



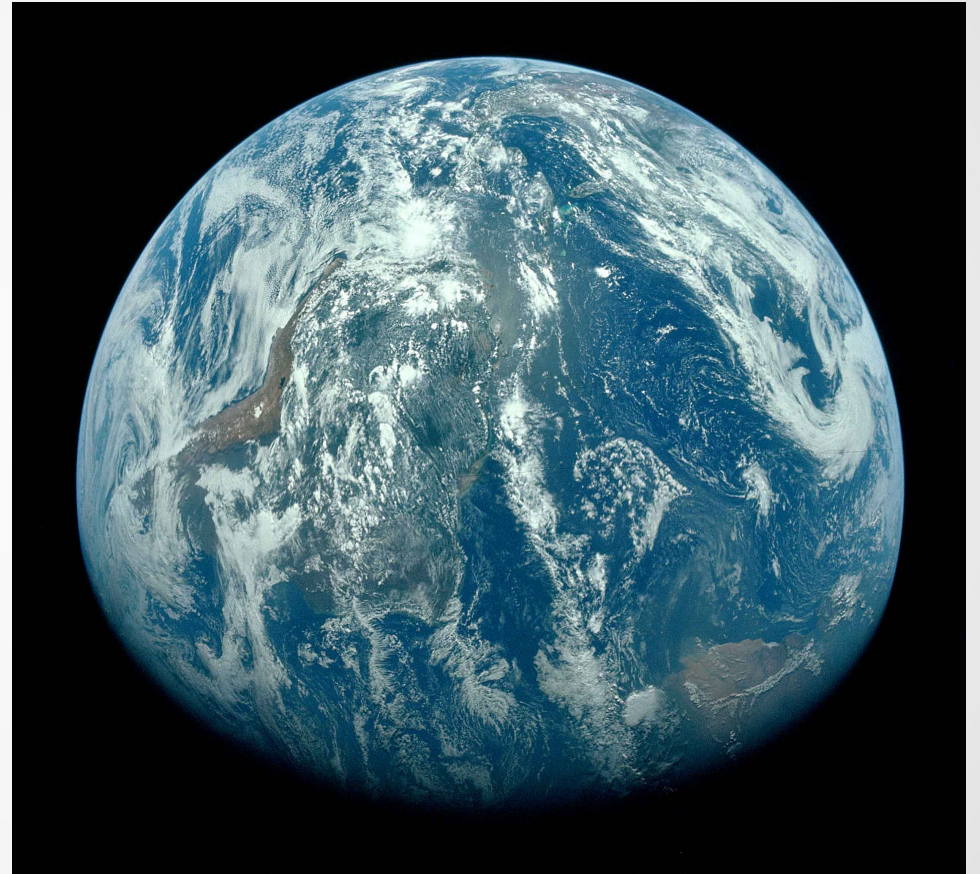
Changes in Some Federal Rules and State Breach/Notification Laws

High Technology Crime Investigation Association
Greater Gulf Coast Chapter
November 21, 2014

Ronald L. Chichester, Esq.

