**COURT OF APPEALS
DECISION
DATED AND FILED**

August 4, 2009

**David R. Schanker
Clerk of Court of Appeals**

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP002403-CR **Cir. Ct. No. 2005CF3970**

STATE OF WISCONSIN **IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALEX B. PARK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 BRENNAN, J. Alex B. Park appeals from an order entered following a ***Franks v. Delaware***, 438 U.S. 154 (1978) hearing, where the trial court found that Special Agent Eric J. Szatkowski did not make false statements in his affidavit for the application of the search warrant used to search Park's home

and computer and that there was probable cause to issue the search warrant. Park argues in this appeal that paragraphs 15, 19, 20, 26, and 30 in the affidavit contain false statements, which Szatkowski made intentionally or with reckless disregard for the truth.[1] Park contends that the affidavit was insufficient to establish probable cause to search his computer, both with and without the challenged statements, and asserts that the good faith exception does not apply. Because the challenged statements in the affidavit were not false or made with reckless disregard for the truth, and the affidavit states sufficient facts to support probable cause to conduct the search, we affirm.[2]

BACKGROUND

¶2 In February 2003, the Bureau of Immigration and Customs Enforcement (ICE) began a federal investigation of Internet child pornography called "Operation Falcon." During the ICE investigation, they discovered a member-only website "www.darkfeeling.com" operated by Regpay, a company located in Minsk, Belarus. ICE obtained the records of customers who had purchased membership access to various Regpay websites, and over the next several years investigated those customers.

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[1] In his first appeal, Park raised concerns about paragraph 19, but he did not challenge paragraphs 15, 20, 26 or 30. The State, however, did not object to Park challenging the additional paragraphs during the ***Franks v. Delaware***, 438 U.S. 154 (1978) hearing on remand. Thus, we will address the additional paragraphs in this appeal.

[2] Based on this disposition, we need not address whether the good faith exception to the exclusionary rule, *see* ***United States v. Leon***, 468 U.S. 897, 918-20 (1984), applies. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need to be addressed).

¶3 Szatkowski, a senior special agent for the Wisconsin Department of Justice (DOJ), was assigned to assist ICE with the investigations conducted in southeastern Wisconsin. Szatkowski applied for a search warrant of Park's home and office based on Szatkowski's June 17, 2005 affidavit. The search warrant was issued on June 22, 2005. The warrant was executed the same day and Park's home computer was seized. Forensic analysis of the computer revealed approximately forty images of child pornography. In July 2005, Park was charged with six counts of possessing child pornography, contrary to WIS. STAT. § 948.12 (2005-06).[3] Park pled not guilty and on October 11, 2005 filed a motion seeking suppression of the evidence seized from his home. The trial court summarily denied the motion. On November 15, 2005, Park filed a "**MOTION TO SUPPRESS EVIDENCE DUE TO *FRANKS* VIOLATION**" alleging that Szatkowski, in paragraph 19 of the affidavit for the search warrant, made statements that were false or made with intent to mislead.

¶4 On April 4, 2006, Park entered into a plea bargain with the State and pled guilty to three counts of possession of child pornography. The other three counts were dismissed. Park was sentenced to fifteen months' probation on each count, to be served concurrently. The sentence, however, was stayed pending appeal on the suppression motion.

¶5 Park appealed to this court, arguing that paragraph 19 of Szatkowski's affidavit in support of the search warrant "contained knowingly false or misleading statements without which no probable cause existed for the issuance

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[3] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

of the search warrant; therefore, Park is entitled to a ***Franks*** hearing." We agreed that Park should be granted a ***Franks*** hearing "for a determination of whether the statements by Szatkowski in his affidavit regarding Richard Nelson (the Waukesha case arising out of a similar investigation) were made knowingly false, with reckless disregard for their accuracy, or for the purpose of misleading the court in order to obtain the search warrant." ***State v. Parks***, No. 2006AP1139-CR, unpublished slip op. ¶28 (WI App Aug. 7, 2007).

¶6 The case was remanded to the trial court for a ***Franks*** hearing, which was conducted on November 9 and 29, 2007. At the hearing, Park challenged paragraph 19 of Szatkowski's affidavit and, for the first time, paragraphs 15, 20, 26, and 30.

¶7 On June 18, 2008, the trial court issued an order finding that: (1) Szatkowski did not intentionally or with reckless disregard of the truth make a false statement in his affidavit; (2) the affidavit did not contain false information; and (3) there was probable cause to support the issuance of the search warrant. Park now appeals.

DISCUSSION

I. *Franks* Challenge

¶8 Park challenges certain allegations in the affidavit for the search warrant on the grounds that the affiant intentionally lied or recklessly disregarded the truth under ***Franks***, 438 U.S. at 156. He contends that without those allegations, the application for the search warrant lacks probable cause.

¶9 It is the defendant's burden at a ***Franks*** hearing to "prove, by a preponderance of the evidence, that the challenged statement is false, that it was

made intentionally or with reckless disregard for the truth, and that absent the challenged statement the affidavit does not provide probable cause." ***State v. Anderson***, 138 Wis. 2d 451, 462, 406 N.W.2d 398 (1987) (citing ***Franks***, 438 U.S. at 156).

¶10 The challenged statement must be either intentionally false, amounting to perjury, *see* ***State v. Mitchell***, 144 Wis. 2d 596, 605, 424 N.W.2d 698 (1988) (citing ***Franks***, 438 U.S. at 155-56), or it must be made with reckless disregard for the truth. "Proof that the challenged statements were made innocently or negligently is insufficient to have the challenged statement removed from the affidavit." ***Anderson***, 138 Wis. 2d at 463. Reckless disregard for the truth requires the defendant to prove that the affiant "in fact entertained serious doubts as to the truth of the allegations or had obvious reasons to doubt the veracity of the allegations." ***Id.*** (citing, among other authorities, ***United States v. Williams***, 737 F.2d 594, 602 (7th Cir. 1984)). Because the defendant must show intent or reckless disregard, the ***Franks*** test necessarily focuses on the state of mind of the affiant. ***Anderson***, 138 Wis. 2d at 464.

¶11 At the conclusion of the ***Franks*** hearing, the trial court found that "Agent Eric Szatkowski did not intentionally, purposely, deliberately, or with reckless disregard of the truth, make a false statement in his affidavit for application of the search warrant in this case." This court will not reverse a trial court's findings of fact unless they are "clearly erroneous." *See* WIS. STAT. § 805.17(2). On review, "this court will uphold a trial court's findings of fact unless they are against the great weight and clear preponderance of the evidence." ***State v. King***, 175 Wis. 2d 146, 150, 499 N.W.2d 190 (Ct. App. 1993). From our review of the record we conclude that Park has not met his burden of showing that the trial court's findings of fact were clearly erroneous.

A. Paragraph 19

¶12 Park claims that Szatkowski was intentionally untruthful or recklessly disregarding the truth when he stated in paragraph 19 of his June 17, 2005 affidavit for a search warrant for Park's computer, that Richard Nelson "*did nothing in response to get rid of the images of child pornography he possessed*." (Emphasis added). Park bases his challenge on Nelson's statement to Szatkowski, before Szatkowski's affidavit, in which Nelson said that he *had deleted* the images that he thought were illegal. Therefore, Park argues Szatkowski's statement that Nelson "did nothing" was false.

¶13 Park's argument fails because the entirety of Nelson's statement demonstrates that while Nelson stated he deleted some illegal images, he admitted he did not delete all of the images of child pornography, namely, the ones that depicted lewd displays of children's genitals. Therefore, Szatkowski's paragraph 19 statement is not false.

Paragraph 19 states in full:

> Additionally, in the Operation Falcon investigations already worked by your affiant (as described in Paragraph 7 of this affidavit), the last known access of child pornography websites in those cases took place between one to two years prior to the execution of the search warrants. Your affiant has found that the time lapse between the obtaining of child pornography by the suspect and execution of warrants did not result in a lack of evidence, or destruction of all evidence due to the passage of time. Conversely, the passage of time allowed many suspects the opportunity to obtain, view, and possesses [sic] additional images of child pornography. For example, in a Falcon search warrant executed in Waukesha in February of 2005, the suspect, Richard Nelson, admitted to your affiant that about two years ago, he used his credit card to pay a company to access child pornography websites. Nelson essentially stated that he also read various news accounts afterwards about that same company getting busted.

> *Despite that knowledge, Nelson did nothing in response to get rid of the images of child pornography he possessed, and continued to obtain more images.* Nelson also commented to your affiant that he was surprised that it took so long for law enforcement to contact him, and that the investigation was still even going on.

(Emphasis added.)

¶14 Nelson's statement to Agents Szatkowski and Michael Hoell's states:

> NELSON then stated that he knew that the company who collected payment for these sites was involved in the illegal hosting of child pornography and that he had heard this approximately two years ago. NELSON stated he knew specifically that the websites he purchased into under REG PAY were illegal and that he was surprised it took so long for law enforcement to make contact with him.
>
> NELSON was asked if he accessed and downloaded images from the above sites and he stated he did and that he would have "some stuff" on his computer, but was not really sure if all his downloaded images were illegal. NELSON then asked S/A Szatkowski what the definition of "kiddie porn" was, stating further he thought that in order for the images to be illegal they had to show kids involved in sex acts with another person. S/A Szatkowski stated that even images of children with lewd displays of genitals are child pornography.
>
> *NELSON then said he had accessed images of children both displaying genitalia as well as sex acts involving children but that he had deleted the images he thought were illegal right after opening them. NELSON states that if images of children displaying genitalia were illegal then agents should just "slap the cuffs on me now."*

(Emphasis added.)

¶15 Nelson admitted having the illegal images of children lewdly displaying their genitalia on his computer by saying that the agent "should slap the cuffs on him right now." He did nothing to remove them and they were child

pornography. Nelson admitted he had downloaded material from the websites that had been shut down for illegal child pornography. He volunteered that he would have "some stuff" on his computer that he was not sure was legal or illegal. In context, it is clear, when Nelson said that he had deleted some images that he thought were illegal, he also conceded that he "did nothing" to delete the ones that he *mistakenly* thought were legal, or was unsure about. Therefore, Szatkowski was correct when he said Nelson did not delete illegal images of child pornography. Basically, Park is arguing that an omitted fact (he deleted *some* images) makes the statement in paragraph 19 false. Omissions can be the basis of a ***Franks*** challenge, but the omission must be of a material fact without which the affidavit would lack probable cause. "[T]he omitted fact must be material—that is, if the fact were included, the affidavit would not support a finding of probable cause." ***Williams***, 737 F.2d at 604. Here, applying the ***Williams*** test and adding back in the arguably omitted part (Nelson did delete *some* images), the affidavit still states probable cause that the illegal images will be found on Park's computer because the rest of the statement is that Park did not delete other illegal images.[4]

¶16 The Wisconsin Supreme Court addressed and rejected an omitted fact argument in ***Anderson***. The court concluded that the omission did not constitute reckless disregard for the truth because the challenged statement "did not affirmatively state one way or the other," a contrary fact. ***Id.*** (challenged statement that informant twice "return[ed] to" the premises was found not to be

[4] We similarly reject Park's argument that Szatkowski was obligated under ***Franks*** to include in the affidavit the fact that Park bought a new computer in 2004. Assuming, without deciding, that Park presented that evidence at the hearing, that omitted fact also fails the ***Williams/Franks*** tests. Inclusions of that fact (new computer) would not defeat probable cause—as we note in the next section.

untrue or recklessly imply an untruth because it did not expressly state that the affiant saw the informant *enter* the house). Similarly, Szatkowski's statement that Nelson did nothing to delete images of child pornography is true. Precisely parsing Szatkowski's statement, as the court did in ***Anderson***, demonstrates that the statement is not false.

¶17 It is Park's burden to establish that Szatkowski intended to make a false statement or recklessly disregarded the truth. Szatkowski directly testified that he did not. At the ***Franks*** hearing, Szatkowski stated that he did not intend to lie and believed he was testifying truthfully. He testified that when he made the statement in paragraph 19, he was writing from memory of what Nelson had told him. He testified that when he stated that Nelson did nothing to get rid of child pornography he possessed, Szatkowski believed it to be an accurate summary of what Nelson had told him. Reckless disregard for the truth requires proof from the defendant "that the affiant in fact entertained serious doubts as to the truth of the allegations or had obvious reasons to doubt the veracity of the allegations." ***Anderson***, 138 Wis. 2d at 463-64 (citing, among other authorities, ***Williams***, 737 F.2d at 602). Park offered no evidence that Szatkowski had serious doubts about the truth of his statement. In Szatkowski's mind, Nelson had done nothing to get rid of what Szatkowski knew to be illegal, the images of children lewdly displaying genitalia.

¶18 In additional support that his state of mind was not seeking to lie or mislead, Szatkowski testified at the ***Franks*** hearing that he felt he would have gained nothing by including the "*deleted some images*" fact in his affidavit. Szatkowski testified that the reason he included the Nelson incident in the affidavit was to provide an example that rebutted any claim of staleness in a two-year time frame. He already had included in the affidavit the statement of the proclivity of

Internet child pornography subscribers to download and retain their images, which we more fully discuss in the next section. Adding the omitted part, "*he did delete some images*," would not have defeated probable cause.

B. Paragraph 15

¶19 Park challenges the truthfulness of Szatkowski's statement in paragraph 15 of his affidavit that: "Your affiant knows that a forensic examination of such a hard-drive can identify and retrieve such images, including those of child pornography, even if those images have been deleted by the computer operator."

¶20 In his brief on appeal, Park argues that this statement is "significantly misleading and untruthful" because, Szatkowski admitted in his testimony that deleted images *would not necessarily* be found on a hard drive. He testified that it was possible, at some point, over time, that deleted images will be overwritten. Once again, as in the case of Park's paragraph 19 argument, his argument is based on a claimed omission. The claimed omitted fact is that sometimes a forensic exam will not find deleted images.

¶21 Park's argument fails because, first of all, Szatkowski's statement on its face, is clearly consistent with Park's position that retrieval will not always be possible. Szatkowski said forensic examination *can* reveal deleted images, which is a true statement and his admission that sometimes the forensic exam will not reveal deleted images does not contradict that. The actual exchange between the questioner, Park's counsel, and Szatkowski follows:

> Q: All right. And people who delete images that they view on their computer don't remove the images from their hard drive; correct?

> A: At some point those images, if the computer is used, those images will become overwritten; and they won't be able to be found at some point."
>
> Q: All right. Well, there is a paragraph in you application that deals specifically with that; right? (Counsel here reads paragraph 15) Correct?
>
> A: You're not emphasizing a certain word in that sentence. A forensic examination of such a hard drive "can" identify. It doesn't say "will".

¶22 As with Park's "omitted fact" challenge to paragraph 19, his challenge to paragraph 15 also fails the ***Williams*** test. The omission is not material to probable cause. The fact that sometimes images cannot be retrieved, would not defeat probable cause here because the balance of the statement is that sometimes images *can* be retrieved. The statement, even if worded as Park argues it should be, would still express the fact that some images of child pornography are able to be retrieved even after a long period of time.

C. Paragraphs 20 and 26

¶23 Park argues that Szatkowski's statements in paragraphs 20 and 26 are intentionally false or recklessly misleading because they contain mischaracterizations of the content at "darkfeeling.com." Park argues that Szatkowski knew and admitted at the hearing that he doubted any of the images on "darkfeeling.com" were of children engaged in sex acts with other children.

¶24 The flaw in Park's argument is that both of these alleged mischaracterizations repeat what the federal agents said they saw. Paragraph 20 is Szatkowski's statement of what he read in the federal agents' reports of what they saw on the various websites of a company called Regpay. Paragraph 26 is Szatkowski's statement of what he read in the federal agents' reports of what they observed on the "darkfeeling.com" website (one of the Regpay sites).

¶25 Paragraph 20 provides:

> In or about February 2003, a federal undercover operation coordinated out of the District of New Jersey revealed that a company called "Regpay," located in Minsk, Belarus, owned and operated various members-only Internet websites containing images of what appeared to the federal agents in New Jersey to be real children engaging in pornographic and sexually explicit conduct with other children and with adults.

¶26 Paragraph 26 provides:

> The ICE agents determined that the website contained extensive collections of sexually explicit photographic and video images of what appear to be real children posing and/or engaged in pornographic activities with other children. In July and August of 2003, the ICE agents also captured the contents of the website when they visited the site.

¶27 ***Franks*** explicitly acknowledges that statements in an affidavit will, at times, be based on hearsay from an informant. *See* ***id.***, 438 U.S. at 165. The ***Franks*** test, as applied to hearsay statements, is whether the affiant believed or appropriately accepted the information from the informant as true:

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

Id. (emphasis added).

¶28 Szatkowski believed and appropriately accepted the federal agents' reports. In paragraphs 7 and 8 of his affidavit, Szatkowski clearly described the extensive background he had with the federal agents in Operation Falcon. He had been the lead agent in approximately twenty such operations in Wisconsin, all of

which had resulted in search warrants and evidence recovered. He explained that he believed the information they provided him because they did so in the course of their official duties and because the results of their investigation confirmed the reliability of their information.

¶29 Szatkowski testified at the ***Franks*** hearing that he was quoting from the federal agents' reports which he believed:

> So I'm going on the belief that all of the actionable sites are child pornography web sites because that is what ICE told me…. I'm looking at this as an entire operation, an entire investigation, that has been looked at by ICE, by the Department of Justice attorneys, by various judges, prosecutors in this state that agree with the contention that this [darkfeeling.com] was a child pornography web site.

¶30 Yet, Park attempts to counter Szatkowski's testimony of his belief in the federal agents' reports by arguing that Szatkowski admitted that he knew that the Regpay sites were typically "posing" sites. Szatkowski's response was that he believed that the federal agents' description of the Regpay sites was true "in a general sense," even though he knew it did not describe *all* of the Regpay websites. "[T]hat is an accurate description when you look at the totality of actual sites," he explained at the hearing.

¶31 Szatkowski's response to Park's argument that Szatkowski knew the federal agents' description of "darkfeeling.com" was inaccurate and that he relied on the federal agents' description of the site because of their more extensive knowledge of the website. Szatkowski testified that: "From what ICE gave me. I didn't have access to the full, entire website. I'm relying on what they provided me along with the sample images that they provided me."

¶32 Given the size, length and prominence of the ICE Operation Falcon, Szatkowski's history with the federal agents and his own experience in computer child sex crimes, his reliance on their website description was not inappropriate or unreasonable. Additionally, in paragraph 30 of the affidavit, Szatkowski provided summaries of three images from the "darkfeeling.com" website, the accuracy of which is not challenged by Park.

D. Paragraph 30

¶33 Park's final ***Franks*** argument needs little attention. Park argues that Szatkowski committed a ***Franks*** violation in Paragraph 30 when he referred to "young boys" when in fact the website included only girls. Park does not point out in his brief that Szatkowski then followed the "boys" statement in paragraph 30 with three examples from the website all specifically identifying the participants as *females*. The reference to boys is clearly a typographical or editing mistake. Negligence is insufficient to cause a challenged statement to be removed from an affidavit. *See* ***Anderson***, 138 Wis. 2d at 463. A ***Franks*** violation requires an intentional lie, which this certainly was not. Alternatively, ***Franks*** requires a reckless disregard for the truth which, given the inclusion of three examples of females in the same paragraph, this could never be considered. A scrivener's error is not a ***Franks*** violation. *See* **United States v. McClellan**, 165 F.3d 535, 545 (7th Cir. 1999).

¶34 We conclude that the challenged statements in paragraphs 15, 19, 20, 26, and 30 are not false under ***Franks***. Park failed to show that Szatkowski either intentionally, or with reckless disregard for the truth, made false statements in his affidavit for the search warrant for Park's home and office. Accordingly, we

conclude none of the statements need to be excised from the affidavit and we next examine the entire affidavit to determine whether it stated probable cause.

II. Probable Cause

¶35 Park argues that the affidavit lacks probable cause even with all of the challenged paragraphs included. The State disagrees. The trial court found that the affidavit, including all of the challenged paragraphs, stated probable cause. After reviewing the entire affidavit, we agree and affirm the trial court.

¶36 A search warrant may issue if probable cause is shown. *See* WIS. STAT. § 968.12(1). The issuing court must "make a practical, common-sense decision whether," under the totality of the circumstances "there is a fair probability that … evidence of a crime will be found in a particular place." ***State v. Multaler***, 2002 WI 35, ¶8, 252 Wis. 2d 54, 643 N.W.2d 437; *see also* ***Illinois v. Gates***, 462 U.S. 213, 238 (1983). "In addition, the warrant judge may draw reasonable inferences from the evidence presented in the affidavit." ***Multaler***, 252 Wis. 2d 54, ¶8. The level of probable cause required is less than the level required for preliminary hearing bindover. *See* ***State v. Lindgren***, 2004 WI App 159, ¶20, 275 Wis. 2d 851, 687 N.W.2d 60.

¶37 On review, the burden of proof is upon the defendant to establish that the facts were clearly insufficient to support probable cause. *See* ***Multaler***, 252 Wis. 2d 54, ¶7 (citing ***State v. Higginbotham***, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991)). We determine whether the magistrate had a substantial basis for concluding that probable cause existed. *See* ***State v. Ward***, 2000 WI 3, ¶21, 231 Wis. 2d 723, 604 N.W.2d 517. Stated another way, we determine whether the issuing magistrate had "'sufficient facts to excite an honest belief in a reasonable

mind that the objects sought are linked with the commission of a crime, and that they will be found in the place to be searched.'" ***Id.***, ¶27 (citations omitted).

¶38 After a ***Franks*** challenge, we review questions of whether the untainted portions of an affidavit support probable cause *de novo*. *See* ***United States v. Martin***, 426 F.3d 68, 74 (2d Cir. 2005). Upon review, we give "great deference" to the issuing magistrate's probable cause determination. ***Multaler***, 252 Wis. 2d 54, ¶7. "This deferential standard of review 'further[s] the Fourth Amendment's strong preference for searches conducted pursuant to a warrant.'" ***State v. Schaefer***, 2003 WI App 164, ¶4, 266 Wis. 2d 719, 668 N.W.2d 760 (citation omitted) (brackets in ***Schaefer***).

¶39 Based on our review of Szatkowski's entire June 17, 2005 affidavit we conclude that Szatkowski presented an affidavit to the issuing magistrate that provided a substantial basis for the magistrate to conclude that there was at least a fair probability that evidence of Internet child pornography would be found on Park's computer. First, the affidavit clearly presented the extensive experience and training of Szatkowski in these types of crimes. His extensive experience established his credibility and provided a basis for some of the inferences he drew from the facts he knew and observed.

¶40 Szatkowski had been a criminal investigator for twenty-five years. He had been an expert in Internet crimes against children for twenty years. He had interviewed more than 100 suspected child predators which allowed an inference to be drawn of the authenticity of his statements about their practices and behaviors. He had assisted the federal agents of the ICE on Operation Falcon, a nationwide initiative focusing on Internet child pornography since mid-2004. He

knew of their expertise. He had obtained over twenty search warrants for Operation Falcon resulting in the discovery of evidence.

¶41 He reported his own and the federal agents' observations. He reported that the federal agents seized the Regpay records in June 2003 and learned that Park had subscribed to "darkfeeling.com" in May 2003. He stated that the federal agents had viewed the "darkfeeling.com" website in July and August 2003, and based on their descriptions and the affiant's long experience with Wisconsin's criminal laws, affiant believed the images described by the federal agents on the "darkfeeling.com" website fit the Wisconsin criminal code definition of a crime. He stated that, as of the date of the application for the warrant, June 17, 2005, Park still had the same e-mail account he listed with Regpay when he purchased the "darkfeeling.com" membership and that Park still lived at the address he had listed when he signed up for "darkfeeling.com." Szatkowski stated that based on his extensive experience with Internet child pornographers, he knew they saved the images of child pornography on their computers and never voluntarily disposed of them. He thereby presented facts and inferences that Park, as a paying subscriber to a known child pornography site ("darkfeeling.com"), would have retained images of child pornography on his computer which was likely to still be at his home.

¶42 Nonetheless, Park argues on appeal that even with paragraph 19 included, the affidavit fails to provide a sufficient basis to believe that evidence of child pornography would be found on Park's computer. His first argument is based on claimed omissions from the affidavit and his second argument is based on a staleness challenge. As to the omissions, Park argues that the affidavit should have included information about Park's history and whether Park fit the profile of a child molester or collector of child pornography. He, however, failed to provide

any evidence of this "omitted background" that should have been included. Additionally he claims the affidavit should have alleged that Park owned the same computer in 2005 that he owned in 2003.

¶43 As we have noted above, an affidavit for a search warrant is not measured by omissions, but by the sufficiency of its statements. An omission may be relevant to probable cause if the challenger meets his burden of producing evidence that the affiant intentionally or recklessly omitted material facts. ***Williams***, 737 F.2d at 604. Park has not presented any evidence that Szatkowski omitted something material from Park's background much less that he did so intentionally or recklessly.

¶44 As to Park's argument that Szatkowski omitted mention of Park's purchase of a new computer, that fact is not material to the probable cause analysis. The test for materiality of omitted facts set forth in ***Williams*** is whether the omitted fact, if included in the statement, "would not support a finding of probable cause." ***Id.***, 737 F.2d at 604. Inclusion of the omitted fact that Park purchased a new computer one year before the execution of the search warrant would not eliminate probable cause. The facts that Szatkowski *did* include in the affidavit—the ability of a computer to store, copy to disk, transfer to other computers and otherwise retain the images—create the required inference that child pornography images will be found on Park's computer. More is not required. "It is well established in this court that 'the probable cause requirement does not require that every contrary hypothesis be excluded.'" ***United States v. Wagers***, 452 F.3d 534, 542 (6th Cir. 2006) (citation omitted).

¶45 As to Park's staleness challenge, he contends that the lapse in time between Park's May 14, 2003 purchase of a subscription to the "darkfeeling.com"

website, the federal agents' observations of child pornography on "darkfeeling.com" in July and August 2003 and the application for the search warrant on June 17, 2005 is too long to support probable cause. We disagree. The passage of time alone does not make a fact stale for probable cause purposes. "If old information in a warrant affidavit contributes to an inference that probable cause exists at the time of the application for the warrant, the age of the information is no taint." ***Multaler***, 252 Wis. 2d 54, ¶36 (citation omitted). What matters here is whether the fact of Park's May 2003 subscription leads to a fair probability that evidence of a crime will be found on Park's computer in June 2005. That, in turn, depends in part on the nature of the crime of Internet child pornography.

¶46 In the face of a staleness challenge, we review "the nature of the underlying circumstances, whether the activity is of a protracted or continuous nature, the nature of the criminal activity under investigation, and the nature of what is being sought." ***Id.***, ¶37 (citation omitted). In ***Multaler***, a homicide investigator stated in his May 1998 affidavit that the nature of serial killers was to retain mementos of their murders for as long as twenty years. ***Id.***, ¶9. Multaler's alleged connection to the victims was circumstantial evidence that his girlfriend had seen Multaler's scrapbook in 1975 containing an article about a strangulation that Multaler may have been involved in and that Multaler had written letters to the District Attorney and media expressing interest in the murders. ***Id.***, ¶¶28-29. Multaler had argued that the affidavit failed to state probable cause due to the twenty-year lapse in time since his scrapbook had been viewed. ***Id.***, ¶39.

¶47 The Wisconsin Supreme Court rejected Multaler's staleness challenge concluding:

> The type of criminal behavior being investigated was recurring, entrenched, and continuous. The nature of the criminal activity, serial homicide, and the nature of the items sought, the sort of items likely to be retained indefinitely by the killer, both lead to the conclusion that probable cause to search Multaler's house was not stale.

Id., ¶41.

¶48 Similarly, we considered the nature of the crime in evaluating a staleness challenge in ***Schaefer***. We concluded that the habits of child pornographers of going to great lengths to protect their sexually explicit materials and rarely, if ever, disposing of them supported the inference that Schaefer would still have evidence of the crime in his possession in 1998 despite the fact that the witness last saw the evidence in 1996. ***Id.***, 266 Wis. 2d 719, ¶19.

¶49 In rejecting Multaler's other argument, that the affidavit failed for lack of citations to authorities supporting the statement about the tendency of serial killers to save mementos, our supreme court in ***Multaler*** noted that there was no requirement that the investigators provide a citation for every proposition set forth in their affidavit. ***Multaler***, 252 Wis. 2d 54, ¶48. "For purposes of warrant applications, 'the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.'" ***Id.***, ¶47 (citing ***Gates***, 462 U.S. at 232).

¶50 In ***State v. Gralinski***, 2007 WI App 233, 306 Wis. 2d 101, 743 N.W.2d 448, we again noted this unique habit of child pornographers to retain their images and in the context of an Internet child pornography subscriber, noted the unique features of computers to assist in this retention of images. ***Id.***, ¶31.

¶51 ***Gralinski***[5] was an Internet child pornography case with facts in the affidavit for the search warrant that were almost identical to those in the Park affidavit. In ***Gralinski***, another Operation Falcon case, the affiant stated that the federal agents determined that Gralinski used his credit card to purchase membership in Regpay on March 9, 2003. ***Id.***, ¶5. The agents determined that the websites Gralinski registered for were displaying child pornography. ***Id.*** Then on September 8, 2005, a Wisconsin DOJ agent applied for a search warrant stating that four days earlier, he had reviewed the federal agents' reports to verify Gralinski's address, e-mail address and phone number. ***Id.***, ¶¶6-7. He also stated, in language almost identical to that in the affidavit in ***Park***, that Internet child pornography subscribers tend to store and retain the images of child pornography and, that once opened, the image is saved in the computer and can be retrieved. ***Id.***, ¶8.

¶52 We concluded that the affidavit in ***Gralinski*** stated probable cause. ***Id.***, ¶12.

> Because possession of child pornography on one's computer differs from possession of other contraband in the sense that the images remain even after they have been deleted, and, given the proclivity of pedophiles to retain this kind of information, as set forth in the affidavit

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[5] Park argues that ***Gralinski***'s reference in footnote 1, distinguishing itself from this case means ***Gralinski*** cannot be precedent here for a finding of probable cause. *See* ***State v. Gralinski***, 2007 WI App 233, ¶2 n.1, 306 Wis. 2d 101, 743 N.W.2d 448. Park is mistaken. In footnote 1, we clearly noted that no ***Franks*** issue was raised in ***Gralinski*** and that because one was raised in ***Park***, it was remanded for the ***Franks*** hearing. ***Id.*** That is not to say however that having now determined, as we have, that the ***Franks*** challenge to the Park affidavit was unsuccessful, ***Gralinski*** has no comparison value to ***Park*** on the issue of probable cause.

> supporting the request for the search warrant, there was a fair probability that Gralinski's computer had these images on it at the time the search warrant was issued and executed.

Id., ¶31.

¶53 Computer sex crimes have been recognized by many courts outside Wisconsin as crimes that permit easy storage of evidence of the crime combined with participants who have a nature of hoarding the child pornography acquired. "The Second and Fifth Circuits, for example, have noted that evidence that a person visited or subscribed to websites containing child pornography supports the conclusion that he has likely downloaded, kept, and otherwise possessed the material." ***Wagers***, 452 F.3d at 540 (citing ***Martin***, 426 F.3d at 77; and ***United States v. Froman***, 355 F.3d 882, 890-91 (5th Cir. 2004)).

¶54 In ***Martin***, the Second Circuit Court of Appeals found that: "It is common sense that an individual who joins such a site would more than likely download and possess such material." ***Id.***, 426 F.3d at 75. In another case, the general description of the characteristics of child pornographers as hoarders of their images was found sufficient to support probable cause for a search warrant in the fact of a staleness complaint. *See* ***United States v. Gourde***, 440 F.3d 1065, 1068 (9th Cir. 2006).

¶55 Park's staleness challenge fails because Szatkowski's affidavit states that Internet subscribers to child pornography websites view, download, transfer to disks or other computers and retain the images of child pornography they obtain from the websites to which they subscribe. The affidavit establishes that Park subscribed to a website in May 2003, and that federal agents saw that it had child pornography on it in July and August 2003. Park was still living at the same home

address and still had the same e-mail address at the time of the affidavit, June 2005, as he did in May 2003 when he signed up. The inferences that Park saw, downloaded and retained the illegal images are reasonable and create a fair probability that the illegal images would still be found on his computer in 2005.

¶56 We conclude that Park did not meet his burden of showing that the facts in Szatkowski's affidavit were clearly insufficient to support probable cause. There was a substantial basis for the issuing magistrate to conclude that probable cause existed. Accordingly we affirm the decision of the trial court.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.