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"Virtual Certainty" in a Digital World: The Sixth Circuit's Application of the Private Search Doctrine to Digital Storage Devices in *United States v. Lichtenberger*

Stephen Labrecque
Boston College Law School, stephen.labrecque@bc.edu

"VIRTUAL CERTAINTY" IN A DIGITAL WORLD: THE SIXTH CIRCUIT'S APPLICATION OF THE PRIVATE SEARCH DOCTRINE TO DIGITAL STORAGE DEVICES IN *UNITED STATES v. LICHTENBERGER*

Abstract: In 2015 in *United States v. Lichtenberger*, the U.S. Court of Appeals for the Sixth Circuit held that police violated the Fourth Amendment by exceeding the scope of a private search of computer files. This decision deviated from holdings of the U.S. Courts of Appeals for the Fifth and Seventh Circuits, which held that under the private search doctrine, police could more thoroughly search digital devices that were previously searched by a private party. The Sixth Circuit created a circuit split by failing to apply the closed container approach to the digital storage devices in *Lichtenberger*. This Comment argues that the closed container approach should not be applied to searches of digital devices under the private search doctrine. This Comment also argues that the Sixth Circuit correctly adopted the "virtual certainty" test of scope, but failed to properly apply the test to the facts in *Lichtenberger*.

INTRODUCTION

In this age of smartphones and cloud computing, courts have struggled to apply Fourth Amendment protections to searches of electronic devices.[1] Digital evidence has become an important tool for law enforcement agencies in the investigation and prosecution of crime.[2] The nature of these electronic devices, however, raises significant concerns regarding personal privacy rights.[3]

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[1] *See* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."); *see also* Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 HARV. L. REV. 531, 532–33 (2005) (noting the "tentative and often contradictory" lower court opinions regarding personal computers and Fourth Amendment rights); Emma Raviv, Note, *Homing In: Technology's Place in Fourth Amendment Jurisprudence*, 28 HARV. J.L. & TECH. 593, 593–94 (2015) (noting that technological advancements have complicated Fourth Amendment doctrines).

[2] *See* Josh Goldfoot, *The Physical Computer and the Fourth Amendment*, 16 BERKELEY J. CRIM. L. 112, 112–14 (2011) (noting common use of computer forensic examiners in criminal investigations); Kerr, *supra* note 1, at 532 (stating that computer searches have become an important step in many criminal investigations).

[3] *See* Goldfoot, *supra* note 2, at 164 (comparing computer searches to home searches and noting the significant threat computer searches pose to personal privacy).

In 2015, in *United States v. Lichtenberger*, the U.S. Court of Appeals for the Sixth Circuit addressed the question of whether a police search of laptop files exceeded the scope of a prior search by a private party.[4] In ruling that the evidence of child pornography found on Lichtenberger's laptop was properly suppressed, the Sixth Circuit applied the private search doctrine, which states that Fourth Amendment protections do not apply to searches by private parties.[5] Under this doctrine, police can conduct a warrantless follow-up search as long as it does not exceed the scope of the initial private search.[6] An after-occurring police search exceeds the scope of the private search if the police are not virtually certain that nothing else of significance will be discovered.[7] This "virtual certainty" test was articulated by the U.S. Supreme Court in 1984 in *United States v. Jacobsen*.[8]

In *Lichtenberger*, the Sixth Circuit ruled that the child pornography found on Lichtenberger's computer must be suppressed because the police officer had no "virtual certainty" as to what he would discover.[9] By holding that police exceed the scope of a private search by looking at additional files on a digital device, the Sixth Circuit deviated from holdings of the U.S. Courts of Appeals for the Fifth and Seventh Circuit.[10] In doing so, the Sixth

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[4] United States v. Lichtenberger (*Lichtenberger II*), 786 F.3d 478, 491 (6th Cir. 2015).

[5] *Id.* at 488–89.

[6] *See* United States v. Jacobsen, 466 U.S. 109, 115–17 (1984) (stating that the government does not violate the Fourth Amendment by using information revealed by a third-party source); Walter v. United States, 447 U.S. 649, 657 (1980) (noting that the government can conduct a warrantless search if it does not exceed the scope of the private search).

[7] *Lichtenberger II*, 786 F.3d at 488; *see Jacobsen*, 466 U.S. at 119 (applying a virtual certainty test of scope to a police search of a package containing cocaine).

[8] 466 U.S. at 119. In 1984 in *United States v. Jacobsen*, the U.S. Supreme Court found that a field test did not exceed the scope of a preceding private search of a FedEx package. *Id.* In *Jacobsen*, a FedEx employee discovered a white powdery substance when examining a damaged package. *Id.* at 111. A Drug Enforcement Administration Officer performed a field test and identified the substance as cocaine. *Id.* The Court found that there was "virtual certainty" that the field test would reveal nothing else of significance. *Id.* at 119.

[9] *Lichtenberger II*, 786 F.3d at 490.

[10] *Compare id.* (holding that police exceeded the scope of the private search by possibly viewing more files than the private searchers), *with* United States v. Runyan, 275 F.3d 449, 464 (5th Cir. 2001) (holding that the police did not exceed the scope of the private search by viewing addition files on CDs), *and* Rann v. Atchison, 689 F.3d 832, 838 (7th Cir. 2012) (adopting the Fifth Circuit's holding in *Runyan*). In 2001 in *United States v. Runyan*, the U.S. Court of Appeals for the Fifth Circuit analogized digital storage devices to closed containers and held that once a private party searches a device, the police do not exceed the scope of the prior search by more thoroughly searching the same device. 275 F.3d at 464. Under this closed container analysis, a person has a reasonable expectation of privacy in "opaque containers that conceal their contents from plain view." United States v. Villarreal, 963 F.2d 770, 773 (5th Cir. 1992). Once a private party has opened the container, however, the owner's privacy has been compromised. *Runyan*, 275 F.3d at 465. Therefore, any after-occurring governmental search of the container's contents falls within the scope of the initial search. *Id.* at 464–65.

