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

UNITED STATES OF AMERICA,

Plaintiff,

v.

JODY W. LOWE,

Defendant.

REPORT AND RECOMMENDATION

06-CR-122-C

REPORT

The grand jury charged defendant Jody Lowe with possession of child pornography on his computer. Lowe entered a conditional guilty plea to this charge on September 14, 2006, reserving his right to challenge the lawfulness of the state search warrant that led to discovery of the contraband charged against him. Lowe claims that the affidavit contained false material statements that must be stricken, and that there was not probable cause to issue this warrant.

Having held a *Franks* hearing[1] and having considered the parties' arguments, I am recommending that the court uphold the warrant and deny Lowe's motion. The motion raises an interesting question about how much leeway this court has in its review of the challenged affidavit. Regardless of the approach this court takes, I conclude that the search warrant was valid and Lowe was not subjected to an unreasonable search. Therefore, suppression is unnecessary and this court should deny Lowe's motion.

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[1] *See Franks v. Delaware*, 438 U.S. 154 (1978).

The most user-friendly copy of the challenged warrant affidavit is Defendant's Exh. 2, to the Evidentiary Hearing, attached to the other exhibits and loose in the file. This copy also has marginal paragraph numbers, a useful reference tool. On September 18, 2006, I held a *Franks* hearing, mainly to clarify the agents' thought processes and motives. Having heard and seen the witnesses testify, having viewed their demeanors and having judged the reasonableness of their testimony in conjunction with all the evidence in the record, I find the following facts:

FACTS

Tim Schultz has been employed 30 years as a special agent with the Wisconsin Department of Justice. Agent Schultz specializes in Internet crimes against children. Agent Schultz has extensive training and experience in this field, as noted in the search warrant affidavit at ¶¶ (B)(1)-(20).

In January 2006, Agent Schultz received information from Detective Dale Williams of the Seattle, Washington Police Department regarding Detective Williams' investigation of Internet exchanges of images of child pornography between a suspect in Washington and a suspect in Wisconsin. The Wisconsin suspect was Jody Lowe, believed to reside at 654 Park Ridge Drive, Eau Claire, Wisconsin. On January 26, 2006, Agent Schultz received from Detective Williams an information packet detailing the investigation. That same day, Agent Schultz researched Wisconsin Department of Transportation records to learn that Jody and Jacqueline Lowe lived at 654 Park Ridge Drive in Eau Claire. Also that same day

Agent Schultz surveilled the residence at 654 Park Ridge Drive where he observed among other things, a semi-tractor, a motor home, and a van registered to the Lowes.

On February 2, 2006, Agent Schultz met with Eau Claire Police Detective Paul Becker who was assigned to assist Agent Schultz's investigation of Jody Lowe. Detective Becker has been an investigator in the ECPD's Juvenile Crimes Division since 2001 investigating crimes against children, including sexual assault, physical abuse and neglect. Detective Becker has specialized forensic computer training related to crimes against children. Detective Becker already knew Jody Lowe from Becker's 2002 investigation of allegations that Lowe might possess child pornography. Detective Becker had met Lowe at his residence at 654 Park Ridge Drive during that investigation. Agent Schultz provided to Detective Becker the packet of information Schultz had received from Detective Williams in Seattle. Detective Becker read the packet but he never had any contact with Detective Williams. Agent Schultz already had drafted a search warrant affidavit for 654 Park Ridge Drive for his own signature; he provided a copy of that affidavit to Detective Becker to read.

That same day Agent Schultz and Detective Becker met with Eau Claire County Assistant District Attorney Emily Long to discuss their investigation of Lowe. They advised ADA Long that they wished to search Lowe's residence and they submitted Agent Schultz's draft affidavit so that the District Attorney's Office could convert it to the office's format for search warrant applications. Sometime after February 2 but before February 7, Detective

Becker accompanied Agent Schultz on a drive-by surveillance of the home at 654 Park Ridge Drive.

