

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

**UNITED STATES**

**v.**

**DAVID MILLINER**

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**CRIMINAL ACTION**

**NO. 18-295**

**MEMORANDUM**

**Tucker, J.**

**April 29, 2019**

Before the Court is Defendant’s Motion to Suppress Physical Evidence and Post-Incident Statements (“Suppression Motion”) (ECF No. 32), the Government’s Response to Defendant’s Motion to Suppress Physical Evidence and Post-Indictment Statements (ECF No. 38). Upon consideration of the foregoing, the hearing before the Court on April 22, 2019, and as discussed in detail below, Defendant’s Suppression Motion is DENIED.

**I. PROCEDURAL HISTORY**

On April 6, 2018, the Government charged Defendant David Milliner, by criminal complaint, with one count of manufacturing child pornography, in violation of 18 U.S.C. § 2251, and one count of possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B). Approximately three and a half months later, a federal grand jury returned a sixteen count indictment charging Defendant with: four counts of using an interstate commerce facility to entice a minor to engage in sexual conduct, in violation of 18 U.S.C. § 2422(b), six counts of manufacturing and attempting to manufacture child pornography, in violation of 18 U.S.C. § 2251(a), one count of transfer of obscene material to a minor, in violation of 18 U.S.C. § 1470, four counts of receipt and attempted receipt of child pornography, in violation of 18 U.S.C. § 2252(a)(2), and one count of possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B).

## **II. FACTUAL BACKGROUND**

### **A. Wayland, MI Police Department Investigate Sexually Explicit Images Of Minors Contained On School-issued Electronic Device**

On December 5, 2017, the Wayland, MI Police Department (“Wayland Police”) received notice from a local middle school that school officials had uncovered sexually explicit images of minors contained on a school-issued iPad. Def.’s Suppression Mot. 2, ECF No. 32; Gov’t Resp. 2, ECF No. 38. The iPad had been issued to a twelve-year-old student (“Minor #1”). Further review of the iPad and its contents revealed the presence of various unauthorized applications and the presence of sexually explicit images of children between ages eleven and sixteen. Def.’s Suppression Mot. Ex. A, ECF No. 32-1.

Wayland Police interviewed Minor #1’s mother. Minor #1’s mother explained that the child told her that he had been communicating with an Instagram user known as “x090210” who claimed to be a “Prince” named “Daniel David De’Rothschild” living in Beverly Hills, CA. Def.’s Suppression Mot. 4, ECF No. 32. Minor #1’s mother then provided consent to search Minor #1’s iPod, which was synced to Minor #1’s school-issued iPad. Gov’t Resp. 2, ECF No. 38. On the iPod, Wayland Police discovered more sexually explicit images of Minor #1 and several deleted screenshots of text message conversations between Minor #1 and Instagram user x090210. Gov’t Resp. 2, ECF No. 38.

Based on this information, Wayland Police obtained a search warrant for subscriber information associated with Instagram user x090210, which revealed still more sexually explicit text conversations between Minor #1 and Instagram user x090210, as well as Instagram user x090210’s IP address—108.36.174.243. Def.’s Suppression Mot. Ex. A, ECF No. 32-1; Gov’t Resp. 2, ECF No. 38. Wayland Police determined that this IP address was maintained by

Verizon, an internet service provider, to whom Wayland Police issued an administrative subpoena for information associated with this IP address. Gov't Resp. 2, ECF No. 38.

Verizon responded to Wayland Police's administrative subpoena by turning over certain customer information. *See* Gov't Resp. Ex. A, ECF No. 38-1. Verizon informed Wayland Police that the IP address belonged to a customer named "DR Milliner" who had created the account on "August 10, 2015." Gov't Resp. Ex. A, ECF No. 38-1. DR Milliner's account address was 3128 N. 32 St., Philadelphia, PA 19132. DR Milliner's "STN" telephone number was "215-227-0127" and email address was "daniel.david.2625@gmail.com." Finally, DR Milliner's "UserName" was listed as "daniel-derothschild." Gov't Resp. Ex. A, ECF No. 38-1 (emphasis added).

Having obtained this additional identifying information from Verizon, Wayland Police used several databases including the TLO database,<sup>1</sup> N-DEx database,<sup>2</sup> SRMS database,<sup>3</sup> LEIN database,<sup>4</sup> and NCIC database<sup>5</sup> to determine the identity of any person who may have been associated with the 3128 N. 32 St., Philadelphia, PA 19132 address. Gov't Resp. 10, ECF No. 38. This research revealed several names related to the property such as: "David Lee Milliner III, Dr. David Lee Milliner, David L. Milliner, as well as Daniel Derothschild, and Daniel D. Derothschild." Gov't Resp. 10, ECF No. 38. Wayland Police also found that the telephone

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<sup>1</sup> TLO is a database owned and operated by TransUnion that aggregates data from public and proprietary records repositories. Gov't Resp. 10, ECF No. 38.

