

ORIGINAL

**IN THE SUPREME COURT
OF THE STATE OF OHIO**

CASE NO. 2013-0781

STATE OF OHIO,	}	
	}	
Plaintiff-Appellee,	}	On Appeal from the Summit County Court of Appeals, Ninth Judicial District
	}	
v.	}	
	}	
NICHOLAS CASTAGNOLA,	}	Court of Appeals
	}	Case Nos. 26185, 26186
	}	
Defendant-Appellant.	}	

**MERIT BRIEF OF APPELLANT
NICHOLAS CASTAGNOLA**

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STATEMENT OF THE CASE

The seizure of Nicholas Castagnola's personal computer, and its ultimate wholesale search, began with the annual sweep of the Twinsburg's liquor establishments for sales of alcohol to minors. Mr. Castagnola, a clerk at a CVS store, was charged in April of 2010 with selling beer to an 18-year-old and a 16-year-old. (T.p. A:22-23.) David Maistros, the Twinsburg prosecutor, met with Mr. Castagnola, who was unrepresented by counsel, at various pretrials, with the court ultimately denying the "significant number of motions" Mr. Castagnola had filed, and setting a trial date for July 14, 2010. (T.p. A:25-26.) Mr. Castagnola filed a motion to continue the trial date, which was denied on June 14, 2010. (T.p. A:39.)

When Mr. Maistros came out of his house the morning after the court denied the motion for continuance, he found that someone had "egged" his and his wife's cars, and broken off the side rear-view mirror of the latter vehicle.¹ (T.p. A:40-43.) The Maistros vehicles were not the only ones to be egged; a Reminderville police car suffered the same fate five days later, on June 20, 2010.

The day after the egging of the Reminderville police car, Mr. Maistros covered an appearance in Stow Municipal Court for the Reminderville prosecutor regarding a speeding ticket given to Nick Behr. (T.p. A:49.) Mr. Maistros noticed that the file contained motions similar to the ones that Mr. Castagnola had filed in his case, and also observed that Mr.

¹ As will be seen, this appeal stems from two criminal cases, one involving charges of retaliation, intimidation, and vandalism (Common Pleas Case No. 2010-07-1951), and one involving charges of child pornography (Common Pleas Case No. 2010-08-2244). Both cases were tried, and there was also a motion to suppress hearing common to both cases. References to the transcript of the trial in the first case will be designated as T.p. A:#, to the second as T.p. B:#, and to the suppression hearing as S:#. References to the docket will be designated as T.d. A:# or T.d. B:#.

Castagnola was with Mr. Behr. (T.p. A:51-52.) Shortly thereafter, he received a police report that “four individuals had been stopped in the City of Twinsburg with dozens of eggs,” and noticed that one of the individuals was Mr. Castagnola. (T.p. A:45.)

On June 27, 2010, the police investigating the crime got a break: an informant whom the police subsequently dubbed “Source May” told them that Mr. Castagnola was responsible for both incidents, and gave them copies of ten text messages that Mr. Castagnola had sent the informant on his cell phone admitting that. (T.p. A:227-228.)

Armed with this new information, the police fitted Source May with an electronic transmitter and on the following day, June 28, sent him into the house where Mr. Castagnola resided. (T.p. A:237.) Detective Kreiger of the Twinsburg Police Department assisted in this, briefed Source May, and was responsible for “source eradication” – “in case he [Source May] came across an individual with a weapon inside the house, that was my job to go in there and pull him out.” (T.p. A:248.)

Fortunately, “Source May” was able to leave the premises without being fired upon. During the course of his 55-minute conversation with Mr. Castagnola, which was monitored and recorded by Det. Kreiger, (T.p. A:228),² Mr. Castagnola made a full, if unknowing, confession: he admitted to egging the Maistros vehicles and the Reminderville police car, related that his accomplice in the Maistros incident had broken off the side rear-view mirror of Ms. Maistros’ car with a baseball bat, and said that he’d intended to dump bleach into Mr. Maistros’ car but was stymied by the fact that it had a locking gas cap. Moreover, he was not the least reticent in explaining his reasons for doing so, referring repeatedly to his anger with Mr. Maistros for the

² Although “Source May” did not testify at trial, the recording was admitted. (State’s Exhibit 11.)

prosecution for the sale of liquor to minors, as well as Mr. Behr's traffic ticket.

The monitored conversation gave the police all they needed for a successful prosecution: not only an admission of the acts, but an acknowledgment of motive, which would have been necessary to establish the retaliation counts. Nonetheless, the next day Det. Kreiger not only obtained an arrest warrant for Mr. Castagnola, but a search warrant for the house he resided in. (T.p. A:257; B:25; Motion to Suppress Hearing, State's Exhibit "A.")³ On June 29, some fifteen police officers descended upon the Castagnola residence, where Mr. Castagnola lived with his mother and brother (T.p. B:218-219), arrested Mr. Castagnola, and conducted an exhaustive search of the premises. Mr. Castagnola was interrogated that evening by the police, waived his *Miranda* rights, and made a full admission of his involvement in the offenses. (T.p. A:283-284.)

The search warrant for Mr. Castagnola's house sought a wide variety of items, including "computers." Pursuant to that, the police removed two computers, one from the family room and one from a closet in an upstairs bedroom. (T.p. B:35, 38.)

The computers were sent to the Bureau of Criminal Investigation, and on July 7, 2010, nine days after Mr. Castagnola's arrest and full confession to the crime, Natasha Branam, a computer forensic examiner there, began a general exploratory search of them.⁴ (T.p. B:91.) She first pulled up all the image files on the computer, and found images she believed to contain child pornography. *Ibid.* She contacted Det. Krejci at the Twinsburg Police Department, and had him procure a second search warrant. (T.p. B:92.) That warrant was obtained a week later,

³ The Exhibit contains the affidavit submitted in the application for the warrant.

⁴ Although two computers were seized, Ms. Bransham's examination of the one found in the upstairs bedroom did not extend beyond determining that it had not been used in over two years. (T.p. B:101.)

and Ms. Branam renewed her search, making a complete copy of the hard drive of the computer and then analyzing it. (T.p. B:93-94.) Ms. Branam subsequently found the files of child pornography which formed the basis of the charges in the second case.

Mr. Castagnola filed a motion to suppress, which was heard by the court prior to trial. (T.d. A-23, B-20; A-25, B-22. The focus of the hearing was the seizure and subsequent search of the computer. As will be shown later, much of the hearing was directed to the assertion in Det. Kreiger's affidavit that Mr. Castagnola had told "Source May" that he found the address for Mr. Maistros "online." The trial court, after listening to the tape of the conversation that the police had monitored, found that Det. Kreiger's assertion was false: Mr. Castagnola had not, in fact, told "Source May" that he had looked up Mr. Maistros' address "online." Trial Court Opinion on Motion to Suppress, at 6. (T.d. B-24.)

The judge nonetheless denied the motion to suppress (T.d. B-24), and the two cases proceeded to trial. The jury returned a verdict of guilty in the first case on May 31, 2011, and after Mr. Castagnola waived a jury in the second, the court returned a verdict of guilty in that one as well, on September 8, 2011. (T.d. A-55; B-81.)

On October 26, 2011, the trial court conducted a joint sentencing for both cases. The court sentenced Mr. Castagnola to nine months in prison on each of the two retaliation charges, the vandalism charge, and the charge of possession of criminal tools, and ninety days on the misdemeanor charges of criminal damaging and criminal trespass. (T.d. A-70.) On the ten convictions of pandering sexually oriented material involving a minor, the court sentenced Mr. Castagnola to one year of incarceration, and found him to be a Tier II sex offender. (T.d. B-85.) The court ordered the sentences for the one retaliation and the possession of criminal tools, and

the sentence on the other retaliation and the vandalism, to run concurrently, but consecutive to each other. He also ordered those sentences to run consecutively to the sentences in the pandering case, which were run concurrently to each other, for a total term of imprisonment of thirty months. (T.d. A-70, B-85.)

Mr. Castagnola timely appealed his convictions and sentences to the Ninth District Court of Appeals, alleging error in the trial court's denial of the motion to suppress, the failure to merge the counts of retaliation and criminal damaging, and the counts of retaliation and vandalism, as allied offenses, and the failure to make the findings necessary to impose consecutive sentences. He also contended that the evidence on the sexual pandering counts was insufficient. On March 29, 2013, the 9th District rendered its decision, rejecting the argument regarding the insufficiency of the evidence and, by a 2-1 vote, the denial of the motion to suppress. The court found that the trial court had not engaged in the proper analysis of whether the various offenses were allied, and reversed and remanded the case for the trial court to make that determination. It found that, in light of the remand, the assignment of error regarding consecutive sentences was moot. *State v. Castagnola*, 9th Dist. No. 26185, 26186, 2013-Ohio-1215.

Mr. Castagnola appealed, and this Court accepted jurisdiction.

ARGUMENT

Privacy and the Fourth Amendment in a technologically modern society. The Fourth Amendment recognizes the “right of the people to be secure in their persons, houses, papers, and effects.” The specific inclusion of “papers” was intentional. “The Fourth Amendment refers to ‘papers’ because the Founders understood the seizure of papers to be an outrageous abuse distinct from general warrants.” Dripps, “*Dearest Property*”: *Digital Evidence and the History of Private “Papers” as Special Objects of Search and Seizure*, 103 J. Crim. L. & Criminology 49, 52 (2013). Indeed, the “general warrants” which provided the impetus for the adoption of the Fourth Amendment were often directed against a person’s private papers. Typically, those warrants authorized the King’s agents to search “all houses and places” for persons suspected of libels against the government, and to “search in any of the chambers, studies, chests, or other like places for all manner of writing or papers.” Lasson, *The History and Development of the Fourteenth Amendment to the United States Constitution*, at 27 (1937) (quoting from the text of a warrant issued by the Court of the Star Chamber in 1593).

Today the home computer serves as a repository of those “private papers.” When the Census Bureau first asked the question in 1984 of whether there was a computer in the household, only 8.2% of respondents answered affirmatively. Since then, that number has increased more than nine-fold, to 75.6%. Census Bureau, *Computer and Internet Use in the United States*, May 2013, <http://www.census.gov/prod/2013pubs/p20-569.pdf> (accessed 12/27/13). People keep all of their financial data on Quicken, and use Microsoft Outlook to track their appointments and the list of just about everybody they’ve ever had contact with. They’ll use an email program which, without active intervention on their part, will retain every single

email they've ever sent or received, even ones they thought they'd deleted. They'll keep their pictures, their notes, their journals, where they've been, what they've seen, what they've done, what they've thought; if it's important, it will wind up somewhere on their computer. As the court noted in *United States v. Andrus*, 483 F.3d 711, 718 (10th Cir. 2007), “[a] personal computer is often a repository for private information the computer’s owner does not intend to share with others. For most people, their computers are their most private spaces.” J.K. Rowling was perhaps right in observing that the best way of measuring a man is to see how he treats his inferiors, but the best way of learning everything about him is to spend a couple hours going through his computer.

“The basic purpose of this [Fourth] Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.” *Camara v. Municipal Court*, 387 U.S. 523, 528, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). Indeed, the Court implicitly found the roots of the Amendment in the concept of privacy, a dozen years before Louis Brandeis would articulate the right to privacy in a law review article. “It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security” *Boyd v. United States*, 116 U.S. 616, 630, 6 S.Ct. 524, 29 L.Ed. 746 (1886).

Modern technology has presented the courts with issues which could not have been imagined by the Framers, and the courts have used the concept of privacy to resolve them. Can the police eavesdrop on a person’s call from a telephone phone booth without a warrant? No, said the Court in *Katz v. United States*, 389 U.S. 347, 352, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). “[T]he Fourth Amendment protects people, not places . . . what [the defendant] sought

to exclude when he entered the booth was not the intruding eye -- it was the uninvited ear.”

Can they use evidence obtained in a helicopter overflight of one’s property? Yes, said the Court in *California v. Ciraolo*, 476 U.S. 207, 214, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986):

“[defendant’s] expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor.” The Court has similarly tackled issues such as the use of thermal imaging to determine if a defendant is growing marijuana in his home, *Kyllo v. United States*, 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001), use of drug-sniffing dogs, *cf. Illinois v. Cabarales*, 543 U.S. 405, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005), with *Florida v. Jardines*, ___ U.S. ___, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013), and the surreptitious placement of GPS devices on vehicles to allow the police to track one’s movements. *United States v. Jones*, ___ U.S. ___, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012).

In *State v. Smith*, 124 Ohio St.3d 163, 2009-Ohio-6426, 920 N.E.2d 949, this Court also confronted the task of defining the boundaries of permissible search and seizure in the context of modern technology. In that case, when Smith had been arrested, the police seized the cell phone he was carrying and immediately looked through it. Noting that cell phones “are capable of storing tremendous amounts of private data,” *id.*, ¶21, which “gives their users a reasonable and justifiable expectation of a higher level of privacy in the information they contain,” this Court held that because of that “high expectation of privacy in a cell phone’s contents, police must then obtain a warrant before intruding into the phone’s contents.” *Id.*, ¶23.

A computer sold nowadays can store more than sixty times as much data as even a typical smartphone.⁶ One sitting down at his or her computer has a “reasonable and justifiable

⁶ *Smith* made no distinction between smartphones and standard cellphones, which have a

expectation of a higher level of privacy” in the information the computer contains. (Mr. Castagnola certainly manifested an expectation of privacy in the computer’s contents; despite Ms. Branam’s use of a supercomputer to crack his password, it gave up after over six trillion attempts. Mr. Castagnola then provided the password, upon request. (T.p. B:115-117.))

To be sure, computers are sometimes used in crime -- to keep track of drug transactions, to send emails about a mortgage fraud scheme -- but the seizure and search of a computer offers the potential for a gross violation of a person’s privacy.

Since electronic storage is likely to contain a greater quantity and variety of information than any previous storage method, computers make tempting targets in searches for incriminating information. However, this very quantity and variety of information increases the likelihood that highly personal information, irrelevant to the subject of the lawful investigation, will also be searched or seized.

Winick, *Searches and Seizures of Computers and Computer Data*, 8 Harv. J.L. & Tech. 75, 105 (Fall 1994).

This case requires this Court to address the balance between the right of privacy against government intrusion and the legitimate needs of law enforcement, in the context of the ubiquitous personal computer. The Fourth Amendment has two critical components: it demands that the affidavit for a warrant establish probable cause for the search and seizure, and that the warrant be particular in describing what can be searched and seized. The search here failed in both respects: the affidavit failed to establish probable cause to seize the computer, and the warrant lacked the particularity necessary to ensure that any search of the computer was limited to the reasons for which it was sought. The inevitable result was a wholesale invasion of Mr. Castagnola’s privacy.

fraction of the capacity of the smartphone.

APPELLANT’S PROPOSITION OF LAW NO. 1: In determining whether an affidavit is sufficient to establish probable cause for the issuance of a search warrant, the inquiry is limited to the four corners of the affidavit, or testimony taken by the magistrate under oath, and cannot be based on inferences drawn by the affiant unless those inferences were fairly communicated to the issuing magistrate.

The affidavit did not establish probable cause to seize Mr. Castagnola’s computer.

Smith involved a warrantless search, albeit a search incident to arrest, which fell under one of the “few specifically established and well-delineated exceptions” to the warrant requirement,” *Katz v. United States, supra*, 389 U.S. at 357 (1968). The seizure of the computer in this case was done pursuant to a warrant. Still, that warrant had to meet the command of the Fourth Amendment that it be supported by probable cause. “Probable cause to issue a search warrant requires substantial evidence that items sought are connected with a crime and located at the place to be searched.” *State v. Eash*, 2d Dist. No. 03-CA-34, 2005-Ohio-3749, ¶13, citing *Brinegar v. United States*, 338 U.S. 160, 69 S.Ct. 160, 93 L.Ed. 1879 (1949). The conclusion that probable cause exists requires a determination that there is a “fair probability that contraband or evidence of a crime will be found in a particular place.” *State v. George*, 45 Ohio St.3d 325, 544 N.E.2d 640 (1989), Syll. 1, quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

Because no recorded testimony was taken under oath by the issuing magistrate at the time the warrant was obtained, *see* Crim.R. 41(C)(2), the inquiry on probable cause is “limited to facts alleged within the ‘four corners’ of the affidavit.” *State v. Riley*, 6th Dist. No. 1-07-1379, 2009-Ohio-3493, ¶21. In order to find probable cause, the magistrate would have to conclude that the affidavit submitted by Det. Kreiger established a “substantial basis” for believing that Mr. Castagnola’s computer contained contraband, or fruits, instrumentalities, or evidence of a crime.

The trial court found that probable cause was established in part by the text messages that had been sent by Mr. Castagnola with his phone. According to the court, those messages “created a suspicion of criminal activity engaged in through the use of modern technology and provided the court a substantial basis for concluding that there was a fair probability that contraband or evidence of a crime would be found on the computers that were seized.” Trial Court Opinion on Motion to Suppress, p. 4. (T.d. B-24.)

It is difficult to imagine what kind of “contraband” there could be from the crimes of retaliation and vandalism, let alone how it would find its way onto Mr. Castagnola’s computer. More problematically, the trial court’s reasoning boils down to holding that someone’s sending a text message creates probable cause to seize and search his computer. While this would undoubtedly prove a boon to law enforcement, it is impossible to reconcile with the probable cause and privacy concepts that are at the core of the Fourth Amendment.

The court confronted a similar argument in *State v. Eash, supra*. There, police sought a search warrant for defendant’s computers after he accosted two young girls. Although the officer testified at the suppression hearing that he included the computer based on his personal experience in law enforcement, and his knowledge of a recent search which had also found evidence of sexual abuse of a child on a suspect’s computer, none of that made its way into the affidavit. The court concluded that “while [the officer] does identify the Defendant’s computer as property to be seized, he fails to provide any causal connection between the suspect’s conduct and the Defendant’s property.”⁷

⁷ Even the State in *Eash* conceded that the affidavit did not provide probable cause, but argued that the good faith exception to the exclusionary rule applied. This Court accepted review on this proposition, but later dismissed the appeal as having been improvidently granted. 107 Ohio

The same reasoning applies here. The assertion that “text messages = computers” is no more tenable than the assertion that “child molestation = computers,” which the court rejected in *Eash*; one could just as easily argue that someone making sexual advances toward minors will use “modern technology” to satisfy his sexual cravings for children.

The trial court’s justification was largely abandoned by the State and the appellate court (and, to an extent, even by the trial court itself). Instead, the State and the courts focused on a single word in the affidavit.

The only allegation in the affidavit which the State and the appellate court relied upon to show probable cause to seize Mr. Castagnola’s computer was that he had conducted searches “online.” The factual basis for the search warrant is presented over three pages.⁸ The word “computer” never appears in those three pages. In fact, the only word which could be said to even remotely refer to a computer was Det. Kreiger’s description of the monitored conversation between Mr. Castagnola and “Source May”:

Castagnola then says that he found Maistros *online* in the clerk of courts because he got a parking ticket several years ago. Castagnola said that he also found that Maistros [sic] law offices were in Chagrin Falls and he went through Maistros’s mailbox to confirm that Maistros did live at the address he found for him *online*.

Affidavit at p. 3 (Motion to Suppress Hearing, State’s Exhibit “A.”)

Both the State and the courts below accorded great significance to those two references. The prosecutor argued to the trial court that the defendant’s saying “‘I found the information online’ [] would indicate that there is some use for a computer.” (T.p. S:21.) The trial court

St.3d 1681, 2005-Ohio-6480, 839 N.E.2d 402.

⁸ At one point during the suppression hearing, the trial court seemed to be of the view that the first page of the affidavit, which merely specified what items the police sought to seize, could be considered in determining whether they had probable cause to seize it. (T.p. S:35-38.)

found “that the two separate references in the affidavit to ‘online’ efforts made by defendant to find prosecutor Maistros provided the issuing judge a substantial basis for concluding that probable cause existed to justify a search for and/or seizure of the computers found at defendant’s residence.” Opinion of Trial Court on Motion to Suppress, p. 4. In its brief in the court of appeals, the State argued that the judge who issued the warrant could have made a “practical, common-sense decision . . . that there was a fair probability that contraband or evidence of a crime would be found on a computer” because of the “references to text messages and two references to online research.” State’s Appellate Brief, at p. 13. The appellate court quoted the above portion of the affidavit, and held that Det. Kreiger thus “included averments in his affidavit from which one conclude that Mr. Castagnola used the internet to locate the law director’s personal residence.” *State v. Castagnola, supra*, ¶13.

The reliance on those two references is understandable; as noted above, without them, there is nothing in the affidavit to indicate that Mr. Castagnola even *had* a computer, let alone that it contained contraband, fruits, instrumentalities, or evidence of a crime.

But, as we now know, and as the magistrate who issued the warrant did not, Nicholas Castagnola never uttered the word “online,” or implied any use of a computer in locating Mr. Maistros’ home address. The word “online” was the invention of Det. Kreiger.

This case turns, then, on how the falsity of Det. Kreiger’s allegation that the searches were conducted “online” affects the validity of the warrant. The State, and the courts below, advanced two justifications for discounting the fact that the averments were false:

- First, Det. Kreiger did not make the allegations with knowledge of their falsity, or with reckless disregard for whether they were false, and so the allegations can properly be considered under *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

- Second, Det. Kreiger's belief that the searches were conducted online with Mr. Castagnola's computer was a fair inference from the facts.

Neither argument has merit.

The Franks issue. As the Court noted in *Franks*, "when the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a *truthful* showing." 438 U.S. at 164-165 (internal quotation marks omitted; emphasis in original). The Court recognized, though, that conducting a full mini-trial on the truth of every allegation contained in an affidavit was both impractical and an unwarranted application of the exclusionary rule. After all, that rule was implemented to deter police misconduct. When a police officer had been merely negligent in including in the affidavit false information conveyed to him by a third party, there was no misconduct to deter.

Thus, the Court established a two-step procedure for attacking what would otherwise be a facially sufficient affidavit. In order to be entitled to a hearing on the issue, the defendant must first make "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit," 438 U.S. at 155-156, and that "the false information must be essential to the probable cause determination." *United States v. Colkley*, 899 F.2d 297, 300 (4th Cir. 1990). If a defendant met those requirements, he was entitled to a hearing, and if he established perjury or recklessness by a preponderance of the evidence at the hearing, the warrant is voided. *Franks*, 438 U.S. at 156.

This case does not fit neatly into the *Franks* mold because here there was no dispute as to the falsity of the information contained in Det. Kreiger's affidavit. Moreover, Det. Kreiger was

not conveying information he'd gleaned from a third party. If another officer had monitored the conversation between Mr. Castagnola and "Source May," and had told the detective about the "online" reference, one could ascribe the falsity of the representation to a simple miscommunication between Det. Kreiger and the other officer. Here, though, Det. Kreiger had monitored the conversation himself. (T.p. A:248). Moreover, *the conversation was taped*; Det. Kreiger did not have to rely on his memory for its contents. (The appellate court found that "Detective Kreiger's affidavit did not quote Mr. Castagnola's actual statements to Source May," a determination completely at odds with a plain reading of the affidavit: "Castagnola then *says* that he found Maistros online" and "Castagnola *said* that he also found that Maistros [sic] law offices were in Chagrin Falls and he went through Maistros's mailbox to confirm that Maistros did live at the address he found for him online." (Emphasis supplied.))

Furthermore, there is no question here that "the false information [was] essential to the probable cause determination." *Colkley, supra*. As noted, it is the only word in the entire affidavit which even implies that anything was done on a computer.

Thus, the first step of the *Franks* procedure -- the determination of whether the allegation in the affidavit was false, and whether it was material -- was unnecessary. The sole focus, then, is whether Det. Kreiger's false statement that Mr. Castagnola had found the address "online" was made with knowledge or with reckless disregard of its falsity.

Again, in this regard, this situation lies outside the mine run of *Franks* cases. Usually, those cases present a situation where the affiant has included statements from third persons which are of questionable validity, and the issue is whether the police should have included them because they knew that they were false, or were reckless in that regard. Typical is *United States*

v. Davis, 617 F.2d 677 (D.C. Cir. 1979). There, the police had obtained a statement from Gelestino, whom they'd arrested in a drug search, that Davis had been his supplier, then used that to obtain a warrant to search Davis' house, which resulted in the discovery of drugs. Davis argued that Gelestino's statement was of dubious validity, and the failure of the police to relay that the statement had been made after an illegal search of Gelestino's apartment and threats to prosecute Gelestino's girlfriend, as well as the failure to corroborate Gelestino's claims, required suppression of the evidence against him. The court found that while "we do not approve of the police techniques used against Gelestino and agree that the corroboration was less than painstaking, the facts before us indicate that Finkelberg's failure to describe how the statements were elicited was at most negligent, but in any event not reckless." 617 F.2d at 694.

Here, though, the false information was the detective's own statement. We are not dealing with whether the affiant made a good-faith effort to determine the veracity of something somebody else told him. It is impossible to see how Det. Kreiger's statement can be described as something other than being made with knowledge or with reckless disregard of its falsity; the inclusion of a false representation of the contents of a monitored, taped conversation cannot be ascribed to simple negligence. If this does not rise to the level of a statement made with knowledge or reckless disregard of its falsity, it is difficult to imagine one which would.

This Court most recently addressed *Franks*, in the same context as is presented here, in *State v. Dibble*, 133 Ohio St.3d 451, 2012-Ohio-4630, 979 N.E.2d 247. In that case, a detective had spoken to two young women, E.S. and E.K., regarding their experiences with Dibble, who was a theater instructor at a private school. Both described sexual conduct by Dibble, and the affidavit described both women as "victims." The trial court suppressed the evidence, finding

that since the activity with E.K. occurred when she was 18 and after she had graduated from high school, she was not a “victim” of a crime, and the detective’s use of the term was made with knowledge or reckless disregard of its falsity. The 10th District court of appeals affirmed, with one judge dissenting.

In reversing, this Court found the lower courts’ “hypertechnical analysis inappropriate.”

¶20. The court agreed with the dissenting judge’s analysis: that the trial court’s interpretation of the term “‘victim’ to mean, and only to mean, ‘a person who is the object of a crime’” was too limited, and that “even minimal levels of manipulation and control exerted over young adult women by older men violate grounds of immorality and may create some measure of victimization.” Therefore, “an affiant could have reasonably concluded that E.K. was a ‘victim’ under a definition broader than the one the court imposed.” *State v. Dibble*, 195 Ohio App.3d 189, 2011-Ohio-3817, 959 N.E.2d 540, 57-59 (French, J., dissenting). ¶

The difference between the detective’s statement in *Dibble* and the one by Det. Kreiger is easily discernible. The former was a fair description of E.K.’s status; it was not false at all, unless viewed in a “hypertechnical” sense. Det. Kreiger’s statement, however, does not depend upon the definition of the word “online”; that word was a total invention of Det. Kreiger.

Indeed, the lower courts skirted that issue by focusing not on whether Det. Kreiger acted with knowledge or reckless disregard of the falsity of the reference to an “online” search, but on his motives for including that reference. The trial court found that Det. Kreiger was simply interpreting the substance of the conversation, and that his “paraphrase [was] a fair characterization” of that substance. Opinion of Trial Court on Motion to Suppress, p. 5. Similarly, the appellate court found that the “online” references were “based on Detective

Kreiger's understanding of what Mr. Castagnola meant by his statements. Although Mr. Castagnola did not directly state that he searched for the records using the clerk of courts *website* to find the law director's address, it was not illogical for Detective Kreiger to form that impression." *State v. Castagnola, supra*, ¶18.

There is one critical problem with the courts' analysis: it completely misapprehends the key role of the magistrate in the warrant process.

Det. Kreiger usurped the role of the magistrate. As the Supreme Court explained in *Johnson v. United States*, 333 U.S. 10, 13-14, 68 S.Ct. 367, 92 L.Ed. 436 (U.S. 1948),

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

The requirement of a "neutral and detached magistrate," *Coolidge v. New Hampshire*, 403 U.S. 443, 450, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), reflects the "basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government," *United States v. United States District Court*, 407 U.S. 297, 317, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972). "By requiring that conclusions concerning probable cause and the scope of a search be drawn by a neutral and detached magistrate . . . we minimize the risk of unreasonable assertions of executive authority." *Arkansas v. Sanders*, 442 U.S. 753, 759, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979). That the magistrate make an independent weighing of the facts and inferences is crucial to the process; the magistrate must "perform his 'neutral and detached' function and not serve merely

as a rubber stamp for the police.” *Aguilar v. Texas*, 378 U.S. 108, 111, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964).

The application for the warrant listed the computer as one of the items the police sought to seize. In performing her function, the magistrate had to make the determination of whether there was probable cause to do so. That required her to weigh the facts and to make inferences from those facts. The only possible argument which could support a finding of probable cause to seize Mr. Castagnola’s computer is that the magistrate could have inferred, from the allegation that Mr. Castagnola had conducted the searches online, that Mr. Castagnola had used a computer to do so (instead of a smart phone, which also has the capability of accessing the Internet), that he used his own computer to do so, and that the evidence of those searches could still be found on the computer.

The problem here is not just the compounding of inference upon inference which would be necessary for that conclusion. The problem here is that it was not the magistrate who made the inference that a search was conducted “online”-- it was Det. Kreiger. Whether he was justified in making that inference is beside the point: it was the magistrate’s job, not his, to do so. Instead, Det. Kreiger conveyed to the magistrate his “impression” that Mr. Castagnola used a computer in searching for Mr. Maistros’ address (T.p. S:73) not as his inference, but as a fact.

This entire case hinges on determining whether there was probable cause to believe that Mr. Castagnola’s computer would contain evidence of a crime. That determination should have been made by the judge who issued the warrant. Instead, it was made by Det. Kreiger. That is not how the Fourth Amendment is supposed to work.

The search here is not saved by the good faith exception to the exclusionary rule. This case falls far outside the rule established in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). In that case, the Court considered the purposes of the exclusionary rule, and held that suppression of evidence is not appropriate where the police act in objectively reasonable reliance upon the magistrate's determination of probable cause, even if that determination is subsequently determined to be wrong.

But *Leon* contains several "exceptions to the exception" which are relevant here. One is the situation presented in *Franks*: "[s]uppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth." 468 U.S. at 923. That, of course, is precisely the situation with Det. Kreiger's false representation that Mr. Castagnola found Mr. Maistros' reference "online." Nothing in *Leon* permits the conclusion that the police can act in "good faith" reliance upon the magistrate's determination of probable cause when that determination is based upon their own falsehoods.

A second exception exists where the officer relies on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable . . . depending on the circumstances of the particular case, a warrant may be so facially deficient -- *i. e.*, in failing to particularize the place to be searched or the things to be seized -- that the executing officers cannot reasonably presume it to be valid.

Ibid. (internal quotations and citations omitted).

In this regard, Det. Kreiger's beliefs regarding Mr. Castagnola's "online" activities are not relevant. "The objective reasonableness determination does not examine the subjective states of mind of law enforcement officers, rather it inquires whether a reasonably well trained officer

would have known that the search was illegal despite the magistrate's decision.” *United States v. Hodson*, 543 F.3d 286, 293 (6th Cir. 2008) (internal quotations omitted).

Hodson and another Sixth Circuit, *United States v. Schultz*, 14 F.3d 1093 (6th Cir. 1994), demonstrate the limits of the good faith exception in the context of a police officer’s subjective beliefs. In *Schultz*, the officer sought a warrant to search safe deposit boxes, and submitted an affidavit replete with information as to numerous drug transactions the defendant had allegedly made. The affidavit then stated that “based on [the officer’s] training and experience . . . it is not uncommon for the records, etc. of such drug distribution to be maintained in safe deposit boxes.” The court held that although “training and experience” could be considered in establishing probable cause, “it cannot substitute for the lack of evidentiary nexus in this case . . .”

Officer Ideker did not have anything more than a guess that contraband or evidence of a crime would be found in the boxes, and therefore the first warrant should not have been issued. To find otherwise would be to invite general warrants authorizing searches of *any* property owned, rented, or otherwise used by a criminal suspect – just the type of broad warrant the Fourth Amendment was designed to foreclose.

14 F.3d at 1097-1098. The court nonetheless upheld the search under the good faith exception, finding that although the references to “training and experience” were not sufficient to establish a nexus of probable cause between that crime and the safe deposit boxes, “the connection was not so remote as to trip on the ‘so lacking’ hurdle.” *Id.* at 1098.

The court came to the contrary conclusion in *Hodson*. There, an undercover police officer posing as a 12-year-old boy engaged Hodson in a discussion in an AOL chatroom, during which Hodson professed that he had previously molested his sons and a nephew, and solicited the officer for oral sex. The police subsequently obtained Hodson’s identity from AOL, and prepared an affidavit for a warrant to search the residence and seize his computer. The warrant,

though, sought evidence of child *pornography*, rather than child *molestation*. The court noted that “the statement of probable cause contains no information whatsoever with regard to Hodson’s engaging in any aspect of child pornography, or any basis for believing that individuals who engage in child molestation are likely also to possess child pornography,” 543 F.3d at 290. As in *Schultz*, the magistrate found a lack of probable cause, but upheld the search based on the good faith exception.

The court held that any “reasonably well trained officer” would have come to the realization that the “the search described (for evidence of the crime of child pornography) did not match the probable cause described (that evidence would be found of a different crime, namely, child molestation) and therefore the search was illegal.” *Ibid*. The court acknowledged that the detective who prepared the affidavit and obtained the warrant “had specialized, subjective knowledge of these kinds of criminal offenses, this search, and this case.” *Ibid*. But that did not save the warrant; “as the Supreme Court has made clear such subjective knowledge is not sufficient to satisfy a finding of objective good faith,” *ibid*, citing *Groh v. Ramirez*, 540 U.S. 551, 564, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004).

Schultz and *Hodson* present far more compelling cases for the application of the good faith exception than does the situation here. Unlike the affidavit in *Schultz*, Det. Kreiger’s affidavit does not even base his surmise that Mr. Castagnola used a computer to conduct searches on his “training and experience.” In *Hodson*, it was indisputable that the defendant had actually used a computer. Here, that was nothing more than the subjective belief of Det. Kreiger.

Again, it is important to note that Det. Kreiger’s subjective belief was never communicated to the judge who issued the warrant; he presented that belief to her as fact. As

noted above, the good faith exception does not apply “if the officers were dishonest or reckless in preparing their affidavit.” *Leon, supra*, 468 U.S. at 701.

And again, even if Det. Kreiger been truthful in his representation that Mr. Castagnola had conducted the searches “online,” this would not have provided probable cause to seize the computer; it provided no basis for concluding that Mr. Castagnola had used *a* computer to conduct the search, rather than some other device capable of accessing the Internet, that he had used *his* computer to do, rather than a public one or one belonging to his confederates, and that the evidence of that use would still be on the computer. Ohio courts have similarly suppressed evidence found in searches supported by nothing more than “bare bones” affidavits such as the one presented here. *See State v. Richardson*, 9th Dist. No. 24636, 2009-Ohio-5678, ¶17 (quoting *Leon* that suppression is appropriate where affidavit “is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable”).

The subsequent search of the computer, the second warrant, and the search pursuant to that warrant, are fruits of the poisonous tree. Evidence discovered pursuant a lawful search must still be suppressed if its discovery stemmed from an earlier illegal search or seizure, and the taint of the initial illegality has not been attenuated by subsequent events. *Nardone v. United States*, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1940). As this Court explained in *State v. Carter*, 69 Ohio St.3d 57, 67, 1994-Ohio-343, 630 N.E.2d 355, “[t]he reason for the rule is the concern that if derivative evidence were not suppressed, police would have an incentive to violate constitutional rights in order to secure admissible derivative evidence even though the primary evidence secured as a result of the constitutional violation would be inadmissible.”

Application of that principle to this case is simple. The evidence against Mr. Castagnola in the child pornography case depended entirely upon the initial seizure of the computer. If the computer had not been seized, it would not have been searched by Ms. Branam, and no second warrant for a more detailed search would have been sought. There is no attenuation here: the evidence against Mr. Castagnola can be traced directly to the seizure of his computer. If that seizure was unlawful – and it was – then all the evidence obtained from the computer must be suppressed.

APPELLANT’S PROPOSITION OF LAW NO. 2: A general exploratory search for evidence on a computer does not meet the particularity requirement of the Fourth Amendment. An affidavit and search warrant authorizing the seizure and search of a computer must describe with particularity the type of items to be sought, supported by probable cause to believe that those items will be found on the computer.

The requirement of particularity. That the Fourth Amendment’s command that a search warrant “particularly describ[e] the place to be searched, and the persons or things to be seized” sprang from the Colonists’ loathing of the “general warrant” requires no citation. The magistrate’s scrutiny and the requirement of probable cause were intended to set an initial barrier for searches: “The premise here is that any intrusion in the way of search or seizure is an evil, so that no intrusion at all is justified without a careful prior determination of necessity.” *Coolidge v. New Hampshire, supra*, 443 U.S. at 467. But the requirement of a “‘particular description’ of the things to be seized” served a “second, distinct objective”: that those searches deemed necessary should be as limited as possible.

Here, the specific evil is the “general warrant” abhorred by the colonists, and the problem is not that of intrusion per se, but of a general, exploratory rummaging in a person’s belongings.

Ibid.

The requirement of particularity addresses two separate concerns: “whether the warrant supplies enough information to guide and control the agent’s judgment in selecting what to take, and . . . whether the category as specified is too broad in the sense that it includes items that should not be seized.” *United States v. Upham*, 168 F.3d 532, 536 (1st Cir.1999) (internal quotes and citations omitted). Again, because of the potential invasion of privacy a search of a computer entails, “the particularity requirement assumes even greater importance.” *United States v. Galpin*, 720 F.3d 436, 446 (2d Cir. 2013).

The warrant here addressed neither of the separate concerns: it did not give any guidance whatsoever to the agents in defining what to seize or search, and was so broad that it included items which should not have been seized. It was indeed nothing more than a license to rummage through Mr. Castagnola’s belongings.

The warrant offered no guidance to the agents executing it as to what could be seized.

The application for the warrant alleged that “certain property” was being “concealed” at Mr. Castagnola’s house:

Records and documents either stored on computers, ledgers, or any other electronic recording device to [sic] include hard drives and external portable hard drives, cell phones, printers, storage devices of any kind, printed out copies of text messages or emails, cameras, video recorders or any photo imaging devices and their storage media to include tapes, compact discs, or flash drives.

Warrant at p. 1 (Motion to Suppress Hearing, State’s Exhibit “A.”)

Any items seized were to be “used as evidence in the prosecution” of the crimes of retaliation, criminal trespassing, criminal damaging, and possession of criminal tools. *Ibid.*

At the point where Det. Kreiger sought the warrant, the police had Nick Castagnola’s

direct admission of having committed the crime, evidenced by a tape of his oral statement, as well as his text messages. The only justification advanced for the search, and *post hoc* at that, was the supposed need to find evidence showing that Mr. Castagnola had looked up Mr. Maistros' address. Why it was necessary to find out the precise means by which Mr. Castagnola found Mr. Maistros' address, when he freely admitted to being there, is not at all clear.

Even worse, the warrant gave no guidance whatsoever as to what the police were to seize or why. Nothing about the offenses alleged -- retaliation, criminal trespassing, criminal damaging, and possession of criminal tools -- would lead the executing officers to believe that they would find contraband, or fruits and instrumentalities, of those crimes. This was a search for evidence, and the warrant gave no clue as to what that "evidence" would be, or where it would be found, and thus placed no limit on what could be searched or seized. The warrant authorized the seizure of "records and documents." Records and documents of what? There is nothing in the warrant which tells an officer what records or documents are believed to be relevant to the charged crimes, or how the officer would confine his search only to those records and documents.

The courts have routinely condemned this sort of blunderbuss approach. *United States v. Buck*, 813 F.2d 588, 592 (2d Cir. 1987) (warrant allowing police to "seize any papers, things or property" relating to particular crimes "only described the crimes -- and gave no limitation whatsoever on the kind of evidence sought"); *United States v. Roche*, 614 F.2d 6, 7 (1st Cir. 1980) (warrant to seize records relating to motor vehicle insurance fraud "too broad in that it . . . authorized the seizure of a far broader class of documents pertaining to all types of insurance"). The warrant here violated the first objective of the particularity requirement: "[a]s to what is to

be taken, nothing is left to the discretion of the officer executing the warrant.” *Marron v. United States*, 275 U.S. 192, 196, 48 S.Ct. 74, 72 L.Ed 231 (1927).

This lack of specificity carried over into the search of the computer by Ms. Branam. Had her search been confined to examining the contents of the browser history, for example, a reasonable argument could be made that the search was indeed limited to the basis for which the computer had initially been seized: to find evidence that Mr. Castagnola had used the computer to search for Mr. Maistros’ address. Ms. Branam saw her mission in far broader terms: she “was looking for any evidence of intimidation of David Maistros . . . and anything associated with that.” The first thing she did was pull up all the images on the computer. (T.p. B:91-92). No explanation was offered by Ms. Branam as to why she believed that “evidence of intimidation of David Maistros” would be found on any image files in Mr. Castagnola’s computer.

But Ms. Branam can hardly be blamed for the expansiveness of the search. Neither the warrant nor the affidavit provided any description of how the computer was to be searched, or any definition of what was being sought. That left Ms. Branam to do exactly what she did: “look[] for any evidence of intimidation of David Maistros . . . and anything associated with that.” (T.p. B:91.) As the court held in *Buck*, limiting a search to evidence of a crime without any specification of what or where that evidence might be is no real limitation at all.

The warrant was so broad it included items which should not have been seized.

Because the warrant provided no guidance to the officers in determining what should and should not be seized, it comes as no surprise that it allowed for seizure of items which had nothing to do with the crimes alleged. In fact, the major problem was the lack of probable cause to even search *the house*, let alone seize any of the items in it. “Computer” isn’t the only word missing from the

affidavit; so is any reference to Mr. Castagnola's residence. The affidavit clearly establishes the involvement of several people in the crime, but there is nothing in the affidavit which indicates that any aspect of their crimes took place in Mr. Castagnola's home, or that police would find evidence of that in the home.

One might possibly contend that "cell phones" were a legitimate object of the search, as "Source May" had provided the police with copies of text messages sent by Mr. Castagnola concerning the offense. That would permit the search of the house for the cellphone, and for its seizure. (Of course, the fact that the "Source May" *did* provide the copies of the text messages, which were on his own phone and which could be determined to have been sent from Mr. Castagnola's phone, obviated the need for the seizure of the latter's phone.)¹⁰

But the search here ranged far, far beyond that. There was nothing in the affidavit which even hinted that "cameras, video recorders, or any photo imaging devices" would contain any evidence of the crimes charged, yet the warrant allowed the seizure of those items. Perhaps nothing better demonstrates the expansiveness of the search than the fact that it allowed the police to seize "ledgers"; the connection of those, and similar "records and documents," to the crimes charged is impossible to fathom.

In addition to allowing the police to seize items wholly unrelated to the crimes charged, the warrant specified no limit whatsoever in how the computer could be searched. As the Court noted in *United States v. Walser*, 275 F.3d 981, 986 (10th Cir. 2001),

[O]fficers conducting searches (and the magistrates issuing warrants for those searches) cannot simply conduct a sweeping, comprehensive search of a

¹⁰ It is also noteworthy that the cellphone was not found in the search of the house. It was found in Mr. Castagnola's vehicle when he was arrested some distance from the home. (T.p. A-259.)

computer's hard drive. Because computers can hold so much information touching on many different areas of a person's life, there is a greater potential for the 'intermingling' of documents and a consequent invasion of privacy when police execute a search for evidence on a computer . . . Officers must be clear as to what it is they are seeking on the computer and conduct the search in a way that avoids searching files of types not identified in the warrant. [Internal quotations and citations omitted.]

This search was not conducted "in a way that avoids searching files of a type not identified in the warrant." The search was conducted in the precise fashion that the warrant permitted, and the Fourth Amendment does not: a wide-ranging exploratory search of the entire contents of the hard drive, for whatever evidence the police might find.

The Court in *Andresen v. Maryland*, 427 U.S. 463, 482, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976) observed that

In searches for papers, it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized . . . In [such] searches, responsible officials, including judicial officials, must take care to assure that they are conducted in a manner that minimizes unwarranted intrusions upon privacy.

The police here devoted efforts and resources toward apprehending Mr. Castagnola that would normally be reserved for major drug dealers or complex mortgage fraud conspiracies. That is perhaps understandable, given that it was law enforcement, in the form of the prosecutor and the police, which was the focus of Mr. Castagnola's offenses. (Then again, the authorities themselves regarded this as far more of an immature prank than a threat; if anyone gave a thought to providing a security detail to Mr. Maistros after his cars were egged, or even having a police officer patrol the area more frequently, it was not mentioned at trial.) But it also goes to the issue of good faith.

Put simply, the police here did not seek to “minimize” the intrusions upon Mr. Castagnola’s privacy, they sought to *maximize* them. As indicated before, there was no need to search Mr. Castagnola’s home; the police had ample and detailed admissions of every element of the crimes from Mr. Castagnola’s own mouth -- recorded, no less -- and his own cellphone. Despite that, the police drew up a warrant which might have caused the judges of the Star Chamber to look askance: without a semblance of probable cause, it allowed the police unfettered discretion in what they seized and what they searched, including Mr. Castagnola’s “private papers.” No “objective” police officer would have a good faith belief in the validity of the warrant, because any objective police officer would have seen it for exactly what it was: a general warrant seeking to go through Mr. Castagnola’s “house, papers, and effects” in the hope of discovering evidence of a crime.

CONCLUSION

There is a tendency in the legal profession to deconstruct: we break down the Fourth Amendment into its component parts -- probable cause, particularity -- we parse *Franks* and *Leon* and the case law, we analogize, we analyze.

And sometimes in doing so, we lose sight of the larger picture. One cannot imagine anyone standing up in Congress in 1791 during the debates on the Fourth Amendment and urging that if the government had probable cause to suspect a person of a crime, its agents could enter that person’s house and seize all of his personal papers and effects to see if they could find evidence of that crime. The very concept would have been anathema to the Framers.

Yet that is precisely what affirmance of the search here would permit. The warrant here was not a document which allowed a magistrate to make a “careful determination of the necessity” of a search, *Coolidge, supra*; even with the inclusion of Det. Kreiger’s false assertion regarding an “online” search, the affidavit is devoid of any “substantial basis” for believing that evidence of a crime could be found on Mr. Castagnola’s computer, and with that false assertion excised, there is no basis whatsoever for such a belief. The warrant here was not a document carefully crafted to minimize the intrusion upon Mr. Castagnola’s privacy; it allowed the police unbridled discretion in determining what to seize, and unbridled discretion in determining what to look for. This was indeed nothing more than a general warrant: without any probable cause to do so, it allowed the police the unfettered ability to rummage through Mr. Castagnola’s most private possessions for evidence of a crime.

To be sure, there are times when probable cause to seize a computer can be based simply on the nature of the crime. Courts, for example, have consistently upheld searches for computers in child pornography cases. *See, e.g., United States v. Hay*, 231 F.3d 630, 634 (9th Cir. 2000) (upholding seizure of “computer hardware” in search for materials containing child pornography), and *United States v. Campos*, 221 F.3d 1143, 1147 (10th Cir. 2000) (upholding seizure of “computer equipment which may be, or is used to visually depict child pornography”).

But this is not such an offense. Perhaps the most chilling part of the trial court’s decision is its conclusion that the seizure of the computer was justified by the fact that the text messages themselves “created a suspicion of criminal activity engaged in through the use of modern technology.” Trial Court Opinion on Motion to Suppress, at p. 5 (T.d. B-24.) Coupled with its earlier reference to “this age of ‘online’ activities, particularly among people under the age of

APPENDIX

40," *id.* at p. 4, this translates to nothing more than the assertion that if someone in that broad demographic could be suspected of having used "modern technology" in a crime -- and to the trial judge, at least, a simple cellphone would suffice -- the police have the right to seize that person's computer and search everything on it.

It is not difficult to imagine the logical extension of this reasoning. The police could search the house and seize the computer of a person suspected in trafficking in narcotics on the theory that he might have used "modern technology" in keeping records of his drug transactions. The police could search the house and seize the computer of anyone suspected of participating with others in the commission of a crime on the supposition that the person would have used "modern technology" -- emails -- in communicating with his accomplices.

The search here strikes at the very core of the Fourth Amendment, and the reason for its enshrinement in the Bill of Rights.

For the foregoing reasons, Appellant respectfully prays the Court to reverse the judgment of the courts below, and to remand the case for further proceedings.

Respectfully submitted,

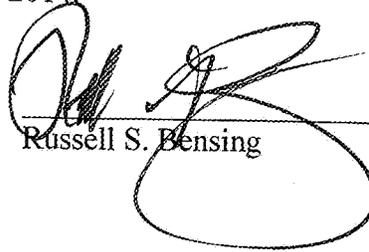


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SERVICE

The undersigned hereby certifies that a copy of the foregoing Merit Brief of Appellant Nicholas Castagnola was sent by ordinary U.S. mail, postage prepaid, to Heaven DiMartino, Assistant Prosecuting Attorney, Summit County Safety Building, 53 University Avenue 6th Floor, Akron, OH 44308, this 10th day of January, 2014.



Russell S. Bensing

APPENDIX

IN THE SUPREME COURT OF OHIO

CASE NO. ~~13-0781~~

STATE OF OHIO,

Appellee,

v.

NICHOLAS CASTAGNOLA,

Appellant.

}
}
} On Appeal from the Summit County Court of
} Appeals, 9th Judicial District

}
} Court of Appeals
} Case No. 26185, 26186

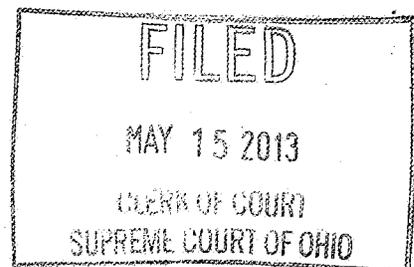
NOTICE OF APPEAL

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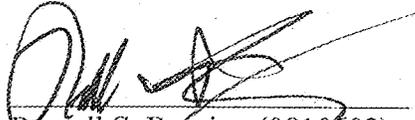
COUNSEL FOR APPELLEE, STATE OF OHIO



Now comes the Appellant, NICHOLAS CASTAGNOLA, by and through Counsel, and hereby gives notice of his appeal from the judgment and final order of the Summit County Court of Appeals, Ninth Judicial District, journalized in Court of Appeals Case No. 26185 and 26186 on March 29, 2013.

This case is a felony, raises a substantial constitutional question, and is one of public or great general interest.

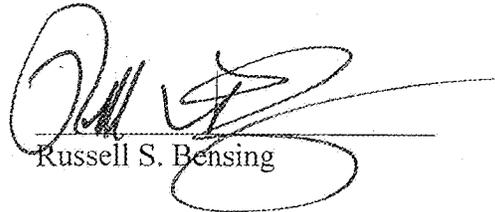
Respectfully submitted,



Russell S. Bensing (0010602)
COUNSEL FOR APPELLANT
NICHOLAS CASTAGNOLA

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Notice of Appeal was sent by ordinary U.S. mail, postage prepaid, to Heaven DiMartino, Assistant Prosecuting Attorney, Summit County Safety Bldg., 53 University Ave., 6th Floor, Akron, OH 44308, this 14th day of May, 2013.



Russell S. Bensing

[Cite as *State v. Castagnola*, 2013-Ohio-1215.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

Appellee

v.

NICHOLAS J. CASTAGNOLA

Appellant

C.A. Nos. 26185
 26186

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE Nos. CR 10 07 1951 (B)
 CR 10 08 2244

DECISION AND JOURNAL ENTRY

Dated: March 29, 2013

MOORE, Presiding Judge.

{¶1} Defendant-Appellant, Nicholas Castagnola, appeals from his convictions in the Summit County Court of Common Pleas. This Court affirms in part and reverses in part.

I.

{¶2} The City of Twinsburg Police Department targeted Mr. Castagnola as a person of interest after more than 20 incidents of criminal mischief had occurred. Specifically, one or more individuals had been egging cars throughout the city. One particular incident involved the city's law director. The day after the law director appeared in court to prosecute Mr. Castagnola for selling alcohol to underage persons, he awoke at his home to find that his car had been egged and that one of its mirrors had been damaged. Another incident involved the egging of a police car from the City of Reminderville's Police Department. The police became suspicious of Mr. Castagnola when he and several friends were observed buying a large amount of eggs from Giant

Eagle. An officer responded to Giant Eagle and asked the group about the eggs. Mr. Castagnola replied that the eggs were for a cake that the group planned on baking. The responding officer ultimately confiscated the eggs and released the group. The following day, a cake was sent to the responding officer at the police department, courtesy of Mr. Castagnola and his friends.

{¶3} The police had a breakthrough in the case when an informant came to them and put them into contact with another informant who had information about Mr. Castagnola's involvement in the foregoing incidents. The second informant showed the police ten text messages that he had received from Mr. Castagnola, all of which pointed to his involvement in the crimes. The informant then agreed to wear a wire and have a conversation with Mr. Castagnola at his home. During the conversation, Mr. Castagnola freely discussed having perpetrated numerous incidents of criminal mischief, including the incidents pertaining to the law director and the police car from Reminderville.

{¶4} The text messages the police reviewed and the conversation they heard between Mr. Castagnola and the informant led them to believe that Mr. Castagnola had found the law director's personal address online. Accordingly, the police obtained a warrant to search his home for any computers or other similar devices. The police then executed the warrant and seized two computers from Mr. Castagnola's home. When a forensic specialist searched one of the computers, she observed what appeared to be numerous images depicting child pornography. The police then obtained a second search warrant to inspect the computer's hard drive. The search uncovered a great deal of pornographic material as well as ten images and/or videos of children engaging in sexual activity.

{¶5} A grand jury indicted Mr. Castagnola in two separate cases. In Case No. 2010-07-1951(B) ("the retaliation case"), Mr. Castagnola was indicted on counts of criminal

damaging, vandalism, criminal trespass, possession of criminal tools, two counts of retaliation, and multiple forfeiture specifications. In Case No. 2010-08-2244 (“the pandering case”), Mr. Castagnola was indicted on ten counts of pandering sexually oriented matter involving a minor. Mr. Castagnola filed a motion to suppress in both cases, challenging the warrant the police relied upon to seize the computer from his home. The trial court held a suppression hearing and ultimately denied the motion. Subsequently, a jury trial took place in the retaliation case. The jury found Mr. Castagnola guilty on all counts, but did not find that his property was subject to forfeiture. The pandering case then was tried to the bench, and the judge found Mr. Castagnola guilty on all counts. The court sentenced Mr. Castagnola in each case and ordered the sentences to run consecutively to one another for a total term of 30 months in prison.

{¶6} Mr. Castagnola now appeals and raises four assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED, TO THE PREJUDICE OF [MR. CASTAGNOLA], IN DENYING [MR. CASTAGNOLA’S] MOTION TO SUPPRESS THE COMPUTERS SEIZED AT THE TIME OF THE SEARCH OF [MR. CASTAGNOLA’S] RESIDENCE.

{¶7} In his first assignment of error, Mr. Castagnola argues that the trial court erred by denying his motion to suppress. Specifically, he argues that the affidavit submitted in support of the warrant upon which the police relied to seize his computers lacked sufficient indicia of probable cause. We disagree.

{¶8} The Ohio Supreme Court has held that:

[a]ppellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Mills*, 62 Ohio St.3d 357, 366 (1992). Consequently, an appellate court must accept the trial court’s findings of

fact if they are supported by competent, credible evidence. *State v. Fanning*, 1 Ohio St.3d 19 (1982). Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. *State v. McNamara*, 124 Ohio App.3d 706 (4th Dist.1997).

State v. Burnside, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. Accord *State v. Hobbs*, 133 Ohio St.3d 43, 2012-Ohio-3886, ¶ 6 (*Burnside* applied). Accordingly, this Court reviews the trial court's factual findings for competent, credible evidence and considers the court's legal conclusions de novo. *State v. Conley*, 9th Dist. No. 08CA009454, 2009-Ohio-910, ¶ 6, citing *Burnside* at ¶ 8.

{¶9} “A warrant shall issue on [] an affidavit * * * sworn to before a judge of a court of record” once the judge “is satisfied that probable cause for the search exists.” Crim.R. 41(C)(1)-(2).

In determining the sufficiency of probable cause in an affidavit submitted in support of a search warrant, “[t]he task of the issuing [judge] is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the ‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.”

State v. George, 45 Ohio St.3d 325 (1989), paragraph one of the syllabus, quoting *Illinois v. Gates*, 462 U.S. 213, 238-239 (1983). “A court reviewing the sufficiency of probable cause in a submitted affidavit should not substitute its judgment for that of the issuing judge.” *State v. Hoang*, 9th Dist. No. 11CA0013-M, 2012-Ohio-3741, ¶ 49. “[T]he duty of a reviewing court is simply to ensure that the [judge] had a substantial basis for concluding that probable cause existed.” *George* at paragraph two of the syllabus. Great deference should be afforded to the issuing judge's probable cause determination, “and doubtful or marginal cases in this area should be resolved in favor of upholding the warrant.” *Id.*

{¶10} The issuing judge here based her probable cause determination strictly upon the four corners of the affidavit submitted in support of the warrant. In his affidavit, Detective Mark Kreiger averred that the following property was being concealed at Mr. Castagnola's residence: ✓

Records and documents either stored on computers, ledgers, or any other electronic recording device to include hard drives and external portable hard drives, cell phones, printers, storage devices of any kind, printed out copies of text messages or emails, cameras, video recorders or any photo imaging devices and their storage media to include tapes, compact discs, or flash drives.

Detective Kreiger wrote that he became aware of approximately 25 incidents of criminal mischief in and around Twinsburg a few weeks before a confidential informant provided the police with information about the incidents. The confidential informant both identified Mr. Castagnola as one of the individuals involved in the mischief and placed the police in contact with another informant whom Detective Kreiger termed "Source May." Detective Kreiger averred that Source May showed the police ten text messages he had received from Mr. Castagnola, all of which pointed to Mr. Castagnola's involvement in the criminal mischief. Detective Kreiger quoted all ten of the text messages in his affidavit. He then wrote that Source May agreed to wear a wire and speak with Mr. Castagnola at his home. During Source May's conversation with Mr. Castagnola, Detective Kreiger averred, Mr. Castagnola admitted that he had damaged several vehicles, including the law director's car. Detective Kreiger stated that Mr. Castagnola said "he found [the law director] online in the clerk of courts" as well as the location of the law director's law office. Detective Kreiger also stated that Mr. Castagnola said he had gone "through [the law director's] mailbox to confirm that [he] did live at the address he found for him online."

{¶11} "The question in this case is whether under the totality of the circumstances, [Detective Kreiger's] affidavit provided a substantial basis for the court's conclusion that there ✓

was a fair probability that evidence of [Mr. Castagnola's criminal activity] would be found [on his computer]." *State v. Crumpler*, 9th Dist. Nos. 26098 & 26118, 2012-Ohio-2601, ¶ 10. Mr. Castagnola argues that Detective Kreiger's affidavit failed to establish that probable cause existed for the seizure of his computer. Specifically, he argues that the fact that one form of technology (i.e. a text message) contains evidence of an individual's wrongdoing does not equate to the conclusion that another form of technology (i.e. a computer) will contain similar evidence. He relies upon *State v. Eash*, 2d Dist. No. 03-CA-34, 2005-Ohio-3749.

{¶12} In *Eash*, the police obtained a warrant to seize Eash's computer and various other items after several minor females reported that Eash had either propositioned them from or actually assaulted them in his car. The officer who provided the affidavit in support of the search warrant later testified that he included Eash's computer in the warrant based on his personal experience in law enforcement and recent consultation with a member of the department's Child Abuse Response Team. *Eash* at ¶ 15. Specifically, he testified that individuals who preyed upon children sometimes used their computers to hide incriminating evidence. He neglected, however, to place any of that information in his affidavit. *Id.* The affidavit itself did not include any "causal link" between Eash's computer and the reports from the minor females. *Id.* at ¶ 16. The Second District found that the State's error in failing to establish any causal link in the affidavit was fatal to the warrant insofar as it concerned Eash's computer because the affidavit did not establish probable cause for the seizure of the computer. *Id.*

{¶13} This case is distinguishable from *Eash*. Detective Kreiger specifically averred in his affidavit that Mr. Castagnola had "found [the law director] online" and had gone "through [the law director's] mailbox to confirm that [he] did live at the address [Mr. Castagnola] found for him online." Accordingly, Detective Kreiger included averments in his affidavit from which

one could conclude that Mr. Castagnola used the internet to locate the law director's personal residence. Unlike the affidavit in *Eash*, therefore, the affidavit here established a causal link between Mr. Castagnola's alleged criminal activities and the item seized. As a matter of common sense, the issuing judge could have determined that Mr. Castagnola used a computer to conduct the foregoing online searches such that the computer would contain evidence of his criminal activities. See *George*, 45 Ohio St.3d at paragraph one of the syllabus, quoting *Gates*, 462 U.S. at 238-239.

{¶14} Mr. Castagnola argues that, even assuming he obtained certain information online, that fact alone would not give rise to probable cause to seize his computer. According to Mr. Castagnola, it was improper for the issuing judge to infer that he owned a computer and used *his* computer to access online information rather than some other computer or device with internet capabilities. The warrant, however, did not limit the object of the search to a computer. The warrant encompassed any device capable of accessing the internet. It is a matter of common knowledge that a computer is capable of accessing the internet. Mr. Castagnola cites no law for the proposition that the police cannot seize any item with internet capabilities once they have probable cause to establish that an online search has occurred in connection with unlawful activities. See App.R. 16(A)(7). This Court will not hold, in the absence of any applicable authority, that the police were required to uncover the exact device Mr. Castagnola used to search for information online before they could secure a warrant. Detective Kreiger's affidavit gave the issuing judge a substantial basis upon which to find that there was a fair probability that any computer in Mr. Castagnola's home contained evidence of his crimes. See *Crumpler*, 2012-Ohio-2601, at ¶ 16. On its face, therefore, the warrant was based upon probable cause.

{¶15} Next, Mr. Castagnola argues that the trial court erred by upholding the warrant because some of the information contained in Detective Kreiger's affidavit was untrue. Suppression is "an appropriate remedy where: (1) '* * * [the] judge * * * was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth * * *.'" *George*, 45 Ohio St.3d at 331, quoting *U.S. v. Leon*, 468 U.S. 897, 923 (1984). "[T]o successfully attack the veracity of a facially sufficient search warrant affidavit, a defendant must show by a preponderance of the evidence that the affiant made a false statement, either 'intentionally, or with reckless disregard for the truth.'" (Internal citations and quotations omitted.) *State v. Willan*, 9th Dist. No. 24894, 2011-Ohio-6603, ¶ 95. "Reckless disregard means that the affiant had serious doubts of an allegation's truth. Omissions count as false statements if designed to mislead, or * * * made in reckless disregard of whether they would mislead, the [issuing judge]." (Internal quotations and citations omitted.) *State v. Ruffin*, 9th Dist. No. 25916, 2012-Ohio-1330, ¶ 6, quoting *State v. Waddy*, 63 Ohio St.3d 424, 441 (1992).

{¶16} Mr. Castagnola argues that Detective Kreiger's averments that he had searched for information online were untrue because he never said he found the law director's address "online." At the suppression hearing, the defense introduced the recording of the wiretapped conversation that took place between Mr. Castagnola and Source May and called Detective Kreiger as a witness. The trial court reviewed the recording in issuing its decision and acknowledged that Mr. Castagnola never uttered the word "online" while speaking with Source May. The court determined, however, that it was reasonable for Detective Kreiger to surmise from all of the information he received that Mr. Castagnola had searched online for the law

director. Accordingly, the trial court rejected Mr. Castagnola's argument that the affidavit contained false statements.

{¶17} Detective Kreiger testified that, given Mr. Castagnola's statements to Source May and the text message he sent, it was his impression that Mr. Castagnola had searched online to find the law director. In two of his text messages, Mr. Castagnola wrote: (1) "Found this address and went to his house * * *" and (2) "How many David M. Maistros' could there be who are attorneys." In the recorded conversation between Mr. Castagnola and Source May, Mr. Castagnola never stated that he found the law director's home "online," but did state that he ultimately had to find the address through the clerk of courts because the address was unlisted. Mr. Castagnola specified that he was able to find the law director's address through the clerk of courts because the law director had received a traffic citation at one point. Detective Kreiger testified that he believed Mr. Castagnola had searched online for the law director's address, so he paraphrased Mr. Castagnola's statements in the affidavit. He specified that Mr. Castagnola's initial text message questioning how many attorneys there could be with the same name as the law director led him to believe that Mr. Castagnola was conducting his search in an online capacity. That belief was bolstered by Mr. Castagnola's statements to Source May that he found the correct address through a search of the clerk of courts' records.

{¶18} Having reviewed the record, we must conclude that Mr. Castagnola failed to show that Detective Kreiger intentionally or recklessly included false statements in his affidavit. *See Willan*, 2011-Ohio-6603, at ¶ 95. Detective Kreiger's affidavit did not quote Mr. Castagnola's actual statements to Source May. Instead, it was based on Detective Kreiger's understanding of what Mr. Castagnola meant by his statements. It was not reckless for Detective Kreiger to surmise that Mr. Castagnola found the law director online given all of the information he

received. Although Mr. Castagnola did not directly state that he searched for records using the clerk of courts *website* to find the law director's address, it was not illogical for Detective Kreiger to form that impression. Mr. Castagnola failed to set forth any evidence that Detective Kreiger made the statements in his affidavit with a reckless disregard for the truth. Consequently, his affidavit cannot be said to have misled the judge. *See George*, 45 Ohio St.3d at 331, quoting *Leon*, 468 U.S. at 923.

{¶19} The trial court correctly concluded that the warrant here was supported by probable cause and properly rejected Mr. Castagnola's argument that Detective Kreiger's affidavit contained false information. Mr. Castagnola's argument that the court erred by denying his motion to suppress lacks merit. Consequently, his first assignment of error is overruled.

ASSIGNMENT OF ERROR II

[MR. CASTAGNOLA'S] CONVICTIONS OF PANDERING SEXUALLY ORIENTED MATERIAL INVOLVING MINORS IN CASE NO. 2010-08-3344 [WERE] NOT SUPPORTED BY SUFFICIENT EVIDENCE, IN DEROGATION OF [MR. CASTAGNOLA'S] RIGHT TO DUE PROCESS OF LAW.

{¶20} In his second assignment of error, Mr. Castagnola argues that his pandering convictions are based on insufficient evidence. Specifically, he argues that there was no direct evidence that he possessed or controlled the pornographic images and videos at issue. We do not agree that Mr. Castagnola's pandering convictions are based on insufficient evidence.

{¶21} In order to determine whether the evidence before the trial court was sufficient to sustain a conviction, this Court must review the evidence in a light most favorable to the prosecution. *State v. Jenks*, 61 Ohio St.3d 259, 273 (1991).

An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution,

any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.

Id. at paragraph two of the syllabus; *see also State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997).

“In essence, sufficiency is a test of adequacy.” *Thompkins* at 386.

{¶22} “No person, with knowledge of the character of the material or performance involved, shall * * * [k]nowingly solicit, receive, purchase, exchange, possess, or control any material that shows a minor participating or engaging in sexual activity, masturbation, or bestiality * * *.” R.C. 2907.322(A)(5). “A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.” R.C. 2901.22(B). Whoever violates the foregoing statute is guilty of pandering sexually oriented matter involving a minor. R.C. 2907.322(C).

{¶23} Mr. Castagnola does not dispute that the computer the police seized from his home contained images and videos that displayed minors engaging in sexual activity. Instead, he argues that the State failed to prove that he either had possession of or control over those items. Because there was testimony that many individuals used the computer in his home, Mr. Castagnola argues, there was no evidence that he even knew the images and videos were saved on the computer.

{¶24} At the time the police executed their warrant, Mr. Castagnola lived at his mother’s home along with his younger brother and his grandfather. Officer Michael Krejci testified that the computer later found to contain pornographic material was seized from an alcove in the home’s family room. Natasha Branam, a forensic scientist from the Bureau of Criminal Identification and Investigation’s Cyber Crime Unit, analyzed the hard drive of the computer. Branam testified that the computer had three different user profiles: Debbie, Nick, and Nick C.

All three profiles were password protected. With the aid of her forensic software, Branam was able to decipher the password for the Debbie profile within approximately half an hour. She also used forensic software to attempt to decipher the passwords for the Nick and Nick C. profiles. After five days and more than six trillion attempts by her computers, however, Branam abandoned the search. She testified that she was never able to decipher the extremely strong passwords for either the Nick or Nick C. profiles.

{¶25} Even without the passwords for the Nick and Nick C. profiles, Branam explained that she was able to examine the entire contents of the computer's hard drive through her forensic software. Once she found any item of interest, she was also able to determine where the item was stored; that is, under which user profile. Branam testified that: (1) the Debbie profile was created August 4, 2008, and had been accessed 900 times between its creation date and June 29, 2010, the date of the seizure; (2) the Nick C. profile was created May 10, 2009, and had been accessed 26 times between its creation date and the date of the seizure; and (3) the Nick profile was created August 2, 2008, and had been accessed 2,192 times between its creation date and June 17, 2010, the last date the profile was accessed. Branam did not find any pornography within the Nick C. profile. Within the Debbie and Nick profiles, Branam testified that she found 629 videos and 395 images of potential child pornography. She testified that the majority of all the videos and images were located within the Nick profile and that all of the images and videos associated with Mr. Castagnola's ten pandering charges were located within the Nick profile. Further, she testified that the images and videos linked to Mr. Castagnola's pandering charges had all been downloaded to the computer. She specified that those images and videos were not the result of accidental pop-ups, but required affirmative steps on the part of a user to accept the

items for download. Branam testified that more than one-third of the storage space on the computer's hard drive was allocated to pornographic material.

{¶26} In addition to the child pornography that she found within the Nick profile, Branam testified that she found several other items of interest. In particular, she found several documents related to legal research, motions, and court proceedings. One document contained a copy of a section of the Revised Code that dealt with the use and purchase of alcohol by a minor. Branam testified that another document appeared to be a school paper. She testified that the paper was captioned: "Nick Castagnola, * * * Poetry Writing II, April 8th, 2010."

{¶27} Deborah Castagnola, Mr. Castagnola's mother, testified that she knew the passwords to all of the user profiles on the computer because she wanted to be able to monitor the profiles at any given time. She testified that the Debbie profile on the computer belonged to her and that Mr. Castagnola had given her the passwords for the Nick and Nick C. profiles. Mr. Castagnola also provided the court with the passwords for the Nick and Nick C. profiles during the trial. Ms. Castagnola testified that she accessed the other user profiles from time to time, but never saw any pornographic material on the computer.

{¶28} Possession is "a voluntary act if the possessor knowingly procured or received the thing possessed, or was aware of the possessor's control of the thing possessed for a sufficient time to have ended possession." *State v. Butler*, 9th Dist. No. 24446, 2009-Ohio-1866, ¶ 18, quoting R.C. 2901.21(D)(1). Viewing the evidence in a light most favorable to the State, a rational trier of fact could have found that the State proved beyond a reasonable doubt that Mr. Castagnola possessed or controlled the pornographic material that formed the basis for the ten pandering counts. All of the images and videos that formed the basis for Mr. Castagnola's pandering counts were found within the Nick user profile and had been actually downloaded by a

user of that profile. The Nick profile also contained other documents associated with Mr. Castagnola. Specifically, it contained a school paper with his name on it and legal research regarding the use and purchase of alcohol by a minor; a topic that would have been relevant to Mr. Castagnola's initial charge for selling alcohol to underage persons. Moreover, the password for the Nick profile was extremely strong. Six trillion attempts to decipher it through the use of forensic software failed. It, therefore, would have been difficult if not impossible for anyone to use the Nick profile without already knowing the password. Mr. Castagnola's mother testified that he provided her with the password for the Nick profile. Mr. Castagnola also admitted at trial that he knew the password. Further, even if some other individual knew all of the passwords for the computer, there was evidence that one-third of the storage space on the computer's hard drive was allocated to pornographic material and two of its profiles contained 629 videos and 395 images of potential child pornography. None of the profiles on the computer existed for more than two years, and the computer was located in the family room of Mr. Castagnola's home. The evidence, therefore, pointed to the conclusion that the individual who downloaded the pornographic material onto the computer resided at the Castagnola home.

{¶29} Although the State did not produce any direct evidence that Mr. Castagnola possessed or controlled the pornographic images and videos at issue, it was not required to do so. This Court has recognized that “[c]ircumstantial evidence and direct evidence inherently possess the same probative value.” *State v. Reglus*, 9th Dist. No. 25914, 2012-Ohio-1174, ¶ 13, quoting *Jenks*, 61 Ohio St.3d at paragraph one of the syllabus. Having reviewed the record, we cannot conclude that Mr. Castagnola's pandering convictions are based on insufficient evidence. His second assignment of error is overruled.

ASSIGNMENT OF ERROR III

THE TRIAL COURT ERRED IN FAILING TO MERGE [MR. CASTAGNOLA'S] CONVICTIONS IN COUNT 1 WITH COUNT 2, AND IN COUNT 3 WITH COUNT 4, IN CASE NO. 2010-07-1051.

{¶30} In his third assignment of error, Mr. Castagnola argues that the trial court erred by sentencing him to allied offenses of similar import with regard to his retaliation case. Specifically, he argues that his retaliation and criminal damaging counts (Counts 1 and 2) should have merged, as they both arose from his damaging the law director's car, and his retaliation and vandalism counts (Counts 3 and 4) should have merged, as they both arose from his damaging a Reminderville police car.

{¶31} In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, syllabus, the Supreme Court of Ohio held that, in determining whether two offenses are allied offenses of similar import, "the conduct of the accused must be considered." The court must first determine "whether it is possible to commit one offense and commit the other with the same conduct," and, if so, then "the court must determine whether the offenses were committed by the same conduct, i.e. 'a single act, committed with a single state of mind.'" (Emphasis omitted.) *Id.* at ¶ 48, 49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶ 50 (Lanzinger, J., concurring). If the answer to both inquiries is yes, then the offenses must be merged. *Johnson* at ¶ 50. The "failure to merge allied offenses of similar import constitutes plain error, and prejudice exists even where a defendant's sentences are to run concurrently because 'a defendant is prejudiced by having more convictions than are authorized by law.'" *State v. Asefi*, 9th Dist. No. 26430, 2012-Ohio-6101, ¶ 6, quoting *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶ 31.

{¶32} The record does not support the conclusion that the trial court considered and applied *Johnson* when it sentenced Mr. Castagnola. During defense counsel's sentencing

recommendation, the trial judge expressed his view that all of the charges related to the retaliation event of June 15, 2010, “should merge” and that the charges related to the retaliation event of June 20, 2010, “should be considered together.” The court then stated, however:

Now, technically, a person could receive separate sentences for each of those if the Court were to find that they were committed with a separate animus within those [] days. So I am not speaking in terms of technical legal interpretation; I am just indicating to you how I look at these sets of charges.

No further discussion took place on the issue of animus. Moreover, neither the parties nor the court ever discussed *Johnson* or the test set forth therein. After the sentencing recommendations and Mr. Castagnola’s allocution, the court simply sentenced him on each of his separate offenses.

{¶33} Were this Court to apply *Johnson* to Mr. Castagnola’s arguments, we would be doing so in the first instance. This Court has consistently declined to do so. *See, e.g., State v. Chisholm*, 9th Dist. No. 26007, 2012-Ohio-3932, ¶ 22. Therefore, this matter must be remanded to the trial court for it to apply *Johnson* and determine whether Mr. Castagnola’s offenses should merge. “Moreover, in the event that the offenses are allied, ‘the State also must have the opportunity to elect the offense[] upon which it wishes to proceed to sentencing.’” *Asefi* at ¶ 8, quoting *State v. Ziemba*, 9th Dist. No. 25886, 2012-Ohio-1717, ¶ 23. Mr. Castagnola’s third assignment of error is sustained solely on the basis that this matter must be remanded, consistent with the foregoing discussion.

ASSIGNMENT OF ERROR IV

THE TRIAL COURT ERRED AS A MATTER OF LAW BY SENTENCING [MR. CASTAGNOLA] TO CONSECUTIVE TERMS OF IMPRISONMENT WITHOUT MAKING FINDINGS AT THE TIME OF THE SENTENCING HEARING, AND WITHOUT GIVING REASONS FOR THE FINDINGS IN THE JOURNAL ENTRY OF SENTENCING, AS REQUIRED BY R.C. §2929.14(C)(4).

{¶34} In his fourth assignment of error, Mr. Castagnola argues that the trial court erred by imposing consecutive sentence terms upon him without setting forth the reasons and findings behind the issuance of the consecutive terms. Based on this Court's resolution of Mr. Castagnola's third assignment of error, Mr. Castagnola's sentence could change upon remand. Accordingly, we decline to address his fourth assignment of error at this time. *See State v. Furman*, 9th Dist. No. 26394, 2012-Ohio-6211, ¶ 5.

III.

{¶35} Mr. Castagnola's first and second assignments of error are overruled. His third assignment of error is sustained insofar as the matter is remanded for the trial court to apply *State v. Johnson* in the first instance. Due to the remand, this Court declines to address his fourth assignment of error. The judgment of the Summit County Court of Common Pleas is affirmed in part, reversed in part, and the cause is remanded for further proceedings consistent with the foregoing opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
CONCURS.

CARR, J.
DISSENTING.

{¶36} I would sustain Mr. Castagnola's first assignment of error because the State's invasion into the Castagnola family home and seizure of all the computers was not supported by probable cause that "evidence of a crime" would be found. Consequently, his remaining assignments of error would have been rendered moot.

{¶37} I must begin by emphasizing that "[w]e are bound to defend the liberties of even the most despised members of society, for it is in their cases that our freedoms are most at risk." *United States v. Ivy*, 165 F.3d 397, 404 (6th Cir.1998). "The occasional benefits that compliance with the Fourth Amendment confers upon the guilty must be recognized as a necessary consequence of guaranteeing constitutional protections for all members of our community" because the law defining the parameters of the Fourth Amendment arises only in cases in which criminal activity was uncovered. *Id.* The heinous activity uncovered on Mr. Castagnola's computer, however, should not cloud this Court's review of the manner in which that evidence

was found. “There is always a temptation in criminal cases to let the end justify the means, but as guardians of the Constitution, we must resist that temptation.” *State v. Gardner*, Slip Opinion No. 2012-Ohio-5683, ¶ 24, citing *United States v. Mesa*, 62 F.3d 159, 163 (6th Cir.1995); see also *State v. Friedman*, 194 Ohio App.3d 677, 2011-Ohio-2989, ¶ 15-25 (9th Dist.) (Carr, J., dissenting). “While I am a strong advocate of zealous law enforcement, the rights of individuals must not be lost in that pursuit.” *State v. Vinez*, 9th Dist. No. 2687, 1992 WL 131397, *3 (June 10, 1992) (Cacioppo, J., dissenting). “It is the duty of this court to guard zealously the constitutional rights of individuals against overzealous police practices. This is necessary to insure that the rights guaranteed in the Constitution do not become but a form of words in the hands of government officials.” *Id.*

{¶38} We must not lose sight of the significant fact that, at the time the warrant was issued in this case, Mr. Castagnola was not suspected of downloading child pornography or engaging in any other illegal computer activity. He was suspected of committing repeated acts of vandalism, only one of which was even arguably connected to a computer in his home. The only purported reason for the entry into his home and seizure of the computers was to verify that Mr. Castagnola had looked online to obtain the law director’s home address.

{¶39} Even if I could agree that there was a “fair probability” that there would be a computer in the home that would verify that he had searched and obtained the law director’s address, that single online search was not sufficiently connected to criminal activity to justify this serious intrusion into the privacy rights of the Castagnola family. See *State v. George*, 45 Ohio St.3d 325 (1989), paragraph one of the syllabus, quoting *Illinois v. Gates*, 462 U.S. 213, 238-239 (1983). In stark contrast to the type of computer evidence that is typically targeted by a search warrant, Mr. Castagnola’s online search for the law director’s address was not illegal

activity, nor was it a fruit, contraband, or an instrumentality of any crime. It was a piece of “mere evidence” to connect Mr. Castagnola to the crimes committed at the law director’s home. *See Warden v. Hayden*, 387 U.S. 294 (1967). Whether that one online search also constituted “evidence of a crime” as that term is used in *Illinois v. Gates* requires further examination.

{¶40} When the United States Supreme Court first authorized the seizure of “mere evidence” pursuant to a warrant or exception to the warrant requirement, it emphasized that there must be a sufficient nexus between that evidence and the criminal activity. *Warden v. Hayden*, 387 U.S. at 307. It explained that, although the “nexus” between the item seized and criminal activity is “automatically provided in the case of fruits, instrumentalities or contraband,” no such connection to criminal activity can be presumed in the case of “mere evidence.” *Id.* “[I]n the case of ‘mere evidence,’ probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction.” *Id.* Moreover, “consideration of police purposes will be required.” *Id.*; *see also Zurcher v. Stanford Daily*, 436 U.S. 547, 577 (1978) (Stephens, J., dissenting); *Andresen v Maryland*, 427 U.S. 463, 483 (1976).

{¶41} After the decision of the United States Supreme Court in *Illinois v. Gates*, probable cause analysis typically presumes that the evidence seized is, in fact, “evidence of a crime,” without analyzing whether the evidence has a sufficient nexus to the criminal activity, whether it will aid the apprehension or conviction of a particular suspect, and/or the purpose of the police in seeking the warrant. Perhaps because search warrants typically target contraband, instrumentalities, or evidence that is otherwise obviously connected to criminal activity, the question of the “nexus” and “mere evidence” is not often litigated. Nevertheless, even after *Illinois v. Gates*, the *Warden v. Hayden* “mere evidence” reasoning remains good law. Although *Warden v. Hayden* is most often cited for its formal recognition of the “hot pursuit” exception to

the warrant requirement, the United States Supreme Court has continued to apply its reasoning pertaining to probable cause to seize “mere evidence” of a crime. *E.g.*, *New Jersey v. T.L.O.*, 469 U.S. 325, 345 (1985).

{¶42} Although Ohio courts have not continued to apply the *Warden v. Hayden* “mere evidence” analysis, courts in other jurisdictions have. *See, e.g.*, *State v. Santini*, 64 So.3d 790, 798 (La.App.2011); *Kennedy v. State*, 338 S.W.3d 84, 92 (Tex.App.2011); *Commonwealth v. Jones*, 605 Pa. 188 (2010); *United States v. Rozell*, D.Minn. No. CRIM.04-241(1) JRT/R, 2004 WL 2801591 (Nov. 19, 2004); *United States v. Alexander*, E.D.Mich. No. 04-20005-BC, 2004 WL 2095701 (Sept. 14, 2004); *State v. Mitchell*, 20 S.W.3d 546, 556 (Mo.App.2000); *United States v. Gilbert*, 94 F.Supp.2d 163, 168 (D.Mass.2000); *Commonwealth v. Ellis*, Mass.Super. No. 97-192, 1999 WL 823741 (Aug. 18, 1999); *State v. Thompson*, Conn. Super. Ct. No. CR 1895928, 1999 WL 545353 (July 16, 1999).

{¶43} To determine whether there was sufficient nexus between the evidence targeted by the warrant (an online search for the law director’s address) and the criminal activity at issue here (vandalism and retaliation against the law director), the probable cause inquiry required an examination of whether there was cause to believe that this piece of evidence would aid in the apprehension and/or conviction of Mr. Castagnola. Through the recording of Mr. Castagnola’s statement to Informant May, and text messages sent from Mr. Castagnola’s phone, the police already had evidence that he had obtained the law director’s home address and that he had participated in the acts of vandalism at his home. Although the police had an interest in obtaining evidence to corroborate that fact, the extent to which Mr. Castagnola’s actual online search would aid in his conviction was minimal.

{¶44} Weighed against the government's interest in obtaining that one piece of corroborating evidence, on the other hand, was the intrusion into the private home of the Castagnola family to seize all of the family computers. The probable cause inquiry here must include an examination of whether it was reasonable to search all computers in the home to find evidence that Mr. Castagnola conducted an online search for the law director's home address. Searching for evidence that is believed to be stored on a computer poses a serious threat to the privacy rights of anyone who has used that computer. As one court emphasized, "Computers are simultaneously file cabinets (with millions of files) and locked desk drawers; they can be repositories of innocent and deeply personal information, but also of evidence of crimes." *United States v. Adjani*, 452 F.3d 1140, 1152 (9th Cir.2006).

{¶45} In authorizing a warrant to invade the privacy interests in the vast amount of information stored on a computer, courts must strike a reasonable balance between the government's ability to prosecute crimes and the privacy rights of the individuals who have personal information stored on those computers. *See id.* Moreover, even when a search for information on a computer is justified, the warrant should identify that information with particularity and the search should be limited in scope accordingly. *See, e.g., United States v. Otero*, 563 F.3d 1127, 1132 (10th Cir.2009).

{¶46} As the Vermont Supreme Court recently emphasized in its review of a warrant to search electronic records, "we ask judicial officers to ensure * * * not simply that there is a reason to believe evidence may be uncovered but that there is a reason that will justify an intrusion on a citizen's privacy interest." *In re Appeal of Application for Search Warrant*, --- A.3d ---, 2012 Vt. 102, ¶ 31. It is "essential that a judicial officer be cognizant of the general

type of invasion being proposed” and remember that “[t]here is interplay between probable cause, particularity, and reasonableness.” *Id.* at ¶ 31, 33.

{¶47} In examining the “totality” of the circumstances, the trial court is always required to “make a practical, common-sense decision,” based on *all* of the circumstances set forth in the affidavit. *State v. George*, 45 Ohio St.3d 325 (1989), paragraph one of the syllabus, quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Viewing these facts through “the lens of common sense,” the probable cause analysis must always consider the “reasonableness” of the government invasion. See *Florida v. Harris*, ____ U.S. ____, 2013 WL 598440; *Pennsylvania v. Mimms*, 434 U.S. 106, 108-109 (1977). Reasonableness is a fluid concept that requires balancing the competing ““public interest and the individual’s right to personal security free from arbitrary interference by law officers.”” *Id.* at 109, quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975).

{¶48} Viewing these circumstances through a lens of common sense, the government’s need for corroborating evidence that Mr. Castagnola obtained the law director’s address online did not outweigh the privacy rights at issue here. Moreover, the probable cause inquiry requires a “consideration of police purposes” for requesting the warrant. *Warden v. Hayden*, 387 U.S. at 307. The police had no reason to search the computers for anything other than verification that Mr. Castagnola had found the law director’s address. No facts in the affidavit even suggested that any other evidence would be found on the computer to connect Mr. Castagnola to criminal activity.

{¶49} At the suppression hearing, Detective Kreiger admitted that, aside from information that Mr. Castagnola had found the law director’s address in court records, he had received no information to support his belief that Mr. Castagnola had used a computer in

connection with any of these crimes. Although the detective had no information to even suggest that other evidence would be found on the computers, because Mr. Castagnola had been so “blatant” in sending out text messages and talking about the “egging” incidents, the detective testified that he “assumed” that there would “probably [be] other items in the house that would be of evidentiary value.”

{¶50} That testimony and the facts as stated in the affidavit suggested that the police believed that they would find other evidence on the computers to connect Mr. Castagnola to acts of vandalism, yet the affidavit stated no factual basis to support that belief. A warrant to perform a “general, exploratory rummaging in a person’s belongings,” is prohibited by the Fourth Amendment. *See Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). “[T]here must be some threshold showing before the government may ‘seize the haystack to look for the needle.’” (Internal citations omitted.) *United States v. Hill*, 459 F.3d 966, 975 (9th Cir.2006). I do not believe that the State made such a threshold showing in this case. For these reasons, I respectfully dissent.

APPEARANCES:

RUSSELL S. BENSING, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN DIMARTINO, Assistant Prosecuting Attorney, for Appellee.

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IN THE COURT OF COMMON PLEAS
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SUMMIT COUNTY
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THE STATE OF OHIO

Case No. CR 10 08 2244

vs.

NICHOLAS J. CASTAGNOLA

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Defendant Nicholas Castagnola has filed a motion to suppress evidence seized from his home computer pursuant to a search warrant. Initially, the court notes that two cases are currently pending against Castagnola. The evidence under consideration in the instant motion – allegedly child pornography – only pertains to the charges being prosecuted in CR 2010-08-2244, in which defendant is charged with ten counts of Pandering Sexually Oriented Matter Involving a Minor. Thus, though the motion to suppress is encaptioned for both of Castagnola's cases, the court files this order only in regard to CR 2010-08-2244 (hereinafter the "child pornography case"). A hearing on the motion to suppress was conducted on January 11, 2011.

In case CR 2010-0701951B, Castagnola was charged with Retaliation, Criminal Damaging, Vandalism and other related offenses and specifications allegedly arising from his actions against the Twinsburg, Ohio prosecutor and the Reminderville, Ohio police department (hereinafter, the "retaliation case").

According to the motion to suppress, as a part of the Twinsburg investigation of the defendant's alleged retaliatory conduct toward the Twinsburg prosecutor and others, the Twinsburg police utilized a confidential informant surreptitiously to record a conversation with Castagnola on June 28, 2010. Prior to the recording of the conversation, the source had disclosed to the police a series of text messages he had received from Castagnola that implicated him in the incidents he was later charged with in the retaliation case. Allegedly based on the information learned from the text messages and the secretly recorded conversation, Twinsburg detective Mark D. Kreiger executed a four-page affidavit (State's Exhibit A) in order to obtain a search warrant to permit a search of the premises, people, and property located at Castagnola's residence, 2421 Haverhill Rd. in Twinsburg. The affidavit contained Kreiger's assertion that:

There is now being concealed certain property, to-wit:

Records and documents either stored on computers, ledgers or any other electronic recording device to include hard drives and external both portable hard drives, cell phones, printers, storage devices of any kind, printed out copies of text messages or e-mails, cameras, video recorders or any photo imaging devices and their storage media to include tapes, compact discs, or flash drives.

In a section of the affidavit headed, "This Knowledge Is Based On The Following Facts," Kreiger recited the contacts between the informant and the Twinsburg Police Department, including the quotation of 10 text messages allegedly sent by Castagnola to the source. In addition, Kreiger summarized – in three paragraphs – the

content of a nearly hour-long recording of the conversation between the informant and Castagnola. Among the statements within the three paragraphs were the following two sentences paraphrasing defendant's statements:

Castagnola then says that *he found Maistros online* in the clerk of courts because he got a parking ticket several years ago. Castagnola said that he also found that Maistros' law offices were in Chagrin Falls and went through Maistros' mailbox to confirm that Maistros did live at the address *he found for him online*. [Emphasis added]

Castagnola challenges the affidavit supporting the search warrant and seeks to suppress the evidence obtained from one or two computers seized through the search warrant on the ground that there was nothing in the affidavit connecting the crimes being investigated – retaliation, criminal damaging, criminal trespassing and possession of criminal tools – with the use of computers. As a result, defendant contends the affidavit lacked necessary probable cause information to justify the seizure of computers at defendant's residence. According to the parties, it was the search of the computers that permitted police to obtain the evidence supporting the prosecution of the child pornography case. The State responds by contending that the affidavit's reference to Castagnola's "online" efforts to look up contact information on prosecutor Maistros was sufficient to provide probable cause for the seizure of the computer.

The governing standard for this court's determination of a motion to suppress based on a challenge to the sufficiency of probable cause in an affidavit submitted in support of a search warrant is found in *State v. George* (1989), 45 Ohio St.3d 325, 544 N.E.2d 640, paragraph two of the syllabus:

In reviewing the sufficiency of probable cause in an affidavit submitted in support of a search warrant issued by a magistrate, neither a trial court nor an appellate court should substitute its judgment for that of the magistrate by conducting a *de novo* determination as to whether the affidavit contains sufficient probable cause upon which that court would issue the search warrant. Rather, *the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed*. In conducting any after-the-fact scrutiny of an affidavit submitted in support of a search warrant, trial and appellate courts should accord great deference to the magistrate's determination of probable cause, and doubtful or marginal cases in this area should be resolved in favor of upholding the warrant. (*Illinois v. Gates* [1983], 462 U.S. 213, followed.) [Emphasis added.]

George also clarified the role of the magistrate or judge initially reviewing the affidavit offered in support of a requested search warrant:

In determining the sufficiency of probable cause in an affidavit submitted in support of a search warrant, "[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." (*Illinois v. Gates* [1983], 462 U.S. 213, 238-239, followed.)

Id., at paragraph one of the syllabus.

George also recognized that under some circumstances, even when there is insufficient probable cause to support the issuance of a search warrant, "[T]he Fourth Amendment exclusionary rule should not be applied so as

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to bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in an objectively reasonable reliance on a search warrant issued by a detached and neutral magistrate. *Id.*, at paragraph three of the syllabus.

Defendant correctly points out that this court's determination of whether the judge who signed the search warrant had a substantial basis for concluding that probable cause existed must be confined to the "four corners" of the affidavit inasmuch as the judge took no other evidence under oath at the time the determination to issue the warrant was made. During the course of the hearing on the instant motion, defendant's counsel repeatedly contended that the court ought to examine only three corners of the affidavit, namely the section entitled "This Knowledge Is Based On The Following Facts." Despite his own argument concerning the "four corners of the affidavit" limit of the court's review, defendant called Detective Kreiger to testify at the hearing.

Detective Kreiger testified regarding his experience investigating crimes in which computers had been used, and offered credible justification for his belief that defendant Castagnola could have been storing information on his home computer concerning the crimes under investigation, including information he learned or inferred from the confidential informant's statements. Because the court may not consider Detective Kreiger's testimony in evaluating whether the judge who issued the subpoena had a substantial basis for concluding that probable cause existed, that information must be disregarded.

The focus of Castagnola's attack on the affidavit is that there was *nothing* from which the reviewing judge could have made a practical, common-sense decision, given all the circumstances set forth in the affidavit before her, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, that there was a fair probability that contraband or evidence of a crime would be found in a particular place, namely the computers. Defendant asserts:

Unfortunately for the State, one searches the affidavit in vain for any indication that the Defendant even *has* a computer, let alone that it would provide evidence of the crimes for which he was under investigation. The solitary mention of anything remotely related to computers occurs in the sixth paragraph of the affidavit, which states "Castagnola then says that he found Maistros online in the clerk of courts because he got a parking ticket several years ago." It would require logical leaps of Olympian proportions to deduce that this would give probable cause to seize the defendant's computers: essentially, one would have to infer that since defendant obtained this information online, he must have used a computer to access it (instead of a data cell phone, which is equipped with a Web browser), that he would have used his home computer to do so, and that evidence of that use would be on the computer.

Defendant contends this case is comparable to the situation presented in *State v. Eash* (2nd Dist. No. 03-CA-34), 2005-Ohio-3749, in which the court suppressed evidence of child pornography seized from a defendant's home computer. In *Eash*, defendant was charged with three incidents of attempted child molestation and one count of kidnapping. Although the search warrant sought seizure of any computers, etc. in defendant's home, the affidavit made no mention of computers or anything related to them. In *Eash*, there was literally nothing about the crime that implicated the use of computers in any way, and the affidavit was completely devoid of any factual reference to computers (other than the request to search and/or seize them). Defendant Castagnola contends that there is an even stronger basis for suppressing evidence here than there was in *Eash*, because none of the crimes under investigation at the time the search warrant was obtained in this matter had anything to do with the use of computers or child pornography.

This Court disagrees. The court finds that the two separate references in the affidavit to "online" efforts made by defendant to find prosecutor Maistros provided the issuing judge a substantial basis for concluding that probable cause existed to justify a search for and/or seizure of the computers found at defendant's residence. This court is required to afford great deference to the magistrate's determination of probable cause, and doubtful or marginal cases in this area should be resolved in favor of upholding the warrant. This court has no doubt that the issuing judge made a practical, common-sense decision that, given all the circumstances set forth in the affidavit before her, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, that there was a fair probability that contraband or evidence of a crime would be found in a computer in defendant's home.

Defendant's argument that the affidavit needed to recite specific facts concerning the use of a computer in the commission of a crime or that one was used to store incriminating information seeks to impose upon the police a more burdensome standard than the law requires. Under defendant's method, the police would never be able to search for a computer even when there was evidence that something was done "online." One can only wonder how the police would ever know of the specific facts defendant's argument suggests they would have to know before a warrant could be obtained. In essence, defendant would require the police to have solved a case before they could seek a search warrant to investigate the case. In this age of "online" activities, particularly among people under the age of 40, such a standard would require the issuing judge to ignore the totality of the circumstances rather than to take them into consideration. This is particularly so where, as here, the affidavit was replete with references to text messaging and at least two references to online research. The issuing court certainly could have drawn "reasonable inferences amounting to a fair probability"¹ that cell phone data and messages are commonly backed up and/or synchronized to computer files. If nothing else, therefore, the content of the text messages received by the informant from Castagnola created a suspicion of criminal activity engaged in through the use of modern technology and provided the court a substantial basis for concluding that there was a fair probability that contraband or evidence of a crime would be found in the computers that were seized.

¹ *State v. George* (1989), *supra*, at 330.

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Moreover, defense counsel's concession at the hearing that the information in the affidavit would have justified the issuance of a search warrant authorizing the seizure of a cell phone that had Internet browser functionality (a "smart phone") – because that phone rather than a home computer could have been used to conduct the online research concerning prosecutor Maistros – is utterly inconsistent with their position on this motion. It is worth noting that defendant's concession in this regard was not that the seizure of a smart phone would have been justified because of the sending of text messages; it was because the smart phone serves as a surrogate for a computer. If the affidavit was sufficient to support a probable cause conclusion concerning the potential that a cell phone was used to conduct the Internet research, it certainly does so for a computer. In either case, the police were merely looking for electronic storage devices that could have reflected the steps taken by Castagnola to search for Maistros.

Defendant's arguments are analogous to those presented in *State v. George*, supra. There, defendant complained that an officer's observation of a marijuana plant growing in the back yard of a residence defendant shared with his parents did not justify a search of the residence itself. Nothing in the factual recitation indicated anything having to do with illegal activity or evidence potentially being located inside the residence. Nevertheless, our supreme court upheld the search of the residence. This court fails to see any significant difference between the breadth of the affidavit and search warrant at issue in *George* and the affidavit and search warrant at issue here.

"The Fourth Amendment exclusionary rule should not be applied so as to bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in objectively reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." *State v. George* (1989), 45 Ohio St.3d 325, paragraph three of the syllabus. *George* drew its analysis of the good faith exception from *United States v. Leon* (1984), 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677. Here, the state urges the court to consider the application of the good faith exception in the event the court concludes the issuing judge lacked a substantial basis for concluding the probable cause determination as she did. Defendant strenuously objects to the application of the good faith exception, contending that the police officers conducting the search knew "the affidavit presented to the signing judge in support of the warrant was so lacking in indicia of probable cause to render official belief in its existence entirely unreasonable." *State v. Richardson* (9th Dist. App. No. 24636), 2009-Ohio-5678, at ¶ 17.

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At the hearing, defendant cross-examined Detective Kreiger to elicit an admission that the recorded interview between the confidential informant and Castagnola didn't even contain the word "online." Therefore, defendant contended, the detective knew objectively that the statement(s) in the affidavit concerning "online" research were false. "Suppression . . . remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in the affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth. *Leon*, 468 U.S. at 923, citing *Franks v. Delaware* (1978), 438 U.S. 154, 98 S. Ct. 2674; 57 L. Ed. 2d 667. While the court may not look outside the four corners of the affidavit and warrant to make a de novo probable cause assessment, the court concludes that it may examine extrinsic evidence to determine the applicability of the good faith exception. By definition, if there were evidence that an affiant had misled a judge in securing a search warrant, that evidence would not be in the affidavit or the warrant. Of necessity, therefore, such evidence must be able to be considered in order to decide the applicability of the good faith exception.

Here, the court has reviewed the recording of the conversation between the confidential information and Castagnola. The court concurs with defendant that the specific word "online" was not mentioned. The court finds credible, however, Detective Kreiger's explanation for how he interpreted the substance of what was said in that conversation and how he attempted to paraphrase the same in his affidavit. The court finds Detective Kreiger's paraphrase to be a fair characterization of the substance of the conversation and his explanation to be sufficient to demonstrate that there was no effort to mislead the judge. Absent evidence that the affiant gave the reviewing judge information that he knew or should have known to be false, the court can and does conclude that the officer executing the warrant acted with objective good faith. Thus, the purposes to be served by the application of the exclusionary rule – deterring police illegality – would not be served here.

For all of the foregoing reasons, defendant's motion to suppress evidence that was generated after computers were seized from his residence pursuant to the search warrant at issue is DENIED.

There is no just reason for delay.

IT IS SO ORDERED.

APPROVED:
January 28, 2011
mjl



TOM PARKER, Judge
Court of Common Pleas
Summit County, Ohio

cc: Prosecutor Brian LoPrinzi/Justin Richard
Attorney James M. Kersey