

Probable Cause Issues in Child Pornography Cases

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Overview:

As the popularity of the Internet grows, so does the trade of child pornography. The ease by which child pornography is shared over the Internet has created a growing market for fresh material, thus placing additional children at risk. Successful investigation and prosecution of these cases requires careful consideration of Fourth Amendment issues. Since the evidence you seize is the basis for your case, you cannot afford to make mistakes in this area. This document discusses some of the most common probable cause issues that arise in child pornography investigations. Cases discussed in this outline are primarily from the federal courts. Since federal courts are typically more government-friendly than state courts, caution should be used when relying on federal precedent. Until your individual state develops sufficient case law in this area, however, federal precedent is probably your best bet.

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Describing Child Pornography in the Search Warrant:

Overview:

Investigators typically need to obtain a search warrant to gather essential evidence in child pornography cases. When using a known child pornography image to establish probable cause for the search warrant, the investigator must be careful to provide an adequate description the image to satisfy probable cause requirements.

In general, child pornography falls into two categories. The first type consists of children engaged in sexual acts. This type of conduct rarely presents problems in the probable cause determination. The second type of child pornography consists

of children engaged in the lewd exhibition of the genitals. This type of child pornography presents unique problems because of First Amendment concerns. Child erotica is a protected form of free speech and such conduct only crosses the line when it can be shown the child's genital area is displayed in a lewd manner. Widely accepted guidelines to make that distinction were provided in the case of U.S. v. Dost, 636 F.Supp. 828 (S.D.Cal.1986). The Dost court listed the following factors to be considering in this determination: (1) whether the genitals or pubic area are the focal point of the image; (2) whether the setting of the image is sexually suggestive (i.e., a location generally associated with sexual activity); (3) whether the child is depicted in an unnatural pose or inappropriate attire considering her age; (4) whether the child is fully or partially clothed, or nude; (5) whether the image suggests sexual coyness or willingness to engage in sexual activity; and (6) whether the image is intended or designed to elicit a sexual response in the viewer.

Since the determination of whether or not an image depicts child pornography as opposed to child erotica is a matter for the court to decide, the investigator has two choices available when presenting such a warrant. The first choice is to attach a copy of the relevant image to the affidavit itself. Many federal courts have expressed a preference for this option, but unfortunately, this method requires the investigator to reproduce the contraband image and make it a part of the record of the case. An order to seal the affidavit may be obtained, but you still face the dilemma of making illegal contraband a part the case file. The second choice is to provide a sufficiently detailed description of the image so as to clearly distinguish it as child pornography. When sexual contact is described this is not a problem, but explaining how a picture of a nude child constitutes pornography as opposed to erotica can be a challenging task subject to legal attack. The following cases discuss these concepts and provide guidance as to the appropriate standards to follow:

Cases:

U.S. v. Cartier, 543 F.3d 442 (8th Cir. 2008):

Probable cause supported search warrant for defendant's computer, although no one reported seeing images of child pornography on defendant's computer prior to execution of the search warrant, the FBI had reliable information from a Spanish law enforcement agency that defendant's computer contained files with hash values matching known child pornography images.

U.S. v. Lowe, 516 So.2d 580 (7th Cir. 2008)

“First, estimating the age of persons is not an area that requires any special expertise. Second, the affidavit describes these images in sufficient detail to

give the reader an understanding of why the officer placed certain individuals within a particular age range. As a general matter, an issuing court does not need to look at the images described in an affidavit in order to determine whether there is probable cause to believe that they constitute child pornography. A detailed verbal description is sufficient.”

The court found the following description sufficient to establish probable cause for child pornography:

... a black and white depiction of a naked 8 year old girl sitting at the edge of a bed. She has her legs spread open exposing her genitals to the camera. She is looking at the camera and smiling. She has her right arm extended out to her right with her right hand resting on pubic hair/vaginal area of an adult female who is lying back on the bed and is shown reading a pornographic magazine.

U.S. v. Griesbach (7th Cir. 2008):

Search warrant affidavit stating that image depicting naked female lying on her back exposing her vagina with vagina being primary focus, which was an image from an identified child pornography series, had been traced to defendant's computer provided probable cause to support warrant to search computer's files for violation of Wisconsin law prohibiting possession of images of a child engaged in sexually explicit conduct.

Discussion: The appellate court noted that the investigator should have submitted the photo to the reviewing magistrate when applying for the warrant. Specifically, the court noted, “The failure of the state investigator to submit the image itself with her affidavit to the state judge is the strangest thing about this case-unless it is the statement by the federal government's lawyer that it is the policy of his office not to submit pornographic images to a judge when seeking a search warrant, for fear of “disseminating pornography.” That position is hard to understand, since in any prosecution for child pornography the essential evidence is the pornography rather than a verbal description of it, and it becomes part of the official record of the case... A picture may be worth a thousand words, but the affidavit's 20-word 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”) is not worth even one picture. The judge to whom the affidavit was submitted should have asked to see the image.”

U.S. v. Lowe, (7th Cir. 2008)

A court issuing a search warrant does not need to look at the images described in an affidavit in order to determine whether there is probable

cause to believe that they constitute child pornography; rather, a detailed verbal description is sufficient.

U.S. v. Leedy, 65 M.J. 208 (2007):

Facts as set forth in affidavit presented by investigator who sought authorization to search accused's computer, including roommate's observation of file entitled "14 year old Filipino girl" in list of titles, some of which mentioned ages and some of which mentioned acts, which led roommate to believe that files in question contained pornography, were sufficient, when assessed through the lens of the circumstances under which the magistrate came to know this information, including investigator's experience in investigating child pornography, to provide substantial basis for magistrate to conclude that there was fair probability that child pornography would be found on accused's computer, even though affidavit did not contain any description of substance of images suspected to depict pornography, and though roommate's observations were one month old.

U.S. v. Battershell, 457 F.3d 1048 (9th Circuit 2006)

Warrant to search computer seized from defendant's residence was supported by probable cause that computer contained pictures of minors engaged in sexually explicit conduct; warrant application included statements of defendant's girlfriend and her sister that they saw pictures on computer of kids having sex, and although application did not include copies of digital photographs taken by police officers of two pictures they had seen on computer screen when they went to residence in response to girlfriend's report, and officer's description of first picture as showing eight-to-ten-year-old female naked in bathtub did not provide probable cause that picture contained lascivious exhibition of child's genitals, officer described second picture as showing another young female having sexual intercourse with an adult male.

U.S. v. Hill, (9th Cir. 2006)

Affidavit submitted in support of search warrant established probable cause to believe that images on defendant's computer were, as described, lascivious, as required for federal crime of possession of child pornography; the affidavit, which described the two images from the defendant's computer as showing three different, minor girls with their breasts and pubic areas exposed, established a fair probability that there was child pornography or evidence thereof to be found in computer hardware or software at the defendant's home and described in some detail the images of three partially nude children, who

were provocatively and unnaturally dressed in light of the photographs' settings and the girls' clothing was opened so as to reveal their breasts and pubic areas, with the girls appearing in sexually suggestive poses.

Discussion: This opinion has a good discussion on the Dost factors and the criteria to use for determining probable cause for child pornography. The descriptions in the affidavit for search warrant described the images as follows:

Image 1

Is a color picture of a female, white, approximately 15 years old, with long dark brown hair. The female is in a room standing between a couch and a coffee table. There is a framed picture on the wall above the couch. She is wearing only a long blouse and pair of socks. The blouse is open and she is exposing her breast and pubic area to the camera, which she is facing while leaning to her left.

Image 2

**2 Is a color picture of a [sic in affidavit] two females, white, approximately 7-9 years of age, both with dirty blond hair. These females are standing on a beach during the daytime. The shorter of the two females is standing to the right of the picture while the other female is standing behind her. Both females are facing the camera askew and wearing only a robe, which is open exposing the undeveloped breast and pubic area of both girls. They both are turning their faces away from the camera preventing the viewer from seeing their faces.*

U.S. v. Syphers, 426 F.3d 461 (1st Cir. 2005)

The best practice for an search warrant applicant seeking a warrant based on images of alleged child pornography is to append the images or provide a sufficiently specific description of the images to enable the magistrate judge to determine independently whether they probably depict real children; an officer who fails to follow this approach without good reason faces a substantial risk that the application for a warrant will not establish probable cause.

U.S. v. Hill, 322 F.Supp.2d 1081 (C.D. Ca 2004):

“The court therefore adopts a different test, one that it believes better comports with the child pornography statute and provides more meaningful guidance in evaluating lasciviousness: If an image of a minor displays the

minor's naked genital area, there is probable cause to believe that the image is lascivious unless there are strong indicators that it is *not* lascivious." Id. 1087.