Thereafter, it was determined that Detective Becker would replace Agent Schultz as the affiant presenting the warrant application to the court. Detective Becker passed this information to ADA Long and asked that the District Attorney's Office revise the affidavit to reflect that Detective Becker now was the affiant. The District Attorney's Office botched the job, leaving most of Agent Schultz's first-person references to himself unchanged.[2]

Even so, when Detective Becker and Agent Schultz read the revised affidavit, neither of them caught these errors. But if they had noticed these errors, then they would have corrected them before Detective Becker signed the affidavit and presented it to the court.

Detective Becker appeared before Judge Wahl of the Eau Claire Circuit Court and swore to the affidavit. Judge Wahl did not notice the errors either and he issued the requested warrant.

Before executing this warrant, Detective Becker realized the warrant did not refer to the semi-tractor and trailer located on Lowe's property. This oversight was brought to ADA Long's attention, and her office changed the search warrant to include these areas as places to be searched. The search warrant affidavit for Detective Becker's signature did not change.

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[2] The "summary of experience and training of affiant, Special Agent Schultz," continued to refer to Agent Schultz's special training as if he were the affiant. *See* Deft. Exh. 2 at (B)(1)-(20). Also, investigative activity performed by Agent Schultz on January 26, 2006 remained in the affidavit in the first person, which made it seem as if Detective Becker personally had engaged in these investigative activities when in fact he had not. *Id*. at (C)(13)-(15).

Detective Becker presented his affidavit with the modified draft warrant to Judge Lenz of the Eau Claire Circuit Court on February 8, 2006. At the time Detective Becker swore to this affidavit before the court, he did not realize that it contained inaccuracies relating to which agent actually had done what. The court did not catch these errors either. Judge Lenz signed the warrant, agents executed it and they found the alleged child pornography forming the basis of the federal charges in the instant prosecution.

Notwithstanding the District Attorney's failure adequately to revise the "summary of experience and training" section of the affidavit (Section B in Def. Exh. 2), by coincidence all of the information contained therein referring to Agent Schultz also happened to be true for Detective Becker.

In paragraph (C)(13), Detective Becker did not actually *receive* the information sent from Seattle, although Agent Schultz–who *had* received it–had shared all of this information with him. In paragraph (C)(14), Detective Becker had not personally researched the Wisconsin Department of Transportation records to determine that Lowe lived at 654 Park Ridge Drive. In paragraph (C)(15), Detective Becker did not conduct surveillance of the residence at 654 Park Ridge Drive on January 26, 2006 because he hadn't started working on this investigation yet. However, after February 2, 2006 but before signing the warrant application, Detective Becker did accompany Agent Schultz for a surveillance of 654 Park Ridge Drive.

ANALYSIS

I. What Facts May the Court Consider When Reviewing Probable Cause?

(A) A General Look at Reasonableness

In Section II of this report I analyze Lowe's claim that the search warrant for his home was not supported by probable cause. Before we get there, this court has to decide whether and how to redact and/or amplify the challenged warrant affidavit. Such sculpting normally is undertaken pursuant to *Franks v. Delaware*, 438 U.S. 154, but in this section I start more broadly, asking whether the purpose of the exclusionary rule even is implicated in this case.

This may seem like an unnecessary starting point, since I actually held a *Franks* hearing. But I held that hearing mainly to determine the accuracy of the only logical inference that can be drawn from the affidavit's jumbled references to the affiant, namely that the agents had not recklessly or intentionally *undermined* their own warrant by failing to recast Agent Schultz's information from first-person to third-person. The facts found above establish that this inference is correct. This is not a case in which the agents lied to or misled the court by inserting false favorable information or omitting unfavorable facts in an unfair attempt to bolster their probable cause showing. To the contrary, the affidavit, prior to editing, provided probable cause to issue the requested warrant. (More on this in Section II). The state actors' subsequent editing blunders were neither reckless nor intentional. How could they have been? The ADA took a perfectly fine warrant application

and gummed it up by negligently retyping attributions and no one caught these errors prior to issuance of the warrant. The core facts establishing probable cause remained unsullied and were properly presented to the court, albeit swaddled in avoidable obfuscation.

