Criminal Procedure: Tenth Circuit Erroneously Allows Officers' Intentions to Define Reasonable Searches: *United States v. Carey*

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I. Introduction

New technologies create interesting challenges to long established legal concepts. Thus, just as when the telephone gained nationwide use and acceptance, when automobiles became the established mode of transportation, and when cellular telephones came into widespread use, now personal computers, hooked up to large networks, are so widely used that the scope of the Fourth Amendment core concepts of "privacy" as applied to them must be reexamined.

— Chief Judge Cox, United States v. Maxwell1

It is indisputable that computers have become an integral component of the everyday lives of millions of Americans. According to a report released in October 2000 by the United States Department of Commerce, over 50% of the households in the United States have a personal computer and over 40% have access to the Internet.2 Millions of Americans store financial, family, health, and other personal information on their computers.3 Because of the widespread use of electronic mail as a form of communication, people now store the same intimate information on their computers as they formerly reserved for private letters to family and friends. This creates a clear need for courts to vigorously protect Americans' rights of privacy with respect to information on their computers.

Unfortunately, the computer age has also created a new tool for criminals.4 The need to combat criminal use of this new tool has the potential of diminishing the Fourth Amendment rights of persons possessing or using computers.5 "The central

3. Id.
4. As one official stated: The Internet has resulted in new and exciting ways for people to communicate, transfer information, engage in commerce, and expand their educational opportunities. . . . Yet, as people have increasingly used computers for lawful purposes, so too have criminals increasingly exploited computers to commit crimes and to harm the safety, security, and privacy of others.

The concern of the Fourth Amendment is to protect liberty and privacy from arbitrary and oppressive interference by government officials. The need to combat the evils of crime and the need to vigilantly protect the Fourth Amendment rights of Americans do create a tension, but this tension is not new. It is precisely what has led to voluminous case law and commentary on Fourth Amendment jurisprudence. Courts have repeatedly faced the challenge of applying language from a centuries-old Constitution to situations that the authors of that Constitution could never have contemplated.

Fourth Amendment jurisprudence relating to searches and seizures of electronic information is still in its infancy, but courts will undeniably face a growing number of cases relating to searches of computers. Courts will be required to develop standards for evaluating such searches under the Fourth Amendment. It is imperative that, in creating such standards, courts not rewrite the Fourth Amendment or alter time-tested principles of Fourth Amendment jurisprudence. Instead, courts must adapt to new technology by applying established Fourth Amendment principles to searches and seizures involving new technology.

In United States v. Carey, the Tenth Circuit chose to depart from a firmly entrenched principle of Fourth Amendment jurisprudence. The Carey court indicated that an officer's subjective expectations during a search of a computer hard drive are relevant in a review of the constitutionality of the search under the Fourth Amendment. By so holding, the court departed from a clear line of Supreme Court cases that require courts to consider only objective criteria when engaging in Fourth Amendment analysis. Not only is a subjective analysis contrary to the plain language of the Fourth Amendment and Supreme Court precedent, but it also creates dangers of results that are inconsistent and that hinge almost entirely on an officer's training or experience. The flaws in the Carey decision highlight the need for courts to develop and apply objective criteria for Fourth Amendment analysis of searches of computers.

This note examines the development of the Supreme Court's interpretation of the objective requirement of Fourth Amendment analysis and discusses how courts should apply this objective requirement to searches of computer files. Part II examines the development of the objective criteria requirement, highlighting the Supreme Court's and Tenth Circuit's prior failed attempts at a more subjective analysis. Part III examines the Tenth Circuit's application of a subjective standard in Carey. Part IV analyzes the Carey decision and evaluates the potential implications of the decision. Part V discusses proper criteria for courts to consider in evaluating

6. United States v. Ortiz, 422 U.S. 891, 895 (1975) (discussing the Fourth Amendment in the context of searches of vehicles at traffic checkpoints). The Fourth Amendment to the U.S. Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no 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.

U.S. Const. amend. IV.

7. 172 F.3d 1268 (10th Cir. 1999), reh'g denied, 172 F.3d 1268 (1999).
which files an officer may open during a search of a computer hard drive and applies an objective analysis to Carey.

II. Background and Law Prior to the Case

A. The Supreme Court’s First Clear Discussion of the Requirement of an Objective Analysis

In Scott v. United States, the Court noted that it had never discussed at length the issue of whether analysis of alleged Fourth Amendment violations should involve objective or subjective assessments. However, the Court observed that "almost without exception" it has undertaken an "objective assessment of an officer's actions in light of the facts and circumstances then known to him." In Scott, the defendant challenged the introduction of telephone conversations intercepted pursuant to an authorized wiretap. The district court suppressed the evidence obtained from the interceptions because the officers were aware of the minimization requirement associated with such wiretaps and purposefully made no effort to comply with the requirement.

The Supreme Court rejected this subjective analysis and explained that "the fact that the officer does not have the state of mind which is hypothesized by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." The Court cited United States v. Robinson, in which a search incident to arrest was challenged on the ground that the officer's motivation for searching was not consistent with the legal justification for the "search incident to arrest" exception. In Robinson, the Court held that an officer's subjective expectations are irrelevant to a search incident to arrest.

The Scott Court explained that the language of the Fourth Amendment proscribes only unreasonable searches and seizures. It noted that in Terry v. Ohio, the

9. Id. at 137.
10. Id.
11. The court explained that "wiretapping or electronic surveillance [must] be conducted in such a way as to minimize the interception of communications not otherwise subject to interception." Id. at 130 (citing 18 U.S.C. § 2518(5) (1976)).
12. Id. at 133-34.
13. Id. at 138.
15. There are "two historical rationales for the 'search incident to arrest' exception: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial." Knowles v. Iowa, 525 U.S. 113, 116 (1998) (citing Robinson, 414 U.S. at 234).
17. "'Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that [the officer] did not indicate any subjective fear of the respondent or that he did not himself suspect that respondent was armed.'" Id. (alteration in original) (quoting Robinson, 414 U.S. at 236).
18. Id. at 137.
Court "emphasized the objective aspect of the term 'reasonable'."  The Court explained:

The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard; would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate?  