Circuit implicitly created a circuit split with potentially far reaching implications on personal privacy and law enforcement.[11]

This Comment argues that the Sixth Circuit correctly articulated the "virtual certainty" test of scope but failed to correctly apply the test to the police search of a laptop computer in *Lichtenberger*.[12] Part I of this Comment reviews the current state of the Fourth Amendment private search doctrine and its application to digital storage devices.[13] Part I also provides the factual and procedural background of *Lichtenberger*.[14] Part II contrasts the Sixth Circuit's reasoning in *Lichtenberger* with the closed container analysis employed by the Fifth Circuit in *United States v. Runyan* in 2001.[15] Part III argues that the closed container approach used by the Fifth and Seventh Circuits should not apply to digital storage devices.[16] Part III also argues that the Sixth Circuit was correct to apply the "virtual certainty" test of scope, but failed to properly evaluate the test in light of the specific facts in *Lichtenberger*.[17]

I. THE CHANGING CONTOURS OF THE PRIVATE SEARCH DOCTRINE IN THE DIGITAL AGE

The dawn of the digital age brought with it a diverse range of new Fourth Amendment applications.[18] Courts have been forced to consider the unique privacy interests posed by electronic devices such as computers and smartphones.[19] Section A of this Part examines the history of Fourth

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[11] *See* Orin Kerr, *Sixth Circuit Creates Circuit Split on Private Search Doctrine for Computers*, WASH. POST (May 20, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/20/sixth-circuit-creates-circuit-split-on-private-search-doctrine-for-computers/ [https://perma.cc/LWD5-Q7L4] (noting that although the Sixth Circuit cites the Fifth and Seventh Circuit cases in support of the decision in *Lichtenberger*, the Sixth Circuit's decision differs materially from the holdings of the Fifth and Seventh Circuits); *see also* Katie Matejka, Note, United States v. Lichtenberger*: The Sixth Circuit Improperly Narrowed the Private Search Doctrine of the Fourth Amendment in a Case of Child Pornography on a Digital Device*, 49 CREIGHTON L. REV. 177, 191–93 (2015) (arguing that the Sixth Circuit erred by declining to follow the reasoning used by the Fifth and Seventh Circuits in *Runyan* and *Rann*).

[12] *See infra* notes 101–125 and accompanying text.

[13] *See infra* notes 23–51 and accompanying text.

[14] *See infra* notes 52–67 and accompanying text.

[15] *See infra* notes 68–100 and accompanying text.

[16] *See infra* notes 105–112 and accompanying text.

[17] *See infra* notes 113–125 and accompanying text.

[18] *See, e.g.*, Riley v. California, 134 S. Ct. 2473, 2480 (2014) (addressing the constitutionality of a police search of cell phone data after arrest); United States v. Jones, 123 S. Ct. 945, 948 (2012) (examining whether Global Positioning System attached to defendant's Jeep violated the Fourth Amendment); Kyllo v. United States, 533 U.S. 27, 29 (2001) (analyzing whether thermal-imaging device used to scan exterior of private home violated defendant's Fourth Amendment rights); Katz v. United States, 389 U.S. 347, 353 (1967) (applying Fourth Amendment in case involving eavesdropping device placed on outside of public phone booth).

[19] *See Riley*, 134 S. Ct. at 2489 (discussing the immense storage capacity of cell phones and the diverse range of information contained therein); *Lichtenberger II*, 786 F.3d at 485–87 (apply-

Amendment jurisprudence and the development of the private search doctrine.[20] Section A also discusses the applicability of the private search doctrine to digital storage devices.[21] Section B reviews the facts and procedural posture of *United States v. Lichtenberger*.[22]

A. The Fourth Amendment and the Private Search Doctrine

The Fourth Amendment protects the American people from unreasonable searches of their "person, houses, papers and effects."[23] To qualify as a Fourth Amendment search, the intrusion must violate a person's reasonable expectation of privacy.[24] In determining whether a Fourth Amendment search is unreasonable, courts first turn to the Warrant Clause of the Fourth Amendment.[25] Warrantless searches and seizures are considered unreasonable on their face; however, there are some limited exceptions.[26] Generally, when determining whether to exempt a search from the warrant requirement, courts balance the individual's privacy with the government's interest in gathering evidence.[27] In order to deter unreasonable, and thereby unlawful, police searches, courts have turned to the exclusionary rule, which prohibits the admission of evidence that is obtained as a result of an unlawful search.[28]

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ing the private search doctrine to police search of a laptop); *Rann*, 689 F.3d at 838 (applying the private search doctrine to police search of a zip drive and a camera memory card).

[20] *See infra* notes 23–42 and accompanying text.

[21] *See infra* notes 43–51 and accompanying text.

[22] *See infra* notes 52–67 and accompanying text.

[23] U.S. CONST. amend. IV.

[24] *See Jacobsen*, 466 U.S. at 120 (holding that search did not violate the Fourth Amendment because it "infringed no legitimate expectation of privacy").

[25] *See* U.S. CONST. amend. IV ("[N]o warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

[26] *See Katz*, 389 U.S. at 357 ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."); *see, e.g.*, Washington v. Chrisman, 455 U.S. 1, 5–6 (1982) (applying the plain view exception to police search of a dorm room); Chimel v. California, 395 U.S. 752, 762–63 (1969) (articulating the search incident to arrest exception: it is reasonable for a police officer to search a person being arrested in order to remove weapons or evidence that may be within the person's reach); Carroll v. United States, 267 U.S. 132, 155 (1925) (establishing the motor vehicle exception, which allows police to search a vehicle as long as they have probable cause to believe that evidence or contraband will be found).

[27] *See Riley*, 134 S. Ct. at 2484 ("[W]e generally determine whether to exempt a given type of search from the warrant requirement 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999))).

