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

UNITED STATES OF AMERICA,

Plaintiff

v.

GARY PRIDEAUX-WENTZ,

Defendant.

REPORT AND RECOMMENDATION

07-CR-63-C

REPORT

The grand jury has charged defendant Gary Prideaux-Wentz with possessing child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). The evidence underlying this charge was seized during the February 2, 2006 execution of a search warrant issued by this court on January 31, 2006. Prideaux-Wentz has moved to quash the warrant and to suppress the government's evidence. *See* dkt. 8. First he claims that the search warrant was tainted by the affiant's reckless or intentional misstatements and omissions, which necessitates a hearing under *Frank v. Delaware*, 438 U.S. 154 (1978) (and requires this court actually to view the allegedly contraband images, *see* dkt. 9). Next, he claims that there was no probable cause to issue the warrant. Third, he claims that the good faith doctrine cannot salvage this warrant.

I have thoroughly considered Prideaux-Wentz's myriad contentions. There is no need for a *Franks* hearing. There was ample probable cause to support the search warrant. In any event, the good faith doctrine would apply. Therefore, I am recommending that this court deny Prideaux-Wentz's motion to quash and to suppress.

I. The Search Warrant

In support of his request to search Prideaux-Wentz's residence for child pornography, FBI Special Agent Steven Paulson submitted a 40-page, 66-paragraph affidavit, which speaks for itself. *See* dkt. 3. This synopsis sets forth the portions most relevant to the parties' suppression arguments.

Agent Paulson's investigation of Prideaux-Wentz was triggered by complaints from the National Center for Missing and Exploited Children (NCMEC), which received information from various internet service providers (ISPs) via NCMEC's "cyber tip line." NCMEC is a national clearing house that gathers information about missing and sexually exploited children for use by law enforcement. Title 42 U.S.C. § 13032 states that if an ISP that becomes aware of facts or circumstances from which child pornography offenses are apparent, then it must report those facts and circumstances to NCMEC's cyber tip line "as soon as is reasonably possible." According to Agent Paulson, NCMEC's information to him, coupled with record checks, led him to suspect that child pornography would be found at N8719 Marty Road, New Glarus, Wisconsin, the current residence of Gary Prideaux-Wentz. Agent Paulson noted that he was not providing all of the information available to him, but only as much as he believed necessary to establish probable cause in support of his warrant request. *See* Affidavit at ¶¶ 1-6.

Agent Paulson set forth definitions from the applicable federal statutes. "Child pornography" is defined in 18 U.S.C. § 2256(8) as:

> any visual depiction of sexually explicit conduct and where (a) the production of the visual depiction involved the use of a minor engaged in sexually explicit conduct (b) the visual depiction is a

> digital image, computer image or computer-generated image that is, or is indistinguishable from, that of a minor engaged in sexually explicit conduct, or (c) the visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaged in sexually explicit conduct, as well as any visual depiction, the production of which involves the use of a minor engaged in sexually explicit conduct.

Affidavit at ¶ 7(b).

"Sexually explicit conduct" is defined in 18 U.S.C.§ 2256(2) to include "actual or simulated . . . (c) masturbation; . . . [*or*] (e) lascivious exhibition of the genitals or pubic area of any persons." *Id.* at ¶ 7(d).

Agent Paulson explained his background investigating child pornography on behalf of the FBI, then outlined how individuals who exploit children (including collectors of child pornography) correspond via e-mail, chat rooms, bulletin boards, and file transfers, via the Internet and its World Wide Web. Agent Paulson explained why child pornography distributors and collectors viewed the Internet as a useful medium for collecting and disseminating child pornography. Affidavit, ¶¶ 14-19. Agent Paulson opined that evidence of an online storage account often would be found on the home computer of a user subscribing to a service. Sometimes the user intentionally stored the information; other times, the information could be retained unintentionally.