Note: This case goes against the grain of prevailing case law. The court analyzes the *Dost* factors and declares them to be unworkable in the context of probable cause determinations. The affidavit in the instant case described the images as follows:

Image 1

Is a color picture of a female, white, approximately 15 years old, with long dark brown hair. The female is in a room standing between a couch and a coffee table. There is a framed picture on the wall above the couch. She is wearing only a long blouse and pair of socks. The blouse is open and she is exposing her breast and pubic area to the camera, which she is facing while leaning to her left.

Image 2

Is a color picture of a [sic] two females, white, approximately 7-9 years of age, both with dirty blond hair. These females are standing on a beach during the daytime. The shorter of the two females is standing to the right of the picture while the other female is standing behind her. Both females are facing the camera askew and wearing only a robe, which is open exposing the undeveloped breast and pubic area of both girls. They both are turning their faces away from the camera preventing the viewer from seeing their faces.

United States v. Brunette, 256 F.3d 14 (1st Cir. 2001):

Investigator described child pornography in affidavit as "'photographs of a pre-pubescent boy lasciviously displaying his genitals."

"This bare legal assertion [by agent], absent any descriptive support and without an independent review of the images, was insufficient to sustain the magistrate judge's determination of probable cause."

"A judge cannot ordinarily make this determination without either a look at the allegedly pornographic images, or at least an assessment based on a detailed, factual description of them."

"But probable cause to issue a warrant must be assessed by a judicial officer, not an investigating agent."

U.S. v. Chrobak, 289 F.3d 1043 (8th Cir. 2002):

Agent stated in her affidavit, "[y]our affiant reviewed the transmitted images and determined that they depict sexually explicit conduct involving children under the age of 16," and "graphic files depicting minors engaged in sexually explicit conduct,"

Affidavit for search warrant, in which agent stated that images graphically depicted sexually explicit conduct involving children under the age of 16, provided substantial basis for concluding that a search would uncover evidence of wrongdoing, as required for issuance of a valid warrant; agent's description of material sought was almost identical to language of statute prohibiting depictions of minors engaged in sexually explicit conduct, satisfying particularity requirement for search warrant.

“Moreover, contrary to Chrobak's authority, Agent Hill did not simply allege the images were "obscene," a conclusion with which a magistrate judge might disagree. She described the graphic content of those images: they depicted actual children engaged in sexually explicit conduct. There are very few pictures of actual children engaged in sexual acts that are not child pornography, *id.* at 822, so it is unlikely the magistrate judge would have disagreed that the images constituted child pornography.”

U.S. v. Getzel, 196 F.Supp.2d 88 (D.N.H. 2002):

Bare legal assertion that image constitutes child pornography, absent any descriptive support and without independent review of images, is insufficient to sustain finding of probable cause sufficient to justify issuance of search warrant.

Computer image of naked boy and naked adult male attached to application for search warrant contained lascivious exhibition of genitals, and thus provided probable cause for search of adult's residence, where image presented both parties' genitalia at forefront, boy was depicted in unnatural pose, and overall positioning of boy and adult on bed engaged in intimate embrace suggested sexual atmosphere.

Image depicting "naked prepubescent male child, kneeling in profile to the camera with an erect penis" constituted lascivious exhibition of genitals, and thus provided probable cause for search of suspect's residence for child pornography, even though kneeling in profile was not per se unnatural pose.

U.S. v. Habershaw, 2001 WL 1867803 (D.Mass 2001):

“Here, the search warrant affidavit included ample evidence to support probable cause apart from the terse description of the picture. The agent described a photograph depicting "a completely nude child standing with her legs spread apart"; a statement by Mr. Habershaw that "It is better to look and not to touch, I have never touch [sic] any young girls"; the addresses on the computer screen from "sites as depicting naked young children in photographs, stores and cartoons in sexual situations"; and Habershaw's

apartment cluttered with little girls' clothes and panties. Consequently, even if the picture was not attached to the warrant application, the search of the computer would still be supported by probable cause or valid under the good faith exception.”

U.S. v. Hernandez, 183 F.Supp.2d 468 (D.PR 2002):

Description given in affidavit for search warrant, of photographs allegedly shown by defendant to two young girls, was not, by itself, enough to establish probable cause that defendant was in possession of child pornography; affidavit did not indicate whether genitals or pubic area of photographed subject were focal point of pictures, or even whether they were visible at all, but only stated that subject was naked, affidavit did not describe setting of photographs or subject's pose, description, that subject was trying to put on a ballerina outfit and necklaces, did not suggest inappropriate attire, and nothing in affidavit suggested willingness on subject's part to engage in sexual activity.

Even though description of photographs allegedly shown by defendant to two young girls was insufficient, by itself, to establish probable cause that defendant was in possession of child pornography, all other information contained in affidavit established a substantial basis for finding probable cause, under “totality of the circumstances” test; defendant invited young girls to his house, offered them drinks, showed them pictures of naked girls on his computer, and asked them to remove their shirts, defendant had been reported as approaching or closely watching other children, and computers were known to be used to transmit and collect child pornography.

U.S. v. Peterson, 294 F.Supp.2d 797 (D. SC 2003):

“The magistrate had a direct statement from an eye-witness that the computer in question contained pictures of pre-pubescent boys in various stages of undress and other boys (unidentifiable as to age) engaged in sexual acts together with links to "underage" internet sites. Together these facts were enough evidence for the magistrate, using the common sense totality of the circumstances test, to find that there was probable cause that defendant's computer contained items subject to seizure.”

U.S. v. Syphers, 296 F.Supp.2d 50 (D.N.H. 2003):

“Dougherty's description of certain images on the VHS-C tapes as "still photographs of female subjects with breasts and or genitalia exposed" does not meet the specificity requirement of *Brunette*.”

“Indeed, the fact that Dougherty describes images of minors engaged in sexually explicit activity, rather than lasciviously displaying their genitals, renders the concerns underlying Brunette less pressing here. ‘While the ‘lascivious exhibition of genitals’ might be a matter of opinion, direct physical contact between the mouth ... and the genitals ... is descriptive and is a determination of fact rather than a conclusion of law.’”

United States v. Lamb, 945 F.Supp. 441 (N.D.N.Y.1996):

Magistrate Sewell need not have viewed every file, but could have relied on the agent's assurance that the images he was presented with were typical of the lot.

United States v. Monroe, 52 M.J. 326 (1999): (**obscenity**)

Affidavit of Office of Special Investigations (OSI) special agent describing images found on accused's e-mail file in government computer as "graphic pornographic photographs," provided a substantial basis for base search authority to decide that probable cause existed to search accused's dormitory room for computer-data media, though it would have been preferable for affiant to include exemplary image files in the affidavit or to give a more detailed description of what was depicted, as photographs, unlike novels or films, speak for themselves without regard to context, and since phrase "graphic pornographic photographs" is not merely conclusory but, given its ordinary meaning, communicates to a reasonable person that the photographs in all probability depict obscenity as legally defined.

It is not required that a magistrate must personally view allegedly obscene films prior to issuing a warrant authorizing their seizure, but the magistrate must be provided sufficient information to make an independent determination under the totality of the circumstances.

“The phrase ‘graphic pornographic photographs’ is not merely conclusory but, given its ordinary meaning, communicates to a reasonable person that the photographs in all probability depict obscenity as legally defined. This is a case of borderline sufficiency and should not be taken as a model for future conduct.”

State v. Jenkins, 30 Fla. L. Weekly D2245 (Fla. 2d DCA 2005):

Search warrant affidavit contained sufficient information to afford magistrate substantial basis for concluding that probable cause existed to search suspect's office for evidence relevant to commission of crime of sexual performance by a child; affidavit included report of suspect's employer, to effect that female minor told her that suspect had taken

photograph or video of himself fondling her breasts, and that employer saw such video on suspect's workplace computer.

Information contained in search warrant affidavit established commission element of offense of sexual performance by a child, where statements of victim and of defendant's employer contained therein were not in conflict; victim reported that defendant photographed her breasts in exchange for a bail bond deal, and defendant's employer reported, based upon her conversation with victim and her viewing of video found on defendant's workplace computer, that defendant had fondled victim's breasts.

Report of defendant's employer that defendant possessed material depicting a child engaged in sexual conduct was sufficient to establish commission element of offense of sexual performance by a child, for purposes of determining sufficiency of search warrant affidavit; there was no requirement that defendant's employer have been present at time video at issue was created.

Discussion: One of the primary issues in this case was whether the affidavit sufficiently showed that there was actual physical contact with the minor victim's breast. The court noted that pictures of the breast alone would not have been child pornography, but touching them for sexual gratification was sufficient under the statute.