[28] *See* Mapp v. Ohio, 367 U.S. 643, 656 (1961) (holding that evidence obtained in searches and seizures that violate the Fourth Amendment is inadmissible in both federal and state courts). The exclusionary rule was not created to deter police misconduct, but in modern times deterrence

These Fourth Amendment protections, however, only apply to governmental action.[29] An unreasonable search or seizure conducted by a private individual is not subject to the exclusionary rule unless the individual who conducted the search was acting under the direction of a government official.[30] Under the private search doctrine, when a person's privacy has been violated by a private party's search, the government is not prohibited from using the information discovered from that search.[31] The private search doctrine also allows a government official to conduct a warrantless follow-up search within the scope of the initial search.[32] The government's follow-up search only violates the Fourth Amendment when it exceeds the scope of the initial private search.[33]

In *Jacobsen*, the U.S. Supreme Court stated that to determine whether the government's search exceeded the scope of the initial private search, courts must balance the amount of information the government stands to gain and the level of certainty regarding what they will find.[34] The government's search is within the scope of the initial search if the officer is virtually certain that nothing new will be discovered.[35] Courts applying the "virtual certainty" test of scope have focused on the nature of the area being searched.[36] For ex-

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has become the primary rationale for use of the rule. *See* Robert M. Bloom & David H. Fentin, *"A More Majestic Conception": The Importance of Judicial Integrity in Preserving the Exclusionary Rule*, 13 U. PA. J. CONST. L. 47, 53 (2010) (noting that deterring police misconduct was not an original justification for the creation of the exclusionary rule). The exclusionary rule disincentivizes unlawful searches by police by prohibiting the admission of evidence obtained during an unlawful search in a criminal trial. *Id.* (noting the development of the theory that the exclusionary rule deters police misconduct by removing the incentive to disregard the Fourth Amendment).

[29] *Jacobsen*, 466 U.S. at 113 (quoting *Walter*, 447 U.S. at 662) (stating that Fourth Amendment protections only apply to government searches and seizures); *Lichtenberger II*, 786 F.3d at 482 (quoting *Jacobsen*, 446 U.S. at 113–14) (stating that Fourth Amendment only protects against government action).

[30] *Jacobsen*, 466 U.S. at 113 (quoting *Walter*, 447 U.S. at 662) (explaining that Fourth Amendment protections do not apply to unreasonable searches by a private individual); *Lichtenberger II*, 786 F.3d at 482 (quoting *Jacobsen*, 446 U.S. at 113–14) (stating that searches by agents of the government are still subject to Fourth Amendment protections).

[31] *Jacobsen*, 466 U.S. at 117; *Lichtenberger II*, 786 F.3d at 482; *Runyan*, 275 F.3d at 457.

[32] *Jacobsen*, 466 U.S. at 115; *Walter*, 447 U.S. at 657.

[33] *See Jacobsen*, 466 U.S. at 115–17 (stating that the government does not violate the Fourth Amendment by using information revealed by a third party); *Walter*, 447 U.S. at 657 (stating that the government cannot exceed the scope of a private search unless an independent search is justified).

[34] 466 U.S. at 119.

[35] *See id.* (stating that the government did not infringe on an individual's privacy rights because there was a "virtual certainty" that reexamining the package searched by the private party would reveal nothing new of significance); *Lichtenberger II*, 786 F.3d at 488 (explaining that to remain within the scope of the private search, police had to have "virtual certainty" that the follow-up search would reveal nothing new).

[36] *See* United States v. Allen, 106 F.3d 695, 699 (6th Cir. 1997) (declining to extend the private search doctrine to a search of a motel room); United States v. Donnes, 947 F.2d 1430, 1436

ample, in 1997, in *United States v. Allen*, the U.S. Court of Appeals for the Sixth Circuit declined to extend the private search doctrine to the search of a motel room.[37] The court distinguished its holding from *Jacobsen* by noting the material differences between the search of a residence and the search of a mail package.[38] Some courts have applied a "closed container" analysis to private search doctrine cases.[39] Under this analysis, a person has a reasonable expectation of privacy in "opaque containers that conceal their contents from plain view."[40] Once the container has been opened by a private party, the owner's expectation of privacy in the container's contents has been frustrated.[41] Therefore, any after-occurring governmental search of the container's contents falls within the scope of the initial search.[42]

The "virtual certainty" test to determine whether a governmental search exceeded the scope of a prior private search has been complicated by technological advances.[43] In particular, courts have been forced to grapple with the application of the private search doctrine to searches of digital storage devices.[44] For example, in *United States v. Runyan*, in 2001, the Fifth Circuit considered the application of the private search doctrine to a police search of CDs and zip disks.[45] When the police conducted the fol-

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(10th Cir. 1991) (holding that search of a closed camera lens exceeded the scope of the prior search).

[37] *See Allen*, 106 F.3d at 699 (noting the differences between personal residences and smaller containers).

[38] *See id.* (stating that the entire contents of a mail package are obvious when opened, whereas a motel room contains personal possessions that were not all viewed during the private search).

[39] *See Rann*, 689 F.3d at 837 (adopting the container analysis for police search of a memory card and zip drive); *Runyan*, 275 F.3d at 458 (accepting the conceded fact that CDs and zip disks were containers for Fourth Amendment purposes).

[40] *Villarreal*, 963 F.2d at 773.

[41] *Runyan*, 275 F.3d at 465 (stating that a person can no longer have an expectation of privacy in the contents of a container that has been opened and searched by a private party); *see Jacobsen*, 466 U.S. at 119 (noting that because the package was unsealed and searched by the private party, the respondents had no privacy interest in the package's contents).

[42] *See Rann*, 689 F.3d at 837 (adopting the Fifth Circuit's ruling in *Runyan*); *Runyan*, 275 F.3d at 464 (holding that police do not exceed the prior private search when they examine a closed container more thoroughly than the private party).

[43] *See* Marc Palumbo, Note, *How Safe Is Your Data?: Conceptualizing Hard Drives Under the Fourth Amendment*, 36 FORDHAM URB. L.J. 977, 999–1000 (2009) (noting that the container approach used in *Runyan* is problematic given the unique characteristics of electronic storage devices). *Compare Lichtenberger II*, 786 F.3d at 487 (noting the unique qualities of electronic devices in applying the "virtual certainty" test), *with Runyan*, 275 F.3d at 464 (using the container approach to hold that police did not exceed the scope of a private search of CDs).

[44] *See Lichtenberger II*, 786 F.3d at 487 (noting the Supreme Court's 2014 decision in *Riley v. California* when articulating the specific privacy concerns posed by digital storage devices); *Runyan*, 275 F.3d at 464–65 (applying the private search doctrine to CDs and zip disks); *see also* Palumbo, *supra* note 43, at 999 (arguing that the closed container approach should not be applied to digital storage devices).

