



ELEVENTH CIRCUIT EXPLAINS THE INDEPENDENT SOURCE DOCTRINE

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On August 28, 2017, the Eleventh Circuit Court of Appeals decided *the United States v. Harling*^j, which serves as an excellent explanation of the independent source doctrine as it relates to the Fourth Amendment. The relevant facts of *Harling*, taken directly from the case, are as follows:

In 2013, Nicole Dunwody saw a listing on Craigslist advertising a condominium unit for rent in Fort Myers, Florida. Harling occupied the unit at the time but was looking to rent it out because he had just purchased a new home.

Nicole decided to rent the unit from Harling and coordinated with him to move in her belongings. Soon after she moved in, Nicole bumped the doorframe of a closet in the residence and heard something fall to the floor. She looked down and saw that three USB drives had fallen from the top of the doorframe inside the closet.

Nicole took the three USB drives to her mother Ada Dunwody's house. There, Ada plugged the first of three drives into her computer, and large thumbnail images loaded onto the screen. She and Nicole scrolled through the contents of the first drive and saw images of what they described as small children in unnatural, sexually suggestive poses engaging in sexually explicit conduct with adults.

After viewing at least thirty thumbnail images, Nicole decided she had seen enough and called the police. Meanwhile, Ada continued to view the contents of the two remaining USB drives. After scrolling through the contents of the second drive, which Ada also described as containing images and videos of young children in unnatural, sexually explicit poses, Ada estimated that she had seen well over 100 images and videos. The third drive contained more videos, but it also had a file type that Ada did not recognize. Afraid of inadvertently downloading something unknown onto her computer, Ada removed the third USB drive from her computer and placed all three USB drives in a plastic bag for delivery to the police. She did not really probe into the contents of the third USB drive.

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Nicole and Ada agreed to meet Fort Myers Police Officer Domonic Zammit at Nicole's condominium. When Officer Zammit arrived, Nicole informed him that Harling owned the condominium unit and had resided in it before she did, a fact that Officer Zammit confirmed when he called and spoke with Harling over the phone. Nicole also gave Officer Zammit the plastic bag containing the three USB thumb drives and explained that she and her mother had seen, between the two of them, explicit images and videos of children engaged in sexual acts. Nicole then showed Officer Zammit the closet from which the three USB drives had fallen. When he looked up into the closet, Officer Zammit discovered two more USB thumb drives in the same location at the top of the door frame inside the closet.

Officer Zammit returned to the Fort Myers Police Department with the five USB drives and along with his supervisor, Sergeant Doro, reviewed them. They opened one image file and one video file on each of the five drives to confirm that all five contained child pornography. Officer Zammit then submitted the five drives into evidence, ending his involvement in the investigation.

Soon after that, Detective Meeks, a member of the computer-crimes unit, retrieved the five USB drives from the evidence custodian and, after reviewing Officer Zammit's report, conducted a limited forensic preview to confirm the presence of child pornography on the drives and to determine the owner of them. He confirmed the presence of images and videos of child pornography on all five drives, including a series of images of a particular minor child being sexually abused by a particular adult male on the first USB drive. He also noted a file on the fourth drive that contained Harling's business card.

Detective Meeks observed that many of the images had file names in a sequential numerical order, which indicated to him that the images were homemade—rather than downloaded from the internet—and taken with a single camera. Because he knew from Officer Zammit's report that Harling was the previous resident of the condominium unit, Detective Meeks obtained Harling's driver's license photograph and confirmed that Harling was the adult in the series of pornographic images involving the particular minor child.

He then contacted the Department of Homeland Security ("DHS") for assistance in locating Harling. DHS agents accessed Harling's public Facebook page and found profile pictures of Harling that matched the adult male observed in the photographs contained on the USB drives, providing further confirmation that Harling was the adult male featured in the pornographic images on the USB drives. Detective Meeks then met with Nicole and Ada, who shared with him the specific details of what they had observed on the USB drives.

Law-enforcement officers eventually learned Harling's address and visited him at his home on July 11, 2013. After being advised of his rights, Harling agreed to speak with the agents. They showed him multiple images that they had downloaded from Facebook, of a young boy whom Harling identified as his step-grandson. That same boy was the minor child who appeared in the series of homemade pornographic images discovered on the USB drives.³

Later that same day, Detective Meeks prepared an affidavit for a search warrant to conduct a complete forensic examination of all five USB drives. His affidavit included the detailed descriptions conveyed to him by both Nicole and Ada regarding exactly what they had seen on the USB drives. After obtaining the warrant, Detective Meeks conducted a more thorough forensic examination of all five USB drives and found that they contained hundreds of images of child pornography and over forty videos, including hundreds of images of Harling sexually abusing his step-grandson.

On the basis of these findings, authorities applied for and were granted a second warrant to search Harling's residence for additional computer equipment and data, which they executed on July 12, 2013. Inside his home, authorities observed furniture, bedding, and other household décor that matched the furniture, bedding, and household décor that appeared in several photographs recovered from the USB drives. Those observations led authorities to obtain a third search warrant that same day to search Harling's residence for specific items matching items previously seen in the images and videos stored on the USB drives.ⁱⁱ

Harling filed a motion to suppress because the USB drives were first searched without a warrant. The district court denied the motion and Harling was convicted at a jury trial. He later appealed the denial of his motion to suppress and his conviction and sentencing. This article will only discuss the Fourth Amendment issues related to the motion to suppress.

On appeal, the Eleventh Circuit first examined the law related to the initial searches of USB drives. The court stated

[T]he Fourth Amendment applies to only governmental action; "it is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as the agent of the Government or with the participation or knowledge of any governmental official." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (quotation omitted). Once a private individual, acting of her own accord, conducts a search—even one that frustrates a defendant's reasonable expectation of privacy—the Fourth Amendment does not forbid the government from replicating the search, as long as government officials constrain their search to the parameters of the search conducted by the private individual. *United States v. Young*, 350 F.3d 1302, 1306-07 (11th Cir. 2003); *Jacobsen*, 466 U.S. at 115. As a result, "a warrantless law-enforcement search conducted after a private search violates the Fourth Amendment only to the extent to which it is broader than the scope of the previously occurring private search." *United States v. Sparks*, 806 F.3d 1323, 1334 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 2009 (2016), *cert. denied sub nom. Johnson v. United States*, 137 S. Ct. 34 (2016).ⁱⁱⁱ

Simply put, once a private individual frustrates another person's reasonable expectation of privacy, the Fourth Amendment does not prohibit the police from replicating the search done by the private citizen, as long as the police do not look deeper than did the citizen.

In Harling's case, the court noted that the first two USB drives were clearly searched by Nicole and Ada. Thus, the police did not violate the Fourth Amendment when they replicated that search.

The court next examined the legality of the initial search of the third, fourth and fifth USB drives; these were the ones that were not searched by Nicole and Ada. The court noted that Harling had not abandoned the USB drives and therefore did have a reasonable expectation in the content of those drives. The court stated, that although the law enforcement search of these USB drives without a warrant "was a *per se* violation of the Fourth Amendment," the evidence obtained is not required to be suppressed because of the "independent source doctrine."^{iv}

Regarding the "independent source doctrine," the court stated

We apply a **two-part test to determine whether the independent source doctrine operates** to render evidence admissible regardless of whether the initial search violated the Fourth Amendment. *United States v. Noriega*, 676 F.3d 1252, 1260 (11th Cir. 2012).

The first thing we do is excise from the search warrant affidavit any information gained during the arguably illegal initial entry and determine whether the remaining information is enough to support a probable cause finding. If the remaining or nonexcised information is enough to support a probable cause finding, the second thing we do is determine whether the officer's decision to seek the warrant was "prompted by" what he had seen during the arguably illegal entry. To determine whether an officer's decision to seek a warrant is prompted by what he saw during the initial entry, courts ask whether the officer would have sought the warrant even if he had not entered. If the officer would have done so, his decision to seek the search warrant is supported by an "independent source," and the evidence seized under the warrant is admissible regardless of whether the initial entry violated the Fourth Amendment. *Id.* at 1260-61 (internal citations omitted).^v

The court then set out to apply the two-part test to Harling's case. First, they examined whether probable cause to obtain a search warrant for all the USB drives and other evidence would have been present if the court excludes all information gained from the warrantless search of USB drives three, four and five. The court held that the evidence found lawfully on the first two USB drives was sufficient to support a finding of probable cause to search the remaining drives that were found hidden with the first two.

The court then examined facts pertaining to the second part of the test, which is whether the officer would have sought a search warrant if he had not received information from the illegal searches. The district court found that Detective Meeks would have sought the search warrant even if he had not viewed USB drives three, four and five, and that the information found on USB drives one and two provided sufficient probable cause for the search warrant. The purpose the warrantless search was to verify what Nicole and Ada reported rather than to obtain further evidence of a crime. The court of appeals found no error in the district courts findings, and therefore held that the independent source doctrine allows the admission of the evidence.

As such, the court of appeals affirmed the denial of the motion to suppress.

ⁱ No. 15-10969 (11th Cir. Decided August 28, 2017 Unpublished)

ⁱⁱ Id. at 2-7

ⁱⁱⁱ Id. at 9-10

^{iv} Id. at 11

^v Id. at 11-12

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