<sup>2</sup> N-DEx is system operated by the Federal Bureau of Investigation. Gov't Resp. 10, ECF No. 38.

<sup>3</sup> SRMS or the "Statewide Records Management System" is a database used by Michigan state law enforcement to share information. Gov't Resp. 10, ECF No. 38.

<sup>4</sup> LEIN or the "Law Enforcement Information Network" is a Michigan state criminal history database. Gov't Resp. 10, ECF No. 38.

<sup>5</sup> NCIC or the "National Crime Information Center" is an electronic database used by law enforcement to apprehend fugitives, locate missing persons, recover stolen property. Gov't Resp. 10, ECF No. 38.

number provided by Verizon—215-227-0127—matched the telephone number associated with Defendant in all but one of the databases. Gov’t Resp. 10, ECF No. 38.

**B. Wayland Police Seek The Assistance Of Philadelphia Police; Issuance Of Search Warrant In Dispute**

Given Wayland Police’s determination that Instagram user x090210, with whom Minor #1 had engaged in explicit sexual exchanges, was associated with the name “DR Milliner” and “DR Milliner” was, in turn, associated with the Verizon username “daniel-derothschild” and a Philadelphia address, Wayland Police sought the assistance of the Philadelphia Police Department to apply for and execute a warrant to search for and seize any evidence of child sex abuse activity at the 3128 N. 32<sup>nd</sup> Street, Philadelphia, PA 19132 address. Gov’t Resp. 3, ECF No. 38. Wayland Police communicated information from their investigation to Philadelphia Police Detective Pete Marcellino who prepared an application for a search warrant and an affidavit of probable cause. Def.’s Suppression Mot. Ex. A, ECF No. 32-1.

**1. Affidavit Of Probable Cause And Search Warrant**

Detective Marcellino’s affidavit provided a summary of the investigation conducted by Wayland Police. Among other information, Detective Marcellino explained that:

- Wayland Police Detective Mark Riemersma investigated a criminal complaint from a local Michigan middle school safety officer who told Detective Riemersma that a school-issued iPad contained “evidence of solicitation”;
- Detective Riemersma personally viewed the iPad and its contents and “observed several images and videos of underage males between 11yrs and 16 yrs, nude and performing sexual acts”;
- Detective Riemersma interviewed Minor #1 and found that Minor #1 had “been in contact and exchanging images and videos with an adult male, via Instagram, with the user name of “x090210”;
- Detective Riemersma obtained a search warrant for the subscriber and account information connected with the Instagram user “x090210”;

- The IP address and subscriber information connected with Instagram user “x090210” “comes back to: David L Milliner, DOB: 5-10-1969, 3128 N. 32<sup>nd</sup> Street, Phila. PA 19132”;<sup>6</sup>
- Detective Riemersma found messages between Instagram user “x090210” and Minor #1 that were “sexually explicit and included requests for nude images from the child”;
- Minor #1 did, in fact, send sexually explicit images to Instagram user “x090210” who Minor #1 believed to be “a royal prince named Daniel Rothschild who lived in L[o]s Angeles”; and
- Detective Riemersma had determined that the name “Daniel Rothschild was an alias of David Milliner.”

Def.’s Suppression Mot. Ex. A, ECF No. 32-1. Upon consideration of the affidavit, a magistrate judge issued a search warrant to the Philadelphia Police to:

search the property located at **3128 N. 32<sup>nd</sup> Street Philadelphia, PA 19132** for the purpose of confiscating any and all computers and computer related material and storage devices such as thumb drives, internal and external hard drives, CD’s and DVD’s containing child pornography, cell phones, any printed or published images and videos depicting child pornography . . . . to view and transport all such seized computer items and materials to a qualified forensic facility for imaging and analysis by trained computer forensic examiners and experts, all to be searched for **violations of PA CC6312 Sexual Abuse of Children.**

Def.’s Suppression Mot. Ex. A, ECF No. 32-1.

**C. Execution Of Search Warrant; Seizure Of Electronic Devices**

On February 16, 2018, Philadelphia Police executed the search warrant. During the execution of the warrant, Philadelphia Police observed Defendant actively using an iPhone, which appeared to be connected through a live video feed to an eight- to ten-year-old boy who

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<sup>6</sup> Defendant contends, and the Government concedes, that this representation in Detective Marcellino’s affidavit is inaccurate in that the IP address and subscriber information provided by Verizon in response to the search warrant obtained by Wayland Police had not identified “David L Milliner, DOB 5-10-1969, 3128 N. 32<sup>nd</sup> Street, Phila. PA,” but instead, “DR Milliner, 3128 N. 32 St., Phila. PA 19132.” As the Court explains in Section IV, below, this inaccuracy does nothing to undermine the magistrate judge’s probable cause determination or the validity of the search warrant.

was smiling and waving while a female voice could be heard off camera. Def.'s Suppression Mot. 5, ECF No. 32. Defendant's iPhone also appeared to show Defendant's username, DANIEL@1131, next to the streaming video of the minor with additional chat messages. Gov't Resp. 6, ECF No. 38. When Philadelphia Police asked Defendant what he was watching on his iPhone, he stated that "he was watching a movie." Def.'s Suppression Mot. 5, ECF No. 32. Philadelphia Police informed Defendant that they had received information from police officers in Michigan that a person claiming to be a prince named DeRothschild had been in contact with a minor and exchanged sexually explicit images with the minor. Gov't Resp. 6, ECF No. 38. Defendant allegedly denied any knowledge of these incidents and denied having ever heard the name "DeRothschild." Gov't Resp. 6, ECF No. 38.