The Role of Officer Expertise in Establishing Probable Cause

Overview:

Probable cause can be expanded significantly in child pornography warrants when the affiant establishes his expertise in child pornography and then explains the characteristics of collectors of child pornography. This type of search warrant affidavit is sometimes referred to as an "expert warrant." When an officer lists his or her training and experience in the area of child pornography, he or she can then draw certain conclusions based upon that experience. This form of testimony typically expands probable cause by concluding that persons who collect, trade in, or seek out child pornography typically keep the pornography in their homes and rarely dispose of it. This enhances our probable cause to get into the defendant's home and defeats most staleness arguments. The affiant can also testify as to the different types of media that can store child pornography and the different types of evidence that may be available for seizure; such as password lists and information containing the identity of the children depicted in the photos.

There are two major pitfalls to be avoided when utilizing this type of warrant. The first pitfall involves the affiant failing to place the suspect within the class of

persons being described. For instance, if the affidavit describes the characteristics of pedophiles, the facts of the affidavit must support the fact that the defendant is indeed a pedophile. The better practice in child pornography cases is to describe the suspect as a person who collects, seeks out, or downloads child pornography. The detective can also rely on the basic facts of the case to establish the fact that the defendant most likely keeps this material for extended periods of time. For instance, if it can be shown that the defendant is engaging in a continuous course of conduct, lack of staleness can be established without the use of any "expert" language. Secondly, the affiant must not make conclusions based upon training and experience unless he or she actually has the requisite background. Many investigators make broad sweeping claims based on their training and experience when they are actually novices in the field. A good remedy for this problem is for the affiant to attribute his conclusions to another expert in the field. For example, "During the course of this investigation, your affiant consulted with Detective Delbert, who has investigated 3 million child pornography cases and received 6 million hours of special training. Detective Delbert has advised your affiant that the defendant's actions are consistent with a collector of child pornography. Such individuals treasure their material...." Since most of the cases discussed below refer to such "expert" language, I will only list a few cases under this section that address some of the pitfalls.

United States v. Weber, 923 F.2d 1338 (9th Cir. 1990):

"If the government presents expert opinion about the behavior of a particular class of persons, for the opinion to have any relevance, the affidavit must lay a foundation which shows that the person subject to the search is a member of the class."

"In this case, the "expert" testimony in the affidavit was foundationless. It consisted of rambling boilerplate recitations designed to meet all law enforcement needs. It is clear that the "expert" portion of the affidavit was not drafted with the facts of this case or this particular defendant in mind. Agent Burke reported that detective Dworin knew the habits of "child molesters," "pedophiles," and "child pornography collectors" and that from his knowledge of these classes of persons he could expect certain things to be at their houses, from diaries to sexual aids to photo developing equipment. But there was not a whit of evidence in the affidavit indicating that Weber was a "child molester." And the affidavit does not say how many magazines or pictures one must buy in order to be defined as a "collector." It goes without saying that the government could not search Weber's house for evidence to prove Weber was a collector merely by alleging he was a collector."

U.S. v. Carlson, 236 F.Supp.2d 686 (S.D.Tx. 2002):

“Evidence about the behavior of a class of people is relevant only if the affidavit shows that the target of the search is a member of the class. Otherwise, the description is mere fluff designed to inflame the passions of the magistrate against the alleged pedophile.”

“Sherman did not present one scintilla of evidence that Carlson produced child pornography, targeted children for molestation, or was improperly involved with children. If he had scrutinized the facts, as another court has commented, he might have noticed that his boilerplate did not refer to Carlson, the search of Carlson's home, or the likelihood that Carlson fit one of the three profiles.”

Note: Affidavit was based on unverified confidential informant's representation that individual emailed him two images of child pornography. Agent submitted 6 page boilerplate affidavit referring to characteristics of pedophiles, child pornographers, and preferential child molesters.

Burnett v. State, 28 Fla. L. Weekly D1179 (Fla. 2d DCA 2003):

Although affiant averred in general terms her experience in investigations involving crimes against children, affiant failed to describe any personal experience with child pornography from which her conclusions concerning defendant were derived.

Affidavit failed to describe a factual link between the video camera and the functioning capability of the computer so that images could be transferred, and omitted any factual averment that the computer was linked to the Internet or that the video camera was compatible with the computer so that images could be downloaded, transferred, or transmitted.

Discussion: The suspect videotaped two boys engaged in lewd conduct. During a consent search of the defendant's home, the detective found the videotape containing the alleged lewd conduct. Based on this finding, the detective sought a warrant to search the defendant's home and computer for more child pornography. The detective alleged that based on her expertise, the defendant would have child pornography on his computer.

Even though this case ruled against the State, it is a helpful resource for us because it explains how the affidavit could have been done correctly. The court discussed two basic problems in the detective's affidavit. The first problem concerned her expertise in child pornography investigations. She detailed her expertise in child sex abuse investigation, but did not detail her training and experience in child pornography and the habits of child pornographers. The court implied that she could have remedied this by either elaborating on her specific expertise in child pornography *or* by listing the

works of other experts in the field. Since she did neither, the affidavit was deemed insufficient.

The second major concern of the court was the detective's conclusory statement that the computer contained child pornography. The court noted that the detective did not state whether the computer was connected to the Internet or whether it had the capability to connect to the video camera. In conclusion, the affidavit could have been sufficient, but wasn't. The actual language from the detective's affidavit is included in the opinion.

Staleness:

Overview:

Child pornography cases are somewhat unique when determining probable cause because individuals who collect, download and seek out child pornography tend to exhibit certain characteristics that make them rather predictable. One such characteristic is the tendency to hold on to their collections indefinitely. Appellate courts have routinely recognized this characteristic in addressing the issue of staleness in search warrants. As long as a detective properly describes his training and experience and relates the facts of the investigation to the individual at hand, staleness will rarely be a valid attack for defendants. Some of the cases that address the issues of staleness follow.

Cases:

United States v. Irving, 432 F.3d 401 (2nd Cir. 2005)

Probable cause supported post-arrest search warrant for defendant's home computer seeking child pornography, contrary to defendant's contention that warrant was stale because arrest, on charges of traveling outside United States to engage in sexual acts with minors, had been based on seizures from defendant's luggage five years earlier, and because defendant's associate had told police that defendant took care to destroy pictures that were sexually suggestive; warrant affidavit included information from defendant's and associate's own writings up until two years before search, and magistrate who issued warrant could determine that as pedophile defendant would likely hoard images of children in his home for extended periods.

U.S. v. Noda, 137 Fed.Appx. 856 (C.A.6 (Ohio),2005):

Information upon which search warrant affidavit was based was not stale, and therefore probable cause existed, in prosecution for aiding and abetting receipt and possession of child pornography by computer, for search of defendant's computer; confidential informants' reports on their visit to defendant's house,

one week before affidavit was sworn, corroborated earlier reports supporting the existence of an ongoing pattern of criminal activity, and affiant stated that in her experience, individuals who produced, obtained, and possessed child pornography were likely to retain the materials for an extended period of time.

U.S. v. Newsome, (7th Cir. 2005)

Warrant to search defendant's house and computer was supported by probable cause that search would uncover evidence of child pornography offenses; defendant's former cohabitant reported to police that she had recently discovered videos on defendant's computer, apparently taped with a hidden camera, showing her daughter naked, and that she had seen pornographic images of very young children on defendant's computer a year earlier, and affidavit in support of warrant stated that computers had ample storage space for numerous images, raising implication that one could hold on to those images for a long time.

“In this case, although the affidavit before the judge did not explain specifically that collectors of child pornography tend to hold onto their stash for long periods of time, it was clear from the context that the police believed that Newsom probably still had the year-old images or something similar on his computer. Also, the police did not base the search warrant on the year-old pornographic images alone; they also relied on Edwards's recent discovery of the tape of her daughter.”

U.S. v. Rakowski, 714 F.Supp. 1324 (D.Vt. 1987)

“We also find that the magistrate could reasonably have concluded that probable cause was not stale in May because of the character of the crime and the evidence to be seized. The affidavit described a continuing offense of receiving child pornography and the enduring utility of the materials to their holder. The affidavit recited that at least four packages had been mailed to Box 155, in November and December 1986 and January and April 1987, and provided a substantial basis for concluding that the defendant set up the box to receive one genre of mail under a fictitious name. The affidavit also stated an experienced agent's conclusion that a collector of such materials would not destroy the collection.”

United States v. Bateman, 805 F.Supp. 1041 (D.N.H. 1992):

Information in affidavit was not too stale to support probable cause to issue search warrant in child pornography case, even though history of videotapes involved went back 15 years and almost seven months elapsed between informant's last contact with defendant and date investigation was opened by local police.

U.S. v. Ricciardelli, 998 F.2d 8 (1st Cir. 1993):

The other side of the coin is equally revealing: exigent circumstances will rarely, if ever, be present in child pornography cases, as history teaches that collectors prefer not to dispose of their dross, typically retaining obscene materials for years.

U.S. v. Horn, 187 F.3d 781 (8th Cir. 1999): (3 months)

Evidence three months old was not stale where subject owned wide range of pornographic videos, duplicating equipment, and traded regularly, indicating a deep and continuing interest in his collection.

