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

UNITED STATES OF AMERICA,

Plaintiff,

v.

GARRETT GERMAN,

Defendant.

OPINION & ORDER

15-cr-101-wmc

A grand jury handed down an indictment against defendant Garrett G. German on two counts of unlawfully creating child pornography. (Dkt. #2.) The defendant subsequently moved to quash the April 7, 2015, state search warrant issued to Charter Communications for customer information, as well as the May 11, 2015, state search warrant for his residence at 510½ North Bridge Street, Chippewa Falls, Wisconsin. (Dkt. #24.) If successful, the defendant further moves to suppress all evidence derived from the execution of these warrants, including defendant's post-search statements. (*Id.*)

German contends that neither warrant was supported by probable cause, which the government disputes. (Dkt. #30.) As a fallback, the government invokes the good faith doctrine articulated in *United States v. Leon,* 468 U.S. 897 (1984). German replies that *no* court has found probable cause on evidence as sparse as that presented here, and that the good faith doctrine is, therefore, inapplicable. (Dkt. #31.) Because the warrant to search defendant's home was plainly *not* supported by probable cause under unambiguous Seventh Circuit case law, and an objective good faith doctrine cannot salvage that warrant, the court will grant defendant's motion.

BACKGROUND[1]

A. April 7, 2015, Search Warrant Application

On April 7, 2015, as part of a child pornography investigation, an Assistant District Attorney sought a warrant from the Eau Claire County Circuit Court for records from Charter Communications, Inc. in order to verify the identity of the Charter customer who had used Charter IP address 68.117.25.179 from January 18-25, 2015. The ADA supported her search warrant application with an April 7, 2015, affidavit of Eau Claire County Deputy Sheriff Jeff Nocchi. (Dkt. #25-1.)

In his affadivit, Deputy Nocchi stated that he had been a law enforcement officer for 12 years. He did not, however, purport to be trained or experienced in investigating child pornography or child enticement cases, except perhaps indirectly when expressing his belief that sealing the warrant and application was appropriate. On that issue, Deputy Nocchi stated, "I base this belief on: **my experience in investigating other crimes of this type; the nature of the crime being investigated.**" (Dkt. #25-1 at 12 (emphasis in original).)

As for the facts supporting a warrant, Deputy Nocchi reported that about eight weeks earlier, he received from Special Agent Matt Joy of the Wisconsin Department of Justice reports of three "CyberTips" from the National Center for Missing and Exploited Children ("NCMEC") and Facebook. The *first* tip originated from a Facebook report to NCMEC that an image uploaded to a Facebook website on January 25, 2015, appeared to depict child

[1] Defendant's counsel submitted the affidavits for both warrants. (Dkts. ##25-1, 25-2.) The affidavits speak for themselves, but the summary above provides context for the opinion that follows.

pornography. NCMEC originally forwarded this report and the suspected image to Agent Joy, who then forwarded both to Deputy Nocchi. Although he apparently chose not to attach the image itself, to his affidavit, Deputy Nocchi states:

> I did observe the image and it does appear to be an image of child pornography.

(Dkt. #25-1 at 10.)

This first Facebook/NCMEC tip reported that the IP address 68.117.25.179 appeared to have been used by the suspected uploader, whom Facebook and NCMEC identified as "Garrett German." Deputy Nocchi's affidavit further stated that he had located a person named Garrett German in Eau Claire County with a birth date of February 13, 1990, and a last known address of 16964 54th Avenue, Chippewa Falls, Wisconsin.

The *second* CyberTip from Facebook/NCMEC that Agent Joy forwarded to Deputy Nocchi provided additional information about "Garrett German," reporting that: his birthday was February 13, 1990; his mobile telephone number was "+17154046484"; and his email address was "garretgerman@gmail.com." There is no indication how or from where this information was obtained, nor does it appear material to the issues now before this court.

The *third* CyberTip from Facebook/NCMEC that Agent Joy forwarded to Deputy Nocchi reported that the same IP address, 68.117.25.179, was used to log into Facebook on January 18, 2015. In this CyberTip, Facebook reported that on January 19, 2015, one image that appeared to depict child pornography was uploaded to Facebook's website "to account 'Garret German' from an[other] IP address (66.87.145.79) that belonged to Sprint PCS."

Agent Joy forwarded this image to Deputy Nocchi as well. In turn, Nocchi averred in support of that warrant that:

> I did observe the image and it does appear to be an image of child pornography.