The state's sloppiness has provided Lowe with a serendipitous opportunity to attack the warrant. Lowe, understandably, has made the most of it, but the errors undergirding his challenge fall within the no harm/no foul doctrine. Occam's Razor suggests that perhaps this is a case in which the court could bypass a more detailed *Franks* analysis, declare this fact situation *sui generis*, review the challenged search warrant application as if the ADA's typist had done his/her job correctly, and declare the challenged search constitutionally reasonable.

As noted in *dicta* in *United States v. Elder*, ____ F.3d ____, ___ WL ____, Case No. 05-3106, (7th Cir. 2006) (a case ultimately decided on the "public safety" doctrine),

> The main requirement of the fourth amendment, after all, is that the search be reasonable. The exclusionary rule comes at such cost to the administration of the criminal justice system that its application might sensibly be confined to violations of the reasonableness requirement. . . . Allowing the criminal to go free because of an administrative gaffe that does not affect substantial rights seems excessive.

Slip Op. at 3.[3]

In *United States v. Harju*, ___ F.3d ___, ___ WL ___, Case No. 05-3777 (7th Cir. 2006), the court observed that "the prime purpose of the rule, if not the sole one, is to deter future

[3] It is worth noting that the court rejected the district court's inevitable discovery analysis, acknowledging that sometimes administrative gaffes *do* lead to suppression. *Id.* I am quoting *Elder* because the court's observation appears directly applicable to Lowe's motion to suppress.

unlawful police conduct," and noted that this focus on deterrence led the Supreme Court recently to contract the rule's scope. Slip Op. At 5 & 6, quoting *Hudson v. Michigan*, 126 S.Ct. 2159, 2168 (2006). The court in *Harju* quoted at length from *United States v. Leon*, 468 U.S. 897 (1984), noting that even if there were a violation of a defendant's fourth amendment rights, a court must weigh carefully the costs and benefits of preventing the use of inherently trustworthy evidence obtained in reliance on a search warrant, issued by a detached and neutral magistrate, that ultimately was found to be defective; therefore, the rule should operate to exclude evidence only when it will deter police misconduct. *Id.* at 7.

In the instant case the affidavit's inaccuracies arise from a botched redraft of the warrant affidavit that made some second-hand information look first-hand, and some third-hand information look second-hand. This collective flat-lining by a squad of state actors is troubling, but one has to ask: what sort of future police misconduct would suppression deter? Sloppy editing that makes a good warrant look bad?

Perhaps this is a lesson worth learning: if officers (and prosecutors) don't dot their "i"s and cross their "t"s in search warrant applications, then the warrants subsequently obtained can be thrown out and the evidence suppressed. But Lowe's situation does not militate toward taking such a hard line: on these facts, it would glorify form over substance to suppress contraband seized pursuant to a court-authorized warrant based on an affidavit that jumbled the names of the state agent and local detective who were providing probable cause to the court. Nothing that the police or the ADA did in this case is so opprobrious as

to merit the sanction of exclusion. Allowing suppression to flow from sloppy retyping that merely obfuscated the pedigree of the material facts would be an unnecessary and unreasonable windfall for Lowe. Therefore, it would not be unfair or unreasonable for this court to consider the actual sources of the information reported in Detective Becker's affidavit when determining whether there was probable cause.

(B) A More Specific Look at *Franks v. Delaware*

If the court is uncomfortable eschewing a standard *Franks* review, then we move to phase two of the preliminary analysis. As a starting point, although I held a *Franks* hearing to which Lowe was not really entitled, a review of the threshold even to obtain such a hearing helps illustrate why there was no *Franks* violation in this case. To obtain a *Franks* hearing, a defendant must make a substantial preliminary showing that: (1) the challenged search warrant affidavit contained false material statements or omitted material facts; (2) the affiant made the false statement(s) or omitted the material fact(s) intentionally or with reckless disregard for the truth; and (3) the false statement or omitted fact was necessary to support the finding of probable cause. 438 U.S. at 155-56. "These elements are hard to prove and thus *Franks* hearings are rarely held." *United States v. Swanson*, 210 F.3d 788, 790 (7th Cir. 2000). Moreover, an unimportant allegation, even if viewed as intentionally misleading, does not trigger the need for a *Franks* hearing. *Id.* at 791; *see also Haywood v. City of Chicago*, 378 F.3d 714, 719 (7th Cir. 2004); *Molina ex rel. Molina v. Cooper*, 325 F.3d 963,

968 (7th Cir. 2003); *United States v. Maro*, 272 F.3d 817, 822 (7th Cir. 2001) (the sorts of discrepancies and shortcomings about which defendant complained in attacking the search warrant "do not come close to the kind of egregious errors necessary to conduct a *Franks* hearing").

A failure to investigate more thoroughly or a failure to provide the court with more information that might better illuminate the situation is, at most, negligence. "A little negligence–actually even a lot of negligence–does not the need for a *Franks* hearing make." *Id*. at 790-91. *See also United States v. Harris*, 464 F.3d 733, 738 ("Allegations of negligent or innocent mistakes contained in a warrant affidavit do not entitle a defendant to a hearing"). Rather, it was Lowe's burden to establish that the claimed misstatements and omissions were intentional and that they were material. *See Harris*, 464 F.3d at 738; *Swanson*, 210 F.3d at 790. Information in a warrant that is "technically contradictory" does not reveal the "disregard for the truth" necessary to obtain a *Franks* hearing. *Maro*, 272 F.3d at 822. In order to prove deliberate falsehood or reckless disregard, a defendant must offer direct evidence of the affiant's state of mind or inferential evidence that the affiant had obvious reasons for omitting facts. *United States v. Souffront*, 338 F.3d 809 (7th Cir. 2003). The Court stated in *Franks*

> Our reluctance . . . to extend the rule of exclusion beyond instances of deliberate misstatements, and those of reckless disregard, leaves a broad field where the magistrate is the sole protection of a citizen's Fourth Amendment rights, namely, in instances where police have been merely negligent in checking

or recording the facts relevant to a probable-cause determination.

438 U.S. at 170.

Put another way, *Franks* hearings are necessary to ensure that a defendant is protected where a fourth amendment violation has been substantial and deliberate. *Id.* at 171.

As noted at the outset, it is pellucid in this case that the state actors would not have deliberately or even recklessly misstated the source of their information in the warrant affidavit. Just the opposite: they had obvious, logical reasons *not* to mis-identify their information sources because this would muck up a perfectly fine warrant affidavit. The outcome does not change by noting that *somebody*–the DCI agent, the local detective, the ADA, her typist, the two reviewing judges–"should have" caught the attribution errors. Not knowing what one "should have known" is negligence, not recklessness. *See United States v. Ladish Malting Co.,* 135 F.3d 484, 487-88 (7th Cir. 1998).

I convened a *Franks* hearing anyway; Agent Schultz and Detective Becker verbalized what I had inferred from the affidavit: they had *not* intentionally or recklessly sabotaged their own warrant application. They never noticed the mistakes caused by the retyping, and if they had, they would have corrected those mistakes. These law enforcement officers did not engage in the sort of egregious conduct condemned by the Court in *Franks*. Therefore, it would be improper for this court to excise from the warrant affidavit the material challenged by Lowe in his motion to suppress.

But do *Franks* and its progeny allow this court to supplement the affidavit with the correct information that the botched edit omitted? In previous cases that presented *Franks*

issues this court has invoked what it characterized as *Franks*'s "redaction/ supplementation" variation, 438 U.S. at 171-72. Lowe challenges this characterization, observing that the Court in *Franks* does not mention inserting omitted information into a challenged warrant. This came later when the circuit courts applied *Franks* to cases involving material omissions from warrants. The Court of Appeals for the Seventh Circuit adopted this approach in *United States v. Williams*, 737 F.3d 594 (7th Cir. 1984), noting that a defendant could challenge an affidavit on the ground that material facts were omitted. *Id.* at 604. The court continued:

> It is further plain that if the challenger is permitted to marshal all exculpatory facts, fairness dictates that the government be allowed to support the affidavit with additional inculpatory information known to the affiant at the time the affidavit was made.

Id.

But the Court reversed course without comment in *United States v. Harris*, 464 F.3d at 738:

> Considering new information presented in the supplemental filing that supported a finding of probable cause was beyond the trial court's analytical reach. Rather, its consideration of new information omitted from the warrant affidavit should have been limited to facts that did not support a finding of probable cause.

One could argue the merits of either position, but the *Harris* approach is fairer and more logical in most cases because it prevents the government from declaring a mulligan and providing new evidence to the reviewing court that it had not seen fit to present to the issuing court.

But "most cases" ≠ "all cases." I note again that the state's mistake in this case defies easy pigeon-holing. Ordinally an omission from a warrant affidavit is considered "material" if the court would not have authorized the warrant had it known the omitted facts. *Shell v. United States*, 448 F.3d 951, 954 (7th Cir. 2006); *Molina ex rel. Molina v. Cooper*, 325 F.3d 963, 970 (7th Cir. 2003) ("In order for a party to establish a *Franks* violation, there must be a reasonable probability that a different outcome would have resulted had omitted information been included in the affidavit"); *United States v. Pace*, 898 F.2d 1218, 1232-33 (7th Cir. 1990)(an omission is material when "if the fact were included, the affidavit would not support a finding of probable cause"). Here, the "omissions" do not involve "new" facts of the sort disapproved in *Harris*, they clarify attribution errors that mostly are already apparent from the face of the affidavit. Indeed, a careful, objective reader would deduce many (but not all) of the necessary corrections on his/her own.

For instance, the section titled "Summary of Experience of Affiant, Special Agent Schultz" (Def. Exh. 2, Section B) indicates to even a casual reader that Agent Schultz was directly involved in the activities set forth in what purports to be Detective Becker's affidavit. Interestingly, the government took advantage of the *Franks* hearing to establish that the "Summary of Experience of Affiant, Special Agent Schultz" just happened to mirror accurately the training and experience of Detective Becker. It's like chasing the MacGuffin in a Hitchcock film: the entire section of the affidavit that Lowe challenges as false and which is so patently false that it could not have fooled anyone, turns out to be completely

true except for the given name of the agent. In the end, Becker did not lie to or mislead the court by inadvertently swearing directly to this information. Therefore, the conclusions Detective Becker draws in ¶¶ (D) (2) - (3) of the affidavit actually are based on his expertise as outlined in Section B.

To equivalent effect, Lowe's challenge to ¶¶ (C) (13) (14) and (15) turns out to be almost bootless because Detective Becker had access to this information from other sources at the time he signed the warrant application. So although there may have been technical falsehoods created by bad editing, the material information contained in these three paragraphs was correct. Notwithstanding the court's admonition in *Harris*, it does no violence to Lowe's fourth amendment rights to consider this information when determining whether the state's search warrant was supported by probable cause.

II. Probable Cause for the Warrant

So now to address the lynchpin question: did probable cause support the warrant issued for Lowe's residence? The short answer is "yes."

A court that is asked to issue a search warrant must determine if probable cause exists by making a practical, common-sense decision whether given all the circumstances, there exists a fair probability that contraband or evidence of a crime will be found in a particular place. *United States v. Walker*, 237 F.3d 845, 850 (7th Cir. 2001), quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1982). 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." *Id.*

Put another way, a court's determination of probable cause should be given considerable weight and should be overruled only when the supporting affidavit, read as a whole in a realistic and common sense manner, does not allege specific facts and circumstances from which the court reasonably could conclude that the items sought to be seized are associated with the crime and located in the place indicated. 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 exists when the circumstances, considered in their totality, induce a reasonably prudent person to believe that a search will uncover evidence of a crime. *United States v. Mykytiuk*, 402 F.3d 773, 776 (7th Cir. 2005). Sometimes, the sum of the probable cause circumstances is greater than their individual parts, establishing in their totality a fair probability that contraband will be found in the suspect's residence. *United States v. Caldwell*, 423 F.3d 754, 761 (7th Cir. 2005). That's why it is inappropriate to consider each piece of evidence individually in a "divide and conquer" approach; rather the focus must be on what the evidence shows as a whole. *Id.* at 760.

Probable cause is a fluid concept that relies on the common-sense judgment of the officers based on the totality of circumstances known to them. 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. *United States v. Reed*, 443 F.3d 600, 603 (7th Cir. 2006). "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). "Probable cause requires 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); *see also United States v. Ramirez*, 112 F.3d 849, 851-52 (7th Cir. 1997)("all that is required for a lawful search is *probable* cause to believe that the search will turn up evidence or fruits of crime, not certainty that it will") (emphasis in original). Although people often use "probable" to mean "more likely than not," probable cause does not require a showing that an event is more than 50% likely. *See United States v. Garcia,* 179 F.3d 265, 269 (5th Cir. 1999);*see also United States v. Funches*, 327 F.3d 582, 586 (7th Cir. 2003) (probable cause determination does not require resolution of conflicting evidence that preponderance of evidence standard requires); *Edmond v. Goldsmith*, 183 F.3d 659, 669 (7th Cir. 1999)(Easterbrook, J., dissenting) (probable cause exists somewhere below the 50% threshold).

In making probable cause determinations, law enforcement agents are entitled to draw reasonable inferences from the facts before them, based on their training and experience. *Funches*, 327 F.3d at 586. As the court noted in *Funches*, a drug case,

> Such expertise is highly significant because . . . officers assigned to specialized areas of enforcement become familiar with the methods of those engaged in particular types of criminal activity, giving them an ability to detect unlawful activity where laymen might not.
>
> *Id.*

The existence of possibly innocent explanations for conduct, while part of the totality of circumstances review, does not by itself negate probable cause. *Id.* at 587.

As noted at pp. 6-14 above, in this case the warrant affidavit doesn't exactly speak for itself, but the core facts are easily discernible. *See* Def. Exh. 2 at (C)(1)-13. Lowe's main challenges to the probable showing are that there is no showing that the Seattle police are trained in child sex crime investigations, there is no proof that the images referenced in the affidavit actually constituted child pornography,[4] there is no nexus between him and the images described in the application, and the information is stale.

Lowe contends that the state should have attached to its affidavit an actual image that it contended was child pornography or should have had a qualified person provide a more detailed description of the allegedly pornographic images. Lowe points out that the training and experience of Detective Williams in Seattle is unknown; therefore, he is not qualified

[4] a statutorily defined term, *see* 18 U.S.C.§ 2256(8)

to assess whether an image constitutes child pornography. Lowe contends that the agents did not allow the court to make the determination whether the images were child pornography, instead assuming that role for themselves.

I disagree. Although the affidavit provides the officers' conclusions about whether certain images qualify as child pornography or child erotica, the descriptions of particular images in ¶¶ (C) (2), (4) and (9) is sufficiently detailed for the issuing court to make its own determination whether the images constitute child pornography. True, we do not know the foundation for Detective Williams's estimation of the age of the boys described in ¶ (C)(4) or the girl in ¶ (C)(9). He estimates one boy to be 8-10 years old, a group of boys to be 13-16 years old, another boy to be 12 to 15 years old, and the girl to be 8 years old. Could he be so wrong in his estimates that all of these people actually are men and women over the age of 18? It's possible, but highly unlikely. To the same effect, for probable cause purposes, it doesn't matter that Detective Williams's training and experience is unknown: common sense indicates that most people, trained or not, would recognize that boys and girls who look like they are about eight years old certainly are not adults. It is closer to the line to make the same assertion about boys who appear to be 12 to 15 years old or 13 to 16 years old, but this is not an area about which lay people are unqualified to opine, and the standard is probable cause, a very low evidentiary threshold.