B. Prior Failed Attempts at a Subjective Analysis

1. The Rise and Fall of the Inadverence Test

At one time the Supreme Court did imply that a subjective analysis was appropriate in Fourth Amendment cases. In Coolidge v. New Hampshire, the Court, in a plurality opinion, announced the "inadverence" plain view doctrine. The doctrine requires that for evidence to be admissible under the plain view exception, the discovery of the evidence must be inadvertent. Under this rule, the plain view exception would not apply where police "know in advance the location of the evidence [of other crimes] and intend to seize it."

However, the portion of the opinion that announced the inadverence requirement did not command a majority of the Court and was therefore not considered binding precedent. Later the Court clearly overruled the inadverence portion of the Coolidge opinion in Horton v. California:

Even-handed law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer. The fact that an officer is

20. Scott, 436 U.S. at 137.
21. Id. (quoting Terry, 392 U.S. at 21-22).
23. Id. at 469.
24. Id.
25. Id. at 469-70.
26. Part II.C of the opinion announced the inadverence requirement. Id. This part of Justice Stewart's opinion was only joined by Justices Douglas, Brennan, and Marshall. Id. at 445.
27. See, e.g., Texas v. Brown, 460 U.S. 730, 737 (1983) (explaining that the inadverence portion of the Coolidge opinion is "not a binding precedent").
28. 496 U.S. 128 (1990). While it abolished the subjective element of the Coolidge plain view doctrine, the Court listed with approval three objective elements of plain view searches found in prior opinions. First, the officer must be "lawfully located in a place from which the object can be plainly seen." Id. at 137. Second, the officer "must also have a lawful right of access to the object itself." Id. Third, "not only must the item be in plain view, its incriminating character must also be 'immediately apparent.'" Id. at 136 (citing Coolidge, 403 U.S. at 466).
interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is confined in area and duration by the terms of a warrant or a valid exception to the warrant requirement. . . . [I]f he or she has a valid warrant to search for one item and merely a suspicion concerning the second, whether or not it amounts to probable cause, we fail to see why that suspicion should immunize the second item from seizure if it is found during a lawful search for the first.29

The Court explained that the inadvertence requirement does nothing to accomplish the goal of preventing police from converting specific warrants into general warrants.30 Adherence to the requirements that (1) a warrant particularly describe the place to be searched and the things to be seized, and (2) a warrantless search be limited by the exigencies that justify its inception sufficiently protects against this danger.31 "Once those commands have been satisfied and the officer has a lawful right of access, however, no additional Fourth Amendment interest is furthered by requiring that the discovery of evidence be inadvertent."32

2. Another Subjective Test Fails — The Pretext Doctrine

As Supreme Court cases eroded the applicability of the subjective inadvertence test, two other tests for examining Fourth Amendment complaints developed in the federal courts of appeals. In United States v. Guzman,33 the Tenth Circuit examined these two tests.34 Guzman involved a traffic stop35 where the officer told the occupants of the vehicle that he was stopping them for failure to wear a seatbelt.36 The officer admitted in court that he was actually attempting to determine whether the defendants were hauling contraband.37 Thus, the Tenth Circuit faced the task of determining whether subjective or objective criteria should be used in evaluating the constitutionality of a traffic stop.38

The court first acknowledged that an objective approach is appropriate, and then proceeded to determine what factors are relevant to an objective approach.39 Other circuits were not in agreement on what objective elements should be examined.40

29. Id. at 138-39.
30. Id. at 139.
31. Id. at 139-40.
32. Id. at 140.
33. 864 F.2d 1512 (10th Cir. 1988).
34. Id. at 1515-16.
35. Cases regarding traffic stops are relevant to Fourth Amendment analysis because a traffic stop is a seizure within the scope of the Fourth Amendment. Whren v. United States, 517 U.S. 806, 809-10 (1996). "An automobile stop is thus subject to the constitutional imperative that it not be 'unreasonable' under the circumstances." Id. at 810.
36. Guzman, 864 F.2d at 1514.
37. Id.
38. Id. at 1515.
39. Id.
40. Id.
The Eleventh Circuit had determined that the proper inquiry "is not whether the officer could validly have made the stop but whether under the same circumstances a reasonable officer would have made the stop in the absence of the invalid purpose."41 The Fifth Circuit had rejected this test and declared that an act is authorized so long as the police "do no more than they are objectively authorized and legally permitted to do."42

The Guzman court determined that the Eleventh Circuit's "would" standard was proper. Under this standard, a "stop [i]s unreasonable not because the officer secretly hope[s] to find evidence of a greater offense, but because it [i]s clear that an officer would have been uninterested in pursuing the lesser offense absent that hope."43 In adopting this standard, the court attempted to create an objective test that still allowed the judiciary to meaningfully review officers' actions.44 Under the "would" standard, actions of an officer that are consistent with common police practices in the region are not invalidated simply because the officer may actually have had an alternative motive to act.45

The "would" standard prevailed for only seven years in the Tenth Circuit. In United States v. Botero-Ospina,46 the Tenth Circuit expressly overruled Guzman.47 It did so after extensively reviewing the holdings and rationale of a clear majority of federal and state courts that rejected the standard.48 The Botero-Ospina court also examined its own application of Guzman and found that it had proven "unworkable."49 The Guzman standard had been applied inconsistently50 and it had made the validity of officers' actions "subject to the vagaries of police departments' policies and procedures."51

