[Cite as *State v. Hale*, 2010-Ohio-2389.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	Appellate Case No. 23582
Plaintiff-Appellee	:	
	:	Trial Court Case No. 2009-CR-80
v.	:	
	:	
AARON T. HALE	:	(Criminal
		Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 28th day of May, 2010.

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FAIN, J.

{¶ 1} Defendant-appellant Aaron Hale appeals from his conviction and sentence on sixteen counts of Pandering Obscenity Involving a Minor. Following the trial court's decision on Hale's motion to suppress, Hale pled no contest to all charges,

and was sentenced to five years of community control sanctions, including intensive sex-offender supervision. He was also designated a Tier II Sex Offender.

{¶ 2} Hale contends that the trial court erred in overruling his motion to suppress evidence seized from a home computer, because the search warrant and supporting affidavit were defective on grounds of lack of probable cause, staleness, and lack of particularity in the warrant.

{¶ 3} We conclude that the issuing judge had a substantial basis for concluding that probable cause existed. All the factors, including an investigation conducted by a federal agency, Hale's choice to pay for a subscription to a child pornography site, and the investigating officer's verification that Hale still resided at the same address from which payment was made, lead to a fair probability that evidence of illegal images would be found at Hale's residence.

{¶ 4} We further conclude that the information in the affidavit is not stale. Time limitations typically applied to more fleeting crimes do not fit child pornography, because child pornography generally occurs in the secrecy of one's home over a long period of time, and downloaded materials often remain on computers for a prolonged period. Digital images of pornography are easily duplicated and have an infinite life span, being recoverable even after being deleted from a computer's hard drive. Hale also was not nomadic and had lived in the same house the entire time. In addition, the place to be searched was Hale's home, which is a secure operational base.

{¶ 5} We also conclude that the warrant is not overbroad. Under the circumstances, the warrant could not reasonably have described the items more precisely. The search was limited to computer hardware and software, and financial

items related to the offense of Pandering Obscenity Involving a Minor. The warrant also did not authorize intrusion into unrelated matters. And finally, even if the warrant had lacked particularity, the trial court correctly concluded that suppression of the evidence is prohibited under the "good-faith exception" to the exclusionary rule.

{¶ 6} Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 7} In June 2008, Detective Michael Rotterman filed an affidavit with Montgomery County Area Two Court, requesting issuance of a warrant to search the person of Aaron Hale, and the premises at 7623 Dalmation Drive, Huber Heights, Ohio, for items of property like computers, central processing units, storage devices, and financial records connected with the crime of Pandering Obscenity Involving a Minor. The probable cause portion of the affidavit outlined Rotterman's position and training, and indicated that he is responsible for investigating child endangering and sexual abuse cases. Rotterman stated that he had been contacted in late May 2008, by agent Tom Mosley of the Immigration, Customs and Enforcement Agency (I.C.E.). Mosley indicated that a nationwide Internet child pornography investigation called "Project Flicker," had identified Aaron Hale, at 7623 Dalmation Drive, Huber Heights, Ohio, as a subscriber to one of the child pornography sites being investigated. Mosley had e-mailed Rotterman a copy of I.C.E.'s report.

{¶ 8} Rotterman further stated that Hale had purchased a subscription to the members- only Internet child pornography site known as "Lolitas Contents" on February 2, 2007, for $79.95. Payment was made through a Paypal account traced to Hale, at

the Dalmation Drive address, and was sent by Paypal to Michelle McCary, Financial Services (BF) at BELFAST_LTD @ JUNO.COM, which was a name and email address identified as a payment processor for the criminal organization. After receiving the information from I.C.E., Rotterman confirmed that Hale still resided at the Dalmation Drive address. Rotterman's affidavit did not contain information about the actual content on the website, Hale's past criminal history, if any, or characteristics of persons who collect pornography.

{¶ 9} After the search warrant was issued, it was executed, and Hale's computer and 28 CDs were seized on June 10, 2008. The computer was sent to the Montgomery County Crime Lab for analysis, which reported that pornographic photos had been downloaded. Hale was then indicted in February 2009, on sixteen counts of Pandering Obscenity Involving a Minor, in violation of R.C. 2907.321(A)(5). Hale subsequently filed a motion to suppress the evidence that had been seized.

