

2-11-2021

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Recommended Citation

Justin Kenyon, *Clarifying the Probable Cause Standard in the Internet Age for Crimes Involving Child Pornography*, 69 Cath. U. L. Rev. 633 (2020).

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Cover Page Footnote

Justin Kenyon is a Law Clerk to the Honorable Margaret M. Schweitzer, Circuit Court for Montgomery County Maryland; J.D., The Catholic University of America, Columbus School of Law, 2020.

CLARIFYING THE PROBABLE CAUSE STANDARD IN THE INTERNET AGE FOR CRIMES INVOLVING CHILD PORNOGRAPHY

Justin Kenyon⁺

An estimated fourteen million child pornography websites post up to 20,000 images of child pornography each week.¹ However, the distribution of child pornography had been nearly eliminated prior to “the advent of the Internet in the early 1990s.”² A main factor driving internet child pornography is the “relative anonymity that the Internet affords to producers and consumers alike.”³ Equally appealing to distributors is the ease and low cost of the mass distribution afforded by the Internet.⁴ In response Congress has repeatedly enacted legislation to aid in federal child pornography prosecutions.⁵ However, the Supreme Court decision in *Ashcroft v. Free Speech Coalition* has inhibited the reach of federal prosecutors combating the crime of child pornography.⁶ It is largely supported that “the rewards that may be reaped from a good forensic investigation” of offenders’ computer devices is law enforcement’s most effective tool towards eliminating the child pornography industry.⁷ Prosecutors and police find gaining access to an offender’s computer as essential to the successful child pornography prosecution.⁸ Establishing a sufficient basis of probable cause to search a digital device has inhibited investigators due to the

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Thank you to Kevin Luibrand for supervising and guiding my development of this article. For their diligent efforts, thank you to the Catholic University Law Review Editors. Last and most of all, thank you to my parents John and Kathryn Kenyon, my siblings John, Courtney and Austin, and to Erin Luibrand for their unwavering support.

1. Michael J. Henzey, *Going on the Offensive: A Comprehensive Overview of Internet Child Pornography Distribution and Aggressive Legal Action*, 11 APPALACHIAN J. L. 1–2 (2011).

2. *Id.* at 1.

3. Benjamin Vernia, *Prosecuting Web-based Obscenity Cases*, U.S. DEP’T. OF JUSTICE 1 (March 2004), <https://www.justice.gov/sites/default/files/criminal-ceos/legacy/2012/03/19/USABulletinMar2004.pdf>.

4. *Id.*

5. Brian Slocum, *The Aftermath of Free Speech: A New Definition for Child Pornography*, U.S. DEP’T. OF JUSTICE 8 (March 2004), <https://www.justice.gov/sites/default/files/criminal-ceos/legacy/2012/03/19/USABulletinMar2004.pdf>

6. Slocum, *supra* note 5.

7. James Fottrell, *Making a Child Exploitation Case with Computer Forensics*, U.S. DEP’T. OF JUSTICE 28 (March 2004), <https://www.justice.gov/sites/default/files/criminal-ceos/legacy/2012/03/19/USABulletinMar2004.pdf>.

8. Fottrell, *supra* note 7, at 29.

changing nature of technology used by offenders.⁹ In determining probable cause, some courts have considered evidence of attempted or prior child molestation.¹⁰ This analysis has been based on courts considering the “intuitive relationship” between prior child molestation and child pornography, an assertion which was supported by scientific research.¹¹ This connection between the crimes of child pornography and child molestation has recently been presented as a disputed consideration in probable cause determinations by the courts, and its reconciliation is necessary.

In 2008, the Second Circuit Court of Appeals in *United States v. Falso* found that a warrant that included evidence of a prior conviction of child molestation did not contribute to a finding of probable cause to form a basis to search the defendant’s dwelling for child pornography.¹² In his concurrence, Judge Livingston warned that the “majority’s analysis is more likely to cloud than clarify [our] understanding of Fourth Amendment issues in the difficult and rapidly evolving context of internet searches.”¹³ True to those words, just two years later the Eighth Circuit Court of Appeals in *United States v. Colbert*¹⁴ found an “intuitive relationship between acts such as child molestation or enticement and possession of child pornography.”¹⁵ In justifying the relevancy of this connection to a probable cause determination, *Colbert* held that the Second Circuit in *Falso* had failed to consider the recency of the child molestation to the probable cause determination. Clarifying the Eighth Circuit’s approach in how it distinguished *Colbert* from *Falso* is necessary to prevent any confusion in the considerations needed in evaluating the connection between prior child molestation and enticement offenses to determining probable cause for a child pornography warrant in the future.

This comment will examine this issue by first following the developments in our judicial system’s understanding of probable cause within the scope of recent advancements in technology. This comment will also explore congressional legislation and prior Supreme Court determinations that have changed how child pornography offenders are prosecuted in the United States. This comment will also examine the differing analysis that the Second and Eighth Circuit used to reach their determinations, along with decisions from other circuits which

9. Fotherell, *supra* note 7, at 29.

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

11. *Id.* See Michael Seto, James Cantor & Ray Blanchard, *Child Pornography Offenses are a Valid Diagnostic Indicator of Pedophilia*, 115 J. ABNORMAL PSYCHOL. 610, 613 (2006), https://www.researchgate.net/publication/6918923_Child_pornography_offenses_are_a_valid_diagnostic_indicator_of_pedophilia (2006) (indicating that child pornography offenders were significantly more likely to show a pedophilic pattern of sexual arousal).

12. *United States v. Falso*, 544 F.3d 110, 124 (2nd Cir. 2008) (finding that while the warrant lacked substantial basis for probable cause, evidence of child pornography seized in the search of the defendant’s house was admissible under the Good Faith exception to the exclusionary rule).

13. *Id.* at 132 (Livingston, J., concurring).

14. *Colbert*, 605 F.3d at 577.

15. *Id.* at 578.

support both holdings. Ultimately this comment will argue that the Eighth Circuit's categorical conclusion¹⁶ that the Second Circuit found the relationship between child molestation and child pornography for the purpose of considering probable cause to be irrelevant is improper. This comment will also posit that the while the tendencies of the courts differ, the two circuits in fact are not in opposition and an interpretation is present that reconciles both their holdings.

I. THE LONG AND CHANGING ROAD BEHIND THE PROBABLE CAUSE STANDARD

A. *Probable Cause Understood From Its Roots*

The Fourth Amendment guarantees that “no [w]arrants shall issue, but upon probable cause, supported by Oath or affirmation.”¹⁷ This clause requiring a warrant is a hallmark of our democratic society since it “serves to interpose between the police and an individual’s personal privacy an orderly procedure involving a neutral and detached magistrate, who is responsible for making an informed and deliberate determination on the issue of probable cause.”¹⁸ The warrant clause protects the individual from arrests being made based upon inferences drawn by law enforcement officers who often times engaged in the “competitive enterprise of ferreting out crime.”¹⁹

In the two centuries since this liberty was secured, the Supreme Court has analyzed probable cause in a variety of ways.²⁰ In 1878, the Supreme Court in *Stacey v. Emery* found that probable cause can only be satisfied “[i]f the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offence has been committed[.]”²¹ However, as the years passed, the analysis for whether there was a sufficient basis for finding probable cause took on different forms, such as the analysis in *Aguilar v. Texas*.²² The *Aguilar* Court stressed the quality and reliability of the source of the information which the affiant used to present their findings to the magistrate.²³ Ultimately the Court reversed the defendant’s conviction for illegal possession of heroin, holding that the affidavit “contain[ed] no

16. *Id.*

17. U.S. CONST. amend. IV.

18. *Aguilar v. Texas*, 378 U.S. 108, 111 (1964); *see also* *United States v. King*, 227 F.3d 732, 739 (6th Cir. 2000).

19. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

20. 1–6 Search and Seizure § 6.09 (2017). *See* *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (stating “the probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances.”).

21. *Stacey v. Emery*, 97 U.S. 642, 645 (1878).

22. *Aguilar*, 378 U.S. at 113.

23. *Id.*

affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein[.]”²⁴

Less than twenty years later, the Court again reconsidered the standard in *Illinois v. Gates*, where a search warrant was issued on the “basis of a partially corroborated anonymous informant’s tip.”²⁵ The Court stated that it agreed that “an informant’s veracity, reliability and basis of knowledge are all highly relevant in determining the value of his report”; however, those elements should not be “understood as entirely separate and independent requirements to be rigidly exacted in every case.”²⁶ By breaking away from the *Aguilar* standard, the Court found that:

[t]his totality-of-the- circumstances approach is far more consistent with our prior treatment of probable cause than is any rigid demand that specific ‘tests’ be satisfied by every informant’s tip. Perhaps the central teaching of our decisions bearing on the probable cause standard is that it is a ‘practical, nontechnical conception’ ... These are not technical; they are the factual and practical considerations of everyday life on which reasons and prudent men, not legal technicians, act.²⁷

The Court’s opinion in *Gates* clarified that probable cause needed to be viewed as a “fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.”²⁸ The standard of probable cause has molded to changes in our society and our understanding of our privacy rights. However, at the advent of the digital age the limit on how far the standard could be stretched was again tested.

B. Understanding the Probable Cause Standard in the Context of the Digital Era

As the Internet rapidly became an everyday necessity, crimes such as the transfer of digital child pornography frequently forced courts to question the application of the probable cause standard when used by law enforcement to search digital media.²⁹ One of the new challenges faced by courts was to “consider whether the warrant application must establish both that defendant is likely to possess child pornography and that he is likely to use electronics to

24. *Id.* at 113–14.

25. *Illinois v. Gates*, 462 U.S. 213, 217 (1983).

26. *Id.* at 230.

27. *Id.* at 230–31 (internal citations omitted).

28. *Id.* at 232. See Yale Kamisar, *Gates*, “Probable Cause,” “Good Faith,” and Beyond, 69 IOWA L. REV. 551, 552 (1984) (terming the test laid out in *Gates* as the “soft standard” in the development of probable cause).

29. 1 PROSECUTOR’S MANUAL FOR ARREST, SEARCH AND SEIZURE § 18.02(3)(b) (2018).

obtain or store those images.”³⁰ The courts have taken two views on what amounts to probable cause for a search and seizure of digital devices.

1. The “Common-Sense” Approach to Establishing a Substantial Finding of Probable Cause in Order to Search and Seize a Child Pornography Offender’s Media Device

One approach courts have taken is to consider digital devices and internet connections as “‘tools of the trade’ of a child molester and allow the seizure and search of such items without any particularized knowledge about the electronics.”³¹ Courts have justified this approach based on:

[T]he observation that images of child pornography are likely to be hoarded by persons interested in those materials in the privacy of their homes is supported by common sense ... Because of their illegality and the imprimatur of severe social stigma such images carry, collectors will want to secret them in secure places, like a private residence.³²

The Tenth Circuit Court of Appeals determined that it was a fair inference to assume a defendant’s computer would contain child pornography based on “[t]he presence of a computer with an internet hook-up and a Kinko’s receipt indicating that [the defendant] had converted Polaroid photos into a digitalized format.”³³ This “common-sense” inferential approach has granted prosecutors and law enforcement a substantial amount of power to search for evidence of children pornography.³⁴

2. A Narrower Approach to the Application of Establishing Probable Cause to Search Digital Devices for Evidence of Child Pornography

Other court have taken a different approach when considering evidence which establishes that the suspect possesses child pornography and that electronics are used to store the contraband in their residence.³⁵ The Second Circuit held that a computer hard drive is similar to a residence, based on “the scope and quantity

30. *Id.* Among other factors, the court must also address whether any suspect with a predilection for child pornography should be deemed likely to use such equipment, thereby authorizing their seizure and search. *Id.*

31. *Id.* See *United States v. Brackett*, 846 F.3d 987, 992–94 (8th Cir. 2017) (finding that a search warrant granting law enforcement to search all of the defendant’s digital devices that had the ability to store images was valid based on information that the defendant had sex with a minor, took nude photos, and had a prior conviction videotaping sexual acts performed by a minor).

32. 1 PROSECUTOR’S MANUAL FOR ARREST, SEARCH AND SEIZURE § 18.02(3)(b) (2018). See *United States v. McArthur*, 573 F.3d 608, 613–14 (8th Cir. 2009) (quoting *United States v. Riccardi*, 405 F.3d 852, 861 (10th Cir. 2005) (quoting *United States v. Lamb*, 945 F. Supp. 441, 460 (N.D.N.Y. 1996)).

33. *Ricardi*, 405 F.3d at 860.

34. *Id.* at 860–61.

35. 1 PROSECUTOR’S MANUAL FOR ARREST, SEARCH AND SEIZURE § 18.02(3)(b) (2018).

of private information it may contain.”³⁶ Due to this relatively new ability to store immense amounts of private information, computer searches logically involve “much more intrusiveness than searches of other containers,” meaning the potential for privacy violations is enormous.³⁷ As an example, if the Government obtains a warrant to search a hard drive, it thereby has the authority to examine the contents of every file it chooses to open.³⁸

By focusing on the suspect’s connection to digital media, Circuit courts have distinguished themselves from the “common-sense” application for finding probable cause for child pornography crimes. In *Chism v. Washington*, the Ninth Circuit Court of Appeals found that probable cause could not be established when the only evidence supporting probable cause that the defendant possessed child pornography was that his credit card had been charged three times from websites that contained child pornographic images.³⁹ The Ninth Circuit applied a “fair probability test,” which had been first identified in *United States v. Gourde*.⁴⁰ This test required that the affidavit to show “(1) that a crime was committed; (2) that it was [the defendant] who committed the crime; (3) that evidence of the crime would be found in the place to be searched.”⁴¹ The Sixth Circuit stated that a “sufficient nexus between the location to be searched and the evidence sought” is required to establish probable cause that this type of crime has been committed.⁴²

This narrower approach places greater emphasis on producing evidence for the warrant that the crime was committed and that the defendant’s electronic devices were used to store the contraband. Regardless of which approach is applied, all courts have considered the strong government interest in preventing the distribution of child pornography and effectively prosecuting offenders.⁴³

36. 5 COMPUTER LAW § 21.03(8)(O) (2018).

