UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ANDREW BLAKE MOOREHEAD, Defendant-Appellant.
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
2019 U.S. App. LEXIS 639; 2019 FED App. 0004P (6th Cir.)
19a0004p.06No. 18-5216
December 6, 2018, Argued
January 9, 2019, Decided
January 9, 2019, Filed

Editorial Information: Prior History

{2019 U.S. App. LEXIS 1}Appeal from the United States District Court for the Western District of Tennessee at Jackson. No. 1:15-cr-10077-1-S. Thomas Anderson, District Judge.United States v. **Moorehead**, 2017 U.S. Dist. LEXIS 217003 (W.D. Tenn., June 6, 2017)

Counsel ARGUED: M. Dianne Smothers, FEDERAL PUBLIC DEFENDER, Memphis, Tennessee, for Appellant.
Debra L. Ireland, UNITED STATES ATTORNEY'S OFFICE, Memphis, Tennessee, for Appellee.
ON BRIEF: M. Dianne Smothers, FEDERAL PUBLIC DEFENDER, Memphis, Tennessee, for Appellant.
Debra L. Ireland, UNITED STATES ATTORNEY'S OFFICE, Memphis, Tennessee, for Appellee.

Judges: Before: COLE, Chief Judge; GRIFFIN and KETHLEDGE, Circuit Judges.

CASE SUMMARY Even if Network Investigative Technique warrant ran afoul of Fourth Amendment, good-faith exception to exclusionary rule precluded suppression because, given that any jurisdictional error was made by magistrate, coupled with fact that Fed. R. Crim. P. 41(b) was amended to authorize such warrants, benefits of deterrence could not outweigh costs.

OVERVIEW: HOLDINGS: [1]-On appeal from denial of a motion to suppress, the court determined that even if a Network Investigative Technique warrant ran afoul of the Fourth Amendment, the good-faith exception to the exclusionary rule applied to preclude suppression; [2]-The good-faith exception was not concerned with whether a valid warrant existed, but instead asked whether a reasonably well-trained officer would have known that a search was illegal; [3]-The good-faith exception to the exclusionary rule was not categorically inapplicable to warrants that were void ab initio because of a magistrate judge's jurisdictional error; [4]-The fact that any jurisdictional error in the case was made by the magistrate, coupled with the fact that Fed. R. Crim. P. 41(b) was amended to authorize warrants like the one at issue, meant that the benefits of deterrence could not outweigh the costs.

OUTCOME: Judgment affirmed.

LexisNexis Headnotes

Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review >

Motions to Suppress
Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Motions to Suppress
Criminal Law & Procedure > Appeals > Standards of Review

On appeal from the denial of a motion to suppress, the United States Court of Appeals for the Sixth Circuit reviews the district court's findings of fact for clear error and its conclusions of law de novo. The evidence is reviewed in the light most likely to support the district court's decision. A denial of a motion to suppress will be affirmed on appeal if the district court's conclusion can be justified for any reason.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Exclusionary Rule
Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Rule Application & Interpretation

Suppression is not an automatic consequence of a Fourth Amendment violation. Indeed, the Fourth Amendment says nothing about suppressing evidence obtained in violation of its command. Nonetheless, the U.S. Supreme Court created the exclusionary rule-a prudential doctrine which prohibits evidence obtained in violation of the Fourth Amendment from being used in a criminal proceeding against the victim of the illegal search and seizure. Exclusion of evidence under the rule is not a personal constitutional right nor is it calculated to redress the injury to the privacy of the victim of the search. Rather, the rule is designed to safeguard Fourth Amendment rights generally through its deterrent effect. As the U.S. Supreme Court has repeatedly held, the rule's sole purpose is to deter future Fourth Amendment violations. Thus, the fact that a Fourth Amendment violation occurred does not necessarily mean that the exclusionary rule applies.

Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Rule Application & Interpretation
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Exclusionary Rule
Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Exceptions > Good Faith

Courts must ask whether the deterrence benefits of suppression outweigh its heavy costs. Where suppression fails to yield appreciable deterrence, exclusion is clearly unwarranted. In the deterrence analysis, courts must consider the culpability of the law enforcement conduct at issue: The deterrence benefits of exclusion vary with the culpability of the law enforcement conduct at issue. When the police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. But when the police act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence, the deterrence rationale loses much of its force and exclusion cannot pay its way.

Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Exceptions > Good Faith
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Exclusionary Rule

The U.S. Supreme Court has created a "good-faith" exception to the exclusionary rule: the introduction of evidence obtained in violation of the Fourth Amendment is permitted in criminal trials when the evidence is obtained in the reasonable good-faith belief that a search or seizure was in accord with the Fourth Amendment. Following Leon, courts presented with a motion to suppress challenging a warrant must ask whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's decision. Leon delineated at least four instances in which a well-trained officer would have known a search was illegal, thus barring application of the good faith exception: [1] If the magistrate was

misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth; [2] where the issuing magistrate wholly abandoned her judicial role; [3] where a warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable and [4] where a warrant is so facially deficient-i.e., in failing to particularize the place to be searched or the things to be seized-that the executing officers cannot reasonably presume it to be valid.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Exclusionary Rule
Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Exceptions > Good Faith
Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Exceptions > Reasonable Reliance Upon Warrant

In most cases, when an officer obtained a search warrant from a judge or magistrate and acted within its scope, the good-faith exception applies.

Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Exceptions > Scope
Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Exceptions > Good Faith
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Exclusionary Rule

The good-faith exception is not concerned with whether a valid warrant exists, but instead asks whether a reasonably well-trained officer would have known that a search was illegal.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Exclusionary Rule
Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Exceptions > Good Faith
Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Exceptions > Scope

The good faith exception is not foreclosed when a warrant is issued outside of a state court judge's jurisdiction.

Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Exceptions > Good Faith
Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Exceptions > Scope
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Exclusionary Rule

The good-faith exception is not categorically inapplicable to warrants found to be void ab initio.

Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Exceptions > Scope
Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Exceptions > Good Faith
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Exclusionary Rule

The good-faith exception to the exclusionary rule is not categorically inapplicable to warrants that are void ab initio because of a magistrate judge's jurisdictional error.

Criminal Law & Procedure > Search & Seizure > Search Warrants > Scope
Criminal Law & Procedure > Search & Seizure > Search Warrants > Issuance by Neutral & Detached Magistrates

The amendment to Fed. R. Crim. P. 41(b), effective December 1, 2016, gives a magistrate judge with authority in any district where activities related to a crime may have occurred the authority to issue a warrant to use remote access to search electronic storage media and to seize or copy electronically stored information located within or outside that district if the district where the media or information is located has been concealed through technological means. Fed. R. Crim. P. 41(b)(6).

Opinion

Opinion by: COLE

Opinion

COLE, Chief Judge. This case is one of many that have arisen from the government's investigation into a child pornography website known as "Playpen." Andrew **Moorehead** was indicted for possession and receipt of child pornography based on his activity on the website. He moved to suppress the evidence against him, arguing that it was obtained as a result of an invalid warrant. The district court denied his motion, and **Moorehead** now appeals. Because the good-faith exception to the exclusionary rule applies, we affirm.

