



Apocalypse Now: Courts and Attorneys Confronting ESI



Computer Crime &
Intellectual Property Section
United States Department of Justice



Agenda

- Scope of the problem
- Current issues regarding computer forensics and electronic evidence
- Ethical and practical issues regarding discovery of ESI
- Current issues regarding computer crime



Scope of the problem

- ESI is present in virtually all cases
 - Maryland arsonist Raven Masters sets fire to apartment building.
 - Aims to kill policeman set to testify against him, and 23 other inhabitants.
 - During investigation, police find Masters:
 - Searched for police/prosecutors' addresses on iPhone;
 - Downloaded lock-picking video, napalm instructions; arson how-to guide.



Scope of problem, cont'd.

- Growing variety of electronic devices can store and transmit ESI
 - Computers
 - Portable storage devices
 - Network servers
 - Digital cameras, iPods
 - Tablets
 - Cell phones



Searching & Seizing Computers in the 9th Circuit

- *US v. Comprehensive Drug Testing (CDT IV)*, 621 F. 3d 1162 (9th Cir. 2010)
 - “majority” rule
 - Search warrant protocols not required
 - Plain view waiver/filter team not required
 - “concurring rule”
 - *US v. Comprehensive Drug Testing (CDT III)*, 579 F. 3d 989 (9th Cir. 2009)
 - *In re US Application for a SW*, 2011 WL 991405 (WD WA)
 - Orin Kerr, *Ex Ante Regulation of Computer Search & Seizure*, 96 Va. L. Rev. 1241 (2010)