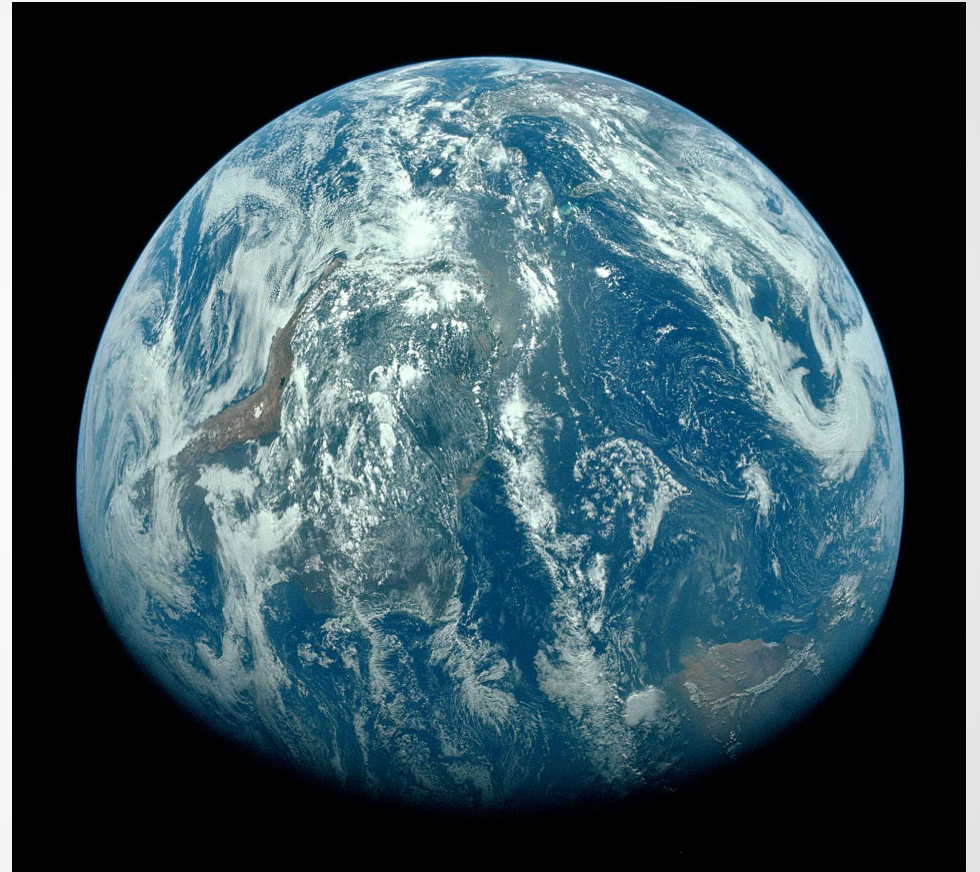
Overview

- The Federal Rules
 - Civil Procedure
 - Criminal Procedure



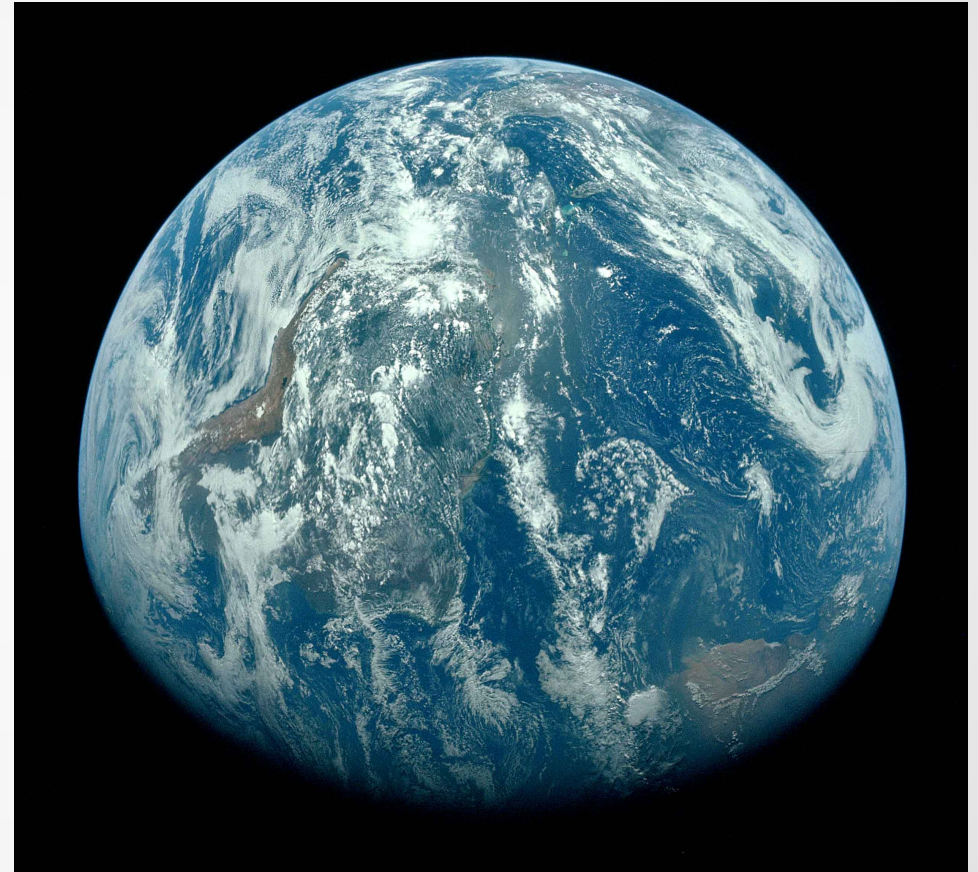
Overview

- The Federal Rules
 - Civil Procedure
 - Criminal Procedure
- State Breach/Notification



Overview

- The Federal Rules
 - Civil Procedure
 - Criminal Procedure
- State Breach/Notification
- U.S. Supreme Court
 - Cell phone searches



Overview

- The Federal Rules
 - Civil Procedure
 - Criminal Procedure
- State Breach/Notification
- U.S. Supreme Court
 - Cell phone searches
- Recent E-Discovery Cases



Upcoming Changes to the Federal Rules

Upcoming Changes to the Federal Rules



Upcoming Changes to the Federal Rules



Upcoming Changes to the Federal Rules

December 15, 2015

Upcoming Changes to the Federal Rules

- Civil Procedure



Upcoming Changes to the Federal Rules

- Civil Procedure
 - Rule 37(e)



Upcoming Changes to the Federal Rules

- Civil Procedure
 - Rule 37(e)
 - Covers Sanctions



Upcoming Changes to the Federal Rules

- Civil Procedure
 - Rule 37
 - Covers Sanctions
 - Subsection (e)
 - Covers Failure to Preserve



Upcoming Changes to the Federal Rules

- Current Rule 37:
 - (e) Failure to Provide Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.



Upcoming Changes to the Federal Rules

- Current Rule 37:
 - Problems



Upcoming Changes to the Federal Rules

- Current Rule 37:
 - Problems
 - What is “good faith”?



