IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Plaintiff-Appellee, vs. **JUSTIN GREEN,** Defendant-Appellant.	Case No. _____ On appeal from the Ross County Court of Appeals, Fourth Appellate District Court of Appeals Case No. 21CA3760 Trial Court Case No. 20CR000445

MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANT-APPELLANT JUSTIN GREEN

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STATEMENT OF WHY THIS FELONY CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND PRESENTS ISSUES OF PUBLIC OR GREAT GENERAL INTEREST

This case involves a substantial constitutional question concerning the due process rights under the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 14 of the Ohio Constitution, namely whether hearsay information provided by an informant, who claims be a law enforcement officer but whose identity and association with law enforcement is never verified, is sufficient to establish probable cause for a search warrant. This case and the Court's answer to the above question are of great interest to the courts, judicial officers who review search warrant applications, law enforcement personnel who prepare or contribute to search warrant affidavits, and the general public of the State of Ohio who may become the subject of a search warrant application.

In *State v. Tidwell*, 165 Ohio St.3d 57, 2021-Ohio-2072, 175 N.E.3d 527 and *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), this Court and the Supreme Court of the United States described several categories of informants, including anonymous informants, known informants (i.e. people who have previously provided reliable tips or information to investigators), and identified citizen informants, and then compared and contrasted the credibility and reliability ordinarily attributed to tips or other information provided by each category of informants and the levels of corroboration needed to establish probable cause based on each category of informants. This case concerns the applicability of the *State v. Tidwell* and *Illinois v. Gates* categories of informants to an informant who claims to be an employee or member of a law enforcement agency of which the search warrant affiant is not an employee or member when (1) the search warrant affiant does not know the purported law enforcement informant and has not had any prior contact or dealings with the purported law

enforcement informant, (2) the search warrant affiant has not verified the purported law enforcement informant's identity and employment or membership with a law enforcement agency, and (3) the search warrant affiant has not independently investigated or obtained any facts or circumstances from which the search warrant affiant could conclude that the purported law enforcement information was credible or that the purported law enforcement informant's tips or other information were reliable.

In the case sub judice, multiple search warrants were issued by the Chillicothe Municipal Court based on uncorroborated hearsay information provided to Detective Christopher Fyffe of the Chillicothe Police Department by an informant who identified himself as "Agent Alex Harnish" and claimed to be associated with the Internet Crimes Against Children (ICAC) task force ("informant"). The informant never provided anything to Det. Fyffe to confirm his identity or association with ICAC, and Det. Fyffe was never able to verify the identity of the informant. Det. Fyffe never met with the informant. Det. Fyffe had not previously worked with the informant or received any tips from the informant in the past. In the search warrant affidavits submitted to the Chillicothe Municipal Court, Det. Fyffe did not indicate anything that would indicate a basis for believing the informant or treating the informant differently from an anonymous informant (including an informant who provides a fake name). Similarly, there was nothing in Det. Fyffe's search warrant affidavits to identify the source of the information that the informant provided to Det. Fyffe or to reveal the basis or source of the informant's knowledge (which was not based on any personal observations of the informant) as to any alleged criminal activity involving Defendant-Appellant, Justin Green.

Defendant-Appellant, Justin Green, filed a motion to suppress any evidence obtained pursuant to the invalid search warrants, which the Trial Court overruled. The Fourth District

Court of Appeals affirmed the Trial Court's decision. Although the Fourth District Court of Appeals cited the collective-knowledge doctrine to justify its decision, there was nothing in Det. Fyffe's search warrant affidavits, testimony during the suppression hearing, or record on appeal to indicate that the informant was actually a law enforcement officer, that the informant was ever involved in any official investigation regarding Defendant-Appellant, Justin Green, or that the information provided to Det. Fyffe was obtained by the informant during any official investigation. As a result, the collective-knowledge doctrine did not apply, and should not apply, unless and until the purported but unverified law enforcement informant's identity and association as an actual law enforcement officer is confirmed.

Given that the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 14 of the Ohio Constitution protect the rights of people to be secure in their homes and property against unreasonable searches and seizures and further require probable cause to be established before a search warrant can be issued, this Court must now decide how a judicial officer should weigh uncorroborated hearsay information provided by a purported but unverified law enforcement informant when reviewing a search warrant affidavit to determine whether probable cause exists for the issuance of a search warrant of a home and its contents.

Unfortunately, society can no longer assume that because a person wears a certain badge or uniform, drives a vehicle with a flashing blue light, or says that he or she is a police officer, the person is actually employed in law enforcement. Impersonation of police officers is a serious problem, which affects not only the safety of the public but also the constitutional rights of individuals subjected to such impersonation attempts. Impersonators are frequently motivated to engage in such impersonation activities in order to gain the power, control, and credibility that is often associated with police officers. Sometimes, the impersonation of police officers takes place

in public areas, such as when an impersonator uses a fake badge and flashing blue lights to direct the driver of a vehicle to pull over on a road or highway. Other times, the impersonation of police officers takes place out of public sight, such as when a person makes a tip to a law enforcement agency and indicates that they are currently affiliated with (or were formerly affiliated with) a law enforcement agency, when that was not the case, in order to increase the perceived credibility and reliability of their tip and/or to motivate an investigator to open an investigation when the investigator would not have opened an investigation if the same tip had been provided by an anonymous informant. Just as society as a whole cannot blindly accept a person's representations about being in law enforcement without some level of verification, law enforcement agencies and investigators also should not blindly accept a person's representations about being in law enforcement without more. And law enforcement agencies and investigators certainly should not blindly undertake actions affecting the constitutional rights of others based on tips made by a person claiming to be in law enforcement when the truth or falsity of such representations is not known by the investigators. Thankfully, it is fairly quick and easy to verify the identity of an informant claiming to be a member or employee of a law enforcement agency. In most cases, an investigator can confirm an informant's identity and association with a law enforcement agency in a matter of seconds by calling or emailing the informant's claimed law enforcement agency or supervisor. In other situations, the informant may be able to verify his or her identity by providing a business card, correspondence on letterhead, etc.

But in those situations where a search warrant affiant does not or is unable to confirm the identity and membership or employment of a purported but unverified law enforcement informant, this Court must decide how a judicial officer should treat the informant's tips when considering the issuance of a search warrant, including the following issues presented in this

appeal: (1) should information provided by a purported but unverified law enforcement informant be treated the same as information provided by an anonymous informant, until the informant's identity is verified; (2) is uncorroborated hearsay information provided by a purported but unverified law enforcement informant alone sufficient to establish probable cause to obtain a search warrant for a home and its contents; (3) in order to establish sufficient probable cause to obtain a search warrant for a home and its contents, does a search warrant affidavit need to include at least sufficient facts or circumstances to determine that a purported but unverified law enforcement informant was credible and that the informant's information was reliable, as well as independent corroboration of the informant's belief regarding the connection between the alleged contraband or criminal activity and the alleged suspect; (4) whether a search warrant based solely on uncorroborated hearsay information provided by a purported but unverified law enforcement information is invalid; and (5) whether evidence seized pursuant to such an invalid search warrant should be excluded from evidence pursuant to the fruit of the poisonous tree doctrine?

The Fourth District Court of Appeals' decision below incorrectly applied the common-knowledge doctrine to information provided by an otherwise anonymous or unknown informant who claimed to be a law enforcement officer but whose identity and association were never verified, by broadly applying the common-law doctrine to any information provided by anyone claiming to be associated with law enforcement. By doing so, the Fourth District Court of Appeals' decision encourages investigators and search warrant affiants to rely on hearsay information from unverified informants and undisclosed sources, emboldens informants to claim to be associated with law enforcement when they are not in order to increase their credibility and the reliability of their tips, and forces judicial officers to treat such unverified hearsay information

as per se reliable when it is not. For these reasons, the Fourth District Court of Appeals' decision is constitutionally problematic and demands immediate correction by this Court.

Accordingly, Defendant-Appellant, Justin Green, respectfully requests that this honorable Court accept this case and his four (4) propositions of law for review.

STATEMENT OF THE CASE AND FACTS

A. Statement of Facts

On April 1, 2020, Chillicothe Police Detective Christopher Fyffe received an unsolicited phone call from an informant who identified himself as "Agent Alex Harnish" (hereinafter "informant"). The informant, whom Det. Fyffe did not know and with whom Det. Fyffe had no prior contact or dealings, indicated he was associated with the Internet Crimes Against Children (ICAC) task force. The informant stated that he would be sending a compact disc containing images depicting minors from a website called "Kik" and a copy of a subpoena issued to Charter Communications with subscriber information, so Det. Fyffe could initiate an investigation against Defendant-Appellant, Justin Green.

Shortly thereafter, Det. Fyffe received an unmarked compact disc in a manila envelope in the mail. The envelope and compact disc were not accompanied by anything to suggest that they were from the ICAC task force or any of its law enforcement officers, such as a cover letter, business card, or other documentation. None of the information contained on the compact disc indicated that it was from, or had been obtained by, the ICAC task force or any other law enforcement agency or law enforcement officer.

After receiving the compact disc in the mail, Det. Fyffe did nothing to verify that the informant was who he said he was or to verify that the informant was affiliated with any law enforcement agency. Further, Det. Fyffe did not do anything to verify any of the information that

the informant had told to him. At no point in time did Det. Fyffe ask the informant, nor did the informant tell Det. Fyffe, the source from where the informant obtained the images and other information contained on the compact disc. Det. Fyffe did not do anything to verify any of the information contained on the compact disc. Det. Fyffe did not do any independent investigation into the Kik website or Charter Communications.

On April 7, 2020, Det. Fyffe presented a search warrant affidavit to Chillicothe Municipal Court Judge John B. Street in an effort to obtain a warrant to search the home of Justin Green. Det. Fyffe's search warrant affidavit contained only the following information:

1. Det. Fyffe has been in law enforcement since 2015, is employed by the Chillicothe Police Department, and has investigated hundreds of cases;

2. On April 1, 2020, Det. Fyffe was contacted by "Agent Alex Harnish of ICAC (Internet Crimes Against Children)" in reference to a case from June 29, 2019.

3. This "Agent" indicated he was going to send a compact disc to Det. Fyffe that contained images from a "chat" website called Kik, a copy of a subpoena with subscriber information, and other data to assist in an investigation.

4. Det. Fyffe received the compact disc, and it contained the following:

    a. A copy of a subpoena issued to Charter Communications from the Franklin County Municipal Court.

    b. The response to the subpoena by Charter Communications, which contained Subscriber Information for IP Address: 174.101.114.241 with Subscriber Name Justin Green, an address on the account of 475 Allen Avenue, Chillicothe, OH 45601, an email address of rebeccalong08@twc.com, and phone number 740-703-6876.

    c. Four (4) folders that each contained a photograph of a nude female, three of which were possible underage females, and related data files.

5. Det. Fyffe identified Justin Green and Rebecca Long and confirmed they lived at 475 Allen Ave. in 2019.

6. Det. Fyffe looked at social media accounts and determined Justin Green and Rebecca Long appeared to be in a relationship.

7. Det. Fyffe observed Rebecca Long enter the home on April 1, 2020.

Judge Street issued the requested search warrant for Mr. Green's home.

Det. Fyffe executed the search warrant on April 9, 2022 and seized a cell phone and Apple iPad from the home. Det. Fyffe then executed another search warrant affidavit on April 13, 2020, which requested a warrant to search the seized devices. That warrant was signed by Chillicothe Municipal Court Judge Toni Eddy on April 13, 2020.

B. Statement of the Case

On November 20, 2020, Justin Green was indicted on five (5) counts of Pandering Obscenity Involving a Minor pursuant to R.C. 2907.321, each count a fourth-degree felony, to which he entered a not guilty plea.

On February 8, 2021, Justin Green filed a Motion to Suppress evidence from the searches of his home and electronic devices with the Ross County Court of Common Pleas (hereinafter "Trial Court"), in which he argued that the search warrants were not based on probable cause because Det. Fyffe's search warrant affidavits were based on hearsay and the search warrant affidavits did not set forth the veracity and basis of knowledge of teh informant who provided the hearsay information to Det. Fyffe. Mr. Green also argues that the search warrant affidavits were stale due to the ten (10) month lapse between the time when the alleged criminal conduct occurred and the time when Det. Fyffe applied for the search warrants.

During the March 24, 2021 hearing on Justin Green's Motion to Suppress, Det. Fyffe testified that he had no knowledge of the informant, "Agent Alex Harnish," prior to requesting requesting the first search warrant other than one (1) telephone call on April 1, 2020. Det. Fyffe admitted that he "had no information to support that this Alex Harnish that [he] spoke to was a reliable or credible source". Det. Fyffe did not apparently meet the informant (or speak with the informant again since April 1, 2020 telephone call) until the the hearing on Mr. Green's Motion

to Suppress on March 24, 2021. Although the purported but unverified law enforcement informant was subpoenaed to the motion hearing by the Plaintiff-Appellee, State of Ohio, the informant did not testify at the hearing despite, apparently, being present.

Det. Fyffe also testified that the only independent investigation that he did prior to seeking a search warrant was to confirm that a Rebecca Long resided at 475 Allen Avenue in Chillicothe, Ohio by observing her walk a dog and go into that residence and to confirm that Justin Green was in a relationship with Ms. Long via Facebook. Det. Fyffe admitted that he performed no other investigation prior to seeking the first search warrant in this case.

The following statements were made by Det. Fyffe during the March 24, 2021 hearing:

1. Det. Fyffe admitted that he had no information to support that this Alex Harnish was a reliable or credible source. Det. Fyffe had never worked with him or met him.

2. Det. Fyffe had never met Rebecca Long or Justin Green prior to executing the search warrant.

3. Det. Fyffe never looked up or contacted anyone with Kik Interactive, Inc. to verify the information he received.

4. The Kik Interactive, Inc. documentation indicates the documents were sent to a law enforcement agency in Canada, and Det. Fyffe indicated that he did not try to contact that law enforcement agency.

5. The informant never told Det. Fyffe from where the documents were obtained and never mentioned any Canadian law enforcement agency during their April 1, 2020 phone call.

6. Det. Fyffe did not contact the Franklin County Municipal Court to determine if the documents on the disc were legitimate or valid.

7. The subpoena from the Franklin County Municipal Court ordered the documents to be returned to Agent Anna Edgar with the Department of Homeland Security, but Det. Fyffe never tried to contact this agent and has never met or spoken to her.

8. Det. Fyffe never received anything identifying the Internet Crimes Against Children as the entity with whom "Agent Alex Harnish" worked. In fact, the only thing received by Det. Fyffe was a blank

> manilla envelope with the disc enclosed and no identifying information therewith.

All the information in Det. Fyffe's search warrant affidavits was alleged to have been facts and was provided to Judges who issued search warrants in reliance upon those statements. However, Det. Fyffe had no basis to credit or believe the informant with whom he had spoken on the telephone, as Det. Fyffe performed no independent investigation to verify the information provided by the informant or even the informant's identity or association with any law enforcement agency, and there was no mention in the search warrant affidavits that the informant was credible.

After the March 24, 2021 motion hearing, the Trial Court (1) ordered the parties to submit any written briefs in support of, or against, the Motion to Suppress and (2) held a hearing on April 29, 2021 for oral arguments regarding the Motion the Suppress and the hearing thereon. The Trial Court orally denied Justin Green's Motion to Suppress at the April 29, 2021 hearing and subsequently issued a written Entry overruling the Motion to Suppress on June 2, 2021.

On June 30, 2021, Justin Green entered a Plea of No Contest to all counts in the Indictment, and the Trial Court found him guilty of each offense in its July 6, 2021 Judgment Entry of Guilty. During a sentencing hearing on August 18, 2021, the Trial Court sentenced Mr. Green to two (2) years in prison and classified him as a Tier II Sex Offender, as reflected in the Trial Court's October 20, 2021 Judgment Entry of Sentence.

On November 9, 2021, Justin Green appealed the Trial Court's June 2, 2021 Entry denying his Motion to Suppress, July 6, 2021 Judgment Entry of Guilty, and October 20, 2021 Judgment Entry of Sentence to the Fourth District Court of Appeals.

On February 14, 2023, the Fourth District Court of Appeals issued its Decision and Judgment Entry, in which it affirmed the Trial Court's decisions. Although the Fourth District

Court of Appeals correctly stated the general rule that a law enforcement officer who obtains information during an official investigation and then provides that information to another law enforcement officer is deemed a credible source for the purpose of the second officer obtaining a search warrant, the Fourth District Court of Appeals' Decision and Judgment Entry broadly misapplied the common-knowledge doctrine to cover any information that is ever provided to a law enforcement officer by an informant who claims to be a law enforcement officer, regardless of whether the informant is actually involved in law enforcement and regardless of whether the provided information came from an official investigation or from some other, unknown, unidentified source. Based on the Fourth District Court of Appeals' February 14, 2023 Decision and Judgment Entry, all that a law enforcement officer or investigator needs to state in a search warrant affidavit in order to guarantee the issuance of a search warrant (which might otherwise not be issued due to Fourth Amendment concerns) is that the hearsay information contained in the search warrant affidavit was provided by a purported law enforcement informant, regardless of informant's true identity and the source of the hearsay information. The Fourth District Court of Appeals' Decision and Judgment Entry crushes one of the foundational principles of law enforcement investigations - knowing and verifying your sources - and instead encourages law enforcement officers and investigators to live by the motto of "what you don't know can't hurt you", even if it violates someone else's constitutional rights.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: Information provided to an investigator by an informant who purports to be a member of another law enforcement agency but does not provide proof of such membership should be treated the same as information provided by an anonymous informant, unless and until the investigator verifies the purported law enforcement informant's true identity and membership.

The Fourth Amendment to the U.S. Constitution and Section I, Article 14 of the Ohio

Constitution guarantee the rights of people to be free from unreasonable searches and seizures. To protect those rights, "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton v. New York*, 445 U.S. 573, 590, 100 S.Ct. 1371, 63 L.E.2d 639 (1980).

A search warrant may be issued only when "probable cause is properly established and the scope of the authorized search is set out with particularity". *Kentucky v. King*, 563 U.S. 452, 459, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011). A search warrant "affidavit must set forth particular facts and circumstances underlying the existence of probable cause, so as to allow the [reviewing judicial officer] to make an independent evaluation of the matter." *Franks v. Delaware*, 438 U.S. 154, 165, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). A search warrant "affidavit must provide the [reviewing judicial officer] with a substantial basis for determining the existence of probable cause." *Illinois v. Gates*, 462 U.S. 213, 239, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Probable cause is "a fluid concept" in that it is "not readily, or even usefully, reduced to a neat set of legal rules." *Gates*, 462 U.S. at 232. It "deals with probabilities and depends on the totality of the circumstances." *Maryland v. Pringle*, 540 U.S. 366, 371, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003).

Not all information contained in a search warrant affidavit is weighed equally. Direct observations of an affiant are deemed the most credible and reliable source of information. However, direct observations of an affiant are not always required, and search warrant affidavits are often based on information provided by other sources. This Court has "found it useful to plaace the informant into one of three categories: (1) anonymous informant, (2) known informant (someone from the criminal world who has provided previous reliable tips), and (3) identified citizen informant [i.e., a person who identifies him- or her-self and provides an eyewitness

account of criminal activity]." *State v. Tidwell*, 165 Ohio St.3d 57, 2021-Ohio-2072, 175 N.E.3d 527, ¶ 29. This Court has recognized that "an anonymous informant was comparatively unreliable and would consequently require independent police corroboration in order to demonstrate some indicia of reliability", and that "an identified citizen informant may be highly reliable and, therefore, a strong showing as to other indicia of reliability may be unnecessary." *Id.* at ¶ 31. This Court has further acknowledged that the distinctions among these categories can be blurred. *Maumee v. Weisner*, 87 Ohio St.3d 295, 300, 1999-Ohio-68, 720 N.E.2d 507.

For example, in *Tidwell*, this Court found that an informant, who initiated face-to-face contact with a highway patrolman and provided information regarding a crime that was then afoot, could not be treated neatly as citizen informant because his identity was unknown and the patrolman "did not have any information as to the [informant's] veracity, reliability, or basis of knowledge" or as an anonymous informant because he had face-to-face contact with the patrolman regarding then active criminal activity. *Tidwell* at ¶¶ 35-39.

The purported but unverified law enforcement informant in this case faces a similar dilemma. Should he have been treated as a credible law enforcement informant under the common-knowledge doctrine, even though his identity and association with law enforcement were not verified and the source of his information was unknown, as the Fourth District Court of Appeals held? Or should he have been treated as an anonymous informant because his credibility and the reliability of his information were unknown and will remain unknown until his identity and association with law enforcement are confirmed, as Appellant contends? More simply put, should a search warrant affiant and a reviewing judicial officer be more cautious or more reckless in assigning and making credibility and reliability determinations of informants whose true identities, associations, and motives have not been verified?

Proposition of Law No. 2: A search warrant affidavit based upon hearsay information provided by a purported but unverified law enforcement informant to the affiant, and which does not include any underlying facts or circumstances from which the affiant concluded that the purported law enforcement informant was credible or that the purported law enforcement informant's information was reliable, is insufficient to establish the probable cause required to obtain a warrant to search a private dwelling and its contents under the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 14 of the Ohio Constitution.

Proposition of Law No. 3: In order to establish sufficient probable cause to obtain a warrant to search a private dwelling and its contents, a search warrant affidavit based primarily on hearsay information provided by a purported but unverified law enforcement informant to the affiant must also include: (1) sufficient facts or circumstances from which the affiant concluded that the purported law enforcement informant was credible; (2) sufficient facts or circumstances from which the affiant concluded that the hearsay information provided by the purported law enforcement informant was reliable; and (3) sufficient facts or circumstances to independently corroborate the purported law enforcement informant's belief regarding the alleged contraband or criminal activity and the alleged suspect's connection thereto.

Propositions of Law Nos. 2 and 3 deal with the same issue and are addressed together.

"[T]here certainly is no basis for treating anonymous informants as presumptively reliable. Nor is there any basis for assuming that the information provided by an anonymous informant has been obtained in a reliable way. If [courts] are unwilling to accept conclusory allegations from the police, who are presumptively reliable, or from informants who are known, * * * there cannot possibly be any rational basis for accepting conclusory allegations from anonymous informants." *Illinois v. Gates*, 462 U.S. at 284 (Brennan, J., dissenting). For these reasons, "an anonymous informant is comparatively unreliable and his tip, therefore, will generally require independent police corroboration." *Weisner*, 87 Ohio St.3d at 300, citing *Alabama v. White*, 496 U.S. 325, 329, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990).

Therefore, absent independent police corroboration, hearsay provided by an anonymous informant is alone insufficient to establish probable cause. *See Gates*, 462 U.S. at 244-45.

Proposition of Law No. 4: A search warrant is invalid where it is based on hearsay information provided by a purported but unverified law enforcement informant but issued without the requisite probable cause (i.e., sufficient facts or circumstances demonstrating the informant's credibility, the reliability of informant's information, and independent corroboration of informant's allegations). Evidence seized pursuant to such an invalid search warrant shall be excluded from evidence pursuant to the fruit of the poisonous tree doctrine.

"[A] reviewing court may properly conclude that, notwithstanding the deference that magistrates [and judges] deserve, the warrant was invalid because the magistrate's [or judge's] probable-cause determination reflected an improper analysis of the totality of the circumstances". *United States v. Leon*, 468 U.S. 897, 915, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

"[E]vidence seized during an unlawful search cannot constitute proof against the victim of the search." *Wong Sun v. United States*, 371 U.S. 471, 484 (1963). Further, if an initial search warrant is unlawful, the evidence seized during that search cannot be used to support the issuance of a second search warrant. *Id.*

CONCLUSION

For the reasons above, this case involves substantial constitutional questions and matters of public and great general interest. Appellant respectfully requests this Court to accept jurisdiction, so these important issues may be reviewed and resolved by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing document was served upon the following individual(s) on the 31st day of March, 2023, as indicated:

1. Delivered via electronic mail:

Jeffrey C. Marks, Esq. Pamela C. Wells, Esq. prosecutor@rosscountyohio.gov *Attorneys for Plaintiff-Appellee, State of Ohio*	

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IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 21CA3760
vs.	:	
JUSTIN GREEN,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Michael L. Benson, Chillicothe, Ohio, for appellant.

Jeffrey C. Marks, Ross County Prosecuting Attorney, and Pamela C. Wells, Ross County Assistant Prosecuting Attorney, Chillicothe, Ohio, for appellee.

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:
ABELE, J.

{¶1} This is an appeal from a Ross County Common Pleas Court judgment of conviction and sentence. The trial court found Justin Green, defendant below and appellant herein, guilty of five counts of pandering obscenity involving a minor, in violation of R.C. 2907.321.

{¶2} Appellant assigns the following error for review:

> "THE TRIAL COURT ERRED IN DENYING THE FEBRUARY 8, 2021 MOTION TO SUPPRESS FILED BY DEFENDANT-APPELLANT, JUSTIN GREEN."

A1

{¶3} On April 1, 2020, Chillicothe Police Detective Christopher Fyffe received a phone call from an individual who identified himself as Agent Alex Harnish. Harnish stated that he worked with the Internet Crimes Against Children task force and informed Fyffe that he would be sending the detective some images depicting minors from a website named Kik. Harnish indicated he would send the detective a compact disk that contained the images, a copy of a subpoena with subscriber information, and other data to assist in the investigation.

{¶4} Shortly thereafter, Detective Fyffe received a compact disk that contained subscriber information for an IP address. This information identified appellant as the subscriber and listed appellant's street address, email address, and phone number. The disk also contained four files, dated June 29, 2019, that each contained an image of possible underage females photographed in various states of undress.

{¶5} On April 7, 2020, Detective Fyffe requested a warrant to search appellant's residence, which the trial court granted. Two days later, the detective served the search warrant and talked to the occupants, appellant and his girlfriend. Appellant admitted that he had used Kik in the past, and his girlfriend stated that appellant "has had a problem in the past

with 'chatting' with young females on Kik." As a result of the search, the detective seized a cell phone and an Apple iPad. Fyffe later applied for a warrant to search the electronic devices, which the court also granted.

{¶6} A Ross County Grand Jury subsequently returned an indictment that charged appellant with five counts of pandering obscenity involving a minor, in violation of R.C. 2907.321.

{¶7} On February 8, 2021, appellant filed a motion to suppress the evidence obtained from the searches of his residence and electronic devices. Appellant alleged that the search warrants were not based upon probable cause because the search warrant affidavits were based upon hearsay and the affidavits did not set forth the veracity and basis of knowledge of the person who provided the detective with the information. Appellant additionally argued that the information contained in the affidavits was stale. He contended that nearly ten months had elapsed since the alleged criminal conduct and, due to the lapse of time, evidence of this criminal conduct was not likely to be found at his residence or on his electronic devices at the time that the detective applied for the search warrant.

{¶8} On March 21, 2021, the trial court held a hearing to consider appellant's motion to suppress the evidence. At the

hearing, Detective Fyffe testified that on April 1, 2020 a person who identified himself as Agent Alex Harnish with Internet Crimes Against Children called the detective to inform him that the agent would be sending in the mail some pictures and documentation. The detective indicated he also exchanged emails with the agent, but did not recall whether they exchanged emails before or after he requested the search warrants. Fyffe noted that Harnish's email address ended with "ice.dhs.gov."

{¶9} Detective Fyffe also explained that when he received the information from Agent Harnish, it arrived in a certified mail envelope. He did not recall, however, whether the envelope contained a return mailing address. The detective further testified that the information that Harnish sent him contained a subpoena from Franklin County that was issued to Charter Communications. Fyffe stated he does not know who prepared this subpoena, but the subpoena did state that the subpoenaed information should be sent to "Special Agent Anna Edgar of ICE, with the Department of Homeland Security."

{¶10} After hearing the evidence, the trial court overruled appellant's motion to suppress. Later, appellant entered no-contest pleas to the five counts of the indictment.

{¶11} On October 20, 2021, the trial court sentenced appellant to serve 12 months in prison for each offense, that the sentences for counts one and two to be served consecutively to one another and the remaining sentences to be served concurrently to the others. This appeal followed.

{¶12} In his sole assignment of error, appellant asserts that the trial court erred by overruling his motion to suppress evidence because, appellant contends, the search warrants were not based upon probable cause. Appellant claims that the information contained in the affidavits is not reliable and is stale. Appellant argues that the search warrant affidavits did not include any facts to indicate (1) why the information purportedly obtained from Agent Harnish is reliable, or (2) that Harnish is indeed who he stated he was. As such, appellant believes that Harnish's information should be treated the same as an unidentified informant. Additionally, appellant argues that the nearly ten-month-old information contained in the affidavits did not make it probable that evidence of criminal activity would be found at his residence, or on his electronic devices, at the time that the detective applied for the search warrant.

AS

{¶13} The appellee disputes appellant's characterization of Agent Harnish's information and argues that information obtained from other law enforcement officers may serve as a reliable basis for issuing a search warrant. The state further disagrees with appellant's assertion that the nearly ten-month-old information did not establish probable cause to believe that evidence of child pornography would be located at his residence, or on his electronic devices, when Detective Fyffe applied for the search warrants.

STANDARD OF REVIEW

{¶14} Appellate review of a trial court's ruling on a motion to suppress evidence involves a mixed question of law and fact. *E.g., State v. Castagnola*, 145 Ohio St.3d 1, 2015-Ohio-1565, 46 N.E.3d 638, ¶ 32; *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8; *State v. Moore*, 2013-Ohio-5506, 5 N.E.3d 41, ¶ 7 (4th Dist.). Appellate courts thus "'must accept the trial court's findings of fact if they are supported by competent, credible evidence.'" *State v. Leak*, 145 Ohio St.3d 165, 2016-Ohio-154, 47 N.E.3d 821, ¶ 12, quoting *Burnside* at ¶ 8. Accepting those facts as true, reviewing courts "'independently determine as a matter of law, without deference

to the conclusion of the trial court, whether the facts satisfy the applicable legal standard.'" *Id.*, quoting *Burnside* at ¶ 8.

FOURTH AMENDMENT PRINCIPLES

{¶15} The Fourth Amendment to the United States Constitution provides:

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

Article I, Section 14 of the Ohio Constitution contains nearly identical language and provides the same protection as the Fourth Amendment. *E.g., State v. Banks-Harvey*, 152 Ohio St.3d 368, 2018-Ohio-201, 96 N.E.3d 262, ¶ 16, citing *State v. Jones*, 143 Ohio St.3d 266, 2015-Ohio-483, 37 N.E.3d 123, ¶ 12; *accord State v. Taylor*, 4th Dist. Lawrence No. 15CA12, 2016-Ohio-2781, ¶ 31; *State v. Eatmon*, 4th Dist. Scioto No. 12CA3498, 2013-Ohio-4812, ¶ 11.

{¶16} "The 'basic purpose of [the Fourth] Amendment' * * * 'is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.'" *Carpenter v. United States*, ___ U.S. ___, 138 S.Ct. 2206, 2213, 201 L.Ed.2d 507 (2018); *accord Castagnola* at ¶ 33, quoting *Wolf v. Colorado*,

338 U.S. 25, 27, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949), overruled on other grounds, *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) ("'The security of one's privacy against arbitrary intrusion by the police * * * is at the core of the Fourth Amendment.'"). Moreover, "[i]n none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home." *Payton v. New York*, 445 U.S. 573, 589, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); *accord Florida v. Jardines*, 569 U.S. 1, 6, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013) ("[W]hen it comes to the Fourth Amendment, the home is first among equals."). "'At the Amendment's "very core" stands "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."'" *Collins v. Virginia*, ___ U.S. ___, 138 S.Ct. 1663, 1670, 201 L.Ed.2d 9 (2018), quoting *Jardines*, 569 U.S. at 6, quoting *Silverman v. United States*, 365 U.S. 505, 511, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961). Accordingly, "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton*, 445 U.S. at 590; *accord State v. Maranger*, 2018-Ohio-1425, 110 N.E.3d 895, ¶ 20 (2d Dist.) (citations omitted) ("[u]nless a recognized

exception applies, the Fourth Amendment * * * mandates that police obtain a warrant based on probable cause in order to effectuate a lawful search.").

STANDARD FOR ISSUING SEARCH WARRANT

{¶17} A search warrant may only be issued (1) upon probable cause, (2) supported by oath or affirmation, and (3) particularly describing the place to be searched and the person and/or things to be seized. *See King*, 563 U.S. at 459 (the Fourth Amendment allows a warrant to issue only when "probable cause is properly established and the scope of the authorized search is set out with particularity"); *accord* R.C. 2933.23; Crim.R. 41. "The essential protection of the warrant requirement of the Fourth Amendment * * * is in 'requiring that [the usual inferences which reasonable men draw from evidence] 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.'" *Illinois v. Gates*, 462 U.S. 213, 240, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), quoting *Johnson v. United States*, 333 U.S. 10, 13-14, 68 S.Ct. 367, 92 L.Ed. 436 (1948).

{¶18} Accordingly, a search warrant "affidavit must set forth particular facts and circumstances underlying the

existence of probable cause, so as to allow the magistrate to make an independent evaluation of the matter." *Franks v. Delaware*, 438 U.S. 154, 165, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). Moreover, the facts and circumstances set forth in the "affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause." *Gates*, 462 U.S. at 239. A search warrant affidavit need not, however, comply with any "'[t]echnical requirements of elaborate specificity.'" *Id.* at 235, quoting *Ventresca*, 380 U.S. 102, 108, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965). Instead,

> [i]n 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, 544 N.E.2d 640 (1989), paragraph one of the syllabus, quoting *Gates*, 462 U.S. at 238-239; *accord Castagnola* at ¶ 35 ("[T]he evidence must be sufficient for the magistrate to conclude that there is a fair probability that evidence of a crime will be found in a particular place.").

{¶19} A search warrant affidavit thus must contain "[s]ufficient information" to allow a magistrate or judge to conclude that probable cause to search exists. *Gates*, 462 U.S. at 239. A magistrate or a judge cannot simply ratify "the bare conclusions of others." *Id.* Therefore, "[i]n order to ensure that such an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued." *Id.*

{¶20} A search warrant issued after a magistrate or judge has independently determined that probable cause to search exists will enjoy a presumption of validity. *State v. Jones*, 90 Ohio St.3d 403, 412, 739 N.E.2d 300 (2000), citing *State v. Roberts*, 62 Ohio St.2d 170, 178, 405 N.E.2d 247 (1980); *State v. Parks*, 4th Dist. Ross No. 1306, 1987 WL 16567 (Sept. 3, 1987), *4; *accord Franks*, 438 U.S. at 171 (search warrant affidavit presumed valid). Thus, "'the burden is on a defendant who seeks to suppress evidence obtained under a regularly issued warrant to show the want of probable cause.'" *United States v. de la Fuente*, 548 F.2d 528, 534 (5th Cir. 1977), quoting *Batten v. United States*, 188 F.2d 75, 77 (5 Cir. 1951); *accord Xenia v. Wallace*, 37 Ohio St.3d 216, 218, 524 N.E.2d 889 (1988), citing *de la Fuente* ("[t]he burden of initially establishing whether a

search or seizure was authorized by a warrant is on the party challenging the legality of the search or seizure"); *State v. Hobbs*, 4th Dist. Adams No. 17CA1054, 2018-Ohio-4059, ¶ 32; *State v. Wallace*, 2012-Ohio-6270, 986 N.E.2d 498, ¶ 27 (7th Dist.) (a defendant who "attacks the validity of a search conducted under a warrant" carries "the burden of proof * * * to establish that evidence obtained pursuant to the warrant should be suppressed").

{¶21} A court that is reviewing a defendant's challenge to a probable-cause determination in a search warrant must "accord great deference to the magistrate's" probable-cause determination and must resolve "doubtful or marginal cases" "in favor of upholding the warrant." *George*, paragraph two of the syllabus. Indeed, any "after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review." *Gates*, 462 U.S. at 236. Thus, a reviewing court may not "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." *George* at paragraph two of the syllabus. Instead, a reviewing court's duty "is simply to ensure that the magistrate had a substantial basis for

concluding that probable cause existed." *Id.*; *accord Gates*, 462 U.S. at 238-39; *Castagnola* at ¶ 35. Additionally, reviewing courts must refrain from interpreting search-warrant affidavits "'in a hypertechnical, rather than a commonsense, manner.'" *Gates*, 462 U.S. at 236, quoting *United State v. Ventresca*, 380 U.S. 102, 109, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965). Nevertheless, "a reviewing court may properly conclude that, notwithstanding the deference that magistrates deserve, the warrant was invalid because the magistrate's probable-cause determination reflected an improper analysis of the totality of the circumstances, or because the form of the warrant was improper in some respect." *United States v. Leon*, 468 U.S. 897, 915, 104 S.Ct. 3405, 3416-17, 82 L.Ed.2d 677 (1984), citing *Gates*, 462 U.S. at 238-239; *accord State v. Jones*, 143 Ohio St.3d 266, 2015-Ohio-483, 37 N.E.3d 123, ¶ 13 ("reviewing courts must examine the totality of the circumstances").

{¶22} Probable cause is "a fluid concept" that is "not readily, or even usefully, reduced to a neat set of legal rules." *Gates*, 462 U.S. at 232. Rather, probable cause "deals with probabilities and depends on the totality of the circumstances." *Maryland v. Pringle*, 540 U.S. 366, 371, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003). The probable-cause standard

"requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Gates* at 243-244, fn.13. Thus, the probable-cause standard does not set "a high bar." *Kaley v. United States*, 571 U.S. 320, 338, 134 S.Ct. 1090, 188 L.Ed.2d 46 (2014); *accord District of Columbia v. Wesby*, ___ U.S. ___, 138 S.Ct. 577, 586, 199 L.Ed.2d 453 (2018).

SOURCE OF INFORMATION

{¶23} Appellant first alleges that the search warrant affidavits did not establish probable cause because the detective failed to ensure that the source of the information contained in the affidavits (Agent Harnish) is a reliable source. Appellant contends that the detective should have independently verified that Harnish is indeed who he claimed to be.

{¶24} We recognize that "'[o]bservations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number.'" *State v. Henderson*, 51 Ohio St.3d 54, 57, 554 N.E.2d 104 (1990), quoting *United States v. Ventresca*, 380 U.S. 102, 111, 85 S.Ct. 741, 13 L.Ed.2d 684, (1965) (footnote omitted). Thus, Ohio courts generally have held that "a law enforcement

official who obtains information during an official investigation and divulges that information to another law enforcement officer * * * is a credible source." *State v. Herron*, 2nd Dist. Darke No. 1404, 1996 WL 697021, *4; accord *State v. Revere*, 2nd Dist. Montgomery No. 28857, 2022-Ohio-551, ¶ 24, citing *United States v. Horne*, 4 F.3d 579, 585 (8th Cir.1993) ("[P]robable cause may be based on the collective knowledge of all law enforcement officers involved in an investigation and need not be based solely upon the information within the knowledge of the officer on scene[.]")." This collective-knowledge doctrine permits officers to form probable cause (or reasonable suspicion) based upon information that another law enforcement officer provided. *See, e.g., State v. Wortham*, 145 Ohio App.3d 126, 130, 761 N.E.2d 1151 (2nd Dist.2001); *United States v. Beck*, 765 F.2d 146 (6th Cir.1985) (the collective-knowledge doctrine typically applied in determining probable cause to arrest "is equally applicable to a search warrant"); *accord United States v. Spears*, 965 F.2d 262, 277 (7th Cir.1992) ("In determining whether probable cause exists, a magistrate is entitled to regard an affiant's fellow law enforcement officers as reliable sources."). Accordingly, Ohio courts generally have upheld search-warrant affidavits that

rely upon information that another officer provided. *Revere, supra; State v. Jones*, 2nd Dist. Montgomery No. 23926, 2011-Ohio-1984, ¶ 20; *Herron*, supra.

{¶25} In *Revere*, for example, the court upheld a search warrant that relied upon information received from another police department. In that case, a Middletown Police detective contacted the Moraine Police Department to request a welfare check at the defendant's residence, the place where a missing person had last been spotted. After officers visited the residence, they sought and were granted a warrant to search. During the search, officers discovered the deceased body of the missing person.

{¶26} Subsequently, a grand jury returned an indictment that charged the defendant with several criminal offenses. The defendant later sought to suppress the evidence obtained as a result, but the trial court denied his motion.

{¶27} After his conviction, the defendant appealed and argued, in part, that the search warrant affidavit rested upon unreliable hearsay evidence (i.e., the Middletown Police detective's statement that the missing person was last spotted at his residence). The appellate court disagreed and stated: "it is well settled that officers may rely on information

received from other members of the law enforcement community if the reliance is reasonable." *Revere* at ¶ 24, citing *Doran v. Eckold*, 409 F.3d. 958, 965 (8th Cir.2005). The court thus determined that the trial court did not err by concluding that the Middletown Police detective's information was reliable and by overruling the defendant's motion to suppress.

{¶28} Similarly, in the case sub judice, Detective Fyffe relied upon information that Agent Harnish, another law enforcement officer, provided. We find nothing in the record to suggest that the detective's reliance was unreasonable. The detective stated that he received the information via certified mail shortly after he spoke with Harnish, that part of this information included an investigative subpoena issued to the IP provider that included the name of another agent and an email address that ended with ice.dhs.gov. Fyffe stated that Harnish's email address also ended with ice.dhs.gov. Although the detective could not recall whether he exchanged emails with Harnish before or after he applied for the warrant, the information that the detective received in the mail, including the investigative subpoena that listed the name of a Special Agent, her email address ending in ice.dhs.gov and her phone number, shows that he reasonably relied upon the information.

{¶29} Consequently, we disagree with appellant that the search warrant affidavits did not contain sufficiently reliable information to support probable cause to believe that a search of his residence and electronic devices would uncover evidence of criminal activity.

STALENESS

{¶30} Appellant also asserts that the facts contained in the search-warrant affidavits were too stale to establish probable cause to search his residence or his electronic devices. Appellant points out that the affidavits reference images downloaded in June 2019 - nearly ten months before Detective Fyffe applied for the search warrants. Appellant claims that, given the lapse of time, when the detective applied for the search warrants, he did not have a reasonable basis to believe that this evidence of alleged criminal activity still might be found at his residence or on his electronic devices.

{¶31} "Probable cause must be determined as of the date the warrant is requested." *State v. Goble*, 2014-Ohio-3967, 20 N.E.3d 280, ¶ 11 (6th Dist.), citing *State v. Sautter*, 6th Dist. Lucas No. L-88-324, 1989 WL 90630, *3 (Aug. 11, 1989). Thus, "probable cause to search cannot be based on stale information that no longer suggests that the item sought will be found in

the place to be searched." *United States v. Shomo*, 786 F.2d 981, 983 (10th Cir. 1986) (citation omitted); *accord United States v. Wagner*, 951 F.3d 1232, 1246 (10th Cir. 2020); *United States v. Knox*, 883 F.3d 1262, 1273, 1276 (10th Cir. 2018).

{¶32} "[T]he timeliness of the information contained in the affidavit is an important variable." *Shomo*, 786 F.2d at 984. However, "probable cause is not determined simply by counting the number of days between the facts relied on and the issuance of the warrant." *Id.* at 983-84 (citation omitted). Instead, "[w]hether facts are 'too stale' to be of probative value must be decided on a case-by-case basis." *Goble* at ¶ 11, citing *Sautter* at *3.

{¶33} "'While there is no arbitrary time limit on how old information can be, the alleged facts must justify the conclusion that the subject contraband is probably on the person or premises to be searched.'" *State v. Jones*, 72 Ohio App.3d 522, 526, 595 N.E.2d 485 (6th Dist.1991); *accord State v. Proffit*, 5th Dist. Fairfield App. No. 07CA36, 2008-Ohio-2912, 2008 WL 2573265, ¶ 20 ("Although specific references to dates and times are best, there is no hard and fast rule as to the staleness issue"). "The affidavit must * * * contain some information that would allow the magistrate to independently

determine that probable cause presently exists - not merely that it existed at some time in the past." *State v. Lauderdale*, 1st Dist. Hamilton No. C-990294, 2000 WL 209395, *1 (Feb. 18, 2000), citing *Sgro v. United States*, 287 U.S. 206, 210, 53 S.Ct. 138, 77 L.Ed. 260 (1932).

{¶34} When reviewing whether information is too stale to establish probable cause, courts may consider "the nature of the criminal activity, the length of the activity, and the nature of the property to be seized." *Shomo*, 786 F.2d at 983-84 (citations omitted); *accord State v. Reece*, 3d Dist. Marion No. 9-17-27, 2017-Ohio-8789, ¶ 15, and *State v. Jendrusik*, 7th Dist. Belmont No. 06-BE-06, 2006-Ohio-7062, ¶ 21 (listing factors more specifically as "(1) the nature of the crime; (2) the criminal; (3) the thing to be seized, as in whether it is perishable and easily transferable or of enduring utility to its holder; (4) the place to be searched; and (5) whether the information in the affidavit relates to a single isolated incident or protracted ongoing criminal activity").

{¶35} For example, when "the property sought is likely to remain in one place for a long time, probable cause may be found even though there was a substantial delay between the occurrence of the event relied on and the issuance of the warrant." *Shomo*,

786 F.2d at 984 (citations omitted). In other cases, like drug cases where drugs are often sold or used promptly, information that is months-old may well be stale. *United States v. Frechette*, 583 F.3d 374, 378 (6th Cir.2009), citing *United States v. Kennedy*, 427 F.3d 1136, 1142 (8th Cir.2005) ("[I]nformation of an unknown and undetermined vintage relaying the location of mobile, easily concealed, readily consumable, and highly incriminating narcotics could quickly go stale in the absence of information indicating an ongoing and continuing narcotics operation.") (citations omitted). In cases involving child pornography, however, months-old information may not be stale "because the images can have an infinite life span." *Id.*; *accord State v. Dixon*, 10th Dist. Franklin No. 21AP-152, 2022-Ohio-4532, ¶ 30, quoting *State v. Eal*, 10th Dist. No. 11AP-460, 2012-Ohio-1373, ¶ 22 ("'child pornography collectors tend to retain their collections for long periods of time helps prevent otherwise dated information from becoming stale'"); *State v. Lowe*, 2nd Dist. Montgomery No. 26994, 2017-Ohio-851, ¶ 13 ("In cases of child pornography, we have held that the elapse of substantial periods of time often do not render the information in a supporting affidavit stale."); *Eal* at ¶ 24 ("an issuing magistrate * * * independently may notice that conduct involving

child pornography is of a continuing nature."); *State v. Ingold*, 10th Dist. Franklin No. 07AP-648, 2008-Ohio-2303, ¶ 37 ("the enduring quality of child pornography to the perpetrator").

{¶36} In *Frechette*, for example, the court determined that information that a defendant paid for a one-month subscription to a child-pornography web site still supported probable cause to believe that evidence of criminal activity would be located at the defendant's home even though officers executed the search warrant 16 months after the defendant's one-month subscription ended. In analyzing the staleness factors, the court observed that "child pornography is not a fleeting crime," and "'is generally carried out in the secrecy of the home and over a long period.'" *Id.*, quoting *United States v. Paull*, 551 F.3d 516, 522 (6th Cir.2009). Additionally, "'evidence that a person has visited or subscribed to web sites containing child pornography supports the conclusion that he has likely downloaded, kept, and otherwise possessed the material.'" *Id.*, quoting *United States v. Wagers*, 452 F.3d 534, 540 (6th Cir.2006). Thus, unlike drug cases in which drugs typically are quickly transferred or used, "digital images of child pornography can be easily duplicated and kept indefinitely even if they are sold or traded. In short, images of child pornography can have an infinite life

span." *Id.* at 379, citing *United States v. Terry*, 522 F.3d 645, 650 fn. 2 (6th Cir.2008) ("Images typically persist in some form on a computer hard drive even after the images have been deleted and, as ICE stated in its affidavit, such evidence can often be recovered by forensic examiners."). The court thus concluded that "'the same time limitations that have been applied to more fleeting crimes do not control the staleness inquiry for child pornography.'" *Id.*, quoting *United States v. Paull*, 551 F.3d 516, 522 (6th Cir.2009).

{¶37} Applying these factors led the *Frechette* court to conclude that the 16-month-old information regarding the defendant's one-month subscription was not stale information. The court therefore determined that the magistrate correctly considered the information when deciding whether probable cause supported issuing the search warrant.

{¶38} In the case sub judice, the search warrant affidavits contained information that, nearly ten months earlier, appellant had downloaded child pornography. Because these images may exist forever and because perpetrators often hold on to the images for long periods of time, we believe that the ten-month-old information is not stale. Consequently, we do not agree with appellant that the information contained in the search-

warrant affidavits was too stale to support probable cause to believe that his residence and electronic devices would contain evidence of child pornography.[1] The trial court, therefore, did not err by overruling appellant's motion to suppress the evidence discovered upon executing the search warrants.

{¶39} Accordingly, based upon the foregoing reasons, we overrule appellant's assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

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1 Because we have determined that probable cause supported issuing the search warrant, we do not consider the state's alternate argument that the good-faith exception applies.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of 60 days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the 60-day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the 45-day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said 60 days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hess, J. & Wilkin, J.: Concur in Judgment & Opinion

For the Court

BY: Peter B. Abele

Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

Bib:06/02/2021

FILED
WITH THE JUDGE
JUN 02 2021
OF THE ROSS COUNTY
COMMON PLEAS COURT

IN THE COURT OF COMMON PLEAS

ROSS COUNTY, OHIO

STATE OF OHIO
Plaintiff

VS

JUSTIN D. GREEN,
Defendant

CASE NO. 20 CR 445

JUDGE ATER

ENTRY

* * * * * * *

On the 29th day of April, 2021, came Assistant Ross County Prosecuting Attorney, Carrie Charles, on behalf of the State of Ohio, and the defendant, Justin Green, appearing in court and represented by his attorney, Michael Benson.

This matter was scheduled for a decision hearing regarding the Motion to Suppress filed by counsel for the defendant on February 8, 2021.

The Court has considered the motion, file, as well as testimony presented during the March 24, 2021 motion to suppress hearing.

It is hereby the order of the Court the Motion to Suppress is overruled.

All until further order of the Court.

ENTER: 6/2/2021

MICHAEL M. ATER, JUDGE
COMMON PLEAS COURT
ROSS COUNTY, OHIO

COPIES TO:
ROSS COUNTY PROSECUTOR
MICHAEL BENSON

A26