(Dkt. #25-1 at 11.) Again, however, there is no indication that Deputy Nocchi attached a copy of this image to his affidavit.

Deputy Nocchi also searched the American Registry for Internet Numbers ("ARIN") and confirmed in his supporting affidavit that the '179 IP address belonged to Charter, while the '79 IP address belonged to Sprint PCS. Deputy Nocchi further stated in his supporting affidavit that issuing a search warrant to Charter for the identity of a customer using Charter's '179 address from January 18-25, 2015, would assist in identifying the individual involved in uploading "the above mentioned images to Facebook, Inc." *(Id.)* Based on these representations, including the three CyberTips, the state court issued a warrant to Charter on April 7, 2015.[2]

B. May 11, 2015, Search Warrant Application

On May 11, 2015, an assistant district attorney in Chippewa County applied for a warrant to search Garrett German's residence at 510½ N. Bridge Street, Chippewa Falls, Wisconsin. The ADA supported this application with a May 11, 2015, affidavit of Investigator Deborah Brettingen, a Sensitive Crimes Investigator for the Chippewa Falls Police Department.

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[2] While it is unclear why, Deputy Nocchi apparently did not seek issuance of a warrant to Sprint for the '79 IP address.

Invesigator Brettingen had been a police officer since 1990 and in her current assignment investigated internet child pornography as part of the Wisconsin Internet Crimes Against Children Task Force. Her supporting affidavit also disclosed that Brettingen had received 64 hours of training in the investigation of computer facilitated exploitation of children and 23 hours of training involving human trafficking and commercial sexual exploitation of children. Paragraphs 3 - 9 of Investigator Brettingen's affidavit were boilerplate background explanations as to: (1) how persons who access child pornography think and act; (2) how they use the internet and other equipment to access, share and store child pornography; and (3) the methodology and scope of an effective law enforcement search for child pornography. (Dkt. #25-2 at 6-12.)

Investigator Brettingen then provided information about the investigation supporting the requested search warrant. Apparently, Deputy Nocchi contacted Investigator Brettingen on April 29, 2015, to advise that his child pornography investigation had led him to 510½ N. Bridge Street in Chippewa Falls, the residence of the Charter customer -- named Keaten Koepel -- who had been using the '179 IP address at the time the first image was uploaded. Investigator Brettingen's affidavit then repeated the same information from the three Facebook/NCMEC CyberTips that Deputy Nocchi had reported in his warrant affidavit. Brettingen did not report that Deputy Nocchi had looked at the two images of suspected child pornography, but instead reported that in her view each image appeared to be an image of child pornography. (Dkt. #25-2 at 13 ¶¶ 3, 5.) There is also no indication, however, that Investigator Brettingen attached either image to her affidavit.

OPINION

The defendant's primary challenge to the state search warrants is that they are not supported by probable cause. In response to the government's claim that German had no expectation of privacy in the data obtained from Charter pursuant to the first warrant, the defendant essentially concedes that point with regard to the information obtained by issuance of the first warrant to Charter, but argues that this does not cure the evidentiary deficiency in the second warrant authorizing the search of his residence in which an expectation of privacy surely applies.[3] The court is inclined to agree. Accordingly, defendant's motion to suppress evidence obtained under the first warrant will be denied as moot and the remainder of this opinion will focus on the validity of the second warrant.

I. Probable Cause

A. Standard

In considering any motion to quash a search warrant, the court must afford great deference to the decision of the judge issuing the warrant, upholding the finding of probable cause "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)).

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[3] Defendant's counsel does submit "arguendo" that the government's position on "the matter of privacy expectations" seems "somewhat cynical in this case" given that Wis. Stat. § 968.775 requires a "showing of probably cause" for issuance of a state warrant. Whatever the merit of this observation (and the court takes no position), the defendant is seeking suppression under the Fourth Amendment's exclusionary rule.

As the Seventh Circuit explained recently in *United States v. Aleshire*, 787 F.3d 1178, 1178 (7th Cir. 2015), "a warrant-authorized search must be sustained unless it is pellucid that the judge who issued the warrant exceeded constitutional bounds."

