



## **Six Years is Too Long to Wait to Seek a Search Warrant**

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In *United States v. Gandy*, 2018 WL 3483072 (S.D. Tex. July 19, 2018), Defendant Jason Gandy asked the United States District Court for the Southern District of Texas to suppress evidence that law enforcement officers obtained from his cell phone. The Government provided the evidence that it obtained from Gandy's cell phone to Gandy and to his defense counsel a few days before his trial was to begin. Gandy asked the District Court to suppress the evidence, arguing that the Government had obtained the evidence in violation of his Fourth Amendment rights. The District Court agreed and suppressed the evidence. The relevant facts are as follows.

On July 20, 2012, the Government seized Gandy's cell phone at an international border. The Government did not download, save, or record the phone's data. Instead, the Government seized the cell phone and, within 48 hours, had it analyzed at a forensic lab in Houston, Texas. During this forensic examination, a technical description of the electronic record was created, but it revealed nothing about the cell phone's contents. No written description of the phone's substantive contents was made, and the contents were not downloaded, recorded, or copied.

In July 2018, six years after the initial border search, the Government conducted a warrantless search of Gandy's cell phone. On July 11 and 13, 2018, the Government produced to Gandy and his attorney the evidence discovered during the search of Gandy's cell phone and stated their intent to offer the evidence as evidence. On July 13, after Gandy moved to suppress the newly produced text messages, the Government applied for and obtained a warrant to search the phone. The agent who signed the search warrant affidavit was not the same agent who conducted the 2012 search. The affidavit merely stated that the cell phone had been in the Department of Homeland Security's custody since it was seized at the border in 2012.

The District Court began its consideration of Gandy's motion to suppress by noting that the Fourth Amendment guarantees the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and by further noting that the ultimate touchstone of the Fourth Amendment is reasonableness. Moreover, warrantless searches and seizures are per se unreasonable unless they fall within a few narrowly defined exceptions. For example, the border-search exception allows a governmental officer at the international border to conduct routine stops and searches without a warrant or probable cause.

Regarding the border-search exception, the United States Court of Appeals for the Fifth Circuit has recently opined: "The border-search doctrine has roots going back to our founding era. The location of a search at the border affects both sides of the reasonableness calculus that governs the Fourth Amendment. The government's interest is at its 'zenith' because of its need to prevent the entry of contraband, and an individual's privacy expectations are lessened by the tradition of inspection procedures at the border." *United States v. Molina-Isidoro*, 884 F.3d 287, 290-91 (5th Cir. 2018). One type of contraband that can be stored within the data of a cell phone or computer is child pornography.

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However, the United States Supreme Court has cautioned against expanding the scope of a warrant exception if doing so would “both undervalue the core Fourth Amendment protection afforded . . . and ‘untether’ the exception ‘from the justifications underlying it.’” *Collins v. Virginia*, 138 S.Ct 1663, 1667 (2018)(internal quotation omitted). A warrant exception may not be extended when there is a “disconnect” between a Fourth Amendment interest and the justifications for the exception. *Id.* at 1673.

In the instant case, Gandy did not challenge the Constitutionality of the initial search of his cell phone at the border in 2012. The contested issue was whether the Government’s second, warrantless search of Gandy’s phone, conducted far away from the border and six years after the legal 2012 border search, was unconstitutional. The District Court held that it was and that the warrantless search did not fall within any of the warrant exceptions.

First, the District Court noted that the Supreme Court has held that individuals have a high privacy interest in the information on their cell phones. Therefore, the Supreme Court has held that the search-incident-to-arrest exception to the Fourth Amendment’s warrant requirement simply does not apply to a phone search.

Second, the District Court determined that the border-search exception did not apply. The District Court explained that the purpose of the border-search doctrine is to protect the Government’s interest in “preventing the entry of unwanted persons and effects” at an international border. The Government’s second, warrantless search of Gandy’s phone did not occur at a border or at the time of the crossing. It happened six years after Gandy returned to the United States after being denied entry to the United Kingdom. Gandy and his phone had both been in custody since 2012 within the United States. Searching Gandy’s phone had no connection to the Government’s interest in preventing illegal entry or contraband smuggling at an international border.

Third, the District Court found that no exigent circumstances existed that would justify the Government’s second, warrantless search.

Furthermore, the District Court held that the after-the-fact warrant obtained by the Government did not make the evidence obtained from Gandy’s cell phone admissible. The District Court noted that the Supreme Court has recognized three Fourth Amendment exceptions involving the “causal relationship between [an] unconstitutional search or seizure and the discovery of evidence.” First, the independent source doctrine allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source. Second, the inevitable discovery doctrine allows for the admission of evidence that would have been discovered even without the unconstitutional source. Third, and at issue here, is the attenuation doctrine. Under this doctrine, evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that “the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.” *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016).

The District Court stated that the attenuation doctrine did not render the evidence against Gandy admissible because suppressing the text messages discovered during the illegal search of Gandy’s cell phone would serve Gandy’s Fourth Amendment interest in protecting his cell phone from warrantless searches. According to the District Court, the Government had not shown or even argued that the connection between the second, warrantless search and the text messages was remote or had been interrupted by an intervening circumstance. Rather, the second, warrantless search directly resulted in the discovery of the text messages as well as the images that the Government produced to Gandy a mere week before trial. Accordingly, the District Court held that the Government’s after-the-fact search warrant did not cure the Constitutional deficiencies that arose as a result of the unconstitutional search.

Finally, the District Court held that the good-faith exception did not apply. The good-faith exception provides that the fruits of a search need not be suppressed if the law enforcement agents acted with the objectively reasonable belief that their actions did not violate the Fourth Amendment. Suppression of evidence is not warranted if the officers acted reasonably in light of the law existing at the time of an unconstitutional search, because in such circumstances, the cost of suppression—excluding the evidence from the truth-finding process—outweighs the deterrent effect suppression may have on police misconduct.

The District Court found that the good-faith exception did not apply in this case because, pursuant to the law in effect at the time of the second search, it was clear that the second, warrantless search of Gandy's cell phone was not justified by the border-search exception. Accordingly, the District Court granted Gandy's motion to suppress the cell phone evidence that the Government produced to him on July 11 and 13, 2018.