



## The “Third-Party Doctrine” Has Limits But Still Applies To Some Business Records

November 2018



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In *United States v. Contreras*, \_\_\_ F.3d \_\_\_, 2018 WL 4689962 (5th Cir. Oct. 1, 2018), the United States Court of Appeals for the Fifth Circuit was asked to weigh Defendant Sebastian Contreras’ privacy interests versus the application of the third-party doctrine. The United States District Court for the Northern District of Texas upheld the validity of the search warrant that unearthed child pornography in Contreras’ possession and, therefore, denied Contreras’ motion to suppress. Contreras filed a timely notice of appeal, challenging the District Court’s denial of his motion to suppress. The relevant facts are these.

On April 15, 2016, and again on April 17, 2016, an undercover Homeland Security Investigations (“HSI”) agent saw that user “alex2smith13” had uploaded sexually graphic images of young children to a group chat on Kik, a mobile messaging application. Also, on April 15, 2016, the United States District Court for the Northern District of Florida issued a grand jury subpoena to Kik, Inc. Kik turned over records showing that “alex2smith13” had accessed Kik from IP address 108.37.82.115. That IP address had been ported by internet service provider Verizon Wireless to Frontier Communications. On May 13, 2016, the Northern District of Florida issued a grand jury subpoena to Frontier. Frontier responded that the IP address was registered to customer Saul Contreras (Contreras’ father) at a residential address in Brownwood, Texas. Local law enforcement confirmed in November 2016 and again in March 2017 that the Contreras family lived at that Brownwood address.

On March 29, 2017, HSI agent Sean Dunagan applied for and was issued a search warrant for the Contreras home, extending to images of child pornography stored on cell phones, computers, and computer hardware. Agent Dunagan’s affidavit in support recounted the facts of the initial investigation and explained: (1) modern internet-connected computers and cell phones have made it possible to share child pornography securely and anonymously; (2) an individual can use a cell phone in tandem with a computer to transfer, store, or back up child pornography files; (3) people who view child pornography typically store the materials for many years in the privacy and security of their own homes; and (4) forensic experts can generally recover evidence of child pornography on a computer even if files were stored remotely (e.g., on Dropbox) or deleted. Dunagan based these statements, in part, on his experience, training, and background as a federal criminal investigator since 2008 with prior experience in investigating the sexual exploitation of children. At Dunagan’s request, an Assistant United States Attorney reviewed the search warrant application before it was submitted to a Magistrate Judge. Federal agents executed the warrant on April 4, 2017 and seized, among other objects, Contreras’ personal computer and external hard drive.

A two-count indictment charging Contreras with transportation of child pornography was filed on April 12, 2017, and a seven-count superseding indictment charging him with receipt as well as transportation was filed on May 17, 2017. Contreras moved to suppress the evidence seized in the search, arguing that Dunagan’s affidavit in support of the warrant made material omissions, that the affidavit, on its face, did not establish probable cause, and that the Government needed a warrant to obtain Frontier’s records connecting the 108.37.82.115 IP address with the Contreras family residence. The District Court held an evidentiary hearing and denied the motion after finding that the affidavit was truthful, contained no material omissions, and established probable

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cause. Contreras reserved the right to challenge the District Court's ruling and conditionally pleaded guilty to two counts of Receipt of a Visual Depiction of a Minor Engaging in Sexually Explicit Conduct. The District Court sentenced Contreras to 168 months of imprisonment on each count, to run concurrently, and to a ten-year term of supervised release. Contreras timely appealed.

On appeal, Contreras argued that evidence from the April 2017 search should be suppressed because: (1) the Government violated his reasonable expectation of privacy in the family address when it obtained Frontier's records without a warrant and (2) Dunagan's affidavit, on its face, failed to establish probable cause for the search warrant. The Fifth Circuit rejected both of Contreras' arguments.

As for Contreras' argument that he had a reasonable expectation of privacy in the family address as contained in Frontier's records, the Fifth Circuit noted that, in a series of precedents dating back to 1976, the United States Supreme Court has found that "a person has no legitimate expectation of privacy in information . . . voluntarily turn[ed] over to third parties," "even if the information is revealed on the assumption that it will be used only for a limited purpose." *Carpenter v. United States*, \_\_\_ U.S. \_\_\_, 138 S. Ct. 2206, 2216 (2018)(quoting *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979)). The Fifth Circuit noted, however, that this "third-party doctrine" has limits. In *Carpenter*, the Supreme Court declined to extend the rule to cell-site records that convey "a detailed and comprehensive record of [a] person's movements." *Id.* at 2217. Nevertheless, the third-party doctrine continues to apply to "business records that might incidentally reveal location information," including telephone numbers and bank records. *Id.* at 2220.