{¶ 10} In April 2009, the trial court held a suppression hearing, at which Detective Rotterman was the only witness. After hearing testimony, the trial court issued a decision in June 2009, overruling the motion to suppress. The trial court noted that the affidavit was not as detailed as the court would like, but was still supported by probable cause. The court further held that even if the warrant were lacking, the good faith exception would apply, as Detective Rotterman reasonably believed the warrant was valid.

{¶ 11} Following the suppression decision, Hale pled no contest to the sixteen counts as charged, and was sentenced to five years of community control sanctions, including intensive sex offender supervision. Hale was also designated as a Tier II Sex

Offender. The trial court stayed the sentence pending appeal.

{¶ 12} Hale appeals from his conviction and sentence.

II

{¶ 13} Hale's sole assignment of error is as follows:

{¶ 14} "THE TRIAL COURT ERRED IN OVERRULING AARON HALE'S MOTION TO SUPPRESS. THE SEARCH AFFIDAVIT AND SUPPORTING AFFIDAVIT WERE DEFECTIVE IN SEVERAL WAYS."

{¶ 15} Under this assignment of error, Hale makes several arguments. Hale first contends that the warrant lacks probable cause, because it fails to demonstrate a fair probability that Hale's computer would contain downloaded images of child pornography. Hale also argues that the probable cause information is stale, because sixteen months elapsed between his purchase of a one-month-only subscription and the issuance of the warrant.

{¶ 16} "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.' " *State v. George,* 45 Ohio St.3d 325, paragraph one of the syllabus, following and quoting from *Illinois v. Gates* (1983), 462 U.S. 213, 238-239, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527.

{¶ 17} In *George*, the Ohio Supreme Court also outlined restrictions on review

of probable cause determinations, stating that:

{¶ 18} "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." 45 Ohio St.3d 325, at paragraph two of the syllabus (citation omitted).

{¶ 19} Hale contends that the affidavit presented to the judge in the case before us is "bare bones," and fails to demonstrate a fair probability that Hale's computer would contain images of child pornography. In this regard, Hale points out the absence of information about the following matters: (1) what the pictures on the website allegedly depicted; (2) whether the website is an exclusive child pornography website or contains adult pornography as well; (3) what, if anything, Hale had downloaded from the site; (4) any indicia that Hale is a "collector;" (5) the alleged proclivities or characteristics of child pornography collectors; and (6) whether the alleged pornography is "virtual" or "actual" child pornography.

{¶ 20} Probable cause determinations are limited to the four corners of the

underlying affidavit. *State v. Eash*, Champaign App. No. 03-CA-34, 2005-Ohio-3749, at ¶ 17, citing *State v. Klosterman* (1996), 114 Ohio App.3d 327, 332. And, as we just stressed, " 'The reviewing court's duty is merely to ensure that the issuing magistrate or judge had a substantial basis for concluding that probable cause existed.' " *State v. Prater*, Clark App. No. 06-CA-89, 2008-Ohio-6730, at ¶ 20 (citations omitted). The magistrate's action "cannot be a mere ratification of the bare conclusions of others." *State v. Zinkiewicz* (1990), 67 Ohio App.3d 99, 110.

{¶ 21} In arguing that probable cause is lacking, Hale relies on *U.S. v. Strauser* (E.D. Mo., 2003), 247 F.Supp.2d 1135. In *Strauser*, the defendant had subscribed to a child pornography "egroup" called "Candyman," which was free and required only an email address to join. The defendant had subscribed on December 26, 2000, and had not "unsubscribed" by the time the site was closed down by Yahoo on February 6, 2001. There was no evidence in the government's affidavit to indicate that the defendant had ever accessed the site or that he was a collector or distributor of child pornography. Id. at 1137. In addition, the evidence indicated that an individual could not be certain that the site contained child pornography until after subscribing. Id. at 1147.

{¶ 22} The district judge found a lack of probable cause, stating that:

{¶ 23} "Essentially the government asks me to find that if a person one time subscribes to a service, whose content could not be known for sure until after subscribing, and the person never goes to the trouble of 'unsubscribing,' then that person is likely to possess child pornography. This is the equivalent of saying if someone subscribes to a drug legalization organization or newsletter, then there is probable cause to believe that person possesses drugs. Yet I have never heard of the

government requesting a warrant to search a home for drugs on such hypothetical evidence. In drug cases the government knows it must at least have some evidence of a delivery. Just as a warrant to search for drugs needs some evidence that there has been a delivery of drugs, a warrant to search for child pornography needs some evidence that there has been a delivery of child pornography.