I.

In December 2014, a foreign law enforcement agency informed the FBI of its suspicion that an IP address**{2019 U.S. App. LEXIS 2}** in the United States was associated with Playpen. After accessing Playpen and verifying the nature of its contents, the FBI obtained and executed a search warrant at Centrilogic, a server hosting company in North Carolina that owned the IP address. The FBI seized the server that was assigned the relevant IP address and confirmed that it contained a copy of Playpen. The agents relocated a copy of the server to a government facility in Newington, Virginia. Because of a server misconfiguration, the government was able to identify the administrator of Playpen and gain administrative control of the website. For approximately two weeks, the FBI continued to operate Playpen from a government-controlled computer server at its facility in Newington.

Even with administrative control, however, the government was unable to identify the individuals who logged into Playpen because the website operates on the Onion Router ("Tor")-an anonymity network that masks computer users' IP addresses. Ordinarily, when the government seizes control of an illicit website, law enforcement officers can access the website's IP log-which records the IP addresses that have accessed the website-and use the log to locate**{2019 U.S. App. LEXIS 3}** and apprehend the website's users. But because Playpen was operating on Tor, the IP addresses of the users were hidden, and traditional investigative techniques were unavailable.

To combat the problem of user anonymity, the FBI turned to counter-technology called the Network Investigative Technique ("NIT"). The NIT works as follows:

> When a user logs into Playpen by entering a username and password, the NIT is downloaded on the user's computer.
>
> Once downloaded, the NIT obtains the following information from the user's computer: (1) the IP address; (2) a unique identifier that distinguishes the data from that of other computers; (3) the type of operating system; (4) information regarding whether the NIT has already been delivered to that computer; (5) the Host Name; (6) an active operating system username; and (7) a Media Access Control address.
>
> That information is then sent to a computer controlled by the government in Newington.

The government sought a warrant in the Eastern District of Virginia authorizing use of the NIT. Specifically, the warrant sought to "cause an activating computer - *wherever located* - to send

[identifying information] to a computer controlled by or known to{2019 U.S. App. LEXIS 4} the government." (Mot. Suppress, Ex. 3, R. 45-3, PageID 452) (emphasis added.) The affidavit in support of the warrant described the large number of Playpen users: "[O]ver 1,500 unique users visit[] the website daily and over 11,000 unique users visit[] the website over the course of a week." (*Id.* at PageID 441.) On February 20, 2015, a magistrate judge in the Eastern District of Virginia signed a warrant authorizing the government to deploy the NIT on "any user or administrator who logs into [Playpen] by entering a username and password" (the "NIT Warrant"). (*Id.* at PageID 421-422.)

Between March 1, 2015 and March 5, 2015, a user named "logidragon321" logged into Playpen for a little over three and a half hours. On March 2, 2015, while "logidragon321" was logged into Playpen, law enforcement personnel deployed the NIT and identified the IP address associated with the username. An administrative subpoena was sent to Jackson Energy Authority, the Internet Service Provider that operated the IP address. The subpoena response indicated that Rebecca **Moorehead** was paying for the Internet service at a residence in Tennessee, and an open source database revealed that she and Andrew **Moorehead**{2019 U.S. App. LEXIS 5} were the occupants of the residence.

On September 22, 2015, the government obtained a residential warrant for the **Moorehead** property, and officers executed the warrant on September 24, 2015, seizing Andrew Moorehead's computer equipment. During the execution of the search warrant, **Moorehead** admitted that he used the Internet to view child pornography and that "logidragon321" was his user name.

Moorehead was indicted by a federal grand jury for one count of possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B) and one count of receipt of child pornography in violation of 18 U.S.C. § 2252(a)(2). He filed a motion to suppress the evidence obtained from the government's use of the NIT, arguing that the NIT Warrant violated Federal Rule of Criminal Procedure 41 and 28 U.S.C. § 636(a) because it was executed outside of the magistrate judge's territorial jurisdiction. On June 6, 2017, the district court denied Moorehead's motion to suppress.

Subsequently, **Moorehead** pleaded guilty to receipt of child pornography and the government agreed to dismiss the possession charge. The plea agreement reserved Moorehead's right to appeal the denial of his motion to suppress.

On February 27, 2018, **Moorehead** was sentenced to 97 months' imprisonment. **Moorehead** filed a timely notice of appeal{2019 U.S. App. LEXIS 6} the following day.

II.

On appeal from the denial of a motion to suppress, "we review the district court's findings of fact for clear error and its conclusions of law de novo." *United States v. Buford*, 632 F.3d 264, 268 (6th Cir. 2011) (citation omitted). The evidence is reviewed "in the light most likely to support the district court's decision." *United States v. Powell*, 847 F.3d 760, 767 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 143, 199 L. Ed. 2d 36 (2017) (citations omitted). "[A] denial of a motion to suppress will be affirmed on appeal if the district court's conclusion can be justified for any reason." *United States v. Pasquarille*, 20 F.3d 682, 685 (6th Cir. 1994).

Moorehead first argues that the magistrate judge violated Federal Rule of Criminal Procedure 41(b) by signing the NIT Warrant. That rule gives a magistrate judge authority to issue warrants for people or property located within her district. In 2015, when the magistrate judge issued the NIT Warrant, Rule 41(b) provided four exceptions to the requirement that a search warrant be issued within a magistrate judge's district. Relevant here is the exception for "tracking devices": the government contends the NIT is analogous to a tracking device and thus argues that the warrant was authorized

at the time it was issued. *See* Fed. R. Crim. P. 41(b)(4). After the warrant was issued, Rule 41(b) was amended to add an additional exception to a magistrate judge's territorial limitations, one that indisputably authorizes warrants**{2019 U.S. App. LEXIS 7}** like the NIT Warrant. But **Moorehead** contends that no exceptions authorized the NIT Warrant in 2015, arguing (persuasively) that the NIT is not a tracking device. He thus contends that the magistrate judge violated Rule 41, rending the warrant invalid. He further contends that such violation is of constitutional magnitude and that the NIT Warrant is void ab initio. But we need not decide these issues. We conclude that even if the NIT Warrant runs afoul of the Fourth Amendment, the good-faith exception to the exclusionary rule applies to preclude suppression.