Upcoming Changes to the Federal Rules

- Current Rule 37:
 - Problems
 - What is “good faith”?
 - One side has burden to show (affirmatively) good faith?
 - Others side has to show bad faith?
 - Burden shifting...



Upcoming Changes to the Federal Rules

- Current Rule 37:
 - Problems
 - What is “routine”?



Upcoming Changes to the Federal Rules

- Proposed Rule 37(e):



Upcoming Changes to the Federal Rules

- Proposed Rule 37(e):
 - If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve the information, and the information cannot be restored or replaced through additional discovery, the court may:



Upcoming Changes to the Federal Rules

- Proposed Rule 37(e):
 - (1) Upon a finding of prejudice to another party from loss of the information, order measures no greater than necessary to cure the prejudice;



Upcoming Changes to the Federal Rules

- Proposed Rule 37(e):
 - (2) Only upon a finding that the party acted with the intent to deprive another party of the information's use in the litigation
 - (A) presume that the lost information was unfavorable to the party;
 - (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
 - (C) dismiss the action or enter a default judgment.



Upcoming Changes to the Federal Rules

When Will Proposed Rule 37(e) Apply?

ESI that *should have been preserved* in the anticipation or conduct of litigation lost

AND

Because a party *failed to take responsible steps to preserve* the information

AND

Information *cannot be restored or replaced* through additional discovery

Upcoming Changes to the Federal Rules

When Will Proposed Rule 37(e) Apply?

ESI that *should have been preserved* in the anticipation or conduct of litigation lost

AND

Because a party *failed to take responsible steps to preserve* the information

AND

Information *cannot be restored or replaced* through additional discovery

What May a Court Order If There Is a Finding of Prejudice?

If finding of prejudice...
Order measures *no greater than necessary to cure the prejudice*

Upcoming Changes to the Federal Rules

When Will Proposed Rule 37(e) Apply?

ESI that *should have been preserved* in the anticipation or conduct of litigation lost

AND

Because a party *failed to take responsible steps to preserve* the information

AND

Information *cannot be restored or replaced* through additional discovery

What May a Court Order If There Is a Finding of Prejudice?

If finding of prejudice...
Order measures *no greater than necessary to cure the prejudice*

What May a Court Do After a Finding of "Intent to Deprive" Use of ESI?

Presume that the last information was *unfavorable to the party*

OR

Instruct the jury that it may or must presume the information was *unfavorable to the party*

OR

Dismiss the action or enter a default judgment

Upcoming Changes to the Federal Rules

Why
should
I care?



Upcoming Changes to the Federal Rules

When Will Proposed Rule 37(e) Apply?

ESI that *should have been preserved* in the anticipation or conduct of litigation lost

AND

Because a party *failed to take responsible steps to preserve* the information

AND

Information *cannot be restored or replaced* through additional discovery

Upcoming Changes to the Federal Rules

- Criminal Procedure



Upcoming Changes to the Federal Rules

- Criminal Procedure
 - Rule 41
 - Search and Seizure



Upcoming Changes to the Federal Rules

- Criminal Procedure
 - Rule 41
 - Search and Seizure
 - Additional Provision



Upcoming Changes to the Federal Rules

- Criminal Procedure
 - Proposed Rule 41(b)(6)



Upcoming Changes to the Federal Rules

- Criminal Procedure Proposed Rule 41(b)
 - (6) a magistrate judge with authority in any district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and to seize or copy electronically stored information located within or outside that district if:

Upcoming Changes to the Federal Rules

- Criminal Procedure Proposed Rule 41(b)
 - (6) a magistrate judge with authority in any district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and to seize or copy electronically stored information located within or outside that district **if**:
 - (A) the district where the media or information is located has been concealed through technological means; or

Upcoming Changes to the Federal Rules

- Criminal Procedure Proposed Rule 41(b)
 - (6) a magistrate judge with authority in any district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and to seize or copy electronically stored information located within or outside that district **if**:
 - (A) the district where the media or information is located has been concealed through technological means; or
 - (B) in an investigation of a violation of 18 U.S.C. 1030(a)(5), the media are protected computers that have been damaged without authorization and are located in five or more districts.

Upcoming Changes to the Federal Rules



Why Should I Care?

