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

UNITED STATES OF AMERICA,

Plaintiff, OPINION AND ORDER

v. 14-cr-118-wmc

THOMAS ZWICKER,

Defendant.

Defendant Thomas Zwicker moves this court to quash a state-issued search warrant and to suppress the evidence discovered during its execution. (Dkt. #24.) That evidence now forms the basis of federal charges against him for unlawfully receiving and one count of possessing images of a minor engaging in sexually explicit conduct. (Indictment (dkt. #2).) Zwicker presents two arguments in support of his motion: (1) the state's evidence of child enticement offered in support of the warrant did not provide probable cause to search his computers for child pornography; and (2) the search warrant violated the Fourth Amendment's particularity requirement. (Def.'s Mot. (dkt. #24) 1.) The government disputes both contentions, offering as a fallback the good faith doctrine articulated by the Supreme Court in *United States v. Leon*, 468 U.S. 897 (1984). (Resp. (dkt. #27).) Zwicker concedes nothing in reply, asserting that the police acted on suspicion and speculation, rather than probable cause to believe his computers contained child pornography. (Reply (dkt. #30) at 13.) For the reasons stated below, the court will deny Zwicker's motion to suppress the evidence derived from the warrant's execution.

BACKGROUND

A. Application for Search Warrant

On June 12, 2014, Detective Steven E. Gately of the Monroe Police Department submitted to the Green County Circuit Court a 22-paragraph application for a warrant to search two laptop computers belonging to Zwicker, asserting that they may contain child pornography in violation of Wis. Stat. 948.12(1m).[1] Detective Gately specifically sought authorization to copy the computers' hard drives and any other storage media so that he could conduct a full examination and analysis of the devices for the purpose of locating, among other things:

> a. Images, photographs, videotapes or other recordings or visual depictions representing the possible exploitation, sexual assault and/or enticement of children;
> b. Any documents in whatever format, including digital/electronic data and written or printed material, evidencing Images, photographs, videotapes or other recordings or visual depictions representing the possible exploitation, sexual assault and/or enticement of children;

(Search Warrant & Application (dkt. #24-1) 5.) Gately also enclosed a longer list of evidence sought with the following descriptor:

> Which things were used in the commission of, and/or may constitute evidence of, a crime, to wit: **Possession of Child Pornography**, committed in violation of Chapter **948.12(1m)** of the Wisconsin statutes.

(*Id.* at 6 (emphasis in original).) Nowhere in his application, however, does Gately cite (or even refer to) Wisconsin's statutes prohibiting child sexual exploitation (Wis. Stat.

[1] Zwicker has attached copies of the application and warrant to his brief (*see* dkt. #24-1), which speak for themselves. For convenience, however, a synopsis follows.

§ 948.05(1)) or child enticement (Wis. Stat. § 948.07).

As for probable cause, Detective Gately's application begins with a four-paragraph synopsis of his training and experience. As of June 12, 2014, Gately had been a Monroe Police Officer for 15 years, but a detective for only two months. Nevertheless, Gately had received training in crimes against children and "crimes of sexual morality," and he had "received instruction regarding offenders' actions, prolonged interest in child sex crimes, including sexual assault and child pornography, and . . . propensity to keep memorabilia or other reminders, including child pornography, of their crimes." (Search Warrant and Application (dkt. #24-1) 6.)

At paragraphs 5 through 12 of his affidavit, Detective Gately next provides a "Background of the Use of Computers for Child Exploitation." In this section, the affidavit defines terms and then explains how people usually produce or seek child pornography on the internet and often store and hide it on their computers, as well as how investigators often can retrieve it even after someone attempts to have it deleted.

In this regard, Zwicker emphasizes what Gately's affidavit does *not* include. For example, the affidavit does not address the culture, etiquette or protocols that might typically attend an exchange of personal photographs -- particularly erotic or explicit personal photographs -- between people who are e-chatting through Skype or more sex-oriented websites. Similarly, the affidavit draws no nexus between the possession of child pornography and either individuals who: (1) possess legal, albeit erotic, photographs of naked children; or (2) engage in sexually-charged online conversations with children.

