

APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOEL THOMAS AUGARD,

Defendant.

No. 4:18cr00134-JAJ

ORDER

This matter comes before the court pursuant to the defendant's September 21, 2018 Motion to Suppress and Request for an Evidentiary Hearing. [Dkt. 27] The motion challenges a search warrant issued by the Iowa District Court for Polk County on April 27, 2018. The defendant contends that probable cause to search the defendant's residence cannot be found in the warrant affidavit because the information is stale. Further, he contends that the affidavit did not show a nexus between the evidence sought and the place to be searched. The defendant further contends that the good faith exception to the exclusionary rule should not apply because the affidavit is so facially deficient as to preclude a reasonable officer from relying upon its issuance. Finally, the defendant contends that the affiant omitted facts from the affidavit that render it misleading.

The government contends that the warrant affidavit supports a finding of probable cause. It contends that even if probable cause is absent, the evidence should not be suppressed because of the good faith exception to the exclusionary rule. Finally, the government contends that the defendant is not entitled to a hearing pursuant to Franks v. Delaware.

The court finds that the affidavit in support of the warrant is not supported by probable cause. However, the evidence is not subject to suppression because the good

faith exception to the exclusionary rule applies in this instance. The court denies the defendant's request for a Franks v. Delaware hearing.

Search Warrant

On April 27, 2018 Detective Lori Kelly appeared before a state district court judge seeking a warrant to search the defendant's residence at 1039 Park Avenue, Cherokee, Iowa. Kelly stated in her affidavit that she had been a police officer since 1998, assigned to the detective bureau of the Des Moines Police Department since 2003. She has considerable experience investigating sex offenses.

In her affidavit, she informed the issuing judge that on April 13, 2018 victim (G.P.) informed her that he was a victim of sexual abuse in approximately 2005 or 2006 when he was approximately 11 to 12 years old. At that time G.P.'s family lived in Des Moines. The affidavit reveals that G.P.'s parents were involved in a volleyball league and became with defendant Joel Augard. Kelly described in detail the allegations made by G.P. G.P. informed her that he was heavily involved with computer gaming. When the defendant would come to G.P.'s home, the defendant and G.P. would play video games together. Eventually, Augard asked if G.P. could come to his house, with his computer, so that they could play a particular game together. This activity was repeated approximately four to five times with no sexual abuse occurring.

The affidavit reveals that after about five visits from G.P. to the defendant's home, the defendant began playing pornographic movies briefly for increasing amounts of time as G.P.'s visits to Augard's home continued. According to G.P., the defendant then began a hands-on form of sexual abuse with G.P. The sexual abuse is alleged to have occurred every time G.P. went to the defendant's house to play video games for a period of approximately a year. The nature of the sexual abuse became more intense. Eventually, it involved the use of sex toys coming from a store called "Adam & Eve".

G.P. informed Kelly that the defendant began filming and photographing the abuse. The defendant is alleged to have taken numerous photographs with a point and shoot style camera which he later downloaded to his computer. He set up a tripod and videotaped himself sexually abusing G.P. on at least three occasions. G.P. stated that the photos and videos were on Augard's computer because Augard showed them to G.P. on the computer. The final act of abuse that was videotaped was a bondage scene with G.P. as the victim.

The affidavit further states that the defendant lost his job with Polk County and lost his home due to foreclosure. The defendant later got a job at the University of Iowa working in the information technology field. The defendant told G.P. and G.P.'s parents that he had been fired from his IT job at Polk County for being in possession of pornography.

G.P. further reported that when he was approximately 15 years old, he went to the University of Iowa to watch his sister in a swim meet. He stated that he received a call from the defendant who had apparently observed G.P. while monitoring security cameras. Finally, G.P. reported the last contact with the defendant as being a Facebook message from the defendant asking why the defendant had not been invited to G.P.'s wedding.

Kelly attempted successfully to corroborate a number of the details provided by G.P. Kelly corroborated the defendant's prior address through the Polk County Assessor's website. She confirmed employment through the Polk County Human Resources Department. She corroborated the defendant's employment at the University of Iowa by contacting the University of Iowa police. She determined his current address by checking Department of Transportation driver license records. She also determined that the defendant registered a blue 2003 Ford Expedition to the address listed on his driver's license. Finally, a DCI agent conducted surveillance at the address listed on the

defendant's driver's license and observed the blue 2003 Ford Expedition registered to the defendant at the residence on April 19-20, 2018.

