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**CONNECTING THE DOTS:
THE NINTH CIRCUIT'S REFUSAL
TO FIND PROBABLE CAUSE
IN *DOUGHERTY V. CITY OF COVINA***

*Carmelo Tringali**

The relationship between molesting children and possessing child pornography is significant, and the U.S. Supreme Court's decision in Illinois v. Gates sets a low threshold requirement for probable cause in justifying search warrants. Nonetheless, federal circuit courts disagree as to whether evidence of child molestation is sufficient in itself to establish probable cause for a search warrant for child pornography. In Dougherty v. City of Covina, the Ninth Circuit furthered this circuit split by siding with the Second and Sixth Circuits in determining that such evidence is insufficient to establish probable cause justifying a search warrant. This Comment examines the Ninth Circuit's ruling in Dougherty and argues that the court incorrectly refused to find probable cause justifying the search warrant and set a dangerous precedent in doing so.

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I. INTRODUCTION

Federal appellate courts across the nation are failing to connect the dots in determining the validity of search warrants for child pornography. This is so, at least, as it relates to the fair probability that child molestation suspects also possess child pornography. Indeed, in *Dougherty v. City of Covina*¹ the Ninth Circuit failed to make the logical and commonsense connection between sexually abusing a child and possessing child pornography.² There, an investigating officer who submitted the affidavit for the search warrant was experienced and specially trained in cases involving juvenile and sex crimes.³ In addition, Bruce Dougherty, whom the officer was investigating for inappropriately touching a sixth-grade student, had been previously accused of molesting another student and engaging in other pedophilic acts.⁴ The court, however, held that the officer's determination that there was a fair probability that Dougherty possessed child pornography was "conclusory" and "insufficient to create probable cause."⁵

By so ruling, the Ninth Circuit joined the Second and Sixth Circuits in making it more difficult for law-enforcement officers to obtain search warrants and enforce statutes proscribing possession of child pornography.⁶ This is particularly troublesome because child pornography significantly harms the children involved.⁷ The U.S. Senate, for instance, has found that "[c]hild pornography plays a critical role in the vicious cycle of child sexual abuse and

1. 654 F.3d 892 (9th Cir. 2011).

2. See *United States v. Colbert*, 605 F.3d 573, 578 (8th Cir. 2010) ("There is an intuitive relationship between acts such as child molestation or enticement and possession of child pornography."). See generally Candice Kim, *From Fantasy to Reality: The Link Between Viewing Child Pornography and Molesting Children*, PROSECUTOR, Mar.–Apr. 2005, at 17 ("The act of viewing child pornography does not exist in a vacuum. The existence of images that sexually exploit children represents tangible evidence of past, present and, most likely, future abuse.").

3. *Dougherty*, 654 F.3d at 896.

4. *Id.*

5. *Id.* at 899.

6. See *United States v. Falso*, 544 F.3d 110 (2d Cir. 2008); *United States v. Hodson*, 543 F.3d 286 (6th Cir. 2008).

7. See generally S. REP. NO. 104-358 (1996) (committee report for the Child Pornography Prevention Act of 1995); Anton L. Janik, Jr., *Combating the Illicit Internet: Decisions by the Tenth Circuit to Apply Harsher Sentences and Lessened Search Requirements to Child Pornographers Using Computers*, 79 DENV. U. L. REV. 379, 382–85 (2002) (discussing Congress's intent for passing legislation increasing sentences for child pornographers).

exploitation.”⁸ The Ninth Circuit’s ruling in *Dougherty*, however, impedes society’s ability to protect the children that child pornography victimizes.

This Comment argues that the Ninth Circuit incorrectly refused to find probable cause justifying the search warrant at issue in *Dougherty v. City of Covina*. The facts of the case are established in Part II, and the court’s reasoning is analyzed in Part III. Part IV then explains that the *Dougherty* majority (1) misapplied *United States v. Weber*;⁹ (2) unreasonably discounted the significant relationship between molesting children and possessing child pornography; and (3) should have upheld the search warrant under established Supreme Court and Ninth Circuit precedent. Part V concludes by summarizing the Ninth Circuit’s errors in *Dougherty* and encouraging the Ninth Circuit en banc or, preferably, the Supreme Court to overrule *Dougherty* or the precedent established in cases like *Dougherty* when the situation to do so next presents itself.¹⁰