U.S. v. Lacy, 119 F.3d 742 (9th Cir. 1997): (10 months)

Given nature of the crime, good reason to believe the computerized visual depictions downloaded would be found in defendant's apartment ten months later.

"The affidavit in this case provided ample reason to believe the items sought were still in Lacy's apartment. Based on her training and experience as a Customs agent, the affiant explained that collectors and distributors of child pornography value their sexually explicit materials highly, "rarely if ever" dispose of such material, and store it "for long periods" in a secure place, typically in their homes."

U.S. v. Hay, 231 F.3d 630 (9th Cir. 2000): (6 months)

Six month time period, between transmission of child pornography images from known trader of such images to Internet address accessible by defendant in his apartment and government's application for warrant to search computer system in apartment, did not render information about such transmission too stale to support warrant, in view of evidence that possessors of pornography stored such materials for long periods of time, and that files could be retrieved by computer expert even if deleted; government was not required to show pattern of activity to raise inference of long-term storage.

U.S. v. Sassani, 139 F.3d 630 (9th Cir. 2000): (*unpublished*)

Search affidavit contained FBI special agent Ken Lanning's profile of a child pornography collector: "The profile includes the following elements: 1. Child pornography collectors exhibit many of the same traits as pedophiles or preferential child molesters; 2. Such individuals keep the pornographic materials for long periods of time in secure locations such as the privacy of

their homes; and 3. They meet and correspond with others who share the same interest in child pornography.”

“The defendant does not present the court with support for his assertion that the profile was required to meet the standards of Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), nor can this court find any such requirement. It is clear that the use of profiles, in conjunction with other evidence, to establish probable cause is allowable.

U.S. v. Winningham, 953 F.Supp. 1068 (D. Minn. 1996): (6 weeks)

Totality of circumstances supported inference that defendant was pedophile who would continue to accumulate child pornography through date of search warrant and, thus, established probable cause underlying warrant for search of defendant's residence for illegal child pornography, despite alleged staleness of supporting information; defendant had been convicted ten years previously of sexual improprieties with minor children, and social worker found in defendant's possession, within six weeks of issuance of warrant, collection of sexually suggestive photographs of young girls and letters to young girls concerning "infantilism.

U.S. v. Albert, 195 F. Supp. 2d 267 (D. Mass 2002):

Affidavit for search warrant established probable cause that child pornography would be found in defendant's residence even though informant had severed ties with defendant several months previously; information was not stale in that defendant had a continuing interest in such materials, and collectors were known to rarely destroy correspondence with other collectors, and evidence of defendant's storage of images on his computer and disks, along with informant's statement that defendant communicated regarding his sexual interest in young boys over the internet, provided sufficient evidence for a "common sense belief" that defendant possessed images that had been shipped in interstate commerce.

U.S. v. Zimmerman, 277 F.3d 426 (3rd Cir. 2002):

Information in police officer's affidavit supporting magistrate's finding of probable cause to issue warrant for search of home of defendant, a high school basketball coach, for adult pornography, was stale, and thus, no probable cause existed, where the affidavit stated that mother of a student stated that six months earlier her son and two other students were shown an Internet video clip, on defendant's home computer, of a woman performing a sexual act with a horse, the affidavit further stated that a former student said he was shown the same video clip at defendant's home ten months earlier at the very earliest, and the affidavit did not suggest that defendant ever downloaded the video

clip or that he continuously acquired or planned to acquire any other pornography.

U.S. v. Chrobak, 289 F.3d 1043 (8th Cir. 2002):

There is no bright line test for staleness. See *Koelling*, 992 F.2d at 822. Agent Hill provided credible testimony from her professional experience that child pornographers generally retain their pornography for extended periods. On this basis, a magistrate judge could find a fair probability that Chrobak had child pornography at his home three months after the intercepted transfer.

United States v. Lamb, 945 F.Supp. 441 (N.D.N.Y.1996):

The observation that images of child pornography are likely to be hoarded by persons interested in those materials in the privacy of their homes is supported by common sense and the cases. Since the materials are illegal to distribute and possess, initial collection is difficult. Having succeeded in obtaining images, collectors are unlikely to quickly destroy them. Because of their illegality and the imprimatur of severe social stigma such images carry, collectors will want to secret them in secure places, like a private residence. This proposition is not novel in either state or federal court: pedophiles, preferential child molesters, and child pornography collectors maintain their materials for significant periods of time.

State v. Felix, (4th DCA 2006):

Information contained in affidavit supporting search warrant for child pornography in defendant's home that was five and one half months old was not stale; affidavit discussed in detail expertise and background of affiant, as well as affiant's opinion regarding propensity of collectors of child pornography to retain images for extended periods, indicating that persons such as defendant "rarely, if ever, dispose of their sexually explicit materials," and "rarely destroy correspondence received from other people with similar interests unless they are specifically requested to do so."

Brachlow v. State, (4th DCA 2005):

Police had probable cause to search for videotape of child pornography when witness told them that defendant took pornographic videos of him 5 years earlier and kept them in a safe in his house. "From the testimony of Special Agent Thomas, an expert in sexual abuse investigations, it was highly likely that a sexual offender, such as appellant, would keep child pornography hidden but readily accessible and that such material was not destroyed. While some courts may conclude that the time period in this case was too remote and thus the warrant stale, it was clearly permissible for the court in this case to

consider this evidence in reaching the conclusion that the warrant was not stale.”

Haworth v. State, 637 So.2d 267 (Fla. 2d DCA 1994)

Evidence in search warrant for defendant's residence was stale; affidavit was based in part pornographic videotape depicting defendant and possibly underage female, but date on videotape label was more than 16 months prior to date on which affidavit was being submitted, there was no information as to when events depicted on tape actually occurred and no nonspeculative evidence of ongoing pattern of criminal activity.

The Scope of Probable Cause

Overview:

The key to any good child pornography investigation is obtaining a valid search of the defendant's home and computer. Investigations into this crime usually consist in the discovery of a limited number of images that trace back to the suspect. Once the suspect has been identified, we must determine how far our probable cause extends when seeking a search warrant. The following cases discuss these issues and give us an idea how far we can extend our probable cause when seeking a warrant.

Membership to Child Pornography Web Sites:

Overview:

Law enforcement has been making increasing efforts to seize child pornography web sites via search warrant and then focus subsequent investigations on the members of those sites. Similar investigation are being conducted into Yahoo Groups, which is a type of free bulletin board service offered by Yahoo where users can share images with each other through specifically defined groups. The issue that arises in these investigations is whether we have sufficient probable cause to obtain a search warrant for the suspect's home and computer by virtue of the fact that he was a member of a web site or other Internet-related medium that distributed child pornography. Although there are some discrepancies among different jurisdictions, a critical fact to be determined is whether the site is exclusively for child pornography or whether child pornography is one of several types of pornography offered. In the latter case, a search warrant will rarely withstand scrutiny unless significant investigative efforts are made to prove the suspect actually downloaded child pornography from the site. Even in cases where the site's sole purpose is to distribute child pornography, the appellate courts have expressed concern when law enforcement does not take efforts to show that

images were actually downloaded. Since the records of the site have already been seized, logs or other business records are likely available to show that the suspect actually downloaded relevant images. The case law is not consistent in this area, so the reviewing prosecutor should err on the side of caution.

Cases:

Yahoo Groups: Candyman cases: The first series of cases discuss a large federal investigation into a Yahoo Group called “Candyman.” An FBI agent joined the group and shortly thereafter began receiving child pornography via email. He obtained a list of all the members in the group from Yahoo and then drafted a boilerplate search warrant detailing his investigation so that federal agencies around the country could execute search warrants on the members’ home computers. Extensive litigation ensued on these cases because the agent stated in the affidavit that all members automatically received child pornography emails when they joined the group. In actuality, however, users only received the email when they affirmatively checked a box requesting it.

U.S. v. Shields, (3rd Cir. 2006):

Remaining, untainted portions of affidavit in support of warrant to search home and computer of subscriber to two e-groups devoted principally to sharing and collecting child pornography were sufficient to supply probable cause after excise of false information that every member of one of those e-groups received every e-mail that contained child pornography images; defendant voluntarily registered for both e-groups and employed self-selected e-mail moniker, “LittleLolitaLove.”

Government's ability to have discovered more corroborating information with further investigation was of no import in conducting *Franks v. Delaware* analysis to determine if remainder of warrant application provided probable cause absent false information.

U.S. v. Martin, 426 F.3d 83 (2d Cir. 2005) (Candyman)

Fact that majority of electronic mail exchanged on Internet site devoted to child pornography contained only text did not negate probable cause to search residence of member of e-group associated with site; members received detailed welcome message making clear that group's essential purpose was to trade child pornography, significant quantity of e-mail exchanged by members contained image-files of child pornography, and picture- and video-files containing such materials were readily available for download to members.