Kelly's affidavit informed the issuing judge that any computer would have to be seized and retained by her for a period of time in order to conduct an appropriate investigation. She specifically stated that she was looking for any nude or partially nude images or videos of minors, any evidence of infliction of harm and/or extortion of minors and any photographs of G.P. She detailed the search methodology to be employed in significant detail.

The warrant authorized the search of the residence at 1039 Park Avenue, Cherokee, Iowa. It authorized the search of any computer systems at the residence that are accessible by the defendant. It authorized the search and seizure of cellular telephones, mobile devices and video game consoles. It authorized the search of the defendant and his blue Ford Expedition. Finally, it authorized the police to seize sex toys and evidence of the purchase of sex toys from the online store "Adam & Eve". The application affidavit and supporting documents for this warrant are 25 pages long.

Search Warrant - Probable Cause

Because the evidence sought to be suppressed was gathered pursuant to a search warrant, the court employs the standard set forth in Illinois v. Gates, 462 U.S. 213 (1983), to determine the existence of probable cause. It is well established that a warrant affidavit must show particular facts and circumstances in support of the existence of probable cause sufficient to allow the issuing judicial officer to make an independent evaluation of the application for a search warrant. The duty of the judicial officer issuing a search warrant is to make a "practical, commonsense decision" whether a reasonable person would have reason to suspect that evidence would be discovered, based on the totality of the circumstances. United States v. Peterson, 867 F.2d 1110, 1113 (8th Cir. 1989).

Sufficient information must be presented to the issuing judge to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusion of others. Gates, supra, at 239. However, it is clear that only the probability, and not a prima facie showing, of criminal activity is required to establish probable cause. Gates, supra, at 235. This court does not review the sufficiency of an affidavit de novo. An issuing judge's determination of probable cause should be paid great deference by reviewing courts. Gates, supra, at 236. The duty of the reviewing court is simply to ensure that the issuing judge had a substantial basis for concluding that probable cause existed, Gates, supra, at 238-39.

Even where probable cause is lacking, the court's inquiry does not end. Pursuant to United States v. Leon, 468 U.S. 897 (1984), in the absence of an allegation that the issuing judge abandoned a neutral and detached role, suppression is appropriate only if the affiant was dishonest or reckless in preparing the affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause. In Leon, the United States Supreme Court noted the strong preference for search warrants and stated that in a doubtful or marginal case a search under a warrant may be sustainable where without one, it would fall. Leon, supra, at 914.

Searches pursuant to a warrant will rarely require any deep inquiry into reasonableness, . . . for a warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good faith in conducting the search. . . . Nevertheless, the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable, . . . and it is clear in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued.

Leon, supra, at 922-23.

Pursuant to Leon, suppression remains an appropriate remedy: (1) where the magistrate issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard for the truth, Franks v. Delaware, 438 U.S. 154 (1978); (2) where the issuing magistrate wholly abandons the judicial role and becomes a "rubber stamp" for the government; (3) where the officer relies on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (4) where the warrant is so facially deficient in failing to particularize the place to be searched or the things to be seized that the executing officers cannot reasonably presume it to be valid. In Leon, the remedy of suppression was not ordered despite the fact that the affidavit in that case did not establish probable cause to search the residence in question. Further, the information was fatally stale and failed to properly establish the informant's credibility. The standard announced in Leon is an objective standard.

Staleness

The defendant contends that probable cause to search the defendant's residence cannot be found in the warrant affidavit because the information is stale. "There is no bright-line test for determining when information in a warrant is stale." See United States v. Huyck, 849 F.3d 432, 439 (8th Cir. 2017) (quoting United States v. Lemon, 590 F.3d 612, 614 (8th Cir. 2017)). Instead, a court must look to "the lapse of time since the warrant was issued, the nature of the criminal activity, and the kind of property subject to the search." Id. Even a lengthy lapse in time becomes "least important when the suspected criminal activity is continuing in nature and when the property is not likely to be destroyed or dissipated." United States v. Johnson, 848 F.3d 872, 877 (8th Cir. 2017) (emphasis added). Thus, staleness would be a pressing concern when the warrant describes a stash of cocaine held by a suspected drug dealer: according to a dealer's usual habits, the cocaine is likely to be either consumed or sold after a short period of time. See, e.g., United States v. Frechette, 583 F.3d 374, 378 (6th Cir. 2009).