II. STATEMENT OF THE CASE

On October 12, 2006, Officer Robert Bobkiewicz of the Covina Police Department and four other police officers searched Bruce Dougherty’s home pursuant to a search warrant for child pornography.¹¹ The officers seized Dougherty’s computer and other related items but filed no charges against Dougherty related to the search.¹² Dougherty later sued the City of Covina, Officer Bobkiewicz, and the chief of police for violating his Fourth Amendment rights.¹³

Officer Bobkiewicz obtained the search warrant after submitting an affidavit reciting certain findings from his investigation of Dougherty that stemmed from an inappropriate touching of one of Dougherty’s sixth-grade students.¹⁴ After learning that the student

8. S. REP. NO. 104-358, at 12.

9. 923 F.2d 1338 (9th Cir. 1990).

10. Dougherty did not appeal the case because the Ninth Circuit affirmed the district court’s holding on other grounds. *Dougherty*, 654 F.3d at 899–901 (affirming the dismissal without leave to amend based on the finding that the officers were entitled to qualified immunity and that Dougherty failed to state a claim against the City of Covina).

11. *Id.* at 895.

12. *Id.* at 896.

13. *Id.* at 896–97.

14. *Id.* at 896.

had won a cross-country meet, Dougherty had placed his hands on the student's breasts and lifted her up in front of the class to a level at which he could look at her buttocks.¹⁵ The molested student stated that she had previously seen Dougherty look up other female students' skirts and down their blouses.¹⁶ The assistant superintendent of the school district, Gloria Cortez, also told Officer Bobkiewicz about an investigation that she had conducted following a student's report in 2003 that Dougherty pulled down a female student's shirt while the two were alone in Dougherty's classroom.¹⁷ This investigation revealed that Dougherty would often touch girls' backs with his hands in search of bra straps.¹⁸ Cortez's investigation, however, was discontinued because of inconsistent statements made by the student-victim, though the student's mother later stated that she had made a mistake in not believing her daughter.¹⁹ When Officer Bobkiewicz later questioned the student from Cortez's investigation, she confirmed that Dougherty had pulled down her shirt, adding that he "touched [my] bare breasts and told [me that I] was 'a special girl.'"²⁰

Officer Bobkiewicz also stated in his affidavit that he had fourteen years of experience in the police force, during which he had received over a hundred hours of training involving juvenile and sex crimes and had conducted hundreds of investigations related to sexual assaults and juveniles.²¹ Because of his experience and training, Officer Bobkiewicz was the designated "Sex Crimes/Juvenile Detective" for the Covina Police Department.²² Officer Bobkiewicz ended his affidavit by concluding that "based upon my training and experience . . . I know subjects involved in this type of criminal behavior have in their possession child pornography."²³

After reviewing Officer Bobkiewicz's affidavit, the search warrant, and Dougherty's complaint, the district court dismissed

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

Dougherty's claims against the City of Covina, the chief of police, and Officer Bobkiewicz, with prejudice, on August 4, 2009.²⁴ According to the court, the affidavit established probable cause to support the warrant.²⁵ Dougherty appealed to the Ninth Circuit.²⁶

III. THE NINTH CIRCUIT'S REASONING

The main issue on appeal, which divided the court,²⁷ was whether probable cause existed to validate the warrant to search Dougherty's home computer and electronic media for child pornography.²⁸ The majority began its discussion of probable cause by stating that "[s]ufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others."²⁹ The majority then explained that affidavits containing more than bare conclusions were valid if they survived the "totality of the circumstances test."³⁰ Under this test, the "magistrate must make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband . . . will be found in a particular place."³¹

The majority next summarized the facts of *United States v. Weber* and its holding that the search warrant for child pornography there lacked probable cause.³² In *Weber*, the investigating officer based his affidavit for probable cause on Peter Weber's receipt of a catalog for child pornography two years earlier and on the suspect's more recent purchase of four images of possible child pornography.³³ The investigating officer concluded his affidavit by stating that "from [my] knowledge of [child molesters, pedophiles, and child

24. *Id.* at 897.

25. *Id.*

26. *Id.* at 892.

27. Judge Brewster concurred in the judgment of the court but disagreed with the majority's probable-cause analysis. *See id.* at 901–02.

28. *See id.* at 897–99.

29. *Id.* at 897 (quoting *Illinois v. Gates*, 462 U.S. 213, 239 (1983)).

30. *Id.* (citing *Gates*, 462 U.S. at 238–39).

31. *Id.* (quoting *Gates*, 462 U.S. at 238) (internal quotation marks omitted).