Citing to and quoting other cases, the Seventh Circuit noted in *Reichling* that probable cause is established when the 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. 781 F.3d at 886. For this reason, the reviewing judge must make a practical, common sense decision whether there is a fair probability that contraband or evidence of a crime will be found in a particular place given all the circumstances set forth in the affidavit supporting the warrant application. The Seventh Circuit has emphasized, consistent with similar observations by the United States Supreme Court, that 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 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 neutrality is required, "the law does not require judges to pretend they are babes in the woods." Judges are allowed to consider what is or should be common knowledge. *Reichling*, 781 F.3d 883 (quoting *United States v. Seiver*, 692 F.3d 774,778 (7th Cir. 2012)). In

issuing a search warrant, the court is given license to draw reasonable inferences concerning where evidence referred to in the affidavit is likely to be kept, taking into account both the nature of the evidence and the offense. *Scott*, 731 F.3d at 665 (quoting *United States v. Singleton*, 125 F.3d 1097, 1102 (7th Cir. 1997)). As the Seventh Circuit observed in *Aleshire*,

> Perhaps none of these facts by itself supplied probable cause, but judges do not view facts in isolation. As *Gates* holds, the question is whether the available facts, taken together, justify the proposed intrusion into the suspect's private life.

787 F.3d at 1179 (citing *Illinois v. Gates*, 462 U.S. 213, 236 (1983)).

B. Application

All of this being said, neither Deputy Nocchi nor Investigator Brettingen provided the state court with enough information to establish probable cause for their requested warrants. Indeed, each affidavit states nothing more than that each of the two images forwarded by Facebook "appears to be an image of child pornography." Additionally, Brettingen's affidavit in support of the second warrant does not even state if this is her opinion, based on her independent review of the images, or if she is just relying on Nocchi's characterization. Regardless, it is not enough.

In *United States v. Clark*, 668 F.3d 934 (7th Cir. 2012), the Seventh Circuit explained that:

> To prove relevant to the search at issue, the FBI investigation must have uncovered child pornography or the use of LimeWire to distribute child pornography, an outcome which cannot be assumed and which requires either submission of the images themselves or a detailed description of them. *See United States v. Lowe*, 516 F.3d 580, 586 (7th Cir. 2008) (explaining that probable cause to search for child pornography may, in lieu of the actual

> images, be based on a detailed verbal description of them, but implying that one or the other is required). Absent the pictures or a detailed description, the FBI investigation could not properly factor into the issuing judge or district court's probable cause assessment.

Id. at 941.

In *Clark,* the Seventh Circuit found unequivocally that the absence of a picture or a detailed description left the issuing court with no basis to assess the claim of child pornography, nevertheless upheld issuance of the warrant to search for it because the agent's supporting affidavit also provided detail with respect to: (1) the defendant's sexual assault of his toddler niece; (2) his sexual advances toward two other children; and (3) defendant's use of a computer in "grooming" a child for the same purpose. Taken together, the Seventh Circuit found this was sufficient for the issuing court to evaluate an agent's characterization of the defendant as a member of the class of child pornography collectors. In particular, the defendant's background of child sexual exploitation, not a conclusory statement that he possessed "child pornography," put Clark "at the heart of the boilerplate language" about collectors: "an individual associated with sex offenses involving minors, [who] likely 'collect[ed] and/or view[ed] images on the computer.'" *Clark*, 668 F.3d at 939-40.

In contrast, neither agent provided any evidence that would have allowed the state court -- or this court -- to draw a line between the agents overly terse affidavits and probable cause to justify the search warrants. While the agents *had* the two images forwarded by Facebook, they both chose not to share them, perhaps out of concern for revictimizing the individual depicted. That concern is at least understandable, if questionable given the ability to seal such evidence, but then the agent's choice is clear under the law: provide a detailed description of

the images to support and justify the requested warrants *or* leave the court with nothing to evaluate.

Making matters even worse, neither Agent Deputy Nocchi nor Investigator Brettingen even provided the court with *their* definition of "child pornography" or even referenced Wisconsin's statutory definitions. Section 948.12(1m) of the Wisconsin Statutes requires proof that the defendant possessed a photograph or other recording of a child engaged in sexually explicit conduct. *See State v. Ahlman*, 351 Wis.2d 684 (table) (App. 2013). In turn, Wisconsin law states that

> "sexually explicit conduct" means actual or simulated:
>
> (a) sexual intercourse, meaning vulvar penetration as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by a person or upon the person's instruction. The emission of semen is not required;
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> (b) Bestiality;
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> (c) Masturbation;
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> (d) Sexual sadism or sexual masochistic abuse, including, but not limited to, flagellation, torture or bondage; or
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> (e) Lewd exhibition of intimate parts.