Images of child pornography, in contrast, are “likely to be hoarded by persons interested in those materials.” See United States v. Riccardi, 405 F.3d 852, 861 (10th Cir. 2005). Due to the difficulty of initial collection and possession, collectors are unlikely to destroy images after having succeeded in obtaining or creating them. See United States v. Chrobak, 289 F.3d 1043 (8th Cir. 2002) (crediting an agent’s testimony that “child pornographers retain their pornography for extended periods”). Put simply, the “hoarding habits of child pornography collectors” are “well-established,” United States v. Notman, 831 F.3d 1084, 1088 (8th Cir. 2016), and this common-sense consideration plays a role in a judge’s assessment of probable cause.

Suppression remains inappropriate even for a warrant based on state information when the executing officers’ conduct falls within Leon’s good faith exception. See Leon, supra, at 904, 926 (reversing the Ninth Circuit’s suppression of a warrant based on “fatally stale” information). Thus, because none of Leon’s exceptions applied, a warrant issued based on stale information about a prescription drug buy survived suppression. United States v. Pope, 467 F.3d 912 (5th Cir. 2006). And even when a delay of several years between a tip about child pornography and the issuance of a warrant renders that information stale, the warrant is saved when the officers relied on the warrant in good faith. United States v. Prideaux-Wentz, 543 F.3d 954, 957-59 (7th Cir. 2008).

Franks v. Delaware

The defendant contends that the affiant recklessly omitted two facts from the warrant affidavit that detract from a finding of probable cause. First, that the defendant moved residences on multiple occasions since the time of the alleged abuse. Second, that the place to be searched was owned by the defendant’s parents.

In order to prevail on a challenge to a warrant affidavit pursuant to Franks v. Delaware, 438 U.S. 154 (1978), the challenger must show (1) that a false statement knowingly and intentionally or with reckless disregard for the truth, was included in the

affidavit and (2) that the affidavit's remaining content is insufficient to establish probable cause. United States v. Gladney, 48 F.3d 309, 313 (8th Cir. 1995).

To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient.

Franks v. Delaware, *supra*, at 171.

Further, in order to mandate a hearing, the challenged statements in the affidavit must be necessary to a finding of probable cause. United States v. Flagg, 919 F.2d 499 (8th Cir. 1990). United States v. Streeter, 907 F.2d 781, 788 (8th Cir. 1990) (contested material must be "vital" to probable cause). It must also be remembered that although the affidavit must contain statements that are truthful,

This does not mean "truthful" in the sense that every fact recited in the warrant affidavit is necessarily correct. For probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that some times must be garnered hastily. But surely it is to be "truthful" in the sense that the information put forth is believed or appropriately accepted by the affiant as true.

Franks v. Delaware, *supra*, at 165.

Omissions of facts are not misrepresentations unless they cast doubt on the existence of probable cause. United States v. Parker, 836 F.2d 1080, 1083 (8th Cir. 1987). The same analytical process used to determine whether an affidavit contains a material falsehood is used to determine whether an omission will vitiate a warrant affidavit under

Franks. United States v. Lueth, 807 F.2d 719, 726 (8th Cir. 1986). The defendant must show that (1) the police omitted facts with the intent to make, or in reckless disregard of whether they thereby made, the affidavit misleading, and (2) that the affidavit, if supplemented by the omitted information, would not have been sufficient to support a finding of probable cause. With respect to the second element, suppression is warranted only if the affidavit as supplemented by the omitted material could not have supported the existence of probable cause. Lueth, supra, at 726.