Upcoming Changes to the Federal Rules

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 - (6) a magistrate judge with authority in any district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and to seize or copy electronically stored information located within or outside that district **if**:
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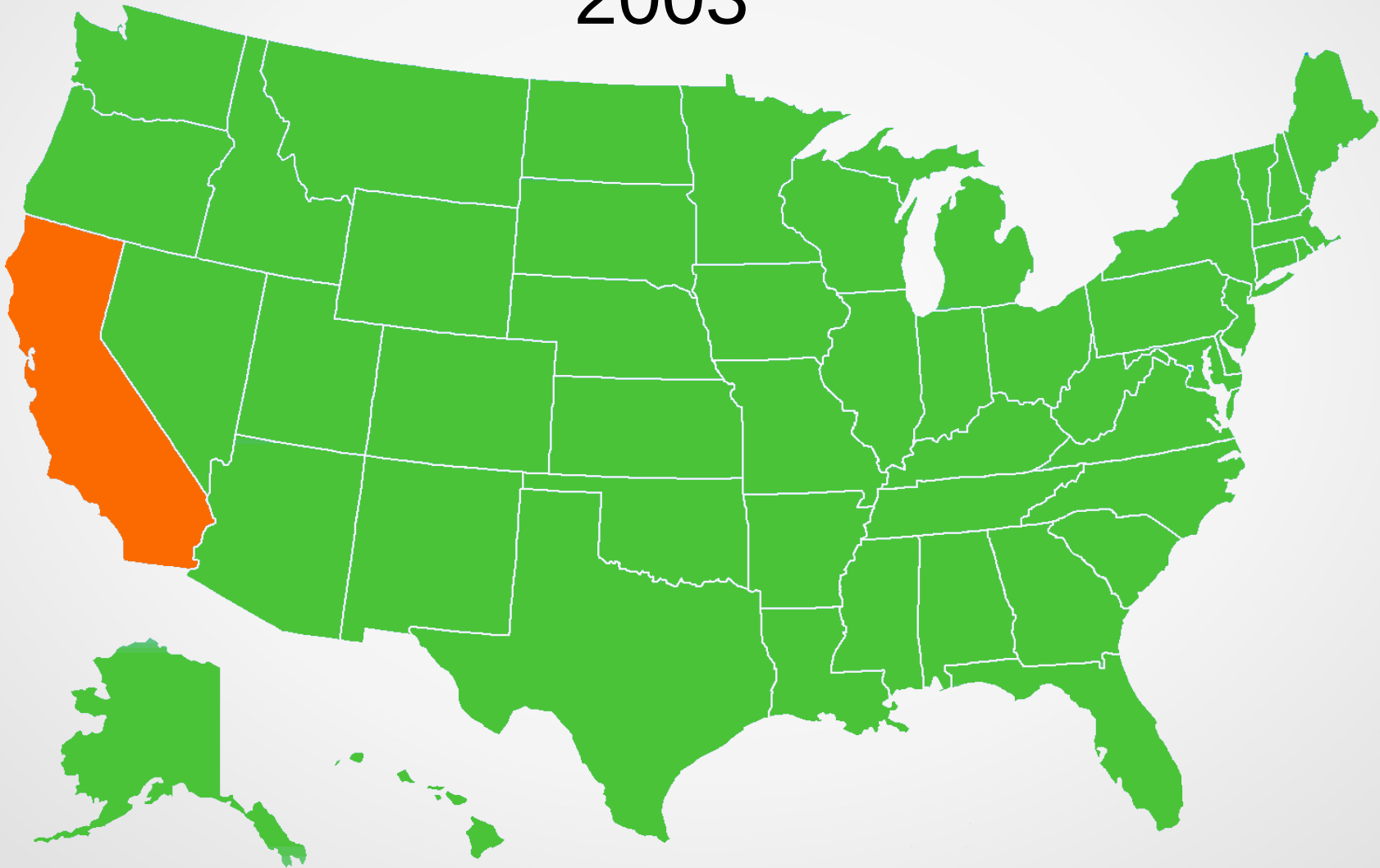
Developments in Breach/Notification Laws

Developments in Breach/Notification Laws

2002

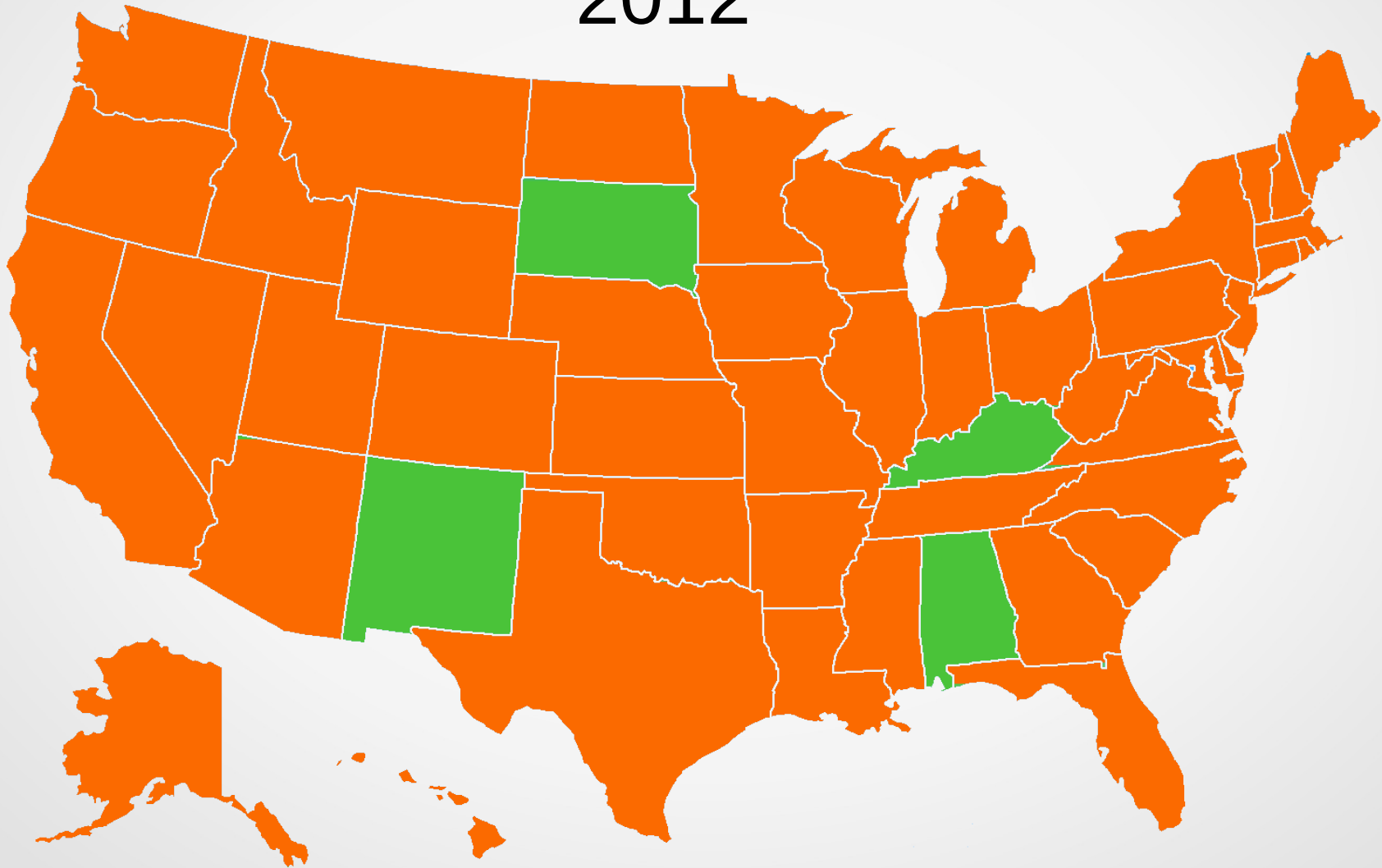
Developments in Breach/Notification Laws