{¶ 24} "The government counters that child pornography is different, because it can be delivered to one's home over the internet, without someone physically carrying it through the door. This argument confuses the mode of delivery with the fact of delivery. Yes, drugs or other contraband must be physically delivered from one location to another. Child pornography either can also be physically delivered, or an electronic image can be delivered over the internet. But for a finding of probable cause there must be some reason to believe that some contraband has been delivered at some time, by some means, whether one is authorizing a search for child pornography, for drugs, or for any other evidence of a crime. Saying that illegal items could be delivered over the internet is like saying that drugs could be delivered to a home when law enforcement was not watching, but we do not normally issue search warrants on this kind of speculation.

{¶ 25} "Here, a person could have clicked on the subscribe button, still not knowing what was on the site, specified the 'no mail' option, and then clicked on the 'join' button. This hypothetical person could then have seen the child pornography on the site, been shocked, and immediately left the site, never to return, not even to search for and find the method of 'unsubscribing.' In such a case there would not be any emails containing child pornography sent, and the person would not receive or be in

possession of any child pornography. Yet under the government's theory, probable cause would exist to obtain a warrant to search this person's home. I believe that the Fourth Amendment's requirement that 'no Warrants shall issue, but upon probable cause' requires more." Id. at 1144-45.

{¶ 26} In contrast, the State relies on *U.S. v. Wagers* (C.A.6, 2006), 452 F.3d 534, and

{¶ 27} *U.S. v. Frechette* (C.A. 6, 2009), 583 F.3d 374. In *Wagers*, the affidavit was 32 pages long and contained a four-page attachment, indicating that the defendant had purchased subscriptions to three different websites that were found to display child pornography. The subscriptions were for between one and two months each. Furthermore, the affidavits indicated that the defendant had a previous conviction for possession of child pornography. The warrants did not specifically allege that the defendant had viewed the sites or that he had accessed unlawful content. 452 F.3d at 537 and 541. The Sixth Circuit Court of Appeals concluded that probable cause existed for issuance of the warrant. Id. at 541.

{¶ 28} Subsequently, in *Frechette*, the Sixth Circuit found probable cause where the defendant paid $79.95 for a one-month subscription to a child pornography website. 583 F.3d at 376. The Sixth Circuit first concluded that the evidence was not stale, even though more than a year had elapsed between the time the defendant purchased the subscription and issuance of the warrant. Id. at 378-79. Analyzing the factors outlined in *United States v. Abboud* (C.A. 6, 2006), 438 F.3d 554 (the crime's character; the criminal; the thing to be seized; and place to be searched), the Sixth Circuit first observed that time limitations which typically apply to more fleeting crimes do not fit

child pornography, because child pornography " 'is generally carried out in the secrecy of the home and over a long period * * * ' ". 583 F.3d at 378 (citation omitted). Downloaded materials also often remain on computers for a lengthy period of time. Id.

{¶ 29} The Sixth Circuit further observed that the defendant was not nomadic and had lived in the same house the entire time. Id. at 379. With respect to the thing being seized, digital images of pornography are easily duplicated and have an infinite life span, being recoverable even after being deleted from a computer's hard drive. Id. Finally, the place to be searched was the defendant's residence, which was a " 'secure operational base.' " Id.

{¶ 30} Having eliminated the staleness issue, the Sixth Circuit went on to consider whether the magistrate had a substantial basis for finding probable cause. Id. In this regard, the Sixth Circuit noted as follows:

{¶ 31} "The evidence before the magistrate judge revealed, among other things, that the defendant paid $79.95 to access a commercial child pornography site on January 13, 2007, using an email address and PayPal account connected to his residence at 8-Van ---- Street. Evidence that an individual subscribed to child pornography web sites 'supports the conclusion that he has likely downloaded, kept, and otherwise possessed the material.' * * * Moreover, the agents verified that the defendant, a registered sex offender, continued to reside at this address at the time of the search on April 8, 2008. Based on his four years of experience handling child pornography cases, Agent Smith stated in his affidavit that consumers of child pornography usually maintain illegal images using their computers. Further, Agent Smith noted that evidence can remain on the computers even after the viewer deletes

the images. Considering all of these facts, there clearly was a 'substantial basis' for the magistrate judge to conclude that there was a fair probability that evidence regarding illegal images of child pornography could be found on a computer located at 8-Van ---- Street. Thus, the affidavit provided the magistrate judge with a sufficient basis for finding probable cause." Id. at 379-80 (citation omitted).