Evidence of resident's membership in e-group associated with Internet site devoted to generating, inventorying and exchanging child pornography supplied probable cause for issuance of search warrant for residence; individuals who sought membership were presented with detailed welcome message making clear group's essential purpose, and thus resident's affirmative joining of group provided fair probability that his networked computer was likely to contain child pornography or evidence, fruits or instrumentalities of its exchange.

Textual e-mail exchanged by members of e-group associated with Internet site containing downloadable child pornography was not protected speech; messages facilitated, inter alia, members' meeting and talking with sexually exploited children, and vast majority of all-text messages sent to members were generated automatically to alert members to new uploaded files.

U.S. v. Froman, 355 F.3d 832 (5th Cir. 2004): (Yahoo Group)

“The magistrate was entitled to infer from the affidavit that the singular purpose of Candyman was to trade pornography among its members. As such the magistrate was entitled to conclude that the overriding reason someone would join this group was to permit him to receive and trade child pornography. We agree with the district court that it is common sense that a person, who voluntarily joins a group such as Candyman, remains a member of the group for approximately a month without cancelling his subscription, and uses screen names that reflect his interest in child pornography, would download such pornography from the website and have it in his possession.”

U.S. v. Ramsburg, 114 Fed.Appx. 78 (4th Cir. 2004) *unpublished* (Yahoo Group)

“Contrary to appellee's suggestion, however, we need not reach the question of whether mere membership in a predominantly illicit organization can support probable cause, for the corrected affidavit submitted by Kornek contained more than an allegation of affiliation. The agent also informed the magistrate that another e-mail address registered to Ramsburg had transmitted an image of child pornography to an agent several years earlier. This information not only strengthened the case for probable cause in its own right, it also bolstered the inference that Ramsburg had participated in Candyman and Shangri_la to download child pornography and not for more innocuous purposes. Indeed, such a cross-weighting of the elements

underpinning a probable cause determination is precisely what the "totality-of- the-circumstances" test invites."

U.S. v. Hutto, 84 Fed.Appx. 6, 2003 WL 22890954 (10th Cir.(Okla. 2003)) *Unpublished* (Yahoo Group)

"These facts show that the group's clear purpose was to share child pornography, that the defendant voluntarily became a member of the group, and that images containing child pornography were available to all members. It is the view of this Court that this evidence provided a sufficient basis for the magistrate judge to conclude that there was a fair probability that child pornography would be found at the defendant's residence or on his computer."

U.S. v. Kunen, 323 F. Supp 2d 390 (E.D.N.Y. 2004) (Yahoo Group)

"Affidavit no longer provided probable cause for issuance of search warrant of computers, operated by members of Internet e-mail group suspected of exchanging child pornography, when redacted to remove false claim that each member automatically received e-mails addressed to other members; without redacted statement evidence was based on invalid presumption that group membership equated with illegal child pornography collection."

U.S. v. Bailey, 272 F.Supp. 2d 822 (D.Neb. 2003): (Yahoo Group)

"In the context of warrants to search for evidence of internet distribution of child pornography, a warrant to search a computer is justified where the officers have established the nexus between an e-mail address and an internet site containing images which graphically depict children engaging in sexually explicit conduct; there is evidence--even, as in this case, inferential evidence--that image transmission was requested or images were actually transmitted to or from that e-mail address; and the warrant application avers the fact that those interested in child pornography generally save the images they have found."

"Even absent the allegedly false statement that all Candyman E-group members received all postings by e-mail, Agent McMillion's warrant application represented that the Candyman E-group site contained graphic images of child pornography; the defendant, as identified by his American Family e-mail address, had been a subscriber of this E-group; defendant's work computer contained what American Family described as pornographic images; and those interested in child pornography tend to retain the pornographic images they collect."

Although American Family did not state that the images located on defendant's work computer were of child pornography, the totality of the facts remaining in the excised warrant application support issuing the warrant to search that computer. After removing the questioned passages of the warrant application, the remaining facts demonstrated a fair probability that pornographic images of children would be found on defendant's work computer."

Note: This case discusses how Yahoo did not fully comply with subpoenas issued by the government, thereby causing relevant evidence to be lost.

U.S. v Coreas, 259 F.Supp 2d. 218 (E.D.N.Y. 2003): (Yahoo Group)

"Here, the facts presented, even without the false statement, support such a finding. First, the affidavit contains extensive background information regarding subscribers to groups such as the Candyman group and the proclivity of members to use such groups to collect, trade and retain images of child pornography. The affidavit further describes the Candyman group in detail. With the exception of the false statement regarding automatic e-mail receipt, all statements regarding the group and the agent's receipt of numerous images of child pornography are truthful. It is also without question that the Defendant joined the group. These facts are sufficient to establish probable cause to believe that a search of Defendant's computer would reveal evidence of criminal activity."

U.S. v. Strauser, 247 F.Supp. 2d 1135 (E.D. Mo. 2003): (Yahoo Group)

If the false information contained in the affidavit is set aside, the only information regarding Strauser is that an email account registered to him subscribed to Candyman on December 26, 2000, and was still a member on February 6, 2001, when the site was shut down, and that the same email account had one active and one previously deleted screen name that could be viewed as sexually suggestive, specifically "EZ2bhrdnla" and "EZ2bhrdnSTL." Although the application contained generic information about how collectors and distributors of child pornography use **computers**, there was nothing other than the **Candyman** subscription to indicate that Strauser was a "collector or distributor of child pornography." No probable cause for warrant.

U.S. v. Perez, 247 F.Supp.2d 459 (S.D.N.Y. 2003): (Yahoo Group)

Search warrant affidavit, listing suspect as member of e-mail group which had been set up for, inter alia, exchange of child pornography,

was not sufficient to establish probable cause for search of suspect's residence; there was no representation that suspect received any e-mails or that he received or downloaded or viewed any images or files or that he sent or uploaded any images or files.

Commercial Website Cases

U.S. v. Wagers, 452 F.3d 534 (6th Cir. 2006):

Search warrant affidavit in prosecution for receipt of child pornography via computer was not rendered invalid, on theory of lack of sufficient nexus between defendant and receipt, by fact that websites to which defendant subscribed and which warrant affidavit relied upon to establish probable cause allegedly contained both legal and illegal content, i.e. both adult and child pornography; defendant had prior child pornography conviction, and affidavit referred only to child pornography content, not to other content.

Probable cause supported search warrant directed to administrator of child pornography defendant's e-mail account; besides warrant affidavit's averment that defendant used named e-mail account to order child pornography, defendant also used Internet Protocol (IP) address furnished by administrator to sign up for at least one subscription to website known to feature child pornography.

Sufficient connection existed between defendant's home address and evidence of defendant's subscriptions to websites featuring child pornography, to support probable cause for search warrant for defendant's home; investigation into websites' subscription records revealed a subscriber's e-mail address that was connected to two addresses, namely defendant's office and home, two credit card numbers and phone number associated with home address were obtained from websites' billing service provider, and internet service provider that defendant used as his home provider had assigned Internet Protocol (IP) address to defendant that was used to purchase website subscriptions.

There was sufficient temporal connection between FBI agents' subscriptions to websites containing child pornography, and defendant's lapsed subscriptions to same websites, to support inference that child pornographic content had been present on sites at time that defendant subscribed, supporting finding of probable cause for search warrants for defendant's home and office; agents' subscriptions began very shortly after defendants' had lapsed,

ranging from only days to five months, and may even have overlapped defendants' subscriptions in some cases.

U.S. v. Laufer, 245 F. Supp. 2d 503 (W.D.N.Y 2003):

FBI agent's affidavit provided probable cause to believe that evidence of child pornography would be located at defendant's residence, even if much evidence was hearsay; agent reasonably relied on information from other FBI agents investigating internet child pornography website, who determined that defendant charged to his credit card a subscription to plan offered by website, and defendant's actions of making three consecutive monthly payments for the subscription supported conclusion that he accessed the website and downloaded images.

U.S. v. Gourde, 382 F.3d 1003 (9th Cir. 2004): (Web site)

Affidavit failed to establish a fair probability that child pornography would be found on defendant's computer and thus did not support search warrant; affidavit revealed only that defendant had subscribed, and thereby received access, to a mixed-pornography website containing both child pornography and legal adult pornography, and there was no evidence that defendant actually downloaded any child pornography, although government had capability of determining whether he had.