In this case, the Fifth Circuit held that the information at issue fell comfortably within the scope of the third-party doctrine. Frontier's records revealed only that the IP address was associated with the Contreras' Brownwood residence. They had no bearing on any person's day-to-day movement. And, Contreras lacked a reasonable expectation of privacy in that information. Accordingly, the Fifth Circuit rejected Contreras' privacy argument.

Likewise, the Fifth Circuit rejected Contreras' argument that the search warrant lacked probable cause. The Fifth Circuit explained that, when a search warrant is involved, a court must determine whether the good faith exception to the exclusionary rule applies. The good faith exception provides that "evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant" typically should not be excluded. *United States v. Leon*, 468 U.S. 897, 922 (1984).

If the good faith exception does apply, the Fifth Circuit stated that it could affirm district court's denial of a motion to suppress without reaching the question of probable cause. But, even where the good faith exception alone would be dispositive, the Fifth Circuit opined that it could review a district court's probable cause determination if the appellant raised a novel question of law whose resolution is necessary to guide future action by law enforcement officers and magistrates.

Here, Contreras argued that his appeal raised novel questions of law concerning probable cause in the digital era, but he failed to address the first step in the suppression analysis, namely whether it was objectively reasonable for officers to rely on the search warrant. Therefore, the Fifth Circuit held that, to the extent that Contreras' probable cause arguments could be recast as challenges to objective reasonableness, he failed to show that the good faith exception should not apply.

The Fifth Circuit has identified four situations in which the good faith exception does not apply: (1) when the issuing magistrate was misled by information in an affidavit that the affiant knew or reasonably should have known was false; (2) when the issuing magistrate wholly abandoned his judicial role; (3) when the warrant affidavit is so lacking in indicia of probable cause as to render official belief in its existence unreasonable; and (4) when the warrant is so facially deficient in failing to particularize the place to be searched or the things to be

seized that executing officers cannot reasonably presume it to be valid. The Fifth Circuit agreed that Contreras' probable cause arguments were relevant to the third circumstance, whether the warrant affidavit was so devoid of indicia of probable cause that reliance on the warrant was objectively unreasonable. But, the Fifth Circuit was unpersuaded by Contreras' other arguments.

Contreras contended that uploading two images of child pornography over the course of a few days from a cell phone connected to a residential WiFi network does not establish probable cause to search that residence for evidence of child pornography because the images could conceivably have been uploaded by a temporary guest or an unauthorized neighbor. The Fifth Circuit acknowledged that possibility but said that probable cause does not demand more than a "fair probability" on which a reasonable person would act." There was at least a fair probability that "alex2smith13" actually lived at the Contreras home, and as such, courts across the country have found probable cause to search a residence based on just one or two uploads of child pornography.

Next, Contreras argued that the information in the affidavit was stale because HSI observed two Kik uploads in April 2016 but did not seek a warrant until March 2017. Although probable cause must exist at the time the warrant issues, the Fifth Circuit stated that there is no bright-line test, and information is less likely to be stale if the evidence sought is of the sort that can reasonably be expected to be kept for long periods of time in the place to be searched.

Here, Dunagan attested that evidence in child pornography cases may be kept for years because people who collect child pornography typically maintain those materials for a long time, and forensic experts can frequently recover evidence of deleted files. Those assertions were offered alongside "specific facts" linking the Contreras residence to uploads of child pornography. Therefore, the Fifth Circuit concluded that, under these circumstances, the year-long interval between Contreras' Kik posts and the Government's application for a search warrant did not render reliance on the search warrant objectively unreasonable.

Finally, Contreras argued that, because Kik is a messaging application for cell phones only, there was no probable cause to search for and seize computers or other objects. The Fifth Circuit found this argument to be unpersuasive. Dunagan's affidavit noted that cell phones can easily be used in conjunction with computers to transfer, view, back up, or store child pornography images. Accordingly, the Fifth Circuit affirmed the District Court's denial of Contreras' motion to suppress based upon its conclusion that the good faith exception applied and was dispositive.