Under the objective standard adopted in Botero-Ospina, it is irrelevant that an officer intended or expected to find evidence of another crime as long as the officer's actions are objectively justified.52 Even though the Guzman court claimed that the "would" standard was objective, the Botero-Ospina court acknowledged that the new standard complied better with the Supreme Court's requirement that Fourth Amendment analysis be objective.53

41. Id. (quoting United States v. Smith, 799 F.2d 704, 709 (11th Cir. 1986)).
42. Id. at 1515-16 (quoting United States v. Causey, 834 F.2d 1179, 1184 (5th Cir. 1987) (en banc)).
43. Id. at 1517 (alteration in original) (quoting Smith, 799 F.2d at 710).
44. Id.
45. Id. at 1518.
46. 71 F.3d 783 (10th Cir. 1995).
47. Id. at 787.
48. Id. (citing cases from eight federal circuit courts and several state supreme courts that rejected the Guzman standard).
49. Id. at 786.
50. The court noted that in Guzman, it examined the officer's actions against the "usual police practices . . . of the entire New Mexico police force," while in other instances it focused on the practices of a particular law enforcement unit or even on the practices of the individual officer. Id.
51. Id. at 788 (quoting United States v. Ferguson, 8 F.3d 385, 392 (6th Cir. 1993)).
52. Id. at 787-88.
53. Id. at 787.
Shortly after the Botero-Ospina decision, the Supreme Court addressed the issue of whether the appropriate standard is whether an officer would have acted or whether an officer could have acted. In Whren v. United States, the Court rejected the "would" standard and stated that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." The Court explained that the "would" standard was actually a subjective analysis disguised in objective terms. "Instead of asking whether the individual officer had the proper state of mind, the ["would" standard] would have us ask, in effect, whether [based on general police practices] it is plausible to believe that the officer had the proper state of mind." The Court then made an interesting observation that is crucial to understanding the inherent error in the "would" standard or any other subjective Fourth Amendment analysis. The Court noted the oddity of creating a pretext standard that does not consider actual and admitted pretext, but rather that attempts to identify pretext by comparing an officer's actions to standard police practices. The Court reasoned that this standard evolved because prior Supreme Court cases had foreclosed the option of considering actual and admitted pretext. The Court acknowledged that the "would" standard might make sense if the Court had based its prior rejections of pretext on the difficulty in establishing actual subjective intent. However, the Court did not base its rejection on this difficulty. "[The cases'] principal basis — which applies equally to attempts to reach subjective intent through ostensibly objective means — is simply that the Fourth Amendment's concern with 'reasonableness'..."  

55. Id. at 813; see also Bond v. United States, 529 U.S. 334, 338 n.2 (2000) ("[T]he subjective intent of the law enforcement officer is irrelevant in determining whether the officer's actions violate the Fourth Amendment."). This does not mean that subjective intent is always irrelevant to determining the constitutionality of a search. In Ferguson v. City of Charleston, 121 S. Ct. 1281, 1292 (2001), the Court found that drug tests taken by medical personnel at a state hospital are unconstitutional searches when the tests are taken "for the specific purpose of incriminating [the] patients." The Court found that the hospital and law enforcement had designed a system of testing pregnant women specifically with a law enforcement purpose in mind, and the court found that this purpose removed the searches from the "special needs" doctrine that the State claimed they fit within. Id. at 1291-92. The Court clearly employed a subjective analysis of the searches. The Ferguson decision, however, can be distinguished from the cases discussed throughout this note. Ferguson involved a situation in which probable cause undisputedly did not exist for a search, but the State claimed that probable cause was not necessary because the tests fell within the "special needs" doctrine. Id. at 1287-88 (noting that neither of the lower courts "concluded that any of the nine criteria used to identify the women to be searched provided either probable cause to believe that they were using cocaine, or even the basis for a reasonable suspicion of such use"). This note addresses cases in which probable cause clearly exists for a search, and the issue is only whether an officer's subjective intent or expectations control where the officer may search for the relevant evidence.  
56. Whren, 517 U.S. at 813-14.  
57. Id. at 814.  
58. The Court acknowledged that the "would" standard does not expressly use the term "pretext," but it is actually designed to combat the "perceived 'danger' of the pretextual stop." Id.  
59. Id.  
60. Id.
allows certain actions to be taken in certain circumstances, *whatever* the subjective intent.\textsuperscript{61}

This Supreme Court language is important because it clarifies the *purpose* of the prohibition against a subjective Fourth Amendment analysis. A subjective analysis is not improper simply for pragmatic reasons. It is improper because the Supreme Court has repeatedly interpreted the plain language of the Fourth Amendment as requiring an entirely objective approach. Therefore, even where no question exists as to an officer's actual subjective motive for acting, such as where an officer admits to an improper motivation, a subjective analysis remains inappropriate.\textsuperscript{62}

**III. United States v. Carey**

**A. The Facts and Arguments**

Police charged Patrick Carey with possessing a computer hard drive containing three or more images of child pornography under 18 U.S.C. § 2252A(a)(5)(B).\textsuperscript{63} Police had been investigating Carey for possession and distribution of cocaine and had completed controlled buys from him at his residence. After obtaining a warrant for his arrest, officers arrested Carey at his home. The officers noticed various paraphernalia and possible marijuana in the house, and obtained consent to search Carey's residence. They found and seized two personal computers during the consent search.

The officers took the computers to the police station and obtained a warrant to search for "names, telephone numbers, ledger receipts, addresses, and other documentary evidence pertaining to the sale and distribution of controlled substances."\textsuperscript{64} Detective Lewis and a computer technician began searching the computers by viewing the directories of both computers' hard drives, and they soon noticed numerous JPG\textsuperscript{65} files with sexually suggestive titles. They then downloaded the

\textsuperscript{61} *Id.* at 814.