Paragraphs 13 through 22 of the affidavit offer Detective Gately's reasons for believing

probable cause supports a warrant. On June 10, 2014, Gately received a telephone call from a woman in Watkinsville, Georgia, who is named in the affidavit, but will be called "B.M." in this opinion. (*Id.* at 9.) B.M. reported that her 14-year old daughter, "H.M" for this opinion, had gone missing the day before. (*Id.*) Gately confirmed on NCIC that on June 9, 2014, the Oconee County Sheriff's Office had reported H.M. as a missing juvenile. (*Id.*) B.M. told Gately that she had logged into her daughter's Skype account,[2] and that she had found conversations of a sexual nature between H.M. and a 67-year old man named Thomas Zwicker at 400 17th Avenue in Monroe Wisconsin. B.M. reported that "Thomas was talking about making [H.M.] a sexual slave and bondage." (*Id.*) There also was a conversation about Thomas picking up H.M. These conversations led B.M. to fear that her daughter might be at Zwicker's residence.

Detective Gately and a colleague (Officer Plenge) then went to 400 17th Avenue in Monroe where they met Zwicker, who agreed to talk with them. Zwicker acknowledged knowing that H.M. was missing and confirmed that he had been communicating with her through Skype and "Collarspace," which Zwicker described as a "BDSM" [3] internet chat site. Zwicker also acknowledged having pictures of H.M., and he agreed to show these pictures to the officers. Once invited inside his home, Zwicker handed the officers three photographs of H.M. Detective Gately reported that:

> Photo #1 was a picture of a pubescent female holding a school identification card with the name [H.M.]. Photo #2 was a

[2] Skype is a program (more precisely, a voice over internet protocol or VoIP) that allows users to communicate inexpensively by voice, video and instant messaging using the internet. *See* en.wikipedia.org/Skype.

[3] This abbreviation stands for "Bondage, Discipline, Sadism and Masochism."

> picture of [H.M.] holding a cell phone. Photo #3 was a frontal topless picture of [H.M.] sitting on a bed.

(*Id.* at 10.) In response to Gately's questions, Zwicker also stated that at first he thought H.M. was 18 years old, but then learned from H.M. that she was actually only 14.

When Zwicker was asked if he had saved any of his correspondence with H.M., he admitted using his HP laptop computer to open the CollarSpace website. Zwicker's username was "grumpy001"; H.M.'s username was "Perfectslave." (*Id.*) Zwicker's CollarSpace chat with H.M. contained: (1) the three photos that Zwicker already had shown the officers; (2) H.M.'s admission that she was 14; and (3) typed messages from Zwicker to H.M. announcing that he was her master and she was his slave, and that Zwicker would come get H.M. to make her his slave.

On Zwicker's coffee table, Detective Gately also saw a note on which he had handwritten H.M.'s name and two addresses, including her address in Watkinsville. In response to further questioning, Zwicker further acknowledged that he had sent H.M. two photos of himself, one in which he was clothed and one which he was nude.

B. Warrant

Based largely on Gately's affidavit, Green County Circuit Judge Thomas Valo issued the warrant, concluding that probable cause existed to search Zwicker's computers for evidence of "the crime(s) of Possession of Child Pornography contrary to Wis. Stat. Section(s) 948.12(1m)." The court, therefore, authorized Gately and his colleagues to search Zwicker's computers for the types of evidence listed in the court's warrant, which included:

> a. Images, photographs, videotapes or other recordings or visual depictions representing the possible exploitation, sexual assault and/or enticement of children
> b. Any documents in whatever format, including digital/electronic data and written or printed material, evidencing Images, photographs, videotapes or other recordings or visual depictions representing the possible exploitation, sexual assault and/or enticement of children;

(Search Warrant & Application (dkt. #24-1) 2.)

C. Execution of Warrant

According to Zwicker, officers of the Monroe Police Department executed the warrant and seized his computers. A subsequent forensic examination of these computers gathered all of Zwicker's emails and chats. Combing through them, Detective Gately found one to Zwicker from "vibrittneyroxs" that said "[H]ey, how are you? I miss you Tom, I'm legal now." After honing in on chats involving vibrittneyroxs, Gately found chats from the summer of 2011 that discussed BDSM behavior, referred to vibrittneyroxs being less than 18 years old, and contained several nude photos of vibrittneyroxs.

