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Expert Analysis

Executing Search Warrants In the Digital Age: 'United States v. Wey'

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Three years ago, following the Supreme Court's unanimous decision in *Riley v. California* barring warrantless searches of cellphones, this column expressed the "hope that, in the digital age, the courts may breathe a bit more life back into the Fourth Amendment after years of cutting back on its protections."[1] That cautious statement of optimism also came in the wake of a U.S. Court of Appeals for the Second Circuit panel's reversal of a tax evasion conviction in *United States v. Ganias* based on the government's violation of the defendant's Fourth Amendment rights by its lengthy, unauthorized retention of his personal files located on a hard drive seized via a search warrant in an earlier investigation. Alas, the need for caution was confirmed when an en banc Second Circuit later reversed the *Ganias* panel's decision, finding that the agents executing the warrant acted in good faith, and declining to rule on whether or not Stavros Ganias' Fourth Amendment rights were violated in the first place. 824 F.3d 199 (2d Cir. 2016).

A recent high-profile Fourth Amendment victory for the defense, a June 2017 decision from Southern District of New York Judge Alison J. Nathan suppressing the fruits of two search warrants in *United States v. Wey*, (__F. Supp.3d __, 2017 WL 2574026 (S.D.N.Y. June 14, 2017)), provides another occasion to assess the state of play as prosecutors, defense counsel, and the courts continue to wrestle with applying Fourth Amendment precedents to today's "big data." In this article, we consider *Wey* in light of the Second Circuit's final opinion in *Ganias*, as well as a recent decision by Southern District of New York Judge Kathleen Forrest in *In re 650 Fifth Avenue and Related Properties*, which declined suppression despite agents' reliance on a search warrant having constitutional infirmities strikingly similar to those in *Wey*.

> 'Wey' and 'Ganias' illustrate continuing questions regarding what meets the Fourth Amendment test of "reasonableness" for searches of electronic files.

These cases demonstrate that the government's tendency to use broadly drafted search warrants to obtain documents in white-collar investigations continues to cause legal and logistical problems.[2] *Wey* and *Ganias*, in particular, illustrate continuing questions regarding what meets the Fourth Amendment test of "reasonableness" for searches of electronic files mirror-imaged at the searched premises and then later reviewed off site by government agents, as permitted by Fed. R. Crim. P. 41(e)(2)(B). For investigators striving to make a case, it is undoubtedly tempting to conduct additional searches of a vast trove

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of the subject's electronic files that have been sitting for months in the government's evidence locker. But *Wey* and *Ganias* show that succumbing to that temptation may draw the investigation into largely uncharted and perilous legal territory. Finally, these decisions also illustrate that whether a flawed search may be saved by a finding that government agents acted in "good faith" is a highly fact specific and unpredictable inquiry.

'United States v. Wey'

A Southern District of New York grand jury indicted financier Benjamin Wey in 2015 on eight counts of securities fraud, wire fraud, conspiracy to commit securities and wire fraud, and money laundering. The indictment was issued almost four years after the government executed search warrants on the offices of Wey's company, New York Global Group (NYGG), and on Wey's private apartment, seizing data from more than 24 computers and cell phones and over 4,500 pages of hard copy documents. Judge Nathan granted Wey's motion to suppress the fruits of the warrants in a detailed decision identifying serious flaws with the warrants themselves, their execution, and the government's actions after the seizure.

First, the court found that the warrants were constitutionally deficient, describing them as "facially lacking in particularity and so sweepingly broad" to be—in function if not in form—general warrants. The warrant applications submitted to the issuing magistrate judge were supported by lengthy affidavits from federal agents detailing the FBI's ongoing investigation of Wey, Wey's sister and NYGG. These affidavits described a scheme where Wey would retain an undisclosed beneficial interest in public companies through reverse merger transactions and then manipulate the trading activity of those companies in order to reap large profits.