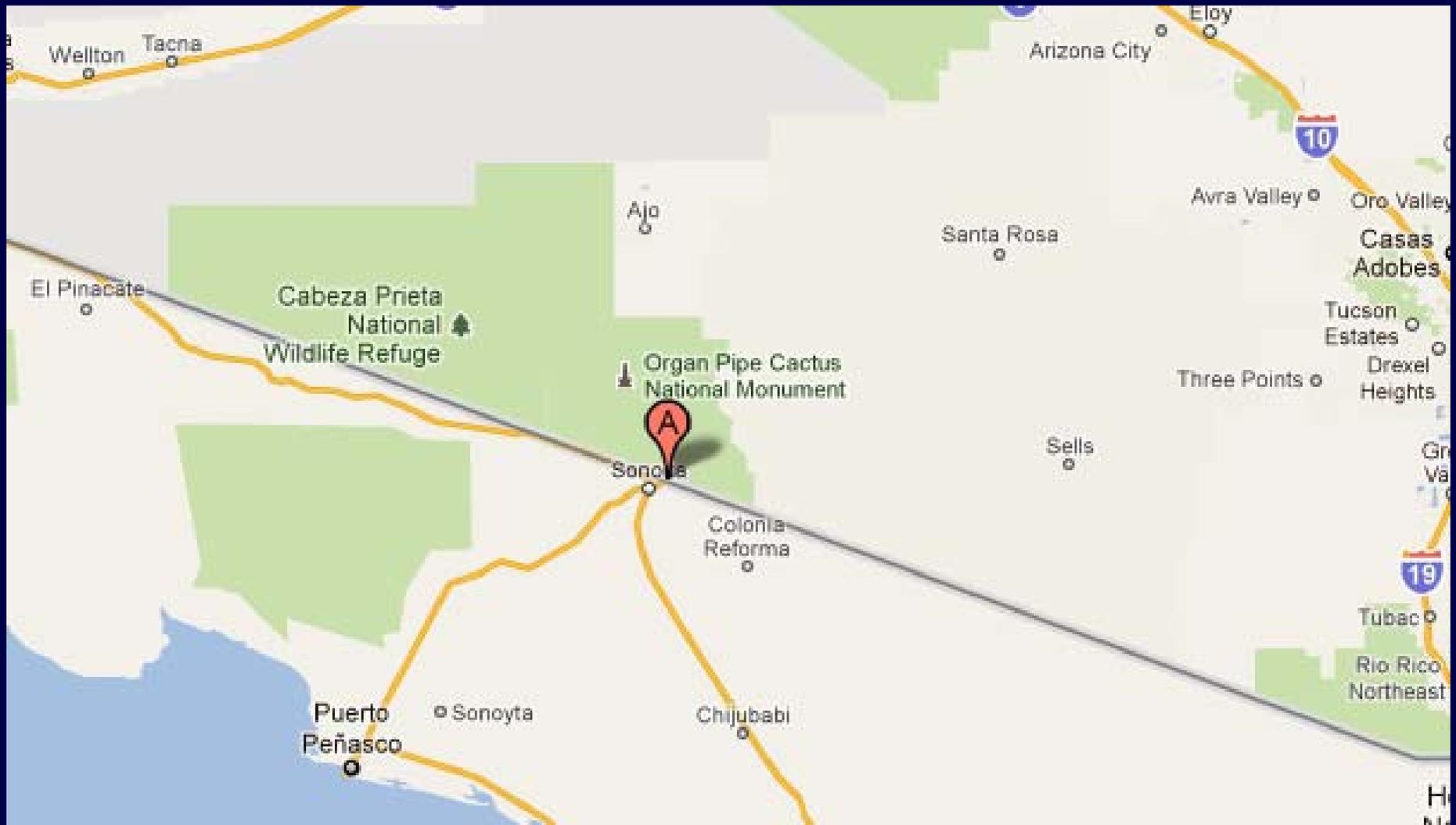


Computers at the Border

- Warrantless search of anything at the border
- Search of computers at the border
 - *US v. Arnold*, 523 F. 3d 941 (9th Cir. 2008)
- *US v. Cotterman*, 637 F. 3d 1068 (9th Cir. 2011)