As Gately investigated further, he learned vibrittneyroxs's actual identity, that she had graduated from a New York high school in 2013, and that vibrittneyroxs was 16 when she sent the photographs of herself to Zwicker. In the indictment returned against Zwicker in this case, vibrittneyroxs is listed as "Victim #1" and the photographs she sent to Zwicker are the images of a minor engaged in sexually explicit conduct charged in Counts 1, 2 and 3.

OPINION

A reviewing court must afford great deference, "so long as the issuing judge had a

substantial basis to conclude that the search was reasonably likely to uncover evidence of wrongdoing." *United States v. Reichling*, 781 F.3d 883, 886 (7th Cir. 2015) (quoting *United States v. Aljabari*, 626 F.3dd 940, 944 (7th Cir. 2010)). Or, as the Seventh Circuit recently phrased it, "a warrant-authorized search must be sustained unless it is pellucid that the judge who issued the warrant exceeded constitutional bounds." *United States v. Aleshire*, 787 F.3d 1178, 1178 (7th Cir. 2015).

Here, Zwicker challenges the admissibility of any document produced through execution of the state's search warrant on two grounds: (1) there was no probable cause to support a search warrant for child pornography; and (2) the warrant allowed too broad a search of his computers. Although a close question, the court ultimately rejects the first ground on the basis of the government's good faith defense. The court finds the second ground unfounded.

1. Lack of Probable Cause

a. Merits

i. General Standard

In *Reichling,* the Seventh Circuit explained that "probable cause" is established when the supporting affidavit sets forth sufficient evidence to induce a reasonably prudent person to believe that a search will uncover evidence of a crime based on the totality of the circumstances. *Reichling*, 781 F.3d at 886. The "question is whether the available facts, taken together, justify the proposed intrusion into the suspect's private life." *Aleshire*, 787 F.3d at 1179. In reviewing a warrant application, the judge is to make a practical, common sense

decision whether, given all the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

This is a low evidentiary threshold, requiring only a probability or a substantial chance of criminal activity, not an actual showing of such activity. *United States v. Roth*, 201 F.3d 888, 893 (7th Cir. 2000) (quoting *Illinois v. Gates*, 462 U.S. 213, 244 (1983)). As the Supreme Court noted 66 years ago in *Brinegar v. United States*, 338 U.S. 160 (1949):

> In dealing with probable cause, . . . as the very name implies, we are dealing with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act.

338 U.S. at 175. More recently, the Court observed that:

> The test for probable cause is not reducible to precise definition or quantification. Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence have no place in the probable cause decision. All we have required is the kind of fair probability on which reasonable and prudent people, not legal technicians, act.
>
> In evaluating whether the State has met this practical and commonsensical standard, we have consistently looked to the totality of the circumstances. We have rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach. In *Gates*, for example, we abandoned our old test for assessing the reliability of informants' tips because it had devolved into a complex superstructure of evidentiary and analytical rules, any one of which, if not complied with, would derail a finding of probable cause. We lamented the development of a list of inflexible, independent requirements applicable in every case. Probable cause, we emphasized, is 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.

Florida v. Harris, --- U.S. ---, 133 S. Ct. 1050, 1055-56 (2013) (internal quotations and

citations omitted); *see also Gutierrez v. Kermon*, 722 F.3d 1003, 1008 (7th Cir. 2013) (probable cause is a practical, common sense standard that requires only the type of fair probability on which reasonable people act); *United States v. Jones*, 763 F.3d 777, 795 (7th Cir. 2014) (probable cause is not even proof by a preponderance of the evidence).

