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To Download or Not to Download: Is Mere Membership Enough to Justify a Search of a Home Computer for Child Pornography Under United States v. Gourde?

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CASE SUMMARY

TO DOWNLOAD OR NOT TO DOWNLOAD:

IS MERE MEMBERSHIP ENOUGH TO JUSTIFY A SEARCH OF A HOME COMPUTER FOR CHILD PORNOGRAPHY UNDER *UNITED STATES v. GOURDE*?

INTRODUCTION

> We conclude where the dissents begin. Given the current environment of increasing government surveillance and the long memories of computers, we must not let the nature of the alleged crime, child pornography, skew our analysis or make us "lax" in our duty to guard the privacy protected by the Fourth Amendment.[1]

In the nine to two decision by the en banc Ninth Circuit panel in *United States v. Gourde*, the court ruled that probable cause existed to search the defendant's home computer based in part on his two-month subscription to a website that offered child pornography.[2] The majority opinion sought to conform to Supreme Court precedent in its probable cause analysis, while the dissenting opinions expressed great concern about the door being opened to this type of governmental invasion of

[1] United States v. Gourde, 440 F.3d 1065, 1074 (9th Cir. 2006) (en banc).
[2] *Id.* at 1070-71.

privacy.[3] *Gourde* has sparked reactions by commentators regarding the implications of the decision, and has influenced the analysis of subsequent child pornography search cases.[4]

I. FACTS AND PROCEDURAL HISTORY

In January 2002, defendant Micah Gourde's name was discovered by FBI agents on a list of subscribers to a pornographic website, www.Lolitagurls.com.[5] The FBI had been investigating the website, which contained images of both child and adult pornography, had identified the owner and operator of the site, and had executed a search warrant seizing the owner's computer that eventually turned up Gourde's name.[6] The owner admitted that Lolitagurls.com was a child pornography website that he operated as a source of income.[7] According to subscriber records, Gourde had been a member of the site for two months, from November 2001 to January 2002, when the FBI shut down the site.[8]

The FBI used Gourde's membership information to obtain a search warrant for his home computer.[9] The agent's affidavit in support of the search warrant also contained extensive background information on computers and the characteristics of child pornography "collectors."[10] The affidavit explained that any evidence of receiving or downloading images of child pornography would almost certainly remain on a computer well after downloading and even after being deleted.[11] The affidavit also described the profile of "collectors" of child pornography, explaining that a majority of collectors: are sexually attracted to children; collect sexually explicit materials of children; seek out like-minded persons; and rarely, if ever, dispose of their sexually explicit materials.[12]

The affidavit also included the following facts about Gourde, concluding that it was fairly probable that Gourde was a child pornography collector and maintained a collection of child pornography

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[3] *Id.* at 1074, 1077 (Reinhardt, J. and Kleinfeld, J., dissenting).

[4] *See infra* notes 56-66 and accompanying text.

[5] *Gourde*, 440 F.3d. at 1067. "The term 'Lolita' conjures up images ranging from the literary depiction of the adolescent seduced by her stepfather in Vladimir Nabokov's novel to erotic displays of young girls and child pornography." *Id.* at 1066 (citation omitted).

[6] United States v. Gourde, 440 F.3d 1065, 1067-68 (9th Cir. 2006).

[7] *Id.* at 1067.

[8] *Id.* at 1067-68.

[9] *Id.* at 1068.

[10] *Id.*

[11] *Id.* at 1067.