32. *Id.* at 898 (citing *United States v. Weber*, 923 F.2d 1338, 1345 (9th Cir. 1990)).

33. *Weber*, 923 F.2d at 1340.

pornography collectors, I] could expect certain things to be at their houses.”³⁴ In holding that the affidavit contained insufficient probable cause to justify a search of Weber’s home, the court emphasized that the affidavit was devoid of any evidence that Weber was either a child molester or a child-pornography collector.³⁵ The court there stated that “the government could not search Weber’s house for evidence to prove Weber was a collector merely by alleging he was a collector.”³⁶

Upon summarizing *Weber*, the *Dougherty* majority concluded that probable cause could not exist to justify the search warrant of Dougherty’s house if probable cause did not exist in *Weber*.³⁷ The majority stated that Officer Bobkiewicz’s “affidavit contain[ed] no facts tying the acts of Dougherty . . . to his possession of child pornography.”³⁸ The majority then stressed that no expert had concluded that Dougherty was a pedophile and there was no evidence that Dougherty had ever received or possessed child pornography, was interested in viewing such images, or conversed with students about sex acts or pornography.³⁹ The majority next noted the split in jurisdictions on the question of whether evidence of child molestation alone creates probable cause for a search warrant for child pornography.⁴⁰ It then implicitly adopted the Second and Sixth Circuits’ approach to that question by concluding that Officer Bobkiewicz’s conclusory statement that Dougherty, an alleged child molester, possessed child pornography was insufficient to create probable cause.⁴¹

IV. ANALYSIS OF THE NINTH CIRCUIT’S REASONING

The Ninth Circuit erred thrice in *Dougherty*: it (1) misapplied *Weber*; (2) unreasonably discounted the significant relationship between molesting children and possessing child pornography; and

34. *Id.* at 1345.

35. *Id.*

36. *Id.*

37. *Dougherty*, 654 F.3d at 898.

38. *Id.*

39. *Id.* at 898–99.

40. *Id.* at 899.

41. *Id.*

(3) should have upheld the search warrant according to established Supreme Court and Ninth Circuit precedent.

A. The Dougherty Majority Misapplied Weber

It is doubtful that *Weber* dictated the outcome in *Dougherty*, as the *Dougherty* majority claimed. The search warrant in *Weber* lacked probable cause not merely because there was insufficient evidence that Weber possessed child pornography, as the *Dougherty* majority asserted, but also—and primarily—because the affidavit there did not “lay a foundation . . . show[ing] that the person subject to the search [was] a member of the class” of persons who could be expected to possess child pornography.⁴² Indeed, the *Weber* court acknowledged that the expert opinion of a police officer could establish probable cause in the absence of direct evidence that a suspect possessed child pornography but found that such an opinion was unfounded in that case.⁴³ This was because the affidavit in *Weber* contained insufficient evidence that Weber was a child-pornography collector and no evidence that he was a child molester.⁴⁴

The court in *Weber* thus did not address the critical issue presented in *Dougherty*: whether evidence of child molestation would have been sufficient in itself to create probable cause for the search warrant. The court, however, did suggest that such evidence would be sufficient when it stated that the expert opinion of a police officer regarding a particular class of people, namely child molesters, could establish probable cause if there were evidence that the suspect was a child molester.⁴⁵ Accordingly, had there been evidence that Weber was a child molester, as there was in *Dougherty*, the *Weber* court could very well have held that the expert officer’s conclusion that Weber possessed child pornography sufficiently established probable cause for a search warrant.

The majority in *Dougherty* also gave undue weight to one of the factors that the *Weber* court used to distinguish *Weber* from *United States v. Rabe*,⁴⁶ in which the Ninth Circuit upheld a search warrant

42. *United States v. Weber*, 923 F.2d 1338, 1345 (9th Cir. 1990).

43. *See id.*

44. *Id.*

45. *See supra* text accompanying notes 42–44.