Suppression is not an automatic consequence of a Fourth Amendment violation. Indeed, the Fourth Amendment "says nothing about suppressing evidence obtained in violation of [its] command." *Davis v. United States*, 564 U.S. 229, 236, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (2011). Nonetheless, the Supreme Court created the exclusionary rule-a prudential doctrine which prohibits "evidence obtained in violation of the Fourth Amendment [from] be[ing] used in a criminal proceeding against the victim of the illegal search and seizure." *United States v. Calandra*, 414 U.S. 338, 347, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974). Exclusion of evidence under the rule "is not a personal constitutional right" nor is it "calculated to redress the injury to the privacy of the victim of the search." *Stone v. Powell*, 428 U.S. 465, 486, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976). Rather, the rule is "designed to safeguard Fourth Amendment rights generally through its deterrent effect."**{2019 U.S. App. LEXIS 8}** *Calandra*, 414 U.S. at 348. As the Supreme Court has "repeatedly held," the rule's "sole purpose . . . is to deter future Fourth Amendment violations." *Davis*, 564 U.S. at 236-37 (citing *Herring v. United States*, 555 U.S. 135, 141, 129 S. Ct. 695, 172 L. Ed. 2d 496, and n.2 (2009); *United States v. Leon*, 468 U.S. 897, 909, 921 n.22, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984); *Elkins v. United States*, 364 U.S. 206, 217, 80 S. Ct. 1437, 4 L. Ed. 2d 1669 (1960)). Thus, "[t]he fact that a Fourth Amendment violation occurred . . . does not necessarily mean that the exclusionary rule applies." *Herring*, 555 U.S. at 140.

Instead, courts must ask whether "the deterrence benefits of suppression . . . outweigh its heavy costs." *Davis*, 564 U.S. at 237; *see also Buford*, 632 F.3d at 270 ("[T]he Court has made clear that the benefits of deterrence must outweigh the costs in order to warrant the exclusion of evidence obtained in violation of the Fourth Amendment.") (citations omitted). "Where suppression fails to yield appreciable deterrence, exclusion is clearly unwarranted." *Davis*, 564 U.S. at 237 (citations and brackets omitted). In the deterrence analysis, courts must consider the culpability of the law enforcement conduct at issue:

> [T]he deterrence benefits of exclusion vary with the culpability of the law enforcement conduct at issue. When the police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. But when the police act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple,**{2019 U.S. App. LEXIS 9}** isolated negligence, the deterrence rationale loses much of its force and exclusion cannot pay its way. *Id.* at 238 (citations and brackets omitted).

The Supreme Court thus has created a "good-faith" exception to the exclusionary rule: the introduction of evidence obtained in violation of the Fourth Amendment is permitted in criminal trials when the evidence is "obtained in the reasonable good-faith belief that a search or seizure was in accord with the Fourth Amendment." *Leon*, 468 U.S. at 909 (citations omitted); *see also Herring*, 555 U.S. at 142 ("We (perhaps confusingly) call[] . . . objectively reasonable reliance 'good faith.'"). "Following *Leon*, courts presented with a motion to suppress [challenging a warrant] must ask whether a reasonably well trained officer would have known that the search was illegal despite the

magistrate's decision." *United States v. White*, 874 F.3d 490, 496 (6th Cir. 2017) (citations omitted). *Leon* delineated at least four instances in which a well-trained officer would have known a search was illegal, thus barring application of the goodfaith exception:

> [1] [I]f the magistrate . . . was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth . . . [2] where the issuing magistrate wholly abandoned [her] judicial**{2019 U.S. App. LEXIS 10}** role . . . [3] [where] a warrant [is] based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable . . . [and [4] where] a warrant [is] so facially deficient-i.e., in failing to particularize the place to be searched or the things to be seized-that the executing officers cannot reasonably presume it to be valid.468 U.S. at 923. In "most . . . cases," however, when an officer "obtained a search warrant from a judge or magistrate and acted within its scope," the good-faith exception applies. *Id.* at 920-21; *see also United States v. Fisher*, 745 F.3d 200, 203 (6th Cir. 2014) ("Exclusion has always been our *last resort*, not our first impulse:") (emphasis in original) (citations and brackets omitted).

Moorehead argues that his case is unlike most because, he says, the NIT Warrant was void from the beginning and therefore had no legal effect. He contends that the good-faith exception is categorically inapplicable to warrants that are void ab initio as a result of a jurisdictional defect. We disagree.

The good-faith exception is not concerned with whether a valid warrant exists, but instead asks whether a reasonably well-trained officer would have known that a search was illegal. *See White*, 874 F.3d at 496. The Supreme Court has**{2019 U.S. App. LEXIS 11}** made this clear time and time again, applying the good-faith exception in a variety of contexts, including in cases where a warrant did not exist at the time of a search. For instance, in *Arizona v. Evans*, the Court found that the good-faith exception applied when officers executed a search based on a warrant that was quashed seventeen days prior to the defendant's arrest. 514 U.S. 1, 4, 6, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995). Similarly, in *Herring*, the Supreme Court applied the exception when an officer executed a warrant that had previously been recalled. 555 U.S. at 137-39. We see no difference between a warrant that does not exist at the time of a defendant's arrest, like the warrants in *Evans* and *Herring*, and a warrant that is void ab initio because of a jurisdictional defect.

Indeed, we relied on *Herring* in holding that the good-faith exception applies when a state judge issues a warrant outside of her territorial jurisdiction. *See United States v. Master*, 614 F.3d 236, 243 (6th Cir. 2010). In *Master*, a state court judge in Franklin County, Tennessee issued a warrant for property that was actually located in Coffee County, Tennessee. *Id.* at 238. Under Tennessee law, judges do not have jurisdiction to authorize a warrant for a search in a different county. *Id.* at 239. After concluding that the warrant was void ab initio and**{2019 U.S. App. LEXIS 12}** violated the Fourth Amendment, we considered whether the good-faith exception was foreclosed in light of the determination that the judge had no authority to issue the warrant. *Id.* at 239-41. We found that it was not. *Id.* at 242-43. In doing so, we rejected a broad interpretation of our decision in *United States v. Scott*, 260 F.3d 512, 515 (6th Cir. 2001) where we held that the good-faith exception did not apply to a warrant signed by a person lacking the requisite legal authority. We explained:

> Th[e] language [in *Herring*] is contrary to a foundational assumption of the opinion in *Scott* that: "Subject to a few exceptions, the exclusionary rule requires the suppression of evidence obtained in violation of the Fourth Amendment." *Scott*, 260 F.3d at 514. Whereas *Scott* effectively required the government to qualify for an exception to the general rule of suppression, the Supreme Court has since emphasized that the decision to exclude evidence is divorced from whether a Fourth Amendment violation occurred. *See Herring*, [555 U.S. at 140]. The

> exclusionary rule's purpose is instead "to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." [*Id.* at 144]. Furthermore, the Court noted that the "exclusionary rule was crafted to curb police rather than judicial misconduct." *Id.* at [142]. Arguably, the issuing magistrate's**{2019 U.S. App. LEXIS 13}** lack of authority has no impact on police misconduct, if the officers mistakenly, but inadvertently, presented the warrant to an incorrect magistrate. *Master*, 614 F.3d at 242. We therefore found that *Herring* required us to conclude that the good faith exception is not foreclosed when a warrant is issued outside of a state court judge's jurisdiction. *Id.* at 243.

