
Although law enforcement officers may not circumvent the Fourth Amendment by acting through private citizens, officers need not restrain or discourage private citizens from doing that which is not unlawful.

In analyzing whether the party performing the search intended to assist law enforcement officers or to further his own ends, the court does not simply evaluate the private person's state of mind. Although he may have a strong intent to aid law enforcement, a private individual making a search will “almost always be pursuing his own ends - even if only to satisfy curiosity. The court must also weigh the government's role in the search. A government agent must be involved either directly as a participant or indirectly as an encourager of the private person's search before the person is deemed an instrument of the government.

*United States v. Lefall*, 82 F.3d 343 (10th Cir. 1996).

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Critical factors considered by courts in making a determination as to whether an individual was acting as a government agent or a private party include: (1) whether the government knew of and acquiesced in the intrusive conduct, (2) whether the private actor’s purpose was to assist law enforcement rather than to further his own ends, and (3) whether the government requested the action or offered the private actor a reward.


In Crowley, The Court held that a UPS driver was not acting as an agent of the state when she opened a package. Police notified delivery services to watch for suspicious packages addressed to the defendants and requested that anyone finding such a package should notify the police. Noticing a package addressed to the defendants, a UPS driver opened the package then contacted police. By the time police questioned her about the package, she had resealed it. Police inspected the outside of the package then handed it back to the UPS driver. While the officer was “momentarily distracted” the driver reopened the package and began removing the contents.

• Police weren’t present the first time the package was opened; furthermore, the police did not instruct anyone to open any packages, just to watch for them and contact police. The Fourth Amendment is not triggered when a private party initiates a search and then contacts the police.

• As to the second time the UPS driver opened the package, there was no evidence that the police gave her “a wink-and-a-nudge,” or otherwise encouraged her to show them the contents of the package. The mere fact that police witness a private party’s search does not transform the private party into a government agent.

United States v. Crowley, 285 F.3d 553 (7th Cir. 2002).

Notes:
Courts have consistently held that the observation of files on a defendant’s computer by a computer technician constitutes a private search, and as such, the Fourth Amendment is inapplicable.

This conclusion is not difficult to reach in cases where there are no communications between the repairman and the government until after the evidence is discovered. Upon this basic framework the court in *State v. Horton*, 962 So.2d 459 (La. App. 2007), found that the examination of defendant’s computer by a computer technician was a private search; evidence that the discovery of child pornography was inadvertent added support to the conclusion that the acts by the technician were not connected with the authority of the state.


**Notes:**
It may become more difficult to determine if a computer hacker who furnishes information to authorities is a private individual or an agent of the state as the contacts between the hacker and government official increase, and it looks like an on-going relationship. However, the analysis is the same, and the answer turns on the degree of the Government’s participation in the hacker’s actions taking into consideration the totality of the circumstances. 


*Notes:*
In *United States v. Jarrett*, 338 F.3d 339 (4th Cir. 2003) the court was faced with the issue as to whether a computer hacker with the user name “Unknownuser” was acting as a private citizen or an agent of the state when he hacked into Jarrett’s computer and provided information to law enforcement regarding child pornography. *Unknownuser* attached a Trojan Horse program to a photo that he posted to a news group frequented by pornography enthusiasts. When anyone downloaded the photo, they also downloaded the Trojan Horse program, which provided *Unknownuser* access to their computers. *Unknownuser* had previously provided authorities with information that had resulted in child pornography indictments and ultimately, convictions. *See United States v. Steiger*, 318 F.3d 1039 (11th Cir. 2003).

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The contact between *Unknownuser* and law enforcement did not end when he gave them the information about Steiger. After Steiger’s indictment, FBI agent contacted *Unknownuser* via email in hopes of persuading him to testify at trial, assuring him that he would not be prosecuted for hacking. When *Unknownuser* refused, the agent thanked him for his assistance and in closing his email told *Unknownuser*, “If you want to bring other information forward, I’m available.” Several months later, the agent contacted *Unknownuser* to tell him that Steiger’s trial had been postponed. The agent again thanked him for his assistance, and repeated the promise that he would not be prosecuted for hacking if he testified at Steiger’s trial.


