NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2021

DERRICK BAER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

APPENDIX ON BEHALF OF PETITIONER DERRICK BAER
VOLUME I of I (Pages 001a – 194a)

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NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-3792

UNITED STATES OF AMERICA

v.

DERRICK BAER,
Appellant

Appeal from the United States District Court
for the District of New Jersey
(D.C. Criminal Action No. 2:15-cr-00417-001)
District Judge: Honorable Claire C. Cecchi

Submitted Under Third Circuit L.A.R. 34.1(a)
January 11, 2021

Before: AMBRO, KRAUSE and PHIPPS, Circuit Judges

(Opinion filed: January 20, 2021)

OPINION*

AMBRO, Circuit Judge,

Appellant Derrick Baer appeals his conviction on one count of knowing receipt and attempt to receive child pornography and one count of knowing possession of material that contained at least three images of child pornography. Baer also appeals his within-Guidelines sentence of 168 months. For the reasons stated below, we affirm Baer's conviction and sentence.

I.

In May 2010, Baer reported the death of his then-girlfriend, Lorianne Kosnac. Upon arriving at their home, the police received oral and written consent from Baer to conduct a "complete search" of the residence and to remove "any documents, materials, things or other property." While the search was ongoing, Kosnac's sister called police to express concerns that Baer may be responsible for Kosnac's death. The sister told police the following:

1. A few months before her death, Kosnac discovered jars containing washcloths that smelled like ammonia under her bed. From that incident, Kosnac learned that Baer previously used homemade chloroform to render her unconscious and perform sex acts on her.

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

2. When confronted, Baer admitted to her that (a) he had used chloroform on Kosnac, (b) he learned to make chloroform on the internet, and (c) he had a problem with porn.
3. Baer and Kosnac's daughter told Kosnac that she had awoken once to find Baer standing over her with a washcloth.
4. Kosnac said Baer "had a problem with kiddy porn" and had "been on the internet and . . . pulled all kinds of stuff off there."

Kosnac's sister also stated that her own minor daughter had alleged Baer once took a picture of her in the shower.

After this interview, law enforcement returned to interview Baer while the search of his house was ongoing. Baer denied having chloroform in the house and researching how to make chloroform on his computer. But he did not object to the search or removal of his computers and expressly stated that law enforcement would not find any evidence of chloroform research on the devices. Officers then asked Baer about a rag found in his house, and he responded that the rag would not test positive for chloroform (law enforcement later confirmed that the rag had chloroform on it). In addition to the rag, law enforcement seized many devices from Baer's residence, including disks labeled "Derrick's eyes ONLY," "pics incriminating," and "porn."

In the months after the search, Baer's daughter confirmed in an interview with law enforcement that she had once awoken to her dad standing over her with a washcloth that smelled like paint. The medical examiner also issued its report and concluded that

"exposure to chloroform" was a "[c]ontributory [c]ondition" of Kosnac's death, although the official cause of death was a heart condition. App. 25–26.

One of the primary officers on the case, Sgt. Robb, sought a search warrant to analyze Baer's computers, but the prosecutor assigned to the case denied Robb's request.[1] In August 2011, after a new prosecutor was assigned to the case, Robb obtained a warrant from New Jersey state court. About a month later, Robb submitted a request to a local computer forensics laboratory for forensic examination of Baer's devices. The laboratory notified Robb that it was ready to begin its examination in July 2012, and Robb brought the devices to the lab that same day. The forensic analysis report, issued in October 2012, found thirteen confirmed—and hundreds of possible—images of child pornography. In November 2012, police charged Baer with one count of possessing child pornography, and a grand jury later indicted him.[2] The FBI soon launched their own investigation and, in 2015, the U.S. Attorney's Office for the District of New Jersey charged Baer with the two counts at issue in this appeal. A federal grand jury later indicted Baer on these charges.

During these proceedings, Baer's ex-girlfriend (whom Baer began dating after Kosnac died), Carly Jones, gave police an external hard drive that belonged to Baer (the "Hard Drive"). Jones made a passing remark about child pornography but did not expressly assert that the drive contained explicit material. Then, in March 2017, Jones's eleven-year-old son reported that Baer had sexually abused him and shared pictures of this abuse with

[1] Sgt. Robb testified that the original prosecutor was skeptical about whether Baer's use of chloroform for sex was consensual.

[2] These charges were dropped after the U.S. Attorney's Office filed federal charges.

friends. Federal law enforcement soon learned of the allegation and obtained a warrant to search the Hard Drive, discovering child pornography.

In 2019, a federal jury convicted Baer for both receiving and possessing child pornography. The District Court sentenced him to 168 months' imprisonment and lifetime supervision. Baer now appeals (i) the District Court's denial of his motion to suppress the devices and images seized from his home in 2010 and the images collected from the Hard Drive; (ii) the District Court's denial of his request for a *Franks* hearing based on factual inaccuracies in the search warrant affidavit; (iii) the District Court's decision to admit three pieces of evidence; and (iv) the Court's refusal to grant a downward variance on his sentence.

II.

A. Motion to Suppress Seized Devices and Media

Baer first argues that the devices and resulting media should have been suppressed because the affidavit used to search his devices failed to establish probable cause and that delays in investigating and searching the devices violated the Fourth Amendment. We review the District Court's underlying factual findings for clear error and the Court's application of the law to those facts *de novo*. *United States v. Perez*, 280 F.3d 318, 336 (3d Cir. 2002).

Here, none of the searches required probable cause because they were conducted with the consent of the owner. Looking first to the devices seized from Baer's residence, Baer consented to a full search of his residence without limitation and never sought to revoke his consent or to have the devices returned. *Schneckloth v. Bustamonte*, 412 U.S.

218, 219 (1973) (noting that one exception to "the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent"). To the extent Baer complains of the Government's failure to return his devices, his argument fails because he never sought their return. Defendants who never seek the return of the property cannot argue that delay violated the Fourth Amendment. *United States v. Stabile*, 633 F.3d 219, 235–36 (3d Cir. 2011) (citing *United States v. Johns*, 469 U.S. 478, 487 (1985)).

Jones also gave express consent for police to search the Hard Drive, and her joint access and subsequent control of the device gave her the authority to do so. *See Stabile*, 633 F.3d at 233 (providing that a cohabitant with joint access and control over computers had authority to consent to warrantless seizure of hard drives under the Fourth Amendment). Jones also never revoked or limited her consent or sought the return of the Hard Drive.

Further, to the extent officers needed the August 2011 warrant to search Baer's devices, the warrant was supported by probable cause. Probable cause is established if there is a "fair probability" that contraband or evidence of a crime will be found in a particular place. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Here, law enforcement had evidence from multiple sources confirming the fair probability that the devices contained evidence of a crime. In his affidavit, Sgt. Robb extensively referenced various witnesses' allegations concerning Baer's research and use of chloroform, as well as the chloroform rag officers discovered in Baer's home. Robb also recounted witness allegations that Baer had "a problem with kiddy porn," had taken a picture of his minor niece in the shower, and had attempted to use chloroform on his daughter. App. 134, 139. The affidavit also

referenced Baer's large collection of electronic media and the suspicious labels on that media. While some of the evidence referenced in the affidavit is hearsay, hearsay statements can support a finding of probable cause if law enforcement has a "substantial basis for crediting the hearsay." App. 241–42. Here, many of the hearsay statements from various witnesses either directly or indirectly corroborated each other (*e.g.*, allegations that Baer had an interest in child pornography were corroborated by Baer's alleged attempts to victimize his daughter and Kosnac's niece), and physical evidence in the home also corroborated those statements. Thus, law enforcement had a substantial basis for crediting the hearsay, and the affidavit established a fair probability that the seized devices had evidence of the crimes for which law enforcement was investigating.

B. Denial of *Franks* Hearing Request

Baer also argues that the District Court erred in denying his motion for a *Franks* hearing because inaccurate statements by Sgt. Robb in the search warrant affidavit merited a hearing. *See Franks v. Delaware*, 438 U.S. 154 (1978) (establishing specific review for allegations of false testimony by police in affidavits establishing cause for a warrant). We have not yet determined the standard of review that applies to a district court's denial of a *Franks* hearing. *See United States v. Aviles*, 938 F.3d 503, 509 n.3 (3d Cir. 2019) (declining to adopt a standard because conclusion is the same under any standard).

Baer, however, would lose even under a fresh review. Two prongs must be satisfied for a defendant to obtain a *Franks* hearing: (1) "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit"; and (2) "the allegedly false statement is

necessary to the finding of probable cause." *Franks*, 438 U.S. at 155–56. The District Court properly decided that the inaccuracies in the affidavit—which included minor inaccuracies in quoted witness statements—were inadvertent and accurately conveyed the information. Further, the alleged errors are insufficient to meet the second prong. Even if the witness statements were inaccurate, the suspicious nature of the labels on the devices and the discovery of a chloroform-soaked rag in Baer's home also supported probable cause. And while Baer makes much of Robb's misrepresentations that he had worked on other media-related child pornography investigations in the past, this minor inconsistency does not affect the probable-cause analysis because Robb had significant evidence, as previously discussed, that Baer's devices may have contained evidence of child endangerment, child pornography, and/or criminal homicide. Baer was therefore not entitled to a *Franks* hearing.

C. Abuse of Discretion in Admitting Evidence of Baer's Conduct

Baer argues that the District Court abused its discretion in admitting certain evidence used to show that Baer used the computer on which child pornography was found and that his possession of the media was not accidental. He takes issue with the admission of three pieces of evidence: (1) testimony that he photographed Kosnac's niece showering; (2) recordings of him admitting to using his computer to research chloroform recipes; and (3) child pornography found on the Hard Drive.

1. Testimony that Baer photographed Kosnac's niece showering

The District Court admitted testimony by Kosnac's niece for the purpose of proving that Baer is sexually attracted to children and thus intentionally obtained the illicit media

found on his devices. Baer contends that the evidence was unduly prejudicial under Federal Rule of Evidence 403. When a district court conducts an on-the-record weighing of probative value against unfair prejudice, its evidentiary decision is reviewed for abuse of discretion and is thus entitled to great deference. *United States v. Lacerda*, 958 F.3d 196, 223 (3d Cir. 2020). We agree with the District Court that the risk of prejudice was tempered because the niece would be testifying as a teenager, not as her eight-year-old self from the incident; her testimony would be less inflammatory than other evidence that would be heard at trial; and her evidence was not any more disparaging than other evidence necessary to the trial. Thus the District Court did not abuse its discretion in admitting this evidence.

2. Recordings of Baer admitting to using his computer to research chloroform recipes

Recordings and testimony from Noel Gowran (a friend of Jones) were admitted under Rule 404(b).[3] This evidence showed that Baer came to Gowran's house and demonstrated on Gowran's computer how Baer found chloroform recipes. The Government sought to admit this evidence, along with evidence that Baer researched chloroform recipes on his own computer a month before child pornography files were saved on that computer, to prove that Baer had indeed used the computer on which child pornography was found. In short, the Government needed this evidence to rebut the defense that Baer did not use the computer—it did not use the evidence to show he used

[3] To be admissible under Rule 404(b), other acts "must (1) have a proper evidentiary purpose; (2) be relevant; (3) satisfy Rule 403; and (4) be accompanied by a limiting instruction (where requested) about the purpose for which the jury may consider it." *United States v. Green*, 617 F.3d 233, 249 (3d Cir. 2010). We conduct a plenary review of whether evidence falls within the scope of Rule 404(b). *Id.* at 239.

chloroform, and the evidence omitted any mention of Kosnac or Baer's intent for the use of the chloroform.

This evidence has a proper purpose and is relevant. The Government sought to use the evidence to prove that Baer had used his computer shortly before the child pornography was downloaded. As the District Court observed, the "obscure topic of the search," how to make chloroform, "ha[d] the potential to significantly narrow the pool of possible people who may be responsible for the alleged child pornography." App. 891. Furthermore, the evidence was highly probative, as Baer's use of the computer was at the heart of the case. Finally, prior to trial, the Government offered to inform the jury that the parties had agreed that Baer used the computer on a specific date, without using the word "chloroform," but Baer rejected this offer. The District Court was also prepared to issue a limiting instruction, but Baer requested that it not do so. Baer thus had the opportunity to avoid prejudice, but he refused. The District Court therefore did not err in admitting this evidence.

3. Child pornography found on the Hard Drive

Baer further contends that the District Court erred in admitting images collected from the Hard Drive under Rule 403 because they were unfairly prejudicial. The images, which are different from those images that form the basis of the indictment, were admitted under Rule 414: "In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant." Fed. R. Evid. 414(a). Baer does not challenge the evidence's admission under this rule. Nonetheless, he argues that the images were unfairly prejudicial under Rule 403 because (1) the jury could

have taken the images as improper character evidence, and (2) the images could have belonged to Jones and thus have little probative value.

This admission was also proper. The District Court found that the images on the Hard Drive were similar to those that formed the basis for Baer's indictment, as both depicted children under the age of fourteen and were all found within a four-year period. The images were relevant because they spoke to Baer's knowing possession of the images for which he was charged, even after law enforcement seized his original devices. These facts sufficiently tie the images to Baer, thus making the evidence probative, even though Jones had possession of the Hard Drive at one time. Further, the risk of prejudice was reduced because the images from the Hard Drive were no more shocking than the other images and videos introduced at trial. We therefore agree with the District Court that this evidence had significant probative value, and the danger of unfair prejudice did not outweigh that value. Moreover, in cases where evidence of a past sexual offense admitted under Rule 414 is substantially similar to the acts for which the defendant is being tried, "it is Congress's intent that the probative value of the similar act be presumed to outweigh Rule 403's concerns." *Johnson v. Elk Lake Sch. Dist.*, 283 F.3d 138, 144 (3d Cir. 2002). The Court thus did not abuse its discretion in admitting this evidence.

D. Sentencing

The District Court sentenced Baer to 168 months, the top of the Guideline range of 135 to 168 months. ***See*** **Appx.1433.** He presented two arguments in his request for a downward departure and variance: the conditions of his pretrial detention and policy-based arguments regarding Sentencing Guidelines for child pornography offenses.

Because Baer's sentence is within the Guidelines range, we presume it is reasonable. *United States v. Handerhan*, 739 F.3d 114, 119–20 (3d Cir. 2014). However, even without this presumption, his arguments are unpersuasive. Baer first argues that his sentence was procedurally unreasonable because the District Court failed to acknowledge either argument in its discussion of the 18 U.S.C. § 3553(a) sentencing factors. *See United States v. Tomko*, 562 F.3d 558, 567 (3d Cir. 2009) (stating that a sentence is procedurally unreasonable if, among other things, the District Court failed to consider the § 3553(a) factors or failed to explain adequately its reasoning). This argument fails because the Court considered these factors when it denied Baer's downward departure and variance requests at sentencing. While the Court did not recite Baer's arguments in summarizing its judgment, it expressly considered and rejected Baer's in-depth arguments on both topics in the context of the § 3553(a) factors. App. 1426–30 (prison conditions), 1441–43 (policy arguments).

Baer next argues that his sentence was substantively unreasonable. *See Tomko*, 562 F.3d at 568 (stating that a sentence is substantively unreasonable if "no reasonable sentencing court would have imposed the same sentence on that particular defendant for the reasons the district court provided"). Here the District Court thoroughly explained its reasons in sentencing Baer at the top of the Guideline range. They included the size of Baer's collection, the steps Baer took to conceal his crime, and the particularly heinous nature of the specific images on his devices. The Court also emphasized that specific deterrence was warranted in this case because Baer compiled a new collection of child pornography on the Hard Drive after law enforcement seized his original devices.

Moreover, it denied the Government's motion for an upward variance because the Guideline sentence had already taken the seriousness of Baer's offense into account. Hence his sentence is substantively reasonable.

* * * * *

We therefore affirm the District Court's judgment of conviction and sentence.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-3792

UNITED STATES OF AMERICA

v.

DERRICK BAER,
Appellant

Appeal from the United States District Court
for the District of New Jersey
(D.C. Criminal Action No. 2:15-cr-00417-001)
District Judge: Honorable Claire C. Cecchi

Submitted Under Third Circuit L.A.R. 34.1(a)
January 11, 2021

Before: AMBRO, KRAUSE and PHIPPS, Circuit Judges

JUDGMENT

This cause came on to be heard on the record before the United States District Court for New Jersey and was submitted on January 11, 2021.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the District Court's judgment entered November 20, 2019, is AFFIRMED. Costs are not taxed. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: January 20, 2021

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT

CLERK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
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January 20, 2021

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RE: USA v. Derrick Baer
Case Number: 19-3792
District Court Case Number: 2-15-cr-00417-001

ENTRY OF JUDGMENT

Today, **January 20, 2021** the Court entered its judgment in the above-captioned matter pursuant to Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:
14 days after entry of judgment.
45 days after entry of judgment in a civil case if the United States is a party.

Form Limits:
3900 words if produced by a computer, with a certificate of compliance pursuant to Fed. R. App. P. 32(g).
15 pages if hand or type written.

Attachments:
A copy of the panel's opinion and judgment only.
Certificate of service.
Certificate of compliance if petition is produced by a computer.
No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. Pursuant to Fed. R. App. P. 35(b)(3), if separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to the form limits as set forth in Fed. R. App. P. 35(b)(2). If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied.

A party who is entitled to costs pursuant to Fed.R.App.P. 39 must file an itemized and verified bill of costs within 14 days from the entry of judgment. The bill of costs must be submitted on the proper form which is available on the court's website.

A mandate will be issued at the appropriate time in accordance with the Fed. R. App. P. 41.

Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

Very truly yours,
Patricia S. Dodszuweit, Clerk

By: Timothy McIntyre
Timothy McIntyre, Case Manager
267-299-4953

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-3792

UNITED STATES OF AMERICA

v.

DERRICK BAER,

Appellant

(District Court No.: 2-15-cr-00416-001)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY and PHIPPS, Circuit Judges

The petition for rehearing filed by **appellant** in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is **denied.**

BY THE COURT,

s/ THOMAS L. AMBRO
Circuit Judge

Dated: February 16, 2021
Tmm/cc: Timothy M. Donohue, Esq.
Molly S. Lorber, Esq.
Mark E. Coyne, Esq.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, Plaintiff, v. DERRICK BAER, Defendant.	Criminal Action No.: 2:15-00417 (CCC) **OPINION**

CECCHI, District Judge.

Defendant Derrick Baer ("Defendant") was charged in a two-count indictment with receipt of child pornography and possession of child pornography. Presently before the Court are two of Defendant's pro se motions: (1) a motion to suppress evidence (ECF No. 99), and (2) a motion to dismiss the indictment pursuant to the Speedy Trial Act of 1974, the Sixth Amendment to the United States Constitution, and Federal Rule of Criminal Procedure 48(b) (ECF No. 115).[1] The Court has considered the submissions and oral arguments made in support of and in opposition to the instant motions. For the reasons set forth below, the Defendant's pro se motions are denied.

I. FACTUAL BACKGROUND

On May 31, 2010, at approximately 3:08 a.m., Defendant called 911 to report that his girlfriend, Lorraine Kosnac, was unresponsive. (First Tr.[2] at 24-25). Local police officers and rescue personnel responded to Defendant's residence in Bloomsbury, New Jersey. *Id.* at 24-25,

[1] Defendant has been, and currently is, represented by counsel. Nonetheless, the Court accepted both pro se motions from the Defendant.

[2] "First Tr." refers to the transcript of the first day of the evidentiary hearing, which occurred on July 12, 2016. At this hearing, the Court heard testimony related to the suppression of the evidence found in Defendant's home.

28-29. Emergency medical technicians were unable to revive Kosnac and she was pronounced dead at approximately 3:58 a.m. *Id.* at 28-29.

That same morning, Cynthia Marcinkowski, Kosnac's sister, called the police when she learned of Kosnac's death and told them Defendant had previously used homemade chloroform on Kosnac to incapacitate her in order to perform sexual acts. *Id.* at 31, 81-82. Also that same morning, Sharon Mancini, Kosnac's mother, called the police with concerns that Defendant may have injured Kosnac two months earlier. *Id.* at 31:18-32:1.