2003



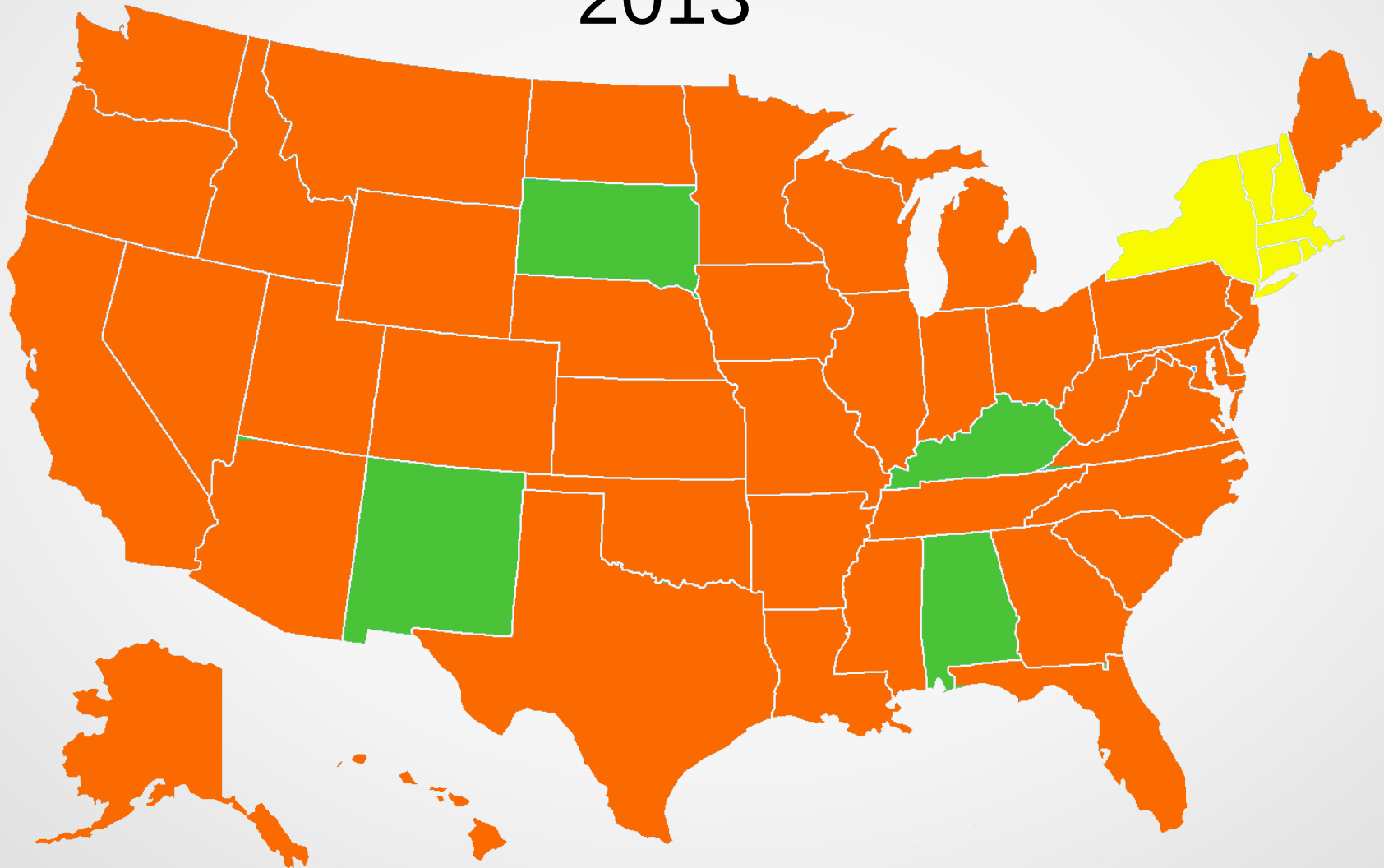
Developments in Breach/Notification Laws