46. 848 F.2d 994 (9th Cir. 1988).

for child pornography.⁴⁷ The *Weber* court noted that in *Rabe* “there was expert testimony in the affidavit which addressed the facts of the defendant’s case and specifically concluded that based on those facts, the defendant was a pedophile.”⁴⁸ Moreover, the facts in *Rabe* were sufficient to make a judgment as to whether the defendant was a pedophile.⁴⁹ In *Weber*, by contrast, the affidavit consisted mainly of “rambling boilerplate recitations,” which demonstrated that “the ‘expert’ portion of the affidavit was not drafted with the facts of [the] case or [Weber] in mind.”⁵⁰ Additionally, the only evidence of Weber’s pedophilia, other than the order solicited by the government prior to the search, was a child-pornography catalog that had been addressed to him that customs had seized twenty months earlier.⁵¹

The *Weber* court, however, only emphasized that the affidavit in *Rabe* contained expert testimony that Rabe was a pedophile for a specific and limited purpose: to distinguish *Weber* from *Rabe*.⁵² The court was prompted to do so in order to dismiss the prosecution’s attempt to analogize *Weber* to *Rabe*.⁵³ Furthermore, because the court had already concluded that the evidence was insufficient to indicate that Weber was either a child molester or a child-pornography collector,⁵⁴ pedophilia was the only basis left on which the investigating officer could conclude that Weber probably possessed child pornography. As such, the court could hardly have meant that expert opinion that a suspect is a pedophile is a necessary factor for determining whether probable cause exists, especially when evidence indicates that the suspect is a child-pornography collector or child molester, as in *Dougherty*.⁵⁵ Accordingly, the majority in *Dougherty* erred in relying as heavily as it did on the

47. *Id.* at 998.

48. *Weber*, 923 F.2d at 1345 (citing *Rabe*, 848 F.2d at 996).

49. *Id.*

50. *Id.*

51. *Id.* at 1344.

52. *See id.* at 1345–46.

53. *Id.* at 1345.

54. *See id.*; *supra* text accompanying notes 35, 44.

55. *Cf.* *United States v. Gourde*, 440 F.3d 1065, 1074 (9th Cir. 2006) (en banc) (“*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*.”).

absence of expert testimony that Dougherty was a pedophile,⁵⁶ particularly because the facts indicated that he was a child molester,⁵⁷ which would likely have been sufficient in itself to create probable cause for the search warrant.⁵⁸

*B. Molesting Children Is Substantially Related
to Possessing Child Pornography*

The second problem with the Ninth Circuit's reasoning in *Dougherty* stems from its reliance on the questionable theory that molesting children is not related to possessing child pornography—even in the age of the Internet.⁵⁹ The *Dougherty* majority based this conclusion on *United States v. Falso*⁶⁰ and *United States v. Hodson*,⁶¹ which opined as much.⁶² These two cases, however, failed to cite any studies or other authorities confirming that child molestation is not associated with possessing child pornography.⁶³ In fact, just two years before its decision in *Falso*, the Second Circuit held that “a direct connection exists between child pornography and pedophilia,”⁶⁴ a finding that it did not overrule in *Falso*.⁶⁵ Hence, the *Dougherty* majority's determination that child molestation does not relate to child pornography was not well founded.

Unlike the assertion that molesting children is unrelated to possessing child pornography, the theory that there is indeed a strong relationship between these two acts is substantially supported. The Supreme Court has ruled that “the evidence . . . collected [to support probable cause] must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.”⁶⁶ Adhering to the Supreme Court's mandate, the Eighth Circuit has reasoned that “common experience” supports a

56. The court provided five main reasons for why the search warrant in *Dougherty* lacked probable cause, which included absence of expert testimony that Dougherty was a pedophile. *Dougherty v. City of Covina*, 654 F.3d 892, 898–99 (9th Cir. 2011).

57. *See supra* Part II.

58. *See supra* text accompanying notes 42–44.

59. *See infra* text accompanying notes 69–73.

60. 544 F.3d 110 (2d Cir. 2008).

61. 543 F.3d 286 (6th Cir. 2008).

62. *Dougherty v. City of Covina*, 654 F.3d 892, 899 (9th Cir. 2011).

63. *See Falso*, 544 F.3d at 123–24; *Hodson*, 543 F.3d at 292–93.

64. *United States v. Brand*, 467 F.3d 179, 197 (2d Cir. 2006).

65. *See Falso*, 544 F.3d at 123 & n.18.