While the judge must be neutral, "the law does not require judges to pretend they are babes in the woods." *Reichling*, 781 F.3d at 887 (quoting *United States v. Seiver*, 692 F.3d 774, 778 (7th Cir. 2012)). Judges are allowed to consider what is or should be common knowledge. In particular, a judge is given license to "draw reasonable inferences concerning *where* the evidence referred to in the affidavit is likely to be kept, taking into account the nature of the evidence and the offense." *Reichling*, 781 F.3d at 888 (quoting *United States v. Scott*, 731 F.3d 659, 665 (7th Cir. 2013)). "[I]n a case involving possible evidence of child pornography or sexual exploitation of a child, the probable cause inquiry 'must be grounded in an understanding of both the behavior of child pornography collectors and of modern technology.'" *Reichling*, 781 F.3d at 887 (quoting *United States v. Carroll*, 750 F.3d 700, 704 (7th Cir. 2014) (citing *Seiver*, 692 F.3d at 776-77)).

ii. Circuit split on presumption of nexus between child enticement and pornography

According to defendant, this motion turns on whether the Seventh Circuit joins four other federal circuits in concluding that evidence of a defendant's probable involvement in child enticement and sexual exploitation is not enough *by itself* to support a warrant to search that defendant's private files, particularly computer files, for child pornography. The government disputes that this is the only evidence of Zwicker's possession of child

enticement, while also arguing that the sole circuit finding such a nexus without additional proof is the correct standard. Before addressing what additional facts were offered to the issuing judge, a brief review of the relevant circuit court decisions on this subject might prove helpful.

In all of the circuit court decisions cited by defendant, the warrant affidavit seeking to search for evidence of child pornography principally, if not exclusively, included facts related to that defendant's prior conviction(s) for child molestation or sexual assault of a child. *See United States v. Falso*, 544 F.3d 110, 123 (2d Cir. 2008) (finding that an eighteen-year-old charge of sexual molestation of, and shortly thereafter pleading to a misdemeanor for endangering, a child under 16 was too stale and unrelated to support a search warrant for child pornography, at least where the supporting affidavit otherwise failed to "draw a correlation between a person's propensity to commit both types of crimes"); *Virgin Islands v. John*, 654 F.3d 412, 419, 421 (3d Cir. 2011) (warrant was not supported by probable cause because the affidavit did not even attempt to allege a nexus exists between evidence of possible child sexual assault and possession of child pornography); *United States v. Hodson*, 543 F.3d 286, 288 (6th Cir. 2008) ("[w]hile the potential inference between [admitting to having engaged in child molestation] and [possession of child] pornography is not an illogical one, it also is not self-evident"); *Dougherty v. City of Covina*, 654 F.3d 892, 898-99 (9th Cir. 2011) (pointing out that the affidavit did not contain facts that tied the plaintiff's alleged acts of child molestation to possessing child pornography). As is discussed below, this case involves other contemporaneous facts, but the reasoning in each of these circuit court decisions is nonetheless persuasive regarding the general proposition that the warrant affidavit

must include evidence in some form supporting a link between the child pornography sought and the behavior described.

In response, the government refers this court to the one circuit court decision going the opposite way. In *United States v. Colbert*, 605 F.3d 573 (8th Cir. 2010), the Eighth Circuit affirmed a district court's conclusion that probable cause supported a warrant permitting a search of the defendant's residence for child pornography based solely on the fact that the defendant attempted to lure a little girl to his residence to show her movies. *Id.* at 575. The Eighth Circuit agreed that individuals interested in children sexually "frequently utilize child pornography," and that a "commonsense, nontechnical analysis" warranted a finding of probable cause to search the defendant's home for such pornography. *Id.* at 577-78. In fairness, as noted by the Third Circuit in *John*, 654 F.3d at 422, the Eighth Circuit did make much of the fact that "it would strain credulity to believe Colbert was attempting to lure the child there to watch, say, 'Mary Poppins' or 'The Sound of Music'" and that "the Supreme Court recognized nearly twenty years ago, evidence suggests that pedophiles use child pornography to seduce other children into sexual activity." *Colbert*, 605 F.3d at 578 (quoting *Osborne v. Ohio*, 495 U.S. 102, 111 (1990)); *but see Colbert*, 605 F.3d at 580 (Gibson, J., dissenting) (commenting that the majority misinterpreted certain facts in the record about the types of movies the warrant sought, substituting its own opinion for that of the more experienced officers).