2012



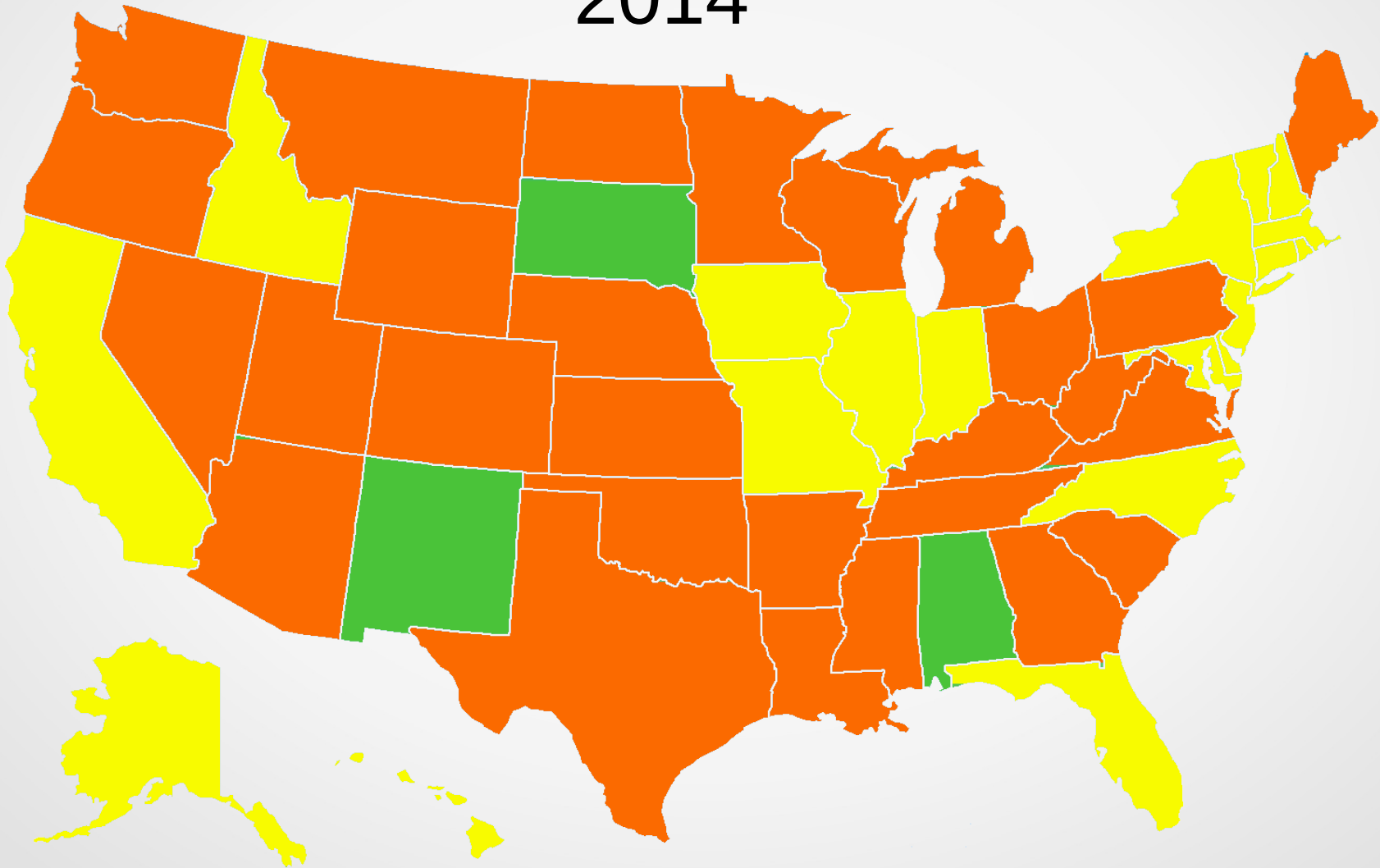
Developments in Breach/Notification Laws