37. *Id.* “[B]ecause files containing evidence may be intermingled with many innocuous files, efforts to locate particular files require examining many others.” *Id.*

38. *Id.*

39. *Chism v. Washington*, 661 F.3d 380, 389–90 (9th Cir. 2011) (finding that “this connection is a far cry from the facts presented in the affidavit which stated [the defendant] ‘downloaded’ and ‘purchase[d]’ child pornography.”).

40. *United States v. Gourde*, 440 F.3d 1065, 1069–71 (9th Cir. 2006).

41. *Chism*, 661 F.3d at 389. *See Gourde*, 440 F.3d 1070–71 (finding the evidence sufficient to establish probable cause to believe [the defendant’s] computer contained images of child pornography when (1) that the accessed website was a child pornography site “whose primary content was in the form of images;” (2) that a subscriber to the website, “[the defendant] had access and wanted access to these illegal images;” and (3) that “having paid for multi-month access to a child pornography site,” and owing to the “long memory of computers” [the defendant’s] computer was likely to contain evidence of the crime.”).

42. *United States v. Wagers*, 452 F.3d 534, 540 (6th Cir. 2006). Here the Sixth Circuit Court of Appeals found that the nexus between an AOL email account and child pornography accessed through the Internet, where it was accessed through AOL IP addresses is sufficient to establish probable cause. *Id.* at 540–41.

43. Michael J. Henzey, *Going on the Offensive: A Comprehensive Overview of Internet Child Pornography Distribution and Aggressive Legal Action*, 11 APPALACHIAN J. L. 1, 13 (2011).

For this reason, it is necessary to examine the measures taken by legislatures to combat this crime.

II. COMBATING THE SPREAD OF CHILD PORNOGRAPHY: THE CONGRESSIONAL RESPONSE TO THE RAPID INFLUX IN CHILD PORNOGRAPHY OFFENDERS

A. *Early Successes in Preventing the Spread of Child Pornography*

Until the mid-to-late 1970s, attitudes towards child pornography were relatively relaxed, and as a result laws prohibiting this industry did not exist.⁴⁴ In response to growing public concern, Congress passed the Protection of Children Against Sexual Exploitation Act of 1977, which prohibited “the manufacture or commercial distribution of obscene materials involving children sixteen years or younger.”⁴⁵ At this time state legislatures who had passed similar laws came under attack in the courts on the grounds that the application of the legislation to individual circumstances violated the First Amendment.⁴⁶ In the landmark case of *New York v. Ferber*, the Supreme Court developed the constitutional foundation for criminalizing child pornography, by (1) finding that obscenity, as understood in *Miller v. California*,⁴⁷ is not protected speech; and (2) holding that states are permitted to criminalize child pornography, as it “constitutes a government objective of surpassing importance.”⁴⁸

44. Henzey, *supra* note 1, at 11. Between 1976 and 1977, however, public opinion on the relaxed attitudes shifted due largely in part by feminist groups and decency campaigners who utilized media outlets such as the NBC Television News. *Id.* at 11–12.

45. Protection of Children Against Sexual Exploitation Act of 1977, 95 Pub. L. 225, 92 Stat. 7 (1978). *See also* Henzey, *supra* note 1, at 12. This Act was credited for “eliminating the open trade of child pornography at the time.” *Id.*

46. *New York v. Ferber*, 458 U.S. 747, 753 (1982).

47. In *Miller v. California*, the Supreme Court discussed the basic guidelines for what material is considered obscene. Those include:

(a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 24 (1973).

48. *Ferber*, 458 U.S. at 754, 757. This holding was based on five determinations made by the court.

First. It is evident beyond the need for elaboration that a State’s interest in ‘safeguarding the physical and psychological well-being of a minor’ is ‘compelling’ *Second.* The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children’s participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled *Third.* The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation *Fourth.*

Over the next decade, Congress passed multiple other federal pornography laws “which virtually removed all First Amendment protection from the entire category of child pornography by automatically deeming any representation of sex involving a minor as obscene and thus illegal.”⁴⁹ By the mid-1990s, Congress passed the Child Pornography Prevention Act of 1996 (CPPA)⁵⁰ in response to “high-tech kiddie porn,” pornographic images of children created, altered, recorded, reproduced or distributed using new technologies, especially computers.⁵¹ Subsequently the definition of child pornography was expanded to include any “computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexual explicit conduct”⁵² The congressional intent behind this act was “to close a loophole in our Federal child pornography laws caused by advances in computer technology.”⁵³ This advancement in the battle against child pornography soon came under attack when reviewed by the United States Supreme Court in *Ashcroft*.⁵⁴

The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimis *Fifth*. Recognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions.

Id. at 756–63.

49. Henzey, *supra* note 1, at 14; see The Child Protection Act of 1984, 98 Pub. L. 292, 98 Stat. 204 (1984); The Child Sexual Abuse and Pornography Act of 1986, 99 Pub. L. 628, 100 Stat. 3510 (1986); The Child Protection and Obscenity Enforcement Act, 100 Pub. L. 690, 102 Stat. 4485 (1988); The Child Protection Restoration and Penalties Enhancement Act, 101 Pub. L. 647, 104 Stat. 2816 (1990).

50. 18 U.S.C. § 2252A (Supp. V 1999).

51. S. REP. NO. 104–358, at 7 (1996).

52. 18 U.S.C. § 2256(8) (2000) (later amended). The full definition provided by the CPPA includes:

Any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where-

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is, *or appears to be*, of a minor engaging in sexually explicit conduct;

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or

(D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct

Id.

53. S. REP. NO. 104–358, at 28 (1996). See also Sarah Sternberg, *The Child Pornography Prevention Act of 1996 and the First Amendment: Virtual Antitheses*, 69 FORDHAM L. REV. 2783, 2797 (2001).

54. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 239 (2002).

B. Ashcroft v. Free Speech Coalition and a Clearer Definition of Child Pornography in its Aftermath

In *Ashcroft*, the Supreme Court was tasked with determining the constitutionality of the CPPA and its prohibition against any images of computer generated children.⁵⁵ The statute had extended beyond the holding in *Ferber* which prohibited child pornography “because of the State’s interest in protecting the children exploited by the production process.”⁵⁶ The respondents included “a California trade association for the adult entertainment industry ... the publisher of a book advocating the nudist lifestyle ... a painter of nudes ... [and] a photographer specializing in erotic images.”⁵⁷ All of these individuals argued that while “they did not use minors in their sexually explicit works,” their work had a chance of falling into the CPPA’s expanded definition of child pornography under 18 U.S.C. § 2256(8)(B).⁵⁸

While the Court acknowledged that “the sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people,” it concluded that the possibility of the crime being committed “by itself does not justify laws suppressing protected speech.”⁵⁹ The Court stated that unlike the speech prohibited in *Ferber*, “the CPPA prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not ‘intrinsically related’ to the sexual abuse of children...”⁶⁰ In response to the Government’s argument that virtual child pornography encourages pedophiles to participate in illegal conduct such as child molestation, the Court found that “the mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.”⁶¹ The Court held that the statutory language of the CPPA

55. *Id.*

56. *Id.* at 240. This prohibition itself extended beyond the *Miller* standard, which prohibited obscene images since that test did not “reflect the State’s particular and more compelling interest in prosecuting those who promote the sexual exploitation of children.” *Id.* See *Osborne v. Ohio*, 495 U.S. 103, 109–10 (1990) (finding that the court was justified in passing legislation against all forms of child pornography since their purpose was to “stamp out this vice at all levels in the distribution chain.”).