\textsuperscript{62} This forecloses the possibility of an exception to the objective requirement where the officer admits to an improper motive, although such an exception has been proposed by at least one commentator. Loren Keith Newman, Comment, Horton v. California: *Searching for a Good Cause*, 46 U. MIAMI L. REV. 455, 499 (1991) ("However, there must be one exception: where an officer makes a statement against interest by testifying that he deliberately acted on a pretext to evade the warrant requirement, the admission should be conclusive proof that a seizure was unconstitutional.").

\textsuperscript{63} This statute provides:

(a) Any person who

\ldots

(B) knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains [three] or more images of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, shall be punished as provided in subsection (b).


\textsuperscript{64} United States v. Carey, 172 F.3d 1268, 1270 (10th Cir. 1999).

\textsuperscript{65} JPG files, also known as JPEG files, are a type of file containing images. *Id.* at 1271. "JPEG
contents of the hard drives onto floppy disks, printed the directories, and began searching the files on another computer. They initially searched the files by entering "words such as 'money, accounts, people, so forth' into the computer's explorer to find 'text-based' files containing those words." This search produced no relevant evidence.

Detective Lewis "continued to explore the directories and encountered some files he 'was not familiar with.'" Unable to view these files on the computer he was using, Detective Lewis transferred the files to another computer using a floppy disk and "was 'immediately' able to view what he later described as a 'JPG file.'" He opened the file and discovered that it contained child pornography. Detective Lewis then downloaded approximately 244 JPG files to nineteen disks. He looked at five to seven files on each disk to determine whether they contained child pornography. He then continued searching the computers for evidence of drug crimes.

Detective Lewis testified that after he opened the first JPG file, he had probable cause to believe that the other JPG files contained child pornography. However, he also testified that he did not know the contents of any file until he opened it and that he did not believe he was restricted from searching JPG files for the evidence set out in the warrant. Detective Lewis testified that even though the directory printout revealed that the JPG files had sexually explicit titles, they could have contained drug evidence because "drug dealers often obscure or disguise evidence of their drug activity." He also explained that JPG or other image files could contain evidence pertinent to a drug investigation such as pictures of "a hydroponic growth system and how it's set up to operate." Even though he knew each of the JPG files contained an image, he claimed he "wasn't conducting a search for child pornography," but that happened to be what these turned out to be.

Carey claimed that Detective Lewis exceeded the scope of the search warrant by opening and seizing the JPG files. He argued that by searching the JPG files, Detective Lewis transformed the search of the computer into exactly the type of "general rummaging" prohibited by the Fourth Amendment. He claimed that the search constituted "'flagrant disregard' for the terms of the warrant."


66. Carey, 172 F.3d at 1271.
67. Id.
68. Id.
69. Id. at 1271 n.3.
70. Id. at 1270 n.2.
71. Id. at 1271.
72. Id. Carey also claimed that he did not actually consent to the search of his residence and that the officers did not have probable cause to seize the computers. Id. The court did not reach these issues. Id.
73. Id. at 1272.
74. Id.
The government claimed that the evidence gleaned from opening the JPG files was admissible under the plain view doctrine. The government compared a search of a computer hard drive to a search of a physical file cabinet, and argued that this case was no different than an officer searching physical files pursuant to a warrant and finding child pornography in the files. Further, the government claimed that the warrant authorized Detective Lewis to search any file on the computer because any file could have contained evidence within the scope of the warrant.

B. The Decision and Reasoning

The Carey court held that a search of JPG files with sexually explicit titles is outside the scope of a search for textual information related to drug crimes where the officer subjectively expects to find only evidence of other crimes in the JPG files. The court explained that because of the massive amounts of data that can be stored on computers, searches and seizures of computer files may require different treatment than searches of files in file cabinets. The nature of computers may require that an officer engage in an intermediate step of obtaining direction from a magistrate regarding which files may be opened in a search.

The Carey court considered it important that Detective Lewis, after opening the first JPG file, expected to find child pornography instead of material related to drugs. "In his own words . . . his suspicions changed immediately upon opening the first JPG file. . . . Thus, because of the officer's own admission, it is plainly evident each time he opened a subsequent JPG file, he expected to find child pornography and not material related to drugs." Because of Detective Lewis's expectations, the contents of the JPG files were not "inadvertently" discovered.

The court reasoned that it could "infer from his testimony Detective Lewis knew he was expanding the scope of his search when he sought to open the JPG files." According to the court, the officer could not justify this expansion because the computer was already seized and out of the control of Mr. Carey. Therefore, no exigent circumstances permitted Detective Lewis to open files outside the scope of the warrant.

The court also noted that because computers contain such a great quantity and variety of information, searches of "computers make tempting targets in searches for incriminating information." Therefore, officers searching computers should

75. Id.
76. Id.
77. Id.
78. Id. at 1272-74.
79. Id. at 1274-75.
80. Id. at 1275.
81. See id. at 1273.
82. Id.
83. Id.
84. Id.
85. Id. at 1275.
86. Id. (citing Raphael Winick, Searches and Seizures of Computers and Computer Data, 8 HARV. J.L. & TECH. 75, 105 (1994)).
"engage in the intermediate step of sorting various types of documents and then only search the ones specified in a warrant." If documents are intermingled, an officer may be required to obtain guidance on the conditions and limitations of the search from a magistrate. The court explained that officers can use several methods to search a computer hard drive. These include "observing files [sic] types and titles . . . on the directory, doing a key word search for relevant terms, or reading portions of each file stored in the memory." The court noted that, in this case, Detective Lewis did use a search to attempt to find relevant key words, but he did not use the results of that test to narrow the search.

IV. Analysis and Implications of the Carey Opinion

A. The Resurrection of Subjective Analysis in Carey

Throughout the Carey opinion, the court repeatedly analyzed the subjective intent and expectation of Detective Lewis at the time he opened the JPG files. The court not only found that the searches of all the JPG files (except the first one opened) were unconstitutional because of Detective Lewis's subjective expectations, but it also indicated that the search of the first file might be constitutional because of Detective Lewis's expectations. This analysis clearly runs contrary to the line of Supreme Court cases holding that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."