66. *Illinois v. Gates*, 462 U.S. 213, 232 (1983) (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)).

conclusion that child molesters likely possess child pornography.⁶⁷ The Fifth Circuit has similarly ruled that “common sense would indicate that a person who is sexually interested in children is likely to also be inclined . . . to order and receive child pornography.”⁶⁸

Such common-sense and experienced conclusions that child molesters possess child pornography are further bolstered by the “relative ease with which child pornography may be obtained on the internet.”⁶⁹ The Internet provides most people with “access to almost any form of electronic information,”⁷⁰ and it has been the “primary medium for pornography transmission” since 1998.⁷¹ The extent to which the Internet facilitates obtaining child pornography today is further underscored by the Ninth Circuit’s en banc reasoning in *United States v. Gourde*.⁷² The *Gourde* court distinguished that case from *Weber* largely because the circumstances in *Weber* were “hardly comparable” to those in *Gourde* since *Weber* did not involve the Internet.⁷³ Therefore, because child pornography can now be obtained with relative ease, a law-enforcement officer specially trained and experienced in the field of child sex abuse, like Officer Bobkiewicz in *Dougherty*, should be able to conclude that an alleged child molester possesses child pornography based solely on the officer’s experience and on facts indicating that the suspect is a child molester.

Even if more evidence than an expert law-enforcement officer’s determination were required to establish probable cause that a child molester also possesses child pornography, significant research and findings additionally support the existence of such a relationship. In its hearings leading up to its enactment of the Child Pornography Prevention Act of 1996, Congress found that “child pornography is often used by pedophiles and child sexual abusers to stimulate and whet their own sexual appetites, and as a model for sexual acting out

67. *United States v. Colbert*, 605 F.3d 573, 578 (8th Cir. 2010).

68. *United States v. Byrd*, 31 F.3d 1329, 1339 (5th Cir. 1994).

69. *Colbert*, 605 F.3d at 578.

70. Laura Davis et al., *Controlling Computer Access to Pornography: Special Conditions for Sex Offenders*, FED. PROBATION, June 1995, at 44.

71. Janik, *supra* note 7, at 379 & n.4 (quoting Lesli C. Esposito, Note, *Regulating the Internet: The New Battle Against Child Pornography*, 30 CASE W. RES. J. INT’L L. 541, 541 (1998)).

72. 440 F.3d 1065 (9th Cir. 2006).

73. *Id.* at 1073–74 (citing *United States v. Weber*, 923 F.2d 1338, 1340 (9th Cir. 1991)).

with children.”⁷⁴ The Senate has similarly noted that “[l]aw enforcement investigations have verified that pedophiles almost always collect child pornography or child erotica.”⁷⁵ This pornography “[i]s an addiction that escalates,” culminating in the “acting out” of that which the viewer has seen.⁷⁶ Accordingly, since sexually abusing children is the ultimate stage of this progression, it is not surprising that “[l]aw-enforcement officers . . . routinely find pornographic materials when they investigate sex crimes against children.”⁷⁷

Such congressional findings deserve a high level of judicial deference because Congress is the superior governmental institution for fact finding.⁷⁸ In *United States v. Perillo*,⁷⁹ the court found that a statute authorizing wire interception of a suspect’s phone lines did not violate the Fourth Amendment.⁸⁰ In justifying the governmental intrusion, the court emphasized, in part, “that Congress specifically found as a fact that such tools as wiretapping and ‘bugging’ were essential to combat organized crime.”⁸¹ The court then demonstrated the high level of deference owed to such findings by noting that “the Supreme Court went so far as to assume facts which Congress might have found and then deferred to them” in *Katzenbach v. Morgan*.⁸² Thus, the *Dougherty* majority should have been more deferential to congressional findings that sexually abusing children is related to possessing child pornography.

Independent research, moreover, confirms that child molestation and pedophilia are substantially related to possessing child pornography. A 2000 Federal Bureau of Prisons study revealed that 76 percent of offenders convicted of Internet-related crimes against children admitted to previously molesting children, which law

74. Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009, 3009-26 to -32 (1996) (codified as amended in scattered sections of 18 U.S.C.), *invalidated in part by* *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002).

75. S. REP. NO. 104-358, at 12–13 (1996).

76. *Id.* at 13.

77. *Id.* (quoting SHIRLEY O’BRIEN, CHILD PORNOGRAPHY (1992)).

78. *See* *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 384 (2001) (Breyer, J., dissenting) (“Unlike courts, Congress can readily gather facts from across the Nation, assess the magnitude of a problem, and more easily find an appropriate remedy.”).

79. 333 F. Supp. 914 (D. Del. 1971).

80. *Id.* at 915, 923.

81. *Id.* at 918–19.