57. *Ashcroft*, 535 U.S. at 243.

58. *Id.* Respondents contended that their work would be subject to the “appears to be provision.” *Id.* Furthermore, they argued that [t]he statute is not so limited in its reach, however, as it punishes even those possessors who took no part in pandering. Once a work has been described as child pornography, the taint remains on the speech in the hands of subsequent possessors, making possession unlawful even though the content otherwise would not be objectionable.

Id. at 242–43.

59. *Id.* at 244–45.

60. *Id.* at 250. The Court rejects the Government’s argument that virtual images can lead to actual instances of child abuse since “the harm does not necessarily follow from the speech...” *Id.*

61. *Id.*

was overbroad as the respondents had initially contended,⁶² and the prohibitions of § 2256(8)(B) and § 2256(8)(D) were ruled unconstitutional.⁶³

The Court's decision in *Ashcroft* was sweeping and had a drastic impact on the Government's prosecutorial abilities to combat the crime of child pornography.⁶⁴ In the aftermath of the decision, defendants charged with possession of child pornography routinely "contend[ed] that there is a 'reasonable doubt' as to whether charged images, particularly digital images on a computer, were produced with an actual child, or as a result of some other process."⁶⁵ This presented a problem for prosecutors because without a statutory provision that included realistic digital images, it was challenging to satisfy the burden of proof in cases of real but unidentified minors.⁶⁶ In cases where the minor would be identified, the Government suffered from a lack of resources and manpower while arranging for law enforcement agents who had been in contact with the child to testify in their trial.⁶⁷ All of these factors, along with the strong criticism⁶⁸ the Court received, prompted a definitive legislative response.⁶⁹

On April 30, 2003, Congress enacted the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 ("PROTECT Act").⁷⁰ Congress amended § 2256(8)(B) to read, "such visual depiction is a digital image, computer image, or computer-generated image that is, or is *indistinguishable from*, that of a minor engaging in sexually explicit

62. *Id.* at 258. The Court cites examples of what could fall under the CPPA, including "a picture in a psychology manual, as well as a movie depicting the horrors of sexual abuse." *Id.* at 246.

63. *Id.* at 258.

64. Brian Slocum, *The Aftermath of Free Speech: A New Definition for Child Pornography*, 52 U.S. ATTY'S BULLETIN 8 (March 2004), <https://www.justice.gov/sites/default/files/criminal-ceos/legacy/2012/03/19/USABulletinMar2004.pdf>.

65. *Id.*

66. *Id.* This pattern grew progressively worse as trials involved experts on both sides "arguing over the method of generating images that look like, and probably are real children." *Id.*

67. *Id.*

68. Henzey, *supra* note 1, at 22. Attorney General John Ashcroft criticized the Court's ruling, stating, "the United States Supreme Court has made our ability to prosecute those who produce and possess child pornography immeasurably more difficult." *Id.* (internal citations omitted). Ernest Allen, President of the National Center for Missing and Exploited Child (NCMEC), stated:

In our judgment, we think it's devastating for America's children. The probable impact is a proliferation of child pornography, unlike anything we have seen in this country for the past 20 years. We believe that it's also going to mean that thousands of children are going to be sexually victimized. Since determining the identity of children in child pornography is very difficult, often times impossible, the requirement that a specific child be identified will result in thousands of prosecutions not happening.

Id. (internal citations omitted).

69. Slocum, *supra* note 64 at 8.

70. See Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. 108-21, 117 Stat. 650 (2003).

conduct[.]”⁷¹ Congress added the phrase “indistinguishable from” to remedy the “appears to be” standard which the United States Supreme Court had found unconstitutionally overbroad.⁷² The legislature defined this more narrowly tailored replacement language as “virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct.”⁷³

Given its concern for growing trends in the child pornography industry, Congress acted hastily.⁷⁴ Congress concluded that “[t]here is no evidence that the future development of easy and inexpensive means of computer generating realistic images of children would stop or even reduce the sexual abuse of real children or the practice of visually recording the abuse.”⁷⁵ Furthermore, they discovered that “in the absence of congressional action [prohibiting virtual child pornography], the difficulties in enforcing the child pornography laws will continue to grow increasingly worse.”⁷⁶ To prevent what Congress termed as a “grave threat,” it concluded that an amendment must be made to the statute to prohibit the subcategory of virtual images from being trafficked or possessed.⁷⁷ The amendment provided through the PROTECT Act was crafted to address the Supreme Court’s concern in *Ashcroft* and it was therefore narrowly tailored to advance the government’s compelling interest without casting a broad net over protected speech.⁷⁸

III. ANALYSIS

The PROTECT Act was intended to provide clarification for the courts and law enforcement on what constituted child pornography in the digital era, but this did not cure the challenges in determining how to meet the probable cause

71. 18 U.S.C. § 2256(8) (2012) (emphasis added).

72. *Id.*

73. 18 U.S.C. § 2256(11).

74. See Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. 108–21, 117 Stat. 650, § 501(14–15).

75. *Id.* at § 501(12).

76. *Id.* at § 501(13). This was based on the understanding that since the “technology exists to create composite or computer-generated depictions that are indistinguishable from depictions of real children [this] will allow defendants who possess images of real children to escape prosecution; for it threatens to create a reasonable doubt in every case of computer images even when a real child was abused.” *Id.*

77. *Id.* at § 501(14–15).

78. Brian Slocum, *The Aftermath of Free Speech: A New Definition for Child Pornography*, U.S. DEPT. OF JUSTICE 9 (March 2004), <https://www.justice.gov/sites/default/files/criminal-ceos/legacy/2012/03/19/USABulletinMar2004.pdf>. The Act was narrowly tailored in four ways:

First, the proscription of virtual images is limited to digital, computer or computer-generated images. Second, the image must genuinely look like they depict real children. Third the sexual content must be particularly explicit. Fourth the defendant can escape conviction through an affirmative defense by establishing that the images were produced without the use of real children.

Id.

standard. This set the framework for the perceived circuit split in *Colbert*, where the Eighth Circuit Court of Appeals distinguished its case from the Second Circuit in *Falso*, a holding which rejected any relationship between the possession of child pornography and other forms of sexual abuse of children.⁷⁹

A. *Getting to Falso: How the Second Circuit Had Ruled on Prior Child Pornography Cases Involving Digital Media*

Falso presented the Second Circuit with a unique situation that the court had not considered in its 2005 opinions *United States v. Martin* and *United States v. Coreas*.⁸⁰ Nonetheless, both of these opinions, which were handed down within two weeks of each other, were relied upon heavily in the court's analysis in *Falso*.⁸¹

In *Martin*, the Second Circuit considered the sufficiency of an affidavit provided to a magistrate for the purpose of searching his residence, which had been based on information gathered in the FBI investigation known as "Operation Candyman."⁸² After the warrant had been issued, it was argued that the supporting affidavit "contain[ed] misstatements about general investigative facts."⁸³ However, *Martin* moved, unsuccessfully, to suppress the evidence obtained by federal investigators.⁸⁴ The Circuit majority affirmed the Eastern District of New York court's ruling and stated "[i]t is common sense that an individual who joins such a site would more than likely download and possess such material."⁸⁵ The court held that this conclusion "does not grant the

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

80. *United States v. Falso*, 544 F.3d 110, 113–14 (2nd Cir. 2008).

81. *Id.* at 116–21.

82. *United States v. Martin*, 426 F.3d 68, 73–77 (2d Cir. 2005). Operation Candyman was a national operation conducted by the FBI conducted to investigate individuals that had been suspected of collecting and distributing child pornography over the internet. *Id.* at 69. The searches conducted "were pursuant to warrants supported by affidavits, each of which recounted the same investigative findings by the same FBI agent but contained additional facts specific to the particular search." *Id.*

83. *Id.* at 69.

84. *Id.*

85. *Id.* at 75. The following factors were considered when determining the sufficiency of the affidavit in establishing probable cause:

First, the girls 12–16's welcome message unabashedly announced that its essential purpose was to trade child pornography Second the affidavit contained an extensive background discussion of the 'modus operandi' of those who use computers for collecting and distributing child pornography, include their reliance on e-groups, e-mail, bulletin boards, file transfers, and online storage Third [the affidavit] described the characteristics and proclivities of child pornography collectors, specifically how they tend to collect such material, store it, and rarely destroy or discard it Fourth, girls 12–16's illicit purpose could be inferred from the website's technological features (files, messages, polls, e-mail, links, polls, chat and membership lists) and facilitated the trading of child pornography Fifth, the agent confirmed that the material uploaded and downloaded on the girls 12–16 site included child pornography and child erotica, and that this material was available to all members Sixth, the affidavit established a nexus

government an unchecked license to search citizens' homes simply because they are members of an offensive or disreputable group," but rather the analysis was based on the "totality of the evidence proffered in the affidavit" and there was "a substantial likelihood" of the crime having been committed.⁸⁶

Judge Pooler dissented, stating that the majority in *Martin* had established "a dangerous precedent."⁸⁷ Judge Pooler warned that this holding now supported the theory that the government could obtain a warrant to search a home based on evidence of an individual subscribing to an e-group that has an illegal purpose, regardless of there being any evidence of the individual participating in the e-group's function.⁸⁸

Two weeks later, the Second Circuit in *Coreas* faced the same question it had answered in *Martin*, but expressed the opposite view.⁸⁹ During Operation Candyman, another e-group known as "Candyman" was discovered "that allowed its members to exchange information, upload and download electronic files, and chat with other members in 'real time.'"⁹⁰ Using the same affidavit filed in *Martin*, which contained false information, FBI agents convinced a magistrate that there was probable cause, resulting in the search of Coreas' residence where investigators discovered over one hundred images of child pornography on his computer.⁹¹

On appeal, the Second Circuit referenced Judge Pooler's *Martin* dissent, specifically that "it [is] well settled that a 'person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person.'"⁹² The Circuit held that "by this act of clicking a button, he provided probable cause for the police to enter his private

between the member and the website: The girls 12–16 member who utilized the e-mail address (omitted) lived at the searched house Seventh, (email omitted) joined girls 12–16 voluntarily and never cancelled his membership.

Id.

86. *Id.* at 76.

87. *Id.* at 78.

88. *Id.* Judge Pooler believed the inferences established by the majority were unreasonable due to the deficiencies presented in the corrected affidavit. *Id.* at 79. Those included:

First the corrected affidavit does not allege facts that support an inference that Martin participated in any of the E-group's legal or illegal functions. Second the corrected affidavit doesn't not support the conclusion that the overriding purpose of the E-group was illegal. Third the corrected affidavit's allegation that Martin was an E-group subscriber indicates only Martin's propinquity to other who were committing a crime, which is not sufficient to establish probable cause. Fourth the corrected affidavit's allegations regarding the propensities of "collectors of child pornography" do little to establish probable cause with respect to Martin.

Id.

89. *United States v. Coreas*, 419 F.3d 151, 159 (2d Cir. 2005).

90. *Id.* at 152.

91. *Id.* at 154.

92. *Id.* at 156 (quoting *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979)). *See also* *United States v. Martin*, 426 F.3d 68, 79 (2d Cir. 2005).

dwelling and rummage through various of his personal effects seems utterly repellent to core purposes of the Fourth Amendment.”⁹³ The Court in *Coreas* determined that the claim that members of Candyman automatically received emails containing child pornography was a reckless disregard of the truth.⁹⁴ Without this support in the corrected affidavit, the Circuit ruled that simply logging on to a website and accepting the introduction message did not suffice to show that Coreas would likely have possessed child pornography.⁹⁵ Aiding the court in drawing this conclusion was the lack of evidence that the e-group Candyman’s sole purpose was to collect and distribute child pornography, which made it distinguishable from the e-group in *Martin*.⁹⁶ The Circuit held that “requiring particularized information to be gathered before the warrant application is made will simply focus law enforcement efforts on those who can reasonably be suspected of receiving child pornography.”⁹⁷

These contrasting viewpoints show that the principal factor that separated the analyses in *Martin* and *Coreas* was the *specific* information contained in the affidavit submitted. This factor is imperative leading up to the Second Circuit’s decision in *Falso*.

B. Falso: A New Challenge for the Second Circuit

In June 2005, David J. Falso became the subject of an FBI investigation for his possible links to an e-group involved with the sharing of child pornography.⁹⁸ The investigation was handled by FBI Agent James Lyons, and the application for a warrant to search Falso’s dwelling was supported by a twenty-six-page affidavit.⁹⁹ Within the affidavit, Agent Lyons provided generalized information:

individuals who exploit children, including collectors of child pornography, commonly use computers to: communicate with like-minded individuals, store their child pornography collections, and locate, view, download, collect and organize images of child pornography found on the internet ... [C]ollectors and distributors of child pornography sometimes use online resources to retrieve and store child pornography, including services offered by internet portals such as Yahoo! Inc.¹⁰⁰

93. *Coreas*, 419 F.3d at 156.

94. *Id.* at 155–56.

95. *Id.* at 156.

96. *Id.* at 157. This judicial conclusion was found based on evidence included in the affidavit regarding the welcome message that all users on Candyman received. *Id.* Phrases from the welcome message, such as “post any type of message you would like,” were considered when determining that the sole purpose of Candyman may not have been the distribution of child pornography. *Id.*

97. *Id.* at 158.

98. *United States v. Falso*, 544 F.3d 110, 114 (2d Cir. 2008).

99. *Id.*

100. *Id.*

Additional information was included, such as observations from the FBI Behavioral Analysis Unit that “the majority of individuals who collect child pornography are persons who have a sexual attraction to children, and that those who collect images of child pornography generally store their collections at home.”¹⁰¹

Essential to the validity of Agent Lyons’ affidavit was the suggestion that Falso was involved with a website, www.cpfreedom.com, which contained “approximately eleven images of child pornography.”¹⁰² The affidavit provided that this assertion was based on a forensic investigation of www.cpfreedom.com, revealing “several possible subscribers along with e-mail addresses” which included a Yahoo account and email address associated with Falso.¹⁰³ Based on this forensic examination, the affidavit stated that “it appear[ed] that Falso ‘either gained access or attempted to gain access to the [non-member] website.’”¹⁰⁴

Moreover, within the affidavit Agent Lyons included that on February 18, 1987, about eighteen years prior to the investigation, “Falso was arrested by the New York State Police for sexually abusing a seven-year old girl and was charged with Sexual Abuse and Endangering the Welfare of a Child.”¹⁰⁵ Agent Lyons’ affidavit was presented to the magistrate and a search warrant was granted on June 1, 2005.¹⁰⁶

The warrant was executed on June 8, 2005, and the search revealed images of child pornography both in his bedroom and on his computer.¹⁰⁷ Falso moved to suppress the evidence seized during the search, arguing that the law enforcement agents had not established a sufficient basis for probable cause, specifically claiming that there was a lack of evidence showing he was “a member or subscriber to the website, or that the overriding purpose of the website was the trading of child pornography.”¹⁰⁸ On February 24, 2006, the district court denied

101. *Id.*

102. *Id.* at 113–14. This website, which “contained approximately eleven images of child pornography,” also advertised additional contraband for a \$99 one-month membership fee. *Id.*

103. *Id.* at 114. (The court finding “[r]ecords obtained from Yahoo indicated that Falso had an active Yahoo account, with the log in name of ‘cousy1731’ and the Yahoo email address.”). Records from Yahoo.com indicated that the account was associated with Falso’s residential address and it had been active “during the period of time immediately preceding the warrant request.” *Id.*

104. *United States v. Falso*, 544 F.3d 110, 114 (2d Cir. 2008) (internal punctuation omitted).

105. *Id.* Details from the police report were also included in the affidavit and stated that “Falso placed his hands inside the girl’s underwear and digitally penetrated her and acknowledged to police that he may need counseling for latent problems.” *Id.*

106. *Id.*

107. *Id.* During the search, Falso “admitted to, among other things, obtaining child pornography from the internet; engaging in sexual activity with females in other countries whom he believed to be between the ages of sixteen and eighteen; and having been convicted for sexually abusing a seven-year old girl.” *Id.*

108. *Id.* at 115. The defendant “submitted an affidavit from a data forensic expert ... explain[ing] that, ‘there is a difference between visiting a website and becom[ing] a member and/or subscriber to the site.’” *Id.*

Falso's motions, finding that probable cause existed.¹⁰⁹ Moreover, the court found that Falso's prior sexual contact with a minor was "highly relevant to the criminal activity at issue here."¹¹⁰ After his motions were denied, Falso pled guilty to all 242 counts in the indictment.¹¹¹

On appeal of the probable cause finding, the Second Circuit faced the question of whether probable cause could be found based on evidence in an affidavit stating 1) Falso had "appeared to have gained or attempted to gain access" to a website that contained child pornography and 2) he "had been convicted 18 years earlier of a misdemeanor based on sexual abuse of a minor."¹¹² The court first analyzed the evidence suggesting that Falso had accessed the website involved in the investigation, and it was within this context that it reviewed both *Martin* and *Coreas*.¹¹³ The Court concluded that the evidence provided in the affidavit distinguished *Martin* and *Coreas* from being controlling, finding that Agent Lyons affidavit only provided evidence that Falso "appeared to have gained or attempted to gain access," rejecting the district court's ruling that it supported its finding of probable cause.¹¹⁴

The other substantial factor the district court attributed to the finding of probable cause was the affidavit referencing Falso's eighteen-year-old misdemeanor charge, which stated "the majority of individuals who collect child pornography are persons who have a sexual attraction to children."¹¹⁵ The court disagreed with the factual analysis by the lower court, finding instead that "the

109. *United States v. Falso*, 544 F.3d 110, 115–16 (2d Cir. 2008). The Court went on to state five inferences which they believed established probable cause:

First, there was the information concerning the background of persons dealing in child pornography, including the fact that persons who collect child pornography have a sexual attraction to children. Second, there was information that the web site, CP Freedom, advertised that it contained child pornography, actually had some images of child pornography available on it free of charge and advertised that it had additional images of child pornography upon payment of a fee. Third, the FBI determined that the material associated with the website is hardcore child pornography. Fourth, there was evidence that [Falso] had access or attempted to access the CP Freedom web site. Fifth, there was information [that Falso] actually engaged in inappropriate sexual contact with a minor in the past.

Id. at 116.

110. *Id.* In addition to finding that probable cause existed, the court also stated that "even if there had been an insufficient basis for finding probable cause, suppression of the evidence was not warranted because of the good faith exception to the exclusionary rule applied." *Id.* at 117.

111. *Id.* at 117.

112. *Id.* at 110.

113. *Id.* at 117–20.

114. *United States v. Falso*, 544 F.3d 110, 113, 120–21 (internal punctuation omitted). By distinguishing this case from *Martin* and *Coreas*, the court asserted that the ultimate inference drawn there, that "membership in the e-group reasonable implied use of the website" and that it was "common sense that an individual who joins such a site would more than likely download and possess such material," could not be established here. *Id.* at 121 (internal citations omitted).

115. *Id.* at 121–22.

association is nowhere stated or supported in the affidavit.”¹¹⁶ Further, the court reiterated Judge Pooler’s dissent in *Martin*, finding that “[i]t is an inferential fallacy of ancient standing to conclude that, because members of group A (those who collect child pornography) are likely to be members of group B (those attracted to children), then group B is entirely, or even largely composed of members of group A.”¹¹⁷ While the court did not deny that the offenses relating to child pornography and the sexual abuse of a minor both involve the exploitation of children, this fact did not support the probable cause correlation found by the lower court.¹¹⁸ Concluding that little weight should be given to the prior conviction, the court also ruled that any support found by the district court in the generalized allegations included within the affidavit “fail to establish the requisite nexus of illegal activity to Falso.”¹¹⁹ The court rejected the district court’s finding of probable cause, but affirmed the judgment due to the separate finding of a good-faith exception.¹²⁰

Falso presented the Second Circuit with a new challenge, which required the consideration of whether prior acts of sexual abuse of children was relevant to the probable cause analysis for the crime of child pornography. Just two years later, the Eighth Circuit in *Colbert* rejected the *Falso* conclusion, further obscuring what was already a difficult issue in the realm of child pornography.

C. *Colbert: A Harsh Take on the Analysis in Falso*

The events of *Colbert* occurred one year after the investigation of *Falso* was conducted. On June 7, 2006 detectives in Davenport, Iowa were called to investigate after suspicious activity involving a young child had been reported.¹²¹ Upon their arrival, the investigators were informed that a man had been observed pushing a five-year-old girl on the swings and talking to her “about movies and videos the man had at his home.”¹²² *Colbert* was later

116. *Id.*

117. *Id.* (internal punctuation and citations omitted).

118. *Id.* In support of this contention, the court provides an analogy, stating “it may be state that most people who sell drugs do drugs. That is not to say, however, that most people who do drugs sell drugs.” *Id.* at n.15.

119. *United States v. Falso*, 544 F.3d 110, 124. The generalized allegations rejected by the court included: “(1) the propensity of collectors of child pornography to intentionally maintain illegal images; (2) law enforcement’s ability to retrieve such images from a computer; and (3) the ability to view child pornography on the cpfreedom.com website.” *Id.*

120. *Id.* at 129 (finding that the good faith exception to the warrant requirement applied since the district court had not been knowingly or recklessly misled and the affidavit was not so lacking in indicia of probable cause).

121. *United States v. Colbert*, 605 F.3d 573, 575 (8th Cir. 2010). Investigators were called to Vandevener Park, in Davenport where they found the child with her uncle. *Id.*

122. *Id.* The detectives had gathered this knowledge from the child herself and two other witnesses, one being the child’s uncle. *Id.*

stopped in his vehicle, and consented to a search of his car.¹²³ Due to the nature of the complaint and the unusual items found in Colbert's car, he was taken to the police station for questioning while law enforcement agents began drafting a warrant seeking "permission to search Colbert's residence for books, photos, videos, and other electronic media depicting 'minors engaged in a prohibited sexual act or in the simulation of a prohibited sexual act.'"¹²⁴ A judge issued a search warrant after reviewing the affidavit which included the facts presented above, along with the assertion that Colbert had "attempted to lure a five-year-old female to go to his apartment."¹²⁵

The search revealed multiple compact disks containing child pornography which Colbert moved to suppress at trial on the basis that 1) the affidavit "was conclusory in nature, failing to specify the source of the information that it contained" and 2) that there was insufficient evidence presented to show a nexus between the alleged enticement and child pornography which would be found at his home.¹²⁶ The district court denied his motion and Colbert plead guilty to possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B).¹²⁷

On the first issue in his appeal, the court cited *Gates*, in which the Supreme Court found that law enforcement affidavits "stated that they believed or had a credible reason to believe that a search would yield evidence of criminal conduct" were prohibited under the Fourth Amendment.¹²⁸ The court found that while the affidavit was not "a model of detailed police work," it nonetheless presented a fair inference that the source of information came from the police

123. *Id.* Colbert's vehicle resembled a police cruiser, due to its blue color and being equipped with rear antennas. *Id.*

124. *Id.* During the search of his vehicle, the police discovered "a police scanner, handcuffs and a hat bearing the phrase 'New York PD'." *Id.* Colbert admitted to speaking with the minor however he claimed his car contained those items because he had previously worked as a security guard. *Id.*

125. *Id.* at 575-76.

126. *Id.* at 576-77.

127. *United States v. Colbert*, 605 F.3d 573, 575 (8th Cir. 2010). 18 U.S.C. § 2252(a)(4)(B) states

Any person who . . . either . . . knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if—

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct; shall be punished as provided in subsection (b) of this section.

§ 2252.

128. *Colbert*, 605 F.3d at 576. *See Illinois v. Gates*, 462 U.S. 213, 239 (1983) (finding that an affidavit that is wholly conclusory does not satisfy the probable cause standard).

officers based on the drafters “firsthand knowledge of the investigation.”¹²⁹ As a result, the court rejected Colbert’s assertion that the affidavit’s conclusory nature prohibited a finding of probable cause.¹³⁰

Next, the court turned to the predominant issue of whether the affidavit had established a sufficient link between evidence of enticement and the contraband located at Colbert’s home. As for proof of the alleged enticement, the court drew the following inferences from the evidence provided in the affidavit: 1) the clothing found in his car show that Colbert was “attempting to appear as an authority figure,” 2) the handcuffs and binoculars “give rise to the inference that he was surveilling the area,” 3) that these factors, in conjunction with Colbert approaching the minor and speaking with her for almost an hour about movies he had at his home, “tend to paint a picture of an older man attempting to entice a young girl into sexual activity.”¹³¹

With these inferences drawn, the court agreed with the district court, which had found probable cause “because individuals sexually interested in children frequently utilize child pornography to reduce the inhibitions of their victims” and “sexual depictions of minors could be logically related to the crime of child enticement.”¹³² Building upon what the district court had stated, the Eighth Circuit ruled that “[t]here is an intuitive relationship between acts such as child molestation or enticement and possession of child pornography.”¹³³ The court found support in the Supreme Court statements in *Osborne v. Ohio* where it was held that “evidence suggests that pedophiles use child pornography to seduce other children into sexual activity.”¹³⁴

Colbert distinguished itself from *Falso*, finding that the two cases were both factually and legally inapposite.¹³⁵ The court emphasized the immediacy of the potential enticement in *Colbert*.¹³⁶ Whereas in *Falso*, evidence provided in the affidavit about the sexual abuse of a minor was almost two decades old, here the

129. *Colbert*, 605 F.3d at 576.

130. *Id.*

131. *Id.* at 577.

132. *United States v. Colbert*, 605 F.3d 573, 577 (8th Cir. 2010).

133. *Id.* at 578. *See United States v. Paton*, 535 F.3d 829, 836 (8th Cir. 2008) (stating that computer and the internet can be considered “tools of the ... trade” for individuals who have pedophilic tendencies); *United States v. Byrd*, 31 F.3d 1329, 1339 (5th Cir. 1994) (holding that it is “common sense” to assume individuals who are sexually attracted to children “order and receive child pornography.”).

134. *Colbert*, 605 F.3d at 578 (quoting *Osborne v. Ohio*, 495 U.S. 103, 111 (1990) (finding an Ohio statute which prohibited possession or viewing of child pornography constitutional due to the state’s compelling interest in safeguarding minors)).

135. *Colbert*, at 577–78. The court also distinguishes itself from the Sixth Circuit Court of Appeals in *United States v. Hodson*, where that court overturned a lower court’s finding of probable cause due to the affidavit presenting probable cause for child molestation but its purpose was to search for evidence of child pornography, “an entirely different crime.” *Id.* at 577. *See also United States v. Hodson*, 543 F.3d 286, 292 (6th Cir. 2008).

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

threat of enticement occurred on the very same day the warrant was executed.¹³⁷ The *Colbert* court contrasted its facts to *Falso* since there the search did not include the place of the relevant sex crime, while law enforcement agents in *Colbert* “focused their search on the very place where Colbert had expressed a desire to be alone with a five-year-old girl.”¹³⁸

The *Colbert* court further distinguished itself from *Falso* by asserting that the Second Circuit Court of Appeals found the defendant’s propensity to sexually abuse children was irrelevant to their probable cause analysis, finding that the Second Circuit “based their conclusions on a categorical distinction between possession of child pornography and other types of sexual exploitation of children.”¹³⁹

While the factual distinctions are readily apparent, the sharp contrast asserted in *Colbert* between the Second and Eighth Circuits in regard to Fourth Amendment purposes for establishing probable cause poses the risk of creating unnecessary confusion within the scope of child pornography. This risk is arguably unfounded however due to the Eighth Circuit’s misunderstanding of the Second Circuit’s analysis in *Falso*.