The Carey court briefly engaged in an analysis of the objective reasonableness of the search by stating that "the case turns upon the fact that each of the files containing pornographic material was labeled 'JPG' and most featured a sexually suggestive title." However, the court went on to use this objective analysis to point out the officer's subjective intent and expectations. In the following sentences, the court stated:

Certainly after opening the first file and seeing an image of child pornography, the searching officer was aware — in advance of opening the remaining files — what the label meant. When he opened the subsequent files, he knew he was not going to find items related to drug activity as specified in the warrant.

87. Carey, 172 F.3d at 1275.
88. Id.
89. Id. at 1276.
90. Id.
91. The court noted that "until he opened the first JPG file, he stated he did not suspect he would find child pornography." Id. at 1273. "Given the officer's testimony that he inadvertently discovered the first image during his search for documents relating to drug activity, our holding is confined to the subsequent opening of numerous files the officer knew, or at least expected, would contain images of child pornography." Id. at 1273 n.4.
93. Carey, 172 F.3d at 1274.
94. Id.
The court stated that even if it were to accept the government's argument that computer files are analogous to files in a file cabinet, "[t]he testimony of Detective Lewis makes the analogy inapposite because he stated he knew, or at least had probable cause to know, each drawer was properly labeled and its contents were clearly described in the label." 95 Once again, the court expressed concern with what Detective Lewis believed he knew or had probable cause to know, rather than with what a reasonable officer would have known or had probable cause to know in the same situation. Clearly, the court used an inherently subjective standard, focusing on the intent and expectations of the individual officer rather than on the reasonableness of the officer's actions.

By making this statement in the context of discussing a search of a file cabinet, the Carey court seems to extend its holding beyond searches of computer hard drives. Under this holding, even if an officer has a lawful right under an objective standard to examine the contents of every file in a file cabinet, the search becomes invalid if the officer subjectively believes the files will not contain the evidence listed in the search warrant.

This holding in Carey is clearly contrary to both Supreme Court and Tenth Circuit precedent. 96 Furthermore, it poses a danger to the criminal justice system for at least two reasons. First, if a court relies on an officer's subjective intent in evaluating a search or seizure, that officer has an incentive to testify that his subjective intent was proper. Arguably, this danger also exists when applying an objective standard because an officer also has incentive to lie about objective facts. However, objective facts can often be independently verified or disproved, whereas an officer's subjective intent or expectations cannot be proven unless the officer has communicated those thoughts to another individual who is willing to testify.

Second, a subjective analysis rewards law enforcement for using untrained officers. An untrained officer might not know that certain types of evidence will usually only be found in certain types of computer files. The officer can then truthfully testify that he intended to search for and expected to find that evidence every time he opened a computer file. Even if a reasonable person would have known that the evidence could not be found in the files the officer searched, a court relying on the searching officer's subjective intent or expectations might find the evidence admissible because the officer's intent was proper.

The concurring opinion of Judge Baldock in Carey demonstrates the danger in applying a subjective standard. Judge Baldock wrote a concurring opinion "to emphasize that the questions presented in this case are extremely close calls and . . . totally fact driven." 97 He stated that "absent Detective Lewis' testimony, [he] would

95. Id. at 1275.
96. See Horton v. California, 496 U.S. 128, 139 (1990) (holding that where an officer has a search warrant for one item, the officer's suspicion or probable cause as to a second item should not immunize the second item from seizure if found during a lawful search for the first item); United States v. Botero-Ospina, 71 F.3d 783, 787-88 (10th Cir. 1995) (holding an officer's secret hope of finding evidence of other crimes is irrelevant as long as the officer's actions are objectively justified).
97. Carey, 172 F.3d at 1276 (Baldock, J., concurring).
not suppress the evidence."

Judge Baldock explained that "it was clear to [Detective Lewis] that he discovered the first image, he had probable cause to believe the computer contained additional images of child pornography." Thus, just as the majority, Judge Baldock examined Detective Lewis's intent and expectations, rather than the objective reasonableness of his actions.

The significance of Judge Baldock's opinion is his statement regarding what the result would have been absent Detective Lewis's testimony about what he subjectively expected to find. Judge Baldock wrote, "[If the record showed that Detective Lewis had merely continued his search for drug-related evidence and, in doing so, continued to come across evidence of child pornography, I think a different result would be required.]

By this statement, Judge Baldock indicated that subjective intentions are relevant in determining inclusiveness as well as exclusiveness of evidence. Not only was evidence in Carey excluded based on Detective Lewis's subjective expectations, but the evidence might have been included based on his subjective expectations, even if the search was objectively unreasonable. This highlights the potential, in some cases, for the result to depend on the officer's training or experience because the officer's subjective expectations will inevitably depend on this training or experience.

B. Other Cases that Evidence the Danger of the Carey Decision

The dangers of the Carey court's subjective analysis can also be seen in subsequent cases that rely on Carey. In United States v. Gray, an FBI Computer Analysis Response Team (CART) agent assisted an FBI case agent in searching computer hard drives for evidence that the owner of the computers had infiltrated computers at the National Institute of Health's National Library of Medicine (NLM). The CART agent transferred files to a CD-ROM for the case agent to examine. As he transferred the files, the CART agent used a program called CompuPic to view "thumbnail-sized images of all the items contained within that file, pictures or text documents." The CART agent testified that this was a routine practice undertaken to search for the materials listed in the warrant for the purpose of facilitating the case agent's search.

While transferring files, the CART agent came across a directory labeled "tiny teen," which contained numerous JPG files. The CART agent viewed one of the JPG files and discovered that it contained child pornography. The CART agent testified that he wondered if the JPG file would contain evidence of child pornography, but that he opened the file while systematically searching for NLM documents. Upon discovering the child pornography, the agent ceased his search and obtained a second warrant to search the computer for child pornography.

98. Id.
99. Id.
100. Id. at 1277.
102. Id. at 526-27.
The court rejected the defendant's argument that it was unreasonable for the agent to view JPG files because the type of information the agents were searching for would be found in text files. The court reasoned that the agent "would have been remiss not to search files with a '.jpg' suffix simply because such files are generally picture files, and he believed the ... materials were more likely to be text files." According to the court, experienced computer hackers often intentionally mislabel files and directories in order to conceal information. Further, the court noted that during the search the agent actually did find "some text files mixed with picture files." The court explained that "this serves to underscore the soundness of the conclusion that Agent Ehuan was not required to accept as accurate any file name or suffix and limit his search accordingly." In a "search for records or documents, '[i]nocuous records must be examined to determine whether they fall into the category of those papers covered by the search warrant." The court explained that "searches of computer records 'are no less constitutional than searches of physical records, where innocuous documents may be scanned to ascertain their relevancy.'"

Up to this point, the Gray court's analysis seemed to be based on the objective reasonableness of the agent's actions. However, when the court began discussing the Carey decision, it entered into a subjective analysis. The court distinguished the facts of Gray from Carey based on the subjective intent of the officers. The court noted that the Carey court suppressed evidence because the officer testified that he was searching for evidence of child pornography when he opened the files, whereas in Gray the agent was only continuing his systematic search for NLM documents. The court then observed that "[a]rguably, Agent Ehuan could have continued his systematic search of defendant's computer files pursuant to the first search warrant, and, as long as he was searching for the items listed in the warrant, any child pornography discovered in the course of that search could have been seized."

103. Id. at 529.
104. Id.
105. Id.
106. Id.
107. Id. at 528 (quoting United States v. Kufroch, 997 F. Supp. 246, 264 (D. Conn. 1997), which cited Andresen v. Maryland, 427 U.S. 463, 482 n.11 (1976)). The court in Andresen stated:

We recognize that there are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers that are not necessarily present in executing a warrant to search for physical objects whose relevance is more easily ascertainable. In searches for papers, it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized. Similar dangers, of course, are present in executing a warrant for the "seizure" of telephone conversations. In both kinds of searches, responsible officials, including judicial officials, must take care to assure that they are conducted in a manner that minimizes unwarranted intrusions upon privacy.

109. Id.
110. Id. at 531 n.11.
like Judge Baldock's concurring opinion in Carey, this statement by the Gray court indicates that as long as the officer has an appropriate subjective intent, the search may be deemed reasonable regardless of the objective reasonableness of the officer's actions.

State v. Schroeder\(^{111}\) involved a similar fact pattern. In Schroeder, a state crime-lab analyst searched a computer hard drive for evidence relating to online harassment. The defendant had told investigators that the computer contained child pornography. While conducting a systematic search of the files on the hard drive, the analyst found child pornography. The analyst then ceased the search and investigators obtained a warrant to search for child pornography. The court admitted the evidence under the plain view exception after examining both Gray and Carey.\(^{112}\) It then noted that, even without the second warrant, "[c]onceivably all the images could fall under the plain view doctrine, provided that the agent continued the search under the original warrant, only actively seeking evidence of the underlying crime."\(^ {113}\) The test of whether an officer is "actively seeking" certain types of evidence is subjective. Thus, similar to Carey and Gray, Schroeder indicates that not only is an officer's subjective intent relevant, it may be dispositive on the issue of the constitutionality of a search or seizure.

These cases illustrate an inherent problem with a subjective analysis of Fourth Amendment issues. A subjective analysis ignores the reasonableness of the officer's actions, even though reasonableness is the standard set forth in the text of the Fourth Amendment. The Supreme Court experimented with a subjective analysis with the inadvertence doctrine but later rejected the doctrine because it was not consistent with the reasonableness requirement of the Fourth Amendment.\(^{114}\) The Tenth Circuit experimented with a subjective analysis with the "would" pretext standard but eventually found this subjective standard unworkable and dangerous.\(^{115}\)

Despite the textual mandate of the Fourth Amendment itself and several prior judicial rejections of a subjective Fourth Amendment analysis, the Tenth Circuit has again conducted a subjective assessment of an officer's actions, and other courts have indicated that they might follow suit. Yet, courts will face the same difficulties and dangers they previously faced in applying a subjective standard. More importantly, a subjective standard directly contradicts the language of the Fourth Amendment and the Supreme Court's interpretation and application of that language. The Fourth Amendment prohibits "unreasonable" searches and seizures, and reasonableness demands an objective assessment.

\(^{111}\) 2000 WI APP 128, 613 N.W.2d 911.
\(^{112}\) Id. ¶ 16, 613 N.W.2d at 916-17.
\(^{113}\) Id. ¶ 16 n.3, 613 N.W.2d at 917 n.3.
\(^{115}\) United States v. Botero-Ospina, 71 F.3d 783, 787 (10th Cir. 1995).
V. A Proper Objective Standard for Computer Searches

A. The Threshold Issue — Is It Reasonable to Believe the Evidence Would Have Been Disguised?

Clearly, the Fourth Amendment demands the use of objective criteria when evaluating the reasonableness of the scope of a search. When examining the reasonableness of looking for physical objects, applying objective criteria is usually fairly simple. For example, it is obviously unreasonable to search for a stolen rifle in a film canister. A court can take judicial notice of the obvious, objective fact that a rifle cannot fit in a film canister.

On the other hand, courts face a more difficult task in examining the reasonableness of searching for certain types of evidence of particular crimes in specific computer files. The criterion for determining the reasonableness of the search for the rifle is the size of the rifle as compared to the size of the container. The criteria for determining the reasonableness of searches of computer files are less apparent and, at first glance, appear to be much more technical.