Wis. Stat. §948.01(7).[4]

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[4] This definition is similar but not identical to the federal definition of sexually explicit conduct in the context of child pornography. *Compare* Wis. Stat. § 948.01(7) *with* 18 U.S.C. § 2256(2)(A). For example, the federal statute defines "sexual intercourse" and "sadistic or masochistic abuse" more tersely, but seems to cover the same conduct. Similarly, instead of "lewd exhibition of intimate parts," the federal statute uses the phrase "lascivious exhibition of the genitals or pubic area of any person."

Perhaps if either affidavit had *cited* to the applicable state statutes defining "child pornography," the issuing court would at least have had a starting point from which to begin its analysis, although still not something to compare with that definition. Even Investigator Brettingen, who reported having expertise in investigating crimes of child exploitation, fails to explain how she defined "child pornography," much less what part of each image met that definition. Without some definition as an analytical reference point, neither the issuing court nor this court has a single clue as to what the images showed. A boy? A girl? A baby? A toddler? Prepubescent? More than one child? Sexual intercourse? Masturbation? Lewd exhibition of intimate parts? We simply do not know, and neither did the judge who issued the warrant.

This court infers from both parties' discussion of *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986), in their briefing on the current motion, that the two images to which the supporting affidavits refer here contained "lewd exhibitions of [a child's] intimate parts." In *Dost,* the court offered a list of six factors one could consider in determining whether nude or partially nude photographs of children constituted an unlawful "lascivious exhibition of the genital or pubic area." *Id.* at 832.[5] The Court of Appeals for the Seventh Circuit has neither

[5]The trier of fact should look to the following factors, among any others that may be relevant in the particular case:

> (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
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> (2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
>
> (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;

approved nor disapproved a court's use of the *Dost* factors. *United States v. Price*, 775 F.3d 828, 839 (7th Cir. 2014). In *Price*, the court acknowledged that it is not plain error to instruct a jury using the *Dost* factors, but it discouraged their routine use, since it views the term "lascivious exhibition" to be "clear enough on its face." *Id.* at 840. The determination whether an image constitutes a lascivious exhibition of the genitalia is typically left to the jury to make in context, using its commonsense understanding of lasciviousness and the distinction between "artistic and other licit photos of children from child pornography as that term is defined in the statutory text." *Id.* In other words, not every nude photograph of a child constitutes child pornography; the determination has to be made in context.

This is the law in Wisconsin as well. To qualify as an "unlawful lewd exhibition of intimate parts," the Wisconsin Supreme Court explained that:

> the photograph must visibly display the child's genitals or pubic area. Mere nudity is not enough . . . [T]he child [must be] posed as a sex object . . . the photograph is lewd in its "unnatural" or "unusual" focus on the juvenile's genitalia, regardless of the child's intention to engage in sexual activity.

United States v. Griesbach, 540 F.3d 654-55, (7th Cir. 2008) (quoting *State v. Petrone,* 161 Wis.2d 530, 561 (1991)). The Wisconsin Supreme Court further held in *Petrone*, in language

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(4) whether the child is fully or partially clothed, or nude;

(5) whether the visual depiction suggests sexual coyness of a willingness to engage in sexual activity;

(6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

United States v. Dost, 636 F. Supp. at 832.

not quoted by the Seventh Circuit in *Griesbach*, that when a jury receives a definition of "lewd" during a child pornography trial, the trial court may remind the jurors that they should use these guidelines to determine the lewdness of an image, but they also may use common sense to distinguish between a pornographic and an innocent image. 161 Wis.2d at 561.

In the absence of the image itself, the Seventh Circuit's decision in *Griesbach* is particularly instructive as to the need for a meaningful description of the images for the issuing judge to assess whether probable cause exists to believe child pornography will be found upon execution of the warrant. As is again true here, the U.S. Attorney's Office in the Western District of Wisconsin was defending a state warrant to search for child pornography in *Griesbach*. In that case, the supporting affidavit described three images of children, two of which the federal prosecutor conceded fit the description of "child erotica," rather than child pornography. Nevertheless, the prosecutor sought to defend the state court's issuance of the search warrant based solely on the agent's verbal description of the third image:

> a naked female exposing her vagina. The female is lying on her back and her vagina is the primary focus of the image. The female appears to be under the age of 18. The image is from identified child pornography series 'Chelsea' where law enforcement has identified the child victim.