Similarly, the issuing court did not need to look at the images described, nor did it need a more detailed description to determine that there was probable cause to believe that

the images described constituted pornography. Lowe cites a six-part test used in California, *see* Brief in Support, dkt. 8, at 4, n. 2 and claims that the images do not meet this test. I agree that the images characterized in the affidavit as child erotica do not meet this test, but the first and fourth images described in ¶¶ (C)(4) and the image described in (C)(9) do. In any event, another court's guidelines are helpful to but not binding on this court.

In his reply brief, Lowe floats the notion that perhaps these images were of "virtual" children and therefore not illegal; this is at least one reason, argues Lowe, why it is imperative that investigators present the court with an actual image to review. I'm not even sure it would be legal anymore for the government to do this, but regardless, it certainly isn't *necessary* for a probable cause determination. A detailed description of the images, of the sort provided here, ordinarily will suffice. If the reviewing agent suspected that an image was virtual, he would be obliged to describe it that way. But if a police detective thought that the image showed a real child, how probable is it that a judicial officer would reach a different conclusion?

As for a nexus between the contraband images and Lowe's residence, ¶ (C)(4) reports that Mark Monroe sent four images to Lowe on September 11, 2005, two of which are described with sufficient particularity to qualify as child pornography. ¶ (C)(9)reports that Mark Monroe sent one image to Lowe on October 19, 2005 that is described with sufficient particularity to qualify as child pornography. The next three paragraphs establish that Detective Williams sufficiently verified the IP addresses involved to connect these exchanges

to the residence at 654 Park Ridge Drive. Lowe claims that the agents needed to understand and explain how IP addresses worked for this information to be credible, but this is not necessarily true. It would have been preferable for the agents to provide more information (and federal agents do so routinely), but their failure to do so does not mean that the affidavit lacked probable cause linking the communications to Lowe.

If the court wishes to rely on the additional information in ¶ (C)(15) connecting Lowe to this residence, then the nexus between the contraband and Lowe's residence is tighter, since many of the communications between Monroe and Lowe that did not directly involve contraband nonetheless established the ongoing relationship between these two men and strongly hinted at Lowe's possible possession of other contraband. *See* ¶¶ (C) (3) and (5) - (8). Certainly there is no genuine doubt that Agent Schultz and Detective Becker knew that Lowe lived at this address at the time they applied for the search warrant.

Lowe's staleness challenge is countered by ¶ (B)(19) of the affidavit, which was written based on Agent Schultz's experience but which was true for Detective Becker as well: both agents were aware that people who collect child pornography tend to keep it indefinitely. As Lowe notes, it would have been relatively easy (and preferable from this court's perspective) to back up this assertion with concrete examples, but the failure to do so doesn't make the assertion untrue or unbelievable.

Lowe is absolutely right that, even setting aside the attribution errors, this warrant application could have been substantially stronger and clearer. But agents are not required

to present A+ work to the court when seeking a search warrant; a marginal warrant still receives a passing grade. This is not an *apologia* for what happened here; this court already is hoarse from voicing its concerns over the shoddy work it sees from the northern counties. At least this case is aggravating in a novel way: here the agents presented a relatively long, detailed warrant to the state court on a complicated topic. Yes, it should have been even longer and even more detailed, but it was enough. The attribution errors caused by the ADA's sloppy retyping are unique and hopefully will stay that way. They were not reckless or intentional.

At this stage of the proceedings, this court's concern is whether execution of this warrant violated Lowe's fourth amendment rights. It did not. Looking at the *gestalt* of the situation, Lowe was not subjected to an unreasonable search. Excluding the evidence seized in this case would not serve the primary function of the exclusionary rule.

RECOMMENDATION

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

Entered this 17th day of November, 2006.

BY THE COURT:

/s/

_____
STEPHEN L. CROCKER
Magistrate Judge

November 17, 2006

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Re: United States v. Jody W. Lowe
Case No. 06-CR-122-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 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 November 27, 2006, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by November 27, 2006, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable Barbara B. Crabb, District Judge