No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

CHARLES BRIAN O'NEILL - PETITIONER

VS.

UNITED STATES OF AMERICA - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS
SIXTH APPELLATE CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Do the deficiencies in the search warrants and their supporting affidavits merit good faith protection from the exclusionary rule?

Introduction to the Case

The Sixth Circuit Court of Appeals decided an important question of Federal Law in a way that conflicts with relevant decisions of this Court when it affirmed the Trial Court denials of Mr. O'Neill's motions to suppress the searches of his home and a barn. The affidavits offered in support of the search warrants did not demonstrate probable cause to search for evidence of child pornography. A reasonably well trained law enforcement officer knows nudity alone does not provide probable cause to search for child pornography. The obvious lack of probable cause, reckless material misrepresentation regarding child pornography exchanged on a peer to peer network, and the systemic disregard of material accuracy in the probable cause affidavits make the warrants here undeserving of the protections afforded by the good faith exception to the exclusionary rule articulated in U.S. v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

List of Parties to the Proceedings in the Courts Below and Rule 29.6 Statement

All parties appear in the caption of the case on the cover page. None of the parties appearing in the caption have a corporate interest in the outcome of this case.

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The decision of the United States District Court for the Northern District of Ohio denying Petitioner's motion to suppress was entered on 18 June 2020 and was not published. U.S. v. O'Neill, 3:18CR0178, Docs. 44, 78 (Pet. App. B, pp. 1-13).

The decision of the United States District Court for the Northern District of Ohio denying Petitioner's motion to suppress was entered on 25 June 2020 and was not published. U.S. v. O'Neill, 3:18CR0178, Docs. 63, 79 (Pet. App. C, pp. 1-2).

Jurisdiction

Mr. O'Neill seeks review from the 29 February 2024 decision of the United States Court of Appeals, Sixth Appellate Circuit, affirming the denials of his motions to suppress. U.S. v. O'Neill, 94 F.4th 531 (6th Cir. 2024) (Pet. App. A, pp.1-25). Jurisdiction is conferred on this Court pursuant to 28 U.S.C. §1254(1).

Constitutional Provisions Involved

The 4th Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statement of the Case

On 20 February 2018, the Fostoria Police Department received a complaint from Mr. O'Neill's wife, J.O., and son, C.O., that they had seen numerous images of nude and partially nude boys on Mr. O'Neill's cell phone and iPad (United States District Court for the Northern District of Ohio, Western Division, Case No. 3:18CR0178, Doc. 12-3, Page ID #: 43). They told Fostoria Police Department Officer Cory Brian they saw the images within the last few days (Id.).

Based on this information, Officer Brian the next day requested a search warrant for Mr. O'Neill's residence at 1023 Gerlock Drive, Fostoria, Seneca County, Ohio. (Doc. 12-1, Page ID #: 32). In relevant part, Officer Brian's probable cause affidavit provides:

> STATE OF OHIO, SENECA COUNTY, SS:
>
> Before me, the undersigned Judge of said Fostoria Municipal Court, personally appeared Officer Cory D. Brian who, being first duly sworn according to law, deposes and says that he has good cause to believe and does believe that the offense of Pandering Obscenity Involving a Minor §2907.32.1, Pandering Sexually Oriented Matter Involving a Minor §2907.32.2, and Illegal Use of a Minor in Nudity-Oriented Material or Performance §2907.32.3, has been committed and that the persons responsible have never been placed in jeopardy thereof; that the following things and/or persons for which search authorization is sought, and if found seized, to wit: any computers, notebooks, cell phones and computer media located therein where the instrumentalities, fruits, and evidence of violations of Ohio Revised Code Sections: Pandering Obscenity Involving a Minor §2907.32.1, Pandering Sexually Oriented Matter Involving a Minor §2907.32.2, and

Illegal Use of a Minor in Nudity-Oriented Material or Performance §2907.32.3 or any other evidence or contraband found believed to be evidence of the crimes under investigation is/are concealed in 1023 Gerlock Drive, City of Fostoria, Seneca County, State of Ohio, two story brick, single dwelling, with green trim, green front door which is facing east, with black railing on each side of the porch. The numeral "1023" in gold, to the left of the front door. That being the residence of Charles Brian O'Neill.

Affiant further avers the facts upon which such belief is based are:

See Exhibit A to be included here in as if rewritten fully here on.

. . .

EXHIBIT A

STATE OF OHIO)
COUNTY OF SENECA) SS:

. . .

I, Officer Cory D. Brian, Fostoria Police Department, being first duly sworn according to law say and deposes that I am an Ohio Peace Officer employed by the City of Fostoria Police Department, as a Police Officer, and have been so employed for the past 12 years. I have been a Law Enforcement Officer for approximately 11 years. I earned my Ohio Peace Officer certificate from the Lorain County Community College Police Academy in 2005. In November 2005, I was assigned to the Fostoria Police Department.

My duties as a Officer with the Fostoria Police Department include the enforcement of criminal laws and ordinances and the investigation of criminal activity and criminal law violations. I have been involved in numerous criminal investigations and arrests for various crimes including Robbery, Burglary, Assaults, Thefts,

Financial Crimes, Sexual Crimes, Drug Crimes, Alcohol Related Crimes, and Computer Related Crimes. Throughout my employment as a Peace Officer, I have received specialized training and experience in the investigation of numerous Felony offenses. I have executed numerous Search Warrants pertaining to numerous Felony offenses, resulting in the apprehension and conviction of persons involved in those offenses.

Furthermore, while being employed as a Police Officer with the Fostoria Police Department, Fostoria, Seneca County, Ohio, the following facts and information became known to me by information from other law enforcement agents and by my own personal observations:

1. On February 20, 2018 a report was received at the Fostoria Police Department about a citizen possessing pornographic material involving a minor. The initial complaint was taken by Sergeant William Campbell.

2. On February 20, 2018 Sergeant Campbell requested my assistance to investigate the allegations of Pandering Obscenity Involving a Minor. Sergeant Campbell and I spoke to the complainants, June M. O'Neill and Clayton O'Neill, about what they had witnessed.

3. Clayton O'Neill reported he observed his father's cellular phone, Charles Brian O'Neill, lying on the counter charging. Clayton O'Neill stated while the cellular phone was lying on the counter plain view, he observed photographs of nude boys he believed to be ranging in age from 5 years of age to 14 years of age, on the screen of the phone.

4. Clayton O'Neill stated he looked further into the phone, and he stated he observed many nude photographs in an album in the saved photographs. Clayton O'Neill stated these photographs were of young boys in varying states of nudity.

5. Clayton O'Neill stated on a separate occasion, he was looking at Charles Brian O'Neill's mini iPad, and when he

swipe to the left on the lock screen, he observed photographs of fully nude male children, which he believed to be 5 years of age and younger. Clayton O'Neill stated be observed other nude photographs of nude male children, which he believed to be ranging in age from 13 to 17 years of age.

6. June M. O'Neill stated her son, Clayton O'Neill, told her on February 17, 2018, he had observed obscene photographs of young male children on his father's cellular phone.

7. June M. O'Neill stated on February 17, 2018, she looked at her husband's, Charles Brian O'Neill, phone, and found two albums in the gallery. June M. O'Neill stated one album had a young male, approximately 8 to 10 years of age, in blue and gray underwear.

8. June M. O'Neill stated when she opened the album she found over one thousand images. June M. O'Neill stated she observed images of young males ranging from 2 to 10 years of age, with some being nude and others clothed.

9. June M. O'Neill stated on Monday, February 19, 2018, Charles Brian O'Neill was in the shower, she looked at his phone again. June M. O'Neill stated she located the same photographs and same two albums as she observed on February 17, 2018.

10. I looked up Charles Brian O'Neill through LEADS, verifying his address through the BMV as 1023 Gerlock Drive, Fostoria, Seneca County, Ohio 44830.

11. I looked up Charles Brian O'Neill's Criminal Case History, and found convictions for Insurance Fraud and Theft. Charles Brian O'Neill has a BCI number of C072557.

12. During my employment with Fostoria Police Department, I have found through my investigations of crimes involving possession of material involving nudity of minors and/or sexual or offensive material involving minors, often times persons involved in such activity

possess items or instruments they use for their illegal activities. Media sources used to retrieve, store, disseminate, or view such material include computers, laptops, tablets, cell phones, external hard drives, flash drives or memory sticks, CD-R or floppy discs, gaming systems with internal media storage, and any other item located which has the capability of storing and/or displaying digital sources of this material. It is therefore requested that these items be seized and entered into for the retrieval of stored electronic data related to this investigation.

13. Based upon my own knowledge, experience, and training in child exploitation and child pornography investigations, and the training and experience of other law enforcement officers with whom I have had discussions, there are certain characteristics common to individuals involved in the receipt and collection of child pornography:

a. Child pornography collectors may receive sexual gratification, stimulation, and satisfaction from contact with children; or from fantasies they may have viewing children engaged in sexual activity or in sexually suggestive poses, such as in person, in photographs, or other visual media; or from literature describing such activity;

b. Collectors of child pornography may collect sexually explicit or suggestive materials, in a variety of media, including photographs, magazines, motion pictures, videotapes, books, slides and/or drawings of other visual media. Child pornography collectors oftentimes use these materials for their own sexual arousal and gratification. Further, they may use these materials to lower the inhibitions of children they are attempting to seduce, to arouse the selected child partner, or to demonstrate desired sexual acts;

c. Collectors of child pornography sometimes possess and maintain their "hard copies" of child pornographic material; that is, their pictures, films, video tapes, magazines, negatives, photographs,

> correspondence, mailing lists, books, tape recordings, etc., in the privacy and security of their homes and some other secure location, such as a private office. Child pornography collectors typically retain pictures, films, photographs, negatives, magazines, correspondence, books, tape recordings, mailing lists, images of child erotica, and video tapes for many years;
>
> d. Collectors of child pornography prefer not to be without their child pornography for any prolonged time period. This behavior has been documented by law enforcement offices involved in the investigation of child pornography throughout the world.
>
> 14. I submit based on the facts set forth in this affidavit, that there is probable cause to believe that Charles Brian O'Neill possesses and collects child pornography within media sources as described above, located at the residence of 1023 Gerlock Drive, Fostoria, Seneca County, Ohio.
>
> 15. Based upon the conduct of individuals involved in the collection of child pornography set forth above namely, that they tend to maintain their collections at a secure, private location for long periods of time, and based on the fact that the user had child pornography available on a P2P network, there is probable cause to believe that evidence of the offenses of distributing, receiving and possessing child pornography is currently located at 1023 Gerlock Drive, Fostoria, Seneca County, Ohio.
> . . .
>
> (Doc. 12-1, Page ID #: 32-36).

On 22 February 2018, the Fostoria Police Department executed the search warrant. A forensic analyst from the Ohio Bureau of Criminal Investigation was on scene (Doc. 18, Page ID#: 93). A forensic analysis of a cell phone taken from Mr. O'Neill done at the scene revealed what the Government alleged were images of child pornography (Doc. 18, Page ID#: 108, 236-237). Mr. O'Neill was arrested on

state charges and taken into custody (Doc. 29, Page ID#: 244).

On 23 February 2018, Mr. O'Neill's son C.O. went to property owned by Mr. O'Neill on Bairdstown Road in Wood County, Ohio (Doc. 18, Page ID #: 132). He was accompanied by his aunt D.G. and an off duty police officer from the Cleveland Area, M.S. They went to the property because C.O., his mother, and others claimed they were concerned that Mr. O'Neill could post bond and was known to own guns (Doc. 29, Page ID #: 210).

When C.O. entered the Bairdstown property, there was a locked door which he forced open with a screwdriver (Doc. 18, Page ID #: 137). In that room, they found things "he believed were of a sexual nature, sex toys, stuff like that, outfits." (Doc. 29, Page ID #: 239). C.O. called his mother to report what he found, and his mother called Officer Brian (Doc. 29, Page ID #: 238).

The next day, Officer Brian contacted Sergeant Ginnie Barta of the Wood County Sheriff's Office (Id.). Officer Davis "basically briefed her on what my case had entailed, the search warrant that I had conducted, what we found with BCI, and then relayed to her what had been told to me by Clayton and June O'Neill." (Doc. 29, Page ID #: 238-239).

Based only on this conversation, Sergeant Barta requested a search warrant for the Bairdstown Road property (Doc. 68-1, Page ID #: 501). With the exception of one name change, the first nine paragraphs of Sergeant Barta's probable cause affidavit are a verbatim repetition of the allegations made by Officer Brian in his search warrant affidavit (Doc. 12-1, Page ID #: 33). Sergeant Barta's affidavit then

provides the following additional information:

> 10. On February 23, 2018 I was contacted by Officer Brian and briefed on the incident. Officer Brian advised Clayton O'Neill went to his father's barn today located at 2117 Bairdstown Road, North Baltimore, Wood County, Ohio, to secure any possible weapons for the family's safety. Clayton had the keys to the barn and opened a room that he advised he was not previously allowed in. Clayton stated upon entering the room he located a computer tower with monitor, computer discs, blank and used discs, vibrators and other sex toys, condoms, and children's clothing and "costumes." Clayton also located approximately fifteen firearms. Clayton contacted Fostoria Police and was advised not to touch anything and to secure the barn and exit.
>
> 11. Officer Brian advised me he arrested Charles Brian O'Neill on February 22, 2018 and during his interview Charles admitted to having photographs of "children models in costumes."
>
> (Doc. 68-1, Page ID #: 502-503).

The remaining paragraphs of Sergeant Barta's affidavit are identical to those of Officer Brian, including the allegation that Mr. O'Neill "had child pornography available on a P2P network . . ." (Doc. 12-1, Page ID #: 36; Doc. 68-1, Page ID #: 504). The Court issued the search warrant and it was executed on the same day (Doc. 68-1, Page ID #: 507). Electronics, media, storage devises, and other evidence was seized and utilized by the Government in their prosecution of Mr. O'Neill.

On 22 March 2018, a complaint was filed in the United States District Court for the Northern District of Ohio, Western Division, charging Mr. O'Neill with violations of 18 U.S.C. §2251(a), Sexual Exploitation of a Minor, and 18 U.S.C. §2252, Receipt and/or Distribution of Child Pornography (Doc. 1, Page ID #: 1). Mr.

O'Neill was arrested and made his initial appearance the same day. He waived preliminary hearing and consented to bind over to the grand jury (3/22/2018 Minutes of Proceedings). On 11 April 2018, Mr. O'Neill was indicted for the same two offenses charged in the complaint (Doc. 8, Page ID #: 14). He pled not guilty to both counts (4/20/2018 Minutes of Proceedings).

On 10 October 2019, Mr. O'Neill filed a motion to suppress the evidence from the search of 1023 Gerlock (Doc. 12-1, Page ID #: 34, 36). He asserted that the affidavit as a whole failed to provide probable cause to search, and that there was no nexus between the described images and the characteristics of child pornography collectors. He argued further that the probable cause affidavit rested on material falsehoods, and the remaining allegations of the affidavit did not provide independent probable cause to issue the warrant (Doc. 44, Page ID #: 321). As examples of the material falsehoods, Mr. O'Neill cited to Officer Brian's affidavit claims that Mr. O'Neill "had child pornography available on a P2P network" and that he had prior convictions for insurance fraud and theft. The Government filed a memorandum conceding the allegation of access to child pornography on a peer to peer network was false, but otherwise opposed the motion. Mr. O'Neill filed a reply (Doc. 47, Page ID#: 339; Doc. 60, Page ID#: 419).

On 12 February 2020, Mr. O'Neill filed another motion to suppress, requesting exclusion of all of the evidence taken at the Bairdstown Road search on 23 February 2018 (Doc. 63, Page ID #: 436). He advanced the same arguments he made in support of his second motion to suppress (Doc. 44, Page ID #: 321): lack of

probable cause in the affidavit; false material allegations in the affidavit; and the good faith exception does not apply. The Government responded with the same arguments in reply: the affidavit provided sufficient probable cause; the factual errors were inadvertent or negligent; and the good faith exception applied. Mr. O'Neill filed an additional reply but raised no new arguments (Doc. 74; Page ID #: 541).

On 18 June 2020, the Trial Court denied the motion to suppress and request for a Franks hearing regarding the Gerlock Road search (Doc. 78; Page ID #: 553). The Trial Court found that the affidavit did not provide probable cause to search 1023 Gerlock for child pornography because nudity, without more, is not illegal, and the probable cause affidavit provided nothing more. Having made that finding, the Trial Court concluded it did not have to decide the Franks issue raised in Mr. O'Neill's motion. However, the Trial Court also found that the Leon good faith exception applied and denied the motion.

On 25 June 2020, the Trial Court denied Mr. O'Neill's motion to suppress addressing the search of the Baridstown Road property (Doc. 79, Page ID #: 566). Incorporating by reference its previous entry, the Trial Court repeated its findings of no probable cause but applied the good faith exception and denied the motion.

On 1 November 2021, Mr. O'Neill withdrew his not guilty plea and offered a conditional guilty plea to count one (11/02/2021 Minutes of Proceeding; Doc. 138, Page ID #: 1108). There was a plea agreement with a reservation of Mr. O'Neill's right to appeal certain issues:

PLEA(S) AND OTHER CHARGE(S)

> 11. Agreement to Enter Conditional Plea of Guilty. Pursuant to Criminal Rule 11(a)(2) of the Rules of Federal Criminal Procedure, Defendant agrees to plead guilty to Count One of the Indictment in this case, conditioned upon reservation of his right to appeal the denial of his motion to suppress (doc. 63), which ruling (doc. 79) incorporates by reference certain findings and orders set forth in other rulings made in this case which Defendant intends to appeal to the extent said rulings were replied upon in the ruling denying the aforementioned motion to suppress.
>
> (Id., Page ID #: 1111-1112).

On 8 July 2022, Mr. O'Neill changed his plea to count two to guilty, with the same reservation of appellate rights regarding suppression (07/08/2022 Minutes of Change of Plea Hearing; Doc. 150, Page ID #: 1185).

On 9 September 2022, Mr. O'Neill was sentenced to 192 months in prison followed by ten years of supervised release and sex offender registration (Doc. 155, Page ID #: 1350). The sentencing order was journalized on 9 September 2022 (Doc. 155, Page ID#: 1350). Mr. O'Neill filed his notice of appeal on 19 September 2022 (Doc. 159, Page ID#: 1394). It was from the judgments denying his motions to suppress that he timely appealed (Docs. 78, 79).

Jurisdiction was conferred on the United States Court of Appeals, Sixth Appellate Circuit, based on 28 U.S.C. §1291. On 29 February 2024, the Sixth Circuit Court of Appeals affirmed the decisions of the Trial Court. In a 2-1 decision, the majority held that the misrepresentations regarding access to child pornography on peer to peer networks were inadvertent and not material to the

probable cause determination. They held the search warrant affidavit contained enough additional facts to support a good faith belief that probable cause existed, precluding exclusion. The dissent found that the peer to peer misrepresentations were made with reckless disregard for the truth and were material to the probable cause determinations, that the remaining allegations in the affidavits fell far short of establishing probable cause, and that the good faith exception to the exclusionary rule did not apply.

Mr. O'Neill's Petition for Certiorari follows.

Reasons for Granting the Petition

Justice Clay provided this Court the reason to grant the petition. "The danger of this holding cannot be overstated." (U.S. v. O'Neill, App. A, p. 24). The lower court decision forgives both officers for a lack of basic knowledge of the law and absolves them of any accountability for the content of their probable cause affidavits. Search warrants like those here are issued and executed hundreds if not thousands of times every day. Intervention from this Court is necessary to reaffirm that U.S. v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) protects the efforts of the reasonably well trained officer exercising reasonable judgment. It was never intended to reward indifferent police work in the manner the Sixth Circuit did here. Affording good faith protection to the deficient search warrants in this case tells law enforcement throughout the Sixth Circuit that it does not matter what an affidavit claims as long as the proper process is followed. The Fourth Amendment demands more than that.

It has been many years since this Court took a focused look at U.S. v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), and its application. A lot has changed in the law enforcement world since Leon was decided in 1984. The evolution of computer technology, the emphasis on the acquisition and analysis of digital and electronic devices as evidence of crime, and the utilization of word processing programs to craft warrants and charging documents all contribute to the need to reevaluate what Leon expects of reasonably well trained officers and what constitutes a knowing or reckless misrepresentation in a probable cause affidavit

supporting a request for a search warrant. The right to be free from unreasonable government intrusion into a home represents the core protection of the Fourth Amendment. Silverman v. U.S., 365 U.S. 505, 511, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961). Given the hundreds of daily occurrences of search warrants requested and executed throughout the country and the uneven application of the good faith exception throughout appellate circuits, it is time for this Court to weigh in and provide uniformity of application this fundamental area of the law demands.

The last substantive examination of the good faith exception to the exclusionary rule by this Court was 13 years ago in Davis v. U.S., 564 U.S. 229, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011). Davis was limited in its holding to whether an officer is reasonable in relying on binding appellate precedent to conduct a search. Id., at 241, 131 S.Ct. 2419. In finding that the officers acted reasonably, the Davis court reemphasized that the deterrence benefits of exclusion are tied to the culpability of the law enforcement conduct at issue. Id., at 238, 131 S.Ct. 2419 (citing Herring v. U.S., 555 U.S. 135, 143, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009)). When police conduct is deliberate, reckless, or grossly negligent with respect to Fourth Amendment rights, the deterrent value of exclusion outweighs the resulting cost. Id., at 144, 129 S.Ct. 695. This seems straightforward enough, but the alarming degree of law enforcement forgiveness many courts believe it validates requires intervention from this Court.

In Davis, this Court assumed officers "will take care to learn 'what is required of them' under Fourth Amendment precedent and will conform their

conduct to these rules." Davis, supra, at 241, 131 S.Ct. 2419; Hudson v. Michigan, 547 U.S. 586, 599, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006). Clearly that did not occur here. The objective standard articulated in Leon "requires officers to have a reasonable knowledge of what the law prohibits." Leon, supra, at 919-920, 104 S.Ct. 3405. The probable cause affidavits here rely heavily on allegations of nudity with no additional description of what the images depict, or how they were acquired. "[D]epictions of nudity, without more, constitute protected expression." Osborne v. Ohio, 495 U.S. 103, 112, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990). In the Sixth Circuit, where the searches here occurred, "'mere nudity' is protected by the First Amendment - even where child pornography is involved." Mikesell v. Conley, 51 Fed.Appx. 496, 506 (6th Cir. 2002).

Both Officer Brian and Sergeant Barta claimed to be trained in this area of the law. The basic constitutional distinction between mere nudity and illegal images is fundamental, since it determines what is and is not legal.

> One might argue that the legal distinction between mere nudity and child pornography is not something that a reasonable law enforcement officer in Virginia should have known. However "[p]olice officers generally have a duty to know the basic elements of the laws they enforce." Kelly v. Borough of Carlisle, 622 F.3d 248, 258 (3rd Cir. 2010). Without anything more than a description of the photographs as depicting "nude children," there were arguably insufficient indicia of probable cause to justify reasonable reliance on a warrant authorizing a search for child pornography. Insofar as possessing nude pictures of children is not per se illegal, reasonable officers should at least obtain a description of the photographs before relying on them to justify entry into a residence.

U.S. v. Doyle, 650 F.3d 460, 473-474 (4th Cir. 2011).

This directive should apply with equal force in the Sixth Circuit. The Doyle court confirmed what is obvious: a reasonably well trained officer in this area of law enforcement knows nudity alone is insufficient to establish probable cause to search for child pornography. Not only do the probable cause affidavits here fail to allege anything other than "mere nudity," the record does not reflect that either officer even asked what the images depicted. The reasonably well trained officer also knows that an affidavit averring only nudity lacks probable cause, is facially deficient, and would never rely on it. The reasonably well trained officer illustrated in Leon knows the basic elements of the crime he or she is investigating.

Having determined that photographs of children depicting mere nudity, without more, is constitutionally protected, it is incumbent on this Court to protect it. Material protected by the First Amendment cannot, standing alone, provide a basis to issue a search warrant. As the dissent below points out, the other items found by Mr. O'Neill's son in the Bairdstown Road barn and used by Sergeant Barta to try to establish probable cause do not establish anything. All of the items were legal to possess (App. A, p. 19, n. 2). Without input from this Court, there is now Circuit precedent for the proposition that legally possessed images protected by the First Amendment provide probable cause to search for evidence of a crime.

Lack of knowledge of the law they seek to enforce is not the only deficiency forgiven by the majority below. Reckless misrepresentations of material facts and systemic disregard for accuracy of affidavit content make the conduct of the officers

here unworthy of good faith protection.

Under oath, Officer Brian told the issuing judge that Mr. O'Neill had "child pornography available on a P2P network . . ." (Doc. 12-1, Page ID#: 36). Sergeant Barta submitted an affidavit with the same false allegation (Doc. 68-1, Page ID#: 504). Her disregard for accuracy is compounded because she knew in advance of drafting the affidavit that the peer to peer allegation was unsubstantiated, but left it in anyway (Doc. 68-2, Page ID#: 515).

Given the scarcity of other facts to justify the search, the materiality of this misrepresentation cannot be minimized. The relationship between peer to peer file sharing and the exchange of child pornography, and its weight in the probable cause determination, is well established in the Sixth Circuit. U.S. v. Dunning, 857 F.Ed.3d 342, 346-348 (6th Cir. 2017). This misrepresentation artificially criminalizes otherwise legal conduct and provides the only basis for a finding of probable cause.

The majority below excused this misrepresentation as an exercise in innocent inadvertence, unintended to influence the issuing judge, and relieves both officers of any accountability for their considerable carelessness in knowledge and craftsmanship. The police want to search a house without the owner's consent. The standard needs to be higher than the ground level bar set by the Sixth Circuit. The majority below hopefully asserts that the allegation of peer to peer access did not affect the decision to issue the warrant. The opposite is likely the case. It is more reasonable to conclude both issuing judges knew nudity alone did not provide

probable cause, but in conjunction with the peer to peer assertion, found probable cause. As Justice Clay's dissent notes, the majority's attempt to minimize the materiality of this false statement challenges reality.

Reckless disregard for the truth is the only explanation for the inclusion of this false material allegation in the affidavits. Officer Brian repeated this false allegation in three other search warrants, giving rise to the inference that he did not read any of them before submitting them to a judge (Doc. 60, Page ID#: 423-424). Sergeant Barta failed to excise from her affidavit a material allegation she knew was false. Her explanation for this double episode of "inadvertence" makes little sense. If she saw the peer to peer allegation when she was copying and pasting, it should have been deleted then (Doc. 68-2, Page ID#: 515). Given the sloppiness of the police work, Justice Clay is correct in saying "The inquiry cannot simply end with a contention that Sergeant Barta's mistakes were unintentional." (App. A, p. 20). She knew it was wrong and left it in anyway. The sum of the inadvertence argument is that these officers are unaware of both the applicable law and the content of their sworn affidavits, yet the Sixth Circuit rewarded them with good faith protection.

The inclusion of the allegation of accessing child pornography through a peer to peer network is a specific instance of the larger problems of warrant applications constructed by copying and pasting portions of a template. This occurs thousands of times a day. The decision below absolves the officers of any responsibility for actual accuracy, as if cutting and pasting itself satisfies any need for accuracy or

applicability. It is, as Justice Clay said, a dangerous holding.

This case presents an excellent opportunity for the Court to reaffirm that good faith protection from exclusion is limited to objectively reasonable police conduct. There was not enough of that here to warrant good faith protection. Requiring that an officer know the law he or she seeks to enforce and be accountable for the accuracy of the content of the probable cause affidavit is the baseline of the reasonably well trained officer envisioned in Leon. The good faith exception was never intended to reward dilatory police work. Leaving intact the holding below invites the intrusive abuses the Fourth Amendment was framed to prevent. It sends the message that no amount of law enforcement carelessness is too much. The Fourth Amendment demands more than that.

Conclusion

The good faith exception to the exclusionary rule was not intended to excuse sloppy police work. The decision of the Sixth Circuit absolves officers of the responsibility to know the law they seek to enforce and ensure the accuracy of probable cause affidavits. Mr. O'Neill respectfully requests this Court grant his Petition.

Respectfully submitted,

/s/ David Klucas
David Klucas
Attorney for Petitioner
Charles Brian O'Neill

Certification

This shall certify that a copy of the forgoing was sent this 12th day of July, 2024 to Ms. Elizabeth B. Prelogar, Solicitor General, United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington, D.C., 20530.

/s/ David Klucas
David Klucas

APPENDIX A

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 24a0042p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES BRIAN O'NEILL,

Defendant-Appellant.

No. 22-3793

Appeal from the United States District Court for the Northern District of Ohio at Toledo.
No. 3:18-cr-00178-1—James R. Knepp II, District Judge.

Argued: October 19, 2023

Decided and Filed: February 29, 2024

Before: SUTTON, Chief Judge; CLAY and LARSEN, Circuit Judges.

COUNSEL

ARGUED: David Klucas, Toledo, Ohio, for Appellant. Frank H. Spryszak, UNITED STATES ATTORNEY'S OFFICE, Toledo, Ohio, for Appellee. **ON BRIEF:** David Klucas, Toledo, Ohio, for Appellant. Tracey Ballard Tangeman, UNITED STATES ATTORNEY'S OFFICE, Toledo, Ohio, for Appellee.

LARSEN, J., delivered the opinion of the court in which SUTTON, C.J., joined. CLAY, J. (pp. 15–24), delivered a separate dissenting opinion.

OPINION

LARSEN, Circuit Judge. Charles O'Neill was charged with sexually exploiting a minor and receiving or distributing child pornography. He pleaded guilty to both charges but reserved

the right to appeal the district court's denial of his motion to suppress. For the following reasons, we AFFIRM the judgment of the district court.

I.

A.

In February 2018, Charles O'Neill's wife and son notified the Fostoria Police Department that they had each recently observed large numbers of photographs of nude and partially nude minor boys on O'Neill's phone and iPad. O'Neill's son reported to police that he first noticed photos of nude boys between five and fourteen years of age while O'Neill's phone was lying on a counter charging. He "looked further into the phone" and saw more photos of "young boys in varying states of nudity" in an album of saved photographs. R. 12-1, PageID 34. He stated that on a separate occasion, he looked through O'Neill's iPad and observed photographs of nude boys ranging in age from under five to seventeen. O'Neill's wife stated that her son informed her that he had "observed obscene photographs of young male children on his father's cellular phone." *Id*. O'Neill's wife then looked through O'Neill's phone herself and found two albums, one containing "over one thousand images" of young boys ranging in age from two to ten in varying states of nudity. *Id.*

After receiving the complaint from O'Neill's wife and son, Fostoria Police Officer Cory Brian sought a warrant to search O'Neill's home in Fostoria, Ohio, and to seize computers, phones, notebooks, and other items that could contain evidence of state crimes involving sexually explicit depictions of minors. Officer Brian provided an affidavit in support of the warrant in which he stated that "a report was received . . . about a citizen possessing pornographic material involving a minor." *Id.* at 33. He recounted the substance of the complaint as described above, and he detailed his "knowledge, experience, and training in child exploitation and child pornography investigations," describing "certain characteristics common to individuals involved in the receipt and collection of child pornography." *Id.* at 34–35. Based on collectors' "tend[ency] to maintain their collections at a secure, private location for long periods of time, and based on the fact that [O'Neill] had child pornography available on a [peer-to-peer] network," Officer Brian stated that "there is probable cause to believe that evidence of

the offenses of distributing, receiving and possessing child pornography is currently located" at O'Neill's home in Fostoria, Ohio. *Id.* at 36. Based on this affidavit, a municipal court judge issued a warrant directing the police to search O'Neill's residence and to seize computers, phones, notebooks, or other items believed to be evidence of violations of ORC § 2907.321 (pandering obscenity involving a minor), ORC § 2907.322 (pandering sexually oriented material involving a minor), or ORC § 2907.323 (illegal use of a minor in nudity-oriented material or performance).

Because the police were aware that O'Neill often carried firearms, two officers traveled to O'Neill's home to detain him prior to the warrant's execution. After Officer Brian arrived and began to search the house, the detaining officers removed a cell phone that was visible in O'Neill's front shirt pocket. Forensic technicians reviewed the phone and identified what they believed to be child pornography and child erotica. Officer Brian then placed O'Neill under arrest on state pandering charges and transported him to a police facility for questioning. An iPad retrieved from the house was also sent for forensic analysis, and the investigating agent identified 7,791 images, "[m]ost" of which "appear[ed] to be of partially clothed prepubescent males," including "multiple images of child pornography, mostly of prepubescent males, with the focus of the image on the child's genitals." R. 15-1, PageID 62.

The day after the search of the house, O'Neill's son, on his own initiative and accompanied by his aunt and a friend, traveled to a barn owned by O'Neill, seeking to secure weapons they believed O'Neill stored there. They entered a room in the barn that O'Neill kept off limits to anyone else and found "a computer tower with monitor, computer discs, blank and used discs, vibrators and other sex toys, condoms, and children's clothing and 'costumes,'" along with "approximately fifteen firearms." R. 68-1, PageID 502. O'Neill's wife and son notified the Fostoria Police Department of the items found in the barn.

Because the barn was in Wood County, outside the jurisdiction of Fostoria police, officers contacted the Wood County Sheriff's Office to brief them on the situation. Sergeant Ginnie Barta of the Wood County Sheriff's Office obtained a search warrant for the barn. Her affidavit in support of the warrant reproduced much of the language in Officer Brian's earlier affidavit but also added information from O'Neill's son about his discoveries of computer

equipment and discs along with children's clothing and costumes, sex toys, condoms, and guns in a private room at the barn. The next day, officers executed the search warrant on the barn. They seized a computer, camcorder, camera, digital storage devices, miscellaneous clothing, and a vibrator. They also observed several firearms, sexual paraphernalia, latex gloves, lubricant, "'Speedo' type underwear," "satin type one-piece outfits," "men's white brief style underwear," fecal-stained sweatpants, and four vials of Promethazine, an antihistamine that can also be used for sedation. R. 68-3, PageID 524; R. 157, PageID 1367. Forensic analysis of the electronics and digital evidence revealed videos and images of child pornography and child erotica, including depictions of young boys masturbating and performing oral sex.

Subsequent forensic examination of a DVD found in the barn revealed multiple child pornography videos produced by O'Neill. In one of these videos, O'Neill is seen fondling an eleven-to-thirteen-year-old boy's genitals and performing oral sex on him. The victim, J.M., was later identified and told law enforcement officers that O'Neill had abused him over a period of roughly six years, including by attempting anal sex with him, requiring him to perform oral sex on O'Neill, and taking sexually explicit photos of him naked. J.M. stated that O'Neill would download depictions of his abuse to a computer and display the images on the screen.

B.

A federal grand jury indicted O'Neill for sexually exploiting a minor in violation of 18 U.S.C. § 2251(a) based on his abuse of J.M., and for receiving or distributing child pornography in violation of 18 U.S.C. § 2252(a)(2) based on the hundreds of child pornography images found on his electronics and digital storage devices.

After his indictment, O'Neill filed several motions to suppress. Two are relevant here. His October 2019 motion requested a *Franks* hearing to evaluate allegedly false statements in Officer Brian's affidavit supporting the first search warrant. *See Franks v. Delaware*, 438 U.S. 154, 155–156 (1978). The motion also asked the court to suppress evidence found at his home on the ground that the affidavit failed to establish probable cause. His February 2020 motion made the same requests in relation to Sergeant Barta's affidavit, which was used to support the warrant to search the barn in Wood County.

The district court denied both motions for identical reasons. On the *Franks* issue, the court found that the Brian and Barta affidavits contained false statements. But the court determined that the officers had not knowingly or recklessly misled the issuing magistrate. As to the existence of probable cause to support the warrants, the district court concluded that probable cause was lacking. The court reasoned that, under the Supreme Court's decision in *New York v. Ferber*, 458 U.S. 747, 764–65 (1982), "nude, or partially nude photos, even of children," are not, without more, "pornography." R. 78, Order, PageID 559; *see also Osborne v. Ohio*, 495 U.S. 103, 114 n.11 (1990). The court stated that "nothing in the affidavit[s] indicate[d] that any of [O'Neill's] . . . images depict[ed] lewd or lascivious exhibitions or [a] graphic focus[] on the boys' genitals," which would meet the Court's definition of child pornography. R. 78, Order, PageID 560. And the conclusory assertion at the beginning of Officer Brian's affidavit that police had received a report "about a citizen possessing pornographic material involving a minor" did not create probable cause to believe "that what [O'Neill] possesse[d] [wa]s child pornography." *Id.*; R. 12-1, PageID 33. The district court's consideration of the Barta affidavit did not mention its discussion of the computer equipment and discs, children's clothing and costumes, sex toys, condoms, and guns O'Neill's son had found in a private room at the barn.

Although the district court determined that the warrants were not supported by probable cause, the court concluded that the good-faith exception articulated in *United States v. Leon*, 468 U.S. 897 (1984), justified the officers' objectively reasonable reliance on the warrants' "apparent validity." R. 78, Order, PageID 562. Accordingly, the court declined to suppress the evidence found in the house and the barn.

With his motions denied, O'Neill conditionally pleaded guilty to the § 2251(a) and § 2252(a)(2) offenses. The district court sentenced him to 192 months' imprisonment on each count, to run concurrently. O'Neill timely appealed.

II.

Before turning to the merits, we consider what issues O'Neill preserved for appeal through his conditional guilty pleas. Both plea agreements contain identical language reserving O'Neill's "right to appeal" the district court's denial of his February 2020 "motion to suppress

(doc. 63), which ruling (doc. 79) incorporates by reference certain findings and orders set forth in other rulings made in this case which Defendant intends to appeal to the extent said rulings were relied upon in the ruling denying the aforementioned motion to suppress." R. 138, PageID 1111–12; R. 150, PageID 1188. The cited documents refer to the motion to suppress evidence obtained from the barn and to the district court's denial of that motion, respectively. Neither plea agreement contains a provision reserving O'Neill's right to appeal the denial of the October 2019 motion to suppress evidence found in the house.

Rule 11(a)(2) of the Federal Rules of Criminal Procedure sets out the procedures for entering a conditional guilty plea. The rule states that, with consent of the government and the court, a defendant may "enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a *specified pretrial motion*." Fed. R. Crim. P. 11(a)(2) (emphasis added). As we have recognized, a conditional guilty plea "represent[s] an exception to the general rule that a guilty plea waives all non-jurisdictional defects in the pre-plea proceedings." *United States v. Herrera*, 265 F.3d 349, 351 (6th Cir. 2001) (citing *Tollett v. Henderson*, 411 U.S. 258, 267 (1973)). If Rule 11(a)(2)'s requirements are not satisfied, the normal rules concerning the effects of a guilty plea apply: "a guilty plea represents a break in the chain of events" and extinguishes the defendant's right to "raise independent claims" relating to events "that occurred prior to the entry of the guilty plea." *Tollett*, 411 U.S. at 267.

O'Neill did not reserve the right to appeal the district court's ruling denying his motion to suppress the evidence found in the house. Although the reservation-of-rights provisions in his plea agreements refer to "other rulings" apart from the barn ruling, those provisions explicitly reserved the right to appeal any such "findings and orders" only "to the extent" they "were relied upon in the ruling denying" the motion to suppress the evidence found in the barn. R. 138, PageID 1111–12; R. 150, PageID 1188. Accordingly, O'Neill may contest the reasoning contained in the order denying his motion to suppress evidence found in the house only to the extent that it was incorporated into and relied upon in the barn ruling. *See United States v. Ormsby*, 252 F.3d 844, 848 (6th Cir. 2001) (defendant's conditional guilty plea waived right to

appeal any issues not specifically identified in the plea); *United States v. Napier*, 233 F.3d 394, 399 (6th Cir. 2000) (same).

III.

The Fourth Amendment requires warrants to be supported by probable cause. To enforce this requirement, "the Supreme Court created the exclusionary rule." *United States v. Moorehead*, 912 F.3d 963, 967 (6th Cir. 2019). The Court has made clear that the "sole purpose" of this rule "is to deter future Fourth Amendment violations." *Davis v. United States*, 564 U.S. 229, 236–37 (2011). And because exclusion "exacts a heavy toll on both the judicial system and society at large," it is only appropriate where "the deterrence benefits of suppression . . . outweigh its heavy costs." *Id.* at 237; *see also Utah v. Strieff*, 579 U.S. 232, 237–38 (2016) ("Suppression of evidence . . . has always been our last resort, not our first impulse." (alteration in original) (citation omitted)). Thus, even when a warrant is later found to be invalid for want of probable cause, the fruits of the search will not be suppressed unless the executing officers' reliance on the warrant was not objectively reasonable. *Moorehead*, 912 F.3d at 967. The Supreme Court recognized this "good faith" exception to the exclusionary rule in *United States v. Leon*, 468 U.S. 897, 920 (1984) (explaining that there is normally no deterrent effect "when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope").

The district court's application of the good-faith exception presents a legal question, which we review de novo. *United States v. McCoy*, 905 F.3d 409, 415 (6th Cir. 2018). But we defer to the district court's findings of fact unless they are clearly erroneous. *Id.*

Reliance on "'a warrant issued by a magistrate normally suffices to establish' that a law enforcement officer has 'acted in good faith in conducting the search.'" *Leon*, 468 U.S. at 922 (quoting *United States v. Ross*, 456 U.S. 798, 823 n.32 (1982)). That is "because any error in deciding whether probable cause exists for the search warrant belongs primarily to the *magistrate* issuing the warrant, not the *officer* seeking it." *United States v. Baker*, 976 F.3d 636, 647 (6th Cir. 2020) (citing *Davis*, 564 U.S. at 239). "And the 'officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the

warrant is technically sufficient.'" *Id*. (quoting *Leon*, 468 U.S. at 921). So evidence obtained in reliance on a warrant ordinarily will not be suppressed.

There are four exceptions, however. Exclusion remains appropriate where: (1) the issuing magistrate was deliberately or recklessly misled by an affiant; (2) the issuing magistrate "wholly abandoned" the judicial role; (3) the affidavit was "bare bones," or "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; or (4) the warrant was "so facially deficient" that the officers could not "reasonably presume it to be valid." *Leon*, 468 U.S. at 923; *see also United States v. Hines*, 885 F.3d 919, 926–27 (6th Cir. 2018). O'Neill contends that all but the second exception applies here, but we agree with the district court that none applies.

With respect to the first circumstance, O'Neill contends that Sergeant Barta knowingly or recklessly misled the issuing magistrate by stating in her affidavit that O'Neill had access to a peer-to-peer network of child pornography. Officer Brian included this statement in his affidavit, though it was unsupported by the complaint he had received, and Sergeant Barta subsequently incorporated it into her own affidavit. But the district court accepted the officers' explanations for this error.[1] The court found that Officer Brian had copied and pasted this material from a template affidavit and mistakenly forgot to delete it. And the court noted that it had viewed the earlier warrant that Officer Brian had used as a template. When Sergeant Barta composed her affidavit, the court concluded, she largely "piggyback[ed]" on the Brian affidavit. R. 79, Order, PageID 566–67. She stated that, in the course of "cutting and pasting" from the Brian affidavit, "she inadvertently failed to delete" the phrase, and she emphasized that she did not "deliberately" leave it in "to bolster probable cause." R. 68-2, PageID 515. The district court did not clearly err in crediting this account and finding that neither Officer Brian nor Sergeant Barta had knowingly or recklessly included the reference to the peer-to-peer network in their affidavits. *See United States v. Colquitt*, 604 F. App'x 424, 430 (6th Cir. 2015). Indeed,

[1]Officer Brian's affidavit also mistakenly stated that O'Neill had prior convictions for insurance fraud and theft. In fact, O'Neill had only been charged with those crimes. This mistake was not repeated in the Barta affidavit, which led to the search of the barn, and O'Neill makes no argument about this issue on appeal. In any event, the district court accepted Officer Brian's explanation that this mistake was inadvertent, and the court also considered it to be immaterial.

based on the location of this material within the affidavits (in boilerplate sections that appear to be copied from templates), and with no evidence to contradict the officers' declarations, this was an entirely plausible factual finding. On the facts as found by the district court, Sergeant Barta's error represents no more than an incident of "'isolated' negligence," *United States v. Kinison*, 710 F.3d 678, 685 (6th Cir. 2013), not the "knowing . . . falsity" or "reckless disregard for the truth" that the exclusionary rule is designed to deter, *United States v. Hammond*, 351 F.3d 765, 773–74 (6th Cir. 2003); *see also id.* at 774 (distinguishing "the remarkable inaccuracies" in the affidavit at issue, which "reflect[ed], at the very least, a reckless disregard for the truth," from "case[s] in which an officer made a small error in the affidavit").

Our dissenting colleague concludes that Sergeant Barta's error was reckless because she "copie[d] and paste[d] from another document" without "ensur[ing] that the copied information applie[d] to the present case." Dissenting Op. at 20. But, as the dissent acknowledges, Sergeant Barta did take steps to ensure that the copied information applied to her request for a warrant for the barn—she "simply fail[ed] to catch" the error "while proofreading." *Id.* at 21. And the law does not deem an officer reckless whenever she includes inaccurate information in her affidavit, even despite having made efforts to ensure her affidavit's accuracy.

The recklessness standard—which we have taken from First Amendment libel law—asks whether the affiant "in fact entertained serious doubts as to the truth of the affidavits or had obvious reasons to doubt the accuracy of the information contained therein." *United States v. Cican*, 63 F. App'x 832, 835–36 (6th Cir. 2003) (quoting *United States v. Johnson*, 78 F.3d 1258, 1262 (8th Cir. 1996)); *see also United States v. Bateman*, 945 F.3d 997, 1008 (6th Cir. 2019); *United States v. Williams*, 737 F.2d 594, 602 (7th Cir. 1984). This standard goes to the officer's "knowledge or state of mind at the time the officer wrote the allegedly false affidavit." *Butler v. City of Detroit*, 936 F.3d 410, 420 (6th Cir. 2019). But the dissent does not provide a sound reason to conclude that Sergeant Barta consciously harbored doubts about the accuracy of her affidavit. Indeed, as the dissent points out, it is clear that Sergeant Barta proofread the copied sections of her affidavit: she changed the address of the search location at two places in the affidavit within a few lines of the peer-to-peer network allegation. *See* Dissenting Op. at 21. In other words, the dissent recognizes that Sergeant Barta took steps to ensure the accuracy of

the information she copied and pasted from Officer Brian's affidavit. Of course, it turns out that her efforts were imperfect, and she failed to delete the peer-to-peer network allegation. But the dissent's only factual basis for labeling the district court's finding of negligence clearly erroneous is precisely the fact that she *did* take care to check her work. This is far from evidence of "a culpable mental state." *Butler*, 936 F.3d at 421. In effect, the dissent's rule would impose strict liability for inaccuracies in an affidavit: even an officer's reasonable care in checking the accuracy of her affidavit would not save the affidavit from being deemed reckless and thus beyond the scope of the good-faith exception.

We have recognized mistakes similar to Sergeant Barta's as negligent in the past. In *Colquitt*, the affidavit described five controlled buys by a confidential informant. 604 F. App'x at 426. The affiant officer completely misdescribed one of these buys after copying a description from an earlier portion of the affidavit and pasting it in the wrong place. *Id.* at 427–28. As a result, the affidavit described the events in a manner that was false and that the officer would have known to be false had she caught the error. But we declined to disturb the district court's finding that the officer's mistake was the result of negligence and not recklessness. *Id.* at 429–30. Similarly, the affidavit in *Butler* made a false (indeed, factually impossible) assertion: the affiant officer stated that he observed events at a "target location" while parked at an address eight miles away. 936 F.3d at 415, 421. This was obviously an inaccurate statement, but we concluded that there had been "no showing" that the officer made it recklessly. *Id.* at 421. Rather, the officer testified that he had accidentally mis-defined the "target location" in his affidavit; the "target location" should have been defined as an address on the same street as where he was parked during his observations. *Id.* at 421–22. He had simply confused three addresses when he composed the affidavit because they were all involved in the same investigation, and we declined to "infer a culpable state of mind" of recklessness from this error. *Id.* at 422. And in *United States v. Thomas*, we affirmed the district court's denial of a suppression motion despite the fact that the affidavit misstated the defendant's criminal history. 852 F. App'x 189, 195, 199 (6th Cir. 2021). The affidavit stated that he had been arrested for possession of cocaine, but the prior arrest was actually for possession of marijuana. *Id.* at 194. We concluded that there was no evidence that this "typographical error" was "anything other than a negligent error." *Id.* at 193–94. *See also United States v. Brown*, 732 F.3d 569, 575

(6th Cir. 2013) (observing that an affiant's admission that he "typed [the affidavit] up wrong"—to include an allegedly false statement about a person's presence—"merely show[ed] that [the affiant] was negligent"); *United States v. Thomas*, 263 F.3d 805, 807–09 (8th Cir. 2001) (due to a typographical error, the warrant identified the place to be searched using the defendant's previous address, but the good-faith exception applied); *United States v. Howard*, 2023 WL 2966032, at *2 (9th Cir. Apr. 17, 2023) (conclusory allegations that "typographical errors were deliberate or reckless" were insufficient to obtain a *Franks* hearing).

O'Neill next argues that the affidavit was "bare bones," or so lacking in indicia of probable cause that an officer could not reasonably have believed that probable cause existed. On this point, the question is "whether the affidavit was so skimpy, so conclusory, that anyone looking at the warrant would necessarily have known it failed to demonstrate probable cause." *United States v. Asgari*, 918 F.3d 509, 513 (6th Cir. 2019). A bare-bones affidavit "merely 'states suspicions, or conclusions, without providing some underlying factual circumstances regarding veracity, reliability, and basis of knowledge.'" *United States v. Christian*, 925 F.3d 305, 312 (6th Cir. 2019) (en banc) (quoting *United States v. Washington*, 380 F.3d 236, 241 n.4 (6th Cir. 2004)). We will not label an affidavit "bare bones" unless it is "woefully deficient." *Id.* The "designation ought to be reserved" for affidavits that are "short, conclusory, and self-serving." *Id.* at 313.

Sergeant Barta's affidavit was not bare bones. It contained more than conclusory claims of criminal conduct and was far from devoid of factual support. *See Baker*, 976 F.3d at 647 (explaining that "a search warrant is not bare bones . . . if it contains 'some modicum of evidence'" connecting the place to be searched with the criminal activity at issue (citation and internal quotation marks omitted)). Contrary to O'Neill's assertion, the affidavit did not "aver[] *only* nudity." Appellant's Br. at 22 (emphasis added). To begin, it described an immense collection of images, saved in dedicated albums, that contained uniform subject matter—nude or partially nude young boys. O'Neill's son described these pictures as "obscene." R. 68-1, PageID 502. O'Neill's wife and son were sufficiently alarmed by this collection that they promptly notified authorities, giving rise to the inference that these were not innocent family pictures. *Cf. Osborne*, 495 U.S. at 112 n.9 (noting that a parent's sharing of a photo of an

unclothed infant with a family friend is constitutionally protected conduct); *Mikesell v. Conley*, 51 F. App'x 496, 502–03 (6th Cir. 2002) ("[T]he First Amendment protects nudity that involves no exploitation of children—as, for example, where a parent innocuously photographs his or her naked infant . . . ."). And as the district court found, the affidavit established that O'Neill "was undoubtedly a 'collector'" of an immense trove of images. R. 78, Order, PageID 559. This characteristic would have suggested to an officer that O'Neill fit the mold of a child pornography offender, which the affidavit described in some detail. *Cf. United States v. Clark*, 668 F.3d 934, 939 (7th Cir. 2012) ("Boilerplate language about the tendencies of child pornography collectors supports probable cause for a search when the affidavit also includes facts that suggest that the target of the search 'has the characteristics of a prototypical child pornography collector.'" (quoting *United States v. Prideaux-Wentz*, 543 F.3d 954, 960 (7th Cir. 2008))).

Moreover, although the district court did not discuss these facts, Sergeant Barta's affidavit also described what O'Neill's son found in a private room in his father's barn: "a computer tower with monitor, computer discs, blank and used discs, vibrators and other sex toys, condoms, and children's clothing and 'costumes,'" as well as "approximately fifteen firearms." R. 68-1, PageID 502. Because the district court did not consider the significance of these items, we cannot know how these facts, combined with the cache of photos of naked children found on O'Neill's phone, might have affected its probable-cause analysis. But there is no doubt that Sergeant Barta's affidavit contained enough factual material to support a good-faith belief that probable cause existed. *See United States v. White*, 874 F.3d 490, 497 (6th Cir. 2017) ("An affidavit cannot be labeled 'bare bones' simply because it lacks the requisite facts and inferences to sustain the magistrate's probable-cause finding . . . ."); *id.* at 500 ("[R]easonable inferences that are not sufficient to sustain probable cause . . . may suffice to save the ensuing search as objectively reasonable."). The affidavit was not bare bones.

Finally, O'Neill claims throughout his brief that the warrant was facially deficient, but he makes no independent argument on this point. Rather, this seems to be a variation of his claim that the warrant lacked any indicia of probable cause. In any event, the warrant was not facially deficient: it described the suspected crimes, "the place to be searched," and "the things to be seized." *Leon*, 468 U.S. at 923.

In sum, the district court correctly applied the good-faith exception and properly denied O'Neill's motion to suppress. The officers' reliance on the warrant to search O'Neill's barn was objectively reasonable, and suppression of the fruits of the search would not serve the purposes of the exclusionary rule.

IV.

Because we conclude that the officers relied on the warrant in good faith, we need not decide whether the warrant was supported by probable cause. In light of the dissent's characterization of the factual record, however, we offer some clarifying observations on the matter. Contrary to the dissent's claims, Sergeant Barta's misstatement about the peer-to-peer network was not "the only non-conclusory statement linking O'Neill to 'child pornography' in the entire affidavit." Dissenting Op. at 19. Rather, as we have already explained, Sergeant Barta's affidavit recounted credible reports not only that O'Neill possessed over one thousand digital images of nude or partially nude minor boys but also that O'Neill maintained a private room in his barn, in which his son found computer equipment and discs along with sex toys, children's costumes and clothing, condoms, and firearms.

In the face of these facts, we would be hard-pressed to say that probable cause did not support the search of the barn. Recall that a finding of probable cause "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *District of Columbia v. Wesby*, 583 U.S. 48, 57 (2018) (quoting *Illinois v. Gates*, 462 U.S. 213, 243–44 n.13 (1983)). "In determining probability, officers and magistrates may rely on 'common-sense conclusions about human behavior.'" *United States v. Tagg*, 886 F.3d 579, 585 (6th Cir. 2018) (citation omitted).

Whatever the significance of any of O'Neill's secret items or images in isolation, when "considered *together*," as they must be, *id.* at 586, they would likely establish a "substantial basis for concluding that a search would uncover evidence of wrongdoing," *Gates*, 462 U.S. at 236 (cleaned up). O'Neill's possession of a large cache of digital photos of naked boys, combined with his secret store of children's costumes, condoms, vibrators, and sex toys, could support the strong inference that O'Neill had a sexual interest in children and that he either had acted or

planned to act on that interest. *See, e.g.*, *Clark*, 668 F.3d at 939 (a "demonstrable sexual interest in children" is relevant to probable cause). These physical items were found in the same private room in the barn that also contained a computer, a monitor, and blank and used computer discs. One could therefore draw the common-sense inference that there was "a fair probability that contraband or evidence of a crime" would be found in the barn and, in particular, on the computer equipment and discs stored in the private room. *Gates*, 462 U.S. at 238.

Thus, even if we shared the dissent's view of Sergeant Barta's state of mind, we likely would conclude that the district court's denial of the suppression motion was proper. Under the framework outlined in *Franks*, a court must excise a recklessly or deliberately false statement and determine whether the officer's affidavit would establish probable cause without it. *See Franks*, 438 U.S. at 171–72. Here, that conclusion seems easy, even setting aside the allegation about a peer-to-peer network. But because the district court rightly concluded that the good-faith exception applies, we can rest our holding there.

* * *

We AFFIRM the judgment of the district court.

DISSENT

CLAY, Circuit Judge, dissenting. The search warrant at issue contained a false statement linking O'Neill to child pornography, and, on appeal, the government does not contend that any other statements in the affidavit provided probable cause for a search warrant. The majority nevertheless affirms the district court's clearly erroneous factual findings and concludes that the inclusion of this false statement—the only non-conclusory statement linking O'Neill to child pornography in the affidavit—was mere negligence because it was copied from another unrelated-case affidavit. But the majority does not explain why using another affidavit as a template excuses the officers from proofreading and excising false information before it is submitted to a magistrate. To the contrary, this represents precisely the type of reckless disregard for the truth that the Fourth Amendment prohibits. Because this recklessly false statement was the only factual representation of child pornography possession in the affidavit, the warrant was deficient and cannot be saved by the good-faith exception. Because I would reverse the denial of O'Neill's motion to suppress, I respectfully dissent.

I. BACKGROUND

The problems with the majority's approach are best understood by a review of the circumstances surrounding the issuance of the two relevant warrants in this case. O'Neill's wife and son reported to the Fostoria Police Department that they had viewed photos of nude young men on O'Neill's phone. After receiving this report, Officer Cory Brian prepared an affidavit to accompany a search warrant for O'Neill's home based on the belief that the information provided probable cause that O'Neill violated Ohio's child pornography laws. The affidavit recounted statements made by O'Neill's wife and son that they had seen photos of nude young boys on O'Neill's phone, and included boilerplate information describing how child pornographers tend to collect child pornography. Amidst this boilerplate language, the affidavit inaccurately stated that "based on the fact that the user had child pornography available on a P2P network," meaning a peer-to-peer network, "there is probable cause to believe that evidence of

the offenses" was available at O'Neill's home. First Search Warrant, R. 12-1, Page ID #36. This statement, as Officer Brian later explained in a declaration under the penalty of perjury, was false, as the police had no information that O'Neill used a peer-to-peer network for child pornography. Officer Brian claimed that he had included the sentence "inadvertently" because he had copied and pasted the information from a template warrant and failed to change it before submitting the warrant to a judge. Brian Decl., R. 47-1, Page ID #375–76.

After officers searched O'Neill's home pursuant to this signed warrant, O'Neill's wife reported to the Fostoria Police Department that her son had discovered a number of items in a locked room only accessible to O'Neill in his barn. Because the barn was located outside of their jurisdiction, Fostoria Police advised the Wood County Sheriff's Office of the report, and Detective Sergeant Ginnie Barta prepared a search warrant to search the barn. This warrant recited the same facts contained in the first search warrant, as well as the discovery of the items in O'Neill's barn. Because Sergeant Barta copied and pasted from the first affidavit to create her own affidavit, the warrant contained the same false statement that O'Neill possessed child pornography on a peer-to-peer network.

After a grand jury indicted O'Neill for sexually exploiting a minor in violation of 18 U.S.C. § 2251(a) and for receiving or distributing child pornography in violation of 18 U.S.C. § 2252(a)(2), O'Neill filed multiple motions to suppress evidence. Two of these motions—those contesting whether the warrant to search the house and the warrant to search the barn contained probable cause—are relevant on appeal.[1] The district court denied both motions. In a written order addressing the motion to suppress the evidence recovered from O'Neill's home, the court acknowledged the government's concession that the statement in the affidavit relating to possession of child pornography on a peer-to-peer network was false. It nevertheless concluded that, because the affiant represented that this inclusion resulted from his use of a template to draft his affidavit in this case, it was not a knowing or reckless misstatement. Notwithstanding the

[1]Although, on appeal, O'Neill attempts to challenge the denial of his motion to suppress evidence recovered from his home, as the majority opinion correctly concludes, the reservations of appeal rights in his plea agreements only extend to the motion to suppress evidence discovered in the barn. Even still, the district court incorporated its reasons for denying the motion to suppress evidence discovered in the home into its denial of the motion to suppress evidence discovered in the barn. Accordingly, the same analysis applies to both orders, even if only one has been properly preserved for appellate review.

government's own acknowledgement of the statement's falsity, the court went on to conclude that there was "in all likelihood nothing false" about the peer-to-peer network statement because it took judicial notice of other court records in child pornography cases that purportedly show that child pornography collectors "universally . . . use P2P file sharing sites." Order, R. 78, Page ID #556.

The district court also concluded that the false statement "could not have affected the decision to issue the warrant" because of the other information before the magistrate, and because what mattered to the probable cause inquiry was that "a cache of . . . contraband" was found on Defendant's electronic devices, not whether it came to be there via a peer-to-peer network. *Id.* Nevertheless, the court found that the rest of the information in the affidavit did not establish probable cause because it only referenced nude photos of children, which, unlike child pornography, receive First Amendment protection under long-standing Supreme Court precedent. *See New York v. Ferber*, 458 U.S. 747, 764–65, 765 n.18 (1982); *see also Osborne v. Ohio*, 495 U.S. 103, 112 (1990) ("[D]epictions of nudity, without more, constitute protected expression."). Despite the lack of probable cause in either warrant, the district court held that the good-faith exception to the warrant requirement applied and denied O'Neill's motions to suppress the evidence recovered from his home and his barn.

II. DISCUSSION

The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. On appeal, the government does not challenge the district court's determination that the warrant lacked probable cause. Instead, it argues that the good-faith exception to the warrant requirement as announced in *United States v. Leon* applies and prevents suppression of the evidence. 468 U.S. 897 (1984). *Leon* provides that the Fourth Amendment's exclusionary rule does not apply to police officers' reliance in good faith on a warrant issued by a magistrate later determined to lack probable cause. *Id.* at 913. However, *Leon* also specifies four situations in which the good-faith exception should not save an otherwise deficient warrant: "(1) when the warrant is issued on the basis of an affidavit that the affiant knows (or is reckless in not knowing) contains false information; (2) when the issuing

magistrate abandons his neutral and detached role and serves as a rubber stamp for police activities; (3) when the affidavit is so lacking in indicia of probable cause that a belief in its existence is objectively unreasonable; and, (4) when the warrant is so facially deficient that it cannot reasonably be presumed to be valid." *United States v. Laughton*, 409 F.3d 744, 748 (6th Cir. 2005) (citing *Leon*, 468 U.S. at 914–923).

"In the years since *Leon*, this Court and others have repeatedly held that the good-faith exception does not apply when 'the supporting affidavit contained [a] knowing or reckless falsity.'" *United States v. Abernathy*, 843 F.3d 243, 257 (6th Cir. 2016) (citations omitted) (quoting *United States v. Hammond*, 351 F.3d 765, 773 (6th Cir. 2003)). This is because "it would be an unthinkable imposition upon [the magistrate's] authority if a warrant affidavit, revealed after the fact to contain a deliberately or recklessly false statement, were to stand beyond impeachment." *Leon*, 468 U.S. at 914 n.12 (alteration in original) (quoting *Franks v. Delaware*, 438 U.S. 154, 165 (1978)). Whether a statement is made in reckless disregard for the truth is a factual inquiry, reviewable by this Court for clear error. *United States v. Poulsen*, 655 F.3d 492, 504–05 (6th Cir. 2011). "A factual finding is clearly erroneous when a court, on reviewing the evidence, 'is left with the definite and firm conviction that a mistake has been committed.'" *United States v. Gunter*, 551 F.3d 472, 479 (6th Cir. 2009) (quoting *United States v. Navarro-Camacho*, 186 F.3d 701, 705 (6th Cir. 1999)). Because the district court's finding that the officer did not act recklessly in including the peer-to-peer statement leaves one with the definite and firm conviction that a mistake has been committed, I would hold that the good-faith exception does not apply to the warrant to search the barn.

I begin by noting two legal errors in the district court's analysis of the peer-to-peer statements that contribute to the ultimate conclusion that the warrant's deficiencies cannot be excused by the good-faith exception. First, the district court erred in concluding that the information was not material to the issuance of the warrant, and, therefore, could not be the basis for probable cause. It held that this false statement could not have affected the magistrate's decision to issue the warrant "given what else was before the judge." Order, R. 78, Page ID #556. However, as the district court later concludes, and the government does not dispute, the warrant otherwise failed to establish probable cause to search O'Neill's barn. Moreover, the

district court noted that where a defendant acquires child pornography—for example, through a peer-to-peer network—is not as relevant to the probable cause inquiry as the fact that a defendant has child pornography on his devices. But, as stated, the district court itself concluded that the affidavit's references to nude photographs of children did not establish probable cause that O'Neill had child pornography on his devices. And the affidavit did not refer to the peer-to-peer network in a vacuum, but explicitly stated that probable cause existed because O'Neill possessed child pornography on the network. As the remainder of the affidavit only represents that nude images were on O'Neill's devices and lists a number of items found in O'Neill's barn that are legal to possess,[2] this statement is highly material as it is the only non-conclusory statement linking O'Neill to "child pornography" in the entire affidavit.

Second, although the district court explicitly acknowledged the government's concession that the peer-to-peer statement in the affidavit was false, it nevertheless concluded that the statement was likely true by taking judicial notice that individuals who collect child pornography often use peer-to-peer networks. But the fact that some child pornographers use peer-to-peer networks has no bearing on whether O'Neill used a peer-to-peer network in this case. What could be true in the mine-run of cases is irrelevant to whether the statement was true when Officer Brian and Sergeant Barta included it in their affidavits, and taking judicial notice of an irrelevant fact to excuse a false statement in a warrant is clearly improper. The majority does not address this error, instead only writing that "the court found that the Brian and Barta affidavits contained false statements."[3] Maj. Op. at 5. But the district court's finding that the statements were nevertheless likely true represents yet another inherent contradiction in its reasoning in service of a belt-and-suspenders approach to avoid finding the warrant deficient.

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[2]These included "a computer tower with monitor, computer discs, blank and used discs, vibrators and other sex toys, condoms, and children's clothing and 'costumes.'" Second Search Warrant, R. 68-1, Page ID #502. The majority claims that these items, along with the photos of nude young boys on O'Neill's phone, could permit a "strong inference that O'Neill had a sexual interest in children and that he either had acted or planned to act on that interest." Maj. Op. at 13–14. But, again, the majority makes this inference about O'Neill's proclivities based only on a collection of legal items O'Neill possessed in the same room. By contrast, the case that it relies upon to make this leap noted that the challenged affidavit explicitly described the defendant's sexual assault of a child, and that the defendant used a computer as a part of this assault. *United States v. Clark*, 668 F.3d 934, 940 (7th Cir. 2012). This type of evidence is a far cry from the mere collection of legal items contained in the affidavit in this case.

[3]As stated, the district court did acknowledge this admission from the government. This makes the district court's final conclusion that the statements were nevertheless likely true even more troubling.

Thus, despite the district court's conclusions, the statement was certainly material, and certainly false. The question that remains is whether the district court's additional conclusion that the false statement was not made intentionally or recklessly amounts to clear error. The district court credited Officer Brian's statement that the false statement was included "inadvertently" in the first affidavit. Brian Decl., R. 47-1, Page ID #375. Implicitly, as it adopted its reasoning from its first order to deny the motion to suppress the evidence recovered from the barn, it also credited Sergeant Barta's declaration that the inaccurate information was copied and pasted "inadvertently" from Officer Brian's affidavit and accordingly found that her false statement was not intentional or reckless. Barta Decl., R. 68-2, Page ID #515. To be sure, Sergeant Barta's statement contended that the inclusion was unintentional. However, the inquiry cannot simply end with a contention that Sergeant Barta's mistakes were unintentional. The good-faith exception demands more.

When a warrant is issued based on statements made with reckless disregard for their truth or falsity, the good-faith exception does not apply. *Abernathy*, 843 F.3d at 257. An officer acts recklessly when she subjectively entertains serious doubts as to the truth of the allegations in the affidavit. *United States v. Bateman*, 945 F.3d 997, 1008 (6th Cir. 2019) (citing *United States v. Cican*, 63 F. App'x 832, 836 (6th Cir. 2003)). This recklessness can be inferred when there are "circumstances evincing obvious reasons to doubt the veracity of the allegations." *Cican*, 63 F. App'x at 836–37 (quoting *United States v. Whitley*, 249 F.3d 614, 621 (7th Cir. 2001)); *see also United States v. Colquitt*, 604 F. App'x 424, 429 (6th Cir. 2015).

When an officer copies and pastes from another document and does not ensure that the copied information applies to the present case, this presents an obvious reason to doubt the veracity of an allegation. This is particularly true when an officer copies and pastes from a template affidavit governing an entirely different set of facts, as Officer Brian did. Although Sergeant Barta copied and pasted from Officer Brian's affidavit, which was about O'Neill, this does not absolve her of the duty to ensure the accuracy of statements in her affidavit or make her actions any less reckless for failing to do so. To be clear, Sergeant Barta did not believe the statement to be true just because Officer Brian included it in his previous affidavit. Rather, she explained that she had no knowledge of O'Neill's use of a peer-to-peer network, but only

included the false statement because she "simply fail[ed] to catch it while proofreading." Barta Decl., R. 68-2, Page ID #515.

The majority finds that these actions amount to "'isolated' negligence," rather than the "'reckless disregard for the truth' that the exclusionary rule is designed to deter." Maj. Op. at 9 (citations omitted). Bolstering this conclusion, the majority emphasizes that the false statements were found in sections using boilerplate language copied from the template affidavits. Although not explained by the majority, this presumably suggests that the false statement's proximity to boilerplate language makes the officer less culpable for failing to read these sections carefully. But this suggestion is curious given that both Officer Brian and Sergeant Barta did change language in the paragraph at issue and the preceding paragraph. Specifically, the officers intentionally inserted the addresses of the home and barn in the very section containing the false statements. The failure to ensure the accuracy of the five lines of text between the two changes cannot be dismissed as mere negligence.

Moreover, using boilerplate language does not excuse officers from reading the language that they submit to the magistrate and ensuring that it is truthful. Sergeant Barta herself acknowledged that copying and pasting from template affidavits is "standard practice in law enforcement," particularly when time is of the essence in securing a search warrant. Barta Decl., R. 68-2, Page ID #515. Under the majority's approach, whenever an officer fails to ensure that everything copied and pasted from a separate document into an affidavit is truthful, this may be excused as mere negligence. And the majority holds today that this remains true even when the remainder of the warrant establishes no probable cause to search—because the courts should believe that these same officers acted in good faith in relying on a deficient warrant signed by a magistrate.

The majority faults this approach as creating a "strict liability" test because "the law does not deem an officer reckless whenever she includes inaccurate information in her affidavit, even despite having made efforts to ensure her affidavit's accuracy." Maj. Op. at 9–10. But Sergeant Barta's actions were not reckless merely because she did not ensure the accuracy of her statements. Instead, as explained, her copying and pasting from a separate affidavit presented an "obvious reason[] to doubt the veracity of the allegations" made in her own affidavit. *Cican*,

63 F. App'x at 836–37. This obvious reason, coupled with her failure to remove a false statement that she later admitted she had no basis for believing was true, makes the inclusion of the statement reckless.

The majority also misunderstands the relevance of Sergeant Barta's incomplete proofreading. It contends that Sergeant Barta's proofreading and editing of the second affidavit does not create "a sound reason to conclude that Sergeant Barta consciously harbored doubts about the accuracy of her affidavit." Maj. Op. at 9. By contrast, that Sergeant Barta proofread her affidavit and changed material that she had copied and pasted means that she knew her copied text would not fully support her affidavit for the barn. Thus, she subjectively had doubts about the veracity of the information copied and pasted into the affidavit as it applied to the subject of the search.

To be sure, as the majority notes, we have previously upheld factual determinations by district courts that an officer did not act recklessly when she merely made a typographical error in an affidavit, even those resulting from a copy and paste error. *See, e.g.*, *Colquitt*, 604 F. App'x at 429–30; *see also United States v. Frazier*, 423 F.3d 526, 539 (6th Cir. 2005) (upholding the denial of a *Franks* hearing when the affidavit contained a typographical error as to a date in the affidavit). But these previous cases did not involve officers copying and pasting from an entirely separate document. For example, in *Colquitt*, the case most similar to the instant matter, this Court credited the district court's determination, made after hearing live testimony from the affiant, that the affiant did not recklessly include false information when she copied and pasted one portion of the same affidavit to serve as the basis for another, and erroneously stated that a drug transaction occurred in the house to be searched when it actually occurred elsewhere.[4] 604 F. App'x at 429–30. In that case, the district court found the officer's testimony plausible in part because there would be "little reason" for the affiant to have intentionally or recklessly misled the magistrate when the remainder of the affidavit described other drug transactions that

[4]The other cases cited by the majority opinion do not involve the same copy and paste procedure used by Sergeant Barta, but merely involve typographical errors made in affidavits. *See* Maj. Op. at 10–11. Although this Court previously found these mistakes to be merely negligent, they did not present the same "obvious reason[] to doubt the veracity of the allegations"—copying and pasting from a separate document—as are present in this case. *Cican*, 63 F. App'x at 836–37.

occurred in the house. *Id.* at 429. Additionally, the Court agreed with the district court's determination that, even without the false statements, the rest of the warrant contained probable cause. *Id.* at 430.

By contrast, in this case, Officer Brian copied and pasted the false statement from an entirely separate affidavit, and failed to ensure that everything copied and pasted was accurate as to O'Neill. Sergeant Barta, despite admittedly having no information that O'Neill used a peer-to-peer network, failed to proofread, and included materially false information that served as the only basis for probable cause. And, in explaining why this did not constitute a reckless disregard for the truth, the district court in the instant case merely stated: "[W]hy would [Officer Brian] deliberately lie? What's the motive? Most importantly, what's to be gained from lying? The answer to those questions is: none and nothing. This makes clear [Officer Brian's] lack of intent to mislead the issuing judge."[5] Order, R. 78, Page ID #556. The combined effect of this cursory explanation and the district court's multiple, inherent contradictions in its reasoning—and the fact that these false statements were copied from an entirely separate document, giving rise to obvious reasons to question their veracity—leads to the firm conviction that a mistake has been committed.

Finally, the majority claims that the warrant to search the barn would "likely" be supported by probable cause even without the false statement about the peer-to-peer network. Maj. Op. at 13. However, even though the government argued in the district court that the warrant contained probable cause absent the false statement, it has abandoned this argument on appeal, making it unreviewable. *See United States v. Thornton*, 609 F.3d 373, 380 (6th Cir. 2010) (declining to consider abandoned arguments in ruling on a motion to suppress because they were "not reviewable on appeal"). Not only is the majority's last-ditch effort to save this deficient warrant by considering this abandoned argument improper, but it is also legally inconsistent. The good-faith exception to the warrant requirement can be resorted to only when a warrant lacks probable cause. *Leon*, 468 U.S. at 900. By resting its holding on the good-faith

[5]Without making further findings as to Sergeant Barta's affidavit, as stated, the district court incorporated its holding as to the house affidavit in its order denying O'Neill's motion to suppress the evidence gathered from the barn. Thus, the same cursory analysis applies to the warrant for the barn.

exception, while at the same time finding probable cause "likely" existed in the deficient warrant, the majority contorts this long-standing principle in service of upholding the district court's clearly erroneous findings.

III. CONCLUSION

The government on appeal no longer argues that probable cause existed absent the false statement. The majority ignores this abandonment of the government's argument and finds that probable cause "likely" existed. However, the majority is not permitted to also save the defective warrant by invoking the good-faith exception—which is permitted to be invoked only in the absence of probable cause.

Further, the majority opinion attributes the inclusion of the false statement that provided the only link between O'Neill and child pornography in the affidavit as being the result of a poor copy and paste job. The danger of this holding cannot be overstated. As Sergeant Barta herself indicated, law enforcement officers frequently copy and paste information from other affidavits to create search warrants. If they choose to use this practice, the Fourth Amendment requires, at a minimum, that they do so without a reckless disregard for the truth. By not ensuring the accuracy of the copied information in this case, Sergeant Barta acted recklessly. And when a warrant contains recklessly false statements, it cannot be saved by the good-faith exception. Because the district court's conclusion to the contrary leaves one with a definite and firm conviction that a mistake has been committed, I would reverse and remand with instructions to grant O'Neill's motion to suppress the evidence gathered in the barn.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 22-3793

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CHARLES BRIAN O'NEILL,

Defendant - Appellant.

FILED
Feb 29, 2024
KELLY L. STEPHENS, Clerk

Before: SUTTON, Chief Judge; CLAY and LARSEN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Northern District of Ohio at Toledo.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

APPENDIX B

United States of America,

Plaintiff,

v.

Charles Brian O'Neill,

Defendant.

Case No. 3:18CR178

ORDER

This is a criminal case in which the Defendant has filed a motion to suppress and for a *Franks* hearing. (Doc. 44). He seeks to exclude evidence seized during execution of a state court search warrant. The government opposes the motion. (Doc. 47).

For the reasons that follow, I deny the motion.

Background

On February 20, 2018, Defendant's wife and adult son told the Fostoria, Ohio Police that, a few days before, both separately had seen child pornography on Defendant's cell phone. The son had seen photos of nude boys between the ages of five and fourteen on the phone's screen, in a photo album on the phone, and on a mini iPad. In some of the photos the boys were fully nude, in others they were in various states of undress.

The son told the Defendant's wife what he had seen on the two devices. She then also looked in the phone. She discovered two albums in the phone's photo gallery. They contained photos of boys aged two to ten. Like those the son had seen, some were entirely nude and others clothed. She later looked again and saw the same albums and photos she had seen earlier.

Altogether, there were "thousands" of such images.

Based on this information, Fostoria Police Officer Cory Brian prepared an affidavit (Doc. 12-1, pgID# 33-39), consisting of more than twenty numbered segments,

The first segment consisted of twelve individually numbered paragraphs relating the information that the Defendant's son and wife had provided to the police. (*Id.* pgID# 33-34).

The second segment encompassed four multi-paragraph groups. In boilerplate, the affiant recites, on the basis of his employment as an investigator, own knowledge, training, and experience, the "characteristics" of "collectors" of child pornography. *Id.* pgID# 34-36)

The third segment includes eight multi-paragraph groups explaining how computers work and how and why child pornographers use computers to acquire, download, store, retain, and share pornographic images and files. (*Id.* pgID# 36-39).

A judge of the Tiffin-Fostoria Municipal Court issued the warrant, which officers executed the following day, February 22, 2018. The officers arrested the Defendant on state pandering charges as he was arriving home.

In his motion, the Defendant contends, first, that the affidavit contains materially false statements that the affiant, Corporal Bryan,[1] made either knowingly or with reckless disregard for the truth.

Second, he asserts that the affidavit fails to show probable cause because: 1) it is "barebones"; 2) contains mostly boilerplate; and 3) lists "characteristics" common to child pornography "collectors" without showing a "nexus" between him and that list.

[1] The Defendant has filed a motion for an order for a subpoena to compel production of Corporal Brian' personnel file. (Doc. 66). The officer's abrupt resignation from the police department prompts the motion. Defendant believes the cause for his departure relates to his credibility. As explained in .an order overruling that motion (Doc. 77), nothing about the resignation has anything to do with anything in this case.

Third, the Defendant contends the good faith exception to the exclusionary rule does not apply.

Fourth he claims officers unlawfully seized his keys and cell phone.

For the reasons that follow, I deny the Defendant's motion.

Discussion

1. *Franks v. Delaware*

In *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978), the Supreme Court held that affidavits for search warrants that contained false statement made knowingly and intentionally or with reckless disregard for the truth would invalidate the warrant and result in suppression of evidence seized therewith. Determining whether a *Franks* violation occurred involves two steps.

First, the court must determine whether the affidavit contained false statements and, if so, how and why the affiant made them. Second, even if the affiant made the false statements knowingly or recklessly, the court must determine if the false statements were material (*i.e.*, affected the decision to issue the warrant). The court does so by excising the false statement and determining whether the remainder still shows probable cause. *Id.* at 155-56.

The Defendant claims the affidavit contained two material, false statements, namely that the Defendant: 1) used a P2P file sharing site to download the pornography; and 2) had been convicted of insurance fraud and theft. The first may have been true; the second was not. Neither matters.

2. The Affidavit Contained No Material, Knowingly or Recklessly Made False Statements

A. Reference to P2P Network

In response to the assertion, that the affidavit's reference to the Defendant's use of a P2P file sharing program was false, the government submitted an affidavit for an earlier child

pornography warrant for a different location. According to the government, Corporal Bryan used that affidavit as a template for her affidavit here. In doing so, the government represents, she inadvertently, not knowingly, included the P2P reference – as to which the Defendant's son and wife had not made reference.

This explanation is plausible and acceptable: why would Corporal Bryan deliberately lie? What's the motive? Most importantly, what's to be gained from lying?

The answer to those questions is: none and nothing. This makes clear Corporal Bryan's lack of intent to mislead the issuing judge. Furthermore, that statement, given what else was before the judge, could not have affected the decision to issue the warrant.

Moreover, what matters under the Fourth Amendment is not the source of the Defendant's collection of pornographic images of young boys. What matters is that a cache of such contraband is presently to be found in his house on his electronic devices. How those images got there - whether the images came from a P2P file sharing site or via emails from another collector - doesn't matter.

Moreover, I can take judicial notice of court records in other child pornography cases. Fed. R. Evid. 201(b). Those records universally, or nearly so, show that child pornography collectors use P2P file sharing sites to access, download, and disseminate images. It is thus likely that the Defendant did too, given the reports of his son and wife about the extent of his collection. There is, accordingly, in all likelihood nothing false about the inadvertent P2P reference.

B. Reference to Convictions

The Defendant correctly points out that the affidavit erroneously stated that he had been convicted of insurance fraud and theft. In fact, he was not convicted: he'd only been arrested for those offenses.

The government represents that this statement was not deliberate or reckless, but a mistake. In any event, the same questions (and answers) as above come to mind: why lie (no reason) and what's the gain (none). Thus, the government's response to the alleged *Franks* violation is equally plausible and acceptable.

Even if deliberate, which it was not, such convictions, totally unrelated to anything to do with child pornography, could not have had even a featherweight's effect on the issuing judge. It was as immaterial as it was unnecessary.

2. Probable Cause

I discuss the issues that Defendant's probable cause challenge raises in the following subsections in sequence: 1) whether the affidavit was "barebones;" 2) its use of "characteristics"; 3) whether it establishes probable cause as to Defendant's criminal acts; and 4) the applicability of the good faith exception.

Though I find the affidavit not to be "barebones," and its use of "characteristics" appropriate and lawful, I conclude that the good faith exception applies and that suppression, therefore, is not warranted.

A. "Barebones"

The affidavit is not "barebones:" instead it contains specific facts that show the Defendant had a sizable collection of photographs of nude and partially clad underage boys. The affidavit describes the photos, found on his cell phone and mini iPad, as child pornography.

The sources of this information, the Defendant's adult son and wife, could hardly have been more credible.

If possession of those images is a crime, a question I discuss below, then those images are contraband and evidence of that crime.

Thus, it is entirely incorrect to describe the affidavit as barebone.

Even if the affidavit is also, as he complains, "rambling" it doesn't matter. What matters is that, setting aside the question of whether the affidavit show probable cause as to criminal conduct, it clearly meets Fourth Amendment requirements.

B. Boilerplate

"There is nothing inherently wrong with boilerplate." *Feao v. UFP Riverside, LLC,* 2017 WL 2836207, at *10 (C.D. Cal. June 29, 2017). Indeed, "boilerplate . . . [is] acceptable, even if [it] lacks factual specificity, so long as it remains possible that [it] relate[s] to the claim at hand." *Sec'y of U.S. Dep't of Labor v. Kavalec*, 2020 WL 1694560, at *4 (N.D. Ohio Nov. 20, 2017) (Barker, J.); *Lindenbaum v. CVS Health Corp.*, 2017 WL 5562072, at *1 (N.D. Ohio April 7, 2010) (Gwin, J.) ("boilerplate [is] acceptable").

What matters is that the affidavit not rely solely rely on boilerplate. *E.g., U.S. v. Barker*, 2014 WL 2742793, at *2 (E.D. Ky. June 6, 2014), *aff'd*, 611 F. App'x. 346 (6th Cir. 2015) (court noted that affidavits did not rely on boilerplate alone).

The affidavit here did not solely rely on boilerplate. The issuing judge had plenty of individualized facts to find probable cause that the Defendant had the photos on the devices in his residence.

C. Characteristics of Child Pornographers -- "Nexus"

The defendant claims that there was no "nexus" between him and the "characteristics" of "collectors" of child pornography listed in the affidavit. If that were so, the issuing judge could not properly consider those characteristics.

The issue is not whether the characteristics fit the Defendant; it is whether the Defendant fit the characteristics, so that the judge cold authorize the search and its scope accordingly.

The Defendant clearly fit the characteristics: he was undoubtedly a "collector" of the photographs his son and wife had found. A single photo or a couple is a memento or a souvenir. Thousands are a collection.

So he fit within the list.

The question then becomes whether the court could take the list into account when deciding whether to issue the warrant. The Sixth Circuit has upheld references to characteristics lists in child pornography cases. *United States v. Walling*, 747 F. App'x. 382, 355 (6th Cir. 2018).

The facts in *Walling* were different but are instructive. There the defendant, like the Defendant here, claimed his circumstances were not "shared" with those on the list. Unlike the Defendant, he was correct.

In *Walling* the defendant had been convicted of child molestation: that was the only basis on which the government invoked the list. But he did not fit the list because it relates to collectors, whose impulses may also involve sexual activity with children, and have in common an interest in child pornography.

The facts in *Walling* did not establish a nexus between the list and the defendant there. In this case they do.

D. Probable Cause as to Criminal Conduct

The Defendant claims that the affidavit failed to show that he was committing the crime of pandering under Ohio law, O.R.C. § 2907.321.

I agree: nude, or partially nude photos, even of children, are not pornography.

This is so because that's what the Supreme Court held in *New York v. Ferber*, 458 U.S. 747, 764-65 (1982), where the Court stated that depictions "which do not involve live performance or photographic or other visual reproduction of live performances, retains First

Amendment protection." In light of *Ferber*, the law is clearly established that the First Amendment protects nudity "that involves no exploitation of children-as, for example, where a parent innocuously photographs his or her naked infant. . . ." *Mikesell v. Conley*, 51 F. App'x 596, 503 (6th Cir. 2002). Likewise in Ohio, an enactment (*e.g.*, the pandering obscenity statute), may not "sweep[] within its prohibitions what may not be punished under the First and Fourteenth Amendments" *State v. Dellifield*, 2018 WL 6461195 ¶ 29 (Ohio Ct. App Dec. 10, 2018).

States may, however, "prohibit materials and conduct involving the exploitation of children exemplified, for example, by photographs of children other than the defendant's child that depict lewd exhibitions or a graphic focus on the genitals." *Id.*

As Defendant emphasizes, nothing in the affidavit indicates that any of his cached images depicts lewd or lascivious exhibitions or graphic focusing on the boys' genitals.

Merely mirroring the language of a statute penalizing receipt, possession, or distribution of child pornography without "descriptive support and without an independent [judicial] review of the images, [is] insufficient to sustain . . . [a] determination of probable cause" that what the Defendant possesses is child pornography. *United States v. Brunette*, 256 F.3d 14, 17 (1st Cir. 2001). This does not mean that the judge must actually look at the images giving rise to the warrant request. But there must be some description that enables the judge to determine whether the images are in the protected zone of free expression or they have crossed the boundary into the region of culpability.

Given the constitutional line the Supreme Court marked out in *Ferber*, the nudity-only images in this case are on the constitutional side of the line. This is so, despite the vastness of Defendant's collection of those images. Numerosity alone is not enough to transform the permissible into the culpable. Thus, in *United States v. Edwards*, 813 F.3d 953, 961 (10th Cir.

2015), the court gave constitutional protection to 715 images of a prepubescent girl. Though some images were of "child erotica," as here, none focused graphically on the genitals or included lascivious displays. The court held that the images were not pornographic. *Id; see also United States v. Hernandez*, 183 F. Supp. 2d 468, 475-76 (D.P.R. 2002) (affidavit did not indicate whether photos of young girl trying to get into ballerina costume focused or showed the genitals or suggested sexual activity). The Defendant argues that this creates a *Franks* issue: namely, that the affiant's statement that the Defendant possessed child pornography was false,

I agree that, by hindsight, that representation was inaccurate. I assume the affiant should have known that the images were, as a matter of First Amendment law, not pornographic. But there's nothing in the record to suggest that the affiant in fact knew that that was so, intended to mislead the judge, or recklessly made a false statement.

Once again: why lie if you believe you know the truth to be something else? Like the Defendant's other *Franks* contentions, this one is meritless.

Moreover, it is apparent that the issuing judge also did not know the law. If he had, he would not have signed the warrant. So it's hard to find *Franks* fault on the affiant's part, when, but for the judge's equivalent unawareness, there would have been no warrant.

In any event, it doesn't matter, because the affidavit failed to show probable cause as to the commission of a crime. Because the Defendant prevails on this issue by coming through the front door of probable cause, it wasn't necessary for me to have bothered answering his knock at the back door of the *Franks* doctrine's exception to the exclusionary rule.

But, to extend the metaphor, he's about to find himself back out in the cold.

E. Good Faith Exception

Evidence otherwise inadmissible under the Fourth Amendment can become admissible via the good faith exception to the exclusionary rule that the Supreme Court enunciated in

United States v. Leon, 468 U.S. 897, 905-906 (1984). To gain the benefit of this exception, the officers must have relied in good faith on the warrant's apparent validity. Such reliance must be objectively reasonable. *Id.*, at 921-25; *see also, e.g., United States v Tucker,* 742 F. App'x. 994, 998–99 (6th Cir. 2018).

The good faith exception does not apply if a court finds any of four circumstances to have existed: 1) when the affiant misleads the issuing judge with false information in the affidavit; 2) when the judge "wholly abandon[s]" his or her judicial role and acts as an extension of the police; 3) when the affidavit is totally lacking in any "indicia of probable cause so as to render official belief in its existence entirely unreasonable"; and 4) when the warrant is deficient on its face such "that the executing officers cannot reasonably presume it to be valid." *Leon, supra*, 468 U.S. at 922–23.

None of these disqualifying conditions exists here.

First, as I have already found, the affiant made no knowing or recklessly false statements.

Second, the defendant dos not claim that the judge wholly abandoned his judicial role in issuing the warrant.

Third, the affidavit is far from totally lacking in indicia of probable cause. All the Fourth Amendment elements were otherwise there. More importantly, so was, to the best of the affiant's and the judge's understanding, the element of criminal conduct. They jointly believed, and I believe they did so in good faith, that the probable cause was complete.

Fourth, the warrant itself is not so deficient, despite its flawed underpinnings, that no reasonable officer could have relied on its apparent validity.

The warrant though, was not founded on probable cause, and that was not valid. The operative cause for that fact was the judge's, not the affiant's, unawareness of the law. But for

that unawareness, the warrant would not have issued. But, like the judge, so far as the affiant was aware, the affidavit was was valid.

Where a judge makes an error of law of which an officer is unaware, the officer can rely on the apparent validity of the warrant. In *United States v. Wise*, 2020 WL 1452727, at *2 (W.D. Ky. Mar. 25, 2020), for example, a judge who issued a trap and trace order did so in excess of his jurisdictional authority. He did not know that, nor did the officer who sought and executed the order.

The court held the officer had executed the order in good faith. *Id.* That ruling makes sense: after all, the officer could hardly ignore the judge's *order* to implement the trap and trace. The officer would have had neither knowledge nor the authority to disregard that order.

The same holds here. The affiant prepared and presented the affidavit unaware of its flaw. The judge, equally unaware, found the affidavit met Fourth Amendment requirements and signed the order accordingly.

I conclude that the good faith exception to the exclusionary rule applies.

To do otherwise would not make sense. It would take the evidence from the officer's hands, where the judge had told him to put it; a command the officer could not disobey.

This is the prototypical situation *Leon* sought to address and remedy. Namely, that excluding evidence where doing so would not affect the officer's conduct in the future: he would continue to rely, unless he knew better when he wrote his affidavit, on the judge's imprimatur. Withholding exclusion fulfills *Leon's* objective of excluding evidence only when it can have a meaningful effect on future police conduct. *Leon, supra,* 468 U.S. at 916.

3. Seizure of Defendant's Keys

The government acknowledges Defendant's keys have no relevance to any issue in this case. It is not, accordingly, necessary to determine whether their seizure was lawful.

4. Search of Defendant's Cell Phone

Two officers arrived at the Defendant's residence shortly before other officers began executing the search warrant. Within a few minutes of their arrival, the Defendant arrived. As he approached the officers in his driveway, one, noticing a cell phone in his pocket, withdrew it. The F.B.I. subsequently conducted a forensic examination.

The Defendant's motion to suppress also seeks to suppress the evidence found from the cell phone search.

I previously overruled an earlier motion to suppress the same evidence. (Docs. 12, 20). The Defendant now has renewed his motion on the basis of my statement in my earlier order that I assumed, without deciding, that the warrant's scope (and its authorization to seize cell phones) did not extend to the point at which, about four feet from steps leading into the house, the officer had withdrawn the Defendant's cell phone from his pocket.

For the purposes of this opinion, I will assume, again without deciding, that the warrant did not reach out that far. But that doesn't matter for three reasons.

First, the plain view rationale on which I upheld the seizure in my original order remains valid.

Second, if on appeal the Circuit rejected that rational, it is clear that seizure of the phone was inevitable, as the Defendant was arrested at the scene. Incident to that arrest, he would have been searched and the phone taken from him. Alternatively, the phone would have been taken from him later when he was booked into the county jail. *Nix v. Williams*, 467 U.S. 431, 444 (1984) (establishing inevitable discovery exception to exclusionary rule).

Finally, a cell phone is itself an instrumentality of the crime. *United States v. Poole*, 2019 WL 2246537, at *2 (A.F. Ct. Crim. App.) (citing *United States v. Nieto*, 76 M.J. 101,

1072017 WL 706512, at *16 (C.A.A.F. Feb. 21, 2017) (cell phone, as a storage device is a criminal instrumentality).

Courts have similarly held that files stored on other electronic devices are also "instrumentalities" of child pornography. *See, e.g.*, *United States v. Renigar*, 613 F.3d 990, 993, 994 (10th Cir. 2010) (computer and DVDs); *United States v. Vosburgh*, 602 F.3d 512, 527 (3rd Cir. 2010) (computers and computer equipment); *United States v. Williams*, 592 F.3d 511, 519, 520 (4th Cir. 2010) (computer and DVD); *United States v. Wagers*, 339 F. Supp.2d 934, 943 (E.D. Ky. 2004) (computer and DVD).

Those considerations reinforce my earlier determination that the officer lawfully seized Defendant's cell phone as a criminal instrumentality in his plain view.

For these and the other reasons I expressed in my original decision (Doc. 40), I deny his renewed motion to suppress the evidence found on that device.

Conclusion

For the foregoing reasons, it is hereby

ORDERED THAT the Defendant's motion to suppress (Doc. 44) be, and the same hereby is, denied.

So ordered.

/s/ James G. Carr
Sr. U.S. District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

United States of America ,

Plaintiff, Case No. 3:18cr178

v.

Charles Brian O'Neill,

Defendant

Defendant, charged with production, receipt, and distribution of child pornography, moves to suppress evidence of those crimes found during execution of a search warrant in a barn he owns in North Baltimore, Ohio. (Doc. 63). I deny the motion.

Sergeant Barta of the Wood County Sheriff's Department submitted the affidavit in support of the warrant to a Wood County Common Pleas Court judge. Except for details relating to the premises to be searched and other immaterial matters, that affidavit piggybacked on an earlier affidavit that Corporal Brian of the Fostoria Police Department had submitted to a Tiffin-Fostoria Municipal Court judge. That judge issued the warrant, which authorized a search of the defendant's residence.

In an earlier motion the defendant moved to suppress evidence obtained during execution of the residential search warrant. (Doc. 44). That motion raised essentially the same arguments the defendant makes here.

In an order that I file concurrently with this order (Doc. 78), I consider all the arguments the defendant repeats here in challenging the Wood County warrant. In that order I reject his claims under *Franks v. Delaware,* 438 U.S. 154 (1978), and his complaints about reliance on boilerplate.

But in that order, as I do here, I hold that, in light of *Ferber*, the affidavit fails to show probable cause that the photos are pornographic. That was so because the Supreme Court's decision in *Ferber v. United States*, 458 U.S. 747, 764-65 (1982), holds that mere nudity is not pornographic.

But I also hold in that order, as I do again here, that the good faith exception to the exclusionary rule applies. For the reasons I stated in that opinion, I concluded that the good faith exception to the exclusionary rule applies. (Doc. 78, pgID 561-63).

Most simply put, Fostoria's Sgt. Brian, who signed the residential warrant, did not know the law. Wood County's Sgt. Barta did not know the law. Most importantly neither of the judges who approved and issued the warrants knew the law. Even where an affiant is mistaken about the law, her or she can rely on the judge's shared mistake about the law and, in good faith, rely on the warrant's apparent validity.

I incorporate herein by cross-reference all applicable and pertinent portions of the residential search warrant order.

It is, accordingly, hereby

ORDERED THAT the defendant's motion to suppress (Doc. 63) be, and the same hereby overruled.

So ordered.

/s/ James G. Carr
Sr. U.S. District Judge