For example, searches of computer files raise the following issues: Is it reasonable for an officer to search through directories labeled with names that indicate they have no rational relation to the evidence being sought? Is it reasonable to open files labeled with names that indicate they have no rational relation to the evidence being sought? Is it reasonable to open files with a suffix that indicates they are audio files when the officer is only authorized by a warrant to search for information that would normally be found in text files?

The answers to these questions turn on whether it is reasonable to believe that the person labeling the file or directory would have disguised the labels in an effort to hide the true nature of the information contained therein. For example, suppose an officer has a search warrant to search a corporation's computers for information related to a specific employee, and the type of information being sought would normally only be found in the corporation's personnel records. If the corporation has created separate directories, which each contain information about a different employee, then it is probably not reasonable for the officer to search all directories and files on the corporation's computers for the appropriate information. It is probably not even reasonable for the officer to search all text files or all employee-related files for information about the employee in question. Absent special circumstances, it is not reasonable to believe that the corporation would disguise

116. It is important to note that in computers operated by a Windows* operating system, it is relatively simple to modify the names of directories and to modify the names and suffixes of files. See KATHY IVENS, USING MICROSOFT WINDOWS*95 75-76, 84-93 (1998). Windows* operating systems operate at least 95% of Intel-compatible personal computers. United States v. Microsoft, 84 F. Supp. 2d 9, ¶ 35 (D.D.C. 1999).

117. A special circumstance might exist if the corporation is involved in the crime for which the employee is being investigated. In that situation, it might be reasonable to believe that the corporation would have disguised incriminating files. Another special circumstance might exist if the employee has
the directories and filenames to confuse someone. In fact, it is more likely that the files would be properly labeled so records would be convenient for the corporation to use. Therefore, in such a case, an officer should examine the directories to narrow his search. It might then be helpful to conduct a keyword search using relevant terms to attempt to further narrow the search. Only then should the officer begin opening files and scanning them for relevant information.

On the other hand, a drug trafficker will not likely label computer files with incriminating names such as "methamphetamine lab profits," "suppliers," "drug dealing records," etc. Therefore, it is more reasonable to believe that a drug dealer will disguise the files with apparently innocent names or suffixes. Similarly, it may be likely that a sophisticated computer hacker will attempt to conceal information by disguising incriminating information with misleading filenames or suffixes. In such a situation, officers have no way to determine whether a file contains evidence without systematically opening every file to briefly examine its contents and evaluate its relevance, just as, in a noncomputer records search, an officer may have no way to determine the contents of a file without opening it.

access to and control over the files.

118. Erickson v. Comm'r of Internal Revenue, 937 F.2d 1548, 1554 (10th Cir. 1991) (acknowledging that drug dealers often conceal evidence by deceptive records).

119. United States v. Gray, 78 F. Supp. 2d 524, 529 (E.D. Va. 1999) (acknowledging that a searching agent "knew from his experience that computer hackers often intentionally mislabel files, or attempt to bury incriminating files within innocuously named directories").


The Carey court also suggested that an officer might need to obtain approval from a court for specific search methods in specific cases. United States v. Carey, 172 F.3d 1268, 1275 (10th Cir. 1999). While this may be necessary in exceptional situations, it should not be the norm. Officers have always been required to make common-sense decisions regarding actions implicating the Fourth Amendment. United States v. Sokolow, 490 U.S. 1, 8 (1989) ("Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same — and so are law enforcement officers."). The mere fact that the search involves new technology does not mean that officers are incapable of evaluating the reasonableness of their own acts. A court has an opportunity and a duty to limit the scope of the officer's search by the warrant it issues. It then has an opportunity and a duty to review the officer's search at a suppression hearing. It would be impractical and unwise for courts to repeatedly inject themselves into the day-to-day operational functions of law enforcement.

Carey also states that a court should "require officers to specify in a warrant which type of files are sought." Carey, 172 F.3d at 1275. This would be analogous to requiring an officer to specify which drawers the officer will search in a home when searching for evidence of drug crimes. It is unreasonable to expect or require officers to have access to the information required to make such a specification. Certainly the place to be searched must be defined with particularity, but it should not need to be defined with the particularity that could be known only by the person who has stored the evidence. Similarly, when an officer obtains a warrant to search a computer, it is not reasonable to require the officer to define the parameters of the search with information that would only be available to the suspect. It is more reasonable to require the officer to clearly specify the types of information sought within a computer, and then judge the officer's search by evaluating the reasonableness of the locations within the computer that the officer chose to search for that information.
If courts start requiring officers to limit their searches to files whose names suggest the type of evidence sought, criminals will soon learn that they can conceal information from law enforcement by simply assigning misleading names to directories and files. The defense of the disguised file would become the battle cry of child pornographers, terrorists, drug dealers, and any other criminals who conceal information on computers. Courts can avoid this by allowing officers to make objective judgments about which files could reasonably contain the evidence sought and by objectively evaluating the officer's actions.

The threshold question for courts to answer in objectively evaluating an officer's actions is whether, under the relevant facts, it is reasonable to believe that a person with access to and control over the computer(s) in question would have attempted to disguise evidence with misleading directory names, filenames, or suffixes. Does this mean that any time an officer searches for drug evidence, it is reasonable to search every file on a computer? No. "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances." For example, an officer may have information from an informant that the suspect has very little computer knowledge and uses only simple, user-friendly communication and word-processing programs. Depending on the other facts in the case, this specific information may make it unreasonable to believe that the suspect would know how to disguise a file and therefore make it unreasonable to open files that would not typically contain the type of evidence sought.