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Meanwhile, Unknownuser continued hacking into computers and in the course of doing so, uncovered information that served as the basis for a search warrant against Jarrett. In determining Unknownuser’s status, the Fourth Circuit considered whether the Government knew of and acquiesced in his search, and whether the purpose of the search was to assist law enforcement or further his own needs. Since the Government conceded that Unknownuser’s purpose was to aid law enforcement, the court focused on whether the acts by the Government transformed Unknownuser into an agent. The court found that there was not an agency relationship, asserting that mere acquiescence is insufficient, and there must be some evidence that the Government participated in or affirmatively encouraged the private search. The court characterized the statements made by FBI agent as a mere expression of gratitude, which did not suffice to create an agency relationship.


Notes:
Case # 3:

After Case # 2, FBI agent told Unknownuser:

_Couldn’t ask him to search for more cases:_

That would make him a govt agent

Information would not be usable, _but_...

“Feel free to send any additional info you might obtain - you won’t be prosecuted for hacking.”

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Following Jarrett’s arrest, another FBI agent began a correspondence with Unknownuser in which she said she could not ask him to provide the authorities with more information as that would make him an agent of the state and make the information unusable. But she encouraged him to send more information and said he would not be prosecuted for hacking. The Fourth Circuit saw this exchange as “probably” the sort of Government participation sufficient to create an agency relationship, but since the agent’s knowledge and acquiescence was post-search, it could not serve to transform the prior relationship between Unknownuser and the Government into an agency relationship. Id.


Notes:
II. Replication of pvt search

Powerful exception:
Gov’t can replicate identically what pvt party did & 4/A does not apply.

Rationale: Viewing of object eliminates the individual’s expectation of privacy in the object.

General Principle:

Once a private search is conducted, the original expectation of privacy is frustrated, and as such, the Fourth Amendment does not prohibit Governmental use of the now non-private information. Illustrative of this point is United States v. Jacobsen, 466 U.S. 109, 117 (1984) in which the Supreme Court held that the government’s replication of a prior private examination was not a “search” because the defendant no longer had an expectation of privacy in the package. United States v. Jacobsen, 466 U.S. 109, 119 (1984).
• FedEx opened damaged package

• Tube wrapped in newspaper: inside were plastic bags of white powder

• Repackaged and called fed agents

• Agent repeated FedEx actions

_Gvt. action Sunder 4/A_?
• No.

• Agent learned nothing that had not previously been learned during pvt/s

• REP “frustrated” by p/s.
III. Contextual Analysis

Can private party extinguish E/P in objects **he** did not examine?...

Expansion of prior private search

Can examination of **part** of an object destroy E/P as to the **whole**?

**Expectation of Privacy: A Contextual Analysis?**

It is well-settled that in order to be a “search” under the Fourth Amendment, there must be a legitimate expectation of privacy invaded by the government. Are there circumstances in which a private search can extinguish the expectation of privacy in objects not examined during the private search? If the answer is “yes,” a private examination of part of an object can destroy the expectation of privacy as to the whole, any subsequent search by the government, even if it exceeds the scope of the private search, is not a “search” under the Fourth Amendment.

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The Tenth and Fourth Circuits have held that a police search exceeds the scope of a prior private search when the police open a container that the private searchers did not open.


**Notes:**
In *United States v. Runyan*, the Fifth Circuit was faced with this issue. The Fifth Circuit turned to the Supreme Court’s guidance in *Jacobsen* in which the Court emphasized that the police’s actions in that case were not problematic from a Fourth Amendment perspective because their actions “enabled … [them] to learn nothing that had not previously been learned during the private search.”


In *Runyan*, the Fifth Circuit noted that under *Jacobsen*, confirmation of prior knowledge does not constitute exceeding the scope of a prior search. From this, it follows that police exceed the scope of a prior private search when they examine a closed container that was not opened by the private searcher unless the police are already substantially certain of what is inside that container based on the statements of the private searchers, their replication of the private search, and their expertise.

*United States v. Runyan*, 275 F.3d 449, 463 (5th Cir. 2001).

In *United States v Bowman*, 907 F.2d 63 (8th Cir. 1990), an airline employee opened an unclaimed suitcase and found five identical bundles. After unwrapping one bundle and finding a white powdery substance wrapped in plastic and duct tape, he contacted a federal narcotics agent. The agent identified the exposed bundle as a kilo brick of cocaine and proceeded to open the other four bundles. The court held that the agent’s opening of the four previously unopened bundles were not improper, in that “the presence of the cocaine in the exposed bundle ‘spoke volumes as to [the] contents [of the remaining bundles] – particularly to the trained eye of the officer.’ ”

*United States v Bowman*, 907 F.2d 63, 65 (8th Cir. 1990).