For example, the fact that an informant had a criminal record and was cooperating under a plea agreement is not critical to the finding of probable cause. Flagg, supra; United States v. Martin, 866 F.2d 972 (8th Cir. 1989) (omission of fact of informant's drug addiction of no consequence to determination of probable cause). The fact that the police omitted information that an informant had been a drug dealer, was cooperating with the police in order to receive leniency, and was being paid by the police did not warrant relief in United States v. Wold, 979 F.2d 632 (8th Cir. 1992). See also United States v. Reivich, 793 F.2d 957 (8th Cir. 1986). It is not necessary to notify the magistrate of an informant's criminal history if the informant's information is at least partially corroborated. United States v. Parker, supra. Similarly, it was not misleading, as a matter of law, to omit the fact that the informant was the defendant's sister. United States v. Johnson, 925 F.2d 1115 (8th Cir. 1991).


Here, the omitted facts do not warrant relief or a hearing. First, the affidavit shows that the residence where the alleged abuse occurred is not where the defendant currently resides. Second, it is of no consequence to this warrant to know who owned the place to be searched or that others may also live there.

Conclusion

Upon the foregoing,

IT IS ORDERED that the defendant's September 21, 2018 Motion to Suppress [Dkt. 27] is denied.

DATED this 16th day of October, 2018.



JOHN A. JARVEY, Chief Judge
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA

v.

Joel Thomas Augar

JUDGMENT IN A CRIMINAL CASE

Case Number: 4:18-cr-00134-001

USM Number: 18705-030

Andrew James Graeve

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) One, Two, and Three of the three-count Indictment filed on June 26, 2018.☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 2251(a), 2251(e)	Production of Child Pornography	12/31/2009	One
18 U.S.C. § 2251(a), 2251(e)	Production of Child Pornography	12/31/2009	Two
18 U.S.C. § 2252A(a)(5)(B) 2252A(b)(2)	Possession of Child Pornography	12/31/2009	Three

☐ See additional count(s) on page 2

The defendant is sentenced as provided in pages 2 through 9 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

February 25, 2019

Date of Imposition of Judgment

Signature of Judge

John A. Jarvey, Chief U.S. District Judge

Name of Judge

Title of Judge

February 26, 2019

Date

DEFENDANT: Joel Thomas Augard
CASE NUMBER: 4:18-cr-00134-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:
240 months on Count One and 240 months on Count Two of the Indictment filed on June 26, 2018, to be served consecutively, for a total term of 480 months. 120 months on Count Three of the Indictment filed on June 26, 2018, to be served concurrently with Counts One and Two.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before _____ on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Joel Thomas Augard
CASE NUMBER: 4:18-cr-00134-001

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

20 years as to each of Counts One, Two, and Three of the Indictment filed on June 26, 2018, to be served concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - ☒ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☒ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Joel Thomas Augarð
CASE NUMBER: 4:18-cr-00134-001

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: Joel Thomas Augarð
CASE NUMBER: 4:18-cr-00134-001

SPECIAL CONDITIONS OF SUPERVISION

You must participate in a sex offender treatment program, to include psychological testing and polygraph examinations, as directed by the U.S. Probation Officer. You must also abide by all supplemental conditions of sex offender treatment, to include abstaining from alcohol. Participation may include inpatient/outpatient treatment, if deemed necessary by the treatment provider. You must contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment. Sex offender assessments and treatment shall be conducted by therapists and polygraph examiners approved by the U.S. Probation Office, who shall release all reports to the U.S. Probation Office. The results of polygraph examinations will not be used for the purpose of revocation of supervised release or probation. If disclosure is required by mandatory reporting laws, polygraph results will be reported to appropriate treatment personnel, law enforcement, and related agencies with the approval of the Court. If polygraph results reveal possible new criminal behavior, this will be reported to the appropriate law enforcement and related agencies after obtaining approval from the Court.

You must not have any direct contact (personal, electronic, mail, or otherwise) with any child you know or reasonably should know to be under the age of 18, including in employment, without the prior approval of the U.S. Probation Officer. If contact is approved, you must comply with any conditions or limitations on this contact, as set forth by the U.S. Probation Officer. Any unapproved direct contact must be reported to the U.S. Probation Officer within 24 hours. Direct contact does not include incidental contact during ordinary daily activities in public places.