For the same reasons articulated in *Master*, we conclude that the good-faith exception is not categorically inapplicable to warrants found to be void ab initio. The difference between a state court judge acting without authority and a federal magistrate judge acting without authority is of little significance-in both instances, the individual who signed the warrant (arguably) had no power to do so. *Master*'s holding that the good-faith exception applies to one applies with equal force to the other. Accordingly, the good-faith exception to the exclusionary rule is not categorically inapplicable to warrants that are void ab initio because of a magistrate judge's jurisdictional error. Our decision is in accord with the seven other circuits to have decided this very issue, many of whom relied on our decision in *Master*. *See United States v. Levin*, 874 F.3d 316, 318 (1st Cir. 2017); *United States v. Werdene*, 883 F.3d 204, 216-17 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 260, 202 L. Ed. 2d 174 (2018); *United States v. McLamb*, 880 F.3d 685, 691 (4th Cir. 2018); *United States v. Kienast*, 907 F.3d 522, 527-28 (7th Cir. 2018); *United States v. Horton*, 863 F.3d 1041, 1051 (8th Cir. 2017), *cert. denied*, 138 S. Ct. 1440, 200 L. Ed. 2d 721 (2018); *United States v. Henderson*, 906 F.3d 1109, 1118 (9th Cir. 2018)**{2019 U.S. App. LEXIS 14}**; *United States v. Workman*, 863 F.3d 1313, 1317 (10th Cir. 2017).

Having determined that the good-faith exception applies to warrants that are void ab initio, only one question remains: Does the good-faith exception apply here so as to preclude suppression? We conclude that it does.

Moorehead challenges the district court's application of the *Herring* balancing test, arguing first that the district court incorrectly reasoned that the amendment to Rule 41(b) makes deterrence unnecessary. But the district court was correct. While it is certainly arguable that the magistrate judge did not have authority to sign the NIT Warrant under the version of Rule 41(b) in effect in 2015, it is undisputed that the 2016 amendment to Rule 41 specifically authorizes warrants like the NIT Warrant. The amendment, effective December 1, 2016, gives "a magistrate judge with authority in any district where activities related to a crime may have occurred" the authority to "issue a warrant to use remote access to search electronic storage media and to seize or copy electronically stored information located within or outside that district if . . . the district where the media or information is located has been concealed through technological means." Fed. R. Crim. P. 41(b)(6).

The parties do not dispute that the NIT Warrant**{2019 U.S. App. LEXIS 15}** is explicitly authorized by this new exception. **Moorehead** only argues that the NIT Warrant itself could still be used to prosecute hundreds, if not thousands, more defendants. But the *Herring* analysis requires us to look at whether suppression would "deter[] Fourth Amendment violations *in the future*." 555 U.S. at 141 (emphasis added). Because magistrate judges now have the authority to issue warrants like the NIT Warrant, suppressing evidence in this case would not result in appreciable deterrence in the future.

Moorehead next contends that no reasonable officer could have believed in good faith that the NIT Warrant was valid. He does not make any credible argument that any of the four circumstances enumerated in *Leon* apply. Instead, he argues that the officers must have known that the NIT Warrant was not authorized under Rule 41 at the time they obtained it because of a memorandum

addressed to the Committee on Rules of Practice and Procedure, dated May 5, 2014, that proposed the amendment that ultimately became Rule 41(b)(6). **Moorehead** argues that the proposal, which had its origins from a letter from the Acting Assistant Attorney General, shows that the government, including high-level officials, knew that the current version of Rule 41(b)**{2019 U.S. App. LEXIS 16}** did not authorize the NIT Warrant. He also points out that the officers obtained a general "Search and Seizure Warrant," rather than the specialized "Tracking Warrant," that they presumably would have sought if they believed that Rule 41(b)(4) authorized the warrant.

But reasonable jurists have come to different conclusions about whether the NIT Warrant was valid. *Compare United States v. Austin*, 230 F. Supp. 3d 828, 833 (M.D. Tenn. 2017) (finding the NIT Warrant does not violate Rule 41(b) because it is the equivalent of a "tracking device" and therefore falls under the ambit of Rule 41(b)(4)), *with United States v. Croghan*, 209 F. Supp. 3d 1080, 1089 (S.D. Iowa 2016) (concluding that the magistrate judge lacked authority to issue the NIT Warrant), *overruled on other grounds by Horton*, 863 F.3d at 1052. We cannot, therefore, expect officers to have known that this type of warrant was invalid at the time it was sought. *See Workman*, 863 F.3d at 1321 ("[I]f a violation took place, it has escaped the notice of eight federal judges who have held that the same warrant complied with federal law and the federal rules even though data was being extracted from computers outside the Eastern District of Virginia. . . . [E]xecuting agents could reasonably have made the same mistake and reasonably relied on the magistrate judge's decision to issue the warrant.").

Indeed, the magistrate judge who issued the NIT Warrant**{2019 U.S. App. LEXIS 17}** concluded (whether correctly or not) that she had jurisdiction. The Supreme Court's precedent on the exclusionary rule is clear: suppression must deter "police rather than judicial misconduct." *Master*, 614 F.3d at 242 (citing *Herring*, 555 U.S. at 142); *see also Massachusetts v. Sheppard*, 468 U.S. 981, 990, 104 S. Ct. 3424, 82 L. Ed. 2d 737 (1984) ("The exclusionary rule was adopted to deter unlawful searches by police, not to punish the errors of magistrates and judges.") (citations omitted); *Davis*, 564 U.S. at 246 ("[W]e have said time and again that the *sole* purpose of the exclusionary rule is to deter misconduct by law enforcement.") (emphasis in original). The fact that any jurisdictional error here was made by the magistrate, coupled with the fact that Rule 41(b) has been amended to authorize warrants like the one at issue, means "the benefits of deterrence" cannot "outweigh the costs." *Master*, 614 F.3d at 243 (citing *Herring*, 555 U.S. at 141).

Moorehead contends that the good-faith exception has swallowed the exclusionary rule. But Supreme Court precedent dictates that the good-faith exception applies here. All seven appellate courts to have considered the issue on facts **Moorehead** concedes are virtually identical to his case have come to the same conclusion. *Levin*, 874 F.3d at 324; *Werdene*, 883 F.3d at 218; *McLamb*, 880 F.3d at 690; *Kienast*, 907 F.3d at 528, *Horton*, 863 F.3d at 1051; *Henderson*, 906 F.3d at 1120; *Workman*, 863 F.3d at 1321. We now join them.

III.

We affirm the judgment of the district court.

UNITED STATES OF AMERICA, Plaintiff, v. ANDREW BLAKE MOOREHEAD, Defendant.
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, EASTERN DIVISION
2017 U.S. Dist. LEXIS 217003
Cr. No. 1:15-10077-STA
June 6, 2017, Decided
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Editorial Information: Subsequent History

Affirmed by United States v. **Moorehead**, 2019 U.S. App. LEXIS 639 (6th Cir.), 2019 FED App. 4P (6th Cir.) (6th Cir. Tenn., Jan. 9, 2019)

Counsel **{2017 U.S. Dist. LEXIS 1}**For Andrew Blake **Moorehead**, aka: Andy **Moorehead**, Defendant: M. Dianne Smothers, LEAD ATTORNEY, FEDERAL PUBLIC DEFENDER, Jackson, TN USA; Randolph W. Alden, FEDERAL PUBLIC DEFENDER, Memphis, TN USA.