2013



Developments in Breach/Notification Laws

2014

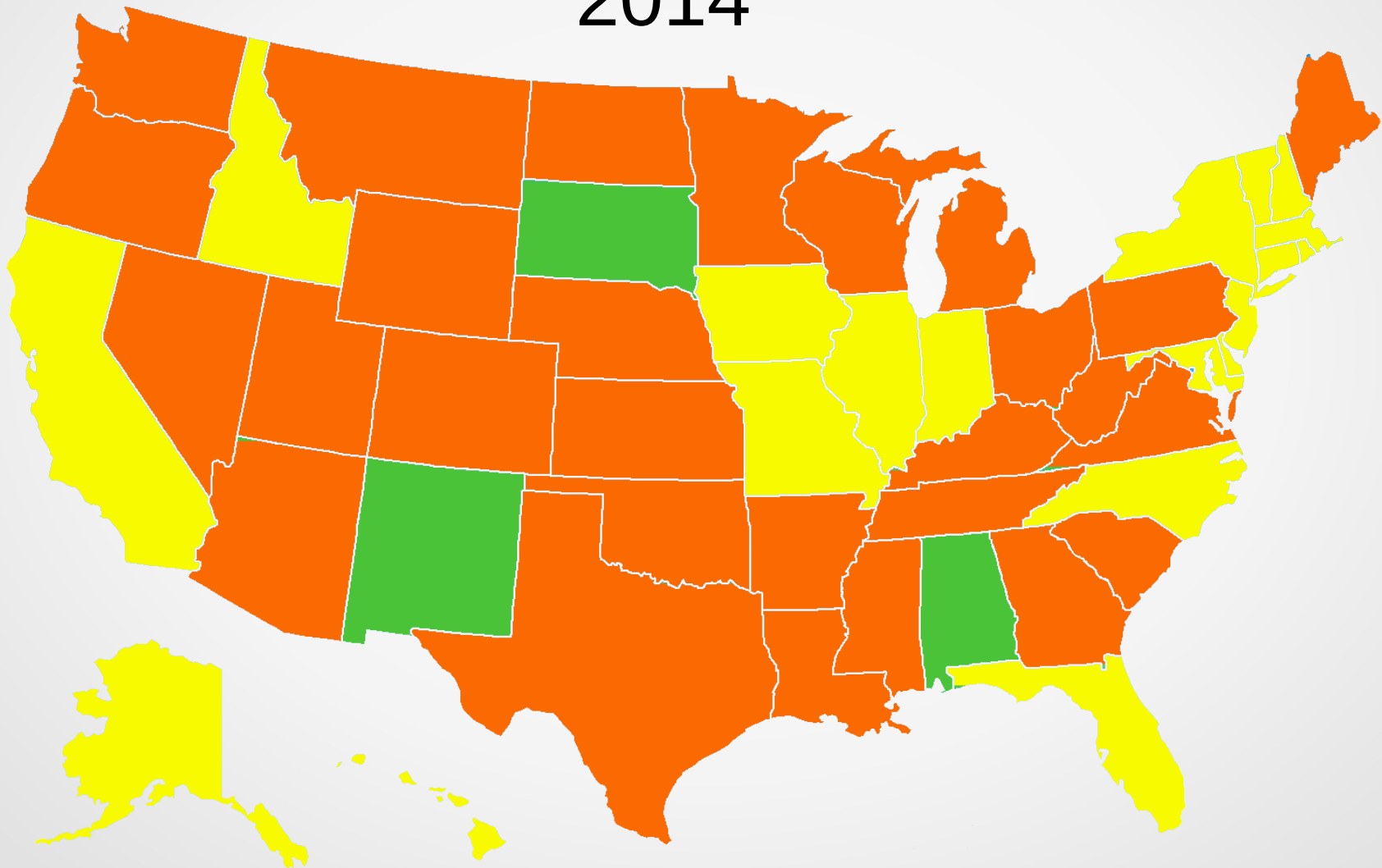


Why Should I Care?



Developments in Breach/Notification Laws

2014



Supreme Court Cellphone Cases

Supreme Court Cellphone Cases

Riley v. California

and

United States v. Wurie

Riley v. California

- Traffic stop
 - License suspended
 - Car impounded
 - Inventory made
 - found 2 handguns
 - Smartphone seized
 - Contents connected
Riley to gang shooting



Riley v. California

- In Court
 - Riley moved to exclude smartphone evidence
 - District Court denied
 - California Supreme Court had said in *People v. Diaz* that warrantless search of cellphone was okay when incident to arrest.



United States v. Wurie

- Police Surveillance
 - Wurie made drug sale from car
 - Arrest netted two cell phones
 - Officers opened “flip phone” and saw “my house” phone number
 - Traced house location and got a warrant which netted lots of contraband



United States v. Wurie

- In Court
 - Wurie moved to suppress fruit of evidence
 - District Court denied
 - First Circuit reversed



The U.S. Supreme Court

- The Justices concluded that searches of digital data contained on a cell phone fail to satisfy the rationales for the search incident to arrest doctrine and therefore do not constitute “reasonable” searches, in the absence of a warrant or some applicable exception to the warrant requirement.



The U.S. Supreme Court

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The U.S. Supreme Court

- The Court found that (1) the search of cell phone digital data is not needed to promote legitimate governmental interests in police safety and preservation of evidence during an arrest, in the way that a search incident to arrest normally is needed to promote these interests, *and*

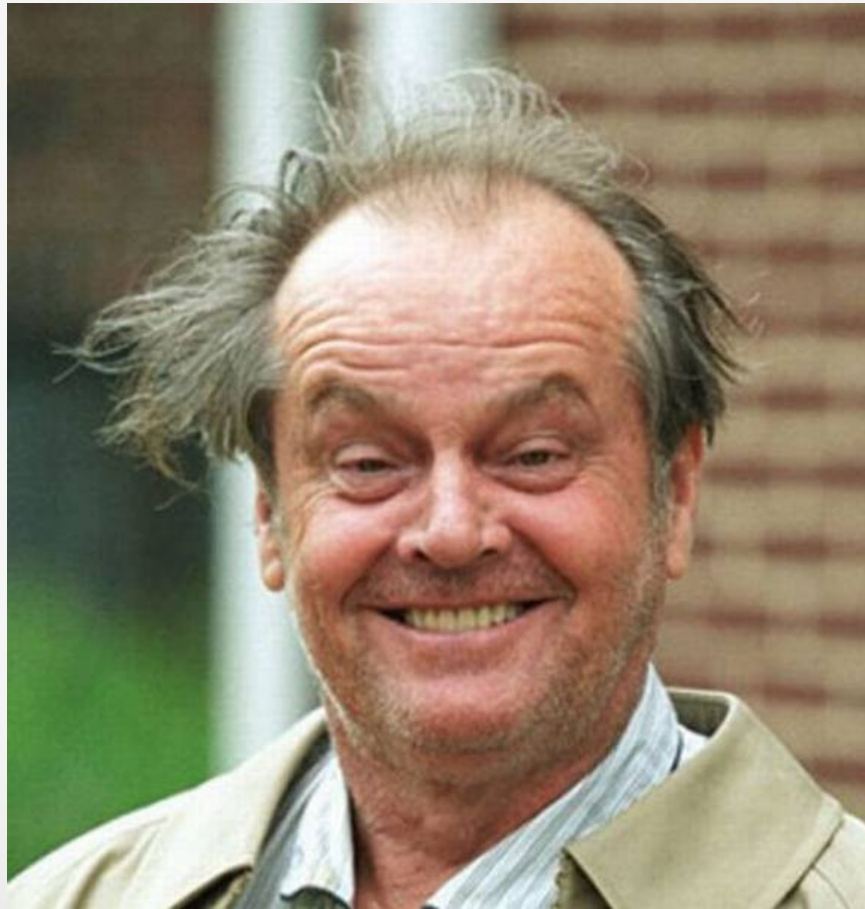


The U.S. Supreme Court

- (2) the search of cell phone digital data represents a major intrusion on the arrestee's privacy, not comparable to the relatively minor added invasion of privacy ordinarily associated with a search incident to arrest.

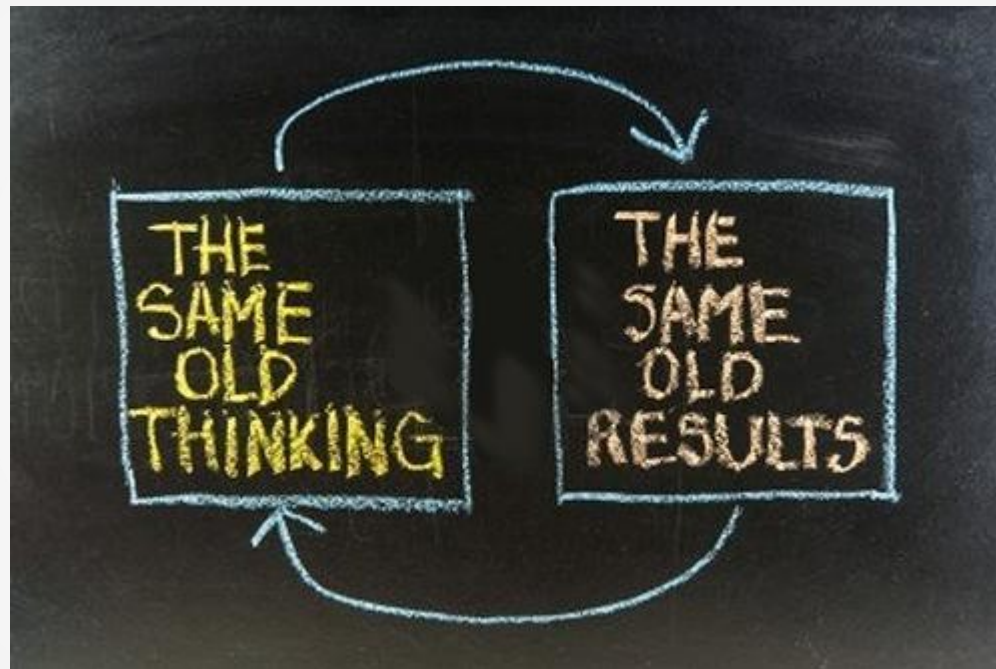


Why Should I Care?



Recent E-Discovery Cases

Recent E-Discovery Cases



Recent E-Discovery Cases



Recent E-Discovery Cases



Why Should I Care?



AUTOMATION

**WILL NEVER
REPLACE**

ME





Questions?