[45] *Runyan*, 275 F.3d at 456.

low-up search, they examined CDs that were previously viewed by the defendant's ex-wife and opened files on zip disks that were not previously viewed by the defendant's ex-wife.[46]

When considering whether the police search exceeded the scope of the private search, the Fifth Circuit asked whether the police were certain that nothing new would be discovered during the follow-up search.[47] The Fifth Circuit concluded that police exceeded the scope of the prior private search by examining zip disks that were not opened during the initial search.[48] Police did not exceed the scope of the prior private search, however, when they viewed more files on the CDs than the private searcher.[49] The Seventh Circuit adopted the same approach in *Rann v. Atchison* in 2012.[50] In *Rann*, the Seventh Circuit held that a more thorough search of a digital device did not exceed the scope of the private search because the officer was certain that the devices contained child pornography.[51]

B. Factual and Procedural History of United States v. Lichtenberger

In 2015, in *United States v. Lichtenberger*, the Sixth Circuit, relying on the U.S. Supreme Court's 2014 decision in *Riley v. California*, held that police exceeded the scope of a preceding private search by examining files that may or may not have been viewed during the initial search.[52] On November 26, 2011, Aron Lichtenberger was with his girlfriend, Karley Holmes, at a home they shared with Holmes's mother.[53] Two of Holmes's mother's friends came to the house and told Holmes's mother that Lichtenberger had previously been convicted of child pornography offenses.[54] The police were called,

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[46] *Id.* at 454.

[47] *See id.* at 463 (considering whether the police were "substantially certain" that their search would uncover nothing new). Although the "substantial certainty" language differs slightly from the "virtual certainty" test applied by other circuits, it has the same meaning. *See Lichtenberger II*, 786 F.3d at 489 (using the phrases "substantial certainty" and "virtual certainty" interchangeably when comparing the decision to *Runyan*); *see also* John T. Burnett, *The Enigma of Workers' Compensation Immunity: A Call to the Legislature for a Statutorily Defined Intentional Tort Exception*, 28 FLA. ST. U. L. REV. 491, 500 (2001) (noting that "substantially certain" and "virtually certain" were interchangeable standards in Florida tort law).

[48] 275 F.3d at 464.

[49] *See id.* (reasoning that the CDs were "containers" under the Fourth Amendment, and therefore the defendant had no reasonable expectation of privacy in the contents of the CDs once they were opened and searched by the private party).

[50] 689 F.3d at 837.

[51] *Id.* at 838. The Seventh Circuit adopted the "substantial certainty" language used in *Runyan* instead of the "virtual certainty" language used in *Jacobsen*. *Id.* at 837.

[52] 786 F.3d at 490–91.

[53] United States v. Lichtenberger (*Lichtenberger I*), 19 F. Supp. 3d 753, 754 (N.D. Ohio 2014) (noting that the residence in Cridersville, Ohio was owned by Holmes's mother), *aff'd*, 786 F.3d 478.

[54] *Id.*

and Lichtenberger was arrested for failing to register as a sex offender.[55] Later that day, Holmes hacked into Lichtenberger's laptop using a password recovery program.[56] She eventually found a folder containing child pornography.[57] After showing her mother, the two found several more sexually-explicit images involving minors on Lichtenberger's laptop.[58] Holmes closed the laptop and called the police.[59]

When Officer Huston arrived at the house in response to Holmes's call, Holmes explained to him why she had searched Lichtenberger's laptop.[60] Officer Huston asked Holmes to show him what she had found, so she opened the laptop and began clicking through random images of child pornography.[61] Officer Huston retrieved Lichtenberger's other electronics and left the home with the evidence.[62]

In the subsequent criminal proceedings for possession and distribution of child pornography, Lichtenberger moved to suppress all of the evidence found on his laptop computer.[63] The U.S. District Court for the Northern District of Ohio suppressed the evidence pursuant to the exclusionary rule.[64] The court found that the private search doctrine applied, but ruled that Holmes was acting as an agent of the government during the follow-up search, therefore, the search violated the Fourth Amendment.[65] The government filed a timely appeal of the evidentiary ruling to the Sixth Circuit.[66]

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[55] *Id.* Holmes requested that police escort Lichtenberger off of the property, but upon discovering an active warrant for his arrest for failing to register as a sex offender, Officer Huston arrested Lichtenberger. *Id.*

[56] *Id.* Holmes testified at the suppression hearing that she hacked Lichtenberger's laptop because Lichtenberger had acted strangely whenever she was near the computer and she wanted to know why. *Id.*

[57] *Id.* Holmes noted that she accessed a folder labeled "private" that contained numbered subfolders. *Id.* When she clicked on one of those folders, it came up with thumbnail images of child pornography. *Lichtenberger II*, 786 F.3d at 481 n.1.

[58] *Lichtenberger I*, 19 F. Supp. 3d at 755.

[59] *Id.*

[60] *Id.* Holmes explained that the laptop belonged to Lichtenberger and that he was the only one who would use it. *Id.* She also noted that she tried to use the laptop once, but Lichtenberger got upset and told her to stay away from it. *Id.*

[61] *Id.*; *see Lichtenberger II*, 786 F.3d at 488 (noting that Holmes admitted during testimony that she could not recall if the photos she showed Officer Huston were the same images she had seen during her previous search).

[62] *Lichtenberger I*, 19 F. Supp. 3d at 755.

[63] *Lichtenberger II*, 786 F.3d at 481. Lichtenberger was indicted on December 5, 2012, and moved to suppress all evidence obtained from the laptop on November 26, 2011. *Id.*

[64] *See Lichtenberger I*, 19 F. Supp. 3d at 759.

[65] *See id.* at 758–59 (holding that the initial search by Holmes was a private action, but that the follow-up search by Officer Huston constituted government action and thus required a warrant); *see also infra* note 87 (explaining that the Sixth Circuit rejected the district court's analysis because a warrantless government search can permissibly follow a private search as long as it does not exceed the scope of the initial search).

[66] *Lichtenberger II*, 786 F.3d at 480.