Agent Paulson provided background information about Yahoo! Groups, noting that some of the millions of Yahoo! Groups specialized in child pornography. Group members could post and retrieve images, including images of child pornography. Notwithstanding the secrecy attendant to child pornography groups on Yahoo!, all users must have a Yahoo! ID and must sign in in order to access posted photos and file sections of a group's website.

Agent Paulson reported that on August 15, 2003, Yahoo! submitted to NCMEC ten "Cyber Tips" that a person using Yahoo! ID *jackinpulpit2001* with an e-mail address of *jackinpulpit@yahoo.com* had posted child pornography images to a Yahoo! Group known as *"Regazzi2003*". Yahoo! provided 10 images to NCMEC which provided them to Agent Paulson. Agent Paulson opined that some of these images were child erotica while others were child pornography. Agent Paulson described these images in ¶ 39 of his affidavit:

> a. A lone, white male, under 18 years old, dressed in a blue shirt and blue jeans reclining on a bed. An adult left hand is pulling down the young male's jeans and underwear exposing his erect, uncircumcised penis.
>
> b. A lone, prepubescent, white male bent over exposing his anus and scrotum. A white, adult hand is seen on the male's left buttock.
>
> c. A lone, prepubescent, white male wearing green patterned underwear and blue jeans is exposing his erect penis. A white, adult hand is shown holding the tip of the male's penis.
>
> d. A lone, prepubescent, white male wearing green patterned underwear, blue jeans and a white shirt . . . is exposing his penis. A white, adult hand is shown pulling down the juvenile's jeans and underwear.
>
> e. A lone, prepubescent, white male wearing green patterned underwear, blue jeans, and a white shirt is exposing his erect penis. A white, male hand is shown resting on the juvenile's bare right thigh.
>
> f. A lone, white male, under 18 years old, dressed in a blue shirt and blue jeans reclining on a bed. An adult left hand is pulling down the young male's jeans and underwear exposing his erect, uncircumcised penis.

> g. A lone, prepubescent, white male bent over exposing his anus and scrotum. A white, adult hand is seen on the male's left buttock.
>
> h. A lone, prepubescent, white male wearing green patterned underwear and blue jeans is exposing his erect penis. A white, adult hand is shown holding the tip of the male's penis.
>
> I. A lone, prepubescent, white male wearing green patterned underwear, blue jeans and a white shirt . . . is exposing his penis. A white, adult hand is shown pulling down the male's jeans and underwear.
>
> k. A lone, prepubescent, white male wearing green patterned underwear, blue jeans, and a white shirt is exposing his erect penis. A white, adult hand is shown resting on the male's bare, right thigh.

Agent Paulson reported that Yahoo! submitted to NCMEC on October 20, 2003, one Cyber Tip that a person using ID *jackinpulpit2001* posted two images of child pornography to the Yahoo Group "*timmygroup*." As before, Agent Paulson was provided a CD of these images which he reviewed and described in ¶ 40:

> a. A prepubescent, white male bending over with anus and scrotum exposed.
>
> b. A nude, prepubescent, white male reclining on a bed exposing his erect penis.

Agent Paulson reported that on November 24, 2003 Yahoo! submitted to NCMEC a tip that j*ackinpulpit2001* had posted 24 images to the Yahoo! Group "BBBboysbarebuns." Agent Paulson reviewed a CD of these images and characterized them as including both child pornography and child erotica. Agent Paulson's descriptions may be found at ¶ 41 of his affidavit; from his descriptions almost all of these images sound like child erotica. The only

arguably "pornographic" images are "t" ("a nude, prepubescent, white male, reclining provocatively on a multi-colored bed, exposing his genitals and buttocks.") and "u" ("a nude, white male, under 18 years old, exposing his anus . . . ").

On December 11, 2003, Yahoo! submitted to NCMEC a tip indicating that *jackinpulpit2001* had posted "child pornography" images to a group titled "Boiboyz." Agent Paulson reviewed a CD of the images and indicated that they appeared to include both child pornography and child erotica. Agent Paulson describes all six images in ¶ 42 of his affidavit. From these descriptions, it does not appear that any of these images depict child pornography.