Defendant then purportedly provided Philadelphia Police with the passcode to access his iPhone. Gov't Resp. 6, ECF No. 38. When unlocked, Philadelphia Police determined that the iPhone was identified by the name "DeRothschild Communications Ltd." Gov't Resp. 6, ECF No. 38. Defendant maintained that he had no knowledge about any person named "DeRothschild," and further explained that he had purchased the iPhone from an unidentified drug addict. Gov't Resp. 6, ECF No. 38. Ultimately, Philadelphia Police seized the following from Defendant's residence: an Apple iPhone, an Apple Powerbook G-4, an RCA tablet, an I-View Notepad devices, and two Motorola cell phones. Def.'s Suppression Mot., Ex. A, ECF No. 32-1.

The next day, in accordance with the search warrant, and upon further forensic review of the contents of Defendant's iPhone, Philadelphia Police discovered additional images of child pornography on the iPhone. Def.'s Suppression Mot. 6, ECF No. 32. Philadelphia Police then referred the matter to the FBI.

**D. FBI Obtain Their Own Search Warrant; Defendant Arrested**

Relying on the information supplied by Wayland Police in connection with Philadelphia Police's first search warrant application, and the information gathered by Philadelphia Police in executing the first warrant, the FBI applied for and obtained its own search warrant to analyze the devices seized by Philadelphia Police from Defendant's residence. Gov't Resp. 5, ECF No. 38. The FBI executed the search warrant and discovered multiple screenshots from a digital application known as "Live.me" containing images of child pornography. Crim. Complaint 4, ECF No. 1. FBI then obtained an arrest warrant for Defendant.

On April 6, 2018, as law enforcement executed the arrest warrant, Defendant allegedly offered a new explanation for the ownership and origin of his iPhone. Defendant told law enforcement officers that the iPhone that he previously told police was purchased from an unidentified drug addict, in fact, belonged to his unidentified roommate who had lived with Defendant and who had failed to pay rent. For this reason, Defendant kept the iPhone as payment from the unidentified roommate. Gov't Resp. 6, ECF No. 38.

Following the return of a grand jury indictment against Defendant on charges relating to his alleged manufacture, transfer, and possession of child pornography, Defendant filed the present Suppression Motion seeking either an evidentiary hearing under *Franks* to challenge the validity of the underlying Philadelphia Police search warrant, or in the alternative, the complete exclusion of all physical evidence recovered from Defendant's iPhone and all statements Defendant made during the execution of the Philadelphia Police's and FBI's search/arrest warrants.

### **III. STANDARDS**

#### **A. Review Of Magistrate Judge’s Probable Cause Determination**

When a warrant is “issued and later challenged, a deferential standard of review is applied in determining whether the magistrate judge’s probable cause decision was erroneous.” *United States v. Ninety-Two Thousand Four Hundred Twenty-Two Dollars and Fifty-Seven Cents*, 307 F.3d 137, 146 (3d Cir. 2002) (citing *United States v. Hodge*, 246 F.3d 301, 305 (3d Cir. 2001)). The reviewing court’s sole “inquir[y] [is] whether there was a ‘substantial basis’ for finding probable cause.” *Id.* In addressing the question of whether the magistrate judge had such substantial basis, the Third Circuit has advised that “[t]he resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.” *Id.* (citing *United States v. Jones*, 994 F.2d 1051, 1057–58 (3d Cir. 1993)). Accordingly, where the issuing magistrate judge had a substantial basis on which to base a finding of probable cause, the magistrate judge’s determination must be left undisturbed. In reviewing the magistrate judge’s basis for a finding of probable cause, the district court is limited to those facts submitted to the magistrate judge. *See, e.g., United States v. Stearn*, 597 F.3d 540, 549 (3d Cir. 2010) (confining review of magistrate judge’s finding of probable cause to facts contained in the “four corners” of the affidavit of probable cause).

Probable cause is found when “viewing the totality of the circumstances, ‘there is a fair probability that . . . evidence of a crime will be found in a particular place.’” *Ninety-Two Thousand Four Hundred Twenty-Two Dollars and Fifty-Seven Cents*, 307 F.3d at 146 (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1982)). The probable cause determination “does not require absolute certainty that evidence of criminal activity will be found at a particular place, but rather that it is reasonable to assume that a search will uncover such evidence.” *Yusuf*, 461 F.3d 374,

390 (3d Cir. 2006) (citing *United States v. Ritter*, 416 F.3d 256, 263 (3d Cir. 2005)); *see also Agnellino v. New Jersey*, 493 F.2d 714, 727 (3d Cir. 1974) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925) (explaining that “probable cause is an elusive concept, it clearly is something less than ‘certainty’ or ‘evidence of guilt beyond a reasonable doubt.’”).