For U. S. Attorneys: Beth Boswell, U.S. ATTORNEY'S OFFICE-Jackson, Jackson, TN; USA; Debra Lynn Ireland, US ATTORNEY'S OFFICE, Memphis, TN USA.

Judges: S. THOMAS ANDERSON, CHIEF UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: S. THOMAS ANDERSON

Opinion

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

Before the Court is Defendant Andrew Blake Moorehead's Motion to Suppress (ECF No. 45) filed under seal on August 11, 2016. The United States of America has responded in opposition and filed two supplements to its initial response.1 On March 24, 2017, this matter was transferred to the undersigned for all further proceedings. The parties agree that a contested evidentiary hearing is unnecessary, as the issues raised in the Motion to Suppress present questions of law for the Court. For the reasons set forth below, Defendant's Motion is **DENIED**.

BACKGROUND

On September 25, 2015, the United States filed under seal a Criminal Complaint against Defendant accusing him of accessing with the intent to view child pornography in violation of**{2017 U.S. Dist. LEXIS 2}** 18 U.S.C. § 2252(a)(4)(B). The Criminal Complaint was sworn and supported by the affidavit of Special Agent Chris Miller of the Federal Bureau of Investigation. According to SA Miller's affidavit, the FBI had obtained a search warrant from the United States Magistrate Judge to search the home of Defendant and executed the warrant on September 24, 2015. The affidavit identifies specific computer files which Defendant allegedly accessed from a website known to contain child pornography. Agents advised Defendant of his rights during the search, and Defendant agreed to give a statement. According to SA Miller, Defendant admitted that he had downloaded and viewed

images of child pornography from the internet. Defendant further admitted that he had been viewing child pornography for the previous ten to fifteen years and that he accessed images online with the username "logidragon321." SA Miller averred that based on his training and experience in investigating child pornography offenses, he believed that probable cause existed to charge Defendant with accessing known child pornography websites with the intent to download images and videos depicting child pornography. The Court issued a warrant for Defendant's arrest**{2017 U.S. Dist. LEXIS 3}** the same day.

On October 19, 2015, a grand jury sitting in the Western District of Tennessee returned an indictment against Defendant charging him with one count of knowingly possessing a computer containing child pornography in violation of 18 U.S.C. § 2252(a)(4)(B), and one count of knowingly receiving child pornography in violation of 18 U.S.C. § 2252(a)(2). Defendant pleaded not guilty to the charges. In his Motion to Suppress, Defendant asks the Court to suppress the evidence seized from his home and his statement obtained by the FBI. Defendant states that the search warrant issued for his home and computer relied on information obtained from a broader investigation of a child pornography website, which the parties refer to as "Website A." The facts surrounding the investigation are undisputed and supported by affidavits from federal agents involved in the investigation.

The undisputed facts show that Website A encouraged users to register anonymously using a false email address at which point users could access different sections of the website including forums related to the sexual exploitation of children. The FBI seized the computer server hosting Website A in North Carolina on February 20, 2015, and brought the server to**{2017 U.S. Dist. LEXIS 4}** Virginia. Once there the FBI assumed administrative control over the website and continued to operate it from a government facility in Virginia through March 4, 2015. On the same day the FBI seized the server, the government obtained a Title III search warrant from a United States District Judge in the United States District Court for the Eastern District of Virginia. The warrant authorized the investigators to intercept electronic communications on Website A's private chat and messaging services. However, Website A operated network software known as the Onion Router, or "TOR," to conceal each registered user's Internet Protocol address, thereby preserving their anonymity. This meant that even though Website A's server logged user activity, the FBI could not analyze the logs to locate and identify the users. To get around the TOR and identify Website A's registered users, the FBI sought and obtained a separate warrant to deploy its own software dubbed a Network Investigative Technique, or "NIT." The NIT communicated with other computers accessing Website A and caused the computers to deliver data to the Website A server. The data revealed the IP addresses, among other data,2 of the**{2017 U.S. Dist. LEXIS 5}** computers used by Website A's registered users to access the child pornography on Website A.

During the time in which the FBI assumed operational control over Website A's server, a user named "logidragon321" registered an account on the site and logged into the site for approximately three hours total between March 1, and March 5, 2015. The FBI used the NIT on March 2, 2015, to obtain the IP address associated with the "logidragon321" username. Investigators caused an administrative subpoena to issue as to the Jackson Energy Authority seeking information connected to the "logidragon321" IP address. The Jackson Energy Authority identified the subscriber associated with the IP address. Using that information, the FBI obtained a search warrant for the residence where it seized Defendant's computer and obtained the previously mentioned statement from Defendant.

Defendant now seeks the suppression of that evidence. Defendant's argument is straightforward. The warrant obtained for the use of the Network Investigative Technique (hereinafter "the NIT warrant") allowed the FBI to work around Website A's masking protocols and discover Defendant's IP address

in the Western District of Tennessee.**{2017 U.S. Dist. LEXIS 6}** However, the NIT warrant was issued in the Eastern District of Virginia and signed by a United States Magistrate Judge. Rule 41(b) of the Federal Rules of Criminal Procedure limits the authority of magistrate judges to issue search warrants outside their own Districts, and none of Rule 41(b)'s exceptions to this general rule apply. The warrant did not concern a search within the Eastern District of Virginia for purposes of Rule 41(b)(1). According to Defendant, the NIT warrant incorrectly stated that the evidence sought was in the Eastern District of Virginia and the Website A server was the place to be searched. Likewise, Defendant's computer was never present in the Eastern District of Virginia and the computer did not implicate a terrorism offense, making subparagraphs (2) and (3) of Rule 41(b) also inapposite. Finally, the NIT is not a "tracking device," as Rule 41 (b)(4) uses the term. Under the circumstances, Defendant argues that the NIT warrant ran afoul of Federal Rule of Criminal Procedure 41(b) as well as the Federal Magistrates Act, 28 U.S.C. § 636.

Defendant contends that the NIT warrant was "no warrant at all" and suppression is therefore required. Def.'s Mem. in Support of Mot. to Suppress 5 (quoting *United States v. Krueger*, 809 F.3d 1109, 1126 (10th Cir. 2015) (Gorsuch, J., concurring)). Defendant asserts that suppression will vindicate a number of significant policies. First, suppression**{2017 U.S. Dist. LEXIS 7}** will "preserve judicial integrity and proper separation of powers. . . ." *Id.* at 10. Rule 41(b) creates specific geographic limits on the jurisdiction of a magistrate judge to issue a warrant. Second, suppression will cure the prejudice Defendant suffered because without the NIT warrant, investigators would have never had probable cause to search Defendant's home and computer. Third, suppression is necessary due to the constitutional gravity of the violation, as opposed to a merely technical violation, of Rule 41(b). Finally, suppression would deter police misconduct. According to Defendant, the FBI acted "in intentional and deliberate disregard of Rule 41" and in bad faith. On its face, Rule 41(b) did not authorize the Magistrate Judge to issue the subpoena, and the FBI knew as much. At the time agents sought the NIT warrant in February 2015, a change had already been proposed to amend Rule 41(b), an amendment that would permit a magistrate judge to "issue a warrant to use remote access to search electronic storage media and seize electronically stored information inside or outside of the district: (1) when a suspect has used technology to conceal the location of the media to be searched." *Id.* at 13-14 (citation omitted). Defendant argues that the**{2017 U.S. Dist. LEXIS 8}** government was aware then its NIT search was not proper because an Acting Assistant General had proposed the amendment to Rule 41(b). For all of these reasons, Defendant contends that suppression is necessary.

ANALYSIS

The Court holds that Defendant has failed to show why the Court should suppress the evidence against him. As a threshold matter, the parties agree that an evidentiary hearing is not necessary. "An evidentiary hearing is required only if the motion [to suppress] is sufficiently definite, specific, detailed, and non-conjectural to enable the court to conclude that contested issues of fact going to the validity of the [police conduct] are in question." *United States v. Abboud*, 438 F.3d 554, 577 (6th Cir. 2006) (citation and internal quotation marks omitted); *United States v. Lawhorn*, 467 F. App'x 493, 495 (6th Cir. 2012). An evidentiary hearing is not required where the defendant's motion to suppress raises only questions of law. *Lawhorn*, 467 F. App'x at 495; *United States v. Knowledge*, 418 F. App'x 405, 408 (6th Cir. 2011). Based on the parties' agreement that an evidentiary hearing is not required to decide Defendant's Motion to Suppress, the Court will proceed to consider the questions of law presented.

Defendant argues that the Court should suppress the evidence against him because the Magistrate Judge in the Eastern District of Virginia exceeded her authority in issuing the NIT warrant.**{2017 U.S. Dist. LEXIS 9}** The evidence collected pursuant to the NIT warrant allowed investigators to identify

Defendant as a registered user of Website A and resulted in the search of Defendant's home and his statement to police. The Federal Magistrates Act states as follows:

> (a) Each United States magistrate judge serving under this chapter shall have within the district in which sessions are held by the court that appointed the magistrate judge, at other places where that court may function, and elsewhere as authorized by law-
>
> (1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts . . .
>
> 28 U.S.C. § 636(a)(1).

At the time of the investigation at issue in this case and at the time of Defendant's indictment, Rule 41(b) of the Federal Rules of Criminal Procedure granted a magistrate judge with authority in a judicial district the authority to issue a warrant (1) "to search for and seize a person or property located within the district;" (2) "for a person or property outside the district if the person or property is located within the district when the warrant is issued but might move or be moved outside the district before the warrant is executed;" (3) as part of "an investigation**{2017 U.S. Dist. LEXIS 10}** of domestic terrorism or international terrorism;" (4) "to install within the district a tracking device . . . to track the movement of a person or property located within the district, outside the district, or both;" and (5) "for property that is located outside the jurisdiction of any state of district, but within" a U.S. territory, possession, or commonwealth, or within certain diplomatic or consular property so long as the "activities related to the crime" may have occurred in the magistrate judge's district. Fed. R. Crim. P. 41(b). The United States Supreme Court has described Rule 41's grant of authority as "broad" and "flexible." *United States v. New York Tel. Co.*, 434 U.S. 159, 169-70, 98 S. Ct. 364, 54 L. Ed. 2d 376 (1977) (holding that Rule 41 authorizes "seizures of intangible items such as dial impulses recorded by pen registers as well as tangible items").

Effective December 1, 2016, Rule 41(b) was amended to add subparagraph (6) which states as follows:

> [A] magistrate judge with authority in any district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and to seize or copy electronically stored information located within or outside that district if: (A) the district where the media or information is located has been**{2017 U.S. Dist. LEXIS 11}** concealed through technological means; or (B) in an investigation of a violation 18 U.S.C. § 1030(a)(5), the media are protected computers that have been damaged without authorization and located in five or more districts.
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> Fed. R. Crim. P. 41(b)(6). The notes to the 2016 amendments to Rule 41(b) explain that the new "subparagraph (b)(6)(A) provides authority to issue a warrant to use remote access within or outside that district when the district in which the media or information its located is not known because of the use of technology such as anonymizing software." Advisory Committee Notes to Fed. R. Crim. P. 41, 2016 Amendments. It is undisputed in this case that the 2016 amendment to Rule 41(b) authorizes magistrate judges to issue warrants like the NIT warrant but that the NIT warrant issued before the amendment took effect.

The first question presented then is whether the Magistrate Judge exceeded her authority under Rule 41(b) by signing the NIT warrant. Defendant's is merely the latest in a number of prosecutions across the country to challenge the NIT warrant and raise the issue of the territorial limits of the Magistrate Judge's power to act under Rule 41(b). A majority of courts, including five district courts within the Sixth Circuit, have either held that the NIT warrant violated**{2017 U.S. Dist. LEXIS 12}** Rule 41(b) or assumed without deciding that the NIT warrant violated Rule 41(b) and then went on to conclude that