On December 23, 2003, Yahoo! submitted two cyber tips to NCMEC indicating that *jackinpulpit2001* had posted images of child pornography to the group "*Boysonly9-16undies*." Agent Paulson reviewed a CD of these ten images and opined that they all appeared to be child erotica. Agent Paulson describes all ten images at ¶ 43 of his affidavit.

On January 20, 2004 Yahoo! submitted to NCMEC a tip that *jackinpulpit2001* had posted child pornography images to the group *"LETSHAVEFUN2003."* Agent Paulson reviewed a CD of seven images and opined that they contained child pornography. He described them in ¶ 44:

> a. A nude, prepubescent, white male hanging by his hands from outdoor playground equipment exposing his genitals.
>
> b. A nude, prepubescent, white male playing on outdoor playground equipment exposing his genitals.
>
> c. A nude, prepubescent, white male standing on outdoor playground equipment exposing his genitals.

d. A nude, prepubescent, white male hanging by his hands and feet from outdoor playground equipment.
e. A nude, prepubescent, white male lying on outdoor playground equipment and exposing his buttocks.

f. A nude, prepubescent, white male squatting on pebbled area and holding a rock on his head.

g. A nude, prepubescent, white male standing outside and exposing his genitals.

On January 20, 2004, Yahoo! submitted to NCMEC a tip indicating that j*ackinpulpit2001* had posted child pornography images to the group "*torbenfun*." Agent Paulson reviewed the four images, opined that they were child pornography and described in ¶ 45:

a. Two nude, prepubescent, white males sitting on a light-colored sofa and masturbating.

b. Different view of two nude, prepubescent, white males sitting on a light-colored sofa and masturbating.

c. Different view of two nude, prepubescent, white males sitting on a light-colored sofa and masturbating.

d. Different view of two nude, prepubescent, white males sitting on a light-colored sofa and masturbating. One young male appears to have a tube of lotion or lubrication in his hand.

On January 28, 2004, Yahoo! submitted a tip to NCMEC indicating that *jackinpulpit2001* had posted child pornography images to the group "When_All_Is_Quiet." Agent Paulson reviewed six images from these uploads and opined that they were child pornography. Agent Paulson described these images in ¶ 46:

a. A prepubescent, white male wearing red shorts with a spider motif and lying on a bed. A lone, adult hand is groping the young male's genitals through the shorts leg opening.

> b. Close-up photograph of a white, prepubescent penis.
>
> c. A white male under 18 years old, wearing a blue tee shirt, blue shorts and sleeping on his face. Focal point of photograph is partially exposed buttocks and genitals.
>
> d. A white male under 18 years old, wearing blue shorts. Upper body is partially covered with red bedding with a "motorcycle" motif. The young male is sleeping on his side. Focal point of photograph is partially exposed buttocks.
>
> f. A prepubescent, white male wearing red shorts with a spider motif and lying on a bed. A lone adult hand is groping the young male's genitals through the shorts leg opening.

On October 17, 2005, NCMEC Staff Analyst Lisa Stenzel provided her technical assistance report to Agent Paulson detailing NCMEC's data base search for Prideaux-Wentz and Timothy Galbraith and the screen name *jackinpulpit2001*. Stenzel reported that in NCMEC's opinion, ten of the 19 cyber tips provided to Agent Paulson contained child pornography; the other 9 either did not, or were categorized "erotica/nudism/BoyLove." Affidavit at ¶47. Stenzel also reported that tip #169810 (¶ 41 of Agent Paulson's affidavit) contained five images of previously-identified child victims. *See* ¶ 48.