{¶ 32} The Sixth Circuit also rejected the defendant's contention that a one-month subscription is insufficient to indicate that evidence would exist at the residence. The court stressed that:

{¶ 33} "[R]equiring law enforcement to show a two-month or multiple-month subscription before finding probable cause exists would effectively turn the requirement of a fair probability of finding contraband into one of near certainty. Indeed, there is a fair probability that someone who paid for a one-month subscription would use it, whereas a person who pays a second time almost certainly made the determination to pay again after viewing the site. * * * Certainty has no part in a probable cause analysis. * * * Stated another way: if someone spends $80 for something, it is highly likely that the person will use it - whether it is a tie, a video game, or a subscription to a pornographic web site." Id. at 380-81 (citations omitted).

{¶ 34} The facts in *Frechette* are quite similar to those in the case before us. We agree with the trial court that the affidavit could have been more detailed, making the issue somewhat close. Nonetheless, all the factors, including the investigation conducted by the federal agency, Hale's choice to pay for a subscription to a child pornography site, and Detective Rotterman's verification that Hale still resided at the same address from which payment was made, lead to a fair probability that evidence of

illegal images would be found at Hale's residence. We also note that in contrast to the case before us, *Strauser* involved a free subscription to an e-group by email, which did not result in the transmission of pornographic images. It is easier to see a potentially innocent explanation for that type of activity, compared to the deliberate choice to spend a substantial amount to gain access to a site that offers child pornography.

{¶ 35} The Ninth Circuit Court of Appeals made a similar observation in a child pornography case, noting that:

{¶ 36} "Membership is both a small step and a giant leap. To become a member requires what are at first glance little, easy steps. It was easy for Gourde [the defendant] to submit his home address, email address and credit card data, and he consented to have $19.95 deducted from his credit card every month. But these steps, however easy, only could have been intentional and were not insignificant. Gourde could not have become a member by accident or by a mere click of a button." *U.S. v. Gourde* (C.A.9 , 2006), 440 F.3d 1065, 1070.

{¶ 37} Likewise, Hale could not have become a member of "Lolitas Contents" by accident. Accordingly, we conclude that the trial court did not err in finding probable cause.

{¶ 38} Hale's next argument relates to staleness. In this regard:

{¶ 39} "An affidavit in support of a search warrant must present timely information and include facts so closely related to the time of issuing the warrant as to justify a finding of probable cause at that time. * * * No arbitrary time limit dictates when information becomes 'stale.' * * * The test is whether the alleged facts justify the conclusion that certain contraband remains on the premises to be searched. * * * If a

substantial period of time has elapsed between the commission of the crime and the search, the affidavit must contain facts that would lead the judge to believe that the evidence or contraband are still on the premises before the judge may issue a warrant." *State v. Marler*, Clark App. No. 2007 CA 8, 2009-Ohio-2423, at ¶ 37 (citations omitted).

{¶ 40} For the reasons outlined in *Frechette*, we reject Hale's staleness argument. See 583 F.3d at 378-79. The considerations leading to rejection of staleness in *Frechette* exist in the case before us. Other Ohio courts have also applied similar factors in analyzing staleness. See, *e.g.*, *State v. Ingold*, Franklin App. No. 07AP-648, 2008-Ohio-2303, at ¶ 23 (identifying factors including "the character of the crime, the criminal, the thing to be seized, as in whether it is perishable, the place to be searched, and whether the affidavit relates to a single isolated incident or ongoing criminal activity.") (Citation omitted.) The court stressed in *Ingold* that "[i]n child pornography cases, these factors are so closely intertwined that consideration of one necessarily involves consideration of the others." Id. Although a substantial period of time elapsed between Hale's purchase of the subscription and the issuance of the warrant, Hale still resided at the same address, which was verified by Detective Rotterman shortly before he applied for the warrant. In addition, as *Frechette* noted, pornographic images may be stored on computers or computer-related items for long periods of time. 583 F.3d at 378. See, also, *State v. Bates*, Guernsey App. No. 08 CA 15, 2009-Ohio-275, at ¶ 49 (noting that "Ohio courts have recognized that the continuing nature of sexual offenses involving minors often justifies a finding of probable cause where the information supplied in an affidavit identifies conduct that occurred several months prior to the warrant's issuance.") Accordingly, the trial court did not err

in concluding that the information in the affidavit is not stale.

