

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

UNITED STATES OF AMERICA

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v.

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Criminal No. CCB-02-0366

GRAYSON RAMSBURG

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**MOTION TO SUPPRESS EVIDENCE AND STATEMENTS AND
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

Grayson Ramsburg, by and through his attorneys, James Wyda, Federal Public Defender for the District of Maryland, and Sarah S. Gannett, Assistant Federal Public Defender, hereby moves this Honorable Court to suppress the evidence seized from his home under authority of a search warrant on January 3, 2002, and the statements he made on that date during the execution of the search.

Procedural History

On January 3, 2002, agents of the Federal Bureau of Investigation (“FBI”) executed a search warrant at Mr. Ramsburg’s home at 61 Fox Rock Drive in Myersville, Maryland. They seized Mr. Ramsburg’s computer, zip drives, and floppy disks, and took a statement from him. Later FBI examiners located child pornography on Mr. Ramsburg’s equipment, and Mr. Ramsburg subsequently was arrested on a criminal complaint on August 1, 2002. After a detention hearing on that day, the Honorable Beth P. Gesner, United States Magistrate Judge, released Mr. Ramsburg on home detention. Mr. Ramsburg was indicted shortly thereafter, and is charged in this case with two counts of receiving child pornography and one count of possession of child pornography, in violation of 18 U.S.C. section 2252A.

Mr. Ramsburg filed a motion to suppress statements on September 12, 2002, citing Fifth and Sixth Amendment grounds. This motion is intended to supplant that motion, which is pending. Mr.

Ramsburg has not sought a trial. If this motion is not granted, the defense anticipates that the case will be resolved by a conditional plea.

Factual Background

A. The Affidavit and Search

In approximately January 2001, FBI Special Agent (“SA”) Geoffrey S. Binney, of the Houston Division, began an undercover investigation of internet websites suspected of providing access to child pornography. One of those websites was called “The Candyman.” The site advertised as follows: “This group is for People who love kids. You can post any type of messages you like too [sic] or any type of pics and vids you like too [sic]. P.S. IF WE ALL WORK TOGETHER WE WILL HAVE THE BEST GROUP ON THE NET.” Through records obtained by subpoena from internet providers, Mr. Ramsburg ultimately was identified as one of 3,397 subscribers to The Candyman.

In December 2001, SA Kathleen Kornek, of the Baltimore Division, sought a search warrant for Mr. Ramsburg’s residence at 61 Fox Rock Drive in Myersville, Maryland. The affidavit in support of the warrant request, attached as Exhibit A, appears to have been drawn in large part from a draft affidavit circulated by SA Binney and based on his investigation of The Candyman.

The affidavit began with a general description of how computers and the internet are used to facilitate the distribution and collection of child pornography. *See* Ex. A at ¶¶ 18-25. It also included a general description of “child pornography collector characteristics.” *See* Ex. A at ¶¶ 35-39.

The affidavit provided little detail about The Candyman, beyond the description given above. It did note that the site had four separate features: the “files” section, which provided an area for members to post images or video files for others to view or download; the “polls” section, which permitted members to answer survey questions; the “links” section, which permitted members to post

links to other websites; and the “chat” section, which permitted members to engage in conversations with each other. *See* Ex. A at ¶ 28. “The affidavit did not represent or assert that the sole or principal purpose of the Candyman Egroup was to engage in unlawful conduct.” *United States v. Harvey Perez*, ___ F. Supp. 2d ___, 2003 WL 741237, at *2 (S.D.N.Y. Mar. 5, 2003).

The affidavit stated that to join The Candyman, a subscriber had to visit the website and send an e-mail to the group moderator. *See* Ex. A. at ¶ 28. Upon subscribing, the affidavit stated that “all new members of the Egroup were immediately added to the Candyman e-mail list. **Every e-mail sent to the group was distributed to every member automatically. Therefore, when an individual sent an email containing child pornography to the Candyman group, those images were transmitted to every one of the group members.**” *Id.* (emphasis added). During the period that SA Binney was a member of The Candyman—which overlapped with Mr. Ramsburg’s subscription term—the agent received 105 child pornography images via e-mail.

In a section titled, “The Evidence Related to This Specific Application For A Search Warrant,” the affidavit provided information that purportedly strengthened the probability that child pornography would be found in Mr. Ramsburg’s possession. First, the affidavit noted that Mr. Ramsburg also was a member of a second Egroup—known as “Shangri_La”—which was similar in nature to The Candyman. Second, the affidavit alleged that “[a]ccording to a review of the [sic] SA Binney’s official records, during the time period that [Ramsburg] was a member of the Candyman E-group and the Shangri_La Egroup, this individual received approximately 178 images of child pornography (two of which featured a young female child with ejaculation on her vagina)” *See* Ex. A at ¶ 40(a). Third, the affidavit reported that, “[o]n December 14, 2001, an FBI database check revealed that

[Ramsburg] transmitted an image of child pornography to an FBI Undercover Agent in Baltimore on 04/18/95.” *See* Ex. A at ¶ 40(i).

Based upon this information, on December 27, 2001, the Honorable Paul W. Grimm, United States Magistrate Judge, approved issuance of a search warrant for Mr. Ramsburg’s home. The search was conducted on January 3, 2002, in the presence of Mr. Ramsburg, who cooperated fully with the search and gave a lengthy statement to the agents. Agents seized Mr. Ramsburg’s computer, zip drives, and floppy disks, and sent them to an FBI laboratory for examination. That examination revealed suspected child pornography, and Mr. Ramsburg was arrested on August 1, 2002.

B. The Government Acknowledges Error

Since Mr. Ramsburg’s arrest, the government has acknowledged three errors in the search warrant affidavit.

A. E-mails Were Not Distributed “Automatically”

In a letter dated August 14, 2002, attached as Exhibit B, the government notified counsel of “an apparent factual inaccuracy” in the search warrant affidavit. The letter advised that although the affidavit stated that “every e-mail sent to the group was distributed to every member automatically,” in fact, three delivery options were available to members. Members could choose to receive all e-mails, receive a daily digest of e-mails, or receive no e-mails at all. *See id.* Given these delivery options, the affidavit’s assertion that every Candyman member received every e-mail from the group was incorrect. The fact that SA Binney may have received e-mails containing child pornography, then, could not predict whether any other member received those e-mails in the absence of information regarding the e-mail option chosen by that member.

In its letter, the government attempted to explain the error. It claimed that the representation that all members received all e-mails was “based on the hands-on experience of FBI Supervisory Special Agent Geoffrey Binney as an undercover member of the Candyman Egroup.” *See* Ex. B. According to the government, “In his experience as a member, SSA Binney was never given an option for how to receive e-mail.[] After sending an e-mail requesting to become a member of the Egroup, he began receiving all e-mail traffic automatically.” *See* Ex B. The government also offered that an employee of Yahoo! Inc., Lauren Guarnieri, had confirmed SA Binney’s understanding that, upon joining the group, members started receiving e-mail automatically. *See id.* Finally, the government stated, “recent conversations with Yahoo! indicate the default setting for Egroups was for each member to receive every e-mail and that a member wishing to change e-mail delivery options would have to do so via some (uncertain) hyperlink or button on the website.” *See id.*

In the context of a *Franks* hearing in another jurisdiction, “another issue arose” with respect to the representations in the affidavit that were based on SA Binney’s experience with The Candyman. In a letter dated November 13, 2002, attached as Exhibit C, the government notified counsel that, although SA Binney claimed that he subscribed to The Candyman via e-mail, Yahoo! records reflect that he actually subscribed via the website, and so would have been presented with delivery options himself. The government noted that two courts had rejected defense challenges based on the inaccuracies in the warrant affidavit, and that the government had reason to believe that the Yahoo! records were incorrect. *See* Ex. C.

Since that time, one of those courts has reversed itself, and another court has joined it in suppressing evidence obtained by a search warrant that was based on SA Binney’s representations about The Candyman. *See United States v. Strauser*, ___ F. Supp. 2d ___, 2003 WL 832313 (E.D. Mo.

Mar. 6, 2003); *United States v. Perez*, ___ F. Supp. 2d ___, 2003 WL 741237 (S.D.N.Y. Mar. 5, 2003). In those cases, the courts found that SA Binney acted with reckless disregard for the truth in making the statement that all members of The Candyman automatically received all e-mails. *See Strauser* at * 7; *Perez* at *21. The courts made their findings based on the following evidence, elicited through affidavit, documents, and testimony:¹ (1) SA Binney actually joined The Candyman via website and was himself presented with email delivery options; (2) at around the time that he joined The Candyman, SA Binney joined seven other Egroups which presented similar e-mail delivery options; (3) SA Binney explored The Candyman website, which contained indications that e-mail options were available; (4) on February 9, 2001, Yahoo! produced to SA Binney documents that referred to e-mail options; (5) on January 18, 2002, Yahoo! produced additional information that referred to e-mail options; (6) on January 24, 2002, Yahoo! representatives met with FBI agents and provided oral information regarding e-mail options; and (7) on March 18, 2002, FBI agents interviewed Mark Bates, the former moderator of The Candyman, who told them that e-mail options existed. *See Strauser* at * 8; *Perez* at *7.²

¹ Counsel is in the process of attempting to collect those affidavits and documents, as well as transcripts of the testimony.

² Admittedly, these last three developments took place after the warrant in this case was executed. The same is true in *Strauser*, in which the warrant was executed on January 17, 2002. As the court noted in *Strauser*, though, “the agents’ reaction demonstrates their willingness to ignore obvious reasons to doubt their assumptions,” for the agents continued to maintain that all members received all e-mail automatically, even after these revelations. *Strauser* at * 8 & n.3 (“the agents refused to even consider that their unfounded assumption had been wrong.”).

C. Agent Binney Had No Information As To What Material Ramsburg Received

Following the issuance of suppression orders in *Strauser* and *Perez*, counsel—in an abundance of caution—contacted the government to verify “The Evidence Related to This Specific Application For A Search Warrant.” If true, the statement in paragraph 40(a) of the affidavit that SA Binney’s official records could demonstrate that Mr. Ramsburg received “approximately 178 images of child pornography” would distinguish this case from *Strauser* and *Perez* because the affidavits in those cases apparently contained no such statement. Counsel asked the government to produce the referenced records so that counsel could complete due diligence with respect to this issue. After consulting with SA Kornek, however, the government advised counsel that paragraph 40(a) was an extrapolation based on the amount of e-mail that SA Binney received as a subscriber to The Candyman and Shangri_La and the faulty assumption that all subscribers received e-mail automatically. In other words, paragraph 40(a) is not based on any evidence regarding the number of e-mails Mr. Ramsburg actually did or did not receive. Thus, this purportedly “specific” portion of the affidavit suffers from the same flaws as the boilerplate portions.

D. Mr. Ramsburg Did Not Transmit Child Pornography To An Undercover Agent

The other fact which potentially distinguishes this case from *Strauser* and *Perez* is that, as stated in paragraph 40(i) of the affidavit, Mr. Ramsburg allegedly transmitted child pornography to an undercover FBI agent in 1995. At the detention hearing in this matter, however, the government conceded that this statement was inaccurate (although not materially so). The truth is that America On-Line notified the FBI in 1995 that it suspected illegal transmission of child pornography based on one e-mail from Mr. Ramsburg to another private citizen, and forwarded that image to the FBI. *See*

Audio tape of Detention Hearing (August 1, 2002) (transcript in progress). Notably, the FBI did not act on that information. *See id.*

In view of all of these inaccuracies in the search warrant affidavit, on March 12, 2003, counsel advised the government that the defense would seek leave to late file a motion to suppress the evidence seized from Mr. Ramsburg's home, as well as the statements made by Mr. Ramsburg in the course of the search on January 3, 2002. The government indicated that it would oppose late-filing of the motion.

Argument

A. Legal Standard

In *Franks v. Delaware*, 438 U.S. 154 (1978), the Supreme Court authorized attacks on facially sufficient search warrant affidavits in circumstances in which the defendant can make “a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit.” *Franks*, 438 U.S. at 155-56. In order to warrant a hearing, this showing must be “more than conclusory” and must be accompanied by a detailed offer of proof. *Id.* at 171; *see also United States v. Colkley*, 899 F.2d 297, 300 (4th Cir. 1990). Additionally, the false statement must be material to the probable cause determination. “[I]f, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant to support a finding of probable cause, no hearing is required.” *Franks*, 438 U.S. at 171. If, however, a hearing is appropriate and material perjury is shown by a preponderance of the evidence, the warrant “must be voided” and evidence or testimony gathered in connection with it must be suppressed. *Id.* at 156. The *Franks* test also applies to omissions from warrant affidavits. *See Colkley*, 899 F.2d at 300.

“Little precedent exists to define ‘reckless disregard’ in the search warrant context.” *Perez* at * 13. In *Franks*, the Court noted simply that information contained in a warrant “is to be ‘truthful’ in the sense that the information put forth is believed or **appropriately accepted** by the affiant as true.” 438 U.S. at 165 (emphasis added). The Court maintained that “allegations of negligence or innocent mistake are insufficient,” *id.* at 171, but provided little guidance beyond that point. A review of Fourth Circuit case law reveals that our court has not expanded meaningfully on the definition contained in *Franks*. See, e.g., *Colkley*, 899 F.2d at 301. Other courts have applied a “reason to doubt” standard, which finds recklessness when, “viewing all the evidence, the affiant must have entertained serious doubts as to the truth of his statements or had obvious reasons to doubt the accuracy of the information he reported.” *United States v. Schmitz*, 181 F.3d 981, 986-87 (8th Cir. 1999) (internal quotation marks and citation omitted); see also *United States v. Ranney*, 298 F.3d 74, 78 (1st Cir. 2002); *Wilson v. Russo*, 212 F.3d 781, 788 (3^d Cir. 2000); *United States v. Whitley*, 249 F.3d 614, 621 (7th Cir. 2001); *Beard v. City of Northglen*, 24 F.3d 110, 116 (10th Cir. 1994).

B. Analysis

1. The Agents Acted With Reckless Disregard For The Truth

The defense does not allege that SA Binney or SA Kornek committed perjury in preparing the warrant affidavit in this case. Rather, the defense submits that both agents acted with reckless disregard for the truth in including the now-acknowledged inaccuracies in the affidavit.

SA Binney’s Statement. With respect to SA Binney’s statement that all members of The Candyman automatically received e-mails, recklessness is clear. Through his experience with The Candyman and similar websites, and through the information provided him by Yahoo!, SA Binney repeatedly was confronted with the reality that e-mail options were available to subscribers.

Accordingly, he should have entertained serious doubts as to whether e-mails were automatic. At a minimum, he had obvious reasons to doubt whether e-mails were automatic. Under these circumstances, inclusion in the affidavit of the statement in paragraph twenty-eight that “[e]very e-mail sent to the group was distributed to every member automatically,” and omission of information regarding e-mail options, violated the first part of the *Franks* test. See *Strauser* at * 8; *Perez* at *7.

The fact that SA Binney’s statements were adopted and presented by SA Kornek, who did not have access to the information with which SA Binney was presented, does not insulate the statements and affidavit from challenge. See *Franks* 438 U.S. at 164 n.6; *United States v. Brown*, 298 F.3d 392, 408 (5th Cir. 2002) (Dennis, J., concurring). “Otherwise, the government would be able to shield itself from *Franks* suppression hearings by deliberately insulating affiants from information material to the determination of probable cause.” *United States v. Wapnick*, 60 F.3d 948, 956 (2d Cir. 1995).

SA Kornek’s Statement. With respect to SA Kornek’s statement in paragraph 40(a) that SA Binney’s records showed that Mr. Ramsburg had received child pornography, recklessness is even more clear. SA Kornek wrote that “According to a review of the [sic] SA Binney’s official records, during the time period that the individual using the e-mail zigdude@aol.com [Mr. Ramsburg] was a member of the Candyman E-group, this individual received approximately 178 images of child pornography” Ex. A at ¶ 40(a). The phrasing of this paragraph appears “intended to mislead the magistrate,” *Colkley*, 899 F.2d at 300, in that it suggests that the government had direct evidence demonstrating Mr. Ramsburg’s receipt of child pornography. As counsel recently learned, the government had no such evidence. Rather, the figure in this paragraph is an extrapolation from SA Binney’s records of his own participation in the Candyman, and relies on the faulty premise that all members received all e-mail. In this misleading phrasing, and in omitting any information about the

mathematical exercise underlying the statement, SA Kornek acted in reckless disregard for the truth. *Cf. United States v. Jones*, 913 F.2d 174, 175 (4th Cir. 1990) (involving “a generalization subject to two different interpretations.”).

2. The False Statements Are Material

As discussed above, materiality in the *Franks* context is measured by considering whether, in the absence of the false statements, the warrant affidavit supports a probable cause determination. In this case, the remaining allegations in support of probable cause are (1) that Mr. Ramsburg was a subscriber to two websites that provided access to child pornography, and (2) that Mr. Ramsburg transmitted pornography some six years before the warrant at issue here was executed.

It is practically axiomatic that “proof of mere membership in [an organization] without a link to actual criminal activity, [is] insufficient to support a finding of probable cause.” *United States v. Brown*, 951 F.2d 999, 1002 (9th Cir. 1992) (finding that membership in a corrupt police unit did not establish probable cause); *see also Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) (“[A] person’s mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person.”). The exception to this rule is where the organization in question is engaged in criminal activity to such an extent that it must be considered “wholly illegitimate.” *United States v. Rubio*, 727 F.2d 786, 793 (9th Cir. 1984).

SA Binney himself has acknowledged that The Candyman and similar websites provided access to “constitutionally protected” activities such as chatting and posting of links. *See Perez* at * 5; Ex. A at ¶28. Indeed, the websites provided e-mail options and “buttons” that allowed law-abiding subscribers to avoid coming into contact with illegal material completely. *See id.* Thus, the

organizations cannot be characterized as “wholly illegitimate,” and Mr. Ramsburg’s membership alone would not support a finding of probable cause.

Similarly, Mr. Ramsburg’s alleged transmission of one image of child pornography in December 1995 is insufficient to support a finding of probable cause. Even prior convictions for similar crimes cannot establish probable cause. *See United States v. Melvin*, 419 F.2d 136, 141 (4th Cir. 1969) (“While some weight may normally be given to the fact of prior convictions of similar crimes, this fact standing alone cannot sustain a finding of probable cause.”). Here, there is only “an FBI database check,” Ex. A at ¶ 40(i), which apparently was not fully accurate in that Mr. Ramsburg did not transmit the image to an undercover agent, as the database allegedly reflected.

In any event, the lapse of six years between the alleged transmission and the application for the search warrant in this case makes the information about the transmission stale. An affidavit must be based on facts “so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time.” *Sgro v. United States*, 287 U.S. 206, 210 (1932). Although “numerous cases support a finding that distribution of child pornography on several different occasions may provide sufficient probable cause despite delay between a distribution and the date a search warrant is sought or executed,” *United States v. Sassani*, 1998 WL 89875 at *4 (4th Cir. 1998) (unpublished opinion) (attached at Exhibit D), the defense is unaware of any court finding probable cause in the case of one alleged act of distribution six years previous. *Cf. United States v. Hay*, 231 F.3d 630 (9th Cir. 2000) (lapse of six months); *United States v. Horn*, 187 F.3d 781 (8th Cir. 1999) (lapse of three months); *United States v. Lacy*, 119 F.3d 742 (9th Cir. 1997) (lapse of ten months); *United States v. Harvey*, 2 F.3d 1318 *3d Cir. 1993) (lapse of two to fifteen months); *United States v. Rabe*, 848 F.2d 994 (9th Cir. 1988) (lapse of two years supported by recent correspondence describing defendant’s

collection). Courts appear to be “unwilling to assume that collectors of child pornography keep their materials indefinitely” *Lacy*, 119 F.3d at 746.³

Even in combination, Mr. Ramsburg’s membership in The Candyman and other e-groups and his prior transmission of one image of child pornography cannot amount to probable cause. Given the time that had passed since his only established involvement with child pornography (transmission of one image in 1995), there is no basis for assuming that Mr. Ramsburg’s membership in e-groups was for illegal purposes or that he was a child pornography “collector.” At best, there might have been a basis for assuming that Mr. Ramsburg maintained some prurient interest in children. However, there were perfectly legal ways for Mr. Ramsburg to express that interest on The Candyman, through the survey and chat functions, for example. Prurient interests do not establish a person as a collector, as described in paragraphs 35-39 of the warrant affidavit. Indeed “nowhere in [the] affidavit is there even a conclusory recital that the evidence of [the defendant’s] interest in child pornography—consisting of one proven [instance]—places him in the category of those pedophiles, molesters, and collectors about whom [the agent] has expertise.” *United States v. Weber*, 923 F.2d 1338, 1341 (9th Cir. 1990).

Thus, it is clear that without the false statements that all members of e-groups automatically received e-mails, and that records showed that Mr. Ramsburg received child pornography in 2001, the affidavit does not provide probable cause to believe that a search of Mr. Ramsburg’s residence would yield child pornography.

³ This case law also is cited in the affidavit at paragraph 43, apparently in justification of the ten-month delay between the demise of the Candyman website and the request to search Mr. Ramsburg’s residence.

3. The Good Faith Exception Does Not Apply

In other jurisdictions where The Candyman affidavits have been challenged, the government has asserted that the good faith exception protects the searches in these cases. It is fundamental, however, that a warrant that violates *Franks* is not subject to the good faith exception to the exclusionary rule. See *United States v. Leon*, 468 U.S. 897, 923 (1984); *Colkley*, 899 F.2d at 300.

Conclusion

WHEREFORE, Mr. Ramsburg respectfully moves this Honorable Court to suppress any evidence and statements obtained in connection with this case.

Respectfully submitted,

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REQUEST FOR HEARING

Pursuant to Rule 105.6 of the Local Rules of the United States District Court for the District of Maryland, Mr. Ramsburg requests a hearing on this motion.

SARAH S. GANNETT
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of September, 2007, a copy of the foregoing Motion to Suppress Evidence and Statements was hand-delivered to: Jacabed Rodriguez-Coss, Assistant United States Attorney, Office of the United States Attorney, 101 West Lombard Street, 6625 U.S. Courthouse, Baltimore, Maryland 21201.

SARAH S. GANNETT
Assistant Federal Public Defender

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

UNITED STATES OF AMERICA

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v.

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Criminal No. CCB-02-0366

GRAYSON RAMSBURG

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**REPLY TO GOVERNMENT’S OPPOSITION TO
MOTION TO SUPPRESS EVIDENCE AND STATEMENTS**

Grayson Ramsburg, by and through his attorneys, James Wyda, Federal Public Defender for the District of Maryland, and Sarah S. Gannett, Assistant Federal Public Defender, hereby replies to the government’s opposition to his motion to suppress evidence and statements.

Introduction

The government goes to great lengths in its opposition to establish Mr. Ramsburg’s guilt for the Court and to identify the most offensive aspects of his behavior. None of that—his possession of pornography, his confession to the crime, his ugly chats about sex with children,⁴ or his sexual preference or practices—is relevant to the determination whether there was probable cause prior to January 2, 2002, to believe that child pornography could be located in his home. “[T]here is no lower standard when the crimes are repugnant and the suspects frustratingly difficult to detect.” *United States v. Perez*, __ F. Supp. 2d __, 2003 WL 741237 at * 24 (S.D.N.Y. Mar. 5, 2003).

The inquiry here is simple. First, did Special Agents Binney and Kornek make representations in the search warrant affidavit in reckless disregard for the truth. We submit that they did. Second, does Mr. Ramsburg’s membership in The Candyman and Shangri-La and his alleged transmission of

⁴ In view of the government’s presentation, counsel feels compelled to advise the Court that Mr. Ramsburg passed a polygraph examination by a former law enforcement polygrapher with regard to whether he had ever engaged in any sexual act with a child.

one image of child pornography in 1995, coupled with SA Clemente's summary of child pornography collector characteristics establish probable cause. We submit that it does not.

Argument

In its opposition, the government concedes not only that the search warrant affidavit misrepresented that all members of The Candyman website received all e-mails automatically (§ 28), but also that the affidavit misrepresented that Mr. Ramsburg received any e-mails from The Candyman, or Shangri_La, a related website, at all (§ 40(b)).⁵ With those misrepresentations established, the remaining issues in the *Franks* analysis are whether the misrepresentations were made with reckless disregard for the truth and whether the misrepresentations were material.

I. The Misrepresentations Were Made With Reckless Disregard for the Truth.

As noted at page nine of the motion to suppress, the standard for determining reckless disregard for the truth, derived from *Franks* and its progeny, provides that facts are not appropriately accepted by the affiant if he or she had reason to doubt them. *See Franks v. Delaware*, 438 U.S. 154, 165 (1978); *United States v. Schmitz*, 181 F.3d 981, 986-87 (8th Cir. 1999). Based on the factual findings made in *United States v. Strauser*, ___ F. Supp. 2d ___, 2003 WL 832313 (E.D. Mo. Mar. 6, 2003), and *United States v. Perez*, ___ F. Supp. 2d ___, 2003 WL 741237 (S.D.N.Y. Mar. 5, 2003), reckless disregard for the truth is apparent as to both Agent Binney and Agent Kornek's misrepresentations.

⁵ Indeed, the government has presented no evidence that Mr. Ramsburg received any email from either website.

A. Agent Binney and Automatic E-Mail Distribution

The government's position as to Agent Binney's state of mind relies primarily on his recollection of his "experience" with the websites in question. However, the documents reviewed by the Missouri and New York courts indicate that Agent Binney's recollection of his experience, as outlined in the affidavit submitted by the government, is flat wrong.⁶ Indeed, since executing the affidavit submitted by the government, Agent Binney has acknowledged that "it is at least probable that [I was presented with email options]." *See Perez* at *6 (citing a transcript dated January 15, 2003). In fact, based on the documentary evidence, it is certain that Agent Binney was presented with e-mail options.

Yahoo logs containing subscriber information show that Agent Binney subscribed to The Candyman via the website. The logs show that "gobannon@usa.net, Jan 02 2001 12:53 PM, subscribed gobannon@usa.net via web from 24.162.50.185." *See Perez* at * 6 (citing Yahoo! logs). The government stipulated in *Perez* that this log entry related to the Candyman website and that "gobannon@usa.net" was Agent Binney's undercover e-mail address. *See id.* (citing McGoff and Hull stipulations). The government also acknowledged that if Agent Binney subscribed via the website, he would have been presented with the three e-mail delivery options. As the FBI summarized at the conclusion of its investigation of Binney's experience with The Candyman, "we have no information

⁶ Given the Court's intention to rely on the factual findings made by those courts, which was expressed in the recent telephone conference, the defense has not sought to obtain the documents. Instead, copies of *Perez* and *Strauser* are attached to this filing as Exhibits A and B. If the Court has any question as to what Agent Binney's "experience" was, the defense would appreciate the opportunity to present evidence. Counsel believes that the relevant documents readily could be obtained from the Federal Public Defender offices in the jurisdictions in which these cases were litigated.

to dispute [Yahoo's] claim that . . . Binney must have subscribed via the website, and that he must have been presented with email delivery options." *Perez* at *6 (citing FBI report).⁷

Having been presented with e-mail options in the course of his own subscription to The Candyman, Agent Binney obviously had reason to doubt his assumption that all subscribers automatically received all e-mails. *See Strauser* at * 5 (describing subscription process). His reason to doubt was magnified by his subscription to seven other similar groups, including Shangri_La, in the period between January 2, 2001 and March 6, 2001—long before the search warrant was executed in this case. Yahoo! logs show that in six of those seven, Agent Binney joined “via web” and was presented with e-mail delivery options.⁸ *See Perez* at * 7 (citing stipulation, exhibit to stipulation, and testimony).

Given Agent Binney's extensive background in criminal investigations—including eight years as an FBI agent, experience with the Crimes Against Children Division and Innocent Images Project, and supervisory responsibility for the Houston Computer Crime Squad, *see* Gov't Ex. C at ¶ 2—it is inconceivable that he could have been oblivious to the existence and importance of e-mail options, either theoretically or in this case. Given his testimony in other jurisdictions that he “explored” the Candyman website, *see Perez* at * 7 (citing transcript), it is hard to believe that he would not have clicked on the “subscribe” button and examined thoroughly the process by which members came to

⁷ The FBI apparently prepared two reports. The second of those, Gov't Ex. F, found that “it must be concluded based on the log data that Mr. Binney must have been presented with email delivery options.” *See id.* (citing FBI report).

⁸ No entry is given for the seventh. *See Perez* at * 7 (citing stipulation and exhibit to stipulation).

receive e-mails. Merely clicking that button would have sent him to the page that offered the three e-mail delivery options. *See Strauser* at * 5, *Perez* at * 7.

Moreover, as early as February 9, 2001, Agent Binney had in his possession Yahoo! documents—produced in response to his subpoena—that suggested the existence of e-mail options. One of those documents concerned the group’s moderator, Mark Bates, a primary target of the FBI investigation. The document was the second and third page of a fifty-eight-page fax, and was titled “View/Edit User Attributes.” One of the attributes listed was “Email preference: none.” This document alone should have raised a question as to whether e-mail delivery options existed. *See Perez* at * 7. Nonetheless, Agent Binney proceeded based on his faulty assumption.

That Yahoo! did not produce all documentation immediately or answer all questions accurately does not insulate Agent Binney. Indeed, in testimony in another jurisdiction, Agent Binney acknowledged that his error regarding e-mail options was based “very little” on the information Yahoo! provided. *See Perez* at * 11 (citing transcript). In any event, the government’s characterization of the information available from Yahoo! prior to the execution of the warrant in this case is simply incorrect. As noted above, the logs obtained from Yahoo! clearly provided indications of e-mail options.

Furthermore, Yahoo! never “confirmed” Agent Binney’s erroneous assumption about automatic e-mails. The substance of the conversation between Agent Binney and the Yahoo! representative was summarized by Agent Binney in his New York testimony:

Not having any start dates for any of these people, I asked her, I said, Well are these people like me? I have e-mails that I thought at that point went o every member of the group and since I couldn’t tell when they started, if I had an e-mail from Joe at AOL.com on January 10, was it safe to say that they received the same e-mails I did between the 10th and the day it shut down? And she said yes.

Perez at * 11 (citing transcript). The question posed by Agent Binney was ambiguous at best. Of course, if the other subscribers were “like [Agent Binney]” in that they had elected to receive all e-mails, they would have received all e-mails. The notion that Agent Binney fairly could conclude on the basis of that exchange that all members automatically received all e-mails is absurd.⁹ His willingness to do so, if he did so, further demonstrates his reckless disregard for the truth.

It is true that some of the evidence that Yahoo! ultimately produced was turned over after the execution of the search warrant in this case.¹⁰ That information included a group profile for The Candyman, which plainly showed that e-mail options existed. The document reported “3213 Normal (Single: 413 Digest: 60 NoMail: 2740),” meaning that 413 members elected to receive all e-mails, sixty elected to receive a digest of e-mails and, 2740 elected to receive no e-mails. Similar materials were provided with respect to the other websites, including Shangri_La. *See Perez* at * 8 (citing documents). In addition, after the execution of the search warrant in this case, Yahoo! representatives and the moderator of The Candyman orally informed the FBI of the existence of e-mail options. *See id.* Notably, however, the FBI continued to ignore obvious reasons to doubt Agent Binney’s assumption about automatic e-mail. *See Strauser* at * 8 & n.3. The Court in *Strauser*, in which (as

⁹ Contrary to the government’s assertion, Agent Binney has never testified that Yahoo “confirmed” his assumption about automatic e-mail. In *Strauser*, Agent Binney testified that, in fact, he “didn’t put a whole lot of stock in what [Guarnieri] was saying . . . It was apparent to me that she was trying to get me off the phone . . . I bring up this conversation, and I brought it up in my affidavit, only to show that she didn’t do anything to dissuade my belief.” *Strauser* at * 6 (citing transcript).

¹⁰ In its opposition, the government notes “SA Binney’s year [sic] long efforts to corroborate his information with Yahoo.” Gov’t Opp. at 18. Evidently, Yahoo! had not expeditiously provided all the information requested by the FBI, *see Strauser* at * 5, “yet the FBI went forward with the false information in the warrant while it was still attempting to get more information from Yahoo.” *Strauser* at * 8.

in this case) the search warrant was executed prior to these disclosures, nonetheless held that they were relevant to a finding of recklessness, because even this information gave the FBI no pause. *See Strauser* at * 8.

In connection with suppression motions like this one, Agent Binney has repeatedly testified that he understood that automatic e-mail was determinative of probable cause, at least as to those members of The Candyman who had not actually uploaded files or sent e-mail containing pornography. *See Strauser* at * 8. This understanding also is evident in the drafting of the form affidavit on which the one in this case (and others) is based. Nonetheless, to put it as generously as possible, Agent Binney seems to have studiously avoided any investigation as to e-mail options, even as reasons to doubt his premise abounded in his experience and on paper. Under these circumstances, a finding that Agent Binney acted with reckless disregard for the truth in including the automatic e-mail assumption in the affidavit and in omitting information about e-mail options is warranted.

B. Agent Kornek and Mr. Ramsburg’s Purported Receipt of Pornographic Images

The government’s opposition does not address Agent Kornek’s misrepresentation, titled “The Evidence Related to This Specific Application for A Search Warrant,” that “[a]ccording to a review of the [sic] SA Binney’s official records, during the time period that [Ramsburg] was a member of the Candyman E-group and the Shangri_La Egroup, this individual received approximately 178 images of child pornography (two of which featured a young female child with ejaculation on her vagina.” In its only comment with regard to this paragraph, the government notes that it “now knows this statement to have been incorrect.” Gov’t Opp. at 6 n.2. In this, the government minimizes the problem with this paragraph. It is true that this paragraph is incorrect because (we now know) it relies on Agent Binney’s faulty premise about automatic e-mail. However, the statement is more than

incorrect, it is misleading, in that it suggests that the government had direct evidence demonstrating Mr. Ramsburg's receipt of child pornography. In this misleading phrasing, and in omitting any information about the extrapolation based on Agent Binney's experience, Agent Kornek acted with reckless disregard for the truth.

II. The Misrepresentations Were Material to the Probable Cause Determination.

The parties agree that materiality in this context depends on whether, in the absence of the false statements, the warrant affidavit would support a probable cause determination. *See Franks*, 438 U.S. at 171. If the false statements regarding automatic e-mail and Mr. Ramsburg's purported receipt of child pornography are excised from the affidavit in this case, the government is left with Mr. Ramsburg's membership in The Candyman and Shangri_La, Mr. Ramsburg's transmission of one image of child pornography six years prior to the execution of the warrant, and a generic discussion of the attributes of "collectors" of child pornography. These are not sufficient to establish probable cause.

Membership. The government begins with the proposition that membership in The Candyman and Shangri_La alone is sufficient to establish probable cause. This unsupported proposition ignores both the facts and the law contained in Mr. Ramsburg's motion to suppress at pages 11-12. Although the purpose behind the groups concededly appears to have been promotion of a prurient interest in children, it is a giant leap from that fact to the conclusion that the groups were engaged in illegal activity to such an extent that mere membership was criminal. The government's distaste at the chat rooms, surveys, and links offered by The Candyman and Shangri_La does not diminish the fact that they are, as SA Binney put it, "constitutionally protected." Indeed, even viewing child pornography, as long as it is not downloaded or otherwise possessed is fully legal. *See United*

States v. Stulock, 308 F.3d 922, 925 (8th Cir. 2002); *see also United States v. Zimmerman*, 277 F.3d 426, 435 (3d Cir. 2002). *Cf. United States v. Tucker*, 305 F.3d 1193, 1205 (10th Cir. 2002). It is perfectly conceivable that members could join the groups to indulge their interests in child sex without committing any crime. Based on the number of subscribers who elected to receive e-mail or digests from The Candyman (473), and those who did not (2740), this appears to have occurred frequently. As a result, the number of groups to which Mr. Ramsburg belonged, or the length of time for which he belonged, cannot alone support a probable cause finding.

Prior Distribution. The government next contends that Mr. Ramsburg's distribution of pornography once in 1995, alone or in combination with his membership in The Candyman and Shangri_La, is sufficient to establish probable cause. The government has not cited, and the defense is unable to identify, any case law in support of this proposition.

The affidavit's sole allegation regarding Mr. Ramsburg's known association with child pornography dates from December 1995, when, according to an FBI database, he sent one pornographic photograph via e-mail.¹¹ As discussed in Mr. Ramsburg's motion to suppress, there is no case finding probable cause on the basis of such dated information. The longest lapse of time identified by the parties was two years, in *United States v. Rabe*, 848 F.2d 994 (9th Cir. 1988). Even

¹¹ The defense questions the reliability of this information. As noted in Mr. Ramsburg's motion to suppress, although the government now asserts that the database reflects a transmission by Mr. Ramsburg to an undercover FBI agent, the proffer at Mr. Ramsburg's detention hearing was different. At that time, AUSA Andrew Norman stated, "Yes, Your Honor, the only thing I have to add (inaudible) the case agent [Kornek] corrected me about something I said to the Court in response to one of your questions regarding the 1995 incident. This was not an FBI investigation, this was a referral from America Online. In those days, the American Internet was just really getting started and America Online referred this transmission of child pornography to the FBI, in fact, they referred many of them and it did not result in any formal file, opening of a case file, or a prosecution. So it was not the defendant transmitting to an undercover FBI agent. It was a referral." Audio tape of Detention Hearing (August 1, 2002).

then, when the lapse was only one-third as long as the lapse in this case, the court rested its finding on correspondence “just before the search” in which the defendant described his existing pornography collection. *See id.* at 997. The affidavit in this case is devoid of any such information providing a link to Mr. Ramsburg’s earlier one-time distribution.

All of the other cases cited by the government also are distinguishable in one way or another. For example, in *Cherna*, a fraud case, the court found probable cause that business records dating from one to two years prior would be found in the defendant’s home because of investigation only one week to one month before the execution of the warrant suggesting that the defendant was conducting business at the home. *See United States v. Cherna*, 184 F.3d 403, 410 (5th Cir. 1999). Similarly, in *Freeman*, a drug smuggling case—which the government cites for the incontrovertible notion that each case must be evaluated on its own facts—the court noted that the smuggling operation was ongoing as recently as six months prior to the execution of the warrant, and that the evidence sought (travel documents and bank records) likely still would be present at the defendant’s residence. *See United States v. Freeman*, 685 F.2d 942, 951-2 (5th Cir. 1982). Finally, in *United States v. Lacy*, 119 F.3d 742 (9th Cir. 1997), the lapse of time was only ten months, and the court specifically commented that “we are unwilling to assume that collectors of child pornography keep their materials indefinitely.” *Id.* at 746.

Moreover, none of these cases support the government’s position that Mr. Ramsburg’s recent membership in organizations that offered access to child pornography, even in combination with the alleged prior distribution of one image in 1995, is sufficient to establish probable cause. Indeed, in *United States v. Albert*, 195 F. Supp. 2d 267 (D. Mass. 2002), also cited by the government, the finding of probable cause rested on much more. Despite a lapse of time of less than six months, an

informant who had viewed child pornography multiple times in the defendant's home and had received more than 1500 images of child pornography from the defendant, and the defendant's recent conviction of disseminating pornography, indecent exposure, indecent assault, and contributing to the delinquency of a minor, the court concluded merely that "it was *reasonable* for the magistrate to find that there existed a *reasonable probability* that child pornography would be at [the defendant's] residence at the time of the search." *See id.* at 277-278 (emphasis added).

Collector Characteristics.

Finally, the government posits that, based on the one alleged transmission in 1995, Mr. Ramsburg is a "child pornography collector," and that this is sufficient, alone or in combination with his membership in the websites, to establish probable cause. In doing so, however, the government does not address the defense's argument that, given the time that had passed since Mr. Ramsburg's only established involvement with child pornography, there is no basis for assuming that his membership in the e-groups was for illegal purposes or that he was a child pornography "collector." In particular, the government fails to address the fact that "nowhere in [the] affidavit is there even a conclusory recital that the evidence of [the defendant's] interest in child pornography—consisting of one proven [instance]—places him in the category of . . . collectors . . ." *United States v. Weber*, 923 F.2d 1338, 1341 (9th Cir. 1990). Certainly, "for the opinion [about collectors] to have any relevance, the affidavit must lay a foundation which shows that he person subject to the search is a member of the class." *Id.* at 1345.

The government suggests that the Court may draw the following "reasonable inferences" in support of probable cause: "1) only persons interested in child pornography would join [The Candyman and Shangri-La]; 2) such persons should be equated with collectors and distributors of

child pornography; and 3) such persons are likely to have actually received child pornography from either Egroup and have kept it.” Gov’t Supp. Opp. at 3. In the collector cases cited by the government, as in *Weber*, courts have required more than such bare assertions. Adoption of the government’s theory of probable cause in this case would be a radical departure from existing jurisprudence.

In *Coye*, which forms the basis for the government’s supplemental opposition, the court clearly relied on SA Binney’s automatic e-mail assumption in making its probable cause finding. *See* 2002 WL 31526542 at * 3 (E.D.N.Y. Nov. 14, 2002) (“[The] affidavit established that Coye ‘was a member of two E-groups that focused on child pornography and *sent unsolicited images of child pornography to their members*, and that collectors of child pornography rarely dispose of images and typically maintain them at their residence.’”) (emphasis added). The defendant in *Coye* did not raise a Franks challenge to the affidavit, and while the court stated in dicta that the automatic e-mail assumption was not material to the probable cause determination, that statement appears to be based on the court’s mistaken belief that “[w]hile a person could opt out, if a person joined and took no further action, that person would receive all e-mails sent to the group.” *Id.* at * 2.

The other cases cited by the government also are inapposite. In *Hall*, a computer repair shop had identified “1,000 files with names indicative of child pornography” and had “viewed three to five files that depicted minors engaged in sexual activity” on the defendant’s hard drive, which clearly permitted the court to consider collector characteristics. *See* 142 F.3d 988, 995 (7th Cir. 1998). In *Riccardelli*, the warrant was issued in anticipation of a sting operation in which the defendant would accept child pornography immediately prior to the search. *See* 998 F.2d 8, 11 (1st Cir. 1993). In *Harvey*, the defendant had received child pornography by mail at least ten times. Three of those

mailings were within two months of the search warrant being issued. Moreover, the defendant had been convicted of corrupting a minor and indecent assault and had previously been deported for being a pedophile. *See* 2 F.3d 1318, 1321 & 1323 (3rd Cir. 1993). In *Rakowski*, four packages containing child pornography had been delivered to the defendant's home within the six-months prior to the warrant being issued. *See* 714 F. Supp. 1324, 1331 (D. Vermont 1987). In *Koelling*, a mere nine days elapsed between the discovery of pornographic images and the application for the search warrant. *See* 992 F.2d 817, 823 (8th Cir. 1993). Finally, in *Rabe*, the court could rely on an exchange of letters just before the search in which the defendant discussed his "collection" of pornography. *See* 848 F.2d 994, 997 (9th Cir. 1988).

Conclusion

To find probable cause in this case, the Court would have to make the finding that Mr. Ramsburg's one-time transmission of an image of child-pornography in 1995, coupled with his membership in websites that provide access to child pornography among other legal services, qualifies him as a collector, who could be expected to be maintaining child pornography in his home. This stretch in logic and reasoning is simply too great.

WHEREFORE, Mr. Ramsburg respectfully moves this Honorable Court to suppress any evidence and statements obtained in connection with this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ___ day of September, 2007, a copy of the foregoing Reply was hand-delivered to: Jacobed Rodriguez-Coss, Assistant United States Attorney, Office of the United States Attorney, 101 West Lombard Street, 6625 U.S. Courthouse, Baltimore, Maryland 21201.

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