[12] United States v. Gourde, 440 F.3d 1065, 1068 (9th Cir. 2006).

in violation of federal law:

> (1) Gourde "took steps to affirmatively join" the website; (2) the website "advertised pictures of young girls"; (3) the website offered images of young girls engaged in sexually explicit conduct; (4) Gourde remained a member for over two months, although he could have cancelled at any time; (5) Gourde had access to hundreds of images, including historical postings to the website; and (6) any time Gourde visited the website, he had to have seen images of "naked prepubescent females with a caption that described them as twelve to seventeen-year-old girls."[13]

Based on the information in the affidavit, the magistrate judge issued a warrant to search Gourde's residence and computers.[14] Pursuant to the warrant, FBI agents seized Gourde's computer and discovered over 100 images of child pornography and child erotica.[15]

Gourde filed a motion to suppress the images found on his computer, which the district court denied.[16] Restricting its ruling to "the face of the affidavit," the court determined that it supported a fair probability that evidence of a crime would be found on Gourde's computer.[17] Although the subscription was to a "mixed" site (offering both legal adult pornography and illegal child pornography), the court concluded that the evidence supported a fair probability that Gourde received or possessed child pornography in violation of 18 U.S.C. § 2252.[18]

Thereafter, Gourde pleaded guilty to one count of possession of visual depictions of minors engaged in sexually explicit conduct, but conditioned his plea on his right to appeal the district court's denial of his motion to suppress.[19] The Ninth Circuit three-judge panel reversed, holding that (1) the affidavit failed to establish a fair probability that child pornography would be found on Gourde's computer, and (2) officers were objectively unreasonable in applying for the search warrant.[20] The Ninth Circuit voted to rehear the case en banc and ultimately affirmed Gourde's conviction, concluding that there was

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[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.* at 1068-69.

[17] *Id.* at 1069.

[18] United States v. Gourde, 440 F.3d 1065, 1069 (9th Cir. 2006).

[19] *Id.*

[20] United States v. Gourde, 382 F.3d 1003 (9th Cir. 2004), *reh'g en banc granted*, 416 F.3d 961 (9th Cir. 2005).

probable cause to support the search warrant.[21]

II. EN BANC NINTH CIRCUIT ANALYSIS

Both the majority and dissenting opinions in *United States v. Gourde* recognized the particular challenges posed, as in the present case, by the intersection between the current digital universe and particularly distasteful crimes such as child pornography.[22] While the majority opinion sought to closely conform to Supreme Court precedent in its probable cause analysis, the dissents expressed concern about the governmental invasion of privacy into an extremely personal aspect of many individual's lives—their personal computers.[23]

A. CONFORMING TO SUPREME COURT PRECEDENT: THE MAJORITY OPINION

The en banc Ninth Circuit majority opinion began its discussion with the Fourth Amendment's prohibition of "unreasonable searches and seizures" and its requirement of probable cause for a magistrate judge to issue a search warrant.[24] The opinion also framed the probable cause inquiry, set forth by the Supreme Court in *Illinois v. Gates*, as a "totality of the circumstances" test, meaning a "'fair probability,' not a certainty or even preponderance of the evidence."[25] This is a "commonsense, practical question" to be answered by the magistrate judge and to which a reviewing court must pay great deference.[26]

The majority concluded there were sufficient facts in the affidavit to support the magistrate judge's finding that there was a "fair probability" that evidence of a crime would be found on Gourde's computer.[27] According to the majority, the affidavit explained that the website had illegal images, that Gourde intended to have access to those images, and that the images would almost certainly be on his computer if he had ever downloaded or received them.[28] Given all of these "solid facts," the only

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[21] United States v. Gourde, 440 F.3d 1065, 1074 (9th Cir. 2006).

[22] *See id.* at 1074 (majority opinion); *see also id.* at 1074, 1077 (Reinhardt, J. and Kleinfeld, J., dissenting).

[23] *Id.*

[24] *Id.* at 1069; U.S. CONST. amend. IV.

[25] *Gourde*, 440 F.3d at 1069 (citing Illinois v. Gates, 462 U.S. 213, 246 (1983)).

[26] *Gourde*, 440 F.3d at 1069 (citing Illinois v. Gates, 462 U.S. 213, 230, 236 (1983)).

