

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	
	:	
vs.	:	CRIMINAL ACTION
	:	NO. 16-293
	:	
SEAN FAGER	:	

MEMORANDUM OPINION

SCHMEHL, J.

March 1, 2018

Defendant was indicted on two counts of production of child pornography in violation of 18 U.S.C. §§ 2251(a) and (e) and §§ 2256 2(A) (iv) and (v), one count of transportation of child pornography in violation of 18 U.S.C. § 2252(a)(1) and two counts of possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). Presently before the Court is the defendant’s motion to suppress the fruits of what he claims to have been an unlawful search of his Verizon internet account, his home on two occasions, computers that were seized from his home, and his Dropbox internet cloud storage account. Because the government and the defendant agreed that there were no factual disputes that would necessitate an evidentiary hearing, the Court held oral argument on the motion. For the reasons that follow, the motion is denied.

On March 17, 2014, the National Center for Missing and Exploited Children (“NCMEC”) was contacted by Dropbox, Inc. (“Dropbox”) security officials. Dropbox is an online file hosting service based in San Francisco, California, that offers “cloud” storage. Dropbox can be utilized to share photographs or documents with other designated subscribers to the user’s account. Dropbox indicated to NCMEC that suspected child pornography had been uploaded to Dropbox by a computer assigned Internet Protocol (“IP”) address '108.36.138.114' on March 17, 2014, at 18:48:00 UTC by an individual using the email address myfuckingdropbox2@yahoo.com. Dropbox provided 9 files to

NCMEC, which contained videos. Without viewing any of the images, NCMEC referred the “cybertip” to the Delaware County Criminal Investigation Division. After an analyst with the Delaware County Criminal Investigation Division reviewed the images and determined them to be child pornography, the tip was referred to Berks County Detectives where it was assigned to Detective Trevor S. Ritter (“Detective Ritter”).

Detective Ritter has been a Detective in Berks County since November 2000 and an Federal Bureau of Investigation (“FBI”) Task Force Officer since January 2015. He works primarily on cases involving internet crimes against children. He has been deputized to investigate violations of federal law, and has the authority to execute warrants issued under the authority of the United States. Prior to joining the Task Force, Detective Ritter was involved in investigations with various state and local law enforcement agencies, as well as the Drug Enforcement Administration (“DEA”), the FBI, the Bureau of Alcohol Tobacco and Firearms (“ATF”), and the United States Marshal’s Service. He attended trainings and seminars from various state and local law enforcement agencies, as well as training programs administered through the DEA, FBI, and other agencies.

Detective Ritter reviewed the downloads and identified four digital videos of suspected child pornography. Detective Ritter searched the IP address associated with the downloads and determined the IP address to be owned or maintained by Verizon Online, LLC (“Verizon”). On April 25, 2014, Detective Ritter obtained a search warrant from a magisterial district judge with the Commonwealth of Pennsylvania, County of Berks to obtain the utilization address, ownership, billing information, and service records associated with the IP address from Verizon. The warrant return from Verizon revealed that the IP address was associated with defendant’s home address.

On May 15, 2014, Detective Ritter obtained from a different magisterial district

judge with the Commonwealth of Pennsylvania, County of Berks a warrant to search for and seize, *inter alia*, all computer hardware, software, and digital media devices from defendant's home. According to Detective Ritter's probable-cause affidavit, the purpose of the warrant was to "further the investigation into the uploading/file sharing of child pornography in violation of the Pennsylvania Crimes Code, Title 18, section (6312) Sexual Abuse of Children (Child Pornography)." (ECF 39, Ex. B.) Detective Ritter further averred that he "*reviewed the images of child pornography uploaded to 'Dropbox' through (I.P.) address '108.36.138.114' on 17 March 2014. I observed multiple digital videos of juveniles, predominately male juveniles, participating in sexual activity. I determined/confirmed that the images are images of child pornography.*" *Id.* (emphasis added.)

