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MEMORANDUM

TO: The Honorable John Daniel Dailey, Chair, Criminal Rules Committee
FROM: Robin Whitley
SUBJECT: Recommendation for changes to Criminal Rule 41
DATE: 9/29/2016

Judge Dailey,

I would like the Committee to consider amending Crim. P. 41 along the lines of 2009 amendments to Federal Rule 41 regarding search warrants and electronically stored information. Clarity and updating would be of benefit to the bench, forensic examiners, and detectives. It would greatly help to get the language and concepts more in line with current technological and forensic realities. I thank Dick Reeve for bringing this to our attention.

I offer as a starting point the following suggestion.

Add the following somewhere in Rule 41:

A warrant under Rule 41(b) may authorize the seizure of electronic storage media or the seizure or copying of electronically stored information. Unless otherwise specified, the warrant authorizes a later review of the media or information consistent with the warrant. The time for executing the warrant in Rule 41(d)(5)(VI) refers to the seizure or on-site copying of the media or information, and not to any later off-site copying or review.

Amend Rule 41(d)(5)(VI) as follows:

(VI) A search warrant shall be executed within 14 days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or

premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. In a case involving the seizure of electronic storage media or the seizure or copying of electronically stored information, the inventory may be limited to describing the physical storage media that were seized or copied. The officer may retain a copy of the electronically stored information that was seized or copied. The judge upon request shall deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

References:

Fed. R. Crim. P. 41(e)(2)

(B) Warrant Seeking Electronically Stored Information. A warrant under Rule 41(e)(2)(A) may authorize the seizure of electronic storage media or the seizure or copying of electronically stored information. Unless otherwise specified, the warrant authorizes a later review of the media or information consistent with the warrant. The time for executing the warrant in Rule 41(e)(2)(A) and (f)(1)(A) refers to the seizure or on-site copying of the media or information, and not to any later off-site copying or review.

ADVISORY COMMITTEE NOTES

2009 Amendments

Subdivision (e)(2). Computers and other electronic storage media commonly contain such large amounts of information that it is often impractical for law enforcement to review all of the information during execution of the warrant at the search location. This rule acknowledges the need for a two-step process: officers may seize or copy the entire storage medium and review it later to determine what electronically stored information falls within the scope of the warrant.

The term “electronically stored information” is drawn from Rule 34(a) of the Federal Rules of Civil Procedure, which states that it includes “writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained.” The 2006 Committee Note to Rule 34(a) explains that the description is intended to cover all current types of computer-based information and to encompass future changes and developments. The same broad and flexible description is intended under Rule 41.

In addition to addressing the two-step process inherent in searches for electronically stored information, the Rule limits the 10 [14]1 day execution period to the actual execution of the warrant and the on-site activity. While consideration was given to a presumptive national or uniform time period within which any subsequent off-site copying or review of the media or electronically stored information would take place, the practical reality is that there is no basis for a “one size fits all” presumptive period. A substantial amount of time can be involved in the forensic imaging and review of information. This is due to the sheer size of the storage capacity of media, difficulties created by encryption and booby traps, and the workload of the computer labs. The rule does not prevent a judge from imposing a deadline for the return of the storage media or access to the electronically stored information at the time the warrant is issued. However, to arbitrarily set a presumptive time period for the return could result in frequent petitions to the court for additional time.

It was not the intent of the amendment to leave the property owner without an expectation of the timing for return of the property, excluding contraband or instrumentalities of crime, or a remedy. Current Rule 41(g) already provides a process for the “person aggrieved” to seek an order from the court for a return of the property, including storage media or electronically stored information, under reasonable circumstances.

Where the “person aggrieved” requires access to the storage media or the electronically stored information earlier than anticipated by law enforcement or ordered by the court, the court on a case by case basis can fashion an

appropriate remedy, taking into account the time needed to image and search the data and any prejudice to the aggrieved party.

The amended rule does not address the specificity of description that the Fourth Amendment may require in a warrant for electronically stored information, leaving the application of this and other constitutional standards concerning both the seizure and the search to ongoing case law development.

Fed. R. Crim. P. 41(f)(1)

(B) Inventory. An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of another officer and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person. *In a case involving the seizure of electronic storage media or the seizure or copying of electronically stored information, the inventory may be limited to describing the physical storage media that were seized or copied.* The officer may retain a copy of the electronically stored information that was seized or copied.

ADVISORY COMMITTEE NOTES

2009 Amendments

Subdivision (f)(1). Current Rule 41(f)(1) does not address the question of whether the inventory should include a description of the electronically stored information contained in the media seized. Where it is impractical to record a description of the electronically stored information at the scene, the inventory may list the physical storage media seized. Recording a description of the electronically stored information at the scene is likely to be the exception, and not the rule, given the large amounts of information contained on electronic storage media and the impracticality for law enforcement to image and review all of the information during the execution of the warrant. This is consistent with practice in the “paper world.” In circumstances where filing cabinets of documents are seized, routine

Memorandum-Crim. P. 41

9/29/16

Page 5

practice is to list the storage devices, i.e., the cabinets, on the inventory, as opposed to making a document by document list of the contents.