{¶ 41} Hale's final argument in support of his assignment of error is that the search warrant lacks particularity, because it broadly refers to matters like "any documentation and or notations referring to the computer," and "any personal communications, including but not limited to e-mail, chat capture," etc. The warrant also authorizes a search of "all of the above records." Hale contends that the warrant gives officers the ability to examine any contents of the computer, like tax and health records, that have nothing to do with child pornography.

{¶ 42} Under the Fourth Amendment to the United States Constitution, no warrants shall issue except those " * * * particularly describing * * * the things to be seized." Section 14, Article I of the Ohio Constitution is nearly identical to the Fourth Amendment in its language, and "its protections are coextensive with its federal counterpart." *State v. Kinney,* 83 Ohio St.3d 85, 87, 1998-Ohio-425 (citation omitted).

{¶ 43} "In search and seizure cases where a warrant is involved, the requisite specificity necessary therein usually varies with the nature of the items to be seized. Where, as here, the items are evidence or instrumentalities of a crime, it appears that the key inquiry is whether the warrants could reasonably have described the items more precisely than they did." *State v. Benner* (1988), 40 Ohio St.3d 301, 307, citing LaFave, Search and Seizure: A Treatise on the Fourth Amendment 104-105, Section 4.6(d) (1978), and abrogated on other grounds by *Horton v. California* (1990), 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112. Catchall provisions of warrants also " 'must be read in conjunction with the list of particularly described items which preceded it pertaining to the crimes alleged.' " *State v. Dillard*, 173 Ohio App.3d 373,

2007-Ohio-5651, at ¶ 43 (citation omitted).

{¶ 44} In the case before us, the search warrant indicates that probable cause exists to believe that an offense involving R.C. 2907.321(A)(5) occurred in Huber Heights, Ohio, and that the items of property described in the warrant are connected with the commission of the offense. R.C. 2907.321(A)(5) outlines the offense in question as follows:

{¶ 45} "(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

{¶ 46} " * * *

{¶ 47} "(5) Buy, procure, possess, or control any obscene material, that has a minor as one of its participants * * *."

{¶ 48} The term "obscene" is defined in R.C. 2907.01(F), as follows:

{¶ 49} "When considered as a whole, and judged with reference to ordinary adults or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to that group, any material or performance is 'obscene' if any of the following apply:

{¶ 50} "(1) Its dominant appeal is to prurient interest;

{¶ 51} "(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way that tends to represent human beings as mere objects of sexual appetite;

{¶ 52} "(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

{¶ 53} "(4) Its dominant tendency is to appeal to scatological interest by

displaying or depicting human bodily functions of elimination in a way that inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose;

{¶ 54} "(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such an interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose."

{¶ 55} The warrant states that the described items are connected with the offense of Pandering Obscenity Involving a Minor. These items include:

{¶ 56} "1. Computers, central processing units, computer motherboards, printed circuit boards, processor chips, all data drives, hard drives, floppy devices, optical drives, digital audio tape drives, and/or any other internal or external storage devices such as magnetic tapes and/or disks. Any terminal and/or display units and/or receiving devices and/or peripheral equipment such as, but not limited to, printers, digital scanning equipment, automatic dialers, modems, fax, acoustic couplers and/or direct line couplers peripheral interface boards, and connecting cables and/or ribbons. Any computer software programs, and source documentation, computer logs, diaries, magnetic audio tapes and recorders, digital audio disks, and/or recorders, any memory such as, but not limited to, memory modules, memory chips, bubble memory, and any other form of memory devices utilized by the computer or its peripheral devices (This description constitutes the definition of a computer system as that term may be used

throughout this document.) And all computer related accessories not specifically mentioned herein, all equipment having been used in said offense.

{¶ 57} "2. Any documentation and/or notations referring to the computer, the contains [sic] of the computer, the use of the computer [,] any computer software and/or communications.

{¶ 58} "3. All information within the above listed items including but not limited to machine readable data, all previously erased data, and any personal communications including but not limited to e-mail, chat capture, capture files, correspondence stored in electronic form, and/or correspondence exchanged in electronic form.

{¶ 59} "4. Any financial records, monies, and/or receipts kept as a part of and/or indicative of the obtaining, maintenance, and/or evidence of said offense; financial and licensing information with respect to the computer software and hardware.

{¶ 60} "5. All of the above records, whether stored on magnetic media such as tape, cassette, video cassette, cartridge disk, diskette, DVD or on memory storage, devices such as optical disks, programmable instruments such as telephones, 'electronic address books,' calculators, or any other storage media, together with indicia of use, ownership, possession or control of such records, all items having been in violation of the Ohio Revised Code as stated." Search Warrant, p. 1.

{¶ 61} The search warrant also specifically incorporates the affidavit in support of the search warrant, by stating that:

{¶ 62} "The facts upon which the Affiant relies and bases his/her belief that said items of property and things are so unlawfully concealed are obtained in Paragraph IV

of the affidavit which is filed in support of the Warrant and is incorporated herein." Search Warrant, p. 2.

{¶ 63} In *U.S. v. Upham* (C.A. 1, 1999), 168 F.3d 532, the First Circuit Court of Appeals analyzed the defendant's argument that a warrant was not sufficiently particular because it authorized seizure of "[a]ny and all computer software and hardware, * * * computer disks, disk drives * * *." The First Circuit noted that:

{¶ 64} "The question whether a warrant is sufficiently 'particular' has been much litigated with seemingly disparate results. See Twenty-Sixth Annual Review of Criminal Procedure, 85 Geo. L.J. 821, 836-38 & nn. 75-78 (1997)(collecting cases). The root is the Fourth Amendment's direction that a warrant describe 'particularly' the place to be searched and 'the persons or things to be seized.' U.S. Const. amend IV. The requirement of particularity arises out of a hostility to the Crown's practice of issuing 'general warrants' taken to authorize the wholesale rummaging through a person's property in search of contraband or evidence. See *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

{¶ 65} "The cases on 'particularity' are actually concerned with at least two rather different problems: one is whether the warrant supplies enough information to guide and control the agent's judgment in selecting what to take, see *United States v. Abrams*, 615 F.2d 541, 545-46 (1st Cir.1980); and the other is whether the category as specified is too broad in the sense that it includes items that should not be seized, see *United States v. Kow*, 58 F.3d 423, 427 (9th Cir.1995). See also *Davis v. Gracey*, 111 F.3d 1472, 1478-79 (10th Cir.1997) (discussing both problems). Unfortunately, making a warrant more objective may also make it broader, and vice versa.

{¶ 66} "Upham's [the defendant's] main attack is on the first paragraph, allowing the seizure of computer equipment, which he describes as 'generic.' Although Upham relies principally on *United States v. Klein*, 565 F.2d 183, 188 (1st Cir.1977), that case was concerned with whether a warrant was imprecise because it permitted unduly subjective judgments. Here, the first paragraph is easily administered based on objective criteria (i.e., whether the items seized are computer equipment). The problem is not imprecision but arguable overbreadth.

{¶ 67} "As a practical matter, the seizure and subsequent off-premises search of the computer and all available disks was about the narrowest definable search and seizure reasonably likely to obtain the images. A sufficient chance of finding some needles in the computer haystack was established by the probable-cause showing in the warrant application; and a search of a computer and co-located disks is not inherently more intrusive than the physical search of an entire house for a weapon or drugs. We conclude, as did the Ninth Circuit in somewhat similar circumstances, see *United States v. Lacy*, 119 F.3d 742, 746-47 (9th Cir.1997), that the first paragraph was not unconstitutionally overbroad.

{¶ 68} "Of course, if the images themselves could have been easily obtained through an on-site inspection, there might have been no justification for allowing the seizure of all computer equipment, a category potentially including equipment that contained no images and had no connection to the crime. But it is no easy task to search a well-laden hard drive by going through all of the information it contains, let alone to search through it and the disks for information that may have been 'deleted.' The record shows that the mechanics of the search for images later performed off site

could not readily have been done on the spot." *Upham*, 168 F.3d at 535.

{¶ 69} In view of the statutory definition of "obscene," the warrant in the case before us provided officers with sufficient guidance and control regarding what matters to take. The particularity issue relates more to overbreadth, in that the warrant allegedly fails to limit the items to be reviewed.

{¶ 70} When courts consider the overbreadth of search warrants, they do not apply a deferential standard of review. Instead, the standard of review is *de novo*. *State of Ohio v. Gritten*, Portage App. No. 2004-P-0066, 2005-Ohio-2082, at ¶ 11, citing *United States v. Ford* (C.A. 6, 1999), 184 F.3d 566, 575. We also note that:

{¶ 71} "Not all broad and generic descriptions of things to be seized are invalid under the Fourth Amendment. A broad and generic description is valid if it 'is as specific as circumstances and nature of the activity under investigation permit' and enables the searchers to identify what they are authorized to seize." *State v. Armstead*, Medina App. No. 06CA0050-M, 2007-Ohio-1898, at ¶ 10 (citation omitted).

{¶ 72} In *United States v. Otero* (C.A. 10, 2009), 563 F.3d 1127, the Tenth Circuit Court of Appeals noted that a "warrant authorizing a search of 'any and all information and/or data stored on a computer' " would be "the sort of wide-ranging search that fails to satisfy the particularity requirement." Id. at 1132. The Tenth Circuit concluded that the warrant failed to describe the items to be seized with either "technical precision" or "practical accuracy," because the section of the warrant pertaining to seizure of the computer items did not limit the search to evidence of

specific crimes or to specific persons on the defendant's delivery route.[1] Id.

{¶ 73} In this regard, the Tenth Circuit distinguished its prior decision in *United States v. Brooks* (C.A. 10, 2005), 427 F.3d 1246, which had upheld a warrant authorizing a search of evidence of child pornography that included " 'photographs, pictures, computer generated pictures or images, depicting partially nude or nude images of prepubescent males and or females engaged in sex acts," as well as "correspondence, including printed or handwritten letters, electronic text files, emails and instant messages.' " *Otero*, 563 F.3d at 1133. The Tenth Circuit stated that:

{¶ 74} "A technical reading of that warrant might suggest that the search of correspondence was wide-ranging and not limited to correspondence that related to child pornography. In context, however, we found that while 'the language of the warrant may, on first glance, authorize a broad, unchanneled search through [the] document files, as a whole, its language more naturally instructs officers to search those files only for evidence related to child pornography.' * * * The warrant authorizing the search of Ms. Otero's computer, however, has significant structural differences from the warrant in *Brooks*. In *Brooks*, the portion authorizing the text search was not separated by paragraphs and headings from the portion authorizing the image search; the two portions were contained in a single paragraph, with no separation, and appeared under the same heading, namely, 'evidence of child pornography.' The structure of the warrant in *Brooks* thus suggested that the image and text searches were subject to the

[1]The defendant in *Otero* was suspected of stealing mail from customers along her mail route, and the warrant authorized seizure of mail addressed to persons other than the residents of defendant's house, as well as computer equipment and data. 563 F.3d at 1129-30.

same limitations, whereas the structure of the warrant in this case, with its clearer divisions and stark contrasts between the two sections, suggests the opposite." Id.

{¶ 75} Because of these deficiencies, the Tenth Circuit held the warrant invalid. Id. Ultimately, the Tenth Circuit allowed the evidence to be used, pursuant to a "good-faith exception" to the exclusionary rule. Id. at 133-36.

{¶ 76} Section I of the warrant to search Hale's person and residence identifies the offense as Pandering Obscenity Involving a Minor. Section II of the warrant identifies the items of property for which officers are to search, and indicates that the listed items are connected with the offense of Pandering Obscenity Involving a Minor. Section II contains five paragraphs, and is reasonably read to restrict seizure to items connected with Pandering Obscenity Involving a Minor. Unlike the warrant in *Otero*, the warrant in the case before us does not divide the items to be seized into separate sections and does not relieve items from the requirement that they be connected to the specified offense. Furthermore, Section II, paragraph 5 of the warrant again reiterates that all the above records (those listed in paragraphs 1 through 4), are items that are "in violation of the Ohio Revised Code as stated." Accordingly, the warrant informs officers that they are to search only for items connected to the crime of Pandering Obscenity Involving a Minor. Given Ohio's statutory definitions of that crime and of the word "obscene," the warrant did not authorize a "broad, unchanneled search." *Otero*, 563 F.3d at 1133. Compare *United States v. Riccardi* (C.A. 10, 2005), 405 F.3d 852 (holding that a warrant was not particular enough, where it was not limited to any particular computer files or to any particular federal crime, but authorized the "seizure"