540 F.3d at 655.

While the Seventh Circuit thought that the affiant should have included this third image for the issuing state court judge to consider, it upheld the warrant based on the verbal description, which the court found "sufficient to justify an inference that a search of the defendant's computer files would turn up pornographic images, as it did." *Id.* at 656. The court found it "especially telling" that this image was part of a known series of child

pornography images. *Id.*[6] The government's successful defense of the state search warrant in *Griesbach* based on the description of the third image, does not, however, change the Seventh Circuit's unambiguous holding that the other two images, inadequately described by the affiant to the state court, would *not* support issuance of the warrant.[7]

As German observes in his reply brief, *none* of the cases cited by the government upheld a warrant in which the affiant neither submitted the image itself nor described it to the court, unless something else supported it. For instance, in *United States v. Prideaux-Wentz*, 543 F.3d 954 (7th Cir. 2008), the Seventh Circuit noted (in another case originating from this district) that the affiant -- an FBI agent with extensive experience investigating child pornography -- and the expert from NCMEC who had flagged the purported offending images disagreed about how to classify several of them. The court found that such a disagreement was not unusual, even between experts, "because it is often difficult to distinguish between child pornography and child erotica." *Id*. at 960. Later in that same opinion, the court noted the "somewhat hazy line between child erotica and child pornography." *Id.* at 962.

Even so, the court held that the criminality of the images was sufficiently established because the agent "included a detailed description of each image," so that "the magistrate judge was able to make his own determination about how to classify the images." *Id.* at 960. The

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[6] The Wisconsin Court of Appeals subsequently adopted this same criticism of an affiant for not including the purported pornographic image in *State v. Ahlman*, 351 Wis. 2d 684, 2013 WL 5612529, noting that a brief description of an image, without the image itself, is likely to result in the issuance of an unlawful warrant. *Id*. ¶ 13 n.6.

[7] Even the affiant's terse description of the third image was saved by the fact that it already known to be child pornography within the law enforcement community. *Id*.

Seventh Circuit noted that the court issuing the warrant can rely on "a verbal description of images," rather than the actual images, to determine whether there is probable cause that the images constitute child pornography. *Id.* (citing *Lowe*, 516 F.3d at 586). Still, the issuing court cannot abdicate its responsibility to assess the evidence independently by relying on an assessment by the petitioning officer or some unknown person further up the ladder.

As German notes, the Court of Appeals for the First Circuit has expressly held what is implicit in these Seventh Circuit cases:

> It was error to issue the [search] warrant absent an independent review of the images, or at least some assessment based on a reasonably specific description. Ordinarily, a magistrate judge must view an image in order to determine whether it depicts the lascivious exhibition of a child's genitals.

United States v. Brunette, 256 F.3d 14, 19 (1st Cir. 2001).[8]

In 1998, three years before *Brunette*, the Court of Appeals for the Second Circuit reached a similar conclusion in *United States v. Jasorka*, 153 F.3d 58 (2d Cir. 1998). There, a magistrate judge had issued a search warrant in a child pornography investigation based on the affiant's statement that parcels mailed to the defendant contained "pornographic photographs of male children displaying a lewd and lascivious exhibition of the genitals and pubic areas." *Id.* at 59.

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[8] That being said, the First Circuit also upheld the warrant under the good faith doctrine. Although the court found affiant's failure to provide or to describe the images was "a serious defect in the warrant application," it also found "the uncertain state of the law at the time [January 1999] made reliance on the warrant objectively reasonable." *Id.* The court specifically rejected defendant's claim that the affiant had lied to the issuing magistrate judge when the affiant averred that "all" of the images were pornographic when in fact, 2 out of 79 images were not. The court found this error to be the product of "inadvertence and inattention to detail." *Id.* at 20. This court will address the good faith doctrine in the next section, but as noted at the outset, that doctrine will not save this warrant.

The district court granted defendant's motion to quash this warrant, finding that the affiant's declaration did not establish probable cause that the photographs were sexually explicit. The court of appeals dodged the probable cause question, finding that since the law was unclear on how much detail the affiant had to provide, the magistrate judge's determination that the affiant had provided enough allowed the agents to rely on the search warrant in good faith. *Id.* at 60-61.