[27] United States v. Gourde, 440 F.3d 1065, 1069 (9th Cir. 2006) (citing Illinois v. Gates, 462 U.S. 213, 230, 236 (1983)).

[28] *Gourde*, 440 F.3d at 1070-71. According to the majority, the website was a child pornography website because its primary content was child pornography and the site's owner

inference the magistrate judge needed to make was that Gourde had actually received or downloaded images—an inference the majority concluded was reasonable based on the additional details in the affidavit regarding computers and the child pornography "collector" profile.[29]

Confronting Gourde's argument that probable cause was lacking because the government could have but failed to determine with certainty whether he in fact downloaded illegal images, the majority stressed that this was not an inquiry demanded by precedent.[30] The court reiterated the test under *Gates* is a "fair probability," not a "near certainty" as advocated by Gourde and explicitly rejected by the Supreme Court in *Gates*.[31] In addition, the majority cited two cases "facing nearly identical facts" from the Second and Fifth Circuits that reached the same result.[32] "It neither strains logic nor defies common sense to conclude, based on the totality of these circumstances, that someone who paid for access for two months to a website that actually purveyed child pornography probably had viewed or downloaded such images onto his computer."[33]

Moreover, the majority factually distinguished a Ninth Circuit child pornography search and seizure case relied on by both Gourde and the three-judge panel in concluding there was no probable cause in this case.[34] In fact, the issue of whether Ninth Circuit law on searches for

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admitted it was a child pornography site that he operated for money. *Id.* at 1070. Additionally, Gourde had and desired access to those illegal images as a paying member of the site for over two months. *Id.* "But more importantly, Gourde's status as a member manifested his intention and desire to obtain illegal images. Membership is both a small step and a giant leap." *Id.*

[29] *Id.* at 1071-72.

[30] *Id.* at 1072-73.

[31] *Id.* at 1073.

[32] *Id.* at 1071-72 (citing United States v. Martin, 426 F.3d 68, 75 (2d Cir. 2005) ("It is common sense that an individual who joins such a site would more than likely download and possess such material."); United States v. Froman, 355 F.3d 882, 890-91 (5th Cir. 2004) ("[I]t is common sense that a person who voluntarily joins a group such as Candyman, remains a member of the group for approximately a month without canceling his subscription, and uses screen names that reflect his interest in child pornography, would download such pornography from the website and have it in his possession.")); *see also 9th Circuit Court rules police can search home computer for child porn (U.S. v. Gourde)*, LAWYERS WEEKLY USA, Mar. 27, 2006 (noting the Ninth Circuit's mention of similar decisions in the Second and Fifth Circuits in reaching its conclusion).

[33] United States v. Gourde, 440 F.3d 1065, 1071 (9th Cir. 2006).

[34] *See id.* at 1074.

> We view *Weber* [923 F.2d 1338 (9th Cir. 1991)] as distinguished by its facts, and we are not persuaded by Gourde's argument that it dictates the outcome of his case. *Weber* cannot be read to support Gourde's position—that a search warrant for child pornography may issue only if the government provides concrete evidence, without relying on any inferences, that a suspect *actually* receives or possesses images of child pornography—without running afoul of *Gates*.

Id. (emphasis in original). *See also* United States v. Gourde, 382 F.3d 1003, 1010 (9th Cir. 2004) ("We conclude that this case is much more like *Weber* than *Lacy* or *Hay*. As in *Weber*, the evidence

child pornography properly applied Supreme Court precedent was raised by Circuit Judge Ronald M. Gould in his concurrence to the panel opinion:

> It is too bad that the Ninth Circuit's prior precedents on searches for child pornography impose a more rigorous test for probable cause than that called for by common sense and common experience, and in my view more than should be required under the Supreme Court's precedent of *Illinois v. Gates*. I join the court's well-reasoned opinion under compulsion of our precedent . . . . But it would be better if we rethought and reformulated the requirements of our circuit law.[35]

Ultimately, the en banc panel concluded that "the result in this case, which hews to Supreme Court precedent" was a proper application of the test for probable cause and was not an erosion of individual privacy rights protected by the Fourth Amendment, as challenged by the dissents.[36]

B. PRIVACY AND GOVERNMENTAL INTRUSION: THE DISSENTS

Concerns about both privacy and guarding the protections provided by the Fourth Amendment were echoed in the dissents of Circuit Judge Stephen Reinhardt and Circuit Judge Andrew J. Kleinfeld.[37] According to one commentator, the two dissents resulted in "a rare marriage of the minds" between two Ninth Circuit Judges "who are on the liberal and conservative extremes of the court . . . ."[38] While both dissents began with concerns about invasions of privacy, Judge Reinhardt focused on the evidence in the government's possession that it failed to examine and Judge Kleinfeld concentrated on the majority's leap in logic from defendant Gourde as a website *subscriber* to child pornography *collector*.[39]

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underlying the search warrant at issue here fails to draw the crucial link between Gourde's having some attenuated connection to child pornography and his actually possessing it.").

[35] United States v. Gourde, 382 F.3d 1003, 1016 (9th Cir. 2004) (Gould, J., concurring) (referring to Ninth Circuit precedent on cases of searches for child pornography in United States v. Weber, 923 F.2d 1338 (9th Cir. 1991), United States v. Hay, 231 F.3d 630 (9th Cir. 2000), and United States v. Lacy, 119 F.3d 742 (9th Cir. 1997)).

[36] *Gourde*, 440 F.3d at 1074.

[37] *Id.* at 1074, 1077 (Reinhardt, J. and Kleinfeld, J., dissenting).

[38] Pamela A. MacLean, *Strong Dissent in Computer Search Case: Warrant Based Only on Web Site Membership*, NAT'L L.J., Apr. 3, 2006, at 6.

[39] United States v. Gourde, 440 F.3d 1065, 1074, 1077 (9th Cir. 2006) (Reinhardt, J. and Kleinfeld, J., dissenting).

1. *Evidence in the Government's Hands: The Reinhardt Dissent*

Most troublesome to Judge Reinhardt was the fact that the government possessed direct evidence, namely the owner of the pornography site's computer, yet "chose" not to examine it to determine if Gourde had actually downloaded illegal images.[40] According to Judge Reinhardt, considering this "conscious avoidance" or "material omission" by the government in the totality of the circumstances analysis, there was not a "fair probability" that evidence of a crime would be found on Gourde's computer.[41]

The majority squarely addressed Judge Reinhardt's material omission analysis as flawed because "the affidavit candidly described that the FBI had seized the owner's computer, a fact that figured into the totality of the circumstances analysis."[42] Thus, labeling the government's failure to examine the evidence "conscious avoidance" was pure speculation.[43] Furthermore, according to the case law summarized by the majority, "[a]n affidavit may support probable cause even if the government fails to obtain potentially dispositive information."[44]

Distinguishing the cases relied on by the majority, Judge Reinhardt articulated two types of evidence: that which the government *could have obtained* but did not possess at the time of the warrant application; and that which the government *had in its possession* but did not utilize.[45] In the latter case, Judge Reinhardt would find the government's failure to examine the dispositive evidence a strong "circumstance" casting substantial doubt on the probable cause conclusion.[46] However, according to the majority, this standard would require the government

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[40] *Id.* at 1074-75 (Reinhardt, J., dissenting).

[41] *Id.* at 1074-75 (Reinhardt, J., dissenting). Thus, in Judge Reinhardt's analysis, the affidavit suffered from a material omission providing grounds for Gourde to void the warrant and exclude the fruits of the search under *Franks v. Delaware*, 438 U.S. 154, 156 (1978). *Gourde*, 440 F.3d at 1074-75 (Reinhardt, J., dissenting).

[42] *Gourde*, 440 F.3d at 1073 n.5 (majority opinion).

[43] *Id.*

[44] *Id.* (citing United States v. Miller, 753 F.2d 1475, 1481 (9th Cir. 1985) (holding that an affidavit supported probable cause even though "[i]ndependent verification could have been easily accomplished in this case" and the "officers failed to take these simple steps"); United States v. Ozar, 50 F.3d 1440, 1446 (8th Cir. 1995) ("[T]he magistrate judge erred in focusing his Franks v. Delaware analysis on what the FBI could have learned with more investigation . . . ."); United States v. Dale, 991 F.2d 819, 844 (D.C. Cir. 1993) (noting that "failure to investigate fully is not evidence of an affiant's reckless disregard for the truth" and that "probable cause does not require an officer to . . . accumulate overwhelming corroborative evidence.") (internal quotation marks omitted)).

[45] United States v. Gourde, 440 F.3d 1065, 1076 (9th Cir. 2006) (Reinhardt, J., dissenting).

[46] *Id.* (Reinhardt, J., dissenting).

"to provide more facts than necessary to show a 'fair probability'"—a standard rejected by the Supreme Court in *Gates*.[47]

2. *A Leap in Logic to "Collector" Status: The Kleinfeld Dissent*

Judge Kleinfeld's conclusion that probable cause did not exist in this case struck directly at the inference, determined to be "reasonable" by the majority, that an individual who subscribes to a pornography website containing illegal material would more than likely download and possess such material.[48] Judge Kleinfeld challenged this inference as flawed based on two "unarticulated assumptions" by the majority: that a person who subscribes to a website containing both legal and illegal material must collect the illegal material; and that a person attracted to child pornography must also collect it.[49]

First, an analysis of the "mixed" nature of the site in this case (i.e., a website containing both child and adult pornography) was conspicuously absent from the en banc majority opinion.[50] Consequently, it was not reasonable for the majority to assume that a person who subscribed to such a site downloaded or received images of illegal as opposed to legal pornography.[51]

The more problematic assumption made by the majority, according to Judge Kleinfeld, was that "evidence of an attraction to child pornography does not support an inference that a person possesses it."[52] Even assuming that a subscriber to a mixed site intended to view illegal child pornography, and in light of the fact that possession and not viewing is against the law, the natural desire of a person to stay out of jail must be considered in the inferential step between viewing and possessing.[53] Thus, according to Judge Kleinfeld, the "collector" profile and Gourde's subscription, without more, was not enough for probable

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[47] *See id.* at 1073 (majority opinion).

[48] *See id.* at 1077 (Kleinfeld, J., dissenting); *see also id.* at 1071-72 (majority opinion).

[49] *See id.* (Kleinfeld, J., dissenting) (characterizing the holding of the majority "that if a person has subscribed to a site that has legal and illegal material, that suffices as probable cause for a search warrant" and "[t]hat if a person has paid money to look at material that is illegal to possess, he probably possesses it").

[50] *See id.* at 1078-79 (Kleinfeld, J., dissenting) ("agree[ing] with the careful analysis in the panel opinion about the mixed nature of the site" but in this dissent "focus[ing] mostly on the additional point that evidence of an attraction to child pornography does not support an inference that a person possess it.") (citation omitted).

[51] United States v. Gourde, 440 F.3d 1065, 1074, 1078-79 (9th Cir. 2006) (Kleinfeld, J., dissenting).

[52] *Id.* (Kleinfeld, J., dissenting).