You must not view or possess any "visual depiction" (as defined in 18 U.S.C. § 2256), including any photograph, artwork, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of "sexually explicit conduct" (as defined in 18 U.S.C. § 2256). You must not correspond with anyone in the business of providing such material, or enter adult entertainment venues where sexually explicit conduct is the primary product(s) for purchase or viewing.

You must not access the internet or possess and/or use computers (as defined in 18 U.S.C. § 1030(e)(1)), internet capable devices, cellular telephones, and other electronic communications or data storage devices or media without the prior approval of the U.S. Probation Officer. If computer or internet use for employment is approved by the U.S. Probation Officer, you must permit third party disclosure to any employer or potential employer concerning any computer/internet related restrictions that are imposed upon you.

If approved by the U.S. Probation Officer to use or possess computers (as defined in 18 U.S.C. § 1030(e)(1)), internet capable devices, cellular telephones, and other electronic communications or data storage devices or media, you must submit your devices to unannounced examinations/searches, and possible removal for a more thorough inspection. You must allow the installation of monitoring hardware and software on such equipment, abide by and cooperate in supplemental conditions of monitoring, and pay the costs associated with this service, as directed by the U.S. Probation Officer. You must notify third parties who use these devices that the devices are subject to monitoring and/or unannounced examinations.

You may not possess any type of camera (to include cameras within cellular telephones) or video recording device without the prior approval of the U.S. Probation Officer.

You must comply with all sex offender laws for the state in which you reside and must register with the local sheriff's office within the applicable time frame.

You must not contact the victim(s), nor the victim's family without prior permission from the U.S. Probation Officer.

You must not apply for, solicit, or incur any further debt, included but not limited to loans, lines of credit, or credit card charges, either as a principal or cosigner, as an individual, or through any corporate entity, without first obtaining written permission from the U.S. Probation Officer.

DEFENDANT: Joel Thomas Augard
CASE NUMBER: 4:18-cr-00134-001

ADDITIONAL SUPERVISED RELEASE TERMS

You will submit to a search of your person, property, residence, adjacent structures, office, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), and other electronic communications or data storage devices or media, conducted by a U.S. Probation Officer. Failure to submit to a search may be grounds for revocation. You must warn any other residents or occupants that the premises and/or vehicle may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that you have violated a condition of your release and/or that the area(s) or item(s) to be searched contain evidence of this violation or contain contraband. Any search must be conducted at a reasonable time and in a reasonable manner. This condition may be invoked with or without the assistance of law enforcement, including the U.S. Marshals Service.

DEFENDANT: Joel Thomas Augar
CASE NUMBER: 4:18-cr-00134-001**CRIMINAL MONETARY PENALTIES**

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

- ☐ Pursuant to 18 U.S.C. § 3573, upon the motion of the government, the Court hereby remits the defendant's Special Penalty Assessment; the fee is waived and no payment is required.

	<u>Assessment</u>	<u>JVTA Assessment *</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 300.00	\$ 0.00	\$ 0.00	\$0.00

- ☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.
- ☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
(To be determined)			
TOTALS		\$0.00	\$0.00

- ☐ Restitution amount ordered pursuant to plea agreement \$ _____
- ☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- ☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:
- ☐ the interest requirement is waived for the ☐ fine ☐ restitution.
- ☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Joel Thomas Augard
CASE NUMBER: 4:18-cr-00134-001**SCHEDULE OF PAYMENTS**

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☒ Lump sum payment of \$ 300.00 due immediately, balance due
- ☐ not later than _____, or
☒ in accordance ☐ C, ☐ D, ☐ E, or ☒ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:
 All criminal monetary payments are to be made to the Clerk's Office, U.S. District Court, P.O. Box 9344, Des Moines, IA. 50306-9344.
 While on supervised release, you shall cooperate with the Probation Officer in developing a monthly payment plan consistent with a schedule of allowable expenses provided by the Probation Office.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☒ The defendant shall forfeit the defendant's interest in the following property to the United States:
 See next page.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVT A assessment, and (8) costs, including cost of prosecution and court costs.