82. *Id.* at 918 n.27 (discussing *Katzenbach v. Morgan*, 384 U.S. 641 (1966)).

enforcement had failed to discover.⁸³ Furthermore, these convicts had an average of 30.5 child sex victims each.⁸⁴ U.S. Postal Inspection Service reports similarly indicate that more than 80 percent of child pornography purchasers are active abusers, and child pornography was connected with *every* incident of reported child molestation in Louisville, Kentucky, from 1980 through 1984.⁸⁵ U.S. Senate Reports⁸⁶ and independent articles⁸⁷ also cite the progression from watching child pornography to sexually abusing children. For instance, a “developmental pattern” has been identified among pedophiles who interact with children, which “begins with fantasy, moves to gratification through pornography, then voyeurism, and finally to contact.”⁸⁸

Other behavioral analyses of child molesters have likewise concluded that “there is little behavioral doubt that probable cause to believe a given individual is a preferential sex offender is, by itself, probable cause to believe the individual collects pornography . . . related to his preferences.”⁸⁹ This is because preferential child molesters generally collect child pornography.⁹⁰ Additionally, “preferential-type offenders,” such as pedophiles, are much easier to investigate because they exhibit these “highly predictable and repetitive behavior patterns.”⁹¹

The results of congressional hearings and independent research thus overwhelmingly evince a significant relationship between pedophilia, molesting children, and possessing child pornography. These findings provide additional support for the common-sense and experienced conclusions of expert law-enforcement officers that such a relationship exists where evidence suggests that a suspect is a pedophile or child molester. The Ninth Circuit should have therefore accepted that molesting children and possessing child pornography

83. Kim, *supra* note 2, at 20.

84. *Id.*

85. *Id.* at 17.

86. See S. REP. NO. 104-358 (1996).

87. See, e.g., Kim, *supra* note 2, at 19–20.

88. *Id.* at 20.

89. See, e.g., KENNETH V. LANNING, CHILD MOLESTERS: A BEHAVIORAL ANALYSIS 106 (5th ed. 2010). A “preferential sex offender” is characterized by (1) “long-term and persistent patterns of behavior”; (2) “specific sexual interests”; (3) “well-developed techniques”; and (4) “fantasy-driven behavior.” *Id.* at 52.

90. *Id.* at 79.

91. *Id.* at 51.

are strongly related not only because Officer Bobkiewicz stated as much in his affidavit based on his training and experience but also because Congress and independent research has found such a relation to exist.

*C. The Dougherty Court Should Have Upheld the
Search Warrant According to Established
Supreme Court and Ninth Circuit Precedent*

As the Supreme Court stated in *Illinois v. Gates*⁹² and the Ninth Circuit acknowledged in *Dougherty v. City of Covina*,⁹³ under the “totality of the circumstances test,” a magistrate must “make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . , including the ‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay information, there is a fair probability that contraband . . . will be found in a particular place.”⁹⁴ The majority in *Dougherty*, however, never applied the “totality of the circumstances” test. The majority refused to acknowledge that child molestation is substantially related to possessing child pornography, and there were no other facts independent of Dougherty’s alleged child molestation that indicated that Dougherty possessed child pornography.⁹⁵ Accordingly, the *Dougherty* majority concluded that Officer Bobkiewicz’s affidavit did not “move[] beyond the bare bones” of the conclusions of others and qualify for review under the “totality of the circumstances test.”⁹⁶ However, since molesting children is substantially related to possessing child pornography,⁹⁷ the “totality of the circumstances” test should have been applied to the facts of *Dougherty*.

Under the “totality of the circumstances” test, there must first have been probable cause that Dougherty sexually abused a child because probable cause that he possessed child pornography rested entirely on the relationship between the two crimes.⁹⁸ The majority appears to have accepted that Officer Bobkiewicz had probable cause to believe that Dougherty molested at least one child. The court

92. 462 U.S. 213 (1983).

93. 654 F.3d 892, 897 (9th Cir. 2011)

94. *Id.* (quoting *Gates*, 462 U.S. at 228).

95. *Id.* at 898–99.

96. *See id.* at 897–99.

97. *See supra* Part IV.B.