In *United States v. Battershell*, 457 F.3d 1048 (9th Cir. 2006), the defendant appealed the denial of his motion to quash a warrant to search his computer for child pornography. Again, unlike the present case, the affiant for the warrant had at least described two images found on defendant's computer: "a young female (8-10 YOA) naked in a bathtub. The second picture showed another young female having sexual intercourse with an adult male. This confirmed that the pictures were illegal to obtain." *Id.* at 1049. The court of appeals noted the determination whether an image fit the fifth definition of sexually explicit conduct (the lascivious exhibition of the genitals or pubic area of any person) "is far more subjective and open to interpretation than the first four," and that determining whether an image fit this definition "will almost always involve, to some degree, a subjective and conclusory determination on the part of the viewer." *Id.* at 1051 (citing *Brunette*, 457 F.3d at 18).

In light of this, the government "correctly concede[d]" that the affiant's description of the first image did not provide probable cause that the image was sexually explicit. This is because "his conclusory statement is an inherently subjective analysis and it is unclear if the photograph exhibited the young female's genitals or pubic area." *Id.* The court found, however, that the description of the first image, when considered along with the citizen

witnesses' reports that the pictures they had seen were of "kids having sex" was sufficient to establish probable cause for the search. *Id.* at 1052.

In *United States v. Pavulak*, 700 F.3d 651 (3rd Cir. 2012), the Court of Appeals for the Third Circuit rejected this approach, holding that:

> Magistrates–not affiants or officers–bear the responsibility of determining whether there exists a fair probability that sought-after images meet the statutory and constitutional definitions of child pornography. . . . In any event, we believe the Supreme Court's decision in *P.J. Video* [475 U.S. 868, 876-77 (1986) and our own precedent] . . . compel us to require more than a conclusion by an affiant that the sought-after images constitute child pornography.

Id. at 662-63. The Seventh Circuit's approach mirrors the Third Circuit's approach in *Pavulak*. *See, e.g., Clark*, 668 F.3d at 941; *United States v. Prideaux-Wentz*, 543 F.3d at 960.

Finally, in *United States v. Simpson*, 152 F.3d 1241 (10th Cir. 1998), the court held that there was probable cause to uphold a search for "child pornography" where the affiant did not show or describe the materials to the issuing court. The affiant, however, did report that an FBI agent had communicated with the defendant in an internet chat room named "# sexpicshare # % % kidsexpics," and the agent had arranged for defendant to send him $30 and a diskette with "numerous scenes of prepubescent children under the age of thirteen" in exchange for images of child pornography. The court found this information, while minimal, sufficient to uphold the search warrant. *Id.* at 1247. The government cited *Simpson* in *Pavulak*, but the Third Circuit rejected the government's claim that the court in *Simpson* had held sufficient an agent's bald assertion that the defendant possessed "child pornography," pointing to the bartered exchange as additional proof. 700 F.3d at 662. In other words, it took

something more than the agent's unadorned characterization of the images to clear even the low probable cause threshold.

In light of this case law, Deputy Nocchi and Investigator Brettingen's respective, conclusory opinion that the two images forwarded by Facebook each appeared to be an image of child pornography does not, without more, establish probable cause that either image actually *is* child pornography. Tellingly, the government fails to cite a single case in which a search warrant was upheld based on nothing more than a bald conclusory statement of the affiant, untethered to a statutory definition or a description of the images being viewed.

This court was able to find one such case supporting the government's position, at least superficially. In *United States v. Grant*, 490 F.3d 627, 632 (2007), that court upheld a search warrant based on the affiant's statement that a citizen informant -- a computer repair technician -- told him that he had seen images on a customer's computer that were "child pornography." The Eighth Circuit agreed with the district court that the computer repairman "was uniquely able, and properly motivated, to distinguish between child pornography and lawful images." The court also went on to find that, regardless, the *Leon* good faith exception would apply. *Id.*

The Eight Circuit's decision in *Grant* is an outlier and appears to conflict with the law, not only of this circuit, but with respect to every other federal circuit, as well as every state in this circuit. All other cases addressing this issue hold or imply that something more than an officer's conclusory statement is required. Therefore, neither of the warrants issued by the state court in this case is supported by probable cause, and this court must quash these warrants and

suppress the evidence seized, unless the good faith doctrine provides a basis for the government to salvage this evidence from the defective warrants.