The search warrants themselves, however, did not contain any similar detail, nor were the agents' detailed supporting affidavits attached to or specifically incorporated into the warrants, as required by relevant Supreme Court precedent. Rather, the warrants defined the property to be seized through the attachment of two exhibits. Exhibit A set forth by category the types of materials to be seized, including very broad generalized groupings such as financial records, correspondence, computers, hard drives and corporate documents, and Exhibit B set forth a list of 220 individuals and entities linked to Wey's alleged schemes to whom the items on Exhibit A had to be related.

Critically, the list of individuals and entities in Exhibit B included, at the very top, the names NYGG and Wey (and, for the apartment warrant, Wey's wife), thus having the circular effect of authorizing the seizure of effectively all conceivable documents from NYGG's offices and Wey's apartment, because all such documents could be said to relate to NYGG and/or the Weys.

In addition, the warrants failed to specify the crimes under investigation and lacked any date limitations. As a result, the court found that "those [w]arrants, by their terms, authorized essentially limitless search and seizure—targeting all documents in both the NYGG offices and the Wey apartment, regardless of their potential connection to any criminal conduct and bounded only by the illusory 'limitation' that they relate to NYGG or the Weys."

In considering whether the good faith exception could save the searches, the court also took issue with the government's execution of the warrants. The good faith exception provides that where the officers have a reasonable, good faith belief that they are acting according to legal authority, such as by relying on a search warrant that is later found to have been legally defective, the illegally seized evidence may be admissible. Pursuant to Second Circuit case law, courts are required to consider first whether the officers acted in an objectively reasonable manner. If not, they must determine whether the officers' conduct constituted isolated negligence such that the exclusion of the evidence would serve little deterrent purpose.

On the threshold question, the court found that there could be no objectively reasonable reliance on such facially unparticularized warrants, and that there were no exigent or other unusual circumstances that might excuse such fundamental flaws. As to the execution of the warrants, the court found that, without

reason, the government rushed to execute the warrants, not allowing the 17 to 20 executing agents time to be trained regarding the investigation or to review the detailed supporting affidavit, and that the agent who had drafted the affidavit provided no meaningful guidance limiting the scope of the seizure. As a result, there was extensive evidence that the government "overseized," confiscating items that were unrelated to the crimes at issue, including educational records and scholastic mementos of the Wey's children, X-rays, and family photographs.

Another critical factor in the court's rejection of the good faith argument was the government's lengthy and ever-expanding search of the electronically stored files it held after the original search. An evidentiary hearing revealed that over the course of more than three years prior to indictment, government agents searched such materials, including files previously deemed unresponsive to the warrants, for evidence of alternative charging theories and used search terms (including the name of a co-defendant) generated from witness proffer sessions held long after the warrants were executed. This material was neither included in the original warrant application nor presented to the issuing magistrate. The court opined that this conduct might be "independently violative of the Fourth Amendment," because if the government had conducted additional physical searches of NYGG's office or the Weys' apartment years later for hard copy documents deemed irrelevant and left behind in the original search, such searches would be impermissible in the absence of a new warrant. The court found that the agents' conduct "if nothing else…constitutes further evidence of the agents' culpability in making affirmative choices to treat the warrants as though they were the functional equivalent of general warrants. Such conduct can and should be deterred."

Distinguishing 'Ganias'

In finding that the good faith exception did not apply, the *Wey* court distinguished the circumstances in *Ganias*. In that case, the defendant, Stavros Ganias' accounting offices were searched pursuant to a warrant in connection with the investigation of two of his clients for fraud and theft of government property in connection with a government contract. While executing the warrant in November 2003, government agents made forensic mirror images of the hard drives of Ganias' computers.

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The government completed its review of the imaged hard drives and segregated responsive documents by the end of 2004, but did not return the nonresponsive files to Ganias. In April 2006, the government obtained a new warrant to search the hard drives for Ganias' personal financial records in connection with its expanded investigation into potential tax violations. The government subsequently obtained Ganias' indictment on charges of tax evasion.