“Notably, the government concedes that it had the means to actually track Gourde's usage of the site to determine whether he downloaded images. It is not clear from the record, however, whether the government (1) chose not to avail itself of the information or (2) found no evidence of downloading. This uncertainty provides an important rebuttal to the argument that not finding probable cause here will inhibit the government's ability to prosecute child pornographers in the future. Simply put, there is no reason to think that the government's access to corroborating information in this case is atypical; once the government has gone through the motions necessary to procure a membership list (i.e., seized a website's computer and gained access to the website server), it likely also can access the necessary tracking information to demonstrate whether or not the subject of the investigation has actually downloaded child pornography. Requiring the government to buttress its affidavit with personalized information linking a website member to actual child pornography strikes a reasonable balance between safeguarding the important Fourth Amendment principles embodied in the probable cause requirement

and ensuring that the government can effectively prosecute possessors and distributors of child pornography.”

U.S. v. Wagers, 339 F.Supp. 2d 934 (E.D.Ky. 2004):

Search warrant affidavits established probable cause supporting searches of defendant's residence and business, given facts demonstrating that defendant had Internet access, that his connections to Internet were inextricably intertwined with his home and business addresses, and that defendant, who had previously been convicted on child pornography charges, subscribed to suspect websites providing child pornography, and given probability that, having visited several websites known to make child pornography available, defendant would have images, files, and/or electronic data evincing his downloading, possession, receipt, accessing, or distribution of child pornography.

Establishing a Nexus to Offender's Home: Under What Circumstances Can We Infer That Evidence Will be Found in Suspect's Home?

Overview:

Case law is quite favorable when it comes to assuming the child pornography will be found in the defendant's home. When the investigator includes language in the affidavit regarding the fact that collectors of child pornography usually keep such material in their homes, the nexus is not difficult to make. It would be wise, however, to take extra investigative measures to solidify that nexus. Two basic issues that should be addressed are whether there is even a computer in the home to be searched and whether there is an Internet connection. Subpoenas to Internet Service Providers and telephone companies can aid in this pursuit. If the suspect's local telephone records show that he dialed an ISP access number at the time of the offense, it helps to establish that the offense was committed from a computer within the home. Investigators can also do phone surveys asking the person in the house if they have dial-up or broadband service and if they are happy with their connection speeds. Although some of the federal cases cited do not require such measures to be taken, it is still a good idea to do them.

U.S. v. Terry, 522 F.3d 645 (6th Cir. 2008):

Sufficient nexus existed between child pornography image sent by e-mail and defendant's home computer, as required for probable cause to issue search warrant, where e-mail account belonging to “skippie4u” screen name sent two e-mail messages at approximately 2:30 a.m.

containing image, defendant was registered user of such screen name, defendant lived at certain address at time e-mail messages were sent, defendant had computer at that address through which he accessed “skippie4u” e-mail account used to send messages, and defendant's explanation that he could have been replying to unsolicited pornography to request that no further images be sent to him was unsupported.

U.S. v. Meeks (6th Cir. 2008):

U.S. v. Perez, F.3d (5th Cir. 2007):

Affidavit of FBI agent provided probable cause to believe that physical evidence of child pornography would be found at defendant's address, as required to issue search warrant; affidavit stated that a witness had received an internet message that showed images of child pornography, that such images had been transmitted over Internet Protocol (IP) address assigned to defendant at his residence, that images appeared to be videos played on television screen transmitted by web cam, providing basis to believe suspect would have such videos at his residence, and that in FBI agent's experience, persons interested in child pornography typically retained numerous images and material documenting their acquisition.

Discovery by officers executing search warrant of defendant's residence for child pornography that two other housemates lived at the residence with defendant did not eliminate probable cause to search defendant's room and common areas of residence, despite possibility that housemates had access to Internet Protocol (IP) address used to transmit images of child pornography over internet; IP address was registered in defendant's name, and housemates maintained separate residences, so that there was still a fair probability that defendant was responsible for illegal transmissions.

Discussion: The court rejected defendant's claim that his unsecured wireless access point could have allowed others to use his IP address, and thus, defeat probable cause.

U.S. v. Bach, 400 F.3d 622 (8th Cir. 2005) (**Morphed**)

Information contained in application for warrant to search defendant's residence for a computer, data contained on computer, and storage devices was sufficient to create probable cause that evidence of criminal activity would be found; sergeant's affidavit stated that she was informed that specific internet user name had corresponded over internet and had met in

person with a minor, that user name was registered to defendant at his address and phone number, that defendant had at least one other internet account, and that defendant had previously been convicted of criminal sexual contact with a minor.

It should be noted that the court rejected Bach's argument that, "there was no probable cause to search for a computer in his residence because he could have accessed the internet from other locations. He contends that a valid warrant for searching his home computer could not have been obtained without cross references between his telephone records and IPs provided by his service provider. There was no showing he says of any link between the alleged criminal activity and a computer located at his residence." The court ruled that this was unnecessary under the circumstances.

U.S. v. Peterson, 294 F.Supp.2d 797 (D.S.C. 2003):

Evidence that defendant, after speaking with computer repairman in store, left the store to go home and get his computer to be repaired, together with inference that computer was likely kept in a private residence inasmuch as it was a desktop computer not capable of easy mobility, and contained images of a private nature, provided a sufficient nexus, for purposes of issuance of a search warrant, between defendant's residence and the evidence of child pornography observed on his computer.

United States v. Chrobak, 289 F.3d 1043 (8th Cir. 2002): (images posted to newsgroup)

"Agent Hill established a sufficient nexus between Chrobak and the internet moniker by providing evidence that the name was registered to him. She also established a sufficient nexus between the transfer and Chrobak's house by providing evidence that he lived there and that, in her experience, pedophiles maintain their child pornography in a secure place."

In the affidavit, the agent stated child pornographers "almost always maintain and possess their materials in a place considered secure due to its inherent illegality."

United States v. Zimmerman, 277 F.3d 426 (3rd Cir. 2002):

Police officer's search warrant affidavit did not establish probable cause to search defendant's home for child pornography, where virtually the entirety of the lengthy affidavit recounted various incidents in which

defendant, a high school basketball coach, allegedly sexually accosted students at the high school or on athletic road trips, with only brief mention made of pornography, and contained no information that defendant had ever purchased or possessed child pornography.

An expert opinion must be tailored to the specific facts of the case at hand to have any value. Rambling boilerplate recitations in a search warrant affidavit designed to meet all law enforcement needs do not produce probable cause.

Note: In ruling that there was no good faith exception to this warrant, the court blasted the government for the drafting of the warrant.

U.S. v. Angle, 234 F.3d 326 (7th Cir. 2000):

Search warrant for suspect's residence was supported by probable cause to believe that child pornography contraband would be found there; affidavit in support of warrant averred, inter alia, that defendant had ordered and paid for five child pornography videotapes and corresponded regularly by e-mail with child pornography distributor.

U.S. v. Simpson, 152 F.3d 1241 (10th Cir. 1998):

Probable cause existed that evidence of child pornography would be found, warranting issuance of a search warrant allowing for seizure of defendant's computer and its files; an agent of the Federal Bureau of Investigation (FBI) had contacted a person giving the defendant's name in an Internet chat room, and struck an agreement under which the contact would send the agent still pornographic images of underage persons in return for a video of underage sexual activities, the contact gave the defendant's address, and the term "child pornography" was sufficiently clear not to require further definition.

There was sufficient evidence to support a trial court's determination of probable cause to search a computer and its files for child pornography, based on an Internet chat room conversation between an agent of the Federal Bureau of Investigation (FBI) and a contact alleged to be the defendant, in which the contact allegedly agreed to send pornographic images of children to the agent in return for a video of child sexual activity, even though the contact reneged on the promise.

There was sufficient evidence to support a trial court's determination of probable cause to search a computer and its files for child pornography, based on an Internet chat room conversation between an agent of the Federal Bureau of Investigation (FBI) and a contact alleged to be the

defendant, in which the contact allegedly agreed to send pornographic images of children to the agent in return for a video of child sexual activity, even though the contact reneged on the promise.

U.S. v. Gallo, 55 M.J. 418 (2001): (*Work Computer*)

“Even excluding from search warrant affidavit accused's admission that he owned a home computer as improperly obtained, affidavit provided probable cause to believe a search of accused's residence would uncover child pornography, where affidavit set forth opinion of law enforcement expert as to how pornographic material is obtained and stored, information that child pornography had been found on accused's work computer, and that child pornography had been downloaded and uploaded from accused's work computer.”

“A judicial officer may give considerable weight to ‘the conclusion of experienced law enforcement officers regarding where evidence of a crime is likely to be found,’ *United States v. Fannin*, 817 F.2d 1379, 1382 (9th Cir.1987), and is ‘entitled to draw reasonable inferences about where evidence is likely to be kept, based on the nature of the evidence and the type of the offense.’ *United States v. Angulo-Lopez*, 791 F.2d 1394, 1399 (9th Cir.1986). *United States v. Lawson*, 999 F.2d 985, 987 (6th Cir.1993); see also *United States v. Hodge*, 246 F.3d 301 (3d Cir.2001); *United States v. Emmons*, 24 F.3d 1210 (10th Cir.1994).”

U.S. v. Grant, 218 F.3d 72 (1st Cir. 2000): (*Registered Screen Name*)

Probable cause to search defendant's residence was established by evidence, included in underlying affidavit, that persons using Internet screen names linked to defendant had logged on to Internet channels dedicated to the distribution of child pornography, that access to one of those channels required possession of at least 10,000 images of child pornography and access to a File Transfer Protocol (FTP) server, that defendant maintained an account configured as an FTP server, and that search of home of one member of that Internet channel had led to discovery of about 42,000 images of child pornography.

“Grant first faults the Booke Affidavit for failing to prove that it was in fact he, and not an imposter, who was using his IBM account to traffic in child pornography. There is, as Grant urges, always reason to question whether a screen name is actually being used by the individual to whom it is registered. But, as Grant has acknowledged, use of a password-protected account does require, at the least, that the user know the password associated with a given screen name. Though the evidence demonstrates that an individual other than an account's registrant might access that

account illicitly, there is no evidence suggesting that on any given occasion, the user is not likely in fact to be the registrant. Thus, even discounting for the possibility that an individual other than Grant may have been using his account, there was a fair probability that Grant was the user and that evidence of the user's illegal activities would be found in Grant's home. We therefore reject Grant's argument that evidence of a screen name's activity is, in all cases, per se insufficient to establish probable cause with respect to the registrant."

"Indeed, it appears that in internet child pornography cases such as this one, warrants to search an individual's residence often issue based solely on the activities of the defendant's registered screen name. See, e.g., United States v. Tank, 200 F.3d 627, 629-30 (9th Cir.2000); United States v. Fabiano, 169 F.3d 1299, 1302 (10th Cir.1999); United States v. Hibbler, 159 F.3d 233, 234 (6th Cir.1998)."

U.S. v. Rakowski, 714 F.Supp. 1324 (D.Vt. 1987)

Magistrate had sufficient underlying facts before him to determine that crime had been committed and that items sought would be found in defendant's residence so as to justify issuance of search warrant for defendant's residence, where customs official knew that package intercepted at defendant's post office box was from known foreign distributor of child pornography, monitoring of post office box disclosed two additional packages from known importers or distributors of child pornography, and affidavit recited that defendant appeared to be only one to pick up mail from post office box.

U.S. v. Lacy, 119 F.3d 742 (9th Cir. 1997):

"Evidence the defendant has ordered child pornography is insufficient to establish probable cause to believe the defendant possesses such pornography. However, the affidavit stated Lacy downloaded at least two GIFs depicting minors engaged in sexual activity from BAMSE, providing sufficient evidence Lacy actually received computerized visual depictions of child pornography."

"Both warrants described the computer equipment itself in generic terms and subjected it to blanket seizure. However, this type of generic classification is acceptable "when a more precise description is not possible,"

"The government knew Lacy had downloaded computerized visual depictions of child pornography, but did not know whether the images were stored on the hard drive or on one or more of his many computer

disks. In the affidavit supporting the search warrant application, a Customs agent explained there was no way to specify what hardware and software had to be seized to retrieve the images accurately.”

State v. Felix (4th DCA 2006):

Information provided in search warrant affidavit provided sufficient nexus between defendant's possession of child pornography on computer and residence of owner of computer to be searched; although affidavit listed computer owner's former residence, it was reasonable to believe that even after five and one-half months, defendant would still be in possession of images that he had uploaded from his computer onto police website, and that his computer would be in his new residence.

A valid search warrant does not require that there exist direct proof that the objects of the search are located in the place to be searched.

State v. Brennan 674 N.W.2d 200 (Minn.App.,2004)

Search warrant issued for defendant's home was supported by probable cause; affidavit supporting warrant included officer's statements that, based on his training and experience, defendant's act of using his computer laptop at work to view child pornography established a fair probability that defendant would view child pornography in his home, and crime of possession of child pornography was a crime commonly committed in secret and thus made it likely that someone who possessed and viewed child pornography would keep the illicit material in a safe and secretive place.

How Much are We Authorized to Seize?

Overview:

Once we have established probable cause to believe that evidence is in the defendant's home, we must then decide how much evidence we will be able to look for once we enter the house. This is usually addressed in the “particularity” section of the affidavit and warrant. Courts typically allow the investigator to look not only for the image transmitted or downloaded in the investigation, but also any other child pornography images. If the affidavit supports it, he can usually search for books, magazines and publications regarding child pornography as well. The investigator is also allowed to take not only the suspect's computer, but also the associated peripherals and storage devices. These issues should be addressed in the affidavit so as to support their inclusion in the warrant. It is important to relate all of the material sought to the law being violated. For example,

instead of asking to seize “pictures, magazines and videotapes,” ask to seize “pictures, magazines and videotapes depicting children engaged in sexual conduct contrary to State Statute 111.222.” If you relate the object of your search to a particular violation of the law, you will greatly enhance your ability to survive a particularity challenge.

U.S. v. Hill, 322 F.Supp.2d 1081 (C.D. Ca 2004):

Agents were authorized to seize computers and all storage media. Agents were not required to separate legitimate storage media from illegitimate storage media at scene because of complexity of task. Furthermore, forensic search was not required to be limited to files likely containing evidence related to child pornography because such files can be disguised or labeled in misleading ways.

United States v. Hay, 231 F.3d 630, 637 (9th Cir.2000):

Court upheld, in a child pornography case, a warrant authorizing seizure of a defendant's entire computer system because the circumstances "justified taking the entire [computer] system off site because of the time, expertise, and controlled environment required for a proper analysis."

U.S. v. Sassani, 139 F.3d 630 (9th Cir. 2000): (*unpublished*)

“The warrant listed among the items to be seized any computers, tapes, cassettes, cartridges, streaming tape, commercial software and hardware, computer disks, disk drives, monitors, printers, modems, tape drives, disk application programs, data disks and graphic interchange format equipment which could be used to depict, distribute, possess or receive child pornography. This listing directed the FBI agents to search those items in the home with direct connection to the alleged crime of the defendant: distribution and receipt of child pornography through the Internet by use of a computer. Courts have been clear that, in the case of child pornography, a warrant allowing seizure of a computer and all its associated printing, storage, and viewing devices is constitutional. The computer, applications, and various storage devices not only may contain evidence of distribution of child pornography, but are also the instrumentalities of the crime.”

U.S. v. Campos, 221 F.3d 1143 (10th Cir. 2000):

Warrant authorizing search of defendant's residence for evidence of child pornography was not required to be limited to search of defendant's computer for two images he sent to complainant, which authorities had

already seen; warrant was not overly broad, as it did not authorize unfocused inspection of all of defendant's property, but was directed at items relating to child pornography, affidavit presented by FBI agent in support of warrant provided explanation of ways in which computers facilitated production, communication, distribution, and storage of child pornography, and FBI agent also explained why it was not usually feasible to search for particular computer files in person's home.

Warrant authorized the agents to seize computer equipment "which may be, or [is] used to visually depict child pornography, child erotica, information pertaining to the sexual activity with children or the distribution, possession, or receipt of child pornography, child erotica or information pertaining to an interest in child pornography or child erotica." It also authorized the seizure of books, magazines, films, and videos containing images of minors engaged in sexually explicit conduct.

United States v. Upham, 168 F.3d 532, 535 (1st Cir.1999):

A warrant authorizing search and seizure of defendant's computer and all disks "was about the narrowest definable search and seizure reasonably likely to obtain the images" and that "a search of a computer and co-located disks is not inherently more intrusive than the physical search of an entire house for a weapon or drugs."

Search warrant authorizing seizure of any and all computer software and hardware, computer disks, and disk drives authorized the recovery of previously deleted information through use of undelete key and using specialized utility program; recovery of deleted images was no different than decoding a coded message lawfully seized or pasting together scraps of a torn-up ransom note

United States v. Lamb, 945 F.Supp. 441 (N.D.N.Y.1996):

Removal and off-site inspection is a reasonable approach for determining whether something is contraband when the determination cannot be made on the spot.

U.S. v. Habershaw, 2001 WL 1867803 (D.Mass 2001):

The First Circuit has explicitly held, in a case involving a search for child pornography images on a computer, that a warrant authorizing the seizure and search of the computer and all available disks "was about the narrowest definable search and seizure reasonably likely to obtain the images."

Nor does Papargiris's search method violate the warrant clause. The Upham court explicitly upheld a scanning of a entire computer hard drive for images, including deleted images, where the seizure of unlawful images was within the plain language of the warrant.

United States v. Torch, 609 F.2d 1088, 1090 (4th Cir.1979):

Affidavit was sufficient for requesting "records, documents and writings related to the transportation, sale and distribution in interstate commerce of lewd, lascivious and filthy films."

