Id. at 285. Despite this, the enhancement was improperly applied because Brown's conduct did not cause a "substantial disruption" of that critical infrastructure:

> Brown's conduct did not constitute a substantial disruption of a critical infrastructure. There is no indication that Brown's conduct affecting a portion of Citibank's operations for a short period of time could have had a serious impact on national economic security. As a result of Brown's actions, Citibank suffered relatively minor financial losses and was temporarily unable to optimally serve its customers. Neither of these harms threatened to disrupt the nation's economy, and, in light of Citibank's demonstrated ability to quickly resolve the disruption and mitigate in the interim, there is no other evidence that Brown's conduct had the potential to do so. Accordingly, we hold that the district court erred by applying an enhancement that we conclude is reserved for conduct that disrupts a critical infrastructure in a way that could have a serious impact on national economic security.

Id. at 287.

CHAPTER 5

THE FOURTH AMENDMENT

■ ■ ■

A. THE REQUIREMENT OF GOVERNMENT ACTION

On page 399, after Note 4, add the following new note 4.1:

4.1. *When reenacting a private search, does it matter whether the officer conducts the search or asks the private party to do so?* Note 4 on page 398 discusses how the Fourth Amendment applies when a private party finds evidence of crime on a computer and brings the evidence to the police. As Note 4 explains, lower courts are divided on whether and how much the police can search the computer without a warrant on the ground that they are merely reconstructing a private search. Now consider another wrinkle: Should the answer to that question depend on whether the police search the computer themselves or merely ask the private party to show the police the digital evidence previously found?

Contrast two recent cases. In the first case, State v. Terrell, 831 S.E.2d 17 (N.C. 2019), the government did the searching. A woman named Ms. Jones found a suspicious image on her boyfriend's thumb drive and brought the thumb drive to the police to investigate. Detective Bailey searched the thumb drive in order to locate the image Ms. Jones had found. On the way to locating the suspicious image, the detective observed additional suspicious images. The Supreme Court of North Carolina ruled that the detective's search violated the boyfriend's Fourth Amendment rights because Ms. Jones's search of the thumb drive had been limited in scope:

> Following the mere opening of a thumb drive by a private individual, an officer cannot proceed with "virtual certainty that nothing else of significance" is in the device "and that a manual inspection of the [thumb drive] and its contents would not tell him anything more than he already had been told." *Jacobsen*, 466 U.S. at 119. Rather, there remains the potential for officers to learn any number and all manner of things that had not previously been learned during the private search. Accordingly, the extent to which an individual's expectation of privacy in the contents of an electronic storage device is frustrated depends upon the extent of the private search and the nature of the device and its contents.
>
> It is clear that Ms. Jones's limited search did not frustrate defendant's legitimate expectation of privacy in the entire contents of

> his thumb drive and that Detective Bailey's follow-up search to locate the image of was not permissible under Jacobsen because he did not possess "a virtual certainty that nothing else of significance was in the [thumb drive] and that a manual inspection of the [thumb drive] and its contents would not tell him anything more than he already had been told" by Jones. *Jacobsen*, 466 U.S. at 119. The requirement that an officer possess "virtual certainty that nothing else of significance" is in a container is central to *Jacobsen* because the private-search doctrine, unlike other exceptions to the Fourth Amendment's warrant requirement, is premised fundamentally on the notion that the follow-up search is not a "search" at all. *Jacobsen*, 466 U.S. at 120 ("It infringed no legitimate expectation of privacy and hence was not a 'search' within the meaning of the Fourth Amendment."). If a container continues to support a reasonable expectation of privacy, it is a necessary corollary that an officer cannot proceed with a "search" of that container absent virtual certainty that he will not infringe upon that expectation of privacy.

Id. at 26–27.

Compare *Terrell* with Commonwealth v. Shaffer, 209 A.3d 957 (Pa. 2019), a case in which the officer asked the private party to do the search. After a computer repairman found suspected child pornography on a computer and brought the computer to the police, the officer asked the repairman to show the officer exactly what images the repairman had previously seen. The repairman complied, searching the computer "using the exact route taken to find the images" previously. *Id.* at 960. The repairmen then showed the officer the images he had previously discovered. According to the Pennsylvania Supreme Court, the officer did not violate the Fourth Amendment. The officer "merely viewed the images that [the repairman] presented to him," and therefore he did not exceed the repairman's private search. *Id.* at 974–76.

Does it make sense that these two cases should reach different results?