The Sixth Circuit affirmed the decision of the district court on different grounds, and the case was dismissed on remand.[67]

II. CLOSED CONTAINERS OR "VIRTUAL CERTAINTY": TWO APPROACHES TO APPLYING THE PRIVATE SEARCH DOCTRINE TO DIGITAL STORAGE DEVICES

In *United States v. Runyan* in 2001 the U.S. Court of Appeals for the Fifth Circuit ruled that police did not exceed the scope of a prior search by examining more files on a CD than the private searchers.[68] The U.S. Court of Appeals for the Sixth Circuit came to the opposite conclusion when analyzing a similar search of a digital device in *United States v. Lichtenberger* in 2015.[69] This Part examines the approaches used by both courts that led to this circuit split.[70]

In *Runyan*, the Fifth Circuit analogized zip disks and CDs to closed containers and held that police did not exceed the scope of a private search by examining more files on a digital storage device than the original searchers.[71] In 2000, Robert Runyan was convicted on four counts related to child pornography.[72] Following his conviction, Runyan filed an appeal in the Fifth Circuit arguing that evidence obtained during a police search should have been suppressed as the search that violated his Fourth Amendment rights.[73] In remanding the case for further fact-finding the Fifth Circuit split its analysis into two separate categories of evidence.[74]

The court first considered disks that were never accessed by Runyan's ex-wife but which were turned over to police with other evidence of child pornography.[75] The Fifth Circuit applied a "substantial certainty" test, a functional equivalent of the "virtual certainty" test, and held that the police ex-

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[67] *Id.* at 491, *remanded to* No. 3:12-cr-00570-JGC (N.D. Ohio dismissed July 9, 2015).

[68] United States v. Runyan, 275 F.3d 449, 464 (5th Cir. 2001).

[69] *See* United States v. Lichtenberger (*Lichtenberger II*), 786 F.3d 478, 491 (6th Cir. 2015) (holding that police exceed the scope of the prior search by examining more files in a folder than the private searcher).

[70] *See infra* notes 71–100 and accompanying text.

[71] 275 F.3d at 464. The government conceded that electronic disks were closed containers for Fourth Amendment purposes. *Id.* at 458. The Fifth Circuit did not rule on this point but accepted the characterization as it was uncontested. *Id.*

[72] *Id.* at 455.

[73] *Id.*

[74] *See id.* at 460–65 (applying the private search doctrine to the zip disks that were not accessed by the ex-wife, prior to applying the doctrine to the CDs which were accessed by the ex-wife).

[75] *See id.* at 460 (addressing Runyan's argument that police exceeded the scope of the prior search by examining more disks than the private searches, before determining whether police erred by examining more files on disks which were opened by the private searchers). The private searchers only examined some of the CDs and floppy disks that they discovered. *Id.* The private searchers did not have the equipment required to open or read the contents of the zip disks. *Id.* at 464.

ceeded the scope of the prior search by examining disks that were not opened by the private searchers.[76] The court noted that the disks were not labeled, and the private searchers testified that they did not know the contents of the disks they had not opened.[77] The fact that the disks were found in the same location as other evidence of child pornography was not enough to make police substantially certain as to the contents of the disks.[78]

The Fifth Circuit next considered Runyan's argument that the police exceeded the scope of the initial search by examining more files on the CDs than the private searchers.[79] The Fifth Circuit noted that individuals possess an expectation of privacy in closed containers.[80] Once a container is opened, however, the expectation of privacy is frustrated.[81] Therefore, when private searchers open a closed container, police do not exceed the scope of the prior search by more thoroughly examining the container's contents.[82] The Fifth Circuit in *Runyan* equated CDs and zip disks to closed containers, and held that police do not exceed the scope of a prior search when they view more files on a digital device than the private searchers.[83]

The Sixth Circuit came to the opposite conclusion in *Lichtenberger*, holding that Officer Huston exceeded the scope of the prior search because he viewed files that may have differed from those viewed by the private party.[84] The Sixth Circuit first considered whether the private search doctrine was applicable.[85] The court found that the critical elements, a private

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[76] *Id.*; *cf.* Burnett, *supra* note 47, at 500 (noting that "substantially certain" and "virtually certain" were interchangeable standards in Florida tort law).

[77] *Runyan*, 275 F.3d at 464.

[78] *Id.* Police could not be sure that the unopened and unlabeled disks contained child pornography. *Id.*

[79] *Id.* The Fifth Circuit notes that it is not clear if police examined more files than the private searchers because the officer only looked at two or three images on each disk. *Id.* The court determined that, even if more files were examined, the police did not violate the Fourth Amendment. *Id.*

[80] *Runyan*, 275 F.3d at 464 (citing Smith v. Ohio, 494 U.S. 541, 542 (1990)).

[81] *See Runyan*, 275 F.3d at 465 (stating that a person's expectation of privacy in a container is compromised once it is opened and searched by a private party).

[82] *See id.* (holding that police do not conduct a new Fourth Amendment search each time they find a particular item if the container was previously opened and examined during the private search); Matejka, *supra* note 11, at 193 (arguing that the folder viewed in *Lichtenberger* is analogous to a closed container, and if it was opened by the private searcher, then the after-occurring police search is within the scope of the prior search).

[83] *Runyan*, 275 F.3d at 464–65.

[84] *Lichtenberger II*, 786 F.3d at 489–91. The Sixth Circuit noted the Fifth Circuit's similar focus on "virtual certainty," but the court also characterized the approach in *Runyan* as being broad. *Id.* at 489. The Sixth Circuit discussed the "container analysis" in *Runyan*, but did not explicitly support or reject it. *Id.*; *see also* Matejka, *supra* note 11, at 193 (noting that if the Sixth Circuit had adopted the container approach of the Fifth and Seventh Circuits, Officer Huston's search would have been within the scope of the private search).

[85] *Lichtenberger II*, 786 F.3d at 484.

search and an after-occurring police search, were satisfied.[86] Having determined that the private search doctrine applied, the Sixth Circuit analyzed the scope of Officer Huston's search in relation to Holmes's private search.[87] Given the testimony that the files viewed by Officer Huston may have differed from those viewed in the private search, the Sixth Circuit concluded that Officer Huston had no "virtual certainty" as to what he would discover.[88]

The Sixth Circuit noted that the "virtual certainty" test also was used by the Fifth Circuit in *Runyan*; however, the Fifth Circuit came to the opposite conclusion regarding files that were not examined by the private searcher.[89] This discrepancy is explained by the Fifth Circuit's use of the closed container analysis.[90] The Fifth Circuit only applied the "virtual certainty" test to the disks that were not opened by Runyan's ex-wife.[91] Using

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[86] *Id.* Lichtenberger argued that the private search doctrine should not apply to laptops. *Id.* at 483. He cited the Sixth Circuit's 1997 holding in *United States v. Allen*, which declined to extend the private search doctrine to searches of motel rooms. *Id.* at 483; United States v. Allen, 106 F.3d 695, 699 (6th Cir. 1997). Lichtenberger argued that laptops contain information similar to that found in a home, or temporary abode, and therefore *Allen* should apply. *Lichtenberger II*, 786 F.3d at 484. The Sixth Circuit declined to extend the special protections afforded to homes to laptops stating that "[h]omes are uniquely protected space under the Fourth Amendment." *Id.* (citing Kyllo v. United States, 533 U.S. 27, 37 (2001)).

[87] *Lichtenberger II*, 786 F.3d at 485. The Sixth Circuit rejected the district court's analysis that Holmes was acting as an agent of the government during the follow-up search and thus the search was impermissible. *Id.* Agency is only relevant to Holmes's initial search, as a governmental search can permissibly follow a private search. *Id.* (citing United States v. Jacobsen, 466 U.S. 109, 119–20 (1984).

[88] *Id.* at 488. Holmes testified that she could not be sure if the photos she showed Officer Huston were the same as the images she had seen earlier as the folders contained hundreds of pictures. *Id.*

[89] *Id.* at 489 (noting that other circuit courts similarly used a "virtual certainty" test when applying the private search doctrine to searches of contemporary electronic devices). *Compare id.* at 491 (holding that Officer Huston exceeded the scope of the private search by possibly viewing files that had not been viewed in the private search), *with Runyan*, 275 F.3d at 463–65 (holding that police did not exceed the scope of the private search by examining more files on CDs than the private searchers).

[90] *See Runyan*, 275 F.3d at 463–65 (applying a "substantial certainty" test of scope to disks that had not been opened by the private searchers but relying on a container approach in place of the "substantial certainty" test when evaluating the police search of more files on disks that were opened during the private search); *see also* Matejka, *supra* note 11, at 193 (noting that if the Sixth Circuit had adopted the container approach of the Fifth and Seventh Circuits, Officer Huston's search would have been within the scope of the private search). The Fifth Circuit's use of the container approach precluded the application of the "virtual certainty" test for all digital devices that had been opened by the private searchers. *Id.* The court stated that once a container was opened by the private party, police could more thoroughly search that container. *Id.* at 464. Therefore, police did not exceed the scope of the private search by viewing additional files in the container than the private searchers. *Id.* at 465.

[91] *Runyan*, 275 F.3d at 464–65. The Fifth Circuit used the "substantial certainty" test to evaluate the scope of the police search of disks that were not accessed by the private searchers, but there is no mention of the term during the court's analysis of the disks that were examined during the private search. *Id.*

the container analysis, the Fifth Circuit determined that Runyan did not have a reasonable expectation of privacy in the disks that had been opened by his ex-wife.[92] Therefore, the court did not apply a "virtual certainty" test to the CDs that were previously opened.[93]

The Sixth Circuit declined to adopt the container approach used by the Fifth Circuit, and instead focused on the unique privacy concerns posed by digital storage devices.[94] The Sixth Circuit echoed the U.S. Supreme Court's decision in *Riley v. California*, in 2014.[95] In *Riley*, the Supreme Court focused on the immense storage capacity of cell phones and computers, noting that these devices can contain a digital record of a person's personal and professional life.[96] Given the qualities of electronic devices, the Sixth Circuit concluded that the files viewed by Officer Huston could have been photos of Lichtenberger, his bank records, or his medical history; the possibilities were endless.[97] The Sixth Circuit's decision in *Lichtenberger* implicitly created a circuit split with the Fifth and Seventh Circuits.[98] The Fifth and Seventh Circuits employed a closed container analysis; whereas the Sixth Circuit, focused on the unique qualities of digital devices, applied the "virtual certainty" test of scope.[99] The effects of this split are made clear when

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[92] *See id.* (stating that once a container is opened and searched by a private party, the owner's expectation of privacy in the contents of the container is compromised).

[93] *Id.* The Fifth Circuit held that once a container is opened by a private party, the police do not exceed the scope of that prior search by examining more of the contents of the container. *Id.* at 465. Therefore, there was no reason to apply a "substantial certainty" test. *See id.*

[94] *See Lichtenberger II*, 786 F.3d at 488 (citing the district court's finding that a laptop is not comparable to a physical container given the amount of information that a laptop can contain). The Sixth Circuit discussed the 2014 U.S. Supreme Court decision in *Riley v. California*, which focused on the unique privacy concerns posed by electronic devices. *See Riley*, 134 S. Ct. 2473, 2489 (2014); *Lichtenberger II*, 786 F.3d at 488.

[95] *Lichtenberger II*, 786 F.3d at 487–88. In *Riley*, the Supreme Court, focusing on the significant privacy interests at stake, held that police must obtain a warrant before searching a cellphone seized incident to arrest. *See* 134 S. Ct. at 2495.

[96] *Riley*, 134 S. Ct. at 2489. In *Riley*, the defendant was stopped for driving with an expired registration and a suspended license. *Id.* at 2480. A search of the car revealed two concealed handguns, and the defendant was arrested and searched. *Id.* Police seized the defendant's cell phone and searched its contents for evidence of gang activity. *Id.*

[97] *Lichtenberger II*, 786 F.3d at 489.

[98] *See* Kerr, *supra* note 11 (noting that the Sixth Circuit considered individual files whereas the Fifth and Seventh Circuits analogized digital devices to Fourth Amendment containers). *Compare Lichtenberger II*, 786 F.3d at 491 (holding that Officer Huston exceeded the scope of the private search by possibly viewing files that had not been viewed in the private search), *with Runyan*, 275 F.3d at 463–65 (holding that police did not exceed the scope of the private search by examining more files on CDs than the private searchers).

[99] *Compare Runyan*, 275 F.3d at 465 (noting that an individual's expectation of privacy in a container is compromised when it is opened and searched by a private party, and, therefore, the police do not exceed the scope of the search by examining more of the contents of the container), *with Lichtenberger II*, 786 F.3d at 490 (holding that Officer Huston's lack of "virtual certainty" was dispositive).

looking at the outcomes of the two cases: in *Runyan*, the evidence from police searches of disks viewed by the ex-wife were ruled admissible, and after being remanded to the district court, three of the convictions were upheld on a subsequent appeal, but in *Lichtenberger*, the evidence was suppressed and the case was dismissed on remand.[100]

III. CLOSING THE DOOR ON THE CONTAINER APPROACH: APPLYING THE PRIVATE SEARCH DOCTRINE TO DIGITAL DEVICES

The U.S. Court of Appeals for the Sixth Circuit in *United States v. Lichtenberger* in 2015 correctly abandoned the closed container approach used by the U.S. Court of Appeals for the Fifth Circuit in 2001 in *United States v. Runyan*.[101] The Sixth Circuit erred, however, in its application of the "virtual certainty" test to the facts of the case.[102] This Part argues that the closed container analysis used by the Fifth Circuit, and adopted by the Seventh Circuit in *Rann v. Atchison* in 2010, should not apply to digital storage devices.[103] This Part also argues that the Sixth Circuit articulated the correct test of scope, but failed to properly apply the test to the facts in *Lichtenberger*.[104]

The closed container approach to digital devices could result in significant violations of personal privacy, and therefore should not be adopted in future cases.[105] In, *United States v. Jacobsen* in 1984, The U.S. Supreme

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[100] *Compare Runyan*, 275 F.3d 449, *appeal after remand*, 290 F.3d 223, 252 (5th Cir. 2002) (affirming three of four convictions on a subsequent appeal after the case was remanded to the district court for further fact finding), *with Lichtenberger II*, 786 F.3d at 491 (all charges were dismissed after remand to district court), *remanded to* No. 3:12-cr-00570-JGC (N.D. Ohio dismissed July 9, 2015).

[101] *See* Kerr, *supra* note 11 (arguing that the Sixth Circuit approach is correct as the container approach would lead to inconsistent and concerning results). *Compare* United States v. Lichtenberger (*Lichtenberger II*), 786 F.3d 478, 490 (6th Cir. 2015) (holding Officer Huston's lack of "virtual certainty" dispositive in determining that his search exceeded the scope of the prior private search), *with* United States v. Runyan, 275 F.3d 449, 465 (5th Cir. 2001) (holding that police did not exceed the scope of the private search by examining more items in a container than the private searchers).

[102] *See* Matejka, *supra* note 11, at 196 (arguing that because Holmes knew that the majority of the images in the folder were child pornography, the "virtual certainty" test was satisfied); *cf.* United States v. Tosti, 733 F.3d 816, 822 (9th Cir. 2013) (noting that because the private searcher could identity the contents of the photos from the thumbnail images, police enlargement of the photos was irrelevant). In *United States v. Lichtenberger* in 2015 the U.S. Court of Appeals for the Sixth Circuit stated that the files viewed by Officer Huston could have been bank statements or medical records. *Lichtenberger II*, 786 F.3d at 489. This was incorrect because the thumbnails were smaller images of child pornography and clicking on them merely enlarged the images. *Id.* at 480.

[103] *See infra* notes 105–112 and accompanying text.

[104] *See infra* notes 113–125 and accompanying text.

[105] *See Lichtenberger II*, 786 F.3d at 488 (citing the district court's finding that the search of a laptop is highly intrusive given the amount of data it can hold, and therefore the laptop is not

Court noted that in follow-up searches of physical containers, the risk to personal privacy is that the private searcher did not notice, or remember seeing, a particular object.[106] In the case of digital devices, which can hold vast amounts of information, the private searcher would have to click on every individual file to see all of the disk's contents.[107] Therefore, in follow-up searches of digital storage devices, the privacy risks are greatly increased.[108]

The Sixth Circuit highlighted these risks in *Lichtenberger*, explaining that digital devices can contain bank statements, medical records, personal correspondences, and a range of other material not discovered by the private searcher.[109] In *Runyan*, the police had no virtual certainty that the follow-up search of the CDs would reveal nothing else of significance.[110] The CDs accessed by the ex-wife could have contained tax forms or investment information in addition to child pornography.[111] The Fifth Circuit's use of the closed container approach, however, precluded the application of a "virtual certainty" test of scope, and violated Runyan's personal privacy rights.[112]

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comparable to a physical container); Kerr, *supra* note 1, at 555–56 (arguing that the physical container approach used in *Runyan* would lead to disturbing results given the amount of private information a digital device can contain); Palumbo, *supra* note 43, at 1000 (noting that network disk drives can contain information from a large group of individuals and that the closed container approach would mean that if one user's data was legally searched, then police could search other individuals' data stored on the same drive).

[106] *See* 466 U.S. 109, 119 (1984) (stating that the defendant's privacy is not further infringed if the government is simply avoiding the risk of false testimony or faulty memory from the private searcher and noting that the Officer's inspection of the package simply protected against the risk of misdescription).

[107] *See Lichtenberger II*, 786 F.3d at 489 (stating that the files viewed by Officer Huston could have been anything).

[108] *See id.* (noting that police could have discovered a range of private information unrelated to child pornography); *see also* Palumbo, *supra* note 43, at 1000 (suggesting that the search of a business man's computer in connection to financial fraud could reveal his wife's personal data stored on the same computer); *cf.* William Clark, Note, *Protecting the Privacies of Digital Life:* Riley v. California*, the Fourth Amendment's Particularity Requirement, and Search Protocols for Cell Phone Search Warrants*, 56 B.C. L. REV. 1981, 2008 (2015) (noting the unique threat to the "privacies of life" posed by searches of cell phones).

[109] *Lichtenberger II*, 786 F.3d at 489.

[110] *See Lichtenberger II*, 786 F.3d at 488–89 (noting that the "virtual certainty" test was not satisfied because there was a possibility that Officer Huston may have opened files that had not been examined by the private searcher); *Runyan*, 275 F.3d at 464 (noting that it was not clear whether police had viewed files that were the same or different than those viewed by the private searchers).

[111] *See Lichtenberger II*, 786 F.3d at 487–88 (quoting Riley v. California, 134 S. Ct. 2473, 2489 (2014)) (noting the different types of documents which could also be stored on a digital storage device); *see also* Palumbo, *supra* note 43, at 1000 (suggesting that the search of a business man's computer in connection to financial fraud could reveal his wife's personal data stored on the same computer).

[112] *See Runyan*, 275 F.3d at 464–65 (applying the container analysis instead of a "virtual certainty" test of scope when evaluating the police search of disks that were opened during the prior private search); Palumbo, *supra* note 43, at 999–1000 (arguing that the closed container

The Sixth Circuit correctly adopted the "virtual certainty" test of scope, but the court incorrectly applied the test given the specific facts of *Lichtenberger*, which show that Officer Huston was virtually certain that nothing else of significance would be revealed by his follow-up search.[113] The Sixth Circuit reasoned that because files cannot be viewed prior to clicking on them, the police officer could not have been virtually certain of what he was to discover.[114]

The court failed to consider, however, that the files at issue in *Lichtenberger* were displayed as thumbnails, smaller versions of the file's images.[115] The Sixth Circuit states that Officer Huston could have discovered documents such as bank statements, medical records, internet search histories, and personal communications among the photographs.[116] This was not the case, however, as the files Holmes discovered in her private search were displayed as thumbnail images, and thus they could not have been text-based documents.[117] Therefore, there was no risk of revealing other documents like those suggested by the court.[118] Holmes was not sure if she showed Officer Huston the same images that she had previously viewed, but there was little risk that the few files shown to Officer Huston would reveal anything else of significance other than images of child pornography.[119]

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approach would lead to exposure of a vast amount of private information). *Contra* Matejka, *supra* note 11, at 194 (arguing that the Sixth Circuit should have followed the persuasive authority of the Fifth and Seventh Circuit's decisions in *Runyan* and *Rann*).

[113] *See Lichtenberger II*, 786 F.3d at 490 (noting that Officer Huston's lack of virtual certainty was dispositive); *id.* at 481 (noting Holmes's testimony that she had viewed approximately one hundred photos of child pornography and Officer Huston's statement that he was shown four or five photographs).

[114] *See id.* at 489 (noting that the main folder was labeled "private" and the sub-folders were labeled with numbers, therefore Officer Huston could not have been sure if the files contained pornography or unrelated images or documents).

[115] *See id.* (stating that police could have discovered text-based documents such as bank statements and medical records). Holmes stated that she clicked on the sub-folders, which revealed images of child pornography displayed as thumbnails. *Id.* Clicking on specific thumbnails revealed larger versions of the images. *Id.*

[116] *Id.*

[117] *See id.* at 480 (noting Holmes's testimony that she found "thumbnails [*sic*] images of adults engaging in sexual acts with minors"); *see also Tosti*, 733 F.3d at 822 (noting that the private searcher and the detectives testified that a person could identify the photos as child pornography from the thumbnail images).

[118] *See Lichtenberger II*, 786 F.3d at 480 (noting Holmes's testimony that she found "thumbnails [*sic*] images of adults engaging in sexual acts with minors"). Holmes testified that she could tell the photos contained child pornography from the thumbnail images. *Id.*; *see also Tosti*, 733 F.3d at 822 (noting testimony that the thumbnail images could be identified as child pornography without clicking on them). In *United States v. Tosti* in 2013 the U.S. Court of Appeals for the Ninth Circuit ruled that police did not exceed the scope of a private search by viewing enlarged thumbnails of child pornography. 733 F.3d at 825.

[119] *See Lichtenberger II*, 786 F.3d at 481 (noting Holmes's testimony that the thumbnail images showed child pornography). Holmes testified that she clicked roughly one hundred images of

This understanding of the "virtual certainty" test emphasizes the key factors articulated by the Supreme Court in *Jacobsen*: the amount of information the government stands to gain, and the level of certainty regarding what they will find.[120] Here, Officer Huston was just confirming Holmes's testimony by viewing four or five images.[121] He did not search the entire computer or all of the contents of the folders.[122] As such, the government could have gained little information from the follow-up search.[123] Furthermore, Holmes's extensive private search of approximately one hundred photos of child pornography, and the fact that all the files were clearly images, made it "virtually certain" that the few images viewed by Officer Huston would also contain child pornography.[124] As Officer Huston's search did not exceed the scope of Holmes's prior search, the Sixth Circuit should have reversed the district court's ruling and remanded the case for trial.[125]

CONCLUSION

The Sixth Circuit's decision in *Lichtenberger* represents a necessary return to the fundamentals of the private search doctrine envisioned by the U.S. Supreme Court in *Jacobsen*. The closed container analysis used by the Fifth Circuit in *Runyan*, and adopted by the Seventh Circuit in *Rann*, fails to fully account for the unique attributes of electronic storage devices. This application of the container approach opened the door for violations of privacy that far exceeded the limits envisioned by the Supreme Court when crafting the private search doctrine. In *Lichtenberger*, the Sixth Circuit

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child pornography saved in a folder labeled "private," and it contained sub-folders labeled 2-12. *Id.* She later showed Officer Huston approximately four or five of the pictures in the folder. *Id.*; *see also* Matejka, *supra* note 11, at 196 (arguing that because Holmes had identified so many images in the folder as child pornography, the Sixth Circuit should have ruled that the "virtual certainty" test was satisfied).

[120] *See Jacobsen*, 466 U.S. at 119–20 (holding that the government search did not exceed the scope of the private search because the advantage gained by the government was merely avoiding a flaw in the private party's recollection and that there was a "virtual certainty" that nothing else of significance would be found).

[121] *Lichtenberger II*, 786 F.3d at 481. After seeing a few images of the child pornography, Office Huston asked Holmes to shut down the computer, and he called his supervisor for further instructions. *Id.* at 480.

[122] *Id.* at 481.

[123] *See id.* at 480–81 (noting Holmes testimony that the files in the sub-folder were displayed as thumbnail images). Given the thumbnail images, there was no danger that Officer Huston would see any documents other than pictures. *Id.* Furthermore, Officer Huston only viewed four or five of the images, whereas Holmes had already viewed approximately one hundred images, which all contained child pornography. *Id.*

[124] *Id.*; *see also* Matejka, *supra* note 11, at 196 (arguing that the virtual certainty test was satisfied).

[125] *See* Matejka, *supra* note 11, at 196 (arguing that because Holmes knew that the majority of the images in the folder were child pornography, the "virtual certainty" test was satisfied).

rightly declined to adopt the closed container approach, instead returning to the "virtual certainty" test articulated by the Supreme Court in *Jacobsen*. The Sixth Circuit adopted the correct test of scope, but erred in applying the test to the facts of the case.

STEPHEN LABRECQUE

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