## **B. *Franks* Standard**

*Franks v. Delaware* provides that where a defendant shows that but for the knowing, intentional, or reckless inclusion of a false statement in warrant application, there could be no finding of probable cause to justify the government’s search, any evidence derived from the exercise of that warrant must be excluded from a criminal trial. *See Wilson v. Russo*, 212 F.3d 781, 787 (3d Cir. 2000). The defendant must prove two things to qualify for relief under *Franks*: “(1) that the affiant knowingly and deliberately, or with a reckless disregard for the truth, made false statements or omissions that created a falsehood in applying for a warrant; and (2) that such statements or omissions were material, or necessary, to the probable cause determination.” *Yusuf*, 461 F.3d at 383 (emphasis added).

A defendant seeking relief under *Franks*, including an evidentiary hearing, must first “make a substantial preliminary showing that the affidavit contained a false statement [or omission], which was made knowingly or with reckless disregard for the truth, which is material to the finding of probable cause.” *United States v. Livingston*, 445 F. App’x 550, 556 (3d Cir. 2011) (citing *Yusuf*, 461 F.3d at 383) (emphasis added). To make this preliminary showing, “the defendant cannot rest on mere conclusory allegations or a ‘mere desire to cross-examine,’ but rather must present an offer of proof contradicting the affidavit.” *Yusuf*, 461 F.3d at 383 n.8.

#### **IV. DISCUSSION**

Defendant argues that suppression is warranted in this case for three reasons: (A) the magistrate who issued the Philadelphia Police search warrant lacked a substantial basis upon which to find probable cause that evidence of a crime would be found in Defendant's residence; (B) the Philadelphia Police search warrant was an invalid general warrant in that it did not provide limitations on the search of any electronic devices seized at Defendant's residence; and (C) in obtaining its search warrant, Philadelphia Police knowingly or recklessly included false material facts in its affidavit of probable cause without which, the issuing magistrate could not have found probable cause. The Court rejects each of Defendant's arguments in turn below.

##### **A. Magistrate Judge Had A Substantial Basis To Find Probable Cause**

Defendant first argues that the magistrate who issued the Philadelphia Police search warrant could not have found probable cause to authorize a search of Defendant's residence based on the information contained in the police affidavit because the police had not proven that Defendant was associated with Instagram user x090210, nor had the police proven that Instagram user x090210 was an adult such that sexual exchanges with Minor #1 constituted a violation of 18 Pa. Cons. Stat. Ann. § 6312 (Sexual Abuse of Children).

In advancing these arguments, Defendant misapprehends the import and purpose of search warrants in two fundamental ways. First, contrary to Defendant's assertions, a valid search warrant need only be based on a finding of probable cause that a crime has been committed; a search warrant need not be based on evidence of a crime committed beyond a reasonable doubt. Second, a search warrant need not identify a specific individual target to be valid.

It is axiomatic that a finding of probable cause “does not require absolute certainty that evidence of criminal activity will be found at a particular place, but rather . . . it is reasonable to assume that a search will uncover such evidence.” *Yusuf*, 461 F.3d at 390 (citing *Ritter*, 416 F.3d 256, 263 (3d Cir. 2005)). Thus, Defendant’s arguments relating to law enforcement’s purported failure to “confirm[] the identity of Instagram user X090210 as Mr. Milliner” and failure to “confirm[] that Instagram user X090210 was in fact an adult” are rejected. Def.’s Suppression Mot. 4–5, ECF No. 32. Law enforcement was not required, for purposes of obtaining a search warrant on probable cause, to prove that Defendant was Instagram user x090210 or that Instagram user was an adult beyond a reasonable doubt.

The Supreme Court has explained that “search warrants are not directed at persons; they authorize the search of ‘place[s]’ and the seizure of ‘things,’ and as a constitutional matter they need not even name the person from whom the things will be seized.” *Zurcher v. Stanford Daily*, 436 U.S. 547, 555 (1978). Thus, contrary to Defendant’s assertion, Philadelphia Police need not have established that it was Defendant who participated in the alleged inappropriate and illegal conduct with Minor #1 in Michigan for the magistrate to have found probable cause to search his residence. Instead, Philadelphia Police need only have established, as they did in this case, that there was a “fair probability that evidence of a crime [would] be found in” Defendant’s residence. *United States v. Merz*, 396 F. App’x 838, 842 (3d Cir. 2010) (citing *Gates*, 462 U.S. at 238). Defendant’s complaint that law enforcement did not “confirm the actual identity of Instagram user X090210” before seeking a search warrant for Defendant’s residence, is, therefore, without a basis because there is no requirement that law enforcement target any specific person when seeking authority to search a place and seize evidence. Def.’s Suppression Mot. 4, ECF No. 32.

Having clarified these principles, the Court concludes that Detective Marcellino's affidavit provided a substantial basis for the magistrate's finding of probable cause. Among other facts establishing a fair probability that evidence of a crime would be found in Defendant's residence, was that user x090210—who had been engaged in the exchange of sexual images of children with Minor #1 in Michigan—was connected to an IP address for a device in Defendant's residence. Def.s' Suppression Mot., Ex A, ECF No. 32-1. By analytically connecting Instagram user x090210 to an IP address associated with Defendant's residence, Philadelphia Police supplied a substantial basis to find probable cause that evidence of a crime would be found therein. Various courts, including the Third Circuit, have concluded that use of such IP address information is a strong factor in establishing probable cause. *See, e.g., United States v. Vosburgh*, 602 F.3d 512, 527–28 (3d Cir. 2010) (citing *United States v. Perez*, 484 F.3d 735 (5th Cir. 2007)) (concluding that a warrant to search an apartment associated with an IP address that police had identified as having been used to attempt access to an internet link containing child pornography was valid).

While law enforcement was under no obligation to identify Defendant as a target or an adult for purposes of the search warrant, law enforcement nevertheless supplied more than enough information to show that it was likely Defendant, an adult individual, who had unlawfully exchanged sexually explicit images of children with Minor #1. Among other things, Detective Marcellino swore in his affidavit that “investigation by Det. Mark Riemersma showed that the name Daniel Rothschild was an alias of David Milliner.” Def.'s Suppression Mot. Ex. A, ECF No. 32-1. As discussed in detail in Section IV.C.1, below, this representation was factually supported by Wayland Police's investigation. Given that the allegation that “Daniel Rothschild” was an alias for Defendant, and Minor #1's belief that he was engaged in

communication with a prince named “DeRothschild” law enforcement supplied a strong analytical basis to conclude that Defendant was, indeed, the individual who had been exchanging sexually-explicit images and messages with Minor #1.

In short, the magistrate judge’s finding of probable cause was properly founded on a substantial basis.

**B. The Philadelphia Police Search Warrant Was Sufficiently Specific And Particularized**

Defendant next argues that even if there existed a substantial basis for the magistrate to find probable cause to search Defendant’s residence, the search warrant was nevertheless defective because it failed to meet the requirements of specificity and particularity under the Fourth Amendment. While Defendant concedes that the search warrant did, on its face, permit the search and seizure of electronic devices in Defendant’s residence, Defendant contends that the warrant’s failure to otherwise specify the precise electronic devices to be seized and searched transformed the warrant into an impermissible general warrant. The Court disagrees.

The Fourth Amendment provides that for a warrant to be valid, the warrant must be based on probable cause, and “particularly describe[e] the place to be searched, and the persons or things to be seized.” U.S. Const. amend. IV. The Constitution, thus, prohibits so-called “general warrants” because “they essentially authorize ‘a general, exploratory rummaging in a person’s belongings.’” *United States v. Carter*, 530 F. App’x 199, 204 (3d Cir. 2013) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971)). So long as a warrant based on probable cause “does not vest the executing officers with unbridled discretion to conduct an exploratory rummaging through appellees’ papers in search of criminal evidence,” then a warrant is not an invalid general warrant. *Id.* (citing *United States v. Christine*, 687 F.2d 749, 753 (3d Cir. 1982)).

In the context of child pornography cases, the Third Circuit has routinely concluded that search warrants allowing law enforcement to “search and seize any computers, computer peripherals, cameras, photos, e-mails, and chat messages at [a defendant’s] residence” are sufficiently particularized. *United States v. Himmelreich*, 265 F. App’x 100, 102 (3d Cir. 2008) (not precedential) (emphasis added); *see also United States v. Morgan*, 562 F. App’x 123 (3d Cir. 2014) (not precedential); *Perez*, 712 F. App’x at 138 (emphasis added) (affirming decision to deny motion to suppress even where a search warrant authorized FBI to “search and seiz[e] [] all computer equipment at [a] physical address,” and where the FBI, in fact, seized 130 computers and digital storage items from a residence in which five different people lived); *United States v. Karrer*, 460 F. App’x 157, 159 (3d Cir. 2012) (upholding similar warrant as the warrant at issue in this case).

In *Morgan*, the Third Circuit rejected the argument that Defendant advances in this case. 562 F. App’x at 127. The defendant in *Morgan* argued that the district court erred in failing to suppress evidence seized under a warrant because the warrant was impermissibly vague about the items to be seized and searched. *Id.* The warrant authorized “the seizure of ‘any and all computer equipment,’ including ‘[a]ll storage media capable of collecting, storing, maintaining, retrieving, concealing, transmitting, and backing up electronic data.’” *Id.* at 127 n.2. The warrant further provided that the “seizure of computer and computer related hardware relates to such computer related-times as being the instrumentalities of crime and also to allow for analysis/search for evidence of crime in an appropriate forensic setting.” *Id.*

In support of suppression, the defendant argued that the warrant was impermissibly vague because it failed “to state with sufficient particularity the things to be searched and seized.” *Id.* at 127. The Third Circuit rejected the defendant’s argument stating that “[t]o determine whether

[the defendant's] computers contained evidence of child pornography and related criminal sexual exploitation of children, law enforcement needed the authority to search the computers it found in the home." *Id.* at 128. The Third Circuit continued that such a conclusion was well-founded given the "distinctive difficulties for law enforcement" in the context of child pornography allegedly stored on digital devices. *Id.* The Third Circuit explained:

A user may name, rename, and store files in ways that allow the "files containing evidence of a crime [to] be intermingled with millions of innocuous files." Child pornography images and communications can be saved under file names and in formats that conceal the contents and make the file appear innocent. The contents cannot be identified until the file is opened. "By necessity, government efforts to locate particular files will require examining a great many other files to exclude the possibility that the sought-after data are concealed there." *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1176 (9th Cir. 2010) (en banc) (per curiam); see also *United States v. Stabile*, 633 F.3d 219, 237 (3d Cir. 2011) ("[I]t is clear that because criminals can—and often do—hide, mislabel, or manipulate files to conceal criminal activity, a broad, expansive search of the hard drive may be required.").

*Morgan*, 562 F. App'x at 128 (first citation omitted). While the Third Circuit also acknowledged that computers and other electronic devices can "store a vast amount of information, including private information unrelated to the targets or purposes of the search," the court nevertheless concluded that the warrant at issue was sufficiently particularized to satisfy the requirements of the Fourth Amendment. *Id.* The Third Circuit reasoned:

[T]he warrant in this case specified that the search was limited to particular items that could provide evidence of the crimes for which probable cause was established: child pornography images; sexual communications with and about a child; and materials related to sexual offenses against and involving children.

*Id.* at 129.

The Court concludes that the warrant challenged here was, as the challenged warrant in *Morgan* was, sufficiently particularized to satisfy the requirements of the Fourth Amendment.

Here, the warrant identified the place to be searched—Defendant’s residence—and the items to be seized—electronic devices containing evidence of child pornography. In this way, the warrant hews closely to the warrant upheld by the Third Circuit in *Morgan*. This warrant forbade Philadelphia Police from rummaging for evidence of any other crimes except those related to child abuse and pornography. *See* Def.’s Suppression Mot. Ex. A, ECF No. 32-1 (limiting the search of Defendant’s residence to electronic and physical media “containing child pornography” and “depicting child pornography” relating to “violations of PA CC6312 Sexual Abuse of Children.”).<sup>7</sup> Thus, the warrant properly limited the executing officers’ ability to engage in an impermissible exploratory rummaging. The warrant in this case was as specific and particularized as it could be under the circumstances especially in view of the challenges posed by electronic storage of information as the Third Circuit acknowledged in *Morgan*. 562 F. App’x at 128 (discussing the unique challenges in searching for child pornography contained in electronic formats).<sup>8</sup>

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<sup>7</sup> In concluding that the search warrant was sufficiently specific and particularized, the Court also rejects Defendant’s alternative argument that the search warrant did not authorize law enforcement to search the electronic devices seized from Defendant’s residence. The magistrate judge found, and the Court agrees, that there existed probable cause to authorize the search of these electronic devices for evidence of child pornography and child abuse in violation of 18 Pa. Cons. Stat. Ann. § 6312. *See* Section IV.A, above, for a discussion of the substantial basis for the magistrate judge’s finding of probable cause. The search of Defendant’s electronic devices was, therefore, pursuant to a valid search warrant, and the evidence obtained under the warrant need not be suppressed.

<sup>8</sup> Defendant relies on the Supreme Court decision in *Riley v. California* to support his argument. 573 U.S. 373, 394 (2014). Defendant’s reliance on *Riley*, however, is misplaced because *Riley* is entirely distinguishable from this case. In *Riley*, the Supreme Court merely held that “what police must do before searching a cell phone seized incident to an arrest is [] simple—get a warrant.” *Id.* at 403. The search of Defendant’s cell phone was not incident to an arrest, rather, the search was pursuant to a valid search warrant. Philadelphia Police’s search was, thus, consistent with the holding in *Riley*.

**C. Defendant Is Not Entitled To A *Franks* Hearing; The Philadelphia Affidavit Of Probable Cause Contains No Material Misrepresentations Or Omissions**

Finally, Defendant contends that he is entitled to a *Franks* hearing because he has made a substantial preliminary showing that Wayland Police and/or Philadelphia Police included, with “a reckless disregard for the truth,” material misrepresentations and omissions in their application for a search warrant for Defendant’s residence. Def.’s Suppression Mot. 14, ECF No. 32. Without these misrepresentations, Defendant reasons, the magistrate judge could not have found probable cause to issue the warrant. With the excision of these false statements from the affidavit, no probable cause exists and, therefore, all evidence obtained in connection with this search warrant must be suppressed.

Defendant has identified two main inaccuracies in Detective Marcellino’s affidavit and search warrant application. First, Defendant takes issue with the following statement from the affidavit:

Det. Mark Riemersma interviewed the 12yr old male student in possession of the I-Pad and found that he has been in contact and exchanging images and videos with an adult male, via Instagram, with the user name of “x090210.”

Def.’s Suppression Mot. Ex. A, ECF No. 32-1 (emphasis added). Defendant contends this statement is inaccurate because Wayland Police’s investigation in Michigan revealed that Minor #1 subjectively believed that he was in communication with a “prince named ‘Daniel David De’Rothschild’ who lived in Beverly Hills, California,” but Minor #1 did not know or suspect that Instagram user x090210 was an adult. Def.’s Suppression Mot. 4, ECF No. 32.

Defendant also takes issue with the following statement:

Det. Mark Riemersma obtained a search warrant for subscriber and account information related to “x090210” and found that the IP address and subscriber information comes back to:

**David L Milliner, DOB: 5-10-1969, 3128 N 32<sup>nd</sup> Street,  
Phila. PA 19132**

Def.'s Suppression Mot. Ex. A, ECF No. 32-1. Defendant contends this statement is inaccurate in two ways. First, this statement is inaccurate because the subscriber and account information provided by Verizon in response to Wayland Police's administrative subpoena did not specify that the subscriber associated with the Instagram user x090210 was named "David L. Milliner." Instead, the Verizon data showed that Instagram user x090210 was associated with a "DR Milliner." *Compare* Def.'s Suppression Mot. Ex. A, ECF No. 32-1 (representing that the subscriber associated with the Instagram user name x090210 and related IP address was "David L Milliner") *with* Gov't Resp. Ex. A, ECF No. 38-1 (showing the "Customer Name" associated with the Instagram user name x090210 and related IP address to be "DR Milliner"). Second, Defendant contends that this statement is inaccurate because the subscriber and account information provided by Verizon did not include any information about the subscriber's date of birth. *See generally* Def.'s Suppression Mot. Ex. A, ECF No. 32-1.

**1. Defendant Has Not Made A "Substantial Preliminary Showing"**

At the outset, while the Government concedes that Defendant is "partially correct" in that the two inaccuracies Defendant identified are, indeed, inaccuracies,<sup>9</sup> the Government argues, and the Court agrees, that Defendant has not made the requisite "substantial preliminary showing" to establish his entitlement to a *Franks* hearing. The information submitted by Defendant and the Government in briefing the issues presented undermines Defendant's argument that Wayland Police and/or Philadelphia Police knowingly or recklessly included false information to secure a search warrant from a neutral magistrate.

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<sup>9</sup> Gov't Resp. 7, ECF No. 38.

Discovery submitted by the Government to Defendant and filed with the Government's Response to the Suppression Motion as Exhibit B (under seal) shows that the two inaccurate statements identified by Defendant are technically inaccurate, but otherwise substantively true. For example, while it was inaccurate to state that Detective Riemersma's interview with Minor #1 alone established that Instagram user x090210 was an adult, Wayland Police's extensive investigative reports show that the representation that Instagram user x090210 was an adult was supported by Detective Riemersma's interview with Minor #1 when considered with his other investigative findings. *See generally* Gov't Resp. Ex. B (under seal) (showing Wayland Police conducted extensive research and found evidence to support assertion that Instagram user x090210 was an adult male).

Similarly, while it was inaccurate to state that the subscriber information returned by Verizon in response to Wayland Police's administrative subpoena alone connected Instagram user x090210 to "David L Milliner" with a date of birth of "5-10-1969," this statement was still substantively supported by Wayland Police's investigative findings. *See generally* Gov't Resp. Ex. B (under seal) (showing Wayland Police's research findings supporting the conclusion that "Daniel David De'Rothschild" was one of many aliases used by Defendant). Indeed, the information returned by Verizon itself provided a substantial basis, though not conclusively, for concluding that Daniel David De'Rothschild was one of Defendant's aliases. The Verizon information showed that Instagram user x090210—the purported prince "DeRothschild"—was associated with "DR Milliner" whose Verizon user name was "daniel-derothschild" and whose address was 3128 N. 32<sup>nd</sup> Street, Philadelphia, PA 19132. This 3128 N. 32<sup>nd</sup> Street address, Police investigations revealed, was also Defendant David Milliner's residence. *See generally* Def.'s Suppression Mot. Ex. A, ECF No. 32-1. It was not unreasonable, therefore, to conclude

that David Milliner was likely the same person as the DR Milliner/daniel-derothschild identified in the Verizon records.

In short, while Defendant has identified two inaccuracies in Detective Marcellino's affidavit, Defendant has fallen far short of making a substantial preliminary showing that the inaccuracies constitute knowingly false misrepresentations or misrepresentations resulting from a reckless disregard for the truth.

**2. The Inaccuracies In The Affidavit Were Not Material To The Finding Of Probable Cause**

While the Court concludes that Defendant has failed to meet his burden to justify a hearing under *Franks*, the Court further concludes that even if Defendant could show his entitlement to a hearing, Defendant's argument under *Franks* would fail on the merits because the admittedly inaccurate information in Philadelphia Police Detective Marcellino's warrant application was not material to the magistrate judge's finding of probable cause.

The Third Circuit has acknowledged two lines of analysis to determine whether a purported omission or false assertion is "material" to a finding of probable cause. If "faced with an omission, the court must remove the 'falsehood created by an omission by supplying the omitted information to the original affidavit'" and then determine whether probable cause would still exist upon the facts provided to the magistrate judge. *Yusuf*, 461 F. 3d at 384. By contrast, if "faced with an affirmative misrepresentation, the court is required to excise the false statement from the affidavit" and determine whether, without the false statement, probable cause would still exist. *Yusuf*, 461 F. 3d at 384. Here, Defendant argues that Philadelphia Police made an affirmative misrepresentation. Therefore, the Court must apply the second line of analysis in determining whether the misrepresentations are material.

The Court concludes that the inaccurate statements identified by Defendant in this case are not material because even when these two inaccuracies are excised from the affidavit, there still exists a substantial basis to support the magistrate judge's finding of probable cause and probable cause did exist. Removing the two inaccuracies—"David L" from "David L Milliner" and Defendant's "DOB: 5-10-1969"—and adding omitted information—"DR" to "DR Milliner"—leaves the following statement in the affidavit of probable cause:

Det. Mark Riemersma obtained a search warrant for subscriber and account information related to "x090210" and found that the IP address and subscriber information comes back to:

**DR Milliner, 3128 N. 32<sup>nd</sup> Street, Phila. PA 19132**

This modified statement, considered in tandem with the rest of Detective Marcellino's affidavit, is enough to support a finding of probable cause to search Defendant David Milliner's residence at 3128 N. 32<sup>nd</sup> Street, Philadelphia, PA 19132 for evidence of child sex abuse. *See* Section IV.A, above, for a detailed discussion of the substantial basis for the magistrate judge's finding of probable cause. Among other things, Detective Marcellino's affidavit, cleansed of these two inaccuracies, provided that Defendant was "an adult male" and that he went by the alias "Daniel Rothschild," which is substantially same name as Instagram user x090210 who represented to Minor #1 that he was a prince named "Daniel David De'Rothschild." As there exists probable cause even after excising the affidavit of the two inaccuracies identified by Defendant, the two inaccuracies are immaterial. Thus, even if Defendant had established a substantial preliminary showing to entitle Defendant to an evidentiary hearing, Defendant cannot establish that any inaccuracies in the affidavit are material as required under the second prong of the *Franks* standard.

#### **D. Good Faith Exception**

The Government submits that even if the search warrant in dispute were invalid, that law enforcement relied on the warrant in good faith and, therefore, suppression of any evidence is inappropriate.

The Supreme Court has carved out a good faith exception to the rule that evidence obtained pursuant to a warrant later deemed invalid must be excluded from use at trial. *See United States v. Leon*, 468 U.S. 867 (1984) (establishing good faith exception). The Third Circuit has explained this exception by stating that:

suppression of evidence “is inappropriate when an officer executes a search in objectively reasonable reliance on a warrant’s authority.” “The test for whether the good faith exception applies is ‘whether a reasonably well trained officer would have known that the search was illegal despite the magistrate [judge’s] authorization.’” The mere existence of a warrant typically suffices to prove that an officer conducted a search in good faith and justifies application of the good faith exception.

*United States v. Hodge*, 246 F.3d 301, 307–08 (3d Cir. 2001) (citations omitted). As the Court concludes that the warrant in this case is valid, however, the Court need not determine whether the good faith exception applies in the alternative.

#### **V. CONCLUSION**

For the foregoing reasons, Defendant’s Suppression Motion (ECF No. 32) is DENIED. An appropriate Order follows.

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

**UNITED STATES**

**v.**

**DAVID MILLINER**

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**CRIMINAL ACTION**

**NO. 18-295**

**ORDER**

**AND NOW**, this \_\_29th\_\_ day of April, 2019, upon consideration of Defendant’s Motion to Suppress Physical Evidence and Post-Incident Statements (“Suppression Motion”) (ECF No. 32), the Government’s Response to Defendant’s Motion to Suppress Physical Evidence and Post-Indictment Statements (ECF No. 38), and the hearing before the Court on April 22, 2019, **IT IS HEREBY ORDERED AND DECREED** that Defendant’s Suppression Motion is **DENIED**.<sup>1</sup>

**BY THE COURT:**

/s/ **Petrese B. Tucker**

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**Hon. Petrese B. Tucker, U.S.D.J.**

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<sup>1</sup> This Order accompanies the Court’s Memorandum Opinion dated April 29, 2019.