IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff

v.

PAUL GRIESBACH,

Defendant.

REPORT AND RECOMMENDATION

07-CR-44-C

REPORT

The grand jury has charged defendant Paul Griesbach with possessing child pornography on his computer hard drive in violation of 18 U.S.C. § 2252(a)(4)(B). The evidence underlying this charge was seized during execution of a state search warrant. Griesbach has moved to suppress the government's evidence on the ground that the search warrant was not supported by probable cause. Griesbach argues that the affiant failed adequately to establish that the images showed "sexually explicit conduct" as defined by state law. *See* dkts. 10 (motion), 22 (first brief) and 24 (reply). For the reasons stated below I am recommending that this court deny Griesbach's motion to suppress.

I. The Search Warrant

Agent Jenniffer Price is a special agent with the Wisconsin Department of Justice, Department of Criminal Investigation, assigned to the Wisconsin Internet Crimes Against Children Task Force. On December 12, 2006, Agent Price sought from the Dane County District Court a search warrant for Griesbach's residence. The court issued the warrant; its

execution led to the recovery of the alleged child pornography charged against Griesbach in this federal prosecution. A copy of Agent Price's affidavit in support of her warrant request is attached to Griesbach's motion (dkt. 9)and it speaks for itself. To synopsize, Agent Price's affidavit contains about 10 pages of small-font, single-spaced probable cause narration, most of which is boilerplate explaining Price's training and experience in the field of child pornography.

Agent Price starts talking about Griesbach on page 9 (also numbered 33). According to Price, on October 24, 2005, Yahoo! reported that a person using Griesbach's web address had posted to a group titled ". . . visible skin" 15 files that appeared to contain child pornography. A Wisconsin DOJ employee reviewed the images and opined that some were child pornography. Agent Price also looked at these images, three of which she describes as:

> (1) a prepubescent female posing by a body of water. She has her top pulled up to expose her breasts.
>
> (2) a female who appears to be under the age of 18 posing naked. She is standing to expose her full body.
>
> (3) a naked female exposing her vagina. The female is lying on her back and her vagina is the primary focus of the image. The female appears to be under the age of 18. This image is from the identified child pornography series "Chelsea" where law enforcement has identified the child victim.

Affidavit at 9-10 (33-34).

Next, Agent Price outlined how her investigation had led her to conclude that these images had originated from Griesbach's account, which he maintained at his residence on commercial Avenue in Madison. Agent Price reported that criminal records maintained by the state and by the FBI revealed that Griesbach was a registered sex offender in Wisconsin, having

been convicted in 1985 of lewd and lascivious behavior, in 1990 of second degree sexual assault and child abuse (and a marijuana offense in 1998). Agent Price synopsized in almost prurient detail the facts underlying the 1990 conviction for sexual assault of a minor.

The state court issued the requested warrant. The subsequent search uncovered the alleged contraband forming the basis for the criminal charge in this case.

ANALYSIS

Griesbach claims that there was no probable cause to issue the search warrant for his residence because the three images described by Agent Price do not constitute child pornography. The government responds that the third image described above (labeled "image 12" in Agent Price's affidavit) constitutes child pornography and that even if it doesn't, the good faith doctrine rescues this warrant. Griesbach replies that this third image so obviously is *not* child pornography that a well-trained officer should have known that this warrant was not supported by probable cause; therefore, the good faith doctrine cannot rescue the warrant.

To uphold a challenged warrant, a reviewing court must find that the affidavit provided the issuing court with a substantial basis for determining the existence of probable cause. In the Seventh Circuit, this standard is interpreted to require review for clear error by the issuing court. "We will not invalidate a warrant by interpreting the affidavits in a hypertechnical rather than a common sense manner." *United States v. Walker*, 237 F.3d 845, 850 (7th Cir. 2001). Doubtful cases should be resolved in favor of upholding the warrant. *United States v. Quintanilla*, 218 F.3d 674, 677 (7th Cir. 2000).