II. The Good Faith Doctrine

Even if a search warrant is subsequently deemed invalid for lack of probable cause, evidence seized during execution of the warrant should not be suppressed if the officers relied in good faith on the judge's decision to issue the warrant. *United States v. Leon*, 468 U.S. 897, 926 (1984). Where "law enforcement officers have acted in objective good faith or their transgressions have been minor," the costs of the suppression on society and the judicial system compared to the magnitude of the benefit conferred on guilty defendants "offends basic concepts of the criminal justice system." *Leon*, 468 U.S. at 908. "A police officer's decision to obtain a warrant is treated as prima facie evidence that the officer was acting in good faith." *United States v. Miller*, 673 F.3d 686, 693 (7th Cir. 2012) (citing *United States v. Garcia*, 528 F.3d 481, 487 (7th Cir. 2008)).

To overcome this presumption, the defendant must show: (1) the issuing judge abandoned the detached and neutral judicial role, serving as a rubber stamp for the police; (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. *Reichling*, 781 F.3d at 889; *Prideaux-Wentz*, 543 F.3d at 959.[9] When applying the good faith

[9] The defendant does not argue either that the issuing judges here abandoned their neutral roles or that the officers were dishonest or reckless, the analysis of which would require an inquiry beyond the affidavit. *See United States v. Thatcher,* 4 F.3d 998 (1993) (rejecting argument that magistrate judge abandoned his neutral role, considering evidence

doctrine, the court is guided by the principle that "suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule." *Leon*, 468 U.S. at 918. On the other hand, when the court repeatedly must resort to the good faith doctrine to salvage palpably deficient warrants issued by state courts, there comes a point where the probable cause requirement is being honored in the breach. *See United States v. Thompson*, 801 F.3d 845, 848 (7th Cir. 2015) ("Like other affidavits that we have criticized, this one falls short of what we would expect to see in a case brought by federal prosecutors. We are growing weary of thin affidavits that suffer from the same omissions which provoked our criticism in the past.").

Crucial to the court's analysis here, because there is no affirmative evidence of bad faith, but rather an inexplicable ignorance of established law, is that the good faith reliance test is an objective one. As the Seventh Circuit explained in *United States v. Koerth*:

> The *Leon* test for good faith reliance is clearly an objective one and it is solely based on facts presented to the magistrate. An obviously deficient affidavit cannot be cured by an officer's later testimony on his subjective intentions or knowledge.... *Leon* creates an exception to the exclusionary rule when officers have acted in reasonable reliance on the ruling of a judge or magistrate. The point is that officers who present a colorable showing of probable cause to a judicial officer ought to be able to rely on that officer's ruling in executing the warrant. When the officers have not presented a colorable showing ... the reasoning of *Leon* does not apply.

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that an inexperienced magistrate judge took outside advise when issuing a warrant); *Prideaux-Wentz*, 543 F.3d at 962 (a *Franks* hearing may be held to challenge the veracity of statements in a warrant where the defendant can show "that the signatory of the warrant affidavit made a false statement (or omitted a material fact) either intentionally or with reckless disregard for the truth"). Accordingly, the court's good faith analysis is restricted to the four corners of the warrant affidavits.

312 F.3d 862, 871 (7th Cir. 2002) (quoting *United States v. Hove*, 848 F.2d 137, 140 (7th Cir. 1988)).

For the reasons discussed above, the law was clear for both the officers and the judges here that the four corners of the affidavit were wholly insufficient under settled case law. Consequently, as the officers failed to provide a "colorable showing" that probable cause existed, the government cannot receive the benefit of the good faith exception.

For many years, this court, and the Seventh Circuit, has critiqued shoddy affidavits presented to state courts that resulted in searches, the fruits of which were later allowed in federal court to be introduced in criminal prosecutions under the good faith doctrine. *See, e.g., Koerth*, 312 F.3d at 869-70 (government concedes that the state investigator's affidavit failed to establish a substantial basis for concluding there was probable cause; search nonetheless is salvaged by the good faith doctrine); *United States v. Mykytiuk*, 402 F.3d 773, 778 (7th Cir. 2005) (local drug task forces that routinely work with the federal government have responsibility to learn and follow applicable legal precedent so that their warrant applications actually are supported by probable cause; otherwise a double standard could develop); *Reichling*, 781 F.3d at 887, 889 (court fills palpable gaps in Darlington police officer's warrant affidavits by resorting to common knowledge; "[w]hile we do not endorse this affidavit as a model for other officers to follow, this is not one of 'those unusual cases in which exclusion will further the purposes of the exclusionary rule'") (*quoting Leon*, 468 U.S. at 918).