As the nexus between child pornography and enticement arguably still requires specific knowledge, particularly with growing evidence of the behavior of child pornography collectors to the contrary, the court respectfully disagrees with the conclusion that these inferences are

now supportable based on common sense alone. *See Reichling*, 781 F.3d at 887. There is an important distinction between the factual scenario addressed by the Eight Circuit in *Colbert* and the one addressed by the Seventh Circuit in *Reichling*, 781 F.3d at 886, which affirmed the validity of a warrant for child pornography based on an inference that images sent via cell phones or social network websites could be transferred to other storage devices. In the latter case, the permissible inference was based on common knowledge that electronic images are readily transferable. Here, as in *Colbert*, the inference requires a particular understanding of a nexus between those involved in child enticement and child pornography. As Zwicker suggests, because Detective Gately did not "bridge the gap" between the facts of enticement here and possession of child pornography, the warrant is arguably based on something less than probable cause.

b. Information before issuing judge

Relying on the decisions of four other federal circuit courts of appeal in his opening brief, the defendant would draw the same distinction between evidence of child enticement and possession of child pornography in support of his essential argument that:

> Here, information about Zwicker's explicit conversations with H.M. coupled with the topless photo did not amount to evidence that his computer would contain evidence of child pornography. Child enticement is wholly distinct from child pornography. And, as noted, child erotica is both non-criminal and constitutionally protected, and it can't be used as a basis to believe Zwicker engaged in criminal behavior. . . . The affidavit did not bridge the gap between child erotica, child enticement, and child pornography – nor could it have done so. Nothing but speculation and stereo-typing would establish probable cause to think that Zwicker had child pornography on his computer.

(Def.'s Mot. (dkt. #24) 15.)

Implicit in defendant's argument is that Gately's affidavit *would* support a warrant targeted at evidence of child enticement, but the specific criticisms of the factual and inferential gaps in Detective Gately's affidavit have merit. The first gap is in Gately's failure to address the legal definition of child pornography. Under Wisconsin law, not every nude photograph of a child constitutes pornography. On this, the Wisconsin child pornography statute is quite specific:

> Whoever possesses, or accesses in any way with the intent to view, any . . . photograph . . . or other recording of a child engaged in sexually explicit conduct under all of the following circumstances may be punished . . . .

Wis. Stat. § 948.12(1m). "Sexually explicit conduct" includes the actual or simulated "lewd exhibition of intimate parts." Wis. Stat. § 948.01(7)(e). As applied, this definition involves a common sense determination of "whether the pictures show nudity and are sexually suggestive." *State v. Mercer*, 2010 WI App 47, ¶ 40, 324 Wis. 2d 506, 782 N.W.2d 125; *see also United States v. Griesbach*, 540 F.3d 654, 656 (7th Cir. 2008) ("under federal law as under [Wisconsin] law, more than nudity is required to make an image lasciviously; the focus must be on the genitals or the image must be otherwise sexually suggestive").[4] Determining whether a photograph constitutes child pornography, therefore, depends on the specific nature and context of the photograph. Although experienced in the enforcement of these laws, Gately's affidavit neither stated that the topless photograph here constituted child

[4] As the court in *Greiesbach* explained, this distinction recognized in the law is found in literature and the arts as well. 540 F.3d at 655; *see also* Kenneth V. Lanning, *Child Molesters: A Behavioral Analysis* 65 (4th ed. 2001) (certain photographs depicting nude children are not child pornography, although they may constitute "child erotica," which is defined as any material "relating to children, that serves a

pornography, nor could he have done so in good faith, at least as child pornography is defined under federal and Wisconsin law. *Greiesbach*, 540 F.3d at 655-57. At least as troubling is the second gap in Gately's affidavit -- its failure to opine that this type of photograph is likely to lead to the discovery of child pornography, even in the larger context here.

These gaps alone do not, however, end the analysis, since the state court might apply common sense in drawing such an inference from all the facts, including the description of Zwicker's sexually explicit online conversations with H.M. *and* the fact that Zwicker sent H.M. a nude photograph of himself. These facts, too, must be viewed in determining probable cause. *See Aleshire*, 787 F.3d at 1179.