Probable cause to support a warrant exists if the affidavit sets forth sufficient evidence to induce a reasonably prudent person to believe that a search will uncover evidence of a crime. The inquiry is practical, not technical. *United States v. Watzman*, ___ F.3d ___ 2007 WL 1425615 at *2 (7th Cir. May 16, 2007). When reviewing a warrant application, a court is entitled to rely on the affiant's expertise to conclude that there was a fair probability that child pornography would be found at the specified location. *Id.* at *3. *See also United States v. Reed*, 443 F.3d 600, 603 (7th Cir. 2006)(in determining whether suspicious circumstances rise to the level of probable cause, officers are entitled to draw reasonable inferences based on their training and experience). "So long as the totality of the circumstances, viewed in a common sense manner, reveals a probability or substantial chance of criminal activity on the suspect's part, probable cause exists." *United States v. Parra*, 402 F.3d 752, 763-64 (7th Cir. 2005).

Using this federal case law as the template, the question is whether the challenged search warrant passes muster under Fourth Amendment. Agent Price alleged that the information she had provided in her affidavit evidenced a violation of Wis. Stat. § 948.12, titled "possession of child pornography." This statute criminalizes possession of any pictorial reproduction of "a child engaged in sexually explicit conduct." Wis. Stat. § 948.01(7)(e) defines "sexually explicit conduct" to include "lewd exhibition of intimate parts." The statutes do not define "lewd;" one dictionary defines it as "inclined to, characterized by, or inciting to lust or lechery; lascivious," Random House Webster's College Dictionary (1999) at 762. The federal definition of "sexually explicit conduct" is synonymous: "graphic or simulated lascivious exhibition of the genitals or pubic area of any person,' *see* 18 U.S.C. § 2256 (2)(B)(iii)).

In his first brief, Griesbach quotes the Wisconsin Supreme Court's definition of what constitutes a "lewd exhibition:"

> First, the photograph must visibly display the child's genitals or pubic area. Mere nudity is not enough. Second, the child is posed as a sex object. The statute defines the offense as one against the child because using the child in that way causes harm to the psychological, emotional and mental health of the child. The photograph is lewd in its "unnatural" or "unusual" focus on the juvenile's genitalia, regardless of the child's intention to engage in sexual activity or whether the viewer or photographer is actually aroused.

State v. Petrone, 161 Wis.2nd 530, 561 468 N.W.2d 676, 688 (1991).

Actually, this quote is a part of the court's gloss of a challenged jury instruction; the court noted in the same breath that "the court may remind the jurors that they should use these *guidelines* to determine the lewdness of a photograph, but *they may use common sense* to distinguish between a pornographic and innocent photograph." *Id.*, emphasis added.

Earlier in the *Petrone* opinion, when addressing the trial court's probable cause determination in support of a challenged search warrant, the court noted that "probable cause is not a technical, legalistic concept but a flexible, common-sense measure of the plausibility of particular conclusions about human behavior." 161 Wis.2d at 547-48, 468 N.W.2d 682. The court found it sufficient for the victim/witness to testify that the defendant had asked the victims to pose by sitting on the ground "and like put our knees up and stuff and just so that we could show parts of our bodies." *Id.* The court found that this testimony "strongly implied" that the juveniles' genital areas were exposed; this was enough to uphold the search warrant. *Id.*

This alone would be sufficient to uphold the warrant in the instant case, but reference to state law on lewdness is a bit of a canard, since "state law is irrelevant to a determination of reasonableness under the Fourth Amendment." *United States v. Brack*, 188 F.3d 748, 759 (7th Cir. 1999), quoting *Kraushaar v. Flanigan*, 45 F.3d 1040, 1047 (7th Cir. 1995). I say "a bit" of a canard because Wisconsin's pronouncements on lewd imagery aren't materially different from those offered by most federal courts. In *United States v. Wiegand*, 812 F.2d 1239, 1244 (9th Cir. 1987), the court found that a photograph of a naked 10-year old girl was sexually explicit because of its "unnatural focus on the girl's genitalia." The court noted that lasciviousness is not a characteristic of the child being photographed, but of the exhibition which the photographer has concocted for an audience that consists of like-minded pedophiles, that is, a display of a child's genitalia "so presented by the photographer as to arouse or satisfy the sexual cravings of a voyeur." 812 F.2d at 1244.

Some courts, more enamored of checklists than this circuit, determine an image's lasciviousness by employing the six-part test of *United States v. Dost*, 636 F.Supp. 828, 832 (S.D. Cal. 1986): (1) Is the focus of the depiction the child's genitalia or pubic area? (2) Is the setting sexually suggestive, that is, in a place or pose generally associated with sexual activity? (3) Is the child depicted in an unnatural pose or inappropriate attire, considering the child's age? (4) Is the child fully clothed, partially clothed or nude? (5) Does the depiction suggest sexual coyness or a willingness to engage in sexual activity? (6) Is the depiction intended or designed to elicit a sexual response from the viewer? The list is not intended to be exhaustive and an image need not satisfy every factor to be deemed lascivious. 636 F.Supp. At 832.

At the other extreme, Circuit Judge Alex Kozinski, sitting by designation at the district level in Los Angeles, deemed the *Dost* checklist highly subjective and easily manipulated, so he replaced it with a one-factor presumption in *United States v. Hill*, 322 F.Supp. 2d 1081, 1084-85 (C.D. Cal. 2004). In *Hill*, the defendant challenged the probable cause supporting a state search warrant, claiming that the verbal descriptions of two images did not establish that they were sexual explicit.[1] Judge Kozinski court crafted his own test, which he deemed a closer fit to the federal statute and better at providing meaningful guidance in evaluating lasciviousness:

> If an image of a minor displays the minor's naked genital area, there is probable cause to believe that the image is lascivious unless there are strong indicators that it is *not* lascivious.

322 F. Supp.2d at 1086-87, emphasis in original.

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[1] The warrant application provided these descriptions:

> Image 1 is a color picture of a female, white, approximately 15 years old, with long dark brown hair. The female is in a room standing between a couch and a coffee table. There is a framed picture on the wall above the couch. She is wearing only a long blouse and pair of socks. The blouse is open and she is exposing her breast and pubic area to the camera, which she is facing while leaning to her left.
>
> Image 2 is a color picture of a [*sic*] two females, white, approximately 7-9 years of age, both with dirty blond hair. These females are standing on a beach during the daytime. The shorter of the two females is standing to the right of the picture while the other female is standing behind her. Both females are facing the camera askew and wearing only a robe, which is open exposing the undeveloped breast and pubic area of both girls. They both are turning their faces away from the camera preventing the viewer from seeing their faces.

322 F.Supp.2d at 1083.

The court acknowledged that although this test might not be a good fit for a jury's determination of lasciviousness at trial,

> Judges evaluating probable cause–and courts reviewing those decisions–must work with probabilities, often without access to the images. . . . There is at least probable cause to conclude an image is lascivious when it exhibits a minor's bare genitalia, and weak or ambiguous indicators of an innocent purpose do not suggest otherwise.

Id. at 1087, n.9.

Applying its new test to the challenged search warrant, the court concluded that the state court properly issued the warrant. *Id.* At 1087. The Court of Appeals for the Ninth Circuit affirmed this decision while sidling past the streamlined test used by the district court. *United States v. Hill*, 459 F.3d 966, 972-73 (9th Cir. 2006).

So where does this leave Griesbach? If this court were to employ the *Hill* test–which has a lot to commend it–then clearly there was probable cause to support the warrant. This is my initial recommendation and it is sufficient to deny suppression.

As a fallback, if one were to consider other indicia of lasciviousness, the warrant still passes muster, although Agent Price did not provide the court with very much useful information. In fact, she shot herself in the foot by opining that all three images she described constituted child pornography, when there are no clear indicators that the first two images are anything more than lawful art shots or erotica. This impeaches the value of Agent Price's expert opinions, notwithstanding her lengthy recitation of her training and experience.

Additionally, Agent Price did not rule in/rule out other elements of the third image that state and federal courts find useful when determining lewdness. By way of example, let's run the third image past the *Dost* checklist:

> (1) Is the focus of the depiction the child's genitalia or pubic area?
>
> *Yes.*
>
> (2) Is the setting sexually suggestive, that is, in a place or pose generally associated with sexual activity?
>
> *Unknown.*
>
> (3) Is the child depicted in an unnatural pose or inappropriate attire, considering the child's age?
>
> *The child is on her back, a position consistent with sexual activity (as well as many other nonsexual activities).*
>
> (4) Is the child fully clothed, partially clothed or nude?
>
> *Nude.*
>
> (5) Does the depiction suggest sexual coyness or a willingness to engage in sexual activity?
>
> *Unknown.*
>
> (6) Is the depiction intended or designed to elicit a sexual response from the viewer?
>
> *Unknown.*

There's one more crumb of probable cause: Agent Price reports that this image is from the "Chelsea" series, which is an identified set of child pornography images of a known victim. Although this fact has minuscule corroborative value under the circumstances, it is not completely valueless: if there is a known series of images that are characterized by the law enforcement community in general as "child pornography," then the court issuing this warrant

logically could surmise that Agent Price's characterization of this image as child pornography is based in part on a consensus by others trained in the field, notwithstanding Agent Price's failure to provide a more detailed description of the image. Not strong corroboration, to be sure, but something.

In short, it was reasonable for the state court to conclude that the third image constituted child pornography because it was from a series generally deemed to be child pornography, it depicted a nude child on her back, and the image focused primarily on the child's vagina. It's not a strong set of facts, but it was enough to meet the minimal, common-sense threshold of probable cause and to survive review by this court.

Finally–and apparently contrary to Wisconsin law as cited by Griesbach–the fourth amendment would not forbid the state court from taking into account Griesbach's prior sex crimes convictions when making its probable cause determination. *See United States v. Olson*, 408 F.3d 366, 372 (7th Cir. 2005)(suspect's criminal record retains some corroborative value when aggregating indicia of suspect's recent criminal conduct). This fact would be irrelevant to the probable cause determination if none of the three described images fairly could be characterized as child pornography since the most logical inference in that circumstance would be exculpatory, not inculpatory.[2] But because the third image was–or at least *probably* was–child pornography, then Griesbach's prior record corroborates this conclusion by confirming that Griesbach is sexually attracted to children.

[2] Then the fairest surmise would be that Griesbach, having learned the high cost of victimizing children, has limited his post-conviction image collection to child erotica in order to avoid re-conviction.

Even if probable cause did not support this warrant, suppression would be inappropriate unless Agent Price lacked good faith in relying on the warrant. *United States v. Sidwell*, 440 F.3d 865, 869 (7th Cir. 2006), citing *United States v. Leon*, 468 U.S. 897, 920-22 (1984). An agent's decision to seek a warrant is prima facie evidence that she was acting in good faith; a defendant may rebut this prima facie evidence only by establishing that the issuing judge wholly abandoned his judicial role, or that the warrant affidavit was so lacking in indicia of probable cause as to render belief in its existence entirely unreasonable. *Id.* Such determinations must be made on a case-by-case basis with suppression ordered "only in those unusual cases in which exclusion will further the purpose of the exclusionary rule." 468 U.S. at 918.

Griesbach argues that the government cannot rely on *Leon* because the definition of child pornography is so well-known and Agent Price's descriptions of the three images fall so abysmally short of this definition that she could not reasonably have believed that this search warrant was valid. *See* Reply Brief, dkt. 24, at 3. This is incorrect. The *Hill* test for lasciviousness, coupled with the Wisconsin Supreme Court's indulgent inferences in *Petrone,* establish *at least* that the definition of child pornography does not clearly exclude the third image described by Agent Price in her affidavit. While it might be a stretch to attribute to Agent Price such a wide and deep knowledge of the applicable case law (including the ramifications of any differences between state and federal law), the point is that there was no reason for Agent Price to question the validity of a search warrant arising out of the "Chelsea" image, which prominently featured the vagina of a naked child lying on her back.

It may be that Agent Price, when drafting the non-boilerplate section of her application, lapsed into an alarming terseness because she (incorrectly) saw no need to include additional information relevant to the court's determination of lewdness. Or not; perhaps there is nothing else in the third image that possibly could be deemed lewd. If the former, then Agent Price's approach has the potential to cause trouble for the government in future cases, but it causes no genuine concern in Griesbach's case. There is no basis to quash the state warrant or suppress the evidence.

RECOMMENDATION

Pursuant to 28 U.S.C. §636(b)(1)(B) and for the reasons stated above, I recommend that this court deny defendant Paul Griesbach's motion to quash the warrant.

Entered this 22nd day of June, 2007.

BY THE COURT:
/s/
STEPHEN L. CROCKER
Magistrate Judge

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June 22, 2007

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Re: United States v. Paul Griesbach
Case No. 07-CR-044-C

Dear Counsel:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the newly-updated memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before July 2, 2007, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by July 2, 2007, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/ S. Vogel for
Connie A. Korth

Secretary to Magistrate Judge Crocker

Enclosures

cc: Honorable Barbara B. Crabb, District Judge