Detective Ritter and other officers executed the search warrant. Subsequent forensic searches of six computers seized from defendant's home revealed over 300 digital images of suspected alleged child pornography. The majority of these images depicted unknown nude female infants and children, between the ages of one and five years old, being penetrated vaginally by an adult male penis. In addition, a search of one of the computers yielded hundreds of pictures of children which appeared to have been taken in defendant's home, including some digital photographs of two small children in diapers tied by the wrists and ankles with black fabric straps in "bondage type fashion" to a wooden dining room chair and to the railing of an oversized crib. Therefore, on August 13, 2014, Detective Ritter obtained from yet another magisterial district judge with the Commonwealth of Pennsylvania, County of Berks a second warrant to search defendant's home for evidence relating to those photos and the children they depicted. In his probable-cause affidavit, Detective Ritter again averred that he "reviewed the images of child pornography uploaded to 'Dropbox' through (I.P.) address '108.36.138.114' on 17

March 2014. I observed multiple digital videos of juveniles, predominately male juveniles, participating in sexual activity. I determined/confirmed that the images are images of child pornography.” (ECF 39, Ex. C.) Detective Ritter also obtained a warrant for defendant’s arrest.

Detective Ritter and his fellow officers also executed this search warrant. During the execution of this warrant, agents seized a photograph of the two small children from a wall in the dining room, a black and blue checkered blanket that had appeared as a background in some of the digital images of one of the small children, a wooden dining room chair, a diaper bag found in defendant’s computer room closet that contained the black straps used to bind the two children to the wooden dining room chair and the crib railing, two spindles from an adult-sized crib, one homemade electric shock device from under defendant’s bed, and a notebook with crib design schematics from under the kitchen table. Approximately 15 photographs of defendant engaged in diaper play were seized from the closet in the computer room. Various cameras and DVDs and a folder containing medical records and patient information of children from a local pediatrician’s office were also seized. Defendant was arrested at the scene.

The case was subsequently adopted by federal authorities and defendant was indicted by a grand jury on July 21, 2016. On August 1, 2016, Detective Ritter, in his capacity as an FBI Task Force Officer, sought two federal search warrants to search defendant’s Dropbox account and Motorola Tracfone mobile device. These federal warrants relied on the evidence found during the previous searches of defendant’s home and the investigations that followed. Unlike the previous affidavits that Detective Ritter swore to in state court, these affidavits were extremely detailed. They noted that the search was related to a violation of a federal statute, 18 U.S.C. §§ 2251 and 2252 production, transportation and possession of child pornography. The affidavit provided

detailed descriptions of the four videos. Specifically, Detective Ritter averred:

- a. The first video is seventeen minutes and forty-six seconds (00:17:46) in length, is entitled "8," and depicts two male children, six (6) to eight (8) years of age, masturbating as they lie next to each other on a bed.
- b. The second video is forty-seven seconds (00:00:47) in length, is entitled "2013-12-31 17.44.10," and depicts two male children, eight (8) to twelve (12) years of age, performing oral sex upon each other. Both children are nude in the video and their erect penises are visible as the oral sex is being performed.
- c. The third video is fourteen minutes and twenty-seven seconds (00:14:27) in length, is entitled "Two of us = P," and depicts two male children, eight (8) to fourteen (14) years of age. The older boy's erect penis is exposed as the two of them sit on a sofa. The younger boy masturbates the older boy and then performs oral sex upon the older boy's erect penis.
- d. The fourth video is nine minutes and fifty seconds (00:09:50) in length, is entitled "!!2010[MB] Dad and best friend fuck 10yoson," and depicts a nude juvenile male, approximately ten (10) years of age, performing oral sex upon the erect penises of two nude, adult males. The child then performs anal sex upon one of the adult male individuals. The adult male individuals then perform anal sex upon the child.

(ECF 39, Ex. D, pp. 304-305; Exhibit E, p. 332.)

As the result of his search of the Dropbox account, Detective Ritter discovered approximately 95 videos that appear to be child pornography, including the videos that Dropbox had submitted to NCMEC. Detective Ritter's search of defendant's Motorola mobile device did not produce any evidence of child pornography.

Defendant argues that the search of his Verizon account and the initial search of his home were conducted without a sufficient probable cause showing being made to the magistrates. Specifically, defendant argues that Detective Ritter failed to append to either probable-cause affidavit a copy of the images he viewed. Defendant further argues that the affidavits averred to by Detective Ritter in support of the first two warrants failed to

adequately describe the images on the videos so that either magistrate could exercise his detached and neutral judgment as to whether any of these videos met the definition of child pornography. As a result, defendant moves to suppress what he claims to be all derivative fruits of the unlawful searches of the Verizon account, the computers and media devices seized from his home, any other evidence seized from his home, and the evidence obtained from his Dropbox account.

The Court need not examine the warrant for defendant's Verizon account because "[f]ederal courts have uniformly held that 'subscriber information provided to an internet provider is not protected by the Fourth Amendment's privacy expectation' because it is voluntarily conveyed to third parties." *United States v. Perrine*, 518 F.3d 1196, 1204 (10th Cir.2008); see also *United States v. Wheelock*, 772 F. 3d 825, 828-29 (8th Cir. 2014); *United States v. Bynum*, 604 F.3d 161, 164 (4th Cir.2010); *Guest v. Leis*, 255 F.3d 325, 336 (6th Cir.2001). The Third Circuit has cited these cases and others in support of its holding that an individual also does not have a reasonable expectation of privacy in his internet protocol address. *United States v. Christie*, 624 F. 3d 558 (3d Cir. 2010). These cases based their holdings in large part on what has come to be known as the "third party disclosure doctrine." That doctrine states that "[t]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." *United States v. Miller*, 425 U.S. 435, 443 (1976). See also *Smith v. Maryland*, 442 U.S. 735, 744 (1979).

Defendant acknowledges the above-cited precedent, but argues that given the technological advances and corresponding shift in society's expectation of privacy that have occurred in the last 40 years since *Miller* was decided, the third party disclosure

doctrine has become outdated and needs to be revisited. As one example of legal support for this shift, defendant directs the Court's attention to the language in the concurring opinion of Justice Sotomayor in *United States v. Jones*, 132 S.Ct. 945, 957 (2012) that "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."

While the defendant's arguments may ultimately prove to be correct, it is the responsibility of a Court of Appeals or the Supreme Court to revise the third-party disclosure doctrine, not this Court. At present, the third party disclosure doctrine remains good law and all the Courts that have applied it to internet subscriber information have held that an individual does not have reasonable expectation of privacy in such information. Since defendant did not have a reasonable expectation of privacy in his internet subscriber information, a warrant was not necessary to obtain this information.

The Court now turns to the first search warrant of defendant's home in which the defendant of course had a reasonable expectation of privacy. In deciding whether to issue a search warrant, the task of a magisterial district judge is to make a "practical, common-sense decision whether, given all the circumstances set forth in the affidavit ... there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). See also *United States v. Shields*, 458 F.3d 269, 277 (3d Cir. 2006). A magistrate's "determination of probable cause should be paid great deference by reviewing courts." *Gates*, 462 U.S. at 236, (quoting *Spinelli v. United States*, 393 U.S. 410, 419). This Court's duty on review "is simply to ensure that the magistrate had a 'substantial basis for ... [concluding]' that probable cause existed." *Id.* at 238–39.

With respect to “a warrant application to search for child pornography, a magistrate must be able to independently evaluate whether the contents of the alleged images meet the legal definition of child pornography.” *United States v. Pavulak*, 700 F.3d 651, 661 (3d Cir. 2012). The evaluation by a magisterial district judge is necessary since “identifying images as child pornography will almost always involve, to some degree, a subjective and conclusory determination on the part of the viewer” which must be made by the magistrate, not the affiant. *Id.* That evaluation can occur “in one of three ways: (1) the magistrate can personally view the images; (2) the search-warrant affidavit can provide a sufficiently detailed description of the images; or (3) the search-warrant application can provide some other facts that tie the images’ contents to child pornography.” *Id.* (internal quotation marks and citation omitted).

In *Pavulak*, the Third Circuit held that the affiant’s label of images in a probable-cause affidavit as “child pornography,” without more, did 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.” *Pavulak*, 700 F. 3d at 661. (citation omitted.)The Third Circuit noted that the affidavit did not describe whether the minors depicted in the images were clothed or nude and whether they were engaged in any “prohibited sexual act” as defined by Delaware law. *Id.* The Court referred to language it previously used in *United States v. Miknevich*, 638 F.3d 178 (3d Cir. 2011) that “that kind of ‘insufficiently detailed or conclusory description’ of the images is not enough.” *Id.* (quoting *Miknevich*, 683 F. 3d at 183).

In *Miknevich*, the affiant averred that “[t]he movie is described as children, under the age of eighteen years old engaged in sexual acts and/or poses.” The Court of Appeals criticized this language because it “provided no factual details regarding the substance of the images in question.” *Miknevich*, 638 F. 3d at 183. Nevertheless, the Court of Appeals

found that the affidavit was saved since it also “identified the contents of the computer file as child pornography through a sexually explicit and highly descriptive file name referring to the ages of the children and implying that they were masturbating.” *Pavulak*, 700 F. 3d 662 citing *Miknevich*, 638 F.3d at 184. According to the Court of Appeals, the file name was “explicit and detailed enough so as to permit a reasonable inference of what the file is likely to depict.” *Id.*

Here, the probable-cause affidavit in support of the warrant for the initial search of defendant’s home did not provide the magisterial district judge with a “sufficiently detailed” description of the images for the magisterial district judge to evaluate whether they contained child pornography as defined by Pennsylvania law. In his probable-cause affidavit, Detective Ritter averred that he “observed multiple digital videos of juveniles, predominately male juveniles, participating in sexual activity. I determined/confirmed that the images are images of child pornography.” As the affiant in *Pavulak* failed to do, Detective Ritter does not aver that these male juveniles were nude. Most significantly, as the affiant in *Pavulak* failed to do, Detective Ritter does not aver that the male juveniles were engaged in *prohibited* sexual activity as defined by 18 Pa. C.S. 6312. That statute defines a prohibited sexual act as “[s]exual intercourse as defined in section 3101 (relating to definitions), masturbation, sadism, masochism, bestiality, fellatio, cunnilingus, lewd exhibition of the genitals or nudity if such nudity is depicted for the purpose of sexual gratification of any person who might view such depiction.” 18 U.S.C. 6312(g).

Detective Ritter’s averment that the juveniles were participating in “sexual activity” does not provide a magisterial district judge with enough information to independently determine if the juveniles were participating in *prohibited* sexual activity as defined by Pennsylvania law. As suggested by defendant, the images might have depicted two brothers hugging or kissing. This activity, while perhaps sexual in nature, nevertheless

would not amount to *prohibited* sexual activity under the statute. The probable cause-affidavit also does not contain a highly descriptive file name similar to the one the Third Circuit ruled saved the warrant in *Miknevich*. Nor does the affidavit contain any other information that would corroborate that the images contained prohibited sexual activity under Pennsylvania law. The Court therefore finds that the first warrant to search defendant's home clearly lacked probable cause under the tenets of *Miknevich* and *Pavulak*.

The government argues that even if the Fourth Amendment was violated, the ill-gotten evidence taken from defendant's home pursuant to the first warrant to search defendant's home should not be suppressed based on the "good-faith" exception to the exclusionary rule.

Under *United States v. Leon*, [468 U.S. 897](#), 922 (1984), the exclusionary rule is a "deterrent sanction" created by the Supreme Court to "bar[] the prosecution from introducing evidence obtained by way of a Fourth Amendment violation." *Davis v. United States*, 564 U.S. 229, 231-32 (2011). The Supreme Court has cautioned that "exclusion [should be] our last resort, not our first impulse[.]" *Herring v. United States*, [555 U.S. 135](#), 140 (2009) (citation omitted.). The exclusionary rule deters "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Id.* at 144. "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Id.* When the police act with an "objectively reasonable good-faith belief" in the legality of their conduct, or when their conduct "involves only simple, isolated negligence, the deterrence rationale loses much of its force, and exclusion cannot pay its way." *Id.* (citations and internal quotation marks omitted). Accordingly, discerning "whether the good faith exception applies

requires courts to answer the ‘objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal in light of all of the circumstances.’” *United States v. Katzin*, 769 F.3d 163, 171 (3d Cir. 2014) (en banc) (quoting *Herring*, 555 U.S. at 145); see also *Leon*, 468 U.S. at 922 n.23.

Typically, issuance of the search warrant itself presents the existence of good faith for the police officer executing the search. *Id.* at 922. Yet there are situations in which, although a neutral magistrate has found probable cause to search, a lay officer executing the warrant could not reasonably believe that the magistrate was correct *United States v. Hodge*, 246 F. 3d at 308. Those four rare circumstances occur when: (1) the magistrate issued the warrant in reliance on a deliberately or recklessly false affidavit; (2) the magistrate abandoned his judicial role and failed to perform his neutral and detached function; (3) the warrant was based on an affidavit “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable”; or (4) the warrant was so facially deficient that it failed to particularize the place to be searched or the things to be seized. *Id.* at 307-308 (internal quotation marks and citations omitted).

Here, defendant claims that the good faith exception is not available because Detective Ritter’s probable-cause affidavit was “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.” The threshold for establishing this particular rare circumstance is a high one. *Messerschmidt v. Millender*, 565 U.S. 535, 547 (2012).

Defendant argues that, because *Pavulak*’s requirements were clear when Detective Ritter drafted his affidavits for the search of defendant’s home in 2014, his omission of the images or a detailed description constituted disregard for, or ignorance of, clearly established Third Circuit law.

Indeed, the Court is somewhat puzzled by the fact that the affidavits Detective Ritter drafted in support of the federal warrants in 2016 fully complied with *Miknevich* and *Pavulak*. Indeed, defendant admits as much. It appears that Detective Ritter either was not aware of the Third Circuit's *Pavulak* decision at the time he drafted the state probable-cause affidavits in 2014 or was under the mistaken belief it did not apply to warrants in state cases. Nevertheless, defendant does not argue, and there is no evidence that, by omitting a detailed description of the images in the affidavit, Detective Ritter intended to mislead the magistrate or acted in a deliberate, reckless or grossly negligent manner. In fact, the record reveals that Detective Ritter acted in a careful, conscientious manner, having sought four different search warrants for each step of his investigation from four different magistrates. As discussed above, the first warrant was not even necessary since defendant did not have a reasonable expectation of privacy in his internet subscriber information. Therefore, the fact that he even sought to obtain the first warrant could be considered surplusage.

In addition, although the affidavit for the second warrant did not follow Third Circuit precedent to a tee, it did contain more detail than the affidavit that was the subject of the *Pavulak* decision in that it averred the juveniles were engaged in sexual activity as opposed to merely averring that the images represented, in the affiant's view, child pornography. Detective Ritter also averred that the purpose of the warrant was to "further the investigation into the uploading/file sharing of child pornography in violation of the Pennsylvania Crimes Code, Title 18, section (6312) Sexual Abuse of Children (Child Pornography)." (ECF 39, Ex. B.) A reasonably well-trained judge or officer could understand that Detective Ritter's language that he "observed multiple digital videos of juveniles, predominately male juveniles, participating in sexual activity" referred to the specific sexual activity prohibited by 18 U.S.C. § 6312.

In addition, any defect here would not have been obvious from the face of the warrant for the initial search of defendant's home. Rather, any arguable defect would have become apparent only upon a close parsing of the language contained in the probable-cause affidavit as well as a close parsing of the Third Circuit's decisions in *Miknevich* and *Pavulak*. It is one thing for a jurist, well-trained in the law, to decide whether the exact words in a probable-cause affidavit comport with all the nuances of the *Miknevich* and *Pavulak* decisions. It is quite another matter to expect a reasonable well-trained detective, with no legal training, to discern the same nuances. See *United States v. Taxacher*, 902 F.2d 867, 872 (11th Cir. 1990). (“[B]ecause a reasonable jurist has more legal training than a reasonably well-trained officer, what would be reasonable for a well-trained officer is not necessarily the same as what would be reasonable for a jurist.”)

After a careful review of all the circumstances, the Court concludes that Detective Ritter acted in objective good faith and that the warrant was not so lacking in indicia of probable cause as to render official belief in the existence of probable cause entirely unreasonable. In reaching this result, the Court notes that the Supreme Court has stated that the “costs” associated with suppression are “substantial,” *Leon*, 468 U.S. at 907, given that suppression “often excludes ‘reliable, trustworthy evidence of a defendant’s guilt, ‘suppress[es] the truth and set[s] [a] criminal loose in the community without punishment.’” *Katzin*, 769 F. 3d at 186 (quoting *Davis*, 564 U.S. at 237). There is no question that the government has substantial evidence against the defendant and that without this evidence, the most serious, if not all, the charges would have to be dismissed.

In short, the Court finds that Detective Ritter’s actions were not “sufficiently deliberate that exclusion can meaningfully deter [them], and sufficiently culpable that such deterrence is worth the price paid by the justice system.” *Herring*, 555 U.S. at 144.

Defendant has failed to satisfy the “high threshold” of showing that the first warrant for the search of his home “was based on an affidavit so lacking in probable cause as to render official belief in its existence entirely unreasonable.” *Hodge*, 246 F 3d at 307-308.

Detective Ritter and the other officers reasonable relied on this warrant in good faith.

Since the Court has ruled that the second warrant (initial warrant for defendant’s home) is saved by the good faith exception, the Court finds that the remaining warrants which relied in large part on the items seized as a result of the initial search of defendant’s home contained sufficient probable cause and the defendant’s motion to suppress is denied.

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SEAN FAGER	:	

ORDER

AND NOW, this 1st day of March, 2018, upon consideration of the defendant's motion to suppress and all responses and replies thereto, it is hereby **ORDERED** that the motion [Doc. 39] is **DENIED**.

BY THE COURT:

s/s JEFFREY L. SCHMEHL, J.
JEFFREY L. SCHMEHL, J.