As the defendant essentially concedes, the facts here implicate Wisconsin's child enticement and sexual exploitation statutes, but not necessarily possession of child pornography. Indeed, had Detective Gately sought a search warrant related to enticement or exploitation, the probable cause analysis would be quite different. Wisconsin law criminally punishes sexual exploitation of a child (Wis. Stat. § 948.05(1)) and child enticement (Wis. Stat. § 948.07).[5] Given the fact that Zwicker engaged H.M. in ongoing discussions involving his BDSM fantasies -- apparently even after learning she was only 14 years old, including his suggestion that he pick her up to make her his "sexual slave" -- an exchange of H.M.'s semi-

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sexual purpose").

[5] "Sexual exploitation of a child" occurs when one "[e]mploys, uses, persuades, induces, entices, or coerces any child to engage in sexually explicit conduct involving the child." Wis. Stat. § 948.05(1)(a). "Child enticement" occurs when one "causes or attempts to cause any child who has not attained the age of 18 years to go into any vehicle, building, room or secluded place," with the intent to: (1) have sexual contact or sexual intercourse with the child, (2) cause the child to engage in prostitution, (3) expose genitals, public area or intimate parts to the child or cause the child to expose genitals, public area or intimate parts, (4) record the child engaging in sexually explicit conduct, (5) cause bodily or mental harm to the child, or (6) give or sell the child a controlled substance. Wis.

nude picture with his own nude picture requires no "leap of reason" to conclude that Zwicker may have been engaged in acts of sexual exploitation and child enticement in violation of Wisconsin law. On the contrary, considering what are increasingly well-known, grooming techniques by predators to leverage a child into a point of no return -- like exchanging embarrassing nude or semi-nude pictures of each other -- common sense leads to other reasonable inferences regarding possible reasons to elicit and retain child pornography. Even the most innocuous inference is that Zwicker was pushing a minor to the edge of sexually lewd and inappropriate conversation and conduct without crossing over into criminal activity, but a "probable cause" analysis does not entitle Zwicker to the best possible inference. *See United States v. Malin*, 908 F.2d 163, 166 (7th Cir. 1990) (citing *United States v. Fama*, 758 F.2d 834, 838 (2d Cir. 1985) ("The fact that an innocent explanation may be consistent with the facts alleged . . . does not negate probable cause.")), *abrogated on other ground by United States v. Monroe*, 73 F.3d 129, 133 (7th Cir. 1996).

Assuming that Detective Gately honestly believed (as well he might have) that all of the averred facts, when taken as a whole, made it likely that Zwicker possessed child pornography, however, his affidavit nevertheless left it up to the issuing judge to infer as much. Contrary to the government's argument, those inferences have not generally been found permissible under the rubric of "common knowledge." *See Reichling*, 781 F.3d at 883. The government cites to a decision where the Seventh Circuit permitted the collection of child erotica, along with obscene material pursuant to a warrant, *United States v. Hall*, 142 F.3d 988 (7th Cir. 1998), as well as to two decisions where child erotica was admissible at

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Stat. § 948.07

trial to demonstrate a defendant's knowledge and intent, *United States v. Dornhofer*, 859 F.2d 1195, 1199 (4th Cir. 1988); *United States v. Caldwell*, No. 97-5618, 1999 WL 238655 (6th Cir. Apr. 13, 1999). These decisions are ultimately unhelpful, however, because each warrant was supported by the presence of *both* child erotica and child pornography.

Here, Gately offered *no* evidence of child pornography. Instead, his affidavit required the issuing judge to have specific knowledge or apply common sense in finding that someone likely to be grooming a child for sexual exploitation and enticement is likely to possess child pornography. Although the court may assume the issuing judge knew the law, it may not assume that he was sufficiently knowledgeable in the field of child enticement and pornography to make the inferences the affidavit required. Indeed, as discussed, all federal circuit courts of appeal, save the Eighth, have concluded that however intuitive it may seem, such an inference is not obvious and may well be wrong as a matter of fact.[6]

c. Good Faith Doctrine

Without additional supporting argument, the government cites to *United States v. Leon*, 468 U.S. 897 (1984), for the proposition that even if a search warrant is invalid based on a lack of probable cause, evidence seized in executing the warrant should not be suppressed provided the officers relied in good faith on the judge's decision to issue the warrant. *Id*. at