98. *See Dougherty*, 654 F.3d at 896.

recounted both alleged victims' statements that Dougherty touched them inappropriately, and it neither refuted nor questioned the validity of either statement.⁹⁹ The majority's discussion of the split in jurisdictions over the issue of whether evidence of child molestation creates probable cause for a search warrant for child pornography also suggests that it had accepted that there was probable cause that Dougherty had molested two children.¹⁰⁰ The concurrence similarly appears to have accepted that there was probable cause that Dougherty molested the two alleged victims.¹⁰¹

Having established that there was probable cause that Dougherty molested at least one child, an expert should have then been able to conclude that Dougherty possessed child pornography.¹⁰² This is exactly what Officer Bobkiewicz did. In his affidavit, he concluded that "based upon [his] training and experience . . . [he knew] subjects involved in this type of criminal behavior have in their possession child pornography."¹⁰³ Additionally, there is no indication in either the majority or concurring opinion¹⁰⁴ that the affidavit "consisted of rambling boilerplate recitations designed to meet all law enforcement needs" or "was not drafted with the facts of this case or this particular defendant in mind," like the affidavit in *Weber*.¹⁰⁵

To the contrary, Officer Bobkiewicz's affidavit met the *Weber* court's requirement that "the affidavit . . . address[] the facts of the defendant's case and specifically conclude[] . . . based on those facts."¹⁰⁶ Indeed, Officer Bobkiewicz specifically concluded—albeit implicitly—that it was fairly probable that Dougherty possessed child pornography based on the evidence, which was included in the

99. *Id.* at 896–99.

100. *See id.* at 899.

101. *Id.* at 901–02 (Brewster, J., concurring) ("I conclude the search warrant was supported by probable cause. . . . Dougherty's pattern of affirmative misconduct with several sixth grade students is closely related to an interest in looking at sexual images of minors." (citation omitted)).

102. *See id.*; *United States v. Colbert*, 605 F.3d 573, 578–79 (8th Cir. 2010); *United States v. Weber*, 923 F.2d 1338, 1345 (9th Cir. 1990); *United States v. Houston*, 754 F. Supp. 2d 1059, 1064–65 (D.S.D. 2010); *supra* text accompanying notes 42–44; *cf. Illinois v. Gates*, 462 U.S. 213, 231–32 (1983) (describing probable cause as "a fluid concept—turning on the assessment of probabilities" based on evidence collected and "common-sense conclusions about human behavior" evaluated "by those versed in the field of law enforcement." (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981))).

103. *Dougherty*, 654 F.3d at 896.

104. *See id.* at 895; *id.* at 901 (Brewster, J., concurring).

105. *Weber*, 923 F.2d at 1345.

106. *Id.*

affidavit, that he touched both a current student's breasts while inappropriately lifting her in class and a past student's breasts while alone in his classroom.¹⁰⁷ Officer Bobkiewicz also included in the affidavit allegations that Dougherty looked up female students' skirts and down their blouses and searched their backs for bra straps.¹⁰⁸

Since there was sufficient information to allow a magistrate to find probable cause, it was then up to the district court to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit, including the veracity and basis of Officer Bobkiewicz's knowledge, there was a fair probability that child pornography would have been found at Dougherty's house.¹⁰⁹ The district court did so, finding the existence of such a fair probability to justify the search warrant.¹¹⁰ At this point, the Ninth Circuit should have accepted the magistrate's determination because the Ninth Circuit owed "great deference" to the magistrate's finding and "the Fourth Amendment[] strong[ly] prefer[s] . . . searches conducted pursuant to a warrant."¹¹¹ Furthermore, the Supreme Court has mandated that "after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review."¹¹² Judge Brewster noted as much in her concurrence, similarly quoting from the Supreme Court and asserting that the magistrate judge's determination and investigating officer's experience and training were owed more deference than that which the majority afforded them.¹¹³

Even if no such deference was owed to the magistrate's finding of probable cause, Supreme Court precedent required the *Dougherty* court to affirm the magistrate's judgment. The Supreme Court's "totality of the circumstances" test is "a fluid and nontechnical conception of probable cause," requiring only that a "fair probability" exist that the specified contraband will be found in the specified location.¹¹⁴ The Court has also required that "evidence . . .

107. *Dougherty*, 654 F.3d at 896.

108. *Id.*

109. *See supra* text accompanying notes 29–31.

110. *Dougherty*, 654 F.3d at 897.

111. *Illinois v. Gates*, 462 U.S. 213, 236 (1983).

112. *Id.*

113. *Dougherty*, 654 F.3d at 901–02.