**Notes:**
This issue was before the Court in *Walter v. United States*, 447 U.S. 649 (1980) in which the government argued that the private examination of packages that revealed boxes of films destroyed any reasonable expectation of privacy in the content of the films. In *Walter*, 12 packages were delivered to the wrong company. When employees opened the packages, they discovered 871 boxes of 8-millimeter film; each box was labeled with a suggestive drawing as well as an explicit description of the contents. One employee tried unsuccessfully to view the contents of a sampling of the films by holding the film up to the light. The employees then contacted federal agents who viewed the films with a projector.

The Supreme Court did not produce a majority opinion, but the opinion authored by Justice Stevens, held that the government’s search of the films (viewing by use of a projector) violated the Fourth Amendment, because it exceeded the scope of the prior private search. Justice Stevens maintained that just as a lawful official search is limited by the particular terms of its authorization, there must be a strict limitation to any official use of information gained through a private party’s invasion of another’s privacy.


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Justice Stevens’ reasoned that when the private party unwrapped the containers and revealed the labels on the film canisters, the sender’s expectation of privacy was frustrated in part, but not altogether extinguished. The subsequent projection of the films breached the remaining, unfrustrated portion of the sender’s expectation of privacy.

The analysis as to the expectation of privacy was somewhat obscured by a comment that Stevens made in a footnote in which he seemed to indicate that there might be no expectation of privacy in a container if the contents can be ascertained by information outside the container. He noted that one would not have a reasonable expectation of privacy in the contents of a gun case, whereas he would if the gun case was enclosed in the locked suitcase.


**Notes:**
In his dissent, Justice Blackmun asserted that because the private search revealed the pictures and labels describing the nature of the films, there was no remaining expectation of privacy in the contents of the films. Accordingly, the viewing of the films by the FBI was not an additional search. Addressing Stevens’ gun case hypothetical, Justice Blakmun wrote: “The films in question were in a state no different from Mr. Justice Stevens’ hypothetical gun case when they reached the FBI. Their contents were obvious from the ‘condition of the package,’...and those contents had been exposed as a result of a purely private search that did not implicate 4/A.”


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Airline employee opened unclaimed suitcase – found 5 identical bundles.
Opened 1 bundle & found a kilo brick of cocaine
Called agent.
Agent opened 4 remaining bundles.

Notes:
Agent’s act of opening previously unopened bundles not improper...

“the presence of cocaine in the exposed bundle spoke volumes as to the contents [of the remaining bundles] – particularly to the trained eye of the officer.”

Notes:
**Computer context:**
- Estranged wife removed from home she had shared w/ D. - computer, floppy disks, cds and zip drives
- Wife looked at some cds, some floppies – found op
- Wife did *not* examine ZIP drives
- Turned all over to police – who viewed *everything*

**Expectation of Privacy in Computers**
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. What is the proper analysis for determining whether police searching a computer exceeded the scope of a prior private search? To what does the expectation of privacy attach itself in regard to computers and other digital media: hard drives, folders, files, disks?

In *United States v. Runyan*, the Fifth Circuit faced an inquiry as to whether police exceeded the scope of a prior private search when they examined more disks than were examined by the private searcher, and when, in examining the disk viewed by the private party, they viewed files not examined by the private party?

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

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The court in *Runyan* found that the Supreme Court’s decision in *United States v. Jacobsen* which analyzed whether a search by police enabled them to learn more than had been learned during the private search served to reconcile the apparent split among circuits. Relying on *Jacobsen*, the court stated that police exceed the scope of a prior private search if they examine a closed container that was not opened by the private searchers unless the police are already substantially certain of what is inside the container based on: (1) the statement of the private searcher, (2) their replication of the private search, and (3) their expertise.

By applying this guideline, the *Runyan* court held that the police clearly exceeded the scope of the private search when they opened disks that were not opened during the private search. The police could not have concluded with reasonable certainty that all of the disks contained child pornography based on statements from the private searchers, information in plain view or their expertise. The fact that the disks were found in the same location as the disks containing child pornography was not sufficient to establish with substantial certainty that all of the storage media contained child pornography.

*United States v. Runyan*, 275 F.3d 449, 463-64 (5th Cir. 2001).

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The Fifth Circuit addressed whether the police exceeded the scope of the private search by examining more files on each of the disks than the private searchers, and held that they did not.


The Runyan court reasoned that police do not exceed the scope of a private search by performing a more thorough examination of the same materials previously examined by a private party.

United States v. Runyan, 275 F.3d at 465 (citing United States v. Simpson, 904 F.2d 607, 610 (11th Cir. 1990)).

Therefore, in the context of a closed container search, police do not exceed the scope of a private search by examining more items within the closed container than did the private searchers.

United States v. Runyan, 275 F.3d at 464 (5th Cir. 2001).

Notes:
In *United States v. Emerson*, the court asserted the fact that police viewed more images of child pornography than the private searcher was not alone determinative as to whether police exceeded the scope of the prior search.

The *Emerson* court began its analysis with the assumption that computer file folders and perhaps even individual images are closed containers. In *Emerson*, a computer repairman discovered two file folders (closed containers) on defendant’s computer, both of which contained files with names describing children performing pornographic acts. The repairman opened some of the files within the folders, determined the images to be child pornography, and contacted police.

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NCJIL.org
As to **Same Files:**

Did police learn anything NOT already learned by repairman?

No. Not a search under 4/A.

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As to the images viewed by repairman and re-examined by police, the court found no invasion of defendant’s privacy, since the search enabled agents to learn nothing that had not already been learned during the private search.


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The court found no problem with the portion of the search in which police opened additional files within the two file folders, reasoning: “The police do not exceed the scope of a prior private search when they examine the same materials that were examined by the private searchers, but they examine these materials more thoroughly than did the private parties. In the context of a closed container search … police do not exceed the private search when they examine more items within the closed container than did the private searchers.”


How does the holding in Emerson fit in with the holdings in *Walter, Runyan, and Bowman*, which also contemplate searches in which the government does not merely replicate a prior private search? The court in Emerson found it to be of critical significance that the private searcher actually viewed images of child pornography in the course of examining two file folders, whereas the private searcher in Walter did not view the contents of the films. Emerson’s expectation of privacy as to the contents of the two computer files was frustrated once the repairman gave this information to the authorities. **United States v. Emerson**, 766 N.Y.S.2d 482, 490 (N.Y. Sup. Ct. 2003).

The portion of the search in Runyan that was found to exceed the scope of the prior private search occurred when police opened more of the defendant’s CDs than the private searcher had. The Emerson court distinguished the case before them from Runyan on the facts; namely, that the defendant in Runyan had an expectation of privacy in the contents of the unopened CDs due to the very nature of CDs as storage devices that are “free standing” – not a part of the computer’s hard drive, unlike the images in Emerson located on the same hard drive in the same file folders that contained image files with titles clearly indicating the presence of contraband. **United States v. Emerson**, 766 N.Y.S.2d 482, 490 (N.Y. Sup. Ct. 2003).

The court in Emerson analogized the case before them to Bowman; the presence of cocaine in the privately opened bundle “spoke volumes” as to the contents in the remaining bundles, as did the titles of the additional files opened by the police. *Id.* (citing United States v. Bowman, 907 F.2d 63, 65 (8th Cir. 1990).

**Notes:**

*Priscilla Grantham*
Hypothetical -
Computer tech opens “kid sex” folder:
files:
littlegirls.under16.sexualintercourse
littlegirls.under15.sexualintercourse
littlegirls.under14.sexualintercourse
littlegirls.under13.sexualintercourse
littlegirls.under12.sexualintercourse
littlegirls.under11.sexualintercourse
littlegirls.under10.sexualintercourse

Tech opens 16, 15, 14
finds CP - closes files & calls police.
Police open 16, 15, 14....

littlegirls.under16.sexualintercourse
littlegirls.under15.sexualintercourse
littlegirls.under14.sexualintercourse
littlegirls.under13.sexualintercourse
littlegirls.under12.sexualintercourse
littlegirls.under11.sexualintercourse
littlegirls.under10.sexualintercourse

Can police open files 13 – 10?

Do they exceed scope of private search by opening more computer files than the tech?

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To what does E/P attach?
What is the relevant Container?
Computer? Folder? File? Image?

What is most cautious course of action?

Notes:
Thank you!

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