[53] *Id.* at 1079 (Kleinfeld, J., dissenting).

cause that Gourde was a collector.[54]

> The majority concludes that the affidavit made out probable cause by assuming that anyone who subscribes to an internet site with both legal and illegal material must collect illegal material from the site. This assumption stacks inference upon inference until the conclusion is too weak to support the invasion of privacy entailed by a search warrant.[55]

III. IMPLICATIONS OF THE DECISION

The en banc Ninth Circuit decision in *United States v. Gourde* has been characterized by some commentators as a ruling that mere membership in a pornographic website is sufficient to justify a search warrant of a personal computer.[56] These commentators have additionally noted the "strong" or "vigor[ous]" dissents by Circuit Judges Reinhardt and Kleinfeld.[57]

Still other commentators focused on the lack of attention the majority opinion gave to the "mixed" nature of the website.[58] According to Colin Fieman, a federal public defense attorney in Tacoma, Washington, "This is the only case I found where the warrant rested exclusively on membership. . . . I think the key issue that wasn't addressed in the en banc decision was the fact that it was a mixed-content site."[59] Fieman further noted that "Courts' traditional view is that if a search is based entirely on membership, it has to be an

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[54] *Id.* at 1082 (Kleinfeld, J., dissenting).

[55] *Id.* at 1084 (Kleinfeld, J., dissenting).

[56] *See, e.g.*, Pamela A. MacLean, *Strong Dissent in Computer Search Case: Warrant Based Only on Web Site Membership*, NAT'L L.J., Apr. 3, 2006, at 6 ("a court ruling that mere membership in a pornographic Web site containing both legal and illegal porn is enough to authorize the FBI to search a home computer"); Justin Scheck, *Judges Get Worked Up About Sex Crimes*, THE RECORDER (SAN FRANCISCO), Apr. 11, 2006, at 4 ("[a]n en banc panel in USA v. Gourde, . . . on March 9 said a person's membership in a Web site containing both legal and illegal porn could justify a search warrant."); *9th Circuit Court rules police can search home computer for child porn (U.S. v. Gourde)*, LAWYERS WEEKLY USA, Mar. 27, 2006 ("A defendant's two-month subscription to a website that offered child pornography provided probable cause to justify the search of his home computer . . . .").

[57] *See* MacLean, *supra* note 56, at 6 ("Two judges on the 9th Circuit U.S. Circuit Court of Appeals who are on the liberal and conservative extremes of the court joined forces in strongly dissenting from a court ruling that mere membership in a pornographic Web site containing both legal and illegal porn is enough to authorize the FBI to search a home computer."); Scheck, *supra* note 56, at 4 ("Judges Andrew Kleinfeld and Stephen Reinhardt each dissented with vigor.").

[58] *See, e.g.*, MacLean, *supra* note 56, at 6.

[59] *Id.*

organization with a wholly illegitimate purpose."[60]

On the other hand, the ruling "provides some guidance in the circuit in the context of probable cause for computers and child pornography cases," said Assistant United States Attorney Janice Freeman, disputing the notion that the majority held that membership alone was sufficient for probable cause.[61] According to Freeman, the Ninth Circuit considered other factors along with membership in the website.[62]

Whether one is more persuaded by the opinion of the majority or of the dissents, *Gourde* will influence probable cause analyses in future child pornography cases. For example, the Ninth Circuit has subsequently upheld a search warrant in a case with facts similar to *Gourde* where the affidavit recited details of computers and child pornography collectors, and where the government did not allege that the defendant actually downloaded any images.[63] In addition, a district court denied a defendant's motion to suppress and request for a *Franks*[64] hearing (based on a claim that there was a materially false statement or material omission made knowingly and intentionally or with reckless disregard for the truth by the search warrant affiant) relying on the *Gourde* decision.[65] The district court cited *Gourde* for the proposition that "[t]he Government is not required to obtain potentially dispositive information in its affidavit of probable cause."[66]

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[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] United States v. Meek, 177 Fed. Appx. 576, 577-78 (9th Cir. 2006) (case not selected for publication in the Federal Reporter).

[64] Franks v. Delaware, 438 U.S. 154 (1978).

[65] United States v. Hibble, No. CR05-1410, 2006 WL 2620349, at *1 (D. Ariz. Sep. 11, 2006).

[66] *Id.* at *3.

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