[6] As already alluded to, this court's analysis would be different if Detective Gately's affidavit or other supporting material would have supported such a link. For instance, Gately could have averred that it has become common for a pedophile engaged in grooming activities to exchange nude photos with the victim, making it likely that if H.M. sent Zwicker one nude photograph, she may have felt coerced into sending photographs of herself that did constitute child pornography. *See, e.g.,* Rosin, "Why Kids Sext," The Atlantic Magazine (Nov. 2014). Or Gately could have submitted that in his own experience, these facts have led to the discovery of child pornography. Since Gately did neither, the

922-23. In response, Zwicker argues that the government is not entitled to the good faith exception here because "perfunctory and undeveloped arguments" are deemed waived. (Reply (dkt. #30) 8 (quoting *United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991); *see also United States v. Jackson*, 787 F.3d 1153, 1161 n.22 (7th Cir. 2015) (citing *Perez v. Illinois*, 488 F.3d 773, 776-77 (7th Cir. 2007)). However, the decision to obtain a warrant *is prima facie evidence* that the officer was acting in good faith. Indeed, as a matter of law, the presence of the warrant creates a presumption of good faith that a defendant must rebut. *United States v. Koerth*, 312 F.3d 862, 868 (7th Cir. 2002).

To overcome this presumption, the defendant must show one of these things: (1) the issuing judge abandoned the detached and neutral judicial role; (2) the officer was dishonest or reckless in preparing the affidavit; or (3) the warrant was so lacking in probable cause that the officer could not reasonably rely on the judge's issuance of it. *See Reichling*, 781 F.3d at 889 (citations omitted). There is no evidence supporting a finding that the issuing judge abandoned his role as a neutral evaluator, although he might be faulted for failing to insist on a more carefully crafted: (1) warrant, targeted at a search for further evidence of child enticement and sexual exploitation of H.M. or other minor child; or (2) affidavit drawing the nexus with this evidence to possession of child pornography. This is evidence of a lack of care, not abandonment of his neutral judicial role, at least in the context of facts supporting the issuance of a warrant that at least alluded to good grounds for its issuance and repeatedly referred to those grounds in directing officers what to look for in its execution.

The court is similarly unconvinced that the warrant affidavit reflects dishonesty or

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state court was, and now this court is, left to the four corners of the warrant affidavit as it is.

recklessness on Detective Gately's part. At most, Gately appears to have engaged in a "cut and paste" drafting job, rather than a carefully crafted warrant based on the specific facts of this case. Even then, however, it is not clear under the law that Gately's affidavit did not support the issuance of a warrant and, even a warrant to search for child pornography, if one were to accept that Zwicker's grooming technique in exchanging increasingly riské photos between a 67-year man and a 14-year old girl would lead to an exchange of child pornography, whether by or as part of a campaign of insidious coercion toward the ultimate goal of sexual exploitation.[7]

Finally, there is no evidence that the warrant was so lacking in probable cause that an officer could not reasonably rely on the judge's issuance of it. On the contrary, the warrant and supporting affidavit contained plenty of cause to believe a crime had been committed, albeit not necessarily that of child pornography. While the court is reticent to reward such careless drafting of the warrant and supporting affidavit, neither can it find the detective's conduct to be dishonest or reckless enough to warrant the suppression of evidence obtained in its good faith execution. Indeed, the Second Circuit found as much in *Falso*, noting that reasonable minds -- including those of the panel members -- differed as to whether probable cause existed, which warranted application of the good faith exception. 544 F.3d at 128.