United States v. Layne, 43 F.3d 127 (5th Cir. 1995):

Court upheld two warrants describing materials to be sought and seized as follows: "assorted pornographic videotapes; assorted pornographic magazines; assorted devices;" and, in the second warrant, "Child pornography; records of victims; drawings; pictures; computer disks, sexual devices; videotapes; child abuse books; magazines; audiotapes; and any other obscene or child pornographic material;" finding the warrants sufficiently limited officers' discretion in searching.

United States v. Kimbrough, 69 F.3d 723, 727 (5th Cir.1995):

Warrants' authorization for seizure of " 'bills, correspondence, receipts, ledgers, Postal receipts and telephone records all of which show orders and deliveries to or from any known foreign or domestic distributor of child pornography' was sufficiently particular.

Upheld seizure of "hardware, computer disks, disk drives, monitors, computer printers, modems, tape drives, disk application programs, data disks, system disk operating systems, magnetic media-floppy disks, CD ROMs, tape systems and hard drive, other computer related operational equipment ... used to visually depict a minor engaging in sexually explicit conduct."

U.S. v. Horn, 187 F.3d 781 (8th Cir. 1999):

There was probable cause to search defendant's apartment for video or videos relating to contact with woman in Texas, even if defendant's correspondence with her never mentioned existence of any video tapes, where, although defendant suggested to undercover detective that his contact in Texas had proved to be disappointing, there was nonetheless a reasonable likelihood that correspondence did involve video or videos of child pornography, and fair probability either that Texas woman had sent video cassette after defendant's last reference to her or that defendant

possessed child pornography that he intended to trade for her material if it ever arrived.

U.S. v. Hay, 231 F.3d 630 (9th Cir. 2000):

Search warrant authorizing seizure of suspect's computer system, including, inter alia, hardware, software, and electronically or magnetically stored records, as well as depictions of child pornography, was not overbroad but was limited by its preface to materials constituting evidence of offenses relating to sexual exploitation of minors.

U.S. v. Albert, 195 F.Supp. 2d 267 (D.Ma. 2002):

Search warrant's authorization of search and seizure of computer and all of its related disks, software and storage devices was sufficiently particular and narrow; search and seizure of the computer and its related storage equipment was only practical way to obtain child pornography images and documents referenced in affidavit, and description of items to be searched was limited to items relating to child pornography.

Search warrant's authorization of search and seizure of communications with or about minors was sufficiently particular and narrow; items related to defendant's state of mind in possessing images of child pornography and transporting them in interstate commerce.

Miscellaneous Issues:

U.S. v. Hodson, 543 F.3d 286 (6th Cir. 2008):

A reasonably well trained officer in the field, upon looking at the warrant authorizing a search of the defendant's residence and computers for child pornography images, would have realized that the search for evidence of the crime of child pornography described in the warrant did not match the probable cause described, which was that evidence would be found of a different crime, that of child molestation, and that therefore the search was illegal, despite the magistrate's issuance of the warrant, and thus, the good-faith exception to the Fourth Amendment requirement of a valid search warrant did not apply to validate the search.

Discussion: The defendant engaged in online communications with an undercover officer in which he detailed his sexual exploits with young males. No mention of child pornography was mentioned in the affidavit. The search warrant presented to the judge authorized a search of the defendant's home for child pornography. The court noted that the government did not even try to establish a

nexus between child molesters and the likely possession of child pornography in the affidavit. Based upon the fact that the warrant was issued for a different crime than that described in the affidavit, the government could not even rely on the good faith exception.

State v. Cook, 32 Fla. L. Weekly D2948 (Fla. 5th DCA 2007):

Warrant affidavit set forth facts establishing probable cause to support issuance of warrant to search defendant's residence and his computer; affidavit revealed that citizen informant, defendant's neighbor, told police that he had access to defendant's computer files through a shared hard wire connection, and that, when he opened a file of defendant's labeled "XXX," he saw 122 images of "young preteen girls in nude, sexually explicit positions."

Even if warrant affidavit did not set forth sufficient facts to establish probable cause to support issuance of warrant to search defendant's residence, good faith exception to warrant requirement applied in that police officers did not omit information or make misrepresentations in the affidavit, and affidavit was not so lacking in indicia of probable cause that the officer executing the warrant could not with reasonable objectivity rely in good faith on the probable cause determination.

State v. Woldridge, 31 Fla. L. Weekly D560 (Fla. 2d DCA 2007):

Internet service provider's compliance with federal law mandating that it report a subscriber's apparent violation of federal child pornography laws to National Center for Missing and Exploited Children (NCMEC) provided presumption of reliability akin to that afforded citizen informant, for purposes of determining whether probable cause existed for issuance of residential search warrant arising from provider's reports to NCMEC; provider was a recognized, well-established company that essentially witnessed the crime when it received images of child pornography from defendant subscriber in an attempted e-mail transmission.

Search warrant affidavit relating that officer had received four reports from National Center for Missing and Exploited Children (NCMEC) stating that internet service provider had reported that computer user with specific screen name had attempted to e-mail files containing child pornography provided probable cause to issue warrant; tip came from provider, reliability of tip was presumed because of federal law compelling corporation to report to NCMEC, and provider was acting in manner analogous to that of citizen informant when it forwarded information to NCMEC.

AOL, as required by federal law, provided its business record concerning content of specific e-mails from a specific subscriber to NCMEC for it to forward to law

enforcement, and defendant offered no basis for trial or appellate court to conclude that these business records were unreliable.

U.S. v. King, (3rd Cir. 2006):

Evidence of defendant's subscriptions to child pornography Internet sites four years prior to issuance of search warrant, together with his placement of order for videotape containing child pornography immediately prior to issuance of warrant and warrant affiant's extensive experience with usual habits of persons involved in transmittal and storage of child pornography via the Internet, was sufficient to establish probable cause for warrant to issue with respect to defendant's computer and images and records found thereon.

Statements of warrant affiant with respect to usual habits of persons involved in transmittal and storage of child pornography via the Internet, made in application for warrant to search residence of individual suspected of possession of child pornography, were not rendered invalid as to such individual by fact that such individual had not responded to invitation to purchase child pornography made by postal inspectors some three years prior to issuance of warrant.

U.S. v. Flanders, (5th Cir. 2006)

Even if warrant for search of defendant's computer for evidence of child pornography possession was not supported by probable cause, police officers' reliance on warrant was objectively reasonable, and thus, good-faith exception to exclusionary rule applied; although police officer stated in affidavit in support of warrant that he knew that persons who sexually abused children also collected and kept child pornography, affidavit also contained statements of defendant's wife that defendant had taken digital photograph of his naked two-year-old daughter and that defendant used computer to view adult pornography, daughter's statements to forensic interviewer indicating defendant had licked her genitals, and information that defendant communicated on Internet about his sexual contact with daughter.

Where an affidavit in support of a search warrant states, inter alia, that a defendant has taken sexually explicit photographs of a minor, the affidavit supports a search for child pornography.

United States v. Riccardi, 405 F.3d 852 (10th Cir. 2005)

Defendant made lewd comments and solicitations to teenage boys on the telephone. A search warrant was executed on his home for evidence of the communications with these boys or other children. Based on what they found on the first warrant, they applied for a second warrant to seize and search his computer. Defendant argued that they did not have probable cause to search the

computer. The appellate court supported the probable cause finding, stating,

“Detective Dickey's affidavit contains the following facts in support of probable cause: (1) that Mr. Riccardi called teenage boys for his gratification; (2) that his home contained a number of sexual photographs of teenage boys in the nude; (3) that a receipt from Kinko's showed that he had photographs digitalized for a computer format; (4) that the computer was capable of storing digitized images; and (5) that, based on Dickey's experience, possessors of child pornography often obtain and retain images of child pornography on their computers... In our judgment, this is more than enough to support the magistrate's judgment that "there is a fair probability that contraband or evidence of a crime will be found in a particular place... Mr. Riccardi's collection of some 300 photographs of young men, 50 to 80 of them naked in sexually suggestive poses, is sufficient to indicate the nature of his interests. The presence of a computer with an internet hook-up and a Kinko's receipt indicating that Mr. Riccardi had converted Polaroid photos into a digitized format, gives rise to a fair inference that the computer will contain images similar to the photographs.”

During the execution of the first warrant, the police found a receipt from Kinko's dated 5 years earlier that showed the defendant had scanned some Polaroid photos. The court ruled that this information was not stale and that it showed that “Mr. Riccardi had the desire and ability to convert Polaroid photographs to a digital format, which, as Detective Dickey explained in his affidavit, is a common means by which child pornographers distribute and exchange their materials. When the receipt is considered in the context of other information in the affidavit--the apparent duration of Mr. Riccardi's harassment and solicitation of minors, the existence of sexually explicit pictures of minors found nearby, the screen names, and the observation that possessors often keep electronic copies of child pornography--it provides an ample nexus for the finding of probable cause..”