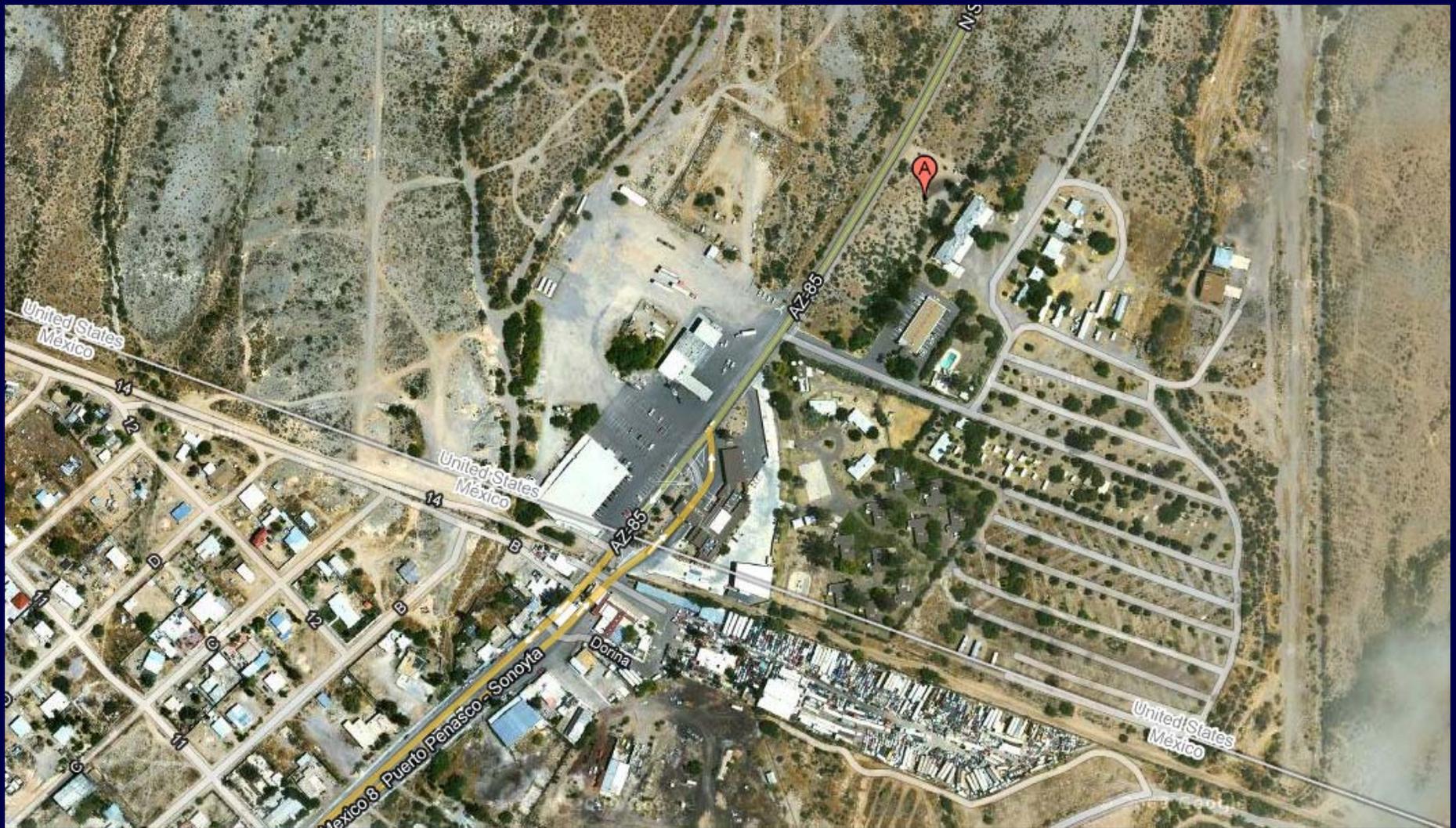


Lovely Lukeville, AZ





Lovely Lukeville, AZ





Just How Many Computers are Being Searched at the Border?

- CBP & ICE policy – 2009
- *Abidor v. Napolitano*, 10-cv-04059 (EDNY).
 - 10/2008–6/2010
 - 590 million entrances into US
 - 6500 persons had an electronic device searched
 - 1 person/90,000 travelers
 - 220 digital devices seized
 - 1 seizure/2.6 million travelers



Ethical & Practical Issues re Discovery of ESI

- DOJ effort to address criminal discovery of ESI
 - Dialogue with Federal Public Defender
 - DOJ policy initiatives
 - Increased training requirements



Challenges of ESI & Digital Communications

- Federal discovery obligations based on multiple principles
 - *Brady v. Maryland*, 373 US 83 (1963): evidence that tends to show that the def. is not guilty of the charged offense and is *material* to guilt/punishment
 - *Giglio v. US*, 405 US 150 (1972): *material* evidence that serves to impeach the government's witnesses



Discovery obligations, cont'd.

- Fed. R. Crim. P. 16: def's statement; def's record; docs & objects; reports of exams & tests; expert Ws
- Jencks Act (18 USC 3500): prior statements of Ws
- USAM 9-5.001: requires broader disclosure than Constitution requires for exculpatory/impeachment

Prosecutors must go beyond the minimum obligations required by the Constitution.



9-5.001 (C). Disclosure of exculpatory & impeachment info > Const./legal reqs.

- “A fair trial will often include examination of relevant exculpatory or impeachment information that is significantly probative of the issues before the court but that may not, on its own, result in an acquittal or, as is often colloquially expressed, make the difference between guilt and innocence.”
- Thus, prosecutors must disclose information beyond that which is "material" to guilt (*see Kyles v. Whitley*, 514 U.S. 419 (1995), and *Strickler v. Greene*, 527 U.S. 263, 280–81 (1999)).
- However, information which is irrelevant, not significantly probative of the issues before the court, or involves spurious issues or arguments which serve to divert the trial from examining the genuine issues need not be disclosed.