DEFENDANT: Joel Thomas Augarð
CASE NUMBER: 4:18-cr-00134-001

ADDITIONAL FORFEITED PROPERTY

- a. A Sony Handycam Video Camera Recorder;
- b. A Maxell XR Metal Hi8 video cassette;
- c. A Sony 64GB SD Card;
- d. A "Strike" desktop tower computer with multiple hard drives within;
- e. A Dell Latitude laptop computer; and
- f. A Compaq laptop computer, as outlined in the Preliminary Order of Forfeiture entered on December 14, 2018.

United States Court of Appeals
For the Eighth Circuit

No. 19-1507

United States of America

Plaintiff Appellee

v.

Joel Thomas Augard

Defendant Appellant

Appeal from United States District Court
for the Southern District of Iowa - Des Moines

Submitted: January 15, 2020

Filed: March 31, 2020

Before COLLOTON, SHEPHERD, and ERICKSON, Circuit Judges.

ERICKSON, Circuit Judge.

Joel Thomas Augard pled guilty to two counts of production of child pornography in violation of 18 U.S.C. §§ 2251(a) and (e) and one count of possession of child pornography in violation of 18 U.S.C. §§ 2252A(a)(5)(B) and (b)(2). Augard moved to suppress evidence uncovered when police searched the home he shared

with his parents. The district court¹ denied Augard's motion without a hearing, finding the warrant lacked probable cause but fell within the good-faith exception. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

I. Background

In 2005 or 2006, when G.P. was eleven or twelve years old, he met Augard, an adult, through a volleyball league. Augard and G.P. shared an interest in video games and G.P. soon began visiting Augard at his home to play video games. After five visits Augard's grooming of G.P. escalated to the showing of pornography. Eventually Augard began sexually abusing G.P., including one incident involving bondage. Augard would use a point-and-shoot camera to film the abuse, transfer the resulting images and video to his computer, and play the videos for G.P. on subsequent visits. The cycle of abuse continued for about a year and only ended when Augard was fired from his job, lost his house to foreclosure, and relocated to take a new job.

Augard's interest in G.P. waned but did not end after he moved. When G.P. was fifteen years old, G.P. attended a sporting event at the University of Iowa where Augard was employed in the university's information technology department. When Augard saw G.P. on a security camera, he sent G.P. a text message saying, "I see you." In 2016, Augard sent G.P. a Facebook message asking why he had not been invited to G.P.'s wedding.

On April 13, 2018, G.P. reported the abuse and more recent contacts with Augard to Detective Lori Kelly of the Des Moines Police Department. Detective Kelly detailed the allegations in a April 27, 2018, affidavit in support of an

¹The Honorable John A. Jarvey, Chief Judge, United States District Court for the Southern District of Iowa.

application for a search warrant for Augard's home. The warrant described the place to be searched as a home located at a specific address in Cherokee, Iowa ("the house"). Detective Kelly's affidavit stated that Iowa Department of Transportation ("DOT") records showed that in December 2017 Augard listed this address as his residence on his driver's license. DOT records also contained a registration for Augard's vehicle to the same address. The affidavit noted that surveillance established Augard's vehicle parked outside the house. Detective Kelly's affidavit also described how she independently corroborated portions of G.P.'s story by cross-referencing Augard's available employment history.

The house was searched pursuant to the warrant and officers found child pornography. Augard was charged with production and possession of child pornography. He moved to suppress the results of the search claiming that the warrant contained stale information and failed to establish a sufficient nexus between the evidence sought and the house. Augard argued the good-faith exception did not apply because: (1) stale information and lack of nexus made executing the affidavit unreasonable; and (2) Detective Kelly did not disclose in her affidavit that Augard had moved several times since 2005 or that the house in Cherokee, Iowa belonged to his parents. Augard requested a Franks hearing based on Detective Kelly's omission.

The district court denied Augard's motion to suppress without an evidentiary hearing, finding that although the warrant lacked probable cause, the search fell within the good-faith exception. The court also denied the request for a Franks hearing. Augard pled guilty and was sentenced to 480 months' imprisonment. Augard appeals the denial of his suppression motion, reasserting the arguments he presented to the district court.

II. Discussion

We review the district court's findings of fact for clear error and the probable cause determination and application of the good-faith exception *de novo*. United States v. Keele, 589 F.3d 940, 943 (8th Cir. 2009). Here, we assume the warrant lacked probable cause. If a warrant lacks probable cause and the executing officer was objectively reasonable in relying on the warrant, the good-faith exception to the exclusionary rule applies and evidence should not be suppressed due to an absence of probable cause. United States v. Leon, 468 U.S. 897, 922–23 (1984). An officer's reliance is only unreasonable if: (1) the affidavit supporting the warrant contains knowing or reckless false statements misleading the judge; (2) the issuing judge wholly abandons its judicial role in issuing the warrant; (3) the affidavit is so lacking in indicia of probable cause that reliance is entirely unreasonable; or (4) the warrant is so facially deficient that no reasonable officer could consider it valid. United States v. Proell, 485 F.3d 427, 431 (8th Cir. 2007). The good-faith exception may apply based on information reasonably known to the executing officer but not included in the warrant. United States v. Jackson, 784 F.3d 1227, 1231 (8th Cir. 2015).

Augard broadly asserts that the officer's reliance was unreasonable because the issuing judge abandoned his judicial role, the warrant was facially deficient, and the warrant was so lacking in probable cause that no reasonable officer could consider it valid. He has failed to articulate any reasons for his first two assertions. Instead, Augard focused on the following alleged deficiencies: (1) the staleness of the information in the supporting affidavit; and (2) the lack of a nexus between evidence of illegal activity and the house.

While there is no bright-line test for determining staleness, we look to a variety of factors, including the nature of the criminal activity and the type of property subject to search. United States v. Huyck, 849 F.3d 432, 439 (8th Cir. 2017). If the

elapsed time between the criminal activity and warrant issuance in the case leaves the evidence too stale to support a finding of probable cause, the nature of the crime and evidence sought may still militate in favor of applying the good-faith exception. United States v. Rugh, 968 F.2d 750, 754 (8th Cir. 1992).

The criminal activity in this case is sexual abuse of a child and production of child pornography. The essence of these crimes involves the abuse of a trust and power relationship, which frequently delays reporting until the minor has obtained majority. G.P. eventually reported the abuse directly to Detective Kelly, who independently corroborated details of the allegation. The affidavit described Augard's extensive grooming of G.P., his repeated abuse of G.P. over a one year period, and his efforts to contact G.P. as recently as 2016. The affidavit also described Augard's prolonged unusual interest in G.P., his need to memorialize and revisit the sexual abuse by retaining and viewing videos, and his efforts to preserve the recordings on a computer for future viewing. Considering the specific nature of the crimes being investigated, the evidence supporting the warrant application was not so stale as to render the officer's reliance on the warrant entirely unreasonable.

The type of property subject to search included digital images and videos of child pornography, which are typically retained for long periods of time. Huyck, 849 F.3d at 439. Given Augard's particular interest and investment in recording the videos on one device, saving and transferring them to another, and revisiting them with G.P. on numerous occasions, the property subject to search in this case was reasonably likely to be retained and kept by Augard close at hand or near him. Like the nature of the crimes, the type of evidence sought establishes the warrant was not so stale that the officer's reliance was entirely unreasonable.

As to the nexus, law enforcement officers may make reasonable inferences in preparing affidavits in support of a warrant. United States v. Thompson, 210 F.3d 855, 860 (8th Cir. 2000). A judge may also draw reasonable inferences based on the

totality of the circumstances in deciding to issue the warrant. Id. The circumstances surrounding this case, including the prolonged grooming, repeated acts of sexual abuse, pornography production, transfer to a storage device, and repeated viewing that occurred regularly over the course of a year, permit a reasonable inference that images and videos Augard took and preserved at a prior residence would be located at his current residence. See United States v. Summage, 481 F.3d 1075, 1078 (8th Cir. 2007) (permitting reasonable inference that a defendant who produced pornography at a prior residence would retain evidence at his new residence). This information established a sufficient nexus connecting the evidence to the house.

We are unpersuaded by Augard's claim that the good-faith exception does not apply because Detective Kelly did not inform the issuing judge that the house was owned by his parents and that he had moved several times since 2005. The supporting affidavit notes that Augard had moved after the abuse. Detective Kelly confirmed Augard lived at the house through multiple sources, including DOT records and surveillance. Considering the likelihood of Augard's presence in the house and that he would retain images and videos memorializing his abuse of G.P. wherever he was living, actual ownership of the home is immaterial to a finding of probable cause. Omitting his parents' ownership of the house does not render the good-faith exception inapplicable.

Because the arguments advanced by Augard presented no contested issue of fact and his suppression motion was decided as a matter of law, the district court did not abuse its discretion by declining to hold an evidentiary hearing. United States v. Stevenson, 727 F.3d 826, 830 (8th Cir. 2013). Likewise, having found ownership of the house was immaterial to a probable cause determination and omission of the details regarding Augard's moves was not a misrepresentation, the district court did not abuse its discretion in declining to hold a Franks hearing. Franks v. Delaware, 438 U.S. 154, 155–56 (1978) (to be entitled to a hearing, the defendant must make a substantial showing that an affidavit includes a knowing or reckless

misrepresentation, and the alleged misrepresentation is necessary to the probable cause determination).

III. Conclusion

For the foregoing reasons, we affirm.

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 19-1507

United States of America

Plaintiff - Appellee

v.

Joel Thomas Augard

Defendant - Appellant

Appeal from U.S. District Court for the Southern District of Iowa - Des Moines
(4:18-cr-00134-JAJ-1)

JUDGMENT

Before COLLOTON, SHEPHERD and ERICKSON, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

March 31, 2020

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Revision of Part V of the Eighth Circuit Plan to Implement the Criminal Justice Act of 1964.

V. Duty of Counsel as to Panel Rehearing, Rehearing En Banc, and Certiorari

Where the decision of the court of appeals is adverse to the defendant in whole or in part, the duty of counsel on appeal extends to (1) advising the defendant of the right to file a petition for panel rehearing and a petition for rehearing en banc in the court of appeals and a petition for writ of certiorari in the Supreme Court of the United States, and (2) informing the defendant of counsel's opinion as to the merit and likelihood of the success of those petitions. If the defendant requests that counsel file any of those petitions, counsel must file the petition if counsel determines that there are reasonable grounds to believe that the petition would satisfy the standards of Federal Rule of Appellate Procedure 40, Federal Rule of Appellate Procedure 35(a) or Supreme Court Rule 10, as applicable. *See Austin v. United States*, 513 U.S. 5 (1994) (per curiam); 8th Cir. R. 35A.

If counsel declines to file a petition for panel rehearing or rehearing en banc requested by the defendant based upon counsel's determination that there are not reasonable grounds to do so, counsel must so inform the court and must file a written motion to withdraw. The motion to withdraw must be filed on or before the due date for a petition for rehearing, must certify that counsel has advised the defendant of the procedures for filing *pro se* a timely petition for rehearing, and must request an extension of time of 28 days within which to file *pro se* a petition for rehearing. The motion also must certify that counsel has advised the defendant of the procedures for filing *pro se* a timely petition for writ of certiorari.

If counsel declines to file a petition for writ of certiorari requested by the defendant based on counsel's determination that there are not reasonable grounds to do so, counsel must so inform the court and must file a written motion to withdraw. The motion must certify that counsel has advised the defendant of the procedures for filing *pro se* a timely petition for writ of certiorari.

A motion to withdraw must be accompanied by counsel's certification that a copy of the motion was furnished to the defendant and to the United States.

Where counsel is granted leave to withdraw pursuant to the procedures of *Anders v. California*, 386 U.S. 738 (1967), and *Penson v. Ohio*, 488 U.S. 75 (1988), counsel's duty of representation is completed, and the clerk's letter transmitting the decision of the court will notify the defendant of the procedures for filing *pro se* a timely petition for panel rehearing, a timely petition for rehearing en banc, and a timely petition for writ of certiorari.

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 19-1507

United States of America

Appellee

v.

Joel Thomas Augard

Appellant

Appeal from U.S. District Court for the Southern District of Iowa - Des Moines
(4:18-cr-00134-JAJ-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Kelly did not participate in the consideration or decision of this matter.

May 15, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans