No. 05-1073

# In the Supreme Court of the United States

JOSEPH MARTIN, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether a search warrant affidavit establishing that an individual has subscribed to a website dedicated to the display and distribution of child pornography establishes probable cause to search his home and seize computer equipment.

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### OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 9a-51a) are reported at 426 F.3d 68 and 426 F.3d 83. The decision of the district court (Pet. App. 52a-54a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on August 4, 2005. A petition for rehearing was denied on November 18, 2005 (Pet. App. 1a-8a). The petition for a writ of certiorari was filed on February 16, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

After entering a conditional guilty plea in the United States District Court for the Eastern District of New York, petitioner was convicted on ten counts of possessing child pornography, see 18 U.S.C. 2252A(a)(5)(B). He was sentenced to 27 months of imprisonment, to be followed by three years of supervised release. Pet. App. 24a; Gov't C.A. Br. 1, 3. The court of appeals affirmed the convictions but remanded for resentencing in light of *United States* v. *Booker*, 543 U.S. 220 (2005), and *United States* v. *Crosby*, 397 F.3d 103 (2d Cir. 2005). Pet. App. 23a-41a.

1. In 2001, the Federal Bureau of Investigation (FBI) initiated a nationwide investigation of Internet child pornography, known as Operation Candyman. The investigation led to the execution of search warrants throughout the country based on a supporting affidavit of FBI Agent Austin Berglas. Pet. App. 24a; Gov't C.A. Br. 3-4.

The affidavit described in detail three e-groups[1] devoted to the display and distribution of child pornography. Pet. App. 25a. In January 2001, FBI Agent Geoffrey S. Binney, acting undercover, first joined an e-group called "Candyman." The website for the e-group announced its purpose to prospective members:

> This group is for People who love kids. You can post any type of messages you like too [sic] or any type of pics or vids you like too [sic]. P.S. IF WE ALL

[1] An "e-group" is an "internet forum through which persons with similar interests can interact by e-mail and online 'chat,' and by posting messages, pictures, and videos to the group's website." Pet. App. 25a n.1.

> WORK TOGETHER WE WILL HAVE THE BEST GROUP ON THE NET.

*Id.* at 25a-26a. While its primary purpose was purveying child pornography through a "files" section that allowed users to post or download pornographic images, the Candyman site also offered subscribers a chat room, a survey service whereby subscribers could register their sexual preferences, a "links" service referring subscribers to websites with similar content, and a "messages" area where messages and files were stored for members' later use. Although subscribers could choose whether or not to receive all group e-mails automatically (and most, in fact, opted out of the automatic e-mail feature), the affidavit incorrectly stated that all subscribers to the Candyman e-group automatically received all the e-mails and attached files from other members. *Id.* at 26a-27a.

In a one-month period, Agent Binney found approximately 100 pictures and movies of child pornography and child erotica in the "files" section of the site, and received approximately 300 child pornography and child erotica images through e-mails from the e-group. Through his membership in the Candyman e-group, Agent Binney learned that members were exchanging information about two other e-groups named "girls12-16" and "shangri_la." Those two groups resembled the Candyman group, but also included a membership list that set forth each member's Yahoo! user identification, his truncated e-mail address, and the date he joined the e-group. Pet. App. 26a-29a.

Binney subsequently joined the girls12-16 e-group, which welcomed prospective subscribers with the following message:

Hi all, This group is for all those ho [sic] appreciate the young female in here [sic] finest form. Watching her develop and grow is like poetry in motioon [sic], to an age where she takes an interest in the joys and pleasures of sex. There is probably nothing more stimulating than watching a young teen girl discover the pleasures of the orgasm. The joy of feeling like she is actually coming into womanhood. It's an age where they have no preconditions about anything, just pure opennes [sic]. What a joy to be a part of that wonderful experience and to watch the development of this perfect form. This is the place to be if you love 11 to 16 yr olds. You can share experiences with others, share your views and opinions quite freely without censorship. You can share all kinds of other information as well regarding-your current model: if you are a photographer. Where the best place to meet gitls [sic] is. The difficulties you experience in your quest. The best way to chat up. Good places to pick girls up. Girls you would like to share with others. The choice is all yours. Welcome home! Post videos and photographs . . . and how about your true life experiences with them so that other viewers can paint a mental picture andin [sic] some ways share the experience with you. You could connect with others from the same country as you and get together sociall [sic] if you wish. The choice is all yours. How about a model resource for photographers? It's all up to you and is only limited by your own imaginations. Membership is open to anyone, but you will need to post something. Mybe [sic] a little bit about yourself/what your interests are (specifically), your age, location . . . and a pic or vid would be a good to [sic]. By doing this other mem-

> bers (or potential members) with the same interest may then contact you if you wish them to.

Pet. App. 27a-28a. During Binney's two-week membership in the girls12-16 e-group, he received 77 images of child erotica and 14 child pornography images. *Id.* at 29a.

The affidavit also described methods used to access, collect, and distribute child pornography through the Internet and the characteristics of child pornographers. According to an expert in the FBI's Behavioral Analysis Unit, collectors of child pornography rarely destroy their collections. Pet. App. 29a-30a.

In addition to the pertinent information about the investigation common to all Operation Candyman affidavits, each also included specific information about the particular premises named in the warrant. In petitioner's case, the affidavit stated that an individual using the e-mail address "Joeym@optonline.net" joined girls12-16 on February 1, 2001, and remained a member until February 15, 2001. The FBI determined from the membership list that that e-mail address was associated with petitioner's address in Hauppauge, New York. Pet. App. 24a, 29a; Gov't C.A. Br. 8-9.

2. A magistrate judge in the Eastern District of New York issued a search warrant for petitioner's residence. Pursuant to the warrant, agents seized petitioner's computer, on which they found hundreds of images and video clips of child pornography and child erotica. A grand jury subsequently indicted petitioner on ten counts of possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B). Pet. App. 30a; Gov't C.A. Br. 3, 9.

After petitioner's indictment was unsealed, the government notified him that the affidavit in support of the

search warrant contained the misstatement about the automatic e-mail feature. In an additional disclosure, the government informed petitioner that an official from Yahoo![2] had testified in another proceeding that Agent Binney should have known, based on the information provided to him when he subscribed to the Candyman site, that e-mail receipt was optional. Pet. App. 30a.

Citing the misstatement in the affidavit, petitioner moved to suppress the evidence, and the district court denied the motion. The court concluded that the affidavit established probable cause even after the erroneous statement was excised. Petitioner subsequently pleaded guilty to the indictment, reserving his right to appeal the denial of his suppression motion. Pet. App. 30a-32a.

3. a. On appeal, petitioner argued, as relevant here, that the untainted portions of the affidavit did not establish probable cause, and that the district court impermissibly relied on his membership in the girls6-12 e-group without requiring further proof that he participated in the group's illegal activities. The court of appeals rejected his arguments and affirmed the convictions. Pet. App. 35a-40a.

After reviewing the applicable law on probable cause and the information in the affidavit, the court held that the untainted portions of the affidavit established probable cause:

> [W]e have no difficulty concluding that the corrected affidavit established probable cause. The affidavit included evidence that an occupant of [petitioner's] house, Joeym@optonline.net, was a member of the girls12-16 e-group, whose raison d'etre, or primary

[2] The e-group service on which Candyman operated was owned and operated by the Internet provider Yahoo!. Pet. App. 30a.

> reason for existence, was the trading and collection of child pornography - a wholly illegal endeavor. It is common sense that an individual who joins such a site would more than likely download and possess such material.

Pet. App. 37a. The court of appeals also noted that its decision was supported by other courts that had reviewed the Candyman affidavit and found that the corrected version established probable cause. *Ibid*.

