

NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION
File Name: 19a0529n.06

No. 18-6333

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Before: SUTTON, KETHLEDGE, and STRANCH,
Circuit Judges.

KETHLEDGE, Circuit Judge. Kendall Carter appeals the district court's denial of his motion for a *Franks* hearing and his motion to suppress evidence of child pornography and interstate extortion. We reject his arguments and affirm.

During the summer of 2014, Carter—then a 20 year-old living in his parents' basement in Milton, Tennessee—befriended a handful of 13 to 16 year-old girls on an instant messaging app called Kik. After he had done so, Carter used multiple online personas to coerce the girls into sending him nude photos. Then Carter threatened to post the photos online unless the girls sent him even more sexually explicit images.

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In October 2014, one of the girls, a 13 year-old in North Dakota, reported that someone was sexually exploiting her on Kik. Investigators looked at her chat logs and found two usernames in chat sessions where she had been coerced into sending sexually explicit photos and videos. They sent Kik an administrative subpoena for information about those usernames and about two chat sessions that took place on September 14, 2014. Kik's reply showed that the usernames had been created several months earlier and had been active on an iPhone and iPad. Kik did not have IP addresses—which are numerical labels that can identify a user's physical location in a computer network—dating back to September 14. (The company retained IP information for just 30 days.) But Kik had that information for hundreds of more recent sessions, when both usernames accessed Kik from the same IP address in Milton, Tennessee. That IP address, a local internet-service provider confirmed, was associated with a residential address in Milton and with a specific subscriber named Kendall Carter.

The investigators in North Dakota handed the case off to Detective Patty Higgins, a sheriff's deputy with the Rutherford County (Tennessee) Sheriff's Office. Higgins applied for a search warrant and signed an affidavit that stated, among other things, that investigators had linked the Kik usernames in the September 14 chat sessions to an IP address, and linked the IP address to Carter. The warrant itself sought evidence of sexual exploitation of minors, including an

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iPhone and an iPad “used to facilitate the aforementioned criminal activity[.]” R. 46-1 at Page ID 404.

Higgins and another officer went to Carter’s house, where Carter’s father invited them in. After a short conversation with Carter’s parents, the officers said they needed to see the iPhone and iPad that belonged to the Carters’ son Kendall. The Carters asked to see a warrant, so the officers showed it to them. Kendall Carter then gave the officers his iPhone, iPad, and passwords to both devices.

Investigators later searched Carter’s iPhone and iPad, where they found hundreds of images of child pornography. They also found Kik chat sessions in which Carter had coerced multiple girls into sending him sexually explicit images and videos.

Federal prosecutors charged Carter with a total of 15 counts of production and attempted production of child pornography, *see* 18 U.S.C. § 2251(a), possession of child pornography, *see id.* § 2252A(a)(5)(B), and use of interstate communications to commit extortion, *see id.* § 875(d). Carter later moved for a *Franks* hearing concerning what he alleged were false statements in Higgins’s affidavit. He also moved to suppress the evidence seized during the search of his house. The district court denied both motions.

Carter thereafter conditionally pleaded guilty to two counts of production of child pornography, two counts of extortion, and one count of possession of child pornography, preserving the right to appeal the denial of his motion to suppress. Before his sentencing

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hearing, however, Carter filed another motion to suppress, alleging that the investigators' use of an administrative subpoena to collect his IP address violated the Fourth Amendment as interpreted in *Carpenter v. United States*, 138 S. Ct. 2206 (2018). The district court again denied the motion, and sentenced Carter to 30 years in prison.

Carter now appeals the district court's denial of his motion for a *Franks* hearing and his motions to suppress. For these denials, we review legal questions de novo and factual findings for clear error. *United States v. Poulsen*, 655 F.3d 492, 503 (6th Cir. 2011).

To obtain a *Franks* hearing, a defendant must make a substantial preliminary showing of two things: first, that the affidavit includes a false statement that was made "knowingly and intentionally, or with reckless disregard for the truth"; second, that the allegedly false statement is "necessary to the finding of probable cause." See *United States v. Mastromatteo*, 538 F.3d 535, 545 (6th Cir. 2008). In the context of child pornography, an affidavit that connects a defendant, an offending username, and the defendant's residence is enough to establish probable cause for a search. See *United States v. Elbe*, 774 F.3d 885, 890 (6th Cir. 2014). Carter says that Higgins's affidavit falsely linked the September 14 chat sessions with his IP address, because Kik in fact did not have IP information for those sessions. The rest of the affidavit, however, shows that someone used two usernames to coerce a child to send sexually explicit images, and that those usernames accessed Kik from an IP address associated with Carter's

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residence. That connection—between Carter, his residence, and the offending usernames—is enough to show that there was a “fair probability” that evidence of a crime would be found at Carter’s house. *See id.* at 888. The affidavit’s allegedly false statement was therefore immaterial to the issue of probable cause. Hence the district court properly denied Carter’s motion for a *Franks* hearing. *See Mastromatteo*, 538 F.3d at 545.

The same is true as to the motions to suppress. Carter argues that the search warrant itself was invalid in several respects. First, he contends that the warrant left the officers free to take any iPhones and iPads they wanted, which he says violates the Fourth Amendment requirement that a warrant describe “with particularity” the things law enforcement may seize. *United States v. Willoughby*, 742 F.3d 229, 233 (6th Cir. 2014). But a warrant that constrains a search to evidence of a specific crime satisfies the particularity requirement. *United States v. Castro*, 881 F.3d 961, 965 (6th Cir. 2018). And here the warrant restricted the search to an iPhone and an iPad “used to facilitate the aforementioned criminal activity[.]” R. 46-1 at Page ID 404. Rather than leaving the officers without direction, the warrant told them enough to “guide and control [their] judgment in selecting what to take[.]” *Willoughby*, 742 F.3d at 233.

Second, Carter says that the warrant was overbroad, because it might have allowed officers to seize “clearly innocuous” items. But the remedy for an overbroad warrant is to suppress the evidence taken

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specifically under the overbroad search term. *United States v. Richards*, 659 F.3d 527, 537 (6th Cir. 2011). Carter points to none here, so his argument fails.

Third, Carter contends that the warrant was invalid because, he says, Tennessee law required Higgins to obtain a district attorney's approval before she applied for it. But the Tennessee Supreme Court has since held otherwise. *See State v. Miller*, 575 S.W.3d 807, 813 (Tenn. 2019). Nor do we suppress evidence based on violations of state law. *See United States v. Beals*, 698 F.3d 248, 263 (6th Cir. 2012). Hence Carter's contention fails.

Carter also argues that the search was improperly executed for several reasons. First, he says that officers violated the "knock-and-announce" rule. *See* 18 U.S.C. § 3109. But that rule applies only when officers enter by force; here, they were invited in. *Id.* Second, he says the officers violated the Fourth Amendment because they did not show the search warrant until asked. But here nothing required the officers to present the warrant any sooner than they did. *See Baranski v. Fifteen Unknown Agents of the Bureau of Alcohol, Tobacco & Firearms*, 452 F.3d 433, 442-43 (6th Cir. 2006) (en banc). Third, Carter says that his federal prosecution effectively precluded him from challenging the search on state-law grounds. But he has not identified any aspect of the search that violated state (or federal) law.

Finally, Carter argues that the investigators violated the Fourth Amendment when they obtained his IP address by an administrative subpoena rather than

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by a search warrant after a showing of probable cause. His argument relies upon the Supreme Court's decision in *United States v. Carpenter*, 138 S. Ct. 2206 (2018), which concerned cell-site locational data, not IP addresses. But we have no need to consider whether to extend *Carpenter*'s holding to IP addresses here. For our court has already held that the good-faith exception to the exclusionary rule applies to searches that complied with the Stored Communications Act and then-binding case law. *See United States v. Carpenter*, 926 F.3d 313, 318 (6th Cir. 2019).

The district court's judgment is affirmed.

UNITED STATES DISTRICT COURT
Middle District of Tennessee

UNITED STATES) **JUDGMENT IN A
OF AMERICA) CRIMINAL CASE**
)) Case Number:
 v.)) 3:15CR00162-001
)) USM Number: 22995-075
 Kendall R. Carter))
)) Peter J. Strianse &
)) Timothy Neil O'Connor
)) Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) 4, 6, 10, 14, and 15
of the Superseding Indictment

pleaded nolo contendere to count(s) _____
which was accepted by the court.

was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 2251(a)	Production of Child Pornography	6/22/2014	4
18 U.S.C. § 875(d)	Extortion	6/23/2014	6
18 U.S.C. § 2251(a)	Production of Child Pornography	9/17/2014	10

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

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The defendant has been found not guilty on count(s)

Count(s) 1-3, 5, 7-9, 11-13

is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

12/7/2018

Date of Imposition of Judgment

Waverly D. Crenshaw, Jr.

Signature of Judge

Waverly D. Crenshaw, Jr.,

Chief U.S. District Judge

Name and Title of Judge

12/12/2018

Date

ADDITIONAL COUNTS OF CONVICTION

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 875(d)	Extortion	10/1/2014	14
18 U.S.C. § 2252A(a)(5)	Possession of Child Pornography	11/18/2014	15

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

360 months as to each of counts 4 and 10; 24 months as to each of counts 6 and 14; and 240 months as to count 15; all counts to run concurrently with each other.

- The court makes the following recommendations to the Bureau of Prisons:
 1. Access to educational programs, including online access, to complete degree; 2. Sex Offender Management Program; 3. Sex Offender Treatment Program-Nonresidential; 4. allow Defendant to volunteer as a teacher; 5. Sentence Length PSF be waived and management variable to classify Defendant as low safety risk; 6. placement at FCI-Seagoville
- The defendant is remanded to the custody of the United States Marshal.
- The defendant shall surrender to the United States Marshal for this district:
 - at _____ a.m. p.m. on _____.
 - as notified by the United States Marshal.
- The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
 - before 2 p.m. on _____.

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- as notified by the United States Marshal.
- as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

_____ UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

LIFE as to each of counts 4, 10, and 15 and 1 year,
as to each of counts 6 and 14; all counts to run concurrently with each other.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.

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3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not

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possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

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10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall participate in a mental health program as directed by the United States Probation Office. The defendant shall pay all or part of the cost of mental health treatment if the United States Probation Office determines the defendant has the financial ability to do so or has appropriate insurance coverage to pay for such treatment.
2. The defendant agrees to submit to a sex offender assessment and treatment as recommended by an appropriate provider contracted per the guidelines and procedures promulgated by the Administrative Office of the United States Court.
3. The defendant shall register as a sex offender with the appropriate authorities of any state in which he resides, is employed, or attends school in compliance with 18 U.S.C. § 2250(a).
4. The defendant shall not consume any alcoholic beverages.
5. The defendant's residence and employment shall be pre-approved by the U.S. Probation Office.
6. The defendant shall not associate with children under the age of 18 nor frequent, volunteer, or work at places where children congregate (e.g., playgrounds, parks, malls, day-care centers or schools) unless approved by the U.S. Probation Office.
7. The defendant shall not contact the victims, A.A., M.K., and M.H., or the victims' immediate families,

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directly or indirectly, either in person, or by telephone, mail, interactive computer service, a third party, or any other means; and the United States Probation Office will verify compliance.

8. The defendant shall not buy, sell, exchange, possess, trade, or produce visual depictions of minors or adults engaged in sexually explicit conduct. The defendant shall not correspond or communicate in person, by mail, telephone, or computer, with individuals or companies offering to buy, sell, trade, exchange, or produce visual depictions of minors or adult engaged in sexually explicit conduct, as defined in 18 U.S.C. § 2256(2).

9. The defendant shall not possess or use a device capable of creating pictures or video without the prior permission of the U.S. Probation Office.

10. The defendant shall not rent or use a storage facility without the prior permission of the U.S. Probation Office.

Computer Restrictions

11. The defendant shall not possess or use a computer or any device with access to any “on-line computer service” at any location (including place of employment) without the prior written approval of the United States Probation Office. This includes any Internet service provider, bulletin board system, or any other public or private network or e-mail system. The defendant’s residence shall not contain any electronic devices capable

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of Internet access without prior approval of the probation officer.

12. The defendant shall consent to the U.S. Probation Office conducting unannounced examinations of the defendant's computer system(s), mobile devices, and internal/external storage devices, which may include retrieval and copying of all memory from hardware/software and/or removal of such system(s) for the purpose of conducting a more thorough inspection. The defendant will consent to having installed on the defendant's computer(s), any hardware/software to monitor computer use or prevent access to particular materials. The defendant will further consent to periodic inspection of any such installed hardware/software to ensure it is functioning properly. The defendant shall pay the cost of the installation of and the continuing use of the monitoring program if the United States Probation Office determines that the defendant has the ability to do so.

13. The defendant shall provide the U.S. Probation Office with accurate information about the defendant's entire computer system (hardware/software) and internal/external storage devices; all passwords used by the defendant; and will abide by by all rules regarding computer use and restrictions as provided by the U.S. Probation Office.

14. The defendant shall furnish all financial records, including, without limitation, earnings records and tax returns, to the United States Probation Office upon request.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>JVTA</u>		
	<u>Assessment</u>	<u>Assessment*</u>	<u>Fine</u>
TOTALS	\$ 500.00	\$	\$

- The determination of restitution is deferred until _____. *An Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.
- The defendant shall make restitution (including community restitution) to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
TOTALS	\$ <u>0.00</u>	\$ <u>0.00</u>	

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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Restitution amount ordered pursuant to plea agreement \$ _____

- The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The court determined that the defendant does not have the ability to pay interest and it is ordered that:
 - the interest requirement is waived for the fine restitution.
 - the interest requirement for the fine restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

- A Lump sum payment of \$_____ due immediately, balance due
 - not later than _____, or
 - in accordance C, D, or E, or F below; or
- B Payment to begin immediately (may be combined with C, D or, F below); or

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- C Payment in __ (e.g., *equal, weekly, monthly, quarterly*) installments of \$ __ over a period of __ (e.g., *months or years*), to commence __ (e.g., *30 or 60 days*) after the date of this judgment; or
- D Payment in __ (e.g., *equal, weekly, monthly, quarterly*) installments of \$ __ over a period of __ (e.g., *months or years*), to commence __ (e.g., *30 or 60 days*) after release from imprisonment to a term of supervision; or
- E Payment during the term of supervised release will commence within __ (e.g., *30 or 60 days*) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

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Joint and Several

Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s):
- The defendant shall forfeit the defendant's interest in the following property to the United States: An iPhone 5, model A1428 (serial number: C39JPSVJDTTN) , and an iPad (serial number DKVHHIENDFHY).

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

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No. 18-6333

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES)	
OF AMERICA,)	
Plaintiff-Appellee,)	ORDER
v.)	(Filed Nov. 21, 2019)
KENDALL R. CARTER,)	
Defendant-Appellant.)	

BEFORE: SUTTON, KETHLEDGE, and STRANCH,
Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

**ENTERED BY ORDER
OF THE COURT**

Deborah S. Hunt, Clerk