According to Agent Paulson, in the fall of 2003, administrative subpoenas were served on Yahoo! And AOL to obtain subscriber information for *jackinpulpit2001*. AOL identified the subscriber as Gary Wentz, N9323 State Road 92, Belleville, Wisconsin. Further investigation revealed that Wentz was Prideaux-Wentz, who had lived at the Belleville address from 1991 until November 2004, when he moved to N8719 Marty Road, New Glarus. The administrative subpoenas confirmed with TDS, and ISP, that Galbraith and Prideaux-Wentz had established e-mail accounts–and therefore had a computer–at their residence in New Glarus. *See* ¶¶ 49-58.

At ¶¶ 60-65 of his affidavit, Agent Paulson reported common characteristics of "child pornography collectors" based on his knowledge and experience, along with the knowledge and experience of Supervisory Special Agent Jennifer Eakin, an FBI expert assigned to the Behavioral Analysis Unit at the FBI academy. According to SSA Eakin, child pornography collectors have need-driven behaviors to which they are willing to devote considerable time, money and energy in spite of risks and contrary to self interest. Child pornography collectors almost always maintain and possess their material in the privacy and security of their homes or some other secure location where it is readily available. SSA Eakin opined at ¶ 63 that:

> Because the collection reveals the otherwise private sexual desires and intent of the collector and represents his most cherished sexual fantasies, the collector rarely, if ever, disposes of the collection. Even if the collector feels threatened, he will usually seek to preserve the collection by hiding it better rather than destroying the material. The collection may be culled and refined over time, but the overall size of the collection tends to increase. In fact, many collectors protect their collections by creating back-ups, sometimes multiple back-ups of some or all of the collection. Child pornography, unlike some other kinds of contraband (e.g. drugs), is not "consumed" by the user. The "consumption" of this product results in its proliferation, more copies are generated. The very nature of computers as a means of collection, transmission and/or storage lends itself to permanent preservation of the item. If the collector relocates, his collection almost always moves with him. Individuals who utilize a collection in the seduction of children or to document that seduction treat the materials as prized possessions and are especially unlikely to part with them.

By way of example, Agent Paulson reported that an FBI agent assigned to the Cyber Crime Task Force in Milwaukee had seized a named suspect's large child pornography collection in 2004 in Beaver Dam and determined that the suspect had images of child pornography on his computer dating back to 1999. *See* ¶ 65.

ANALYSIS

I. The Renewed *Franks* Challenge

On July 9, 2007 I denied Prideaux-Wentz's request for a *Franks* hearing on his challenge to the search warrant, but permitted the parties to address the *Franks* issue further in their briefs if they wished. *See* dkt. 12 at 1. Prideaux-Wentz renews his request for a *Franks* hearing, asserting that Agent Paulson, either intentionally or with reckless disregard for the truth, submitted in his affidavit to the court materially false and misleading statements and omitted material facts, namely: (1) information was omitted that would have shown the absence of a basis to infer when the alleged illegal activity took place; (2) the "false implication" that the images were of actual child victims; (3) the failure to report NCMEC's unsuccessful attempt to identify more of the child victims; (4) the "false implication" that more of the images were child pornography "than was reasonable;"and (5) Agent Paulson did not follow the "Yahoo! Compliance Guide for Law Enforcement" (*see* dkt. 16, Exh. A) in trying to learn when the illegal events occurred and he did not otherwise try to obtain this information. Brief in Support, dkt. 17, at 20; *see also* Motion To Suppress, dkt. 8. The government continues to oppose a *Franks* hearing. Brief in Opposition, dkt. 18, at 10-14.

The Supreme Court intentionally made it very difficult for a defendant to obtain a *Franks* hearing. Picking at a warrant affidavit paragraph by paragraph to second-guess how the investigation was conducted or how the affiant phrased the information is a bootless endeavor. Courts hold *Franks* hearings only upon a substantial showing of intentional malfeasance or

reckless disregard for the truth by the affiant.[1] *Franks*, 438 U.S. at 170. Prideaux-Wentz's attacks on the truthfulness, completeness and accuracy of Agent Paulson's affidavit do not come close to establishing the sorts of egregious errors necessary to conduct a *Franks* hearing. *See United States v. Maro*, 272 F.3d 817, 822 (7th Cir. 2001). As in *United States v. Swanson*, 210 F.3d. 788, 790 (7th Cir. 2000), the attacks here amount to "little more than throwing pebbles at a tank."