Here, it will again be up to the Seventh Circuit to decide ultimately whether the good faith doctrine should save the warrants here, which is as it should be given the policy implications, but it strikes this court that the warrants in this case brings us to that proverbial "fork in the road." What constitutes probable cause for a search warrant based on images of

child pornography is clear in this and all but one other federal circuit (and logically inferable at the state level). There is *no* legal support for the notion that a warrant may issue based on nothing more than the affiant's unadorned statement that an image "does appear to be an image of child pornography."

In the past, other evidence (*e.g.*, the description of another image, proof of activities consistent with child pornography or proof of child exploitation) have saved warrants, but there is no such evidence here. Certainly, if the officer's unsubstantiated opinion is insufficient, the fact that unnamed employees at NCMEC and Facebook may have shared this opinion does not provide probable cause. As noted above, highly trained, experienced investigators often disagree as to whether a particular image constitutes child pornography or child erotica. For the same reason, the second warrant is not saved by Investigator Brettingen's expertise in the area of child pornography.[10] If affiants continue to choose not to show the actual images to the court -- which perhaps for good reason is the norm these days -- then they must *at least* provide enough of a description for the court to determine if the image qualifies as child pornography as described by the Wisconsin Supreme Court in *Petrone*.

Given the law in this field, it is certainly puzzling that the affiants and the state court thought that the affidavits submitted here in support of the warrant applications were sufficient. Sometimes, when the suspected crime is egregious enough and the sparse evidence supporting a warrant application cannot be improved, a court might be tempted to issue the warrant anyway, figuring that such a stretch is for the greater good.

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[10] If it were, then an affiant's expertise would render the judge's independent review meaningless, as it apparently was here.

What happened here is not, however, susceptible to such a characterization. It would have been quick and simple for the affiants either to photocopy the images or to provide a matter-of-fact, clinical description of what the images showed. Their failure to do *either*, or even *try* to do either, demonstrates a fundamental misunderstanding of what constitutes probable cause. While there is *no* evidence that Deputy Nocchi or Investigator Brettingen acted in *subjective* bad faith, any misunderstanding was *not* objectively reasonable given the case law in this circuit. The court cannot glean why the agents took this bare-bones approach, but it was so palpably deficient as to render their reliance on the warrants unreasonable.

To the same effect, the court cannot ascertain why the state court judges signed off on such bare bones applications without addressing these deficiencies. The warrant affidavits were long, but it was the court's responsibility to wade through the background and boilerplate information and focus on the probable cause determination, the essence of each application. Asking a few questions and requiring the affiants to beef up their affidavits would have been easy and would have allowed the court to determine if there was actual probable cause that the Charter customer at the targeted residence possessed child pornography. Without additional information about the images -- or other evidence suggesting that German possessed child pornography -- the affidavits provided no information that would support a conclusion that these images actually constituted child pornography.[11]

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[11] While the government alludes in one sentence to the possibility of "inevitable discovery" (Pltf. Response (dkt. #30) 9), it makes no argument for its application here, much less provide a copy of the two pictures or (even now) a meaningful description of those pictures for this court to determine if the warrant would have issued, had the judge done her job and rejected the supporting affidavit as originally drafted. This court is, therefore, precluded from finding that the officer would have simply provided the pictures or a description that would satisfy the judge that the images were not merely "child erotica" under Wisconsin law. Of course, that assumes "inevitable discovery" is a back door to the general prohibition of looking beyond the four corners of the affidavit supporting a warrant.

Combating the spread of child pornography over the internet is obviously very important, as is a better understanding of the causes for and ways to stem the seemingly growing demand for it, but so is the government's compliance with the Fourth Amendment. At least in this district, the court has reached a tipping point. This case presents one of those rare situations in which exclusion will (hopefully) further the purposes of the exclusionary rule by serving as a concrete example of the consequences of wholly ignoring even the minimal, straightforward evidentiary requirements for issuance of a warrant based on allegations.

ORDER

IT IS ORDERED that defendant Garrett G. German's motion to quash the search warrant and to suppress evidence is DENIED IN PART AS MOOT as to evidence obtained by virtue of execution of the warrant directed to Charter AND GRANTED IN PART as to evidence obtained by virtue of executing the warrant to search the defendant's home.

Entered this 12th day of February, 2016.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge