

## Probable Cause and Child Pornography

**Author :** Jeff Welty

**Categories :** [Search and Seizure](#), [Uncategorized](#)

**Tagged as :** [child pornography](#), [gerard](#), [probable cause](#), [search warrants](#), [terrell](#)

**Date :** February 12, 2018

Shea [blogged last week](#) about [State v. Terrell](#), a case in which the defendant's girlfriend saw on one of the defendant's USB drives an "image of [the girlfriend's] nine-year-old granddaughter sleeping without a shirt." She called the police, and an officer found additional images of "partially or fully nude minors" on the drive. The officer sought and obtained a search warrant that led to the discovery of child pornography. Shea's post, and the case itself, focused on the officer's initial warrantless search and whether it was justified under the private search doctrine. But the court's recitation of the facts reminded me of another common issue in child pornography cases: how much information about an image must an officer provide in order to establish probable cause that the image constitutes child pornography?

**What's child pornography, again?** Under North Carolina law, child pornography is criminalized under the various sexual exploitation of a minor statutes located at G.S. 14-190.16 et seq. Those offenses generally cover creating, duplicating, distributing, and possessing representations of minors engaged in "sexual activity," which is defined in G.S. 14-190.13 to include most of the things one might expect, plus "[t]he lascivious exhibition of the genitals or pubic area of any person."

**What sorts of problems arise?** In cases where a private person or a law enforcement officer views an image that belongs to a suspect, and an officer subsequently seeks a search warrant based on the image, questions might arise about whether the person in the image is a minor and about whether the image depicts "sexual activity." For example, a statement that a suspect possessed an image of "a naked male child" might refer to an innocent family bathtub picture or to child pornography. Sometimes search warrant applications contain statements that an image "is child pornography," and questions may then arise concerning the extent to which a court can or should rely on a witness's opinion or conclusion about how the image should be classified.

**So, what's the law?** The law isn't completely settled, but it is possible to break the issue down into a few common scenarios.

- *Attaching a copy of the image.* If the applicant attaches a copy of the image, the issuing official can see for him or herself what the image contains. The only question then would be about the sufficiency of the image itself to support probable cause, not about the sufficiency of the description. This approach certainly provides the most information to the issuing official, though (1) the application would need to be sealed, and (2) a recent North Carolina appellate case observed that "[i]ncluding copies of the images themselves would further perpetuate the very harm the statutes regarding child pornography were intended to prevent," i.e., the distribution of images that the victim would not want disseminated. *State v. Gerard*, \_\_ N.C. App. \_\_, 790 S.E.2d 592 (2016).
- *Matching the hash value of a known child pornography image.* When an officer goes beyond merely looking at the image and is able to analyze it electronically, the officer may determine -- through the use of [hash values](#) -- that the image matches a known image of child pornography. Under *Gerard*, this is sufficient to establish probable cause.
- *Providing a detailed factual description of the image.* It also may be sufficient if the applicant provides a detailed factual description of what is displayed in the image, including the apparent age of the child, the activity in which the child is engaged, and, if appropriate, any facts supporting the idea that the child's genitals are displayed in a lascivious manner. See, e.g., *United States v. Sparks*, 806 F.3d 1323 (11th Cir. 2015) ("The

affidavit supporting the search of the phone allowed the court to find probable cause. It described photographs of naked men, women, and children, including close-ups of private body parts, and culminated in a description of a photo that focused on a young child's naked vagina and stomach, covered in a fluid that appeared to be semen. This was more than enough to allow a judge, relying on common sense, to determine that it was fairly probable that the phone contained evidence of [child pornography]. . . . An issuing judge need not personally view photographs or images which are alleged to be contraband if a reasonably specific affidavit describing the contents can provide an adequate basis to establish probable cause. . . . The descriptions here were not vague conclusions that the phone contained images of child pornography; they objectively and specifically stated the contents of the photos. . . . [T]he affidavit's descriptions, in and of themselves, established the child-pornographic nature of the images. Because the descriptions independently demonstrated probable cause for possession of child pornography, the judge was not required to actually look at the photos.”)

- *Providing a less detailed description.* Officers who describe images in more general terms may run into problems, as the descriptions may not suffice to provide probable cause. *See, e.g., United States v. Doyle*, 650 F.3d 460 (4th Cir. 2011) (finding no probable cause where a search warrant application stated that a witness reported being shown "pictures of nude children" by the defendant, as such pictures may or may not constitute child pornography).
- *Statements that an image is child pornography.* Courts don't agree about how to treat statements of this kind, with some viewing them as conclusory statements by the affiant that provide no facts to the issuing official, *United States v. Pavulak*, 700 F.3d 651 (3d Cir. 2012) (generally supporting that view), and others viewing such statements as entitled to some credit, at least if made by an experienced officer, *United States v. Krupa*, 658 F.3d 1174 (9th Cir. 2011) (stating that the issuing official "was entitled to give some deference to the agent's statement that the photograph constituted an 'image of suspected contraband,' even though the affidavit's description of the photograph did not necessarily support the conclusion that the photograph constituted child pornography").

**Back to Terrell.** Nothing in this post is meant as a comment on *Terrell*. The search warrant application isn't available on the appellate courts' electronic filing site, and as I mentioned at the outset, this issue wasn't the focus of the opinion in *Terrell*. But officers, lawyers, and judges may all want to keep in mind that probable cause issues are often present in this type of case.