Zwicker's only authorities supporting his position are the *Hodson* and *John* decisions. In each, the court denied the government the benefit of the good faith exception because the

[7] The government did not argue that discovery was inevitable here, so the court does not so hold, but the failure is curious. After all, had Gately more narrowly asked for, or the state judge insisted on, a warrant allowing a search of other evidence of Zwicker's child enticement and sexual exploitation, that search would seem to have led inevitably to discovery of Zwicker's online communications with "vibrittneyroxs" and the pornographic pictures that she shared with Zwicker while still a minor.

affidavit included prior instances of a defendant engaged in child molestation, but not possession of child pornography. *Hodson*, 543 F.3d at 293; *John*, 654 F.3d at 418. Certainly, Detective Gately's failure to link the exchange of pictures and sexually explicit conversations to possession of child pornography is problematic for the reasons described above, but it is distinguishable from the officers' failures to do so in *Hodson* and *John*. For one, Zwicker's manipulation to obtain child erotica and child pornography from H.M. shares the common thread of obtaining photographic images in some form, while child molestation -- an act -- and possession of child pornography do not. Additionally, the facts here involved several, contemporaneous and progressively troubling facts about Zwicker's interactions with H.M., while the facts in *Hodson* and *John* involved prior allegations of child molestation. Ultimately, Zwicker's references to these decisions, the application of the good faith exception in *Falso* and the split decision in *Colbert* serve only to highlight the confusion in the law.

The issuing judge should have required more information from Detective Gately, but the warrant was not so lacking in probable cause that it was unreasonable for Gately to then rely on it. Rather, as reflected by this court's probable cause analysis above, at the time this warrant issued, the defendant has failed to clearly establish that the facts in the affidavit did not constitute probable cause. Therefore, Gately understandably relied upon the inferences of the issuing judge in finding that probable cause existed notwithstanding his sloppiness in crafting his affidavit and warrant, and the good faith exception saves suppression of the evidence obtained from it.

2. The Particularity Requirement

Finally, Zwicker argues that even if the warrant was supported by probable cause, or at least to the good faith exception, it was overly general and gave the police unbridled discretion to look through every file on Zwicker's computers. The court also finds this argument unpersuasive.

To determine whether a specific warrant meets the particularity requirement, a court must inquire whether an executing officer reading the description in the warrant would reasonably know what items are to be seized. *See United States v. Hall*, 142 F.3d 988, 996 (7th Cir. 1998). Here, the warrant permitted the agents to conduct a forensic examination of the computer. It limited the search to images and videos representing the "possible exploitation, sexual assault and enticement of children," any documents tending to evidence the same, as well as evidence of who controlled the device during the relevant time, which included such items as email content, email chats and instant messaging.

The defendant claims that because the warrant did not set out a protocol for the search, it permitted the officers to treat Zwicker's computers like an open book. Contrary to defendant's suggestion, that the search should have been limited to interactions between Zwicker and H.M, however, a search warrant that authorizes a search for items related to child pornography is written with sufficient particularity. *See Hall*, 142 F.3d at 997 (search warrant authorizing agents to seize defendant's computer and other hardware containing depictions of or information pertaining to child pornography was sufficiently particular); *United States v. Brown*, No. 00-CR-112-C, 2001 WL 34373161, at *10 (W.D. Wis. Mar. 16, 2001) (warrant that authorized seizure of items that may "depict child pornography, child

erotica, information pertaining to the sexual interest in child pornography" was sufficiently particularized). Further, the suggestion that the search should have been limited to H.M.-specific files ignores the fact that the warrant sought child pornography generally, not just child pornography of H.M.

The fact that the warrant permitted a search of the entirety of Zwicker's computers does not change this conclusion. When officers execute a search warrant at a location, they are permitted to look anywhere in that location. *United States v. Mancari*, 463 F.3d 590, 596 (7th Cir. 2006). In the context of digital media such as a computer, although officers must exercise caution to ensure that the warrant is sufficiently narrow, such that the search uncovers only those things described in the warrant, the search may be as extensive as reasonably necessary to locate the items described in the warrant. *See United States v. Mann*, 592 F.3d 779, 786 (7th Cir. 2010). The warrant permitted the officers to search the entirety of the computer for evidence related to child pornography, sexual exploitation and assault, and enticement because this evidence could be located anywhere in the computers. This is especially true because file names are easily manipulated. Thus, Zwicker's argument that the warrant lacked sufficient particularity fails as well.

ORDER

Accordingly, IT IS ORDERED that defendant Thomas Zwicker's motion to quash and suppress (dkt. #24) is DENIED.

Entered this 1st day of September, 2015.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge