STATE OF CONNECTICUT *v.* ROBERT SHIELDS III
(SC 18731)

Rogers, C. J., and Palmer, Zarella, Harper and Sheldon, Js.*

Argued May 15, 2012—officially released May 28, 2013

Richard Emanuel, with whom, on the brief, was *Robert M. Casale*, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Terence D. Mariani*, senior assistant state's attorney, for the appellee (state).

Opinion

PALMER, J. The defendant, Robert Shields III, was convicted, on a conditional plea of nolo contendere; see General Statutes § 54-94a;[1] of possession of child pornography in the first degree in violation of General Statutes (Rev. to 2005) § 53a-196d.[2] The defendant entered his plea following the trial court's denial of his motions to suppress numerous photographic and video recorded images depicting child pornography that the police discovered in computer equipment that had been seized from his Southbury residence pursuant to a search warrant. The defendant appealed to the Appellate Court pursuant to § 54-94a, and that court affirmed the trial court's judgment upon concluding that the trial court properly had determined that the affidavit in support of the search warrant application contained sufficient facts to establish probable cause to believe that child pornography would be found at the defendant's residence. *State* v. *Shields*, 124 Conn. App. 584, 596, 601, 5 A.3d 984 (2010). We granted the defendant's petition for certification to appeal, limited to the issue of whether the Appellate Court properly concluded that probable cause existed to support the issuance of the warrant. *State* v. *Shields*, 299 Conn. 927, 12 A.3d 571 (2011). We answer that question in the affirmative and, therefore, affirm the judgment of the Appellate Court.

The following relevant facts and procedural history are set forth in the opinion of the Appellate Court. "On November 15, 2005, as the result of a criminal investigation that began in Pennsylvania, Officer Christopher Grillo of the Southbury police department and Trooper Gerard Johansen of the Connecticut state police prepared a search warrant application and affidavit for the search of the defendant's residence at 141 Rocky Mountain Road in [the town of] Southbury.

"The affidavit [contained the following information] . . . . [On] November 4, 2005, Grillo received a telephone call from Brian Sprinkle, a detective with the Ferguson Township police department, located in State College, Pennsylvania. Sprinkle informed Grillo that through his investigation of Brian Gayan, a Pennsylvania resident accused of having unlawful contact with [children] through the Internet, he learned of an online conversation between Gayan and [a person initially identified as] Jerome Cariaso, also of 141 Rocky Mountain Road [in Southbury]. During the conversation, Cariaso made comments regarding sexual contact between him and his eight year old son.[3] Immediately after the call, Grillo confirmed that Cariaso resided at the address provided by Sprinkle.

"On November 10, 2005, Grillo received a letter from Sprinkle that revealed that Trooper Glenn Brad of the Pennsylvania state police [had] executed search warrants at Gayan's place of residence and place of employ-

ment. A forensic search of [Gayan's work computer turned up approximately 200 images containing child pornography and] revealed that Gayan, using the screen name [c]entralpamaster, had contact with seventy-five screen names belonging either to [children] or [to] suspects who had spoken with him about abusing their own children or children they knew. Sprinkle obtained a court order, which [directed] Yahoo, Inc. [Yahoo], to provide log-in Internal [P]rotocol (IP) addresses for the screen name [b]i06488. [Yahoo] revealed that there was a recent log of IP addresses listed under that screen name. It was [determined] that the IP addresses were owned by Charter Communications, and, on November 4, 2005, Charter Communications indicated that Cariaso, of 141 Rocky Mountain Road, Southbury, was the subscriber for the IP address of 24.151.2.100, the IP address in question.

"Additionally, Sprinkle provided Grillo with a [partial] transcript of a [Yahoo instant messaging] conversation between [c]entralpamaster and [b]i06488, in which [b]i06488 asked [c]entralpamaster for pornographic photographs of [c]entralpamaster's son.[4] The person using the [b]i06488 screen name [who subsequently was identified as the defendant] informed [c]entralpamaster that [he] could not swap photographs because he did not currently have pornographic photographs of his son on his computer.[5]

"On November 14, 2005, Grillo obtained land records from the Southbury assessor's office indicating that the property located at 141 Rocky Mountain Road was owned by Cariaso, the defendant and Rosalie Shields.[6] [On the basis of] the foregoing investigation, Grillo and Johansen submitted a search warrant application seeking to search the subject residence." (Internal quotation marks omitted.) *State* v. *Shields*, supra, 124 Conn. App. 586–88.

In addition to the foregoing facts, including the excerpt from the instant messaging conversation between the defendant and centralpamaster, the affidavit accompanying the warrant application also provided that Johansen had been a member of the state police force for five years, was assigned to the computer crimes and electronic evidence unit (evidence unit) and had worked exclusively in the field of computer related criminal activity. The evidence unit is affiliated with the Internet crimes against children task force, a task force devoted to the apprehension of individuals committing offenses against children that often involve the use of computer technology. The affidavit also provided that, through training and experience, Johansen knew that individuals who are engaged in the sexual exploitation of children often will take pornographic photographs of children and trade such photographs with other adults via the Internet. Johansen further stated, on the basis of his training and experience, that persons

involved in sending or receiving images of child pornography tend to retain those images on their computers for extended periods of time, and that even data that the user purports to delete may remain in the computer and, therefore, remain subject to retrieval upon a thorough forensic examination of the computer. Finally, the "affidavit alleged that there was probable cause to believe that Cariaso had violated the following statutes: General Statutes § 53-21, risk of injury to a child; [General Statutes (Rev. to 2005)] § 53a-196d, possession of child pornography in the first degree; and General Statutes [§] 53a-49 and [General Statutes (Rev. to 2005) §] 53a-196d, attempt to possess child pornography in the first degree. The court, *Brown*, *J.*, issued the warrant on the same day, authorizing a search of the residence located at 141 Rocky Mountain Road, the seizure and subsequent investigative review of any computer systems found for evidence of violations of § 53-21 [and General Statutes (Rev. to 2005)] § 53a-196d . . . and the transport of the computer systems to the . . . evidence unit . . . .

"On November 16, 2005, the police executed the warrant. Upon entering the residence, the police found the defendant, Rosalie Shields and Cariaso. The police seized numerous computer systems from the residence. The evidence unit completed a forensic examination of the defendant's [computer equipment] and found numerous [photographic images] and video [files] depicting child pornography. The forensic examination also revealed extensive evidence that the [computer equipment was] used by the defendant and not Cariaso.[7] The defendant was arrested and charged with possession of child pornography in the first degree in violation of [General Statutes (Rev. to 2005)] § 53a-196d and importing child pornography in violation of [General Statutes (Rev. to 2005)] § 53a-196c.

"On August 16, 2006, the defendant filed a motion to suppress the evidence that had been seized, arguing, inter alia, that the search was unlawful [under the fourth amendment to the United States constitution[8] and article first, § 7, of the Connecticut constitution][9] because the warrant failed to establish probable cause to believe that child pornography was located within the subject residence. The defendant further argued that the affidavit [in support of] the warrant failed to establish a connection between the screen name [b]i06488, the IP address and the subject premises. On June 8, 2007, the court, *Cremins*, *J.*, denied the defendant's motion and concluded that the affidavit supported a reasonable inference that [b]i06488 requested . . . pornographic images and that this inference provided the issuing [judge] with a substantial basis from which to conclude that evidence of child pornography would be found in the residence."[10] (Internal quotation marks omitted.) *State* v. *Shields*, supra, 124 Conn. App. 588–89.

"[O]n September 17, 2008, [the defendant] entered a written, conditional plea of nolo contendere to possession of child pornography in the first degree. In accordance with the plea agreement, he was sentenced to a term of imprisonment of twenty years, execution suspended after five years, and ten years probation, with conditions including sex offender evaluation and treatment, and registration as a sex offender."[11] Id., 590.

The defendant appealed to the Appellate Court from the judgment of conviction, claiming, inter alia, that the trial court's denial of his motion to suppress was improper because the warrant authorizing the search of his residence for evidence of the crime of possession of child pornography was not supported by probable cause. Id., 592. The defendant primarily argued that, even if the facts set forth in the affidavit established probable cause to believe that he had attempted to obtain a pornographic image of a child, that attempt, without more, was insufficient to establish probable cause to believe either that he actually possessed child pornography or that such pornography would be found in computer equipment or other related items located at his residence.[12] See id., 595. The Appellate Court rejected this contention, concluding that the trial court properly had determined that the facts contained in the affidavit supported issuance of the warrant authorizing the police to search for images depicting child pornography and other evidence of the offense of possession of child pornography. See id., 595–96.

Thereafter, we granted the defendant's petition for certification on the issue of whether the Appellate Court properly determined that the trial court correctly had concluded that the facts set forth in the affidavit in support of the warrant established probable cause to search the defendant's residence for evidence of the crime of possession of child pornography. *State* v. *Shields*, supra, 299 Conn. 927. Contrary to the defendant's claim, we agree with the trial court and the Appellate Court that the warrant was supported by probable cause to search for evidence of that offense.[13]

Certain well established legal principles guide our analysis of this issue. Both the fourth amendment to the United States constitution and article first, § 7, of the state constitution require a showing of probable cause prior to the issuance of a search warrant. "Probable cause to search exists if . . . (1) there is probable cause to believe that the particular items sought to be seized are connected with criminal activity or will assist in a particular apprehension or conviction . . . and (2) there is probable cause to believe that the items sought to be seized will be found in the place to be searched." (Internal quotation marks omitted.) *State* v. *Batts*, 281 Conn. 682, 700–701, 916 A.2d 788, cert. denied, 552 U.S. 1047, 128 S. Ct. 667, 169 L. Ed. 2d 524 (2007). Although "[p]roof of probable cause requires less than proof by

a preponderance of the evidence"; (internal quotation marks omitted) *State* v. *Santiago*, 305 Conn. 101, 149, 49 A.3d 566 (2012); "[f]indings of probable cause do not lend themselves to any uniform formula because probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." (Internal quotation marks omitted.) *State* v. *Bova*, 240 Conn. 210, 232, 690 A.2d 1370 (1997). Consequently, "[i]n determining the existence of probable cause to search, the issuing magistrate assesses all of the information set forth in the warrant affidavit and should make a practical, nontechnical decision whether . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place. . . . Probable cause, broadly defined, [comprises] such facts as would reasonably persuade an impartial and reasonable mind not merely to suspect or conjecture, but to believe that criminal activity has occurred." (Internal quotation marks omitted.) *State* v. *Grant*, 286 Conn. 499, 511, 944 A.2d 947, cert. denied, 555 U.S. 916, 129 S. Ct. 271, 172 L. Ed. 2d 200 (2008). In other words, because "[t]he probable cause determination is, simply, an analysis of probabilities"; (internal quotation marks omitted) *State* v. *Santiago*, supra, 149; "[p]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity. By hypothesis, therefore, innocent behavior frequently will provide the basis for a showing of probable cause; to require otherwise would be to sub silentio impose a drastically more rigorous definition of probable cause than the security of our citizens' . . . demands. . . . In making a determination of probable cause the relevant inquiry is not whether particular conduct is innocent or guilty, but the degree of suspicion that attaches to particular types of noncriminal acts. . . . *Illinois* v. *Gates*, 462 U.S. 213, 243–44 n.13, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)." (Internal quotation marks omitted.) *State* v. *Batts*, supra, 701.

Furthermore, because of our constitutional preference for a judicial determination of probable cause, and mindful of the fact that "[r]easonable minds may disagree as to whether a particular [set of facts] establishes probable cause"; (internal quotation marks omitted) *State* v. *Santiago*, supra, 305 Conn. 149; we evaluate the information contained in the affidavit in the light most favorable to upholding the issuing judge's probable cause finding. E.g., *State* v. *Buddhu*, 264 Conn. 449, 460, 825 A.2d 48 (2003), cert. denied, 541 U.S. 1030, 124 S. Ct. 2106, 158 L. Ed. 2d 712 (2004). We therefore "review the issuance of a warrant with deference to the reasonable inferences that the issuing judge could have and did draw"; id., 463; and we will "uphold the validity of [the] warrant . . . [if] the affidavit at issue presented a substantial factual basis for the magistrate's conclusion that probable cause existed." (Internal quo-

tation marks omitted.) *State* v. *Batts*, supra, 281 Conn. 699–700. Finally, "[i]n determining whether the warrant was based [on] probable cause, we may consider only the information that was actually before the issuing judge at the time he or she signed the warrant, and the reasonable inferences to be drawn therefrom."[14] (Internal quotation marks omitted.) *State* v. *Mordowanec*, 259 Conn. 94, 110, 788 A.2d 48, cert. denied, 536 U.S. 910, 122 S. Ct. 2369, 153 L. Ed. 2d 189 (2002).

We agree with the Appellate Court that the information contained in the affidavit supported the issuing judge's determination that probable cause existed to search the computer equipment and related items at the defendant's residence for evidence of the crime of possession of child pornography. That information included a portion of the defendant's then recent instant messaging conversation with Gayan, a known collector of child pornography over the Internet who, at the time of the issuance of the warrant, also had been having unlawful contact with children on the Internet and Internet communications with adults who shared with Gayan that they had sexually abused their own or other children. In his conversation with Gayan, the defendant himself commented about having sexual contact with his own child, and he repeatedly asked Gayan to send him a photograph of another child so that he could masturbate to it. This portion of the defendant's conversation with Gayan, in which the defendant clearly expresses his interest in pornographic images of children and then requests such an image from Gayan, provided a reasonable basis for the issuing court to believe that the defendant, like Gayan, used computer equipment to obtain pornographic images of children over the Internet.

In addition to the foregoing information concerning the defendant, Gayan, and their instant messaging conversation, the affidavit also contained several general statements about the behavior of people who sexually exploit children. In particular, the affiant, Johansen, stated that, on the basis of his training and experience as a member of the evidence unit and his affiliation with the Internet crimes against children task force, he knew that individuals who are engaged in the sexual exploitation of children often take or purchase pornographic photographs of children, which they trade through the Internet. Such images, Johansen explained, are stored on the computers of the sender and receiver, and are rarely destroyed or deleted because of their emotional and economic value. Johansen added that, even if the images are deleted, a forensic examination of the subject computer often can lead to the retrieval of such images.

In light of Johansen's training and experience with the evidence unit and the Internet crimes against children task force, there was a substantial basis for credit-

ing Johansen's general observations about the ability of computer experts to locate and retrieve deleted images and about the behavioral patterns of persons who engage in the sexual exploitation of children, including his assertion that persons who sexually abuse children also are prone to collect child pornography. See, e.g., *State* v. *DiMeco*, 128 Conn. App. 198, 206, 15 A.3d 1204 (judge issuing warrant to search for child pornography entitled to credit opinion of affiant with training and experience in matters concerning pedophiles and sexual predators of children), cert. denied, 301 Conn. 928, 22 A.3d 1275, cert. denied, U.S. , 132 S. Ct. 559, 181 L. Ed. 2d 398 (2011). Consequently, the issuing judge reasonably could have concluded that the defendant fit the profile of a collector of child pornography over the Internet: the defendant had acknowledged sexually abusing one child and had used the Internet in an effort to procure, from a known collector of child pornography, the photograph of another child for the purpose of sexual gratification. See, e.g., *United States* v. *Clark*, 668 F.3d 934, 939 (7th Cir. 2012) ("the . . . [suspect's] demonstrable sexual interest in children, along with [his] use of a computer in acting on that interest, sufficiently connects him to the 'collector' profile to justify [issuance of the search warrant]"); *United States* v. *Prideaux-Wentz*, 543 F.3d 954, 960 (7th Cir. 2008) (affiant's general statements about behavioral patterns of collectors of child pornography supported probable cause for search when affidavit included facts that suggested that target of search had "the characteristics of a prototypical child pornography collector"); *United States* v. *Kelley*, 482 F.3d 1047, 1054 (9th Cir. 2007) (search warrant supported by probable cause when affidavit specifically connected suspect's behavior to "offender typology" [internal quotation marks omitted]), cert. denied, 552 U.S. 1104, 128 S. Ct. 877, 169 L. Ed. 2d 738 (2008); cf. *State* v. *Sorabella*, 277 Conn. 155, 211, 217, 891 A.2d 897 (expert testimony regarding customs and habits of preferential sex offenders was admissible to prove criminal intent of person charged with various sexual offenses against child), cert. denied, 549 U.S. 821, 127 S. Ct. 131, 166 L. Ed. 2d 36 (2006). But cf. *United States* v. *Hodson*, 543 F.3d 286, 290–91 (6th Cir. 2008) (no probable cause because affiant failed to draw nexus between child molestation and child pornography).

Contrary to the defendant's contention, the facts contained in the affidavit are no less incriminating—indeed, they are arguably even more incriminating—than those supporting the affidavits in *United States* v. *Shields*, 458 F.3d 269 (3d Cir. 2006), *United States* v. *Gourde*, 440 F.3d 1065 (9th Cir.), cert. denied, 549 U.S. 1032, 127 S. Ct. 578, 166 L. Ed. 2d 432 (2006), *United States* v. *Martin*, 426 F.3d 68 (2d Cir. 2005), cert. denied, 547 U.S. 1192, 126 S. Ct. 2861, 165 L. Ed. 2d 895 (2006), and *United States* v. *Froman*, 355 F.3d 882 (5th Cir. 2004).

In those cases, search warrants for evidence of child pornography allegedly stored in the defendants' computers were upheld on the basis of the defendants' respective memberships in websites that had been established to enable members to collect and share child pornography, even though there was no direct evidence that the defendants ever had used their computers to upload, download, purchase or trade child pornography, or that they were sexually abusing children. *United States* v. *Shields*, supra, 279 ("[a]lthough [the defendant] suggests that an individual such as himself simply might have 'stumbl[ed] upon the [web]sites,' never to return after discovering their content . . . this possibility is remote given his registrations with these e-groups and his subsequent failure to cancel his memberships, one of which continued for more than [one] month and ended only when Yahoo shut down the e-group" [citation omitted]); *United States* v. *Gourde*, supra, 1070 ("[the defendant] could not have become a member [of the website] by accident or by a mere click of a button"); *United States* v. *Martin*, supra, 75 ("[i]t is common sense that an individual who joins such a site would more than likely download and possess such material"); *United States* v. *Froman*, supra, 890–91 (magistrate issuing warrant reasonably concluded that "a person who voluntarily joins [a child pornography website] . . . remains a member of the [website] for approximately [one] month without cancelling his subscription, and uses screen names that reflect his interest in child pornography, would download such pornography from the website and have it in his possession").

It is true that Gayan did not operate a website devoted to the collection and sharing of child pornography. We agree with the state, however, that, in view of the nature and extent of Gayan's illicit conduct over the Internet, the issuing judge reasonably could have concluded that, in important respects, the defendant's act of contacting him was similar to accessing such a website. Furthermore, such contact with Gayan was neither random nor isolated but, rather, purposefully undertaken with the knowledge that Gayan was someone in whom the defendant could safely confide about, and with whom he could safely pursue, his interest in child pornography. This conclusion is supported not only by the substantial criminal penalties and related social stigma associated with the possession of child pornography, but also by the defendant's stated sexual interest in children and his repeated attempts to obtain from Gayan a "pic" of a child for purposes of sexual gratification. Presented with these facts and the information provided by the affiant concerning the proclivity of persons who sexually exploit children to collect and retain child pornography, no great inferential leap was required on the part of the issuing judge to conclude that the "pic" in question was a sexually explicit image of a child and that

a fair likelihood existed that comparable images would be found on one or more of the defendant's computers.

We therefore reject the defendant's contention that, even if the affidavit was sufficient to support a reasonable belief that, as evidenced by the defendant's instant messaging conversation with Gayan, the defendant had attempted to possess child pornography on that one occasion, that information was insufficient to permit the inference that he actually possessed child pornography on one or more of his computers or at some other location in his residence. As we have explained, the issuing judge reasonably could have concluded that when the defendant, who fit the profile of a collector of child pornography, expressly asked Gayan—himself a collector of Internet child pornography—for a photograph of Gayan's son for purposes of sexual gratification, that likely was not the defendant's first such overture. On the contrary, the facts set forth in the affidavit gave rise to a fair inference that the defendant was familiar with the Internet trade of child pornography and that there was a reasonable probability that the defendant had pornographic images of children in his possession as a result of his participation in that Internet activity.

We also are not persuaded by the defendant's contention that the affidavit accompanying the warrant application in the present case resembles the affidavit in *United States* v. *Falso*, 544 F.3d 110 (2d Cir. 2008), cert. denied, 558 U.S. 933, 130 S. Ct. 154, 175 L. Ed. 2d 235 (2009), in which the Second Circuit Court of Appeals concluded that the affidavit in that case did not establish probable cause because it contained no indication that the defendant, David J. Falso, ever had actually subscribed to or been a member of a child pornography website, but only that he " 'appeared' to 'have gained or attempted to gain' access to [such] a site . . . ." Id., 113. The Second Circuit concluded that, in the absence of "any allegation that Falso in fact accessed the website at issue, the question is whether Falso's eighteen-year old [misdemeanor] conviction involving the sexual abuse of a minor . . . provides a sufficient basis to believe that evidence of child pornography crimes would be found in Falso's home." Id., 114. The court then concluded that the misdemeanor conviction did not provide a basis for such a belief because it was stale and because the affidavit failed to draw any correlation between the sexual abuse of children and the collection of child pornography. Id., 122–24. The court explained that, "[a]lthough offenses relating to child pornography and sexual abuse of minors both involve the exploitation of children, that does not compel, or even suggest, the correlation drawn by the [D]istrict [C]ourt. Perhaps it is true that all or most people who are attracted to [children] collect child pornography. *But that association is nowhere stated or supported in the affidavit.*" (Emphasis added.) Id., 122. The court then emphasized

that the magistrate was confined to the information set forth in the affidavit in determining probable cause. Id.

The affidavit in the present case is readily distinguishable from the affidavit in *Falso*. Not only did the affidavit in the present case definitively establish that the defendant sought out and accessed an Internet address similar to a child pornography website, it revealed that the defendant discussed sexually abusing his eight year old son and attempted to procure the image of another child for purposes of sexual gratification. Furthermore, in contrast to the affidavit in *Falso*, the affidavit in the present case provided information that permitted the issuing judge to draw a correlation between the defendant's avowed sexual interest in children and child pornography, thereby strengthening the inference both that the image that the defendant sought to procure from Gayan was pornographic and that the defendant had a propensity to view such pornography.

The defendant also asserts that the affidavit was insufficient to establish probable cause to search for evidence of the crime of possession of child pornography because it did not contain a description of the images being sought. He maintains that, without such a description, the issuing judge could not perform his constitutional role of determining whether the images of children that, according to the affidavit, the defendant was likely to possess satisfied the statutory definition of child pornography, thereby making it impossible for the judge to find that there was probable cause to believe that the defendant's alleged possession of those images was unlawful. For the same reason, the defendant argues, the affidavit also was insufficient to establish probable cause to search for evidence of the crime of attempt to possess child pornography.

In support of this contention, the defendant relies on several federal child pornography cases; see, e.g., *United States* v. *Brunette*, 256 F.3d 14, 17–19 (1st Cir. 2001); *United States* v. *Genin*, 594 F. Sup. 2d 412, 419, 424–25 (S.D.N.Y. 2009); in which the reviewing courts concluded that a magistrate improperly had issued a warrant authorizing a search for evidence of child pornography on the basis of an investigating officer's conclusory statement that the target of the investigation was in possession of material that met the statutory definition of "child pornography."[15] These cases are inapposite because, in each such case, the issue before the reviewing court was whether the warrant affidavit, when excised of the officers' conclusory statements, contained sufficient, additional information to permit the magistrate to make an independent determination as to whether the image or images being sought met the legal definition of child pornography. Such a determination was necessary because, as the Third Circuit Court of Appeals recently has explained, "[t]he label 'child pornography,' without more, does not present

any facts from which the magistrate could discern a 'fair probability' that what is depicted in the images meets the statutory definition of child pornography and complies with constitutional limits. [Such a label] does not describe, for instance, whether the minors depicted in the images [are] nude or clothed or whether they [are] engaged in any 'prohibited sexual act' as defined by [applicable] law. As [the court previously had stated] . . . that kind of 'insufficiently detailed or conclusory description' of the images is not enough. . . . Presented with just the label 'child pornography,' the most the magistrate [can] infer [is] that *the affiant* concluded that the images constitute child pornography.

"The problem with that inference is that identifying images as child pornography 'will almost always involve, to some degree, a subjective and conclusory determination on the part of the viewer,' and such 'inherent subjectivity is precisely why the determination should be made by a judge,' not the affiant. . . . Otherwise, 'we might indeed transform the [magistrate] into little more than the cliché "rubber stamp." ' . . . Other circuits agree that a probable-cause affidavit must contain more than the affiant's belief that an image qualifies as child pornography. *United States* v. *Doyle*, 650 F.3d 460, 474 (4th Cir. 2011) (holding that there was no probable cause [when] the affidavit did not provide 'anything more than a description of the photographs as depicting "nude children" '); [*United States* v. *Brunette*, supra, 256 F.3d 18] (holding that there was no probable cause [when] an affidavit involved an affiant's 'legal conclusion parroting the statutory definition' of child pornography 'absent any descriptive support and without an independent review of the images' by a magistrate)." (Citations omitted; emphasis in original.) *United States* v. *Pavulak*, 700 F.3d 651, 661–62 (3d Cir. 2012), cert. denied, U.S. , S. Ct. , L. Ed. 2d (2013); see also *United States* v. *Genin*, supra, 594 F. Sup. 2d 421 ("[t]hese cases . . . stand for the proposition that the probable cause determination is a nondelegable judicial duty").

In contrast to cases involving search warrants for child pornography issued on the basis of affidavits consisting of the affiants' descriptions or characterizations of an existing image or images, the affidavit in the present case was not predicated on the affiant's firsthand observation of a particular pornographic image. Indeed, the affiant did not refer to an actual or existing image at all. The affidavit in the present case instead was based on the defendant's own incriminating statements and conduct, as described in the affidavit, and the inferences that reasonably could be drawn therefrom. For the foregoing reasons, we are persuaded that the information set forth in the affidavit, along with the inferences that the issuing judge fairly could have drawn, supported a finding of probable cause to search computer equipment and other related items in the defen-

dant's residence for evidence of the crime of child pornography.

Finally, the defendant maintains that the affidavit was insufficient because it did not indicate whether he ultimately was successful in procuring an image from Gayan. In addition, he argues that the portion of the instant messaging transcript included in the affidavit reveals that, when Gayan proposed that he and the defendant trade photographs of their sons, the defendant responded, "none on [my] machine . . . ." Although the trial court construed this to mean that the defendant did not then have *pornographic* images of his son on his computer, the defendant contends that his response just as readily could have been interpreted to mean either that he did not have *any* images of his son on his computer, pornographic or otherwise, or that he did not have pornographic images of any kind on his computer. According to the defendant, no matter which interpretation is more plausible, his response, " 'none on [my] machine' eliminated any 'fair probability' that evidence of child pornography would . . . be found on [his] computer" at the time of the search. We reject the defendant's argument.

As we previously explained, we agree with the state that the issuing judge reasonably found, on the basis of the facts set forth in the affidavit, that there was probable cause to believe that the defendant possessed child pornography and that evidence of that crime would be found in the computer equipment at his residence, even if the defendant had attempted to erase such evidence. That other reasonable inferences might have been drawn from the information contained in the affidavit does not alter our conclusion. On the contrary, we defer to the issuing judge's reasonable inferences, even when other inferences also might be reasonable, or when the issuing judge's probable cause finding is predicated on permissible, rather than necessary, inferences. We conclude, therefore, that the search of the defendant's residence that resulted in the seizure of his computer equipment, which contained numerous images of child pornography, satisfies federal and state constitutional standards.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

[1] General Statutes § 54-94a provides: "When a defendant, prior to the commencement of trial, enters a plea of nolo contendere conditional on the right to take an appeal from the court's denial of the defendant's motion to suppress or motion to dismiss, the defendant after the imposition of sentence may file an appeal within the time prescribed by law provided a trial court has determined that a ruling on such motion to suppress or motion to dismiss would be dispositive of the case. The issue to be considered in such an appeal shall be limited to whether it was proper for the court to have denied the motion to suppress or the motion to dismiss. A plea of nolo contendere by a defendant under this section shall not constitute a waiver by the defendant of nonjurisdictional defects in the criminal prosecution."

[2] General Statutes (Rev. to 2005) § 53a-196d provides in relevant part: "(a)

A person is guilty of possessing child pornography in the first degree when such person knowingly possesses fifty or more visual depictions of child pornography. . . .''

General Statutes § 53a-193 (13) defines ''child pornography'' as ''any visual depiction including any photograph, film, videotape, picture or computer-generated image or picture, whether made or produced by electronic, mechanical or other means, of sexually explicit conduct, where the production of such visual depiction involves the use of a person under sixteen years of age engaging in sexually explicit conduct, provided whether the subject of a visual depiction was a person under sixteen years of age at the time the visual depiction was created is a question to be decided by the trier of fact.''

[3] As we explain in this opinion, the police initially believed that Cariaso was the person communicating with Gayan because the Internet Protocol address of the target computers was registered to Cariaso. Subsequent to the execution of the search warrant that is the subject of this appeal, however, the police discovered that the defendant, not Cariaso, had communicated with Gayan. The police also determined that the defendant does not, in fact, have a son. Because the police were unaware of that fact prior to the issuance of the warrant, there is no reason why both the police and the issuing court could not have relied on the defendant's own statement that he did have a son and that he engaged in sexual contact with him.

[4] Instant messaging involves a real time conversation in written form between two or more parties that is transmitted over a computer network and can be viewed on the parties' computer monitors. See The American Heritage Dictionary of the English Language (5th Ed. 2011) p. 909.

[5] The warrant application contained the following portion of the transcript of the instant messaging conversation between ''bi06488'' and ''centralpamaster,'' which, according to the electronic log, occurred on July 1, 2005:

''centralpamaster . . . play together in the same room first

''bi06488 . . . sounds good—u gonna send that pic?

''centralpamaster . . . Let's swap pics of our boys

''bi06488 . . . none on the machine . . . but love to get off to a pic of yours right now . . .

''bi06488 . . . now that pic . . . do I get it?

''centralpamaster . . . I have a better idea . . . let's cam

''bi06488: . . . I want [to shoot] to it now . . .

''centralpamaster . . . where is your son?

''bi06488 . . . practice . . . they have this bb team—so he plays . . . .''

We note that this instant messaging conversation represents only a small portion of the considerably longer conversation that took place between the defendant and Gayan, and, with the exception of the statement by the defendant indicating that he engaged in sexual contact with his son, nothing contained in that longer conversation was included in the search warrant affidavit. This is so even though the investigating officers had the full conversation in their possession and even though certain of the defendant's statements during the course of that conversation that do not appear in the affidavit are graphic, incriminating and provide significant support for the contention that there was probable cause to search the defendant's residence for child pornography. Nevertheless, for whatever reason, those additional portions of the conversation were not presented to the issuing judge, and, therefore, we do not consider them in determining whether the issuing judge properly concluded that the affidavit contained probable cause to search the defendant's computer equipment and related items for child pornography. Rather, our review of the issuing judge's probable cause finding is limited to the information contained within the four corners of the affidavit. See, e.g., *State* v. *Batts*, 281 Conn. 682, 700, 916 A.2d 788, cert. denied, 552 U.S. 1047, 128 S. Ct. 667, 169 L. Ed. 2d 524 (2007).

[6] The investigation also revealed that the defendant, Rosalie Shields, Cariaso and Peter Modica all received mail at that same residence.

[7] Police seized more than 1000 photographic images and four video files depicting child pornography. One hundred seventy-four photographs and the four video files depicted victims listed in the child recognition and identification system database of the National Center for Missing and Exploited Children.

[8] The fourth amendment to the United States constitution provides: ''The right of the people to be secure in their persons, houses, papers, and effects,

against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The fourth amendment's proscription against unreasonable searches and seizures is made applicable to the states by incorporation through the due process clause of the fourteenth amendment. See, e.g., *Mapp* v. *Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).

[9] Article first, § 7, of the Connecticut constitution provides: "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation."

[10] Although the trial court did find that there was no probable cause to search for evidence concerning the offense of risk of injury to a child, this finding had no bearing on the court's ultimate denial of the defendant's motion to suppress.

We also note that the defendant thereafter filed a second motion to suppress, claiming that information discovered after the ruling of the court, *Cremins*, *J.*, on the first motion to suppress defeated a finding of probable cause under *Franks* v. *Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), because the state knew or should have known that the affidavit accompanying the warrant application contained materially misleading information. On September 16, 2008, the court, *Alander*, *J.*, denied this motion, which is not the subject of this appeal. Accordingly, all references to the defendant's motion to suppress are to the first motion.

[11] The state dropped the charge of importing child pornography.

[12] The defendant also argued in the Appellate Court that the affidavit in support of the warrant application did not establish probable cause "because the affiants failed to link the IP address, 24.151.2.100, to the subject residence at the exact time [that] [b]i06488 had the incriminating conversation with [c]entralpamaster on July 1, 2005 . . . . Specifically, [the defendant] argue[d] that the information provided by Charter Communications, that he was the subscriber to the IP address, failed to show that there was a direct connection between the IP address and the subject residence at the exact time the incriminating conversation occurred. The defendant further argue[d] that the affiants also failed to inform the court that the IP address was most likely dynamic and subject to change, thus rendering the affidavit insufficient to establish probable cause." (Internal quotation marks omitted.) *State* v. *Shields*, supra, 124 Conn. App. 592–93. The Appellate Court rejected this contention; id., 593–95; and the defendant has not challenged that determination on appeal to this court.

[13] We note that, following oral argument before this court, we ordered the parties to file supplemental briefs on the issue of whether, if we were to determine that the affidavit was legally insufficient, the images of child pornography seized from the defendant's residence nevertheless would be admissible under the inevitable discovery doctrine; see, e.g., *State* v. *Cobb*, 251 Conn. 285, 337–39, 743 A.2d 1 (1999), cert. denied, 531 U.S. 841, 121 S. Ct. 106, 148 L. Ed. 2d 64 (2000); in view of the fact that, when the police sought the search warrant, they had in their possession certain highly incriminating statements made by the defendant that they did not present to the issuing judge. See footnote 5 of this opinion. Because we conclude that the affidavit was supported by probable cause, we need not reach the issue of whether the seized images would be admissible under the inevitable discovery doctrine.

[14] Because the defendant's claim is founded on article first, § 7, of the state constitution as well as the fourth amendment to the United States constitution, the state does not claim that the search in the present case should be upheld, even in the absence of probable cause, under the good faith exception to the exclusionary rule, which the United States Supreme Court adopted in *United States* v. *Leon*, 468 U.S. 897, 919–22, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), for purposes of the fourth amendment. See *State* v. *Marsala*, 216 Conn. 150, 171, 579 A.2d 58 (1990) (good faith exception to exclusionary rule does not apply to article first, § 7, of state constitution).

[15] Under federal law, "child pornography" is defined as "any visual depiction" the production of which "involves the use of a minor engaging in sexually explicit conduct . . . ." 18 U.S.C. § 2256 (8) (A) (2006). "Sexually explicit conduct," in turn, is defined to include the "lascivious exhibition of the genitals or pubic area of any person . . . ." 18 U.S.C. § 2256 (2) (A) (v) (2006). Connecticut law defines "child pornography" and "sexually explicit conduct" in similar or identical terms. See General Statutes § 53a-

193 (13) and (14) (E). As the court explained in *United States* v. *Genin*, supra, 594 F. Sup. 2d 412: "As a consequence of the interpretative ambiguity inherent in the term 'lascivious,' many courts have held that, in the probable cause context, a magistrate may not issue a search warrant based solely on a law enforcement officer's conclusion that the target of the warrant is in possession of 'lascivious' photographs or videos." Id., 421; see also *Illinois* v. *Gates*, supra, 462 U.S. 239 ("Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others. In order to ensure that such an abdication of the magistrate's duty does not occur, courts must . . . conscientiously review the sufficiency of affidavits on which warrants are issued.").