Judge Pooler dissented. She would have suppressed the evidence because Agent Binney's false statements "provided the only basis for the inference that there was a fair probability that all E-group subscribers would possess illegal visual depictions." Pet. App. 43a-44a. She faulted the majority for concluding that the "overriding purpose," *id.* at 44a, of the e-group was illegal and that petitioner participated in the e-group's illegal functions. The dissent also relied on *Ybarra* v. *Illinois*, 444 U.S. 85 (1979), for the proposition that petitioner's participation in criminal activity may not be inferred from his association with a group without any particularized suspicion that he engaged in the group's illegal activities. Pet. App. 48a-49a. Finally, Judge Pooler found that the majority's assumption that subscribers to the e-group were collectors of child pornography was unfounded. *Id.* at 49a.

b. The panel denied petitioner's petition for rehearing with both the majority and dissent issuing written opinions. Pet. App. 10a-22a. The majority first addressed the Second Circuit's opinion in *United States* v. *Coreas*, 419 F.3d 151 (2005), which considered the validity of a search warrant based on the defendant's membership in the Candyman e-group, and was decided after petitioner's case. The *Coreas* panel concluded that peti-

tioner's case was wrongly decided, largely for the reasons expressed in the dissent, but felt compelled to follow the earlier-issued opinion. In response, the majority below explained that the question of probable cause based on membership in the Candyman e-group had not been before it; rather, it had been concerned with petitioner's membership in the girls12-16 e-group. In the majority's view, the differences between the Candyman and girls12-16 e-groups, especially as to the welcome messages, were not "immaterial." Pet. App. 12a. The panel then rejected petitioner's claim that it had mischaracterized the primary nature of the girls12-16 e-group as illegal because some of the site's functions were lawful. It thus reaffirmed its finding that the primary purpose of the website was to facilitate the generation and exchange of child pornography. It also had "no difficulty concluding that the activity of subscribing to the girls12-16 e-group, after being prompted by its name and welcome message, and adhering to membership despite the site's contents, was sufficient to support a finding of probable cause." *Id.* at 15a. The panel further rejected petitioner's reliance on *Ybarra*, finding that a frisk of the unwitting patron of a tavern based on probable cause that the bartender was selling heroin was unlike the search in this case where a subscriber was "on notice that the site was an active marketplace for the illicit trade of child pornography." *Id.* at 17a.

Judge Pooler dissented from the denial of the petition for panel rehearing for the reasons stated in her original dissent and in the panel's opinion in *Coreas*. Pet. App. 18a-22a.

c. The Second Circuit simultaneously denied the petitions for rehearing en banc in petitioner's case and in *Coreas*. Pet. App. 1a-8a. Judge Wesley, concurring

in the denial, wrote separately to emphasize that, contrary to the dissent's characterization:

> [T]his case is not about an accidental tourist who while casually surfing the internet stumbles upon a website with a "few clicks of a mouse." Rather, this case is about a man who visited a Yahoo! e-Group entitled "girls12-16," saw the e-Group's sexually explicit welcome message - which clearly announced its predominantly illegal purpose - affirmatively joined the e-Group, and remained a member of that e-Group for two weeks until it was shut down.

*Id.* at 3a (footnote omitted).

Judge Pooler again dissented from the denial of petitioner's and Coreas's petitions for rehearing en banc. Pet. App. 6a-8a.

**ARGUMENT**

Petitioner renews his argument (Pet. 8-17) that the corrected affidavit did not establish probable cause because it relied exclusively on his membership in a website that had both a legal and illegal purpose. That contention does not warrant this Court's review. The court of appeals' decision is correct, and it does not conflict with the decision of any other court of appeals or this Court.

1. Probable cause to search a particular place exists if an issuing magistrate finds, based on "a practical, common-sense" evaluation of the affidavit in support of the warrant, that there is a "fair probability that contraband or evidence of a crime will be found in [that] place." *Illinois* v. *Gates*, 462 U.S. 213, 238 (1983). The probable cause standard "does not deal with hard certainties, but with probabilities," and law enforcement officers are entitled to "formulate[] certain common-sense conclu-

sions about human behavior." *Id.* at 231 (quoting *United States* v. *Cortez*, 449 U.S. 411, 418 (1981)). Accordingly, the facts presented to the magistrate need only "warrant a man of reasonable caution in the belief" that evidence of a crime will be found; there is no requirement "that such a belief be correct or more likely true than false." *Texas* v. *Brown*, 460 U.S. 730, 742 (1983) (plurality opinion) (quoting *Carroll* v. *United States*, 267 U.S. 132, 162 (1949)).

The court of appeals correctly applied those standards in upholding the warrant in this case. Petitioner joined an e-group whose name (girls12-16) alerted a potential subscriber to its illicit nature and whose welcome message made clear that "its essential purpose was to trade child pornography." Pet. App. 35a. That message emphasized the availability of child pornography ("This group is for all those ho [sic] appreciate the young female" and "[w]atching her develop"; "[y]ou can share all kinds of other information as well regarding your current model: if you are a photographer"; "Post videos and photographs"; "Membership is open to anyone, but you will need to post something * * * and a pic or vid would be a good to [sic]," *id.* at 27a-28a), and the website's technological features, including its files, links, and e-mail sections, facilitated the dissemination of the images. With clear notice of the e-group's purpose, petitioner affirmatively subscribed to the group and remained a member until the site was shut down.

The affidavit also described characteristics of collectors of child pornography, based on expert opinion, including their use of computer e-groups to retrieve, store, and distribute the images, and their propensity to retain child pornography materials in their homes or other

secure locations. Finally, the affidavit directly linked a subscriber's e-mail address to petitioner's home.

Petitioner contends (Pet. 12-17) that the court of appeals erred, as a factual matter, in concluding that the primary purpose of the girls12-16 e-group was illicit. That fact-bound determination does not warrant this Court's review. In any event, the court of appeals' characterization of the e-group was correct. As described above, the website served as a clearinghouse for child pornography and promoted its exchange and distribution. See Pet. App. 14a. Indeed, all the courts of appeals that have evaluated the Candyman affidavit have concluded that the Candyman e-group, whose welcome message was less detailed than its counterpart on the girls12-16 site, had primarily an illegal purpose. See *United States* v. *Froman*, 355 F.3d 882, 885 (5th Cir. 2004) ("The singular goal of the [Candyman] Group was to collect and distribute child pornography and sexually explicit images of children."); *United States* v. *Ramsburg*, 114 Fed. Appx. 78, 81 (4th Cir. 2004) ("The affidavit [excised of its incorrect assertions] also supported the inference that Candyman's primary purpose was to facilitate the exchange and distribution of child pornography. * * * The fact that most of the website's traffic was illicit rightly colors a determination of its purpose."); *United States* v. *Hutto*, 84 Fed. Appx. 6, 8 (10th Cir. 2003) (adopting district court's factual finding that "the group's clear purpose was to share child pornography").

The claim that petitioner may have used only the textual features of the website does not defeat probable cause. Petitioner's argument to the contrary assumes a higher degree of certainty about his conduct than probable cause requires. See *Gates*, 462 U.S. at 244 n.13

("[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity."). Nor is a court precluded from considering conduct susceptible of innocent explanation in determining whether probable cause exists. *Ibid.* ("[I]nnocent 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."); cf. *United States* v. *Arvizu*, 534 U.S. 266, 277-278 (2002) (although each factor in a reasonable-suspicion analysis may have had an innocent explanation, taken together, they were sufficient to establish reasonable suspicion). Applying the commonsense approach that informs the probable cause determination, see *Gates*, 462 U.S. at 238, a reviewing court could reasonably conclude that an individual who "chats" with like-minded people about sex with children, votes on what age groups they prefer, and visits other child pornography sites also downloads the readily accessible child pornography that is the e-group's mainstay. Even if petitioner did not in fact participate in the website's illegal activities, the Fourth Amendment accepts that risk. See *Illinois* v. *Wardlow*, 528 U.S. 119, 126 (2000) (the Fourth Amendment "accepts" the risk that "persons arrested and detained on probable cause to believe they have committed a crime may turn out to be innocent").

Petitioner relies (Pet. 9-12) on *Ybarra* v. *Illinois*, 444 U.S. 85 (1979), to support his contention that mere association with others who may be engaging in illegal activities is not sufficient to establish probable cause. In *Ybarra*, the Court held that officers executing a warrant to search a particular tavern and its bartender for evi-

dence of heroin trafficking did not have probable cause to search one of the tavern's patrons. *Id.* at 90-92. The Court explained that, although "the police possessed a warrant based on probable cause to search the tavern in which Ybarra happened to be at the time the warrant was executed," 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." *Id*. at 91. The search of an individual "must be supported by probable cause particularized with respect to that person," the Court reasoned, and that condition is not met when "coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be." *Ibid*.

Ybarra's presence in the tavern is not comparable to petitioner's membership in the girls12-16 e-group. Although Ybarra "happened to be" at the tavern during execution of the search warrant, there was no reason to suppose that his physical proximity to the suspected crime was anything more than "coincidental[]." *Ybarra*, 444 U.S. at 91. There was no basis for inferring that he had taken part in, or even was aware of, the sale of heroin at the tavern. In contrast, subscribers to the girls12-16 website, like petitioner, deliberately joined an e-group that was identifiable as a forum for collectors of child pornography and sought to associate with others who shared a common, illicit interest in sex with children. Cf. *Maryland* v. *Pringle*, 540 U.S. 366, 373 (2003) (holding that police had probable cause to arrest respondent, a passenger in a car in which drugs were recovered, and rejecting his reliance on *Ybarra* because it was reasonable to infer that he "engaged in a common enterprise with the driver").

Petitioner's related argument (Pet. 9) that the affidavit did not contain "particularized" information that he possessed child pornography is tantamount to a claim that the government must demonstrate that he already possessed illegal materials before it has probable cause to search for more. That position is not supported. See *United States* v. *Gourde*, 440 F.3d 1065, 1073 (9th Cir. 2006) (en banc) (rejecting defendant's argument that probable cause was lacking because the affidavit did not include "concrete evidence" that he had downloaded child pornography onto his computer); *Froman*, 355 F.3d at 891 (declining to adopt a "universal rule" that "without evidence of actual possession of contraband, probable cause does not exist").

The affidavit in this case met *Ybarra*'s requirement that probable cause be particularized. The fact that the particularized information about petitioner's possession of child pornography was based on reasonable inferences from his membership in the girls12-16 e-group rather than on direct evidence of that fact makes no difference. This Court has recognized the significance of inferences in determining whether probable cause exists. *Ornelas* v. *United States*, 517 U.S. 690, 700 (1996) ("[O]ur cases have recognized that a police officer may draw inferences based on his own experience in deciding whether probable cause exists."); *Gates*, 462 U.S. at 240 (magistrate judge may draw "such reasonable inferences as he will from the material supplied to him by applicants for a warrant"). A reviewing court's approach to the magistrate judge's determination that probable cause exists must give those inferences great deference. *Gates*, 462 U.S. at 236.

2. The courts of appeals that have reviewed the sufficiency of the corrected affidavits in the Candyman in-

vestigation have uniformly ruled that they establish probable cause. See *Froman*, 355 F.3d at 888-891; *Ramsburg*, 114 Fed. Appx. at 80-82[3]; *Hutto*, 84 Fed. Appx. at 8. Accord *Gourde*, 440 F.3d at 1065 (affidavit established probable cause that defendant's computer would contain child pornography based on defendant's paid subscription to "Lolitagurls.com," a website that purveyed child pornography). And the Second Circuit's denial of en banc review in this case and *Coreas* demonstrates that the court did not consider the disagreement between the panels worthy of review. Cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). This Court's review is likewise not warranted.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2006

[3] The *Ramsburg* affidavit contained the additional facts that the defendant had belonged to both the Candyman and shangri_la e-groups and that he had conveyed one image of child pornography to an undercover agent several years prior. 114 Fed. Appx. at 79-80.