On appeal, a unanimous three-judge panel of the Second Circuit held that the fruits of the search should have been suppressed because the government had violated the Fourth Amendment's reasonableness requirement when it held onto the nonresponsive documents for 16 months before it developed probable cause to search and seize them.

The full Second Circuit reheard the case, and in May 2016, over a forceful dissent from Judge Denny Chin, the author of the original decision, the court reversed the panel's ruling. The court's decision turned on the agents' good faith, and it did not rule on the underlying Fourth Amendment issue. The opinion includes a thoughtful review of scholarly commentary on the complexities faced by the courts in analyzing searches of electronic media and notes that the government may have a legitimate interest in the preservation of digital evidence, including an entire set of the defendant's data. Significantly, the court noted that "parties with an interest in retained storage media are not without recourse" as they can make a motion for the return of property under Fed. R. Crim. P.

41(g), a process that Ganias did not pursue, formally or informally.

Critical to the Second Circuit's holding that the agents in Ganias acted in good faith was that before they undertook additional searches of files previously found unresponsive to the original warrant, they (unlike the agents in *Wey*) sought and obtained a fresh search warrant. In the process the government disclosed to a magistrate judge its lengthy retention of Ganias' records and its new theories of criminal conduct. According to the Second Circuit, the agents acted reasonably throughout the investigation, and thus their conduct fell within the good faith exception.

'In re 650 Fifth Avenue'

Another recent Southern District of New York decision also addresses many of the same seemingly easily avoided warrant-drafting mistakes present in *Wey*. The decision also demonstrates, however, that these errors need not be fatal.

In *In re 650 Fifth Avenue and Related Properties* (2017 WL 2062983 (S.D.N.Y. May 15, 2017)), a civil forfeiture action in which the United States is seeking the forfeiture of properties and assets owned by organizations tied to the Iranian government, the admissibility of evidence seized from the organizations pursuant to a subsequently invalidated warrant was at issue. In December 2008, FBI agents obtained a warrant to search offices and a storage space located at 500 Fifth Avenue that was used by the Iranian-tied organizations. Several hundred boxes of records and a number of computers were seized. Agents subsequently reviewed the seized material and returned nonresponsive documents to the owners on a rolling basis.

The Second Circuit later found that the warrant was constitutionally deficient because, like the deficient warrants in *Wey*, it did not identify the specific crimes under investigation, it did not sufficiently specify the particular categories of electronic information to be seized, and it did not include any limits in its temporal scope. Just as in *Wey*, the affidavit submitted in support of the warrant applications contained detailed information about the alleged crimes, but the affidavit was not specifically incorporated into or attached to the warrant itself.

On remand, Judge Forrest held that suppression was not the appropriate remedy. Unlike the agents in *Wey*, those who drafted and executed the warrant in *In re 650 Fifth Avenue* were acting under exigent circumstances following a member of the organization's attempt to destroy documents. In addition, the agents followed typical protocol with respect to preparing for the warrant's execution—the agent assigned to lead the search was personally familiar with the investigation and the team assembled to conduct the search reviewed the warrant and the specific items that were being sought.

Finally, there was evidence that the agents left a significant number of documents behind, which the court found to negate any claim that the agents overseized because they were unfamiliar with the limits of the warrant. Based on these facts, Judge Forrest found that the agents acted in good faith. The court also concluded that all of the documents at issue would have been inevitably discovered.

Conclusion

These recent decisions illustrate that in the era of ever-increasing data storage and ever-evolving technology, questions regarding what meets the Fourth Amendment's baseline requirement of reasonableness in the execution of search warrants will continue to vex prosecutors, defense counsel, and courts in white collar criminal cases.

1. See Robert J. Anello and Richard F. Albert, "When the Government Searches Your Hard Drives," N.Y.L.J. (Aug. 5, 2014).

2. This column has previously discussed one such category of logistical problems—the government's use of taint teams to segregate potentially privileged documents. See Robert J. Anello and Richard F. Albert, "Government Searches: The Trouble With Taint Teams," N.Y.L.J. (Dec. 6, 2016).