21st Century Digital Communications

- Telephone
 - Land line
 - Cell phone
 - Voice mail
- E-mail
- Texting

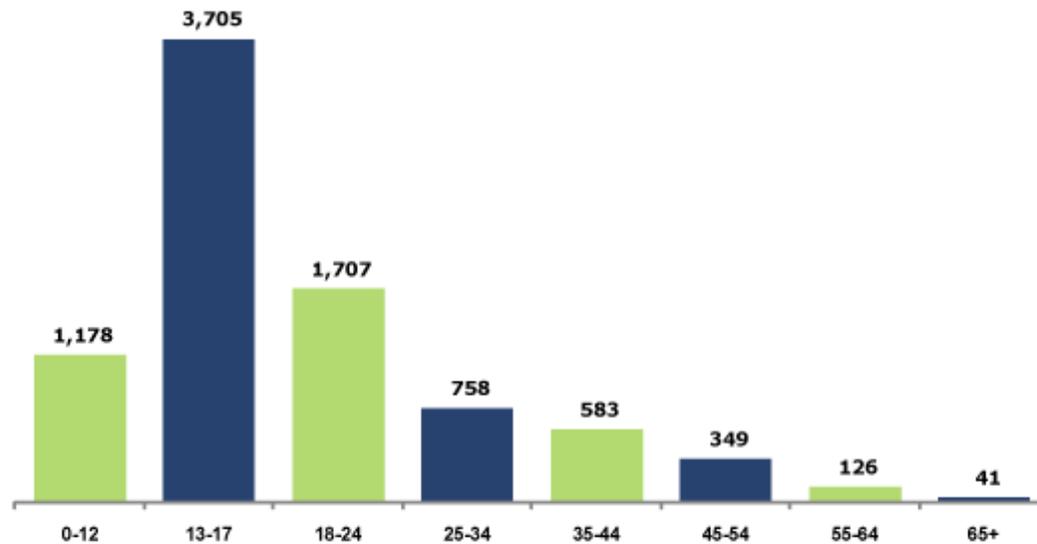


Preserving Digital Communications

- *US v. Suarez*, 2010 WL 4226524 (D. NJ)

No. of SMS Sent/Received per Month

Total by age
January 2011



MC MARKETINGCHARTS.COM

Source: The Nielsen Company



Preserving Digital Communications

- *US v. Georgiou*, 2011 WL 1081156 (ED PA)



Preserving attorney/client privilege in digital communications

- Do you have a reasonable expectation of privacy on your employer's computer
 - Web browsing history
 - Use of corporate e-mail for personal communications
 - Use of web-based e-mail (e.g., G-mail) on employer's network
- Criminal & civil implications



REP Issues

- Does the company have a policy regarding monitoring and REP?
- Was the employee informed about the policy?
- Does the company enforce the policy?



General Guidance

- *In re Asia Global Crossing*, 322 B.R. 247 (SD NY 2005)
- *Muick v. Glenayre Electronics*, 280 F. 3d 741 (7th Cir. 2002)



Government as the employer

- Special issues
- Limited personal use
- *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010)
 - City provided pager
 - Reasonable work related search
 - Court notes that social/work mores are evolving re electronic devices



Employees can maintain a/c privilege

- *Stengart v. Loving Care Agency, Inc.*, 201 N.J. 300 (N.J. 2010)
- *Convertino v. DoJ*, 674 F. Supp. 2d 97 (D DC 2010)



Employees cannot maintain privilege

- *In re Royce Homes*, 2011 WL 873428 (Bkrptcy, SD TX)
 - A/C privilege
- *In re Oil Spill (Deepwater Horizon)*, 2011 WL 1193030 (ED La)
 - Spousal privilege
- *In re Reserve Fund Securities & Derivate Litig*, 2011 WL 2039758 (SD NY)
 - Spousal privilege
- *US v. Hamilton*, 2011 WL 1366481 (ED VA)
 - Spousal privilege



Computer Fraud & Abuse Act

- 18 USC 1030
 - Criminal liability for unauthorized access to a protected computer
 - Criminal liability for exceeding authorized access to a protected computer
 - Civil liability under 18 USC 1030(g)



US v. Nosal

- *US v. Nosal*, 642 F. 3d 781 (9th Cir. 2011)
 - USA alleged that Nosal conspired with staff from his former employer who sent him trade secrets from employer's computer system.
 - Problems with *LVRC Holdings v. Brekka*, 581 F. 3d 1127 (9th Cir. 2009)
 - Holding: employer's access restrictions can trigger 1030 liability
 - Reliance on *US v. Rodriguez*, 628 F. 3d 1258 (11th Cir. 2010)



editrice

- *US v. McCarty*, No. 09–10504 (9th Cir. Aug. 3, 2011).
- CTX machine at Hilo airport alerts on dense item in bag.
- TSA screener inspects further, flips through pictures looking for sheet explosives, finds apparent CP.
- If TSA screener shifted focus to CP from scope of admin search, unlawful search?



latitudo

- So long as (1) search was undertaken pursuant to legitimate admin search scheme; (2) searcher's actions are cabined to scope of permissible admin search; and (3) there is no impermissible programmatic secondary motive for search, the development of a second, subjective motive to verify presence of contraband is irrelevant to 4th Amendment analysis.



For more information . . .

- Read our manuals
- Searching & Seizing Computers and Obtaining Electronic Evidence, available at <http://www.cybercrime.gov/ssmanual/>
- Prosecuting Computer Crimes, available at <http://www.cybercrime.gov/ccmanual/index.html>



Contact

James Silver
Computer Crime and
Intellectual Property Section
United States Department of Justice

- Phone: 202-514-1026
- Web: www.cybercrime.gov