The reasonableness of opening certain types of files may even change as the search proceeds. For example, suppose an officer searches a computer for evidence of child pornography and finds a subdirectory containing files labeled with sexually suggestive and incriminating names. The officer opens one of the files and discovers that it, accurately labeled, contains child pornography. At that point, it would be unreasonable to believe that the suspect would mislabel information on the computer because the suspect properly labeled incriminating evidence. Under these facts, it would be unreasonable to open a file labeled "1999incometax.doc" during a search for child pornography because it would be unreasonable to believe that this person would have disguised child pornography as a file related to income tax.

On the other hand, an officer might begin a search under facts dictating that it is only reasonable to open specific types of files. If, during the search, the officer lawfully opens a file entitled "servicecontract.wpd" and discovers child pornography, it then becomes obvious that the suspect will disguise incriminating files. If the officer fails to find the appropriate information in the files he originally began searching, it is reasonable at that point for the officer to search other types of files. The number of possible scenarios is endless, and courts must carefully examine the facts of each case to determine the objective reasonableness of the officer's actions.

121. "Were [an officer] to limit his search to files whose names suggested the type of evidence he seeks, it would be all too easy for defendants to hide computer evidence: name your porn file '1986.taxreturn' and no one can open it." State v. Schroeder, 2000 WI APP 128, ¶ 16, 613 N.W.2d 911, 916.

B. Defining the Reasonable Officer

It is axiomatic that the reasonableness of an officer's act must be judged on the facts available to the officer at the time of the act. However, courts should recognize one clear exception to this principle. An officer's lack of training or experience regarding storage of information on computers should not be an excuse for the officer's actions. Where an officer does not possess a reasonable level of training or experience in the operation and search of computers, that officer's lack of knowledge should not be used to define the reasonable officer.

In other words, the reasonable officer standard should be modeled after a reasonably trained officer. Courts should evaluate an officer's actions against those of an officer who has (1) a reasonable level of training and experience in the operation and search of computers, and (2) knowledge of the relevant facts of the case available to the officer in question at the time the officer acted. This test encourages agencies to only allow officers with appropriate knowledge or training to engage in searches of computers. This discourages untrained officers from searching files that obviously do not contain the evidence being sought simply because the officer lacks the knowledge to make an informed decision regarding which files to search. Therefore, the test will more carefully safeguard the privacy guaranteed to Americans by the Constitution.

One situation in which an officer's training or experience should be considered is when the officer in question has an inordinate amount of training or experience regarding computers. An officer should not be penalized for possessing technical knowledge not available to other officers trained in the search of computers. For example, if a particular officer has knowledge of new technology or a new method of concealing information on a computer, that knowledge should be considered when evaluating the reasonableness of the officer's actions. The reasonable officer in this situation should be defined as an officer with (1) a reasonable level of training and experience in the operation and search of computers, (2) the specific technical knowledge available to the officer in question, and (3) the facts of the case available to the officer in question at the time the officer acted.

C. Application of an Objective Standard to Carey

In Carey, the warrant authorized Detective Lewis to search for "names, telephone numbers, ledger receipts, addresses, and other documentary evidence pertaining to the sale and distribution of controlled substances." Because a drug trafficker will not likely label directories and files with titles indicating drug activity, it was reasonable for Detective Lewis to open files of any name. It was also reasonable to believe that a drug dealer, in an effort to conceal evidence, would further disguise records by changing the file suffix from one typically associated with text to one typically associated with a picture. Therefore, Detective Lewis acted reasonably in opening a

123. See Scott v. United States, 436 U.S. 128, 137 (1978) (citing Terry v. Ohio, 392 U.S. 1, 21-22 (1968) and holding that the reasonableness of an officer's action should be judged using the "facts available to the officer at the moment of the seizure or search").

124. Carey, 172 F.3d at 1270.
JPG file labeled with a name that suggested it might be child pornography. This is true regardless of his subjective intent or expectations when he actually opened the file.

However, the situation changed once Detective Lewis discovered that Carey had properly labeled a file containing incriminating material. At that point, a reasonable officer would have known that Carey had either not undertaken the effort to disguise files or did not have the knowledge necessary to disguise files. It then became unreasonable for Detective Lewis to open any additional JPG files labeled with sexually explicit titles. In fact, it was probably unreasonable at that point for Detective Lewis to open any files that ordinarily contain image files. The warrant listed only documentary evidence, and, at that point, Detective Lewis had no reason to believe that Carey would have intentionally mislabeled documentary evidence as JPG files.\(^\text{125}\) This is true regardless of whether Detective Lewis intended or expected to find evidence of drug trafficking in those files.

Thus, had the Carey court properly applied an objective standard, it would have reached the same result. With a different set of facts, however, the results of applying the two standards would certainly differ. In future cases, courts should be careful to ensure that they apply an objective standard consistent with the Supreme Court's declarations that officers' subjective expectations are irrelevant to Fourth Amendment evaluations of the scope of an officer's search.

**Conclusion**

The Carey court clearly applied a subjective test to its analysis of a search. While assessments of searches of computer hard drives will clearly require new criteria, those criteria must be objective. Subjective criteria create dangers of inconsistent results that hinge on an officer's training or experience. More importantly, the Supreme Court has repeatedly interpreted the plain language of the Fourth Amendment as requiring an objective standard. The advent of new technology does not nullify the plain language of the Constitution or the Supreme Court's nearly unwavering interpretation and application of that language. Courts must adapt to technology not by rewriting Fourth Amendment principles, but by adapting those time-tested principles to new situations.

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\(^{125}\) Detective Lewis claimed that JPG files may contain pictures of drug-related activity. *Id.* at 1271 n.2. While this may be true, this fact alone does not justify a search of JPG files. The warrant did not authorize a search for pictures of drug activity. It only authorized a search for documentary evidence of drug activity. *But see United States v. Reyes*, 798 F.2d 380, 383 (10th Cir. 1986) (acknowledging that "in the age of modern technology and commercial availability of various forms of items, the warrant could not be expected to describe with exactitude the precise form the records would take").