IV. CLEARING THE AIR: THE EIGHTH CIRCUIT’S MISCONCEPTION REGARDING THE PROBABLE CAUSE ANALYSIS IN *FALSO*

Based on a thorough review of *Falso* and *Colbert*, it is clear that the court in *Colbert* was simply wrong in concluding that the court in *Falso* failed to consider the relationship between the evidence of prior sexual abuse of a child in the probable cause analysis. This is a contention that requires reconciliation to avoid any additional confusion sister circuits may have in an area of law that is already fraught with misperceptions.

The *Falso* court approached the question of whether probable cause was sufficiently established in two separate sections.¹⁴⁰ This was purposely done because the court had determined that the district court’s evaluation rested on two important and separate assertions in the affidavit: 1) that Falso “appeared to have gained or attempted to gain access” to a website containing child pornography, and 2) that he had an eighteen-year-old conviction involving the sexual abuse of a minor.¹⁴¹ In order to analyze the sufficiency of evidence supporting the first element, the *Falso* court relied on their holdings in *Martin* and *Coreas*.¹⁴² Once it was established that the affidavit failed to include the requisite evidence supplied by the affidavit in *Martin*, where the *Falso* court had

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

138. *Id.*

139. *Id.* The court in *Colbert* rejected this conclusion as it was “in tension both with common experience and a fluid, non-technical conception of probable cause. *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 230–32 (1983)).

140. *United States v. Falso*, 544 F.3d 110, 177–224 (2d Cir. 2008).

141. *Id.* at 113–14.

142. *Id.* at 116–21.

ruled that probable cause could be established, the court concluded that the first prong of its analysis failed to lend support to the assertion that there was a substantial likelihood that Falso possessed child pornography in his dwelling.¹⁴³

The Second Circuit continued, stating “[t]he most obvious other factor that might support a finding of probable cause is Falso’s eighteen-year-old misdemeanor.”¹⁴⁴ Subsequently the court dived into an analysis of how this factor would, if at all, contribute to probable cause to search. *Falso* held that the district court’s decision to rule Falso’s eighteen-year-old conviction as “highly relevant” in the probable cause analysis was improper, as shown by their reliance on Judge Pooler’s example of the “inferential fallacy of ancient standing[.]”¹⁴⁵ However, this does not in turn justify the Eighth Circuit’s conclusion that it considered the relationship as wholly irrelevant, since the decision factored in the recency of the prior act.¹⁴⁶ In fact, *Falso* held that the prior conviction was only “marginally relevant because the conviction was stale.”¹⁴⁷ *Falso* relies on the decision in *United States v. Ortiz*, stating that “two critical factors in determining whether facts supporting a search warrant are ‘the age of those facts and the nature of the conduct alleged to have violated the law.’”¹⁴⁸ In considering these two factors, the *Falso* court ultimately decided they “undermined the probity of Falso’s prior conviction.”¹⁴⁹

In support of the conclusion that the recency of the prior sexual abuse results in it being only marginally relevant, the *Falso* court contrasted the facts from those in *United States v. Irving*, another case from the Second Circuit where evidence of attempted sexual abuse of a minor was considered when denying the defendant’s motion to suppress.¹⁵⁰ In *Irving*, the defendant had a prior conviction of attempted sexual abuse of a minor, dating back more than twenty years.¹⁵¹ However, unlike in *Falso*, the court in *Irving* found the conviction to be highly relevant based on evidence within the affidavit that the defendant had sexually abused three children in Mexico just five years before the search of his apartment, as well as two-year-old letters that had been written by the defendant discussing his desire to sexually exploit children.¹⁵² Of the evidence contained within the twenty-six page affidavit compiled in *Falso*, nothing “bridg[es] the

143. *Id.* at 121; *United States v. Martin*, 426 F.3d 68, 75 (2d Cir. 2005).

144. *Falso*, 544 F.3d at 121.

145. *Id.* at 122; *Martin*, 426 F.3d at 82 (Pooler J., dissenting).

146. *Falso*, 544 F.3d at 122–23.

147. *Id.* at 122.

148. *United States v. Falso*, 544 F.3d 110, 122 (2d Cir. 2008) (quoting *United States v. Ortiz*, 143 F.3d 728, 732 (2d Cir. 1998)).

149. *Falso*, 544 F.3d at 122.

150. *Id.* at 123; *United States v. Irving*, 452 F.3d 110, 124–25 (2d Cir. 2006).

151. *Irving*, 452 F.3d at 116.

152. *Id.*

temporal gap between Falso's eighteen-year-old sex offense and the suspected child pornography offense."¹⁵³

The *Falso* court was able to soundly conclude that little weight should be given to this fact when factoring it into their probable cause analysis because his prior conviction was stale.¹⁵⁴ Having established that both the Second Circuit and the Eighth Circuit considered the relevancy of prior acts of child sex abuse when conducting their respective probable cause analyses, it is evident that the level of weight allotted in considering probable cause depends on the recency of the claimed act. Unlike *Falso*, the court in *Colbert* placed greater emphasis on the evidence of his attempted enticement of the five-year old girl when reviewing the lower court's denial of his motion to suppress based on insufficient probable cause due to it happening hours before a search of his home occurred.¹⁵⁵ The weight of these facts, being dependent upon the recency of the actions is in line with our modern understanding of the probable cause standard as the court is required to consider those acts among "the totality of the circumstances."¹⁵⁶ Thus, these courts and those in their sister circuits should continue to consider the recency of evidence of prior sexual abuse when determining if an affidavit provides probable cause for crimes involving the possession of child pornography.

V. CONCLUSION

In 1995, during a Congressional hearing regarding the CPPA, Senator Orrin Hatch warned that child pornography was a "plague upon our people."¹⁵⁷ Now, more than twenty years later those words remain true. In this comment I have focused on the challenges presented when prosecuting offenders who possess child pornography. Among many factors, some courts have questioned the probative value of an offender's history of prior sexual abuse when conducting an analysis of probable cause for possession of child pornography.¹⁵⁸ This uncertainty was exacerbated by the Eighth Circuit's assertion in *Colbert*, stating that the court in *Falso* found evidence of sexual abuse irrelevant to their decision that there was an insufficient basis to conclude that probable cause existed for child pornography being located at the defendant's home.¹⁵⁹ By thoroughly reviewing *Falso* and prior decisions made by the Second Circuit Court of Appeals, I assert that the Eighth Circuit was incorrect in making that statement, since the Second Circuit did in fact consider this evidence, but found

153. *Falso*, 544 F.3d at 123.

154. *Id.*

155. *United States v. Colbert*, 605 F.3d 573, 578–79 (8th Cir. 2010).

156. *See Illinois v. Gates*, 462 U.S. 213, 230–31 (1983).

157. Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 233–34 (2001). *See also* 141 Cong. Rec. S. 24,871 (1995) (statement of Sen. Hatch regarding Child Pornography Prevention Act of 1995).

158. *United States v. Falso*, 544 F.3d 110, 124 (2d Cir. 2008).

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

determinative in its analysis the recency of the act to the application for a warrant.¹⁶⁰ Since this analysis was in line with our current understanding of the probable cause standard, other courts should disregard the discrediting of *Falso* stated in *Colbert*.

160. *Falso*, 544 F.3d at 122–23.