the good faith exception applied and that suppression was therefore unnecessary. *United States v. Ammons*, 207 F. Supp. 3d 732 (W.D. Ky. 2016); *United States v. Schuster*, No. 1:16-cr-51, 2017 U.S. Dist. LEXIS 45674, 2017 WL 1154088 (S.D. Ohio Mar. 28, 2017); *United States v. Gaver*, No. 3:16-cr-88, 2017 U.S. Dist. LEXIS 44757, 2017 WL 1134814 (S.D. Ohio Mar. 27, 2017); *United States v. Kahler*, 236 F. Supp. 3d 1009, 2017 WL 586707 (E.D. Mich. 2017); *United States v. Scarbrough*, No. 16-cr-035, 2016 U.S. Dist. LEXIS 140549, 2016 WL 5900152 (E.D. Tenn. Oct. 11, 2016); *see also United States v. Taylor*, 250 F. Supp. 3d 1215, 2017 WL 1437511 (N.D. Ala. 2017); *United States v. Deichert*, 232 F. Supp. 3d 772, 2017 WL 398370 (E.D.N.C. 2017) (holding that any violation of Rule 41(b) did not rise to the level of a constitutional violation and that the violation was not reckless or prejudicial to the defendant); *United States v. Allain*, 213 F. Supp. 3d 236 (D. Mass. 2016) (holding that NIT warrant violated Rule 41(b) but that good faith exception applied); *United States v. Knowles*, 207 F. Supp. 3d 585 (D.S.C. 2016); *United States v. Werdene*, 188 F. Supp. 3d 431 (E.D. Pa. 2016); *United States v. Broy*, 209 F. Supp. 3d 1045 (C.D. Ill. 2016); *United States v. Lough*, 221 F. Supp. 3d 770, 2016 WL 6834003 (N.D. W. Va. 2016); *United States v. Tran*, 226 F. Supp. 3d 58, 2016 WL 7468005 (D. Mass. 2016);*United States v. Pawlak*, No. 3:16-CR-306-D(1), 237 F. Supp. 3d 460, 2017 WL 661371 (N.D. Tex. Feb. 17, 2017); *United States v. Perdue*, 237 F. Supp. 3d 471, 2017 WL 661378 (N.D. Tex. 2017); *United States v. Dzwonzyk*, No. 4:15-CR-3134, 2016 U.S. Dist. LEXIS 178020, 2016 WL 7428390 (D. Neb. Dec. 23, 2016) (holding that good faith exception applied and that violation of Rule 41(b) was not "fundamental"); *United States v. Vortman*, No. 16-cr-00210-TEH-1, 2016 U.S. Dist. LEXIS 175235, 2016 WL 7324987 (N.D. Cal. Dec. 16, 2016) (same); *United States v. Hammond*, 263 F. Supp. 3d 826, 2016 WL 7157762 (N.D. Calif. 2016) (holding that suppression would not serve any deterrent purpose); *United States v. Duncan*, No. 3:15-cr-00414-JO, 2016 U.S. Dist. LEXIS 168365, 2016 WL 7131475 (D. Or. Dec. 6, 2016) (holding that the NIT warrant "technically violated the letter, but not the spirit of Rule 41(b)" and applying the good faith exception); *United States v. Torres*, No. 5:16-cr-285-DAE, 2016 U.S. Dist. LEXIS 122086, 2016 WL 4821223 (W.D. Tex. Sept. 9, 2016) **{2017 U.S. Dist. LEXIS 13}**(holding that NIT warrant violated Rule 41(b) but that the violation was not of a constitutional magnitude); *United States v. Henderson*, No. 15-cr-00565-WHO, 2016 U.S. Dist. LEXIS 118608, 2016 WL 4549108 (N.D. Calif. Sept. 1, 2016) (holding that the NIT warrant technically violated Rule 41(b) and that good faith exception applied); *United States v. Adams*, No. 6:16-cr-11-Orl-40GJK, 2016 U.S. Dist. LEXIS 105471, 2016 WL 4212079 (M.D. Fla. Aug. 10, 2016) (same); *United States v. Epich*, No. 15-CR-163-PP, 2016 U.S. Dist. LEXIS 32459, 2016 WL 953269 (E.D. Wisc. Mar. 14, 2016) (possible violation of Rule 41(b) was not grounds for suppression); *United States v. Michaud*, No. 3:15-cr-5351-RJB, 2016 U.S. Dist. LEXIS 11033, 2016 WL 337263 (W.D. Wash. Jan. 28, 2016).

A small number of courts have also rejected the theory that the NIT warrant and/or the government's operation of the website was so outrageous that law enforcement's conduct violated due process. *United States v. Kim*, No. 16-CR-191 (PKC), 2017 U.S. Dist. LEXIS 11770, 2017 WL 394498 (E.D.N.Y. Jan. 27, 2017) (rejecting the defendant's theory that the NIT warrant amounted to outrageous conduct); *United States v. Owens*, No. 16-CR-38-JPS, 2016 U.S. Dist. LEXIS 167559, 2016 WL 7079617 (E.D. Wisc. Dec. 5, 2016) (holding that the outrageous conduct defense was not good at law as grounds to suppress the evidence seized as a result of the NIT warrant); *United States v. Anzalone*, 221 F. Supp. 3d 189, 2016 WL 6476939 (D. Mass. 2016) (holding that FBI's act of operating the website for two weeks did not amount to outrageous conduct).

Only a minority of courts have concluded that the NIT warrant violated Rule 41(b) and required the suppression**{2017 U.S. Dist. LEXIS 14}** of the evidence obtained through the NIT. *United States v. Croghan*, 209 F. Supp. 3d 1080 (S.D. Iowa 2016) (holding that investigators could not have relied in good faith on the NIT warrant); *United States v. Workman*, 205 F. Supp. 3d 1256 (D. Colo. 2016)

(holding that the NIT warrant was void *ab initio*); *United States v. Levin*, 186 F. Supp. 3d 26 (D. Mass. 2016) (same); *United States v. Arterbury*, No. 15-CR-182, 2016 U.S. Dist. LEXIS 67091 (N.D. Okla. Apr. 25, 2016).

Several courts, including three district courts in the Sixth Circuit, have concluded that the NIT was the functional equivalent of a tracking device, and so Rule 41(b)(4) authorized the Magistrate Judge to issue the NIT warrant. *United States v. Austin*, 230 F. Supp. 3d 828, 2017 WL 496374 (M.D. Tenn. 2017); *United States v. Jones*, 230 F. Supp. 3d 819, 2017 WL 511883 (S.D. Ohio 2017); *United States v. Sullivan*, 229 F. Supp. 3d 647, 2017 WL 201332 (N.D. Ohio 2017); *see also United States v. Jean*, 207 F. Supp. 3d 920 (W.D. Ark. 2016); *United States v. Darby*, 190 F. Supp. 3d 520 (E.D. Va. 2016); *United States v. Matish*, 193 F. Supp. 3d 585 (E.D. Va. 2016); *United States v. Bee*, No. 16-00002-CR-W-GAF, 2017 U.S. Dist. LEXIS 13055, 2017 WL 424889 (W.D. Mo. Jan. 13, 2017); *United States v. Johnson*, No. 15-00340-CR-W-GAF, 2016 U.S. Dist. LEXIS 145180, 2016 WL 6136586 (W.D. Mo. Oct. 20, 2016); *United States v. McLamb*, 220 F. Supp. 3d 663, 2016 WL 6963046 (E.D. Va. 2016); *United States v. Acevedo-Lemus*, No. SACR 15-00137-CJC, 2016 U.S. Dist. LEXIS 105195, 2016 WL 4208436 (C.D. Calif. Aug. 8, 2016); *United States v. Laurita*, No. 8:13cr107, 2016 U.S. Dist. LEXIS 103405, 2016 WL 4179365 (D. Neb. Aug. 5, 2016).

The Court finds this line of decisions persuasive. Federal Rule of Criminal Procedure 41(b)(4) adopts the definition of a "tracking device" found in 18 U.S.C. § 3117(b) where "tracking device" is defined as "an electronic or mechanical device which permits tracking of movement of a person or object." *See* Fed. R. Crim. P. 41(a)(2)(E); 18 U.S.C. § 3117(b).3 The language of section 3117(b) is certainly broad and elastic enough to include the NIT, an "electronic . . . device" capable of "tracking . . . movement . . . of an object," to wit, the movement of information via the internet. This is precisely the kind of**{2017 U.S. Dist. LEXIS 15}** conduct with which the indictment charges Defendant: possessing a computer containing images of child pornography where the images had been transmitted over the internet, a facility of interstate commerce, in violation of 18 U.S.C. § 2252(a)(4)(B) (Count 1); and receiving child pornography over the internet in violation of 18 U.S.C. § 2252(a)(2) (Count 2).

What is more, the use of the NIT comports with Rule 41(b)(4)'s exception authorizing a magistrate judge to order the use of a tracking device. The Rule operates to permit searches by electronic means to track criminal activity that has some nexus with the magistrate judge's district but where the evidence of a crime, including the perpetrator of the crime, may be found beyond the magistrate judge's district. In this case Website A, the source of the child pornography allegedly accessed by Defendant in the Western District of Tennessee, was located in the Eastern District of Virginia. As one court has noted,

> The whole point of seeking authority to use a tracking device is because law enforcement does not know where a crime suspect or evidence of his crime may be located. In such instances, Rule 41(b)(4) allows a magistrate judge to authorize law enforcement's use of electronic tracking**{2017 U.S. Dist. LEXIS 16}** tools and techniques. When an unknown crime suspect, or unknown evidence of his crime, is located in an unknown district, it would be nonsensical to interpret the Rule . . . to require law enforcement to make application for such a warrant to an unknown magistrate judge in the unknown district. The Magistrate Judge arguably had authority under Rule 41(b)(4) to issue the NIT warrant to track the illegal possession and receipt of child pornography shared online.

In the final analysis, the Court need not decide whether the NIT warrant ran afoul of Rule 41(b) or 28 U.S.C. § 636 generally. Even if Defendant could show that the Magistrate Judge exceeded her authority in issuing the NIT warrant, Defendant has not shown why suppression of the evidence

against him is required. In *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), "the Supreme Court held that the Fourth Amendment exclusionary rule does not apply when police officers rely in good faith on a warrant that is ultimately determined to lack probable cause." *United States v. Abernathy*, 843 F.3d 243, 257 (6th Cir. 2016) (citing *Leon*, 468 U.S. at 913). The Supreme Court declined to apply the exception under the following circumstances: (1) "if the magistrate or judge in issuing a warrant was misled by information in an affidavit" that violated *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978) ; (2) "where the issuing magistrate wholly abandoned his judicial role;"**{2017 U.S. Dist. LEXIS 17}** (3) when the warrant is "based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable;" and (4) when a warrant is "so facially deficient-i.e., in failing to particularize the place to be searched or the things to be seized-that the executing officers cannot reasonably presume it to be valid." *Id.* (quoting *Leon*, 468 U.S. at 923) (internal citation and quotation marks omitted). Defendant has made none of these showings here.

Moreover, a violation of the Fourth Amendment without more does not automatically result in the exclusion of the evidence. *United States v. Master*, 614 F.3d 236, 242 (6th Cir. 2010) (citing *Herring v. United States*, 555 U.S. 135, 140, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009)). Suppression should "deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence" and in particular "police rather than judicial misconduct." *Id.* (citing *Herring*, 555 U.S. at 142, 143). "[T]he exclusionary rule was adopted to deter unlawful searches by police, not to punish the errors of magistrates and judges." *Massachusetts v. Sheppard*, 468 U.S. 981, 990, 104 S. Ct. 3424, 82 L. Ed. 2d 737 (1984) (quoting *Illinois v. Gates*, 462 U.S. 213, 263, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) (WHITE, J., concurring in judgment)). The Sixth Circuit has remarked that "[a]rguably, the issuing magistrate's lack of authority has no impact on police misconduct, if the officers mistakenly, but inadvertently, presented the warrant to an incorrect magistrate."**{2017 U.S. Dist. LEXIS 18}** *Master*, 614 F.3d at 242; *see also United States v. Kienast*, No. 16-CR-103, 2016 U.S. Dist. LEXIS 157154, 2016 WL 6683481 (E.D. Wisc. Nov. 14, 2016) (stating that the "only mistake [of the investigators seeking the NIT warrant]. . . was knocking on the wrong door . . . .").

Assuming without deciding that the NIT warrant was issued in violation of Rule 41(b) and that the violation was constitutional and not merely procedural, the Court holds that suppression of the evidence obtained through the use of the NIT is not required. Suppression would not deter police misconduct in future cases of this kind. Based on the intervening amendments to Rule 41(b), there will likely be no future cases involving challenges to a warrant like the NIT warrant. Defendant has cited no evidence that the FBI agents who presented the NIT warrant to the Magistrate Judge in the Eastern District of Virginia did so with the intent to evade Rule 41(b) or with reckless disregard for the limits of the Magistrate Judge's authority or acted in any way with gross negligence.4 Defendant only argues that the investigators should have reasonably known that the Magistrate Judge lacked authority to issue the NIT warrant in light of the general case law on Rule 41(b) and what were at the time proposed amendments to Rule 41(b). The Court finds Defendant's argument to be unpersuasive. Defendant's contentions**{2017 U.S. Dist. LEXIS 19}** go to the reasonableness of the government's chosen course of action. In other words, Defendant argues the government acted negligently in this instance. A single incident of negligence is not the kind of police malfeasance the exclusionary rule exists to deter.

The Court also rejects Defendant's argument that the NIT warrant was void *ab initio*. Some courts have concluded that the NIT warrant was void *ab initio* because the Magistrate Judge lacked authority to issue the warrant. *Workman*, 205 F. Supp. 3d 1256 (holding that the NIT warrant was void ab initio); *Levin*, 186 F. Supp. 3d 26 (same). The Sixth Circuit has held that warrants issued without authority under state law are void *ab initio*. *United States v. Scott*, 260 F.3d 512, 515 (6th Cir.

2001) (holding that warrant signed by retired Tennessee judge was void *ab initio*); *but see United States v. Bennett*, 170 F.3d 632, 636-37 (6th Cir. 1999) (search warrant issued by court clerk authorized by state law to do so was valid under the Fourth Amendment). However, the Sixth Circuit has never held that a warrant issued by a United States Magistrate Judge in violation of Federal Rule of Criminal Procedure 41(b) is void *ab initio*. On the contrary, the Sixth Circuit concluded in an unreported case that *Scott*'s void *ab initio* rule did not apply in cases where the issuing judge otherwise "had the authority to grant warrants." *United States v. Franklin*, 284 F. App'x 266, 272 (6th Cir. 2008). And even in cases where the warrant issued**{2017 U.S. Dist. LEXIS 20}** by a state court judge was void *ab initio*, the Court of Appeals has not categorically excluded evidence seized with such a warrant. *Master*, 614 F.3d at 242 (holding that good faith exception applied even though the warrant was void *ab initio*). Therefore, the Court has no reason to conclude that the NIT warrant was void *ab initio*, and even if it was, the exclusionary rule does not mandate suppression of the evidence against Defendant. Defendant's Motion to Suppress is **DENIED**.

IT IS SO ORDERED.

/s/ S. Thomas Anderson

S. THOMAS ANDERSON

CHIEF UNITED STATES DISTRICT JUDGE

Date: June 6, 2017.