As recited in this court's previous order, an agent's failure to investigate more thoroughly or his failure to provide the court with more information that might better illuminate the situation is, at most, negligence, and negligence will not trigger a *Franks* hearing. *Swanson*, 210 F.3d at 790-91. *See also United States v. Harris*, 464 F.3d 733, 738 (7th Cir. 2006). Even contradictory information does not, by virtue of the contradiction alone, 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, 822 (7th Cir. 2003). Nothing in Prideaux-Wentz's critiques of Agent Paulson's affidavit rises to this level.

Then there's the issue of the materiality of any alleged misstatements or omissions. 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.

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[1] To prove "reckless disregard for the truth" it is Prideaux-Wentz's burden to prove that Agent Paulson in fact entertained serious doubts as to the truth of his allegations. A factfinder may infer reckless disregard from circumstances evincing obvious reasons to doubt the veracity of the allegations. *United States v. Whitley,* 249 F.3d 614, 621 (7th Cir. 2001).

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"); *Swanson*, 210 F.3d at 791 (unimportant allegations, even if intentionally misleading, do not trigger the need for a *Franks* hearing).

Because of these high thresholds, even Prideaux-Wentz's best argument–staleness–is insufficient to trigger a *Franks* hearing. Prideaux-Wentz claims that Agent Paulson did not adequately pursue information available to him from Yahoo! that might have allowed him to establish the actual dates of the uploads under investigation. By failing to do so, claims Prideaux-Wentz, Agent Paulson misled this court by implying that the uploads had occurred closer in time and therefore were not stale.

But Agent Paulson accurately stated in ¶¶ 39-46 the dates on which Yahoo! had provided its Cyber Tips to NCMEC. He did not state that Yahoo! actually had received this information about *jackinpulpit2001* on these dates; instead, in ¶ 2, he reported that Yahoo! had a statutory obligation to report such facts and circumstances to NCMEC "as soon as is reasonably possible." To the extent that Prideaux-Wentz's point is that the information was materially older than implied by Yahoo!'s report date to NCMEC, this cannot be a basis for a *Franks* hearing in light of Agent Paulson's averments in ¶¶ 63 and 65 regarding the tendency of child pornography collectors never to dispose of their images. The Seventh Circuit recently held a court is entitled to rely on an agent's averments that child pornography collectors maintain their collections for "many years." *United States v. Watzman*, 486 F.3d 1004, 1008-09 (7th Cir. 2007). Agent

Paulson provided a specific example to back up this opinion, establishing five years' worth of contraband retention by a local child pornography collector. So, even if longer dates had been included in the affidavit, or if Agent Paulson would have discovered and reported that the age of the uploads no longer was available (as proffered by Prideaux-Wentz in his reply brief, *see* dkt. 19 at 4), this would not have been material, notwithstanding Prideaux-Wentz's argument to the contrary, dkt. 19 at 4-5. This court has issued many search warrants in previous child pornography investigations and in every one of those other cases in which the government's information was more than a year old, the agents always have found images of child pornography in the suspect's storage media. Such results, coupled with case law such as *Watzman*, demonstrate how radically different the concept of staleness is in a child pornography investigation as opposed to a drug trafficking or gun possession investigation.

Additionally, I reject Prideaux-Wentz's argument that Agent Paulson intentionally or recklessly failed to pursue this information. The fact that additional information about the Cyber Tip program was available did not oblige him to pursue this investigative lead, and his failure to do so, without more, does not demonstrate an intentional or reckless avoidance of knowledge that would have undermined probable cause. As is patent in ¶¶ 63 & 65, from Agent Paulson's perspective, the passage of years would not have affected the strength of his warrant; therefore, learning that the uploads were older than their report date would not have evinced an obvious reason for him to doubt the veracity of his allegations. He had no motive not to pursue this matter further and it would be illogical to attribute one to him. To the contrary, Agent Paulson's challenged affidavit demonstrates that he interviewed a variety of witnesses on topics

relevant to his investigation and presented as thorough and accurate an overview as he believed was necessary. Obviously this court agreed with him at the time because it issued the warrant. Nothing that Prideaux-Wentz has brought to the court's attention in his briefs and other submissions has changed this conclusion.

Next, Agent Paulson did not "falsely imply" that all of the images showed actual child victims. Agent Paulson accurately reported in ¶ 7(b) that illegal child pornography included images indistinguishable from real children. It is hard to envisage any circumstance in which a "false implication" would meet a defendant's burden in a *Franks* dispute, but there were no such vagaries here: in ¶ 48 Agent Paulson reported those images that NCMEC was able to associate with known victims; the reasonable inference to draw from this report is that none of the other images depicted a known victim. *Expressio unius est exclusio alterius.*

The disagreement between Agent Paulson and NCMEC Analyst Stenzel as to whether some of the images contained child pornography was clearly set out and easily discernible from a comparison of ¶¶ 39-46 with ¶ 47, and the court was able to judge for itself from the descriptions provided by Agent Paulson whether certain images probably contained child pornography or instead were child erotica. Even resolving every single doubt in Prideaux-Wentz's favor leaves a large group of images the contraband nature of which cannot be seriously challenged.

In so observing, I find equally unsubstantiated Prideaux-Wentz's assertion that it was reckless for Agent Paulson to deem himself qualified to recognize child pornography. Although Prideaux-Wentz insists in a separate motion (dkt. 8) that this court must review the actual

images seized in this case in order to determine the (in-)adequacy of Agent Paulson's descriptions, Prideaux-Wentz has not met his preliminary burden of demonstrating that Agent Paulson intentionally or recklessly presented a false description of any of the images he described in his affidavit. To the same effect, it is no stretch to observe that, as a general matter, the physical differences between pre- and post-pubescent males are so distinctive that most lay people would be qualified to offer such an opinion under F.R. Ev. 701. It is almost frivolous for Prideaux-Wentz to suggest that "the representation that [*Agent Paulson*] was qualified to classify the images appears to have been made with reckless disregard for the truth." Brief in Support, dkt. 17, at 20-21. Might Agent Paulson have been wrong on an image or two? It's possible, but as the government points out, his opinion is sufficient to establish that the males depicted in the images probably were minors. That suffices.

In sum, Prideaux-Wentz is not entitled to a *Franks* hearing and there is no need to add anything to or redact anything from Agent Paulson's affidavit before this court conducts its probable cause analysis.

II. Probable Cause

To uphold a challenged search warrant, a reviewing court must find that the affidavit provided the issuing court with a substantial basis for determining the existence of probable cause. This standard requires review for clear error by the issuing court. "We will not invalidate a warrant by interpreting the affidavit 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. *Watzman*, 486 F.3d at 1007. 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.

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); *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. Funches*, 327 F.3d 582, 586 (7th Cir. 2003) (a probable cause determination does not require the resolution of conflicting evidence that the 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). Thus, the existence of possibly

innocent explanations for conduct, while part of the totality of circumstances review, does not by itself negate probable cause. *Watzman*, 486 F.3d at 1008*; Funches*, 327 F.3d at 587.

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. *Watzman,* 486 F.3d at 1008; *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). 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.

327 F.3d at 586.

Cross-referencing these legal principles with the facts and opinions reported in Agent Paulson's affidavit clearly establish that there was probable cause.

Starting with the contested images, even if this court uses a narrow approach, there remains probable cause to conclude that a significant number constitute child pornography. Section 2256(2), defines sexually explicit conduct to include "actual or simulated . . . (c) masturbation; . . . (e) lascivious exhibition of the genitals or pubic area of any persons." The affidavit at ¶¶ 45(a)-(d) describes four images of pre-pubescent boys masturbating. These images fit under the definition of "sexually explicit conduct" without reference to the various tests courts have used to define a "lascivious exhibition" of the genitals.

But a larger group of images fits under this other heading. Under either the cumbersome six-part test of *United States v. Dost*, 636 F.Supp. 828, 832 (S.D. Cal. 1986)[2] or the single-factor test of *United States v. Hill*, 322 F.Supp. 2d 1081, 1084-85 (C.D. Cal. 2004), *aff'd on other grounds,* 459 F.3d 966, 972-73 (9th Cir. 2006),[3] at least nine images listed in Agent Paulson's affidavit appear to qualify as lascivious exhibitions of genitalia. Agent Paulson describes four images of an adult hand fondling a child's genitals (which also could be cross-referenced as masturbation) , *see* ¶¶ 39(c), 39(h), 46(a) and 46(f); Agent Paulson describes five other images as showing a prepubescent boy's erect penis with an adult male hand poised nearby, *see* ¶¶ 39(a), (d), (e), (f) and 39(k).

Let's further cull this list by giving veto power to NCMEC Analyst Stenzel's opinions, which Agent Paulson reported at ¶47. This eliminates 39(a) and 39(f) from the list. This leaves eleven images that almost certainly constituted child pornography, reported to NCMEC on three different days (August 15, 2003, January 20, 2004 and January 28, 2004).

This distillation of the images almost mirrors Prideaux-Wentz's *arguendo* concession of the point, *see* Third Bensky Declaration, dkt. 20 at 1 & Exh. A (Paulson and Stenzel agree on only nine images). Prideaux-Wentz argues that this fractional result, coupled with the absence

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[2] (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.

[3] 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.

of other supporting evidence such as credit card receipts for illicit websites, establishes that there is no probable cause to believe that he is a "collector." As a corollary, Prideaux-Wentz argues that the opinions offered by Agent Paulson (both his own and those of SSA Eakin) are unhelpful generalizations that are not peer-reviewed, do not cite to specific studies, and do not included specific estimates of the extent to which they apply. *See* dkt. 17 at 11-12.

Prideaux-Wentz is incorrect. Agent Paulson's affidavit provides probable cause that Prideaux-Wentz was a collector of child pornography. Dissemination of not less than 11 contraband images on different days, conjoined with evidence that on other occasions Prideaux-Wentz uploaded about five dozen additional images that appeared to be child erotica dovetailed logically and reasonably with many of the characteristics outlined by SSA Eakin in ¶ 61. Perhaps there's a bit of a chicken-and-egg sequence here, but the government is entitled to have the warrant reviewed in its entirety, not in bite-sized pieces that are easier to chew up and spit out. When investigating crime, agents are allowed to draw inferences and make deductions based on observed patterns of operation of certain kinds of lawbreakers; this evidence must be seen and weighed "not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *United States v. Cortez*, 449 U.S. 411, 418 (1981). As the Court noted 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.

Id. at 175.

The Fourth Amendment's protection against unreasonable searches is a bedrock of the Bill of Rights, but when dealing with the exclusionary rule, it is important to bear in mind that we are dealing with issuance of a warrant for a search, not a warrant for a Ph.D. in forensic psychology. Prideaux-Wentz cannot win a probable cause challenge by claiming that the opinions offered in the affidavit were too broad and too shallow. Agent Paulson and SSA Eakin offered adequate support for their opinions. As a review of just the published case law would demonstrate, there is a lot of child pornography circulating in America, and the FBI has invested a lot of time and effort investigating it, finding it and seizing it. Agents versed in this field are entitled to offer opinions on the topic and courts are entitled to accept such opinions when determining whether there is probable cause to conduct a particular search.

Therefore, it was not some Kierkegaardian leap of faith for the court to accept Agent Paulson's representation that the person who uploaded the described images probably was a collector of child pornography. Again, we are not concerned with certainty or even likelihood here, we are concerned with probabilities. The evidence more than met this standard.

Once this link had been established, then it was reasonable for the court to accept the representations of the FBI's expert, SSA Eakin, as to what characteristics this collector probably would possess. This would include SSA Eakin's opinion as to a collector's tendency to hoard and maintain images of child pornography, which in turn would make it probable that the collector would transport these images to a new home if he moved. Images of child pornography on a computer would be just as valuable to the possessor as his electronically-stored tax return data and address books, they would be just as easy to move, and they probably would be harder

to replace; perhaps the images are more analogous to a prized Girard-Perregaux than other ESI. In any event, it was eminently logical and reasonable for Agent Paulson and SSA Eakin to predict that Prideaux-Wentz still possessed images of child pornography at the time of the search warrant application.

In conclusion, the facts presented by Agent Paulson, established in their totality a fair probability that contraband will be found in Prideaux-Wentz's residence in New Glarus. Probable cause supported this warrant and suppression is not appropriate.

III. The Good Faith Doctrine

Even if probable cause did not support this warrant, suppression would be inappropriate unless Agent Paulson lacked good faith in relying on the warrant. In *United States v. Leon,* 468 U.S. 897 (1984) the Court held that:

> In a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall.
>
> * * *
>
> . . . [T]he preference for warrants is most appropriately effectuated by according great deference to a magistrate's determination. Deference to the magistrate, however, is not boundless.

Id. at 914.

Having so stated, the Court then held that

> In the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause.

Id. at 926.

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. When the officer's reliance on the warrant is objectively reasonable, excluding the evidence will not further the ends of the exclusionary rule because it is

> painfully apparent that the officer is acting as a reasonable officer would and should act in similar circumstances. . . . This is particularly true . . . when an officer acting with objective good faith has obtained a search warrant from a judge . . . and acted within its scope. . . . Once the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law. Penalizing the officer for the [court's] error rather than his own cannot logically contribute to the deterrence of Fourth Amendment violations.

Id. at 920-21, internal quotations omitted.

The Court noted the types of circumstances that would tend to show a lack of objective good faith reliance on a warrant, including reliance on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, or reliance on a warrant so facially deficient that the officer could not reasonably presume it to be valid. *Id*. at 923. The Court observed that "when officers have acted pursuant to a warrant, the prosecution should ordinarily be able to establish objective good faith without a substantial expenditure of judicial time." *Id*. at 924. *See also Arizona v. Evans*, 514 U.S. 1, 11-12 (1995)(reaffirming the Supreme Court's reluctance to suppress evidence obtained in good faith but in violation of a defendant's Fourth Amendment rights).

Put another way, an agent's decision to obtain a warrant is *prima facie* evidence that he was acting in good faith, and it is the defendant's burden to rebut this presumption. *United States v. Otero*, 2007 WL 2050403, *3, ___ F.3d ___ (7th Cir. July 19, 2007).

In this case, the preceding 20-page review of the facts and case law establish that even if I am incorrect in concluding that this search warrant was valid, nonetheless Agent Paulson's affidavit was not so lacking in indicia of probable cause as to render unreasonable his belief in its validity. Prideaux-Wentz has not accused me of having abandoned my neutral judicial role when reviewing and granting the warrant request. Although Prideaux-Wentz argues that Agent Paulson was dishonest and reckless in his presentation of the material facts when seeking this warrant, Prideaux-Wentz has not made the substantial preliminary showing that would entitle him to have the court accept these arguments. To the contrary, I have considered them and rejected them. Agent Paulson was acting in good faith. Even if the warrant were invalid this court should not suppress the evidence seized.

RECOMMENDATION

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

Entered this 3rd day of August, 2007.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

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August 3, 2007

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Re: United States v. Prideaux-Wentz
Case No. 07-CR-063-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 August 13, 2007, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by August 13, 2007, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable Barbara B. Crabb, District Judge