114. *United States v. Gourde*, 440 F.3d 1065, 1069 (9th Cir. 2006) (en banc) ("In contrast to the more exacting, technical approach to probable cause in cases before *Gates*, *Gates* itself marked a return to the 'totality of the circumstances' test and emphasized that probable cause

must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.”¹¹⁵ Furthermore, the process of determining probable cause “deal[s] with . . . probabilities” and permits law-enforcement officers to “formulate[] certain common-sense conclusions about human behavior.”¹¹⁶

In line with these standards, it was fairly probable that Dougherty possessed child pornography. As an expert in juvenile and sex crimes,¹¹⁷ Officer Bobkiewicz had a substantial basis of knowledge to conclude that Dougherty likely possessed child pornography given the evidence that Dougherty was a child molester.¹¹⁸ Officer Bobkiewicz was permitted to formulate his conclusion based on this common sense and training, and the court was to weigh the evidence as understood by Officer Bobkiewicz, who was “versed in the field of law enforcement.”¹¹⁹ Finally, because molesting children is significantly related to possessing child pornography¹²⁰ and given Officer Bobkiewicz’s expert opinion corroborating this relationship, any ruling other than that it was fairly probable that Dougherty possessed child pornography departs from the practicality and common sense that the “totality of the circumstances” test requires.

Finding probable cause to believe that Dougherty possessed child pornography based on the facts indicating that he was a child molester would have also been consistent with the Ninth Circuit’s own precedent as it relates to searches for firearms in narcotics investigations.¹²¹ In *United States v. Nance*,¹²² for instance, the court found probable cause supporting a search warrant for firearms, which was based mainly on evidence that the suspect was a drug dealer.¹²³ In upholding the search warrant for one crime based on evidence of

means ‘fair probability,’ not certainty or even a preponderance of the evidence.” (citation omitted).

115. *Gates*, 462 U.S. at 231–32 (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)).

116. *Id.* at 231 (quoting *Cortez*, 449 U.S. at 418).

117. *Dougherty*, 654 F.3d at 896.

118. *See id.*

119. *See supra* text accompanying notes 115–16.

120. *See supra* Part IV.B.

121. *See United States v. Gil*, 58 F.3d 1414 (9th Cir. 1995); *United States v. Nance*, 962 F.2d 860 (9th Cir. 1992).

122. 962 F.2d 860 (9th Cir. 1992).

123. *Id.* at 864.

an entirely different crime, the court explained that the investigating officer who submitted the affidavit “knew, based on his experience and training, that people who distribute narcotics keep drug supplies, paraphernalia, records and weapons in their homes.”¹²⁴ Just as selling drugs is related to possessing firearms, molesting children is related to possessing child pornography.¹²⁵ Accordingly, since the Ninth Circuit routinely upholds search warrants for firearms where evidence indicates that a suspect is a narcotics distributor, the court should similarly uphold search warrants for child pornography where evidence indicates that the suspect is a child molester.

V. CONCLUSION

By misapplying *United States v. Weber*, discounting the significant relationship between molesting children and possessing child pornography, and failing to uphold the search warrant for child pornography, the Ninth Circuit failed to connect the logical dots in its holding in *Dougherty v. City of Covina*. These three errors consequently add up to one significant consequence: the court has made obtaining search warrants for child pornography much more difficult for law-enforcement officers.

The significant harms that child pornography inflicts on the children involved demonstrates the severity of this consequence. Perhaps one the most troubling aspects of child pornography is that “it inflames the desires of child molesters, pedophiles, and child pornographers who prey on children, thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children who are victimized as a result of the existence and use of these materials.”¹²⁶ Additionally, child molesters often use child pornography as part of a method of seducing other children into sexual activity.¹²⁷ Therefore, the Ninth Circuit en banc should overrule the dangerous precedent that *Dougherty v. City of Covina* established. It would, however, be even more ideal for the U.S. Supreme Court to settle the split among the federal appellate courts in favor of facilitating search warrants for child pornography based on evidence that the suspect is a child

124. *Id.*

125. *See supra* Part IV.B.

126. S. REP. NO. 104-358, at 2 (1996).

127. *Id.*

molester. This would extinguish the socially harmful consequences of *Dougherty* and its Second and Sixth Circuit ilk throughout the entire country and connect the logical dots between sexually abusing a child and possessing child pornography. Such a decision by either the Ninth Circuit or the Supreme Court would accordingly advance the intentions of Congress¹²⁸ and more fully comport with the less exacting requirements for determining probable cause that the Supreme Court established in *Gates*.¹²⁹

128. See Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009, 3009-26 to -32 (1996) (codified as amended in scattered sections of 18 U.S.C.), *invalidated in part by* Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002); *cf.* Janik, *supra* note 7, at 379 (“The legislation [H.R. REP. NO. 104-90 (1995)] subjects suspected child pornographers to lessened search and seizure requirements . . .”).

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