of the defendant's computer and all electronic media stored in the computer or any internal or external storage devices. The court concluded that the warrant "thus permitted the officers to search for anything – from child pornography to tax returns to private correspondence. It seemed to authorize precisely the kind of 'wide-ranging exploratory search[ ] that the Framers intended to prohibit.' " Id. at 863, citing *Maryland v. Garrison* (1987), 480 U.S. 79, 84, 107 S.Ct. 1013, 94 L.Ed.2d 72.)

{¶ 77} The warrant in the case before us authorizes officers to search the premises for computers, central processing units, hard drives, and other computer-related items connected with the commission of the offense of Pandering Obscenity Involving a Minor. The warrant additionally authorized a search of other items, including software documentation, financial records, and receipts kept as part of the evidence of the offense. Under the circumstances, the warrant could not reasonably have described the items more precisely. The search was limited to items related to the specified offense, which is defined by statute and further restricted by the statutory definition of obscenity. The warrant did not authorize intrusion into unrelated matters. Accordingly, we conclude that the warrant in the case before us is sufficiently particular.

{¶ 78} We also note that even if the warrant were overbroad, courts have severed the offending parts of overbroad warrants, and have refused to suppress evidence for which probable cause exists. See, *e.g.*, *Armistead*, 2007-Ohio-1898, at ¶ 9 and 15 (upholding a warrant to the extent that probable cause for search of crack-cocaine existed, but severing the overbroad permission to search for " 'any other controlled substances or dangerous drugs' and 'any other contraband.' ").

{¶ 79} As an additional matter, if the officers had seized unrelated items, the items would have been inadmissible. "If the scope of the search exceeds that permitted by the terms of a validly issued warrant or the character of the relevant exception from the warrant requirement, the subsequent seizure is unconstitutional without more." *Horton*, 496 U.S. at 140. In this regard, we note that Hale has not suggested that the police seized or prosecuted him for items that were not specified in the warrant. Accordingly, no basis exists for finding a Fourth Amendment violation.

{¶ 80} Finally, even if the warrant had failed the particularity test, the "good-faith exception" to the exclusionary rule would apply. Under this exception, evidence is not barred, where officers act in "objectively reasonable reliance on a search warrant issued by a detached and neutral magistrate," but the warrant is "ultimately found to be unsupported by probable cause." *George*, 45 Ohio St.3d 325, paragraph three of the syllabus, following *United States v. Leon* (1984), 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677. This exception has also been applied to allow use of evidence where the warrant itself is supported by probable cause, but fails the particularity requirement. See *Gritten*, 2005-Ohio-2082, at ¶ 19-21 (concluding that a warrant was so facially deficient in terms of particularity that no reasonable officer could believe the warrant was valid). See also, *Otero*, 563 F.3d at 1133-36 (holding that a reasonable officer could have construed the warrant as valid, despite its lack of particularity).

{¶ 81} In the case before us, the trial court concluded that even if the search warrant were facially lacking, Detective Rotterman had a good-faith belief that the warrant was sufficient and that the judge who approved the warrant did not simply "rubberstamp" his efforts. The trial court noted that the issuing judge, instead, was

neutral and detached. Finally, the trial court concluded that the search warrant is not so lacking in indicia of probable cause as to render unreasonable a belief in the warrant's validity.

{¶ 82} We agree with the trial court. Detective Rotterman was an experienced investigator in child pornography or internet crimes. Rotterman additionally had his affidavit reviewed by two supervisors in the police department before he presented it to the judge. In addition, Rotterman helped execute the search. The warrant was also not so deficient that a reasonable officer would have lacked confidence in its validity.

{¶ 83} Hale's sole assignment of error is overruled.

III

{¶ 84} Hale's sole assignment of error having been overruled, the judgment of the trial court is Affirmed.

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BROGAN, J., concurs.

FROELICH, J., concurring.

{¶ 85} While I "ultimately [find the warrant] to be unsupported by probable cause," *George*, supra, I concur based on the officer's good faith and "objectively reasonable reliance on a search warrant issued by a detached and neutral magistrate." Id.

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