The Warren County Prosecutor's Office ("WCPO") and the Pohatcong Township Police Department ("PTPD") launched an investigation into the circumstances of Kosnac's death. At approximately 5:30 a.m., Sergeant Scott Robb of the PTPD arrived on the scene. *Id.* at 77-78. Sergeant Robb brought a consent to search form and, after getting briefed by the other officers, asked Defendant for permission to search the house. *Id.* at 79-80, 84-85. Defendant gave the officers permission to search his residence and signed a consent to search form, which was also signed by Sergeant Robb and Officer Anthony Goodell of the PTPD, at approximately 6:12 a.m. *Id.* at 36-37, 85, 88. The consent to search form provided for a "complete search" of the residence, without limitation, and authorized officers to remove "any documents, materials, things, or other property." (Govt. Ex. 201).[3]

After Defendant signed the consent to search form, Sergeant Robb and WCPO Detective John Serafin returned to police headquarters to interview Marcinkowski. (First Tr. at 81-82). She told the officers the following:

> (1) Two months earlier, Kosnac temporarily left Defendant after she discovered jars containing washcloths that smelled like ammonia under her bed and learned Defendant used chloroform on her while she was sleeping to rape her. When Kosnac confronted Defendant, he admitted the jars contained homemade

[3] The Government and Defense exhibits referenced herein are from the two-day evidentiary hearing held on July 12 and July 13, 2016.

chloroform that he learned to make on the Internet. (Govt. Ex. 401 at 5-6; First Tr. at 31).

(2) Kosnac's daughter told Kosnac that one morning she had woken up to find Defendant standing over her with a washcloth in his hand. (Govt. Ex. 401 at 6).

(3) Kosnac told Marcinkowski that several years ago Defendant had a problem with "kiddy porn" in the form of pictures and books. *Id.* at 6; (First Tr. at 92).

(4) Kosnac developed an infected cyst on her rectal area that required surgery. At the hospital, when Marcinkowski confronted Baer, he (a) admitted to using chloroform on Kosnac to have sex with her, (b) said he learned to make chloroform on the Internet, and (c) said he had a problem with porn. (Govt. Ex. 401 at 6).

(5) Several years ago, Marcinkowski's teenage daughter spent the night at Defendant and Kosnac's residence. When Marcinkowski picked up her daughter in the morning, her daughter said while she was in the shower Defendant took a picture of her. When Marcinkowski confronted Defendant about this allegation, he denied it. *Id.* at 6; (First Tr. at 92-93).

After interviewing Marcinkowski, Sergeant Robb and Detective Serafin returned to Defendant's residence to continue the investigation. (First Tr. at 93). When they arrived around 8:00 a.m., the search was still underway. *Id.* The search of Defendant's home concluded at approximately 11:50 a.m. *Id.* at 61. The officers seized numerous pieces of electronic media, including eighteen hard drives, four computers, sixty-eight 3½ inch floppy disks, and one CD-R. (Govt. Ex. 402). One of the floppy disks was labeled "Derrick's eyes ONLY" and another floppy disk was labeled "pics incriminating." (First Tr. at 131). One of the hard drives was labeled "porn." *Id.* The officers also found a jar with a rag in it at Defendant's house that they planned to test for chloroform. *Id.* at 115-16.

The Warren County Medical Examiner conducted an autopsy of Kosnac on May 31, 2010. (Govt. Ex. 304). In the autopsy report issued in October 2010, the Medical Examiner concluded "exposure to chloroform" was a "[c]ontributory [c]ondition" of death, but the cause of death was cardiomegaly with atherosclerotic coronary artery disease. *Id.* Additionally, on June 8, 2010, WCPO Detective Hernani Goncalves interviewed Defendant's minor daughter. (Govt. Ex. 401 at

11). The daughter told Detective Goncalves she woke up to Defendant standing over her with a washcloth that smelled like paint. (Def. Ex. 100 at 18-20; Govt. Ex. 401 at 11).

On August 10, 2011, Sergeant Robb obtained a search warrant from New Jersey Superior Court Judge Ann R. Bartlett to conduct forensic testing of Defendant's electronic media for "evidence pertaining to crimes including, but not limited to, Criminal Homicide, N.J.S.A. 2C:11-2, and/or Endangering the Welfare of a Child, N.J.S.A. 2C:24-4." (Govt. Ex. 402 ¶ 3). Thereafter, the New Jersey Regional Computer Forensics Laboratory ("RCFL") conducted a forensic examination of Defendant's electronic media. (Govt. Ex. 305). The RFCL initially located a total of approximately thirteen confirmed images of child pornography; over 762 images of possible child pornography; and approximately sixty-three videos containing possible child pornography. (Govt. Ex. 311 at 3; Govt. Ex. 312 at 3). The Government now represents that a total of 380 images containing child pornography have been recovered from Defendant's devices. (ECF No. 125 at 2).

In 2014, law enforcement received a Seagate Go Flex Hard Drive (the "Seagate Drive") from Defendant's then-girlfriend C.J., who brought the drive from her home that she shared with the Defendant to the PTPD. (ECF No. 90 at 3). Local authorities did not search the Seagate Drive at that time because C.J. did not allege that there was evidence of criminality on that drive. In March 2017, local authorities were advised of allegations that the Defendant sexually abused C.J.'s son, who reported the sexual abuse to the Monmouth County Child Protection and Permanency office. (ECF No. 92 at 5). C.J.'s son indicated that the Defendant not only sexually abused him on multiple occasions, but took pictures of the alleged abuse and transmitted some of the images to his friends. (ECF No. 90 at 1-2). Federal law enforcement was informed of the allegations in September 2017. (ECF No. 92 at 5-6). On October 16, 2017, the Government obtained a Federal

warrant to search the Seagate Drive and discovered images of additional child pornography during the search. (ECF No. 92 at 6).

II. MOTION TO SUPPRESS EVIDENCE

On November 2, 2018, Defendant filed a pro se motion to suppress the evidence contained on the electronic media found in his home in 2010. (ECF No. 99). In his motion, Defendant argues that the search warrant was not supported by probable cause, is not sufficiently particular, and that the good faith exception should not apply. (ECF No. 99 at 3-26). The Government opposed the motion, (ECF No. 101), and Defendant replied. (ECF No. 105). The Court heard oral argument on this matter on March 20, 2019. (ECF No. 141).

A. PROCEDURAL BACKGROUND

The Court previously considered the same underlying facts at issue in the instant pro se suppression motion. On December 22, 2015, Defendant filed a pretrial motion to suppress the evidence against him. (ECF No. 21). Defendant argued, among other things, that the child pornography found on his electronic media should be suppressed because the search warrant was obtained in violation of his Fourth Amendment rights. *Id.* The Government submitted a brief in opposition to Defendant's motion on February 16, 2016, (ECF No. 25), and Defendant replied. (ECF No. 26). The Court held evidentiary hearings on Defendant's motion on July 12 and July 13, 2016. Following the hearings, both parties filed supplemental submissions on July 26, 2016. (ECF Nos. 37, 38). Subsequently, the Court held oral argument on Defendant's motion on July 28, 2016. (ECF No. 39). Following oral argument, the Government filed a supplemental submission on August 3, 2016. (ECF No. 40).

The Court entered an opinion denying Defendant's motion to suppress evidence recovered from electronic media found in Defendant's home on September 9, 2016. *United States v. Baer*,

No. 15-417, 2016 WL 4718214, at *8 (D.N.J. Sept. 9, 2016) (hereinafter "*Baer I*"). In its opinion, the Court found that suppression was not warranted because "the search warrant [was] supported by probable cause, [was] sufficiently particular, and the delay in obtaining the search warrant was reasonable." *Id.* The Court also held that "[e]ven if the search warrant was defective or the amount of time to apply for and execute the search warrant was unreasonably long, suppression in this case is unwarranted because law enforcement acted in good faith." *Id.* at *12.

Thereafter, Defendant filed a motion for a *Franks* hearing on February 28, 2017. (ECF No. 53); *see generally Franks v. Delaware*, 438 U.S. 154 (1978). In this motion, Defendant argued that "the warrant application violated [his] Fourth Amendment[] rights, and all evidence seized from his home as a result of the unlawful search and seizure ultimately should be suppressed." *Id.* at 1. The Government opposed this motion, (ECF No. 55), and Defendant replied. (ECF No. 56). The Court heard oral argument on this motion on July 27, 2017. (ECF No. 59). On August 4, 2017, Defendant submitted further briefing on the issue. (ECF No. 61). The Court subsequently denied Defendant's motion for a hearing. *United States v. Baer*, No. 15-417, 2018 WL 2045991, at *6 (D.N.J. May 2, 2018) (hereinafter "*Baer II*").

Eight days later, Defendant filed a motion for reconsideration of the Court's *Baer II* decision. (ECF. No. 77). Defendant submitted a brief in support of his motion for reconsideration on May 24, 2018. (ECF No. 80). The Government opposed this motion, (ECF No. 81), and Defendant replied. (ECF No. 83). On August 8, 2018, after considering the parties' submissions, the Court denied Defendant's motion for reconsideration. *United States v. Baer*, No. 15-417, 2018 WL 3756437 (D.N.J. Aug. 08, 2018) (hereinafter "*Baer III*"). The instant motion is therefore the fourth motion concerning the same underlying facts.

B. SUPPRESSION DISCUSSION

1. The Court Previously Addressed Defendant's Arguments to Suppress this Evidence and Found that Suppression Was Unwarranted.

The Court previously ruled on Defendant's motions to suppress the evidence at issue here on three separate occasions. First, as discussed above, Defendant filed an omnibus motion on December 22, 2015, in which he argued for the suppression of the evidence found in his home based on the same legal grounds that he relies on now. (ECF No. 21). The Court rejected these arguments and denied Defendant's motion to suppress. *Baer I*, 2016 WL 4718214, at *15. Second, after Defendant's initial suppression motion was denied in September 2016, Defendant essentially repackaged his original argument and filed a motion for a hearing to determine whether the same evidence should be suppressed. (ECF No. 53). After considering Defendant's motion and the parties' subsequent briefs, the Court denied Defendant's motion for a hearing. *Baer II*, 2018 WL 2045991, at *6. Third, eight days after the Defendant's motion for a hearing was denied, Defendant filed a motion for reconsideration of the Court's denial, (ECF No. 77), relying again on similar arguments to contend that this evidence should be suppressed. (ECF Nos. 77, 80, 83). The Court denied Defendant's motion for reconsideration. *Baer III*, 2018 WL 3756437, at * 4. Overall, including the motion addressed herein, the Court has entertained four motions to suppress the evidence at issue, (ECF Nos. 21, 53, 77, 99), with two days of evidentiary hearings, three oral arguments, and at least fifteen written submissions. (ECF Nos. 25, 26, 37, 38, 40, 55, 56, 61, 80, 81, 83, 101, 105; ECF No. 126 at Ex. 2).

Defendant advances three main arguments in his pro se suppression motion, as well as one additional argument in his reply brief. The Court addressed Defendant's same contentions in its previous decisions. Defendant first argues that the search warrant lacked sufficient probable cause

to support a search for child pornography. (ECF No. 99 at 33-38); *see also* (ECF No. 37 at 19-20 for Defendant's previous argument on this point). The Court already concluded in its prior rulings that "probable cause existed for finding child pornography on Defendant's electronic media." *Baer I*, 2016 WL 4718214, at *15; *see also Baer II*, 2018 WL 2045991, at *6. The Court made this decision after presiding over two days of evidentiary hearings, reviewing all pertinent evidence regarding the search warrant application, hearing oral argument, analyzing the relevant legal standards, and carefully considering multiple written submissions from both parties. *Id.* at *15-26. In its decision, the Court outlined five pieces of information in the search warrant application that created a basis for probable cause to search Defendant's electronic media for child pornography. The Court analyzed the issue extensively in its prior decision, writing:

> First, Kosnac told Marcinkowski that "several years ago [Defendant] had a problem with kiddy porn in the form of pictures and books." (Govt. Ex. 401 ¶ 5I, admitted into evidence July 12, 2016). Second, Defendant told Marcinkowski "he had a problem with porn." (*Id.*). Third, Defendant allegedly took a photograph of Marcinkowski's minor daughter while she was showering. (*Id.*). Fourth, Defendant's electronic media included floppy disks labelled "Derrick's eyes ONLY" and "pics incriminating," and a hard drive marked "porn." (*Id.* ¶ 5(g)). Finally, Defendant's minor daughter reported she once woke up and found Defendant standing over her with a washcloth, raising the possibility to law enforcement Defendant may have used chloroform on his minor daughter. (*Id.* ¶ 5(i)). These pieces of information, taken together, create a substantial basis for concluding probable cause existed for finding child pornography on Defendant's electronic media. . . . As Sergeant Robb explained at the hearing, the suspicious labels found on some of the electronic media items (*i.e.*, "pics incriminating, "porn," and "Derrick's eyes ONLY"), taken together with the information provided by Marcinkowski that Kosnac once stated Defendant "had a problem with kiddy porn" and that Defendant had taken a photograph of Marcinkowski's minor daughter while showering, contributed to the possibility that child pornography would be found on Defendant's electronic media. (Second Tr.[4] at 126-27). Sergeant Robb further testified the large amount of electronic media found in the house (eighteen hard drives, sixty-eight floppy disks, four computers, and one CD-R) made him want to examine these items to see if child pornography would be located within. (*Id.* at 127).
>
> Moreover, the lab results confirming that chloroform was on the rag found in the jar in Defendant's home and the autopsy report that chloroform was found in Kosnac's

[4] "Second Tr." refers to the transcript of the second day of the relevant evidentiary hearing, which occurred on July 13, 2016. At this hearing, the Court heard testimony related to the suppression of the evidence found in Defendant's home.

> body further confirmed a central aspect of the account Kosnac reportedly gave Marcinkowski concerning Defendant's conduct—his use of chloroform on her to knock her out for sex. (First Tr. at 129-32). This makes it even more likely that Kosnac's account of Defendant's problem with child pornography was credible. *See United States v. Bush*, 647 F.2d 357, 363 (3d Cir. 1981) (police need not corroborate every detail of an informant's report to establish sufficient veracity of informant for probable cause). As such, hearsay concerning Defendant's previous problem with "kiddy porn" and his other sexual predilections, along with corroborating information, all provided a substantial basis for probable cause that child pornography would be found on Defendant's electronic media.

Id. Thus, the Court found that the search warrant was valid and Defendant's electronic media should not be suppressed. *Id.* at *15-16. Additionally, the Court reconfirmed its conclusion that the warrant was supported by probable cause in its subsequent opinion on Defendant's motion for a hearing. *Baer II*, 2018 WL 2045991, at *6 (holding that "the search warrant was based on probable cause, including because of the vast amount of electronic media found in Defendant's home, and the labels on such electronic media").

Next, Defendant contends that the evidence at issue should be suppressed because the affidavit does not contain "particularized facts to infer nexus." (ECF No. 99 at 31); *see also* (ECF No. 37 at 21-22) for Defendant's previous argument on this point). In its September 2016 ruling, the Court considered Defendant's arguments concerning particularity and concluded that "the search warrant particularly described the places to be search[ed] for child pornography . . . [and] described in detail each computer, hard drive, floppy disk, and CD the police sought to search for evidence related to specific criminal offenses." *Baer I*, 2016 WL 4718214, at *9. Moreover, the Court found that the search warrant affidavit specifically listed the criminal offenses at issue and identified possible electronic evidence pertaining to those offenses, such as child pornography and internet searches about chloroform. *Id.* at *10.

Additionally, Defendant avers that the law enforcement officials here should not be protected by the good faith doctrine. (ECF No. 99 at 15-25); *see also* (ECF No. 37 at 18-19 for Defendant's previous argument on this point). The Court previously decided that the good faith

doctrine properly applied after thoroughly examining the parties' submissions and presiding over evidentiary hearings, during which the affiant, Sergeant Robb, was found to be credible. *Baer I*, 2016 WL 4718214, at *12. Moreover, the Court also extensively considered the conduct of law enforcement in its decisions on Defendant's motion for a hearing and his subsequent motion to reconsider the Court's denial of that motion. *Baer II*, 2018 WL 2045991, at *6; *Baer III*, 2018 WL 3756437 (denying reconsideration). In its ruling on Defendant's first suppression motion, the Court analyzed Defendant's arguments about the good faith doctrine pursuant to *United States v. Hodge*. 246 F.3d 301, 307 (3d Cir. 2001). After conducting its analysis, the Court found that Sergeant Robb did not engage in reckless or grossly negligent conduct in applying for the search warrant and, therefore, the exclusion of evidence would not be appropriate. *Baer I*, 2016 WL 4718214, at *12. This conclusion was confirmed in the Court's decision on Defendant's motion for a hearing. *Baer II*, 2018 WL 2045991, at *6 (finding that Defendant has not properly shown that Sergeant Robb acted knowingly or recklessly in obtaining the search warrant). The Court further concluded in its September 2016 decision that the judge who issued the warrant did not abandon her judicial role and also that the warrant was sufficiently particular and supported by probable cause. *Baer I*, 2016 WL 4718214, at *12. Therefore, the Court held that the good faith doctrine applied and the evidence should not be suppressed. *Id.*

Finally, Defendant argues in his reply brief[5] that he did not consent to any search for child pornography in his home. (ECF No. 105 at 8-9); *see also* (ECF No. 37 at 1-4 for Defendant's previous argument on this point). The Court formerly concluded that Defendant freely gave consent to search his home and that "Defendant did not limit the scope of his consent." *Baer I*,

[5] While the Court acknowledges that this argument was not raised in Defendant's moving brief (ECF No. 99), the Court has considered the arguments contained in Defendant's reply brief given Defendant's pro se status.

2016 WL 4718214, at *11. Specifically, the Court found that Defendant signed a consent to search form which "specifically provided for a 'complete search' of Defendant's residence, without limitation, including all 'documents, materials, things, or other property' considered pertinent by law enforcement." *Id.* Furthermore, Defendant reaffirmed his consent at least twice after signing the consent to search form. *Id.* Accordingly, the Court concluded in its initial suppression decision that "Defendant provided a general consent and did not restrict his consent to certain subject matters, namely, items related to the allegations concerning his use of chloroform on Kosnac." *Id.* (*citing Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *Florida v. Jimeno*, 500 U.S. 248, 250-51 (1990) (approving consent searches because a search permitted by consent is reasonable)).[6]

Now, Defendant argues again that the evidence found in his home should be suppressed. As such, Defendant's pro se suppression motion effectively asks the Court to alter its three prior decisions that found the suppression of this evidence to be unwarranted.

According to local rules, any motion to alter or amend a court's prior judgment must be filed within fourteen days of entry of the initial judgment. L. Civ. R. 7.1(6)(b); *United States v. Curry*, No. 04-280, 2006 WL 1320083, at *1 (D.N.J. May 12, 2006) (finding that Local Civil Rule 7.1 "is applicable in criminal cases tried in the District of New Jersey"). The instant motion was filed on November 2, 2018, (ECF No. 99), which is more than fourteen days from the initial denial of Defendant's suppression motion on September 9, 2016, the denial of Defendant's motion for a

[6] Even if Defendant's consent was limited to searches related to Kosnac's death, the suppression of the evidence contained in Defendant's electronic devices would be unnecessary pursuant to the inevitable discovery doctrine. *United States v. Stabile*, 633 F.3d 219, 245-46 (3d Cir. 2011) (holding that where an officer illegally viewed the contents of videos on Defendant's computer, the evidence should not be suppressed because the police would have inevitably and lawfully uncovered the evidence). During the homicide investigation, the police learned that Defendant had researched how to make chloroform on the internet and later used this homemade chloroform on Kosnac, contributing to her death. Accordingly, law enforcement authorities, following routine and lawful procedures, would have eventually searched Defendant's devices for evidence of chloroform internet searches.

hearing on May 2, 2018, and the denial of Defendant's motion for reconsideration on August 8, 2018.[7] The Court will nonetheless address Defendant's arguments.

2. The Court Need Not Reexamine Its Prior Decisions Because No Extraordinary Circumstances Are Present.

In his pro se suppression motion, Defendant again urges the Court to suppress the same evidence that this Court has repeatedly found was lawfully obtained. The Court finds that it has thoroughly considered Defendant's suppression arguments on multiple occasions and has properly concluded that the relevant evidence should not be suppressed. Courts should only reexamine prior decisions in extraordinary circumstances. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) ("[A]s a rule courts should be loathe to [revisit their prior decisions] in the absence of extraordinary circumstances."). Because no extraordinary circumstances exist here, the Court declines to revisit its prior decisions on this issue.

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[7] Defendant appears to suggest that the instant motion should not be time-barred based on a prior pro se suppression motion Defendant submitted to the Court, which was postmarked on September 29, 2016 and received by the Court on October 3, 2016, following the Court's September 9, 2016 denial. (ECF No. 126, Ex. 2). Considering either September 29, 2016 or October 3, 2016 to be the filing date, the motion would still be time-barred according to the fourteen-day requirement in the local rules. L. Civ. R. 7.1(6)(b). Although the motion is dated September 23, 2016, which is within the fourteen-day period from the Court's September 9, 2016 decision, Defendant provides no statement or other proof that he delivered the motion to prison officials for mailing on that date, as required for the prison mailbox rule to apply. *See Martin v. Attorney General of U.S.*, 466 F. App'x 106, 107 (3d Cir. 2012) (prison mailbox rule not applied where petitioner's certificate of mailing did not state when he gave it to prison authorities for mailing to the court); *Bond v. VisionQuest*, 410 F. App'x 510, 515 (3d Cir. 2011) (declining to apply the prison mailbox rule where petitioner provided "no evidence –and does not even directly state – that he provided the complaint to prison authorities to mail to the District Court."); *Conover v. United States*, 2013 WL 4431259, at *5 (D.N.J. Aug. 14, 2013) (concluding that the prison mailbox rule was not applicable "because there [was] no proof that the Notice of Appeal was deposited as special/legal mail with the internal mail system" at the prison on the relevant date).

According to the Third Circuit, extraordinary circumstances exist where a different outcome is justified by: (1) the availability of new evidence; (2) an intervening change in controlling law; or (3) the need to correct a clear error of law or prevent manifest injustice. *See Wiest v. Lynch*, 710 F.3d 121, 128 (3d Cir. 2013); *N. River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995). Reconsideration motions "may not be used to relitigate old matters, nor to raise arguments or present evidence that could have been raised prior to the entry of judgment." *P. Schoenfeld Asset Management LLC v. Cendant Corp.*, 161 F. Supp. 2d 349, 352 (D.N.J. 2001); *see also Altana Pharma AG v. Teva Pharm. USA, Inc.*, No. 04-2355, 2009 WL 5818836, at *1 (D.N.J. Dec. 1, 2009) ("[C]ourts in this District routinely deny motions for reconsideration that simply re-argue the original motion."); *Tischio v. Bontex, Inc.*, 16 F. Supp. 2d 511, 532 (D.N.J. 1998) ("[A] motion for reconsideration should not provide the parties with an opportunity for a second bite at the apple.") (citations omitted). Moreover, the presentation of a novel legal argument does not entitle a party to a reevaluation of the Court's prior ruling. *United States v. Rabreau*, 376 F. App'x 221, 224 (3d Cir. 2010). As the Third Circuit explained in *Rabreau*, if reconsideration were allowed for every new argument, "the exception [would] swallow the rule, as almost any litigant would be able to articulate at least one reason why his or her arguments are unique," which would "drastically undermine" judicial economy, finality, and jurisprudential integrity. *Id.*

The Court need not reexamine its prior decisions because none of the circumstances that warrant reconsideration are present here. First, after comparing the statement of facts in Defendant's prior and current suppression motions, the Court cannot discern any new factual allegations that would change the Court's analysis. (*Compare* ECF No. 99 at 39-40 *with* ECF No. 21 at 1-4). At the hearing on March 20, 2019, however, Defendant contended that there was new

discovery—six photographs of Defendant's home—that were not made available to him until July 11 or 12, 2016. (Hr'g Tr. at 61:13-17 (March 20, 2019); DBAER000653; DBAER000654; DBAER000657; DBAER000668; DBAER000671; DBAER000711). Defendant argued that these images establish that Defendant was painting his bathroom and therefore explain his minor daughter's statement that she woke up to Defendant putting a washcloth that smelled like paint close to her face while she was sleeping in her bed. *Id.*; (Hr'g Tr. at 46:9-48:3 (March 20, 2019)).

Preliminarily, these images are not new discovery because the Court previously considered numerous similar, and even some identical, photographs of Defendant's home that he submitted as exhibits in the 2016 evidentiary hearing.[8] (Def. Exs. 200-218). Moreover, as stated at the March 20, 2019 hearing, the Government turned these images over to Defendant in its initial discovery and Defendant has had access to these exhibits since 2016. (Hr'g Tr. at 61:12-18, 62:25-63:1 (March 20, 2019)). Accordingly, these photographs are not new discovery. *Guinta v. Accenture, LLP*, 2009 WL 301920, at *7 (D.N.J. Jan. 23, 2009) (concluding that evidence that had been in possession of the parties during the initial proceedings are not "newly discovered" and therefore does not warrant reconsideration). Defendant could have raised this argument in the numerous submissions addressing suppression since July 12, 2016, including Defendant's supplemental brief after the suppression hearing, (ECF No. 37), his motion for a hearing to determine suppression, (ECF No. 53), his two briefs regarding that motion, (ECF Nos. 56, 61), his motion for reconsideration, (ECF No. 77), or his two briefs on the motion for reconsideration, (ECF Nos. 80, 83). *See P. Schoenfeld*, 161 F. Supp. 2d at 352 (holding that motions to alter judgment may not be used to raise arguments or present evidence that could have been raised before).

[8] Two of the photographs are entirely identical to images in Defendant's Suppression Hearing Exhibits (Def. Exs. 203, 206) and two other photographs are extremely similar images of Defendant's bathroom that were previously submitted as defense exhibits.

Furthermore, these photographs would not have changed the Court's analysis given the strong evidence that Defendant was making and administering chloroform. *See Church & Dwight Co., Inc. v. Abbott Labs.*, 545 F. Supp. 447, 450 (D.N.J. 2008) (finding that courts only have the discretion to consider evidence raised for the first time in the motion for reconsideration if such evidence may lead to a different result). For example, Marcinkowski told police that, when Kosnac developed an infected cyst on her rectal area that required surgery, Defendant admitted to Marcinkowski in the hospital that he learned to make chloroform on the internet and was using chloroform on Kosnac to incapacitate her in order to perform sexual acts on her. (Govt. Ex. 401 at 6). Marcinkowski also informed the police that Kosnac was worried that Defendant may have been using chloroform on their daughter as well. According to Marcinkowski, Kosnac said that their daughter "had woken up and found [Defendant] standing over her with a washcloth with his hand on the pillow" and that Kosnac "was very upset, devastated and ya know realized that all of these things could have taken place and in fact could have killed either one of them." (Govt. Ex. 103 at 7). Moreover, the police found evidence of chloroform on rags in Defendant's home and medical reports indicated that there was chloroform in Kosnac's brain and fat tissue, contributing to her death. (Govt. Exs. 303, 304). As such, the alleged new discovery would not have led to a different result because numerous pieces of information already confirmed that the judge who issued the warrant had a substantial basis to conclude that there was probable cause. *See Baer I*, 2016 WL 4718214, at *15; *see also Baer II*, 2018 WL 2045991, at *6.

Second, Defendant mainly argues that the Court should reconsider its prior ruling because he now cites to different case law.[9] (ECF No. 105 at 18-19). However, Defendant admits that

[9] The Court notes that Defendant heavily relies on many of the same cases that were cited in his initial suppression motion and previously considered by the Court, including, among others, *Virgin Islands v. John*, 654 F.3d 412 (3d Cir. 2011), and *United States v. Falso*, 544 F.3d 110, 122 (2d Cir. 2008). *Compare* (ECF No. 37 at 19, 20-21) *with* (ECF No. 99 at 27, 29-31).

there has not been any change in the relevant legal standards. (Hr'g Tr. at 61:9-11 (March 20, 2019)("Q: So was there a change in controlling precedent? A: No, your Honor.")). Reconsideration is permitted where there is a change in controlling precedent, not where a party merely decides to cite cases with different names but the same legal principles. *See P. Schoenfeld*, 161 F. Supp. 2d at 352 (holding that a motion for reconsideration should not be granted where the movant merely restates the law and arguments initially considered by the court). Third, the Court does not find that it disregarded or misapplied any legal authority in clear error. Therefore, Defendant does not demonstrate that any extraordinary circumstances exist here. Accordingly, the Court finds that there is no basis to reconsider its prior decisions.

Defendant claims, however, that the Court should nonetheless consider his pro se motion because he is now raising novel legal arguments that have not yet been presented to the Court. Although Defendant contends that he is raising new legal arguments, Defendant is arguing for the suppression of his electronic media—the same contention that he has now made in three prior motions throughout these proceedings. *See* (ECF Nos. 21, 53, 77). Defendant attempts to reshape his longstanding arguments by attacking other sections of the search warrant affidavit and relying on different Constitutional grounds. However, reconsideration is not warranted when a litigant merely puts a new twist on the same argument, as is the case here. *Rabreau*, 376 F. App'x at 224. Additionally, the law of the case doctrine prevents parties from raising arguments or presenting evidence that could have been raised prior to the entry of judgment. *P. Schoenfeld*, 161 F. Supp. 2d at 352. Defendant was given ample opportunity in the form of multiple motions, briefs, evidentiary hearings, and oral arguments to raise these contentions but failed to do so. Therefore, even if the Court viewed Defendant's arguments as original arguments, Defendant is still not

entitled to reconsideration. However, in the interest of justice, the Court will consider the issues raised by the pro se Defendant in his most recent suppression motion.

3. The Court Denies Defendant's Pro Se Motion on the Merits.

Defendant contends that the evidence at issue should be suppressed because (1) the search warrant violated his First Amendment rights, (2) the search warrant lacked particular facts necessary to support a search for child pornography and, (3) the good faith doctrine should not apply. The Court denies Defendant's pro se suppression motion on the merits.

a. The Relevant Search Warrant Was Based on Probable Cause and Complies with the First Amendment.

First, Defendant argues that the Court should suppress the evidence at issue because the search warrant was not supported by probable cause, in violation of his First and Fourth Amendment rights.[10] (ECF No. 99 at 31-38). Defendant contends that the search warrant violates his First Amendment rights because Sergeant Robb, the affiant, and Judge Bartlett, who issued the warrant, failed to make a content-based determination of whether the images in question depicted child pornography. *Id.* at 3-7. He relies on the Third Circuit's decision in *United States v. Pavulak* to support his argument. 700 F.3d 651 (3d Cir. 2012). In *Pavulak*, the search warrant affidavit stated that two eye witnesses had seen the defendant "viewing child pornography" but did not provide any further details about what the images depicted. *Id.* at 661. The Third Circuit concluded that there was insufficient probable cause because the judge who issued the warrant

[10] Although he did not use the phrase "First Amendment rights" in his original suppression motion, Defendant argued a very similar point in his prior submissions, which the Court considered in its previous ruling. In the Defendant's previous suppression motion, he argued that the police did little to further their investigation of Defendant's alleged child pornography problem and did not corroborate "th[e] layered hearsay" of Marcinkowski's statement that Defendant had a problem with "kiddy porn." (ECF No. 37 at 13, 20).

relied on the eyewitnesses' subjective and conclusory determinations that the images were in fact child pornography.[11] *Id.* Therefore, the Third Circuit found that where probable cause is *based on images* believed to be child pornography, the search warrant must be supported by more than the affiant's conclusion that an image qualifies as child pornography. *Id.* at 661-62 (emphasis added).

Here, unlike in *Pavulak*, the underlying basis for the search warrant was not the content of any images. Indeed, as Defendant admits, no witness nor law enforcement officer had viewed the images on Defendant's electronic media prior to the search warrant application. (ECF No. 99 at 16) ("No one ever claimed that [they] saw child pornography at the Defendant[']s home."). In fact, the purpose of the search warrant was to allow the police to view this media. Therefore, Sergeant Robb was incapable of describing the images because he had not seen them. Similarly, Marcinkowski provided the police with information that Defendant had a problem with "kiddy porn" but was unable to describe the child pornography because she did not observe Defendant viewing child pornography. Accordingly, the scenario in *Pavulak* is not present here because the search warrant was not based on anyone's statement that they viewed the sought-after images and subjectively concluded that the images constituted child pornography. As such, a First Amendment challenge is inapplicable to the search warrant in this case.

Even if *Pavulak* were to apply, the corroborated details here, such as the suspicious labels found on the electronic media, the statement of Defendant's minor daughter, and Marcinkowski's corroborated allegation that Defendant used chloroform on Kosnac, increased the likelihood that the electronic media contained child pornography. *Cf. Pavulak*, 700 F.3d at 661 (finding that the

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[11] The Third Circuit in *Pavulak* ultimately concluded that the evidence in question should not be suppressed because the officers relied on the warrant in good faith. *Pavulak*, 700 F.3d 651, 663 (3d. Cir. 2012).

corroborated details about the defendant's email account, place of work, and travel plans were unrelated to child pornography and, therefore, "did not increase the likelihood that the sought-after images contained lascivious depictions of nude minors or minors engaging in sexual acts."). Accordingly, the Court finds that Defendant's argument that the search warrant is invalid because his First Amendment rights were violated is without merit.

b. The Underlying Search Warrant Was Sufficiently Particular and Supported with Concrete Factual Allegations.

Defendant reargues that the evidence at issue must be suppressed because the search warrant violated the particularity requirement. The Fourth Amendment requires that search warrants particularly describe the place to be searched and the persons or things to be seized. U.S. Const. amend. IV; *see also United States v. Yusuf*, 461 F.3d 374, 393 (3d Cir. 2006). Therefore, there must be some evidence that ties criminality to a specific location and to specific crimes. *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983); *Yusuf*, 461 F.3d at 393. In his pro se motion, Defendant makes three arguments as to particularity.

First, Defendant avers that the affidavit's only link between Defendant and child pornography is Sergeant Robb's statement that based on his education and experience, "persons sexually attracted to younger children tend to collect and save child pornography in many forms such as computer image files." (ECF No. 99 at 31). The Court finds Defendant's argument unavailing. At the time of the search warrant application, law enforcement officials were aware of allegations that Defendant had a problem with "kiddy porn," which directly supports a search

for child pornography. Second, the labels on the electronic media—"incriminating pics,"[12] "Derrick's eyes ONLY" and "porn"—reinforced the police's belief that the labeled media may have contained child pornography. (Second Tr. at 101, 127); *see also United States v. Miknevich*, 638 F.3d 178, 185 (3d Cir. 2011) (explaining that a computer file's name may be detailed enough "so as to permit a reasonable inference of what the file is likely to depict."). Moreover, Defendant's minor daughter's statement that she once woke up to Defendant standing over her with a wash cloth further suggested to police that Defendant may have been using chloroform on children in a sexual manner, given the chloroform discovered in the home and the corroborated allegation that he was using chloroform on Kosnac. (Second Tr. at 110-11, 125, 128, 129-32). Based on all of this information, the Court concludes that there were sufficiently particular facts to support the search for child pornography.

Second, Defendant argues that, because the only allegation in the affidavit referencing "kiddy porn" strictly referred to pornography in the form of pictures and books, the search warrant was overly broad in including Defendant's computer. *Id.* at 12-13. Here, the large quantity of electronic media and the suspicious labels led the police officers to believe that Defendant's electronic devices may have contained child pornography. (Second Tr. at 101, 127). Marcinkowski's reference to pictures and books, instead of digital images, does not weaken law enforcement's determination that Defendant's computer may have contained child pornography. As noted by this Court in reference to Defendant's prior identical argument, pictures and books

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[12] At the oral argument on March 20, 2019, Defendant noted that the photos found in the disk labeled "pics incriminating" depicted drugs use, "[w]hich would be incriminating pictures." (Hr'g Tr. at 71:9-15 (March 20, 2019); DBAER000815; DBAER000821; DBAER000825; DBAER000826; DBAER000827). The Court discerns that Defendant made this statement to show that law enforcement was wrong to believe that the disk may have contained child pornography or information about chloroform. The fact that the disk labeled "pics incriminating" contained photographs of drug use does not undermine law enforcement's reasonable inference that the disk may have contained evidence related to child pornography or homicide given the circumstances.

are often stored on one's electronic media. *Baer I*, 2016 WL 4718214 at *16 n.8. Accordingly, the Court finds that there were enough particularized facts to support law enforcement's belief that Defendant's computer may have contained child pornography.

Lastly, Defendant contends that the information tying him to child pornography was stale because Marcinkowski stated to police that Defendant had a problem with child pornography "several years ago." (ECF No. 99 at 26-27). However, the police corroborated this information with many fresh, additional facts that strengthened their belief that Defendant may have possessed child pornography at the time of the search warrant application. *See United States v. Tehfe*, 722 F.2d 1114, 1119 (3d Cir. 1983). For example, law enforcement's discovery of the labeled electronic media and Marcinkowski's other allegations, taken together with the results of the police investigation, provided further support that evidence of criminality may have been on Defendant's electronic media at the relevant time. (Second Tr. at 101, 127, 129-32).

Moreover, although staleness is a factor in determining probable cause, the Court must also consider the nature of the crime and the evidence at issue. *United States v. Harvey*, 2 F.3d 1318, 1322 (3d Cir. 1993). Courts have consistently found that child pornography is a "continuing offense" and therefore older information may support probable cause. *See, e.g., United States v. Zimmerman*, 277 F.3d 426, 434 (3d Cir. 2002) ("Presumably individuals will protect and retain child pornography for long periods of time because it is illegal and difficult to obtain."); *Harvey*, 2 F.3d at 1322 (concluding that the information in the search warrant was not stale because collectors of child pornography rarely dispose of their collections); *United States v. Lacy*, 119 F.3d 742 (9th Cir. 1997) (finding that information regarding child pornography was not stale and placing "significant weight on expert opinion indicating that collectors of child pornography rarely if ever dispose of such material and store it for long periods in a secure place, typically in their

homes"); *United States v. Koelling*, 992 F.2d 817, 819-20, 23 (8th Cir. 1993) (warrant containing statement that "pedophiles . . . keep [child pornography] for many months and years, and rarely, if ever, dispose of their collections" upheld). As such, the Court concludes that the search warrant was sufficiently particular and denies Defendant's motion to suppress on particularity grounds.

c. ***The Good Faith Exception Properly Applies.***[13]

Defendant contends that the authors of the search warrant affidavit recklessly or knowingly omitted information and, therefore, should not be protected by the good faith doctrine. Specifically, Defendant contends that Sergeant Robb was aware of photographic evidence that Defendant and Kosnac previously painted the bathroom in their home and that Sergeant Robb acted in bad faith when he failed to include this information, which Defendant argues would have explained his minor daughter's allegation that she woke up to Defendant standing over her with a washcloth that smelled like paint. The Court disagrees.

The Third Circuit has opined that "[a]ll storytelling involves an element of selectivity" and courts "cannot demand that police officers relate the entire history of events leading up to a warrant application with every potentially evocative detail." *Wilson v. Russo*, 212 F.3d 781, 787 (3d Cir. 2000). As such, omissions are made with reckless disregard only if an officer withholds a fact that a reasonable person would have known "was the kind of thing the judge would wish to know." *Id.* at 788. Sergeant Robb's omission of these photographs was not made with reckless disregard because, given the circumstances, it was reasonable to conclude that this information would be unremarkable to a judge considering the matter. Despite Defendant's claim that the photographs demonstrate that the bathroom was "in the process of being painted" when the police searched his

[13] Defendant's additional contentions regarding the good faith exception were entirely and extensively addressed in the Court's prior decisions, as discussed throughout this Opinion.

home, (ECF No. 99 at 22), the photographs do not support his contention in a way that would affect a probable cause analysis.[14]

The photograph of the bedroom shows no evidence of painting, as there are no paint brushes, rollers, trays, tarps, or cans of paint visible. (DBAER000711). The bathroom photographs show tape on the shower walls and uncovered outlets, but no other possible indications of an active painting project. (DBAER000653; DBAER000654; DBAER000657; DBAER000668). Rather, the photographs show hair and dental care products covering the bathroom counters next to the walls, and the shower shelves are filled with body wash, shaving cream, shampoo and the like, signifying that the bathroom was being utilized normally and refuting Defendant's claim that painting was in progress in the photo depiction. *Id.* One photograph shows a cleaning supply closet with a white canister, which may or may not contain paint, in the back of the closet partially covered by a package of toilet paper and other household cleaning supplies. (DBAER000671). The Court finds that it was reasonable for Sergeant Robb to conclude that these photographs would not be important to the judge's determination of probable cause, given all of the other evidence presented and the negligible value of these images. Therefore, Sergeant Robb did not recklessly omit this photographic evidence.

Even if, assuming *arguendo*, Sergeant Robb did recklessly omit this information, the Court finds that this was not a material omission. To determine whether an omission is material, the

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[14] As discussed above, the Defendant provided the Court with six photographs during oral argument, upon which the Court relies: DBAER000653; DBAER000654; DBAER000657; DBAER000668; DBAER000671; DBAER000711. *See supra* at 13-14. Defendant's motion also references photos "DCS_0071 – DCS_0100," which do not match the bates numbers for any of the photos provided by Defendant at the oral argument and do not appear to correspond to any other images the Court has in the record. *See* (ECF No. 99 at 22). While the Court can only rely upon the photographs in this case's record and those supplied to the Court, to the extent the DCS prefix pictures depict painting supplies or other clearer evidence of painting, the probable cause analysis would remain the same for the reasons discussed herein.

Court must insert the omitted facts and then decide whether this modified affidavit would establish probable cause. *See United States v. Eberle*, 266 F. App'x 200, 205 (3d Cir. 2008) (denying suppression motion because the officer's omission of information about a previous unsuccessful search of a computer that was supposedly used by the defendant was immaterial to probable cause). Here, a search warrant affidavit that included this omitted information would have established probable cause because the affidavit contained a significant amount of other evidence. This includes information specifically relating to Defendant's daughter's allegation, such as the police's discovery of jars containing rags in Defendant's home, lab results confirming that these rags contained chloroform, and an autopsy report concluding that chloroform was found in Kosnac's body. In addition to Defendant's daughter's allegation, Marcinkowski told police that Kosnac was concerned that Defendant may have been using chloroform on their daughter because the daughter "had woken up and found [Defendant] standing over her with a washcloth with his hand on the pillow." (Govt. Ex. 103 at 7); *see also Illinois v. Gates*, 462 U.S. 213, 241 (1983) (finding that even "an affidavit relying on hearsay is not to be deemed insufficient on that score, so long as a substantial basis for crediting the hearsay is presented"). Thus, even with the information about the photographs of Defendant's home, the judge who issued the warrant had a substantial basis to find probable cause. Therefore, as previously concluded, the Court finds that Sergeant Robb acted in good faith and suppression is not appropriate.

Furthermore, Defendant again relies on the First Amendment to reargue that the good faith exception should not apply. (ECF No. 99 at 16-17). Defendant writes that the warrant in the instant case was so facially deficient that it failed to particularly identify the place to be searched or things to be seized, especially in light of the fact that "[a] warrant's particularity is heightened when the materials sought are protected by the First Amendment." (ECF No. 99 at 17) (citing

Zurcher v. Stanford Daily, 436 U.S. 547 (1978)). First, as Defendant acknowledges, child pornography is unprotected by the First Amendment. (Hr'g Tr. at 55:15-17 (March 20, 2019)); *see also New York v. Ferber*, 458 U.S. 747 (1982). Additionally, as the Court concluded above, Defendant's First Amendment rights were not implicated here because the search warrant application was not based on anyone's subjective interpretation of any images. *Pavulak*, 700 F.3d at 661. Even if the principles established in *Pavulak* were relevant to the instant case, the Third Circuit held in *Pavulak* that the evidence should not be suppressed because the officers relied on the warrant in good faith. *Id.* at 663. The Court concluded in its prior opinions, and restates now, that the officers acted in good faith. *Baer I*, 2016 WL 4718214, at *12; *Baer II*, 2018 WL 2045991, at *6. Therefore, Defendant's First Amendment argument is without merit and the Court holds that suppression is not warranted.

III. MOTION TO DISMISS THE INDICTMENT

Defendant filed his pro se motion to dismiss the indictment pursuant to the Speedy Trial Act of 1974, the Sixth Amendment to the United States Constitution, and Federal Rule of Criminal Procedure 48(b) on February 28, 2019. (ECF No. 115). The Government filed its opposition on March 4, 2019 and a supplemental letter brief in opposition on March 7, 2019. (ECF Nos. 119, 126). Defendant filed his pro se reply on March 8, 2019, and a supplemental pro se reply on March 12, 2019. (ECF Nos. 128, 133).

A. PROCEDURAL BACKGROUND

This matter is as complex procedurally as it is factually, with a very active docket and voluminous motions both in number and in size. Given the unique background of the case and the investigations conducted by both the state and federal government, Defendant's counseled and pro se motions have required the Court to deeply engage with evidentiary questions and constitutional

analyses, as well as more typical pretrial motions. Likewise, the *in limine* motions brought by the Government reflect the complexities in this case. Almost all motions have required oral argument, supplemental briefing, or both.

In total, from the period following his arraignment to the date of this opinion pre-trial, the Defendant has appeared before this Court for a total of fifteen (15) days on a variety of matters: evidentiary hearings, oral arguments, status conferences, an attorney appointment hearing, a *Frye* hearing, and a *Faretta* hearing. (ECF Nos. 22, 34-36, 39, 47, 59, 73, 94, 95, 98, 106, 116, 134, 141). In addition to motions and hearings, nine orders to continue were entered in this matter, eight of which were jointly applied for by the Government and Defendant's counsel. (ECF Nos. 19, 20, 23, 27, 30, 49, 52, 63, 140).

B. SPEEDY TRIAL ACT CLAIMS

The Speedy Trial Act requires that the trial of a criminal defendant begin within seventy (70) days of the filing of the indictment or the date of the defendant's first appearance before a judicial officer, whichever occurs later. 18 U.S.C. § 3161(c)(1). When computing the time within which trial must commence under the Act, certain periods of time are automatically excluded. One such exclusion is for "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C. § 3161(h)(1)(D). The exclusion covers "all time between the filing of a motion and the conclusion of the hearing on that motion, whether or not a delay in holding that hearing is 'reasonably necessary.'" *Henderson v. United States*, 476 U.S. 321, 330 (1986). It also excludes "time after a hearing has been held where a district court awaits additional filings from the parties that are needed for proper disposition of the motion." *Id.* at 331. Another exclusion is for "delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding

concerning the defendant is actually under advisement by the court." 18 U.S.C. § 3161(h)(2). Additionally, any period of delay resulting from a continuance granted by a judge "on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government" shall also be excluded so long as "the judge granted the continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(7)(a).

1. Speedy Trial Clock Timeline and Calculation

Under the Court's own assessment of the Speedy Trial clock ("STC"), the Court finds that the time from the Defendant's indictment to the present does not exceed seventy (70) days. The indictment in this matter was filed on August 20, 2015 and the Defendant was arraigned on September 9, 2015. (ECF Nos. 16, 17). The Court calculates that there are five (5) periods of time which cannot be excluded from the STC based on 18 U.S.C. § 3161(h).[15]

The STC was running for nineteen days (19) between the Indictment and September 9, 2015 when an Order to Continue was granted based on joint application of the Government and Defendant's counsel. (ECF No. 19). On October 23, 2015, prior to the expiration of the first continuance, another Order to Continue was filed based on a joint application, which tolled the STC until December 31, 2015. (ECF No. 20). While the October 23, 2015 Order to Continue was still in effect, the Defendant filed an Omnibus Motion,[16] (ECF No. 21) for which an evidentiary hearing and oral argument were held on July 12-13, and 28, 2016. (ECF Nos. 35, 36, 39).

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[15] The Court notes that items which did not materially influence calculation of the STC have been omitted from this recitation.

[16] Defendant's Omnibus Motion sought to compel disclosure of certain evidence, suppression of evidence seized, and evidentiary hearings to determine: (1) whether consent to search Defendant's residence was voluntarily made or valid, (2) the admissibility of Defendant's statements to law enforcement, and (3) whether suppression of evidence was warranted. *See generally* (ECF No. 21).

Supplemental briefing was provided on August 3, 2016. (ECF No. 40). Defendant's Omnibus Motion was under advisement by the Court for thirty days until September 2, 2016, at which point the STC began running again on September 3, 2016.

On September 16, 2016, after thirteen (13) days had been added to the STC, the Court and the Government received an email from Defendant's counsel stating that Defendant asked his counsel "to relay to the Court that he would like an opportunity to be heard" and that it was his counsel's belief that the Defendant will "be making a request for new counsel," (ECF No. 126, Ex. 1 at 15), which again stopped the STC. In response to that email, the Government filed a formal motion for a status conference on September 19, 2016 to determine whether the Defendant wanted to appoint new counsel. (ECF No. 44). On October 3, 2016, Defendant filed three pro se items:[17] a motion for a pretrial *Franks* hearing, a supplemental brief in support of a motion to suppress evidence, and a motion for a subpoena *duces tecum* related to certain police department and telephone records. (ECF No. 126, Ex. 2 at 17-34). Defendant received a new attorney at a hearing on October 11, 2016. (ECF No. 47, 48). The time between the September 16, 2016 email and the hearing would therefore be excluded, and an excludable thirty-day advisement period began as to Defendant's pro se motions on October 3, 2016. While the advisement period was tolling the clock, another Order to Continue based on a joint application was filed on October 20, 2016. (ECF No. 49). The continuance expired on December 31, 2016, at which point no motions were tolling the clock and it began to run again.

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[17] Defendant's motions are dated September 23, 2016, and postmarked September 29, 2016. The Court considers the filing date as the date on which the envelope was received and stamped by the Court, October 3, 2016. Looking to the prison mailbox rule, there are circumstances where the Court can use the date Defendant signed and dated the motion as the filing date. *See Terrell v. Benfer*, 492 F. App'x 74, 75 n.1 (3d Cir. 2011). In this instance, the STC analysis is the same using any of the three dates.

After four (4) more days were added to the STC, a subsequent Order to Continue was filed based on joint application on January 5, 2017. (ECF No. 52). During the pendency of that continuance, the Defendant, through counsel, filed a Motion for a *Franks* Hearing on February 28, 2017. (ECF No. 53). Oral argument on that motion was heard on July 27, 2017, (ECF No. 59), and a supplemental filing by Defendant's counsel was made on August 4, 2017 (ECF No. 61). The Motion for a *Franks* Hearing was then under advisement until September 3, 2017, at which point the STC began to run again on September 4, 2017.

The STC ran for a total of seven (7) days before the Government filed a motion to continue on September 11, 2017 that tolled the clock. (ECF No. 62). The continuance order was issued on September 28, 2017, based on the reasons set forth in the Government's submission: "to permit counsel for the defendant a reasonable amount of time to review the facts of the case, including the electronic evidence in the Government's possession, to engage in potential plea negotiations, and effectively prepare for trial" and "to allow for a reasonable amount of time for the Court to review information presented by the defendant and the Government" including new information presented at the previous oral argument. (ECF No. 63). The continuance lasted until November 30, 2017, however prior to that date Defendant filed another omnibus motion on November 16, 2017, which held the clock. (ECF No. 64).

Oral argument was heard on the omnibus motion on April 13, 2018, and a related opinion was issued within the advisement period, on May 10, 2018. (ECF Nos. 73, 78). That same day, Defendant filed a motion for reconsideration of the *Franks* hearing denial. (ECF No. 77). There was no argument on the reconsideration motion and the last brief on the issue was submitted on June 14, 2018, at which point the advisement period ran for thirty days until July 14, 2018. (ECF No. 83).

Following the advisement period, twenty-six days (26) ran against the clock from July 15, 2018 through August 9, 2018, without any items pending or otherwise tolling the clock. On August 10, 2018, the Government filed their first motion in *limine*, followed by Defendant's cross-motion to suppress evidence on September 17, 2018. (ECF Nos. 88, 90). Both motions have required several rounds of supplemental briefing and two oral arguments, which concluded with the second oral argument on March 5, 2019. (ECF No. 134). A related *Cunningham* hearing request culminated in a *Cunningham* hearing and letter briefing, which concluded on March 13, 2019. (ECF Nos. 125, 116, 136). The opinion covering these issues was issued within the advisement period at a hearing on March 20, 2019. (ECF No. 141).

Several other motions filed during the same time period have served to toll the clock, including through the date of this opinion: Defendant's pro se suppression motion filed on November 2, 2018 (ECF No. 99), Defendant's current pro se motion to dismiss his indictment at issue here filed on February 28, 2019 (ECF No. 115), and the Government's second and third motions *in limine*, filed on March 4 and 21, 2019, respectively. (ECF Nos. 122, 139). In addition to these motions tolling the STC, a continuance jointly applied for by the Government and Defendant will hold the clock until the start of jury selection on March 27, 2019, in order for the parties to "explore a potential resolution of the pending matter short of a jury trial." (ECF No. 140 at 1).

Based on the Court's computation of the clock as outlined above, the STC has not exceeded seventy days. The Court finds that there were five (5) periods of non-excludable time: 19 days from August 21 through September 8, 2015; 13 days from September 3 through September 15, 2016; 4 days from January 1 through January 4, 2017; 7 days from September 4 to September 10, 2017; and 26 days from July 15 through August 9, 2018, for a total of sixty-nine (69) days on the

clock. The Government's calculation is essentially the same, but allows for an additional two-day reduction of the clock based on a notice of motion filed by the Government.[18] *See* (ECF No. 126, Ex. A at 1). Excluding this two-day period would reduce the Court-calculated STC total to sixty-seven (67) days, however the Court need not opine on whether this time should be excluded because the STC is below seventy days without excluding that time. The Court therefore finds that the Speedy Trial Act requirements have not been violated.

2. Defendant's Arguments

Defendant's two main arguments for noncompliance with the STC are based on (1) accounting of the STC based on time limits set under the District of New Jersey Plan for Prompt Disposition of Criminal Cases, referred to as "Appendix J," and (2) the inclusion of an email and three of Defendant's pro se motions as excludable time. (ECF No. 115 at 4-11; ECF No. 133 at 1-3). The Court disagrees with Defendant's calculations and reading of excludable time.

As discussed above, the Speedy Trial Act governs excludable time for purposes of calculating the STC. Consistent with the vision of Congress that district courts be able to enact their own plans on the administration of the Speedy Trial Act, the District of New Jersey adopted its Plan for Prompt Disposition of Criminal Cases in June 1980, which was most recently amended in March 2010. N.J. Fed. Prac. Rules, Appendix J (2019 ed.); *see also* 18 U.S.C. § 3166. Defendant contends that the plan must be used to calculate the STC to determine whether dismissal of his indictment is required. (ECF No. 115 at 8-10).

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[18] The Government's STC calculation excludes time for their first *in limine* motion starting on August 8, 2018, when the notice of motion was filed, (ECF No. 87) even though the related motion itself was filed on August 10, 2018. (ECF No. 88); *see United States v. Wong*, 40 F.3d 1347, 1371 (2d Cir. 1994) ("Nothing in either the Federal Rules of Criminal Procedure or the [local] Criminal Rules . . . suggests that a motion would not be deemed filed on the date the notice of motion is filed.").

Nevertheless, Appendix J cannot be a basis for finding a violation unless the Act itself was violated. *Compare* N.J. Fed. Prac. Rules, Appendix J 10(a) (2019 ed.), *with* 18 U.S.C. §3161(h). In the sanctions portion of the plan, under the subheading of "Dismissal or Release from Custody" it states that

> Failure to comply with the requirements of Title 1 of the Speedy Trial Act may entitle the defendant to dismissal of the charges against him or her or to release from pretrial custody. **Nothing in this Plan shall be construed to require that a case be dismissed or defendant released from custody in circumstances in which such action would not be required by 18 U.S.C. §§ 3162 and 3164.**

N.J. Fed. Prac. Rules, Appendix J 10(a) at 717 (2019 ed.) (emphasis added); *accord United States v. Simmons*, 812 F.2d 818, 820-21 (2d Cir. 1987) (finding "sanction of dismissal would not be required even if [district court] plan was violated" where sanctions language was identical to Appendix J and "absence of the ultimate weapon of dismissal does not mean that the pretrial provisions of the plan are valueless").[19] Sanctions for noncompliance with the time limits in the

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[19] Defendant relies heavily on *United States v. Felton*, 811 F.2d 190 (3d Cir. 1987). (ECF No. 115 at 10; ECF No. 128 at 1). However, *Felton* compels the denial of his motion. *See* 811 F.2d at 210 (denying the defendant's motion to dismiss on speedy trial grounds). *Felton* acknowledges that "specific time limits for action under subsection (F)," currently subsection (D), of the Speedy Trial Act and any impact on sanctions must be determined by the local rules. *Id.* at 200. Appendix J 6(a) of the New Jersey local rules provides in part that when "determining excludable time under 18 U.S.C. § 3161(h)(1)(F), 90 days will be the maximum time excluded, unless the Court orders a hearing on the motion or additional extensions of time for filing briefs are specifically allowed by the Court." That is not the end of the inquiry. Appendix J also makes clear that the periods set forth in 18 U.S.C. § 3161(h), including the 30-day advisement period, shall be excluded when computing time. Most importantly, Appendix J expressly states that the time limitations in the plan shall not be grounds for dismissal unless otherwise warranted under the Speedy Trial Act itself.

The Court further notes that a plain reading of the portion of Appendix J 6(a) that concerns the 90-day period does not correspond to the pretrial motion section of excludable time in the Speedy Trial Act, but references 18 U.S.C. § 3161(h)(1)(F), which is for "delay resulting from transportation of any defendant." The Court surmises that the inconsistency is due to the Speedy Trial Act amendment in October 2008, which moved the pretrial motions exclusion previously at 18 U.S.C. § 3161(h)(1)(F) to subsection (h)(1)(D), although the District Plan, Appendix J, has not been updated to reflect such change in more than a decade. *See* Pub. L. No. 110-406, § 13, 122 Stat. 4291 (2008).

Speedy Trial Act are set forth at 18 U.S.C. § 3162(a)(2), and that section only calls for dismissing the indictment when more than seventy days have passed after accounting for excludable time in the Act under 18 U.S.C. §3161(h). The Court has therefore analyzed the alleged speedy trial violation solely based on the Speedy Trial Act.

Moving on to Defendant's arguments about excluding time based on an email and three pro se motions, the Court is likewise not persuaded. Defendant contends that the email from his counsel, sent to the Court and the Government, was sent after "business hours" on a Friday at 6:02 p.m. and therefore cannot serve to toll the clock until the following Monday. (ECF No. 133 at 1). Defendant does not cite to, nor is this Court aware of, any authority in the Speedy Trial Act that restricts the time of day a motion must be received for it to toll the clock. Furthermore, "lack of formality does not preclude" the request "from attaining, for Speedy Trial Act purposes, the status of a pretrial motion." *United States v. Arbelaez*, 7 F.3d 344, 347 (3d Cir. 1993).

Defense counsel's email stated that Defendant asked him to relay to the Court that "he would like an opportunity to be heard" and that counsel believed Defendant would "be making a request for new counsel." (ECF No. 126, Ex. B1 at 15). In response to this request, the Government filed a motion the following Monday asking for a status conference to address the issue. (ECF No. 44). In *United States v. Arbelaez*, as is the case here, the submission "was similar enough to a motion, both in context and in content" and "the government, in good faith, treated the request as a motion." *Arbelaez*, 7 F.3d at 348. The Court therefore finds the email to be an excludable motion pursuant to 18 U.S.C. § 3161(h)(1)(D).

Defendant further disputes that his pro se motions submitted to this Court on October 3, 2016 toll the STC. (ECF No. 133 at 1-2). Defendant argues that the Court "refus[ed] to even docket such submissions," that the Government fails to point out when the "undocketed" pro se

motions were submitted to the Court, and claims that the Court "already rejected these submissions on July 28, 2016." *Id.* The Government counters with caselaw demonstrating that even where a defendant is represented by counsel and no action is taken on a motion, it is properly counted as excludable time for Speedy Trial Act purposes. *See United States v. Villalobos*, 560 F. App'x 122, 125, 126 n.3 (3d Cir. 2014) (finding a pro se letter was "functionally a motion requesting intervention" and stopped the clock from when it was filed, although the defendant was represented at the time and the submission "was not actually considered by the District Court").

The Court notes for the record that it never expressly rejected or refused to docket any submissions from the Defendant. At the hearing on July 28, 2016, Defendant stated that he had "prepared motions pro se" which he "wish[ed] to submit to the court." (ECF No. 45 at 125:10-11). The Court, concerned with a potential breakdown of communication between the Defendant and his counsel, provided some time for Defendant and his counsel to "see if there's anything that you might want to talk about that might resolve your current issue before you present it." *Id.* at 128:9-11. Following a brief recess, Defendant's counsel relayed that Defendant wanted to "pursue further motions" and Defendant's counsel team "indicated to him that [they] will not be pursuing those motions" and that Defendant "would request to go pro se . . . or to fire" his counsel. *Id.* at 128:24-129:4. The Court stated that it would provide Defendant with "some time to consider [his] position" and ultimately Defendant determined that he "wish[ed] to go pro se if need be, pending the results of th[e] [evidentiary] hearing." *Id.* at 131:9-10. In light of the Defendant's request to await the results of the hearing before making a determination on whether he wished to proceed with his counsel, the hearing concluded with Defendant's counsel requesting some time to "sit down when we have an opportunity with Mr. Baer and see where things stand." *Id.* at 131:7-20.

Almost two months later, in mid-September, the Court received the email motion from Defendant's counsel discussed above, requesting an opportunity to be heard regarding counsel. In between the time of that email and the attorney appointment hearing, the Court received an envelope on October 3, 2016 containing three pro se motions: a motion for a *Franks* hearing, a suppression motion, and a motion for a subpoena *duces tecum*. *See* (ECF No. 126, Ex. 2), Ex. A to this Opinion. Defendant's pro se motions are therefore proper pretrial motions for purposes of excludable time. *See Bloate v. United States*, 559 U.S. 196, 2016 (2010) (exclusion is "automatic[]" upon filing of the motion); *United States v. James*, 712 F. App'x 154, 164 (3d Cir. 2017) ("Nowhere does the statute distinguish between pro se motions and motions filed by counsel, or between meritorious and frivolous motions.") (quoting *United States v. Williams*, 557 F.3d 943, 951 (8th Cir. 2009)).

To the extent Defendant's motion seeks to claim a violation of the Speedy Trial Act based on continuances granted without his approval, that argument fails. Eight of the nine continuances in this matter were jointly requested by the Defendant's counsel and the Government. (ECF Nos. 19, 20, 23, 27, 30, 49, 52, 140). The Speedy Trial Act expressly states that an "ends of justice" continuance may be "granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government." 18 U.S.C. § 3161(h)(7)(A) (emphasis added). Defendant's express authorization is not required, and the consent of Defendant's counsel therefore properly excluded the periods covered in those eight continuances from the STC. *See United States v. Green*, 516 F. App'x 113, 122 (3d Cir. 2013).

The one continuance granted solely on application of the Government in September 2017 tolled the clock from the date of issue on September 28, 2017 until Defendant's omnibus motion was filed on November 16, 2017. *See* (ECF Nos. 63, 64). The reasons provided for the

continuance were "to permit counsel for the defendant a reasonable amount of time to review the facts of the case, including the electronic evidence in the Government's possession, to engage in potential plea negotiations, and effectively prepare for trial" and "to allow for a reasonable amount of time for the Court to review information presented by the defendant and the Government" including new information presented at the previous oral argument. (ECF No. 63). In granting that continuance, the Court found that the "ends of justice served by the granting of th[e] continuance outweigh the best interests of the public and the defendant in a speedy trial," as required by the statute. *Id.* at ¶ 4; *see also* 18 U.S.C. § 3161(h)(7)(A).

The reasons provided for the continuance were, and remain today, valid reasons for needing additional time. First, the electronic evidence in this matter is highly sensitive and the Government maintains electronic evidence that contains alleged child pornography. Therefore, to the extent the Defendant needed to review certain files, it is a more involved process to review such discovery than in a typical case. Second, new allegations against the Defendant in March 2017 resulted in the search of an additional hard drive, the Seagate Drive, in October 2017, which was determined to contain more images of child pornography. (ECF No. 88 at 5). Lastly, while the Court is not involved in or privy to any plea negotiations between Defendant and the Government, the Government did subsequently extend a formal plea offer to the Defendant (ECF No. 82 at 1), for which the Court held a *Frye* hearing following Defendant's rejection of that offer. (ECF No. 94). Given all of this information, the Court still finds that the "ends of justice served by granting th[e] continuance outweigh[ed] the best interests of the public and the defendant in a speedy trial." *See* (ECF No. 63 at ¶ 4); *see also* 18 U.S.C. § 3161(h)(7)(A). The Court therefore finds that all continuances granted in this matter are valid under the Speedy Trial Act and properly tolled the STC.

C. SIXTH AMENDMENT CLAIMS

Defendant alleges that his Sixth Amendment rights to a speedy trial were violated. (ECF No. 115 at 11-19). The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. Amend. VI. The right of a speedy trial is necessarily relative and depends upon the circumstances. *Barker v. Wingo*, 407 U.S. 514, 522 (1972). As the Sixth Amendment "does not require that a trial commence within a specified time," the protections of the Speedy Trial Act exceed those of the Sixth Amendment. *United States v. Lattany*, 982 F.2d 866, 870 n.5 (3d Cir. 1992). The Court has already found that the Defendant's Speedy Trial Act rights were not violated, however it will proceed nonetheless with a Sixth Amendment analysis.

In *Barker v. Wingo*, the Supreme Court refused to quantify the right into "a specified number of days or months" or to hinge the right on a defendant's explicit request for a speedy trial. 407 U.S. at 523. Rejecting such "inflexible approaches," *Barker* established a "balancing test, in which the conduct of both the prosecution and the defendant are weighed." *Id.* at 530. In conducting this balancing test, courts must weigh (1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant. *Id. Barker* instructs that "different weights should be assigned to different reasons" and that no one factor is dispositive or "talismanic." *Id.* at 531-533. However, "[t]he most important factor is prejudice." *Hakeem v. Beyer*, 990 F.2d 750, 760 (3d Cir. 1993).

First, the Court will analyze the length of the delay. According to *Barker*, the length of the delay is "to some extent a triggering mechanism." That is, "until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." The length of incarceration from Defendant's arrest until trial is sufficient to trigger

examination of the other factors of the balancing test, however the delay must be reviewed through the lens of the circumstances of this case. *Id.*

Looking to the second and third factors, the Court finds that the reason for the delay and the timing of Defendant's assertion of the right weigh against Defendant. All "delays caused by defense counsel are properly attributed to the defendant, even where counsel is assigned." *Vermont v. Brillon*, 556 U.S. 81, 94 (2009). Here, Defendant has filed repetitive motions and demanded reconsideration of denied motions. The numerous motions were accompanied by voluminous amounts of briefing and requests for hearings. The periods of time required to brief these motions and for the Court to consider them—particularly where the Defendant insisted on supplementing motions with pro se submissions—weigh against the Defendant. *See United States v. Loud Hawk*, 474 U.S. 302, 316-17 (1986) ("Having sought the aid of the judicial process and realizing the deliberateness that a court employs in reaching a decision, the defendants are not now able to criticize the very process which they so frequently called upon.") (internal citation and quotation marks omitted).

The record is clear that much of the delay was due to Defendant's insistence on filing motions or taking actions which significantly delayed proceedings. In addition to the delay caused by considering Defendant's various motions, his change in counsel and filing additional pro se motions directly before scheduled trial dates led to further significant delay. *See Hakeem*, 990 F.2d at 764 (noting the "difficulties that a trial court faces in case management when a criminal litigant attempts to act independently of his counsel"). "Just as a State's deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the State, so too should a defendant's deliberate attempt to disrupt proceedings be weighted heavily against the defendant." *Brillon*, 556 U.S. at 93-94 (internal citations and quotation marks omitted).

Defendant's vacillation on whether to terminate counsel, appoint new counsel, or go pro se necessarily contributed to the overall pre-trial delay. In July 2016, the Court gave the Defendant and his counsel team some time to consider whether to pursue further motions at the Defendant's insistence or to request a new counsel appointment. (ECF No. 45 at 128:24-129:4). In September 2016, the Court became aware of Defendant's request for new counsel. (ECF No. 126, Ex. B1 at 15). A hearing for appointment of new counsel was held in October 2016, where Defendant's prior co-counsel were replaced with his current counsel. (ECF No. 47). Defendant's previous counsel relayed to the Court that "it's Mr. Baer's position at this time that he continues in his desire to pursue these other pretrial motions and he would like other counsel appointed to represent him." (Hr'g Tr. at 3:1-4 (Oct. 11, 2016)).

In October 2018, Defendant again equivocated on wanting to "go pro se" and the Court held a *Faretta* hearing in response. (ECF No. 95, 98). Defendant declined to represent himself at that time but still wished to "file a pro se motion," although his counsel represented to the Court that Defendant's counsel did not intend to make any further filings. (ECF No. 109 at 18:16-20:2). At the time of the *Faretta* hearing, a firm trial date had been set for December 3, 2018, (ECF No. 84), and this Court informed the Defendant that "the Court is ready to go to trial in the beginning of December, as . . . are all counsel in the case. But to the extent you elect to go pro se, that is where I'm considering altering the schedule, to provide you sufficient time to prepare your case in this matter." (ECF No. 109 at 24:2-7). The Defendant responded that he "understand[s] that" and that he also understood that "motions toll the clock." *Id.* at 24:2-9.

In light of the discussions about the Defendant seeking to proceed pro se and time required to consider his pro se motion, the Court rescheduled the trial date to commence on March 14, 2019. However, again on the eve of trial, on February 28, 2019, Defendant filed this motion to dismiss

the indictment, (ECF No. 115), requiring the Court to again move the trial, to March 25, 2019, to accommodate a briefing schedule. (ECF No. 131). At oral argument on March 20, 2019, Defendant's trial date was once more rescheduled, until the current trial date of March 27, 2019, based on a request by both parties to "explore a potential resolution of the pending matter short of a jury trial." (ECF No. 140 at 1).

In looking at the factor of Defendant's assertion of his Sixth Amendment rights, a "reasonable assertion of the speedy trial right" must be shown, which is satisfied by "some formal motion . . . to the trial court." *Hakeem*, 990 F.2d at 764-65. However, even multiple assertions of that right "are reduced in weight" by circumstances such as "their proximity to trial" and Defendant's "unreadiness for trial." *Id.* at 766. "Where cognizable speedy trial assertions occur shortly before trial, other courts have given minimal weight to such claims." *Id.* at 765. Furthermore, Defendant's motion is "reduced by his apparent unreadiness to proceed to trial at any of the times he asserted the right" and his request is accorded minimal weight because his contrary actions have evidenced an "unwillingness to commence with the trial as requested." *Id.*; *see also Loud Hawk*, 474 U.S. at 314-315. On the eve of trial, both in November of last year and at the end of last month, it was Defendant's own actions that prevented trial from commencing as quickly as possible. *See Hakeem*, 990 F.2d at 765-66 ("When an incarcerated individual demands a trial, he should be prepared for that trial. Evidence to the contrary weighs against a speedy trial violation.").

In total, very little of the pretrial delay can be attributed to the Government. Eight continuances in this matter were jointly applied for by Defendant's counsel and the Government. The one continuance granted on application of the Government was properly granted, and the Court rejects the allegations made by Defendant that the Government's motivations for requesting

such continuance were a "tactical delay . . . to gain advantage by obtaining additional evidence." *See supra*, III.B.2 at 35-36 and ECF No. 128 at 2-3.

Lastly, the Court finds that Defendant's assertion of prejudice does not support a Sixth Amendment violation. While it is true that "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify," the "speedy trial standards recognize that pretrial delay is often both inevitable and wholly justifiable." *Doggett v. United States*, 505 U.S. 647, 655-56 (1992) (speedy trial claim would fail if government had pursued the defendant "with reasonable diligence from his indictment to arrest" despite eight-and-one-half years passing from the indictment). The "burden of showing prejudice lies with the individual claiming the violation and 'the possibility of prejudice is not sufficient to support the position that . . . speedy trial rights are being violated.'" *Hakeem*, 990 F.2d at 760 (quoting *Loud Hawk*, 474 U.S. at 315).

Defendant does not point to any evidence that he believes has been lost or altered and has not named any witnesses who are no longer available. The core evidence in this matter is in the form of computer files, and the delay here does not alter the reliability or accuracy of that evidence. Overall, the delay in bringing the Defendant to trial has not prejudiced his defense and the Defendant does not allege that the "reliability of the truth finding process" has at all been impaired. *See Hakeem*, 990 F.2d at 760 (citing *Wells v. Petsock*, 941 F.2d 253, 258 (3d Cir. 1991)). In fact, much of the delay was attributable to Defendant's own motions and actions and the Court took great care to ensure that his rights were protected, and each motion was given extensive consideration.

To support his claim, Defendant cites to his anxiety, but admits that he purposely sought to avoid psychiatric evaluation because he did not want medication and therefore has no proof of

such anxiety. (ECF No. 115 at 22). Defendant points to taking medication to treat "frequent headaches and dizzy spells possibly caused by anxiety" but does not provide any medical diagnosis to support his inference. *See id.* In order to state a claim based on anxiety, "a defendant must show that his anxiety extended beyond that which 'is inevitable in a criminal case'" and there must be "evidence of psychic injury" to support such allegations. *Hakeem*, 990 F.2d at 762 (citing *United States v. Dreyer*, 533 F.2d 112, 116 (3d Cir. 1976)).

With regard to Defendant's claims of oppressive pretrial incarceration, he has not provided any proof of "sub-standard conditions or other oppressive factors beyond those that necessarily attend imprisonment." *See Wells v. Petsock*, 941 F.2d 253, 257-58 (3d Cir. 1991). Similarly, the fact that "the jail has virtually no amenities" does not amount to the prejudice required to prove a Sixth Amendment violation. *See* (ECF No. 115 at 21). While the Defendant raised some medical issues he has experienced, the Defendant provides no support for the fact that these conditions were the result of delay, nor does he provide support for the fact that they were a result of being denied medical attention. *See id.* Defendant's own contention that he was prescribed a medication for headaches and dizzy spells that he has been taking "for more than a year," instead supports the fact that the Defendant has access to medical treatment at his detention facility. *Id.*

After careful consideration of the record, the Court finds that Defendant has not suffered a violation of his Sixth Amendment right to a speedy trial. Although the Court agrees that the length-of-the-delay factor weighs in the Defendant's favor, the remaining factors cut against the Defendant. The Defendant sufficiently asserted his right, however his actions contrary to that assertion go against a speedy trial violation. Legitimate reasons were provided for the delay and there is no evidence that the Government deliberately sought delays in order to hamper the defense. In fact, much of the delay is attributable to the actions of Defendant himself. Most significantly,

the Defendant has provided insufficient support to find prejudice as a result of the pretrial delay. Taken together, the *Barker* factors weigh in favor of the Government. *See Conroy v. Leone*, 316 F. App'x 140, 144 (3d Cir. 2009) (finding delay of four years between defendant's arrest and trial did not violate his Sixth Amendment right to a speedy trial where factors other than delay weigh against defendant). The Defendant's motion to dismiss the indictment on Sixth Amendment grounds is therefore denied.

D. FEDERAL RULE OF CRIMINAL PROCEDURE 48(b)

The Defendant further asks this Court to dismiss the indictment for "a want of prosecution" pursuant to Federal Rule of Criminal Procedure 48(b). (ECF No. 115 at 24). As the government contends, it "obtained a search warrant, executed it, and charged Baer by complaint within months of opening its investigation, accommodated his counsel's repeated requests for continuances, made itself available for plea negotiations, and responded promptly to all motions, requests for discovery and Court directives." (ECF No. 119 at 4). The Court agrees, and Defendant's argument fails.

IV. CONCLUSION

For the foregoing reasons, Defendant's pro se motion to suppress evidence (ECF No. 99) and pro se motion to dismiss the indictment (ECF No. 155) are DENIED. An appropriate order accompanies this Opinion.

DATED: March 26, 2019

CLAIRE C. CECCHI, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, Plaintiff, v. DERRICK BAER, Defendant.	Criminal Action No.: 15-00417 (CCC) **ORDER**

This matter comes before the Court by way of the Government's First Motion *in Limine* (ECF Nos. 88 & 97), Defendant's Cross-Motion to Suppress Evidence (ECF No. 90), and the Government's request to admit certain images and videos (the "Subject Exhibits") pursuant to Federal Rule of Evidence 403 and *United States v. Cunningham*, 694 F.3d 372 (3d Cir. 2012) (ECF No. 125). For the reasons set forth on the record in the Court's March 20, 2019 ruling at oral argument (ECF No. 141),

IT IS on this 26 day of March, 2019,

ORDERED that the Government's First Motion *in Limine* (ECF Nos. 88 & 97) is hereby GRANTED, Defendant's Cross-Motion to Suppress Evidence (ECF No. 90) is hereby DENIED and the Government's request to admit the Subject Exhibits (ECF No. 125 Ex. A) is hereby GRANTED.

SO ORDERED.

HON. CLAIRE C. CECCHI
United States District Judge

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, Plaintiff, v. DERRICK BAER, Defendant.	Criminal Action No.: 2:15-00417 (CCC) **ORDER**

This matter comes before the Court by way of Defendant's pro se motions to (1) suppress evidence and (2) dismiss the indictment. (ECF Nos. 99, 115). For the reasons set forth in the Court's corresponding opinion,

IT IS on this 26 day of March, 2019,

ORDERED that Defendant's pro se motion to suppress evidence (ECF No. 99) is hereby DENIED and Defendant's pro se motion to dismiss the indictment (ECF No. 115) is hereby DENIED.

SO ORDERED.

HON. CLAIRE C. CECCHI
United States District Judge

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, Plaintiff, v. DERRICK BAER, Defendant.	Criminal Action No.: 2:15-cr-00417 **OPINION**

CECCHI, District Judge.

I. INTRODUCTION

Defendant Derrick Baer ("Defendant") has been indicted for receiving child pornography and possessing child pornography. Presently before the Court is Defendant's motion for reconsideration of the Court's May 2, 2018 opinion denying Defendant's motion for a *Franks* hearing. (ECF No. 77). The Government opposed the motion, (ECF No. 81), and Defendant replied. (ECF No. 83). The Court has considered the submissions made in support of and in opposition to the instant motion. For the reasons set forth below, Defendant's motion is denied.

II. BACKGROUND

The Court incorporates by reference the factual background of its May 2, 2018 opinion, (ECF No. 75), and will only recite relevant facts for the purposes of this Opinion. On May 2, 2018, the Court entered an opinion denying Defendant's motion for a *Franks* hearing. (*Id.*). In its opinion, the Court explained that "Defendant [failed to] ma[k]e a substantial preliminary showing that Sergeant Robb knowingly or recklessly included false statements in or omitted facts from the Affidavit." *United States v. Baer*, No. 15-417, 2018 WL 2045991, at *6 (D.N.J. May 2, 2018). The court also held that "[e]ven if, assuming *arguendo*, Sergeant Robb did knowingly or recklessly include false statements in or omit facts from the Affidavit, the Court does not find that the alleged false statements or alleged omitted facts were necessary to the finding of probable cause." *Id.*

On May 10, 2018, Defendant filed a motion for reconsideration of the Court's May 2, 2018 opinion. (ECF No. 77). According to Defendant, the Court should reconsider its opinion denying Defendant's motion for a *Franks* hearing because the Court allegedly: (1) "disregarded key facts and legal decisions in concluding that Sergeant Scott Robb of the Pohatcong Police Department had not misrepresented his education, training, and experience in the search warrant [A]ffidavit;" and (2) "overlooked the biases of the witnesses who offered significant information against [Defendant] and the impact of that testimony within [Sergeant] Robb's Affidavit." (ECF No. 80 at 1).

III. LEGAL STANDARD

The Court will reconsider a prior order only where a different outcome is justified by: (1) an intervening change in controlling law; (2) the availability of new evidence not previously available; or (3) the need to correct a clear error of law or prevent manifest injustice. *See N. River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995). A court commits clear error of law "only if the record cannot support the findings that led to [the] ruling." *ABS Brokerage Servs., LLC v. Penson Fin. Servs., Inc.*, No. 09-4590, 2010 WL 3257992, at *6 (D.N.J. Aug. 16, 2010) (citing *United States v. Grape*, 549 F.3d 591, 603-04 (3d Cir. 2008)). "Thus, a party must . . . demonstrate that (1) the holdings on which it bases its request were without support in the record, or (2) would result in 'manifest injustice' if not addressed." *Id.* "Mere 'disagreement with the Court's decision' does not suffice." *Id.* (citations omitted).

IV. DISCUSSION

Defendant sets forth two arguments in his motion for reconsideration, each of which the Court will address below.

A. The Court Did Not Disregard Key Facts and Legal Decisions in Concluding That Sergeant Robb of the Pohatcong Police Department Had Not Misrepresented his Education, Training, and Experience in the Search Warrant Affidavit.

Defendant first argues that the Court should reconsider its opinion denying Defendant's motion for a *Franks* hearing because the Court allegedly overlooked "the significant fact that [Sergeant] Robb lied about his lack of relevant experience and training."[1] (ECF No. 80 at 2). "'Only dispositive factual matters and controlling decisions of law which were presented to the court but not considered on the original motion may be the subject of a motion for reconsideration.'" *ABS Brokerage Servs.*, 2010 WL 3257992, at *5 (citations omitted).

Here, rather than present the Court with dispositive factual matters that were not considered on Defendant's motion for a *Franks* hearing, Defendant expresses disagreement with the Court's conclusion that Sergeant Robb did not misrepresent his education, training, and experience in the Affidavit. Although "[m]ere 'disagreement with the Court's decision' does not suffice" on a motion for reconsideration, *id.* at *6, the Court will discuss each of Defendant's contentions in turn.

Defendant avers that "the Court failed to consider that Sergeant Robb in his Affidavit also frequently refers to his 'training and experience' as well as his 'education and experience' . . . . [which] constituted nothing more than unreliable, untrustworthy boilerplate terms." (ECF No. 80 at 2). According to Defendant, such phrases constituted unreliable, untrustworthy boilerplate terms because Sergeant Robb admitted that Defendant's case "was his very first media-related

[1] Preliminarily, the Court notes that on the previous suppression motion, it found that Sergeant Robb acted in good faith such that the exclusion of evidence would not be appropriate. *See United States v. Baer*, No. 15-417, 2016 WL 4718214, at *12 (D.N.J. Sept. 9, 2016). The Court made this determination after examining the parties' submissions in detail and presiding over two days of hearings, during which Sergeant Robb was found to be credible.

child pornography investigation" and because in drafting the Affidavit, Sergeant Robb consulted with his colleagues that had experience in investigating child pornography matters. (*Id.* at 2-3).

These facts and this argument, however, were expressly considered and rejected by the Court in its May 2, 2018 opinion. More specifically, the Court held that:

> Although Defendant contends that "the flavor" of the Affidavit, including the use of the phrases, "based on my education," "based on my training," and "based on my experience" makes it appear as if Sergeant Robb had more education, training, and experience than he actually had, the Affidavit is clear.

Baer, 2018 WL 2045991, at *5. With respect to what the Affidavit set forth, which Defendant appears to have overlooked, (ECF No. 80 at 2), the Court explained that:

> Sergeant Robb testified that in addition to arrests, he gained experience in these types of matters from consulting with his colleagues, and "attending many schools and training seminars dealing in the investigation of crimes, processing of crime scenes[,] and recovery of evidence[.]" Indeed, Sergeant Robb listed the 18 schools and training seminars that he attended in the Affidavit, including in the areas of arrest, search and seizure, crime scene, recovery of evidence, and managing property and evidence, to which there is no dispute.

Baer, 2018 WL 2045991, at *5. Defendant disagrees with the Court's conclusion that an officer's education, training, and experience may be formed by participating in a variety of activities, (ECF No. 80 at 3), including by consulting with one's colleagues. Such disagreement does not warrant the Court's reconsideration of its opinion. *See ABS Brokerage Servs.*, 2010 WL 3257992, at *6.

The same analysis applies to Defendant's argument that because Sergeant Robb had never personally investigated a child pornography case before, he necessarily lied when stating that "based on [his] education persons sexually attracted to younger children tend to collect and save child pornography in many forms such as computer image files. They also tend to keep addresses and phone numbers of contact[s] within the illegal world of child pornography." (ECF No. 80 at 5). Sergeant Robb acquired his education, training, and experience in a variety of ways, which the

Court found sufficient in its May 2, 2018 opinion. *See supra.* Accordingly, Defendant's argument is without merit.

Defendant also contends that "the Court never considered that Sergeant Robb's Affidavit for the search warrant in this case represents that he has been 'involved in approximately several hundred arrests, including, but not limited to, . . . [those for] endangering the welfare of children by possession of child pornography.'" (ECF No. 80 at 4). Defendant's contention is baseless. The Court's May 2, 2018 opinion explicitly states that:

> Paragraph 1 of the Affidavit describes Sergeant Robb's training, education, and experience, explaining that Sergeant Robb has "been involved in approximately several hundred arrests, including, but not limited to, most statutes covering New Jersey Criminal code 2C and more specifically in this matter, criminal homicide, and/or endangering the welfare of children by possession of child pornography."

Baer, 2018 WL 2045991, at *5. Although Defendant avers that "[t]he Court's Opinion does not recite or rely upon this language from the Affidavit," (ECF No. 80 at 4), the Court quoted this exact excerpt in its May 2, 2018 opinion. In fact, the Court analyzed this precise quotation and concluded that "Sergeant Robb did not testify inconsistently with the Affidavit's statement that he was involved in several hundred arrests in a variety of criminal cases under the New Jersey Code, that include this matter concerning child pornography." *Baer*, 2018 WL 2045991, at *5. Accordingly, Defendant's argument does not provide the Court with a basis to reconsider its opinion denying Defendant's motion for a *Franks* hearing.

Finally, Defendant avers that Sergeant Robb could not have been involved in several hundred arrests throughout his career because Defendant's independent research of the crime rate in Warren County concluded that there were only three murders in 2008 and that the homicide rate was negligible. (ECF No. 80 at 4; *see also* ECF No. 72 at 17-19). Sergeant Robb, however, did not claim to have been involved in several hundred arrests in homicide cases; rather, Sergeant Robb attested to being involved in "approximately several hundred arrests, including, but not

limited to, most statutes covering New Jersey Criminal code 2C and more specifically in this matter, criminal homicide, and/or endangering the welfare of children by possession of child pornography." (ECF No. 53-2 at 2). Notably, New Jersey Criminal code 2C is New Jersey's Code of Criminal Justice, which encompasses a variety of crimes. N.J. Stat. Ann. § 2C:1-1 et seq. Accordingly, the Court did not overlook Defendant's argument that "there is no way that Sergeant Robb told the truth about his law enforcement experience." (ECF No. 80 at 4). As such, the Court concludes that it did not disregard key facts and legal decisions in concluding that Sergeant Robb of the Pohatcong Police Department had not misrepresented his education, training, and experience in the search warrant Affidavit.

B. The Court Did Not Overlook the Biases of the Witnesses Who Offered Significant Information Against Defendant and the Impact of That Testimony Within Sergeant Robb's Affidavit.

Defendant next argues that the Court should reconsider its opinion denying Defendant's motion for a *Franks* hearing because the Court allegedly overlooked "the significant fact that the Affidavit included mostly information from heavily biased witnesses who hated [Defendant.]" (*Id.* at 5). In support of his argument, Defendant summarily concludes that the credibility and the potential biases of two witnesses should have been considered by the Court. Nonetheless, in the Court's May 2, 2018 opinion, the Court held that:

> It is well-established that a substantial showing of the [witness's] untruthfulness is not sufficient to warrant a *Franks* hearing. The Supreme Court made clear throughout *Franks* that a substantial preliminary showing of intentional or reckless falsity *on the part of the affiant* must be made in order for the defendant to have a right to an evidentiary hearing on the affiant's veracity.

Baer, 2018 WL 2045991, at *4 (quoting *United States v. Brown*, 3 F.3d 673, 677 (3d Cir. 1993)). The Court also noted that "there is no obligation on the affiant police officers to provide information about the credibility of the witness[.]" *Id.* (quoting *United States v. Meehan*, No. 11-0440, 2013 WL 1875821, at *7 (E.D. Pa. May 6, 2013)) (citing cases).

Defendant makes no mention in his motion for reconsideration of the law cited by the Court.[2] Under such law, Sergeant Robb was under no duty to discuss in the Affidavit or further investigate the credibility or potential biases of the witnesses in this matter. Accordingly, the Court finds that it did not overlook the potential biases of the witnesses who offered significant information against Defendant and the impact of that testimony within Sergeant Robb's Affidavit, and will deny Defendant's motion for reconsideration.[3]

V. CONCLUSION

For the foregoing reasons, Defendant's motion is denied. An appropriate Order accompanies this Opinion.

DATED: August 8, 2018

CLAIRE C. CECCHI, U.S.D.J.

[2] Defendant does not appear to cite to any law contrary to that cited by the Court to suggest that Sergeant Robb had a duty to discuss in the Affidavit or further investigate the credibility or potential biases of the witnesses in this matter.

[3] Although discussed in detail in the Court's May 2, 2018 opinion, the Court finds that it is worth reiterating the Court's conclusion that "even after removing any alleged false statements from or including any alleged omitted facts in the Affidavit, the Court still finds that the search warrant was based on probable cause, including because of the vast amount of electronic media found in Defendant's home, and the labels on such electronic media." *Baer*, 2018 WL 2045991, at *6 (citing cases). Here, Defendant's arguments pertain solely to Sergeant Robb's education, training, and experience, and the credibility and alleged biases of the witnesses in this matter. Defendant has raised no arguments pertaining to the Court's ultimate conclusion that even when taking into consideration these contentions, the search warrant was still based on probable cause. The Court notes that this fact alone arguably provides the Court with an independent basis on which to deny Defendant's motion for reconsideration.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, Plaintiff, v. DERRICK BAER, Defendant.	Criminal Action No.: 2:15-cr-00417 **ORDER**

CECCHI, District Judge.

Defendant Derrick Baer ("Defendant") has been indicted for receiving child pornography and possessing child pornography. Presently before the Court is Defendant's motion for reconsideration of the Court's May 2, 2018 opinion denying Defendant's motion for a *Franks* hearing. (ECF No. 77). The Government opposed the motion, (ECF No. 81), and Defendant replied. (ECF No. 83). The Court has considered the submissions made in support of and in opposition to the instant motion. For the reasons set forth in the Court's corresponding Opinion:

IT IS on this 8 day of August, 2018,

ORDERED that Defendant's motion for reconsideration, (ECF No. 77), is **DENIED.**

CLAIRE C. CECCHI, U.S.D.J.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, Plaintiff, v. DERRICK BAER, Defendant.	Criminal Action No.: 2:15-cr-00417 **OPINION**

CECCHI, District Judge.

I. INTRODUCTION

Defendant Derrick Baer ("Defendant") has been indicted for receiving child pornography and possessing child pornography. Presently before the Court is Defendant's motion for a *Franks* hearing. (ECF No. 53). The Government opposed the motion, (ECF No. 55), Defendant replied, (ECF No. 56), and the Court held oral argument. (ECF No. 72 ("Tr.")). The Court has considered the submissions made in support of and in opposition to the instant motion. For the reasons set forth below, Defendant's motion is denied.

II. BACKGROUND

On May 31, 2010 at approximately 3:08 A.M., Defendant called 911 to report that his girlfriend, Lorraine Kosnac ("Kosnac"), was unresponsive. (ECF No. 55 at 3). Emergency Medical Technicians were unable to revive Kosnac and she was pronounced dead. (*Id.*). Later that morning, Kosnac's sister ("Marcinkowski") called the police when she learned of Kosnac's death, and told them that Defendant had previously used chloroform on Kosnac to have sex. (ECF No. 53-1 at 7).

That same morning, the Pohatcong Township Police Department requested Defendant's permission to search his home and Defendant signed a consent to search form. (ECF No. 55 at 3-4). The consent to search form authorized the officers to remove "any documents, materials,

things, or other property" from Defendant's home. (ECF No. 21-3 at 1). Among the items seized was a large quantity of electronic media. (ECF No. 55 at 5). After concluding their search, Sergeant Scott Robb and Detective John Serafin of the Pohatcong Township Police Department interviewed Defendant. (*Id.* at 4). On August 10, 2011, Sergeant Robb obtained a search warrant from New Jersey Superior Court Judge Ann Bartlett to conduct forensic testing of Defendant's electronic media. (*Id.* at 5).

The electronic media obtained from the search and seizure of Defendant's home on May 31, 2010, which was the subject of the search warrant obtained by Sergeant Robb on August 10, 2011, contained approximately thirteen confirmed images of child pornography; over 762 images of possible child pornography; and approximately sixty-three videos containing possible child pornography. (*Id.* at 5-6). On or about February 6, 2015, Defendant was arrested and charged by complaint with possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B) and receipt of child pornography in violation of 18 U.S.C. § 2252A(a)(2). (*Id.* at 6). Defendant was indicted on these charges on April 20, 2015. (*Id.*).

On December 22, 2015, Defendant moved to suppress the evidence of child pornography found on his electronic media, as well as his statements to the police on May 31, 2010. (*Id.*). The Court held an evidentiary hearing on July 12 and 13, 2016, and issued a decision denying Defendant's motion to suppress on September 9, 2016. (ECF No. 42).

On February 28, 2017, Defendant filed the instant motion for a *Franks* hearing. (ECF No. 53). Defendant argues that the underlying search warrant affidavit that Sergeant Robb drafted (the "Affidavit") was infused with recklessly misleading statements of fact and critically omitted facts material to the investigation and the charges pending against Defendant. As a result, Defendant contends that the state court judge, Judge Bartlett, was misled into issuing a search warrant. (*Id.*).

Defendant argues that the warrant application violated Defendant's Fourth Amendment rights, and that all evidence seized from his home as a result of the unlawful search and seizure ultimately should be suppressed. (*Id.*). The Government maintains that Defendant has failed to meet his burden to receive a *Franks* hearing, and that in any event, the motion should be denied based on the law of the case doctrine, as the Court has already dealt with these issues in its September 9, 2016 opinion on Defendant's previous motion. (ECF No. 55).

III. LEGAL STANDARD

The Fourth Amendment prohibits the intentional or reckless inclusion of a material false statement (or omission of material information) in a search-warrant affidavit. In *Franks v. Delaware*, 438 U.S. 154 (1978), the Supreme Court held that a defendant may be entitled to challenge the truthfulness of facts alleged in support of a search-warrant application. The right to a *Franks* hearing, however, is not absolute. As the Supreme Court stated in *Franks*, there is a "presumption of validity with respect to the affidavit supporting [a] search warrant." *Id.* at 171. In order to be granted a *Franks* hearing, a defendant "must first (1) make a 'substantial preliminary showing' that the affiant knowingly or recklessly included a false statement in or omitted facts from the affidavit, and (2) demonstrate that the false statement or omitted facts are 'necessary to the finding of probable cause.'" *United States v. Pavulak*, 700 F.3d 651, 665 (3d Cir. 2012) (citations omitted).

In evaluating a claim that an officer both asserted and omitted facts with reckless disregard for the truth, the Third Circuit has held that: (1) "assertions are made with reckless disregard for the truth when an officer has obvious reasons to doubt the truth of what he or she is asserting;" and (2) "omissions are made with reckless disregard for the truth when an officer recklessly omits facts that any reasonable person would want to know." *Wilson v. Russo*, 212 F.3d 781, 783 (3d Cir.

2000). In the case of a misleading assertion, "the defendant must prove by a preponderance of the evidence that once the false statement is excised, the remaining allegations set forth in the affidavit do not establish probable cause." *United States v. Gordon*, 664 F. App'x 242, 245 (3d Cir. 2016). "In the case of a misleading omission . . . the proper course would be for the District Court to 'identify any improperly . . . omitted facts' and 'perform a word-by-word reconstruction of the affidavit' to include those facts," to determine whether there is a sufficient basis to find probable cause. *See id.* at 246 (citations omitted).

IV. DISCUSSION

A. Knowingly or Recklessly Including False Statements in or Omitting Facts from the Affidavit

Defendant avers in his motion that Sergeant Robb knowingly or recklessly included false statements in or omitted facts from the Affidavit by: (1) misusing quotation marks; (2) misrepresenting the statements and backgrounds of witnesses; (3) failing to include certain details about the investigation and corroboration of the statement of Kosnac's sister, Marcinkowski; and (4) overstating Sergeant Robb's law enforcement experience. Each of Defendant's contentions will be addressed in turn.

1. The Use of Quotation Marks

Defendant maintains that "[t]hroughout his Affidavit, Sergeant Robb has a chronically bad habit of attributing words and statements to the witnesses in this case that they did not actually say." (ECF No. 53-1 at 5). Accordingly, Defendant contends that the Affidavit is "suspect and tainted" and "[h]ad the trial court judge known that Sergeant Robb had misquoted witnesses, it is likely that the search warrant would have been subject to far greater scrutiny and probably would have been denied." (*Id.* at 6). In response, the Government argues that "[t]he Court . . . already dismissed this specious claim and held that the use of quotation marks instead of the phrase 'in

sum and substance' 'does not negate the ample record of Sergeant Robb acting in good faith.'" (ECF No. 55 at 10 (quoting *United States v. Baer*, No. 15-417, 2016 WL 4718214, at *12 n.11 (D.N.J. Sept. 9, 2016))).

Preliminarily, the Court notes that on the previous suppression motion, it found that Sergeant Robb acted in good faith such that the exclusion of evidence would not be appropriate. *See Baer*, 2016 WL 4718214, at *12. Although not identical, the circumstances under which the Court must find that an officer did not act in good faith and the showing a defendant must make in order to be granted a *Franks* hearing require similar considerations. That is, the Court must find that an officer did not act in good faith when "the magistrate issued the warrant in reliance on a deliberately or recklessly false affidavit." *United States v. Am. Inv'rs of Pittsburgh, Inc.*, 879 F.2d 1087, 1106 (3d Cir. 1989) (citations omitted). Again, in order to be granted a *Franks* hearing, a defendant must first "make a 'substantial preliminary showing' that the affiant knowingly or recklessly included a false statement in or omitted facts from the affidavit[.]" *Pavulak*, 700 F.3d at 665 (citations omitted). On that basis, the Government contends that the law of the case doctrine applies to this matter, and therefore, that Defendant necessarily cannot meet his burden for a *Franks* hearing. Nonetheless, the Court will undergo a full analysis of Defendant's motion, taking into consideration that certain aspects of his motion may have been addressed in the Court's previous decision.

As stated above, in the Court's September 9, 2016 opinion, the Court held that "the lack of the phrase 'in sum [and] substance' before quotation marks in recounting Marcinkowski's statements in the search warrant affidavit . . . . [did] not negate the ample record of Sergeant Robb acting in good faith." *Baer*, 2016 WL 4718214, at *12 n.11. In other words, the Court found that the Affidavit was not "deliberately or recklessly false." *Id.* at *12. Similarly here, the Court does

not find that Sergeant Robb knowingly or recklessly included false statements in the Affidavit by using quotation marks without the phrase "in sum and substance." As discussed below, the Affidavit accurately conveyed the information provided in the statements at issue. Accordingly, Defendant's argument is without merit.

2. The Statements and Backgrounds of Witnesses

Defendant avers that Sergeant Robb did not accurately portray the statements at issue, omitted important parts of the statement of Kosnac's sister, Marcinkowski, and failed to disclose information about witnesses' backgrounds. In response, the Government contends that this Court has already considered Defendant's arguments and found that Sergeant Robb acted in good faith.

Defendant maintains that Sergeant Robb misrepresented Marcinkowski and Defendant's statements by including false statements in and/or omitting facts from the Affidavit. For example, Defendant asserts that Marcinkowski was equivocal about whether Defendant had a problem with child pornography. The record, however, shows that her statement was clear. In her statement, Marcinkowski explained that Kosnac "also advised [her] at that time that several years ago . . . [Defendant] had a problem with kiddy porn[.]" (ECF No. 53-3 at 7). Similarly, neither was Marcinkowski equivocal about whether Defendant took pictures of her daughter while she was in the shower. Marcinkowski asserted in her statement that she "realized that [Defendant] *must of in fact* taken pictures of [her] daughter." (*Id.* (emphasis added)).

Defendant also contends that the Affidavit falsely portrayed Defendant as having a preference for anal sex. However, the Affidavit is plainly supported by Defendant's statement, in which he explains that he got into "[s]exual arguments" with Kosnac because "she didn't want to do . . . the anal thing . . . . have anal intercourse." (ECF No. 53-4 at 11). Defendant additionally states that the Affidavit misconstrued the reason for Defendant's apology to Marcinkowski. In Marcinkowski's statement, she explained that Defendant showed remorse after discussing with

her both Defendant's problem with porn and Defendant's use of chloroform on Kosnac. Specifically, the statement reads:

> The conversation was about the fact that he said that he had . . . a problem that he admitted that he had a problem with porn was how he put it and I stated that he had a lot more than a problem with porn if he could make homemade chloroform and use it on my sister while she's sleeping and rape her and I made sure that he was aware of the fact that it could have killed her . . . . [and h]e said he knows and he regrets it and ya know that he doesn't know what happened to him he doesn't understand why he did it.

(ECF No. 53-3 at 8-9). The Affidavit does the same. After first discussing the issue of chloroform:

> [Marcinkowski] told [Defendant] she knew everything and wanted to know, what was the matter? [Defendant] admitted to her, "he had a problem with porn." [Defendant] also told her he knows what he did was wrong and he was sorry.

(ECF No. 53-2 at 5). Finally, Defendant avers that the Affidavit casted a false impression in implying that Kosnac was "scared" of Defendant. Both documents, however, place this statement into context in that Kosnac was concerned that she would get Defendant in trouble. (*Id.* at 6; ECF No. 53-3 at 7).

Defendant's arguments do not establish that Defendant has made a "substantial preliminary showing" that Sergeant Robb knowingly or recklessly included false statements in or omitted facts from the Affidavit. Rather, the Affidavit is supported by the statements at issue. At most, Defendant's arguments may provide an alternative way to interpret Marcinkowski and Defendant's statements, which is not in itself a basis on which the Court can grant a *Franks* hearing. *See United States v. Ewell*, No. 13-125, 2016 WL 463784, at *20 (W.D. Pa. Feb. 8, 2016) ("[Defendant] has not satisfied his burden because he has presented only argument of counsel providing a counter-interpretation of some of the intercepted communications without . . . demonstrating that Detective Harpster made materially false statements or omitted material information in the affidavits and did so knowingly or with a reckless disregard for the truth."), *aff'd sub nom. United States v. Fielder*, No. 17-2428, 2017 WL 6759106 (3d Cir. Dec. 4, 2017).

Defendant also argues that Sergeant Robb did not include in the Affidavit a discussion of the credibility, reliability, and biases of various witnesses. (ECF No. 53-1 at 18-20). Nonetheless:

> It is well-established that a substantial showing of the [witness's] untruthfulness is not sufficient to warrant a *Franks* hearing. The Supreme Court made clear throughout *Franks* that a substantial preliminary showing of intentional or reckless falsity *on the part of the affiant* must be made in order for the defendant to have a right to an evidentiary hearing on the affiant's veracity.

United States v. Brown, 3 F.3d 673, 677 (3d Cir. 1993). Further, "there is no obligation on the affiant police officers to provide information about the credibility of the witness[.]" *United States v. Meehan*, No. 11-0440, 2013 WL 1875821, at *7 (E.D. Pa. May 6, 2013); *see also United States v. Hetlman*, 377 F. App'x 157, 178 (3d Cir. 2010) (holding that the fact that the informant used drugs did not, in and of itself, indicate that any testimony he gave was false or unreliable). *Cf. United States v. Hall*, 113 F.3d 157 (9th Cir. 1997) (in a factually distinct case, holding that the testimony of an informant was not sufficient to support the issuance of a warrant where the warrant was based *solely* on the informant's testimony and the informant's previous convictions of serious crimes were not included in the search warrant affidavit). As such, Defendant's arguments are without merit.

3. Details About the Investigation and Corroboration of Marcinkowski's Statement

Defendant professes that Sergeant Robb omitted from the Affidavit certain details about the investigation.[1] For example, Defendant contends that Sergeant Robb should have stated that he found no child pornography in the form of pictures or books in Defendant's house. The Court finds this unavailing, as the purpose of obtaining the search warrant was to locate such pictures on Defendant's electronic media, and the Affidavit presented sufficient probable cause that such

[1] Again, the Government contends that this Court has already considered Defendant's arguments and found that Sergeant Robb acted in good faith.

pictures would be found. The Affidavit stated that during the search of Defendant's home, Sergeant Robb found that "on one of the floppy disks it had the writing of 'Derrick's eyes ONLY' . . . . 'pics incriminating' . . . . [and on o]ne of these hard drives . . . the word 'porn' [was] handwritten on it." (ECF No. 53-2 at 8-9). Further, Sergeant Robb also found a number of floppy disks, desktop computers, and hard drives. (*Id.*). Indeed, the evidence later seized from Defendant's home confirmed that his electronic media contained approximately thirteen confirmed images of child pornography; over 762 images of possible child pornography; and approximately sixty-three videos containing possible child pornography. (ECF No. 55 at 5-6).

Defendant also contends that the Affidavit should have stated that Defendant's daughter never indicated that there was any type of sexual impropriety between her and her father, and that authorities made no findings that Defendant abused either of his children. This too is unpersuasive. The absence of assertions and findings that were never made by witnesses and authorities do not render the Affidavit any less sufficient of probable cause. Moreover, the record contained assertions that Defendant's daughter woke up to Defendant standing over her with a wash cloth that smelled like paint. (ECF No. 53-3 at 7). Lab results also confirmed that chloroform was on the rag found in the jar in Defendant's home, and an autopsy report concluded that chloroform was found in Kosnac's body. (ECF No. 41 at 129-32).

Defendant additionally avers that the Affidavit should have included the fact that Sergeant Robb previously requested permission from a prior prosecutor to file an application for a search warrant in this matter. The reason Sergeant Robb was denied permission, however, appears to have no relation to whether the Affidavit contained adequate probable cause. (*See* ECF No. 46 at 61 (answering when questioned about why he was denied permission to even begin drafting a

search warrant affidavit as because the prior prosecutor stated: "Who's to say she didn't like it?" in apparently referring to Defendant's use of chloroform on Kosnac)).

Further, Defendant maintains that Sergeant Robb did not corroborate Marcinkowski's statement that: (1) Defendant had an interest in child pornography; (2) Defendant's daughter stated that she found her father standing over her with a washcloth that smelled like paint; and (3) Defendant took a picture of his niece in the shower. In other words, Defendant argues that Sergeant Robb knowingly or recklessly included false statements by incorporating Marcinkowski's statement into the Affidavit without further investigation. "[A]ssertions are made with reckless disregard for the truth when an officer has obvious reasons to doubt the truth of what he or she is asserting." *Wilson*, 212 F.3d at 783. Sergeant Robb found a number of floppy disks, desktop computers, and hard drives with the writing of "Derrick's eyes ONLY," "pics incriminating," and "porn." Moreover, Marcinkowski's statement discussed Defendant's use of chloroform on Kosnac, which was later corroborated by: (1) the lab results confirming that chloroform was on the rag found in the jar in Defendant's home, and (2) the autopsy report concluding that chloroform was found in Kosnac's body. (ECF No. 41 at 129-32). With this information, the Court does not find that Sergeant Robb had obvious reasons to doubt Marcinkowski's statement. *See United States v. Bush*, 647 F.2d 357, 363 (3d Cir. 1981) (holding that police need not corroborate every detail of an informant's report to establish sufficient veracity of information for probable cause). Accordingly, Defendant's arguments are without merit.

4. Sergeant Robb's Law Enforcement Experience

Finally, Defendant attests that Sergeant Robb misrepresented his education, training, and experience in the Affidavit. Paragraph 1 of the Affidavit describes Sergeant Robb's training, education, and experience, explaining that Sergeant Robb has "been involved in approximately several hundred arrests, including, but not limited to, most statutes covering New Jersey Criminal

code 2C and more specifically in this matter, criminal homicide, and/or endangering the welfare of children by possession of child pornography." (ECF No. 53-2 at 2).

Sergeant Robb did not testify inconsistently with the Affidavit's statement that he was involved in several hundred arrests in a variety of criminal cases under the New Jersey Code, that include this matter concerning child pornography. (*See generally* ECF No. 46). Although Defendant contends that "the flavor" of the Affidavit, including the use of the phrases, "based on my education," "based on my training," and "based on my experience" makes it appear as if Sergeant Robb had more education, training, and experience than he actually had, Tr. 55:10-13, the Affidavit is clear. Furthermore, Sergeant Robb testified that in addition to arrests, he gained experience in these types of matters from consulting with his colleagues, (ECF No. 46 at 117), and "attending many schools and training seminars dealing in the investigation of crimes, processing of crime scenes[,] and recovery of evidence[.]" (ECF No. 53-2 at 1). Indeed, Sergeant Robb listed the 18 schools and training seminars that he attended in the Affidavit, including in the areas of arrest, search and seizure, crime scene, recovery of evidence, and managing property and evidence, to which there is no dispute. (*Id.* at 1-2). As such, Defendant's arguments are without merit.

B. Demonstrating That the False Statements or Omitted Facts Are Necessary to the Finding of Probable Cause

As discussed above, the Court does not find that Defendant has made a substantial preliminary showing that Sergeant Robb knowingly or recklessly included false statements in or omitted facts from the Affidavit. Even if, assuming *arguendo*, Sergeant Robb did knowingly or recklessly include false statements in or omit facts from the Affidavit, the Court does not find that the alleged false statements or alleged omitted facts were necessary to the finding of probable cause. After reviewing the parties' voluminous submissions and conducting two days of hearings, the Court found that the search warrant was based on probable cause because:

> First, Kosnac told Marcinkowski that "several years ago [Defendant] had a problem with kiddy porn in the form of pictures and books." Second, Defendant told Marcinkowski "he had a problem with porn." Third, Defendant allegedly took a photograph Marcinkowski's minor daughter while she was showering. Fourth, Defendant's electronic media included floppy disks label[]ed "Derrick's eyes ONLY" and "pics incriminating," and a hard drive marked "porn." Finally, Defendant's minor daughter reported she once woke up and found Defendant standing over her with a washcloth, raising the possibility to law enforcement Defendant may have used chloroform on his minor daughter.

Baer, 2016 WL 4718214, at *8 (citations omitted). The Court also found that there was a substantial basis for probable cause because chloroform was definitively found in Defendant's home and Kosnac's body, providing credibility to Marcinkowski's statement:

> [T]he lab results confirming that chloroform was on the rag found in the jar in Defendant's home and the autopsy report that chloroform was found in Kosnac's body further confirmed a central aspect of the account Kosnac reportedly gave Marcinkowski concerning Defendant's conduct—his use of chloroform on her to knock her out for sex. This makes it even more likely that Kosnac's account of Defendant's problem with child pornography was credible . . . . [A]ll [of this information] provided a substantial basis for probable cause that child pornography would be found on Defendant's electronic media.

Id. at *9. The Court has considered all of Defendant's contentions. Nonetheless, even after removing any alleged false statements from or including any alleged omitted facts in the Affidavit, *see United States v. Conley*, 4 F.3d 1200, 1208 n.7 (3d Cir. 1993); Tr. 23:9-12, the Court still finds that the search warrant was based on probable cause, including because of the vast amount of electronic media found in Defendant's home, and the labels on such electronic media. *See United States v. Miller*, 534 F. App'x 204, 210 (4th Cir. 2013) (considering, among other things, that the "truck contained a laptop computer, digital recording devices, and numerous memory cards" in determining whether probable cause existed that defendant created or possessed child pornography); *United States v. Fiscus*, 64 F. App'x 157, 163 (10th Cir. 2003) (noting that the electronic media seized from defendant's home "w[as] labeled '[defendant]'s Pics'" as part of its analysis in deciding whether probable cause existed that defendant's computer and diskettes

contained child pornography); *United States v. Peterson*, 294 F. Supp. 2d 797, 806 (D.S.C. 2003) (observing as a consideration that "internet links were entitled 'Underage xxxxxxx'" in adjudicating whether there was sufficient probable cause that defendant's computer contained items subject to seizure), *aff'd*, 145 F. App'x 820 (4th Cir. 2005). Defendant's electronic media encompassed one compact disc, four desktop computers, eighteen hard drives, and sixty-eight floppy disks. (ECF No. 53-2 at 2-4). Moreover, the electronic media contained floppy disks labeled "Derrick's eyes only" and "pics incriminating," a hard drive labeled "porn," and additional pieces of evidence labeled "pics." (*Id.* at 8-9). Accordingly, Defendant's motion is denied.

V. CONCLUSION

For the foregoing reasons, Defendant's motion is denied. An appropriate Order accompanies this Opinion.

DATED: May 2, 2018

CLAIRE C. CECCHI, U.S.D.J.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, Plaintiff, v. DERRICK BAER, Defendant.	Criminal Action No.: 2:15-cr-00417 **ORDER**

CECCHI, District Judge.

Defendant Derrick Baer ("Defendant") has been indicted for receiving child pornography and possessing child pornography. Presently before the Court is Defendant's motion for a *Franks* hearing. (ECF No. 53). The Government opposed the motion, (ECF No. 55), Defendant replied, (ECF No. 56), and the Court held oral argument. (ECF No. 72). The Court has considered the submissions made in support of and in opposition to the instant motion. For the reasons set forth in the Court's corresponding Opinion:

IT IS on this 2 day of May, 2018,

ORDERED that Defendant's motion for a *Franks* hearing, (ECF No. 53), is **DENIED.**

SO ORDERED.

CLAIRE C. CECCHI, U.S.D.J.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, Plaintiff, v. DERRICK BAER, Defendant.	Criminal Action No.: 15-417 **OPINION**

CECCHI, District Judge.

I. INTRODUCTION

Defendant Derrick Baer ("Baer" or "Defendant") has been indicted for receiving child pornography and possessing child pornography. Presently before the Court is Defendant's motion to suppress (1) the child pornography found on his electronic media seized pursuant to a consent search on May 31, 2010; and (2) Defendant's statements to law enforcement on the day of the search. [ECF No. 21.] The Government opposed the motion. The Court has considered the submissions made in support of and in opposition to the instant motion, as well as the evidence offered during the evidentiary hearing held on July 12 and July 13, 2016. For the reasons set forth below, Defendant's motion is denied.

II. BACKGROUND

A. Factual Background

The facts giving rise to Defendant's motion to suppress are as follows. On May 31, 2010, at approximately 3:08 a.m., Defendant called 911 to report that his girlfriend, Lorraine Kosnac, was unresponsive. [Memorandum in Support of Pretrial Motions ("Def. Mot."), ECF No. 21 at 1;

First Tr.[1] at 24-25.] Local police officers and rescue personnel responded to Defendant's residence in Bloomsbury, New Jersey. [Def. Mot. at 1; Memorandum of the United States in Opposition to Pretrial Motions of Defendant Derrick Baer ("Govt. Opp."), ECF No. 25 at 3; Govt. Ex. 101, admitted into evidence July 12, 2016.] Officer Anthony Goodell of the Pohatcong Township Police Department was the first to arrive.[2] [First Tr. at 25.] Defendant met Officer Goodell at the front door and brought him to the back bedroom where Kosnac was lying on her back on a bed and was not breathing. [Id. at 26-27.] Emergency Medical Technicians were unable to revive Kosnac and she was pronounced dead at approximately 3:58 a.m. [Id. at 28-29; Govt. Ex. 304, admitted into evidence July 12, 2016.]

That same morning, Cynthia Marcinkowski, Kosnac's sister, called the police when she learned of Kosnac's death and told them Defendant had previously used homemade chloroform on Kosnac to knock her out for sex. [First Tr. at 31, 81-82.] Also that same morning, Sharon Mancini, Kosnac's mother, called the police with concerns that Defendant may have injured Kosnac two months earlier. [Id. at 31-32.]

The Warren County Prosecutor's Office ("WCPO") and the Pohatcong Township Police Department launched an investigation into the circumstances of Kosnac's death. At approximately 5:30 a.m., Sergeant Scott Robb of the Pohatcong Township Police Department arrived on the scene. [Id. at 77-78.] When Sergeant Robb arrived, Defendant was in his front yard. [Id. at 80.] Sergeant Robb brought a consent to search form and, after getting briefed by the other officers, asked Defendant for permission to search the house. [Id. at 79-80, 84-85.] Officer Goodell was present when Sergeant Robb asked Defendant for permission to search. [Id. at 88.] Although the

[1] "First Tr." refers to the transcript of the July 12, 2016 evidentiary hearing.

[2] Although Officer Goodell's shift ended at 3:00 a.m. on May 31, 2010, he received a call to report to Defendant's residence at 3:08 a.m. [Id. at 24-25.]

interaction was not recorded, Sergeant Robb and Officer Goodell both testified that Sergeant Robb read the consent to search form to Defendant. [Id. at 36, 84-85.] Defendant gave the officers permission to search his residence and signed the consent to search form, which was also signed by Sergeant Robb and Officer Goodell, at approximately 6:12 a.m. [Id. at 36-37, 85, 88; Govt. Ex. 201, admitted into evidence July 12, 2016.] The consent to search form provided for a "complete search" of the residence, without limitation, and authorized officers to remove "any documents, materials, things, or other property . . . ." [Govt. Ex. 201.] And, as part of his consent, Defendant acknowledged: "I have given this permission without fear, threat, or promises. I have been advised that the officers do not possess a search warrant and that I have a right to demand that they obtain a search warrant, I hereby give up that right." [Id.] On the back of the form, where Defendant signed, he affirmed that: "I understand that I have a right to refuse this permission to search"; "I can read and write the English language"; and "I understand I have the right to be present during the search, and to stop this search at any time." [Id.]

After Defendant signed the consent to search form, Sergeant Robb and WCPO Detective John Serafin returned to police headquarters to interview Marcinkowski. [First Tr. at 81-82.] She told the officers the following:

> (1) Two months earlier, Kosnac temporarily left Defendant after she discovered jars containing washcloths that smelled like ammonia under her bed and learned Defendant used chloroform on her while she was sleeping to rape her. When Kosnac confronted Defendant, he admitted the jars contained homemade chloroform that he learned to make on the Internet. [Govt. Ex. 401 at 5-6, admitted into evidence July 12, 2016; First Tr. at 31.]
>
> (2) Kosnac's daughter told Kosnac that one morning she had woken up to find Defendant standing over her with a washcloth in his hand. [Govt. Ex. 401 at 6.]
>
> (3) Kosnac told Marcinkowski that several years ago Defendant had a problem with "kiddy porn" in the form of pictures and books. [Id. at 6; First Tr. at 92.]
>
> (4) Kosnac developed an infected cyst on her rectal area that required surgery. At

> the hospital, when Marcinkowski confronted Baer, he (a) admitted to using chloroform on Kosnac to have sex with her, (b) said he learned to make chloroform on the Internet, and (c) said he had a problem with porn. [Govt. Ex. 401 at 6.]
>
> (5) Several years ago, Marcinkowski's teenage daughter spent the night at Defendant and Kosnac's residence. When Marcinkowski picked up her daughter in the morning, her daughter said while she was in the shower Defendant took a picture of her. When Marcinkowski confronted Defendant about this allegation, he denied it. [Id. at 6; First Tr. at 92-93.]

After interviewing Marcinkowski, Sergeant Robb and Detective Serafin returned to Defendant's residence to continue the investigation. [First Tr. at 93.] When they arrived—around 8:00 a.m.—the search was still underway. [Id.] At approximately 8:39 a.m., Sergeant Robb and Detective Serafin asked Defendant if he would speak to them. [Id. at 95.] Defendant agreed and Sergeant Robb, Detective Serafin, and Defendant moved to inside Sergeant Robb's police vehicle for the interview. [Id. at 95.][3] Sergeant Robb sat in the driver's seat, Detective Serafin sat in the front passenger's seat, and Defendant sat in the rear seat. [Id. at 96.] Defendant was not restrained in any way. [Id. at 97.]

Sergeant Robb recorded the interview with a portable digital recorder. [Id. at 96.] The Court listened to the recording at the evidentiary hearing. [Govt. Ex. 501, admitted into evidence July 12, 2016.] The officers administered Miranda warnings and explained to Defendant he was not under arrest. [First Tr. at 100-01.] The officers also gave Defendant a written Miranda card, which enumerated his Miranda rights. [Id. at 101.] Defendant initialed next to each of his Miranda rights and signed the Miranda card, which was also signed by Sergeant Robb, at 8:39 a.m. [Govt. Ex. 202, admitted into evidence July 12, 2016.] After being advised of his rights, Sergeant Robb

[3] At the hearing, Sergeant Robb testified he conducted the interview in his police vehicle because Defendant "signed the consent, which he has the right to be present during the search and the option to refuse us to continue the search at any time, and if I would have taken him away from the scene, he would no longer have that right." [Id. at 95.]

asked Defendant whether he was willing to proceed with the interview and Defendant responded "absolutely." [First Tr. at 104.] At the hearing, Sergeant Robb testified Defendant did not display any nervousness when he agreed to proceed with the interview. [Id. at 105.]

During the interview, Defendant spoke about his relationship with Kosnac. [Id.] Defendant indicted he and Kosnac had arguments concerning sex because he wanted anal sex and Kosnac did not. [Id. at 105-06.] He also stated he was "into" pornography. [Id. at 108.]

The interview next turned to Defendant's alleged use of chloroform on Kosnac. Sergeant Robb asked whether there were bottles of chloroform in the house, and noted that any bottles in the house would be found by the police. [Id. at 110-12.] Defendant denied having chloroform in the house and stated "you have my permission to search the house." [Id. at 112] At the hearing, Sergeant Robb testified Defendant acted "a little surprised when the chloroform question came up, but [his] demeanor didn't change." [Id. at 113.]

The officers then asked Defendant whether he researched how to make chloroform on his computer, and noted that Defendant's computers would be searched. [Id. at 114.] Defendant denied looking up how to make chloroform on his computers and said the officers would not find any evidence of Internet searches for chloroform on his computers. [Id.] At the hearing, Sergeant Robb testified Defendant did not express any nervousness or evasiveness when he was told the computers would be searched. [Id. at 114-15.] Sergeant Robb also testified that Defendant never objected to the officers removing his computers from the house. [Id. at 115.]

The officers then asked Defendant about a jar with a rag in it that was found in his house, and noted that it would be tested for chloroform. [Id. at 115-16.] Defendant said the rag should not test positive for chloroform and stated "if there's a way I can help you guys, I want to." [Id. at 116.] Finally, at the end of the interview, the officers asked Defendant whether he gave his

statement to the officers of his own free will, and Defendant confirmed he was not coerced or threatened in any way. [Id. at 123.] Defendant stated "I'm sitting here freely in the back of your patrol car." [Id.]

The search of Defendant's home concluded at approximately 11:50 a.m. [Id. at 61.] The officers seized numerous pieces of electronic media, including eighteen hard drives, four computers, sixty-eight 3½ inch floppy disks, and one CD-R. [Govt. Ex. 402, admitted into evidence July 12, 2016.] One of the floppy disks was labeled "Derrick's eyes ONLY" and another floppy disk was labeled "pics incriminating." [First Tr. at 131.] One of the hard drives was labeled "porn." [Id.]

Defendant retained an attorney, John J. Flynn, a few days after the search of his home. [Affidavit of John J. Flynn ("Flynn Aff."), ECF No. 26-2 ¶2.] On June 2, 2010, Flynn called Sergeant Robb and (1) advised that the police could no longer speak with Defendant, and (2) requested the police allow a voluntary surrender if charges were filed. [Govt. Ex. 401 at 11; Second Tr.[4] at 25.] Flynn did not ask about the electronic media seized. [Second Tr. at 25.]

On June 8, 2010, WCPO Detective Hernani Goncalves interviewed Defendant and Kosnac's minor daughter. [Govt. Ex. 401, at 11.] The daughter allegedly told Detective Goncalves she once woke up and found Defendant standing over her with a washcloth that smelled like paint. [Id.]

On May 31, 2010, the Warren County Medical Examiner conducted an autopsy on Kosnac. [Govt. Ex. 304, admitted into evidence July 12, 2016.] On October 29, 2010, the Medical Examiner issued the autopsy report. [Id.] The Medical Examiner concluded "exposure to chloroform" was a "[c]ontributory [c]ondition" of death, but the cause of death was cardiomegaly

[4] "Second Tr." refers to the transcript of the July 13, 2016 evidentiary hearing.

with atherosclerotic coronary artery disease. [Id.]

On August 10, 2011, Sergeant Robb obtained a search warrant from New Jersey Superior Court Judge Ann R. Bartlett to conduct forensic testing of Defendant's electronic media for "evidence pertaining to crimes including, but not limited to, Criminal Homicide, N.J.S.A. 2C:11-2, and/or Endangering the Welfare of a Child, N.J.S.A. 2C:24-4." [Govt. Ex. 402 ¶3.] On September 20, 2011, Sergeant Robb submitted a request to the New Jersey Regional Computer Forensics Laboratory ("RCFL") for forensic examination of Defendant's electronic media. [Govt. Ex. 305, admitted into evidence July 12, 2016.] The RCFL accepted the request but informed Sergeant Robb it could take up to one year for the examination to commence. [Id.] On July 3, 2012, the RCFL notified Sergeant Robb it was ready to begin the examination. [Govt. Ex. 307, admitted into evidence July 12, 2016.] Sergeant Robb brought the electronic media to the RCFL that same day. [Id.]

On October 2 and October 11, 2012, the RCFL reported its results. [Govt. Ex. 311, admitted into evidence July 13 2016; Govt. Ex. 312, admitted into evidence July 13, 2016.] It located a total of approximately thirteen confirmed images of child pornography; over 762 images of possible child pornography; and approximately sixty-three videos containing possible child pornography. [Govt. Ex. 311 at 3; Govt. Ex. 312 at 3.]

On December 4, 2011, Sergeant Robb and Detective Serafin learned that a person named Noel Gowran had recorded a conversation he had with Defendant on or around October 22, 2011, concerning the events that took place on the date of Kosnac's death. [Second Tr. at 10-11.] The Court listened to the recording during the evidentiary hearing. [Govt. Ex. 502, admitted into evidence July 13, 2016.] During this conversation, Defendant admitted he used chloroform on Kosnac, which he learned to make from "pornography." [Second Tr. 14-19.] Defendant discussed

the effects of chloroform versus Novocain and how the substances are administered. [Id. at 15-16.] When Gowran asked Defendant how he knew this information, Defendant responded "I'm not stupid," and "I didn't graduate from Monmouth Fire Academy for nothing." [Id. at 14-16.] Defendant also told Gowran: "Yeah, I let the police search my house, I gave them a signed copy that says they can search my house." [Id. at 20.] During this conversation, Defendant did not complain of being coerced to speak to the police or give consent to search his home.

On November 13, 2012, the WCPO charged Defendant by complaint with one count of possessing child pornography in violation of N.J.S.A. 2C:24-4b(5)(b). [Def. Mot. at 3; Govt. Opp., Ex. 16.] A grand jury indicted Defendant on this charge on or about September 24, 2014.[5] Shortly thereafter, federal law enforcement began investigating Defendant and, on or about January 28, 2015, the RCFL reported results of its re-testing of one of the hard drives seized from the May 31, 2010 search of Defendant's home. [Govt. Ex. 314, admitted into evidence July 13, 2016.] The subsequent examination revealed Defendant may have used the peer-to-peer program Limewire to download or attempt to download files containing child pornography. [Id.]

B. Procedural History

On February 5, 2015, Defendant was charged by complaint with possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B) and receipt of child pornography in violation of 18 U.S.C. § 2252A(a)(2). [ECF No. 1.] On February 6, 2015, Defendant was arrested and had his initial appearance before Magistrate Judge Cathy L. Waldor. [ECF Nos. 2-4.] At that time, Defendant consented to detention with a right to make a bail application at a later time and was ordered to temporary detention. On February 11, 2015, Defendant's bail application was

[5] On February 20, 2015, after federal charges were filed, the state charges were dismissed. [Def. Mot. at 3.]

denied and Defendant was ordered to detention. [ECF No. 10.]

On August 20, 2015, a federal grand jury returned a two-count indictment charging Defendant with possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B) and receipt of child pornography in violation of 18 U.S.C. § 2252A(a)(2). [ECF No. 16.] On September 9, 2015, Defendant was arraigned before this Court and entered a plea of not guilty. [ECF No. 17.] On December 22, 2015, Defendant filed a pretrial motion to suppress the evidence against him. [ECF No. 21.] The Government filed a brief in opposition to Defendant's motion on February 16, 2016. [ECF No. 25.] Defendant filed a reply on February 29, 2016. [ECF No. 26.] The Court held an evidentiary hearing on Defendant's motion on July 12 and July 13, 2016. Following the evidentiary hearing, both parties filed supplemental submissions on July 26, 2016. [ECF Nos. 37, 38.] The Court held oral argument on Defendant's motion on July 28, 2016. Following oral argument, the Government filed a supplemental submission on August 3, 2016. [ECF No. 40.]

III. DEFENDANT'S FOURTH AMENDMENT CLAIMS

Defendant argues the child pornography found on his electronic media should be suppressed because it was obtained in violation of his Fourth Amendment rights. In deciding whether Defendant's Fourth Amendment rights were violated, the Court must consider the following: (1) whether Defendant's consent to search was voluntarily and freely given; and (2) whether the search warrant complies with the Fourth Amendment.

A. Legal Standard

The Fourth Amendment to the U.S. Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. To prevail on a motion to suppress, a defendant generally bears the burden

of proving the challenged search or seizure was unreasonable under the Fourth Amendment. See United States v. Acosta, 965 F.2d 1248, 1257 n.5 (3d Cir. 1992) ("The proponent of a motion to suppress has the burden of establishing that his Fourth Amendment rights were violated."). However, once the defendant has established a basis for his motion, i.e., that the search or seizure was conducted without a warrant, the burden shifts to the government to show the search or seizure was reasonable. United States v. Johnson, 63 F.3d 242, 245 (3d Cir. 1995). The Government must demonstrate by a preponderance of the evidence the challenged evidence is admissible. See United States v. Matlock, 415 U.S. 164, 178 n.14 (1974).

B. Analysis

1. Defendant's consent was voluntary.

Defendant first argues the May 31, 2010 warrantless search of his home violated the Fourth Amendment. This argument fails because Defendant consented to the search.

The Fourth Amendment prohibits unreasonable searches and seizures. See Illinois v. Rodriguez, 497 U.S. 177, 183 (1990); United States v. Stabile, 633 F.3d 219, 230 (3d Cir. 2011). In general, a "warrantless entry into a person's house is unreasonable per se." See Payton v. New York, 445 U.S. 573, 586 (1980). There are, however, exceptions to this rule. See Jones v. United States, 357 U.S. 493, 499 (1958).

"It is . . . well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conduced pursuant to consent." Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); see also Florida v. Jimeno, 500 U.S. 248, 250-51 (1990) (approving consent searches because a search permitted by consent is reasonable). To justify a search based on consent, the Government "has the burden of proving that the consent was, in fact, freely and voluntarily given." Bumper v. North Carolina, 391 U.S. 543, 548 (1968).

Here, Defendant voluntarily and freely gave consent to search his home. Courts consider the voluntariness of consent by examining the totality of the circumstances. United States v. Price, 558 F.3d 270, 278 (3d Cir. 2009); Schneckloth, 412 U.S. at 224. Courts consider factors such as "the age, education, and intelligence of the subject; whether the subject was advised of his or her constitutional rights; the length of the encounter; the repetition or duration of the questioning; and the use of physical punishment." Price, 558 F.3d at 278 (citing Schneckloth, 412 U.S. at 226). Courts also consider "'the setting in which the consent was obtained [and] the parties' verbal and non-verbal actions.'" Id. (quoting United States v. Givan, 320 F.3d 452, 459 (3d Cir. 2003)).

In this case, Defendant signed a consent to search form which advised him of his constitutional right to refuse consent to the search. See United States v. Mendenhall, 446 U.S. 544, 558-59 (1980) (knowledge of right to decline consent is highly relevant to determination of whether consent was voluntary and substantially lessens the probability that law enforcement conduct could be viewed as coercive); United States v. Velasquez, 885 F.2d 1076, 1082 (3d Cir. 1989) (consent was voluntary because, among other factors, defendant was provided a written consent to search form that was explained to her and which she read).[6] Defendant points to the lack of initials on the consent to search form to contradict voluntary consent. [Supplemental Motion to Suppress by Derrick Baer ("Def. Supp. Br."), ECF No. 37 at 3.] However, Defendant clearly signed the consent to search form, which advised Defendant of his right to refuse consent and to require the officers to obtain a search warrant. [Govt. Ex. 201.] By signing the form, Defendant affirmed he understood he had "a right to refuse this permission to search" and "the

[6] Even though Defendant was advised of his right to refuse consent, the Government does not need to inform the subject of his right to refuse consent. See Schneckloth, 412 U.S. at 227 (noting it is not essential for prosecution to show that the consenter knew of the right to refuse consent to establish consent was voluntary).

right to . . . stop the search at any time," and Defendant affirmed that even though he had "been advised that the officers do not possess a search warrant and that [he] ha[s] a right to demand that they obtain a search warrant, [he] hereby give[s] up that right." [Id.] Such unambiguous affirmation by Defendant shows his consent to search was voluntary. See United States v. Hernandez, 76 F. Supp. 2d 578, 581 (E.D. Pa. 1999) (finding voluntary consent where defendant signed a consent form explaining the police do not have a warrant and there is a constitutional right to refuse permission to search), aff'd, 263 F.3d 160 (3d Cir. 2001).

Defendant argues the reading and explanation of the consent to search form should have been recorded because several officers who were present at the scene were equipped to record the event. [Defendant's July 26, 2016 Supplemental Brief ("Def. Supp. Br."), ECF No. 37 at 2.] At the hearing, the Court heard testimony that at least some of the officers at the scene possessed the capability to either audio record or video record the discussion with Defendant regarding a consent search of his home.[7]

Defendant concedes there is no requirement that officers record the reading and explanation of a consent to search form. [Def. Supp. Br. at 3.] Sergeant Robb testified he read the consent to search form to Defendant and Officer Goodell was present. [First Tr. at 84-85.] Officer Goodell testified he witnessed Sergeant Robb read the consent to search form to Defendant. [Id. at 36.] As such, Defendant signed the form in the presence of two law enforcement officers who testified consistently about the reading and explanation of the consent to search form to Defendant.

[7] For instance, Officer Goodell testified he had a body microphone on the day of the search but had turned it off because his shift ended prior to arriving at Defendant's home. [First Tr. at 46.] Officer Goodell also testified that one or more officers on the scene likely had a car equipped with an operable dashboard camera. [Id. at 49-51.] Sergeant Robb testified he had a portable digital recorder with him on the day of the search that he used to record Defendant's interview, but did not use to record the discussion with Defendant regarding a consent search of his home. [Id. at 96.]

[Id. at 36-38, 84-85.] The Court finds the officers' testimony credible and credits their version of events on this point. See United States v. Bonner, Criminal No. 1:09-CR-0072-02, 2010 WL 1628989, at *5 (M.D. Pa. Apr. 20, 2010).

Next, Defendant was not impaired at the time he gave consent or coerced into giving consent. Defendant's assertion that he was "completely unnerved," [Def. Aff. ¶ 3], and "unable to think straight," [Def. Aff. ¶ 8], prior to signing the form was refuted by the officers' testimony of his cooperative, unimpaired, and calm demeanor. Officer Goodell testified Defendant was "cooperative," "didn't appear to be in duress," did not appear to be impaired by alcohol or drugs, and was not crying or hysterical. [First Tr. at 34, 44-45.] Officer Goodell further testified when Sergeant Robb read the consent to search form, Defendant appeared to be paying attention, did not appear fatigued, and did not appear impaired in any way. [Id. at 41-42.]

Sergeant Robb testified, although Defendant appeared upset by Kosnac's death, Defendant "was still calm," "wasn't . . . agitated or anything like that," and had "a calm demeanor." [Id. at 83.] Sergeant Robb testified he had no concerns about Defendant's mental state at the time he asked for consent and Defendant did not appear to be under the influence of alcohol or drugs. [Id. at 84.]

Notably, Defendant does not allege the police inflicted any physical harm, used any force or threat of force, or even touched him prior to requesting and obtaining his consent. He was at home, was never in custody or under arrest, was never handcuffed, and no guns were drawn. [Id. at 42.] These factors tend to demonstrate the voluntariness of Defendant's consent. See, e.g., Price, 558 F.3d at 279-80 (finding consent voluntary based in part on "low key" circumstances of the law enforcement encounter with defendant, such as the fact that defendant "was asked for consent as she stood on her own property," "officers who were there did not have their guns

drawn," and "[a]t no point was [defendant] arrested, handcuffed, or even touched"); United States v. Kim, 27 F.3d 947, 955 (3d Cir. 1994) (finding consent voluntary based in part on the fact that "[t]here was no threat of force"); United States v. Vaghari, 653 F. Supp. 2d 537, 545 (E.D. Pa. 2009), aff'd, 2012 WL 4707063 (3d Cir. Oct. 4, 2012) (noting that agent did not touch defendant and defendant was in his own apartment).

Moreover, the testimony at the hearing disproves Defendant's allegations of coercive conduct by law enforcement. Contrary to Defendant's assertion that Sergeant Robb told him he would be taken into custody if he did not sign the consent to search form, [Def. Aff. ¶ 7], Officer Goodell, who witnessed the interaction between Sergeant Robb and Defendant concerning the consent to search, testified that Sergeant Robb never told Defendant he would be taken into custody if he did not sign the consent to search form. [First Tr. at 40.] Further, Defendant's assertion he only signed the form so that he could leave his house to be with his children, [Def. Aff. ¶ 8], is refuted by Officer Goodell and Sergeant Robb's testimony that, at no point, did Defendant ask to leave the premises to be with his children. [First Tr. at 41, 87.]

Finally, at least twice after signing the consent to search form, Defendant reaffirmed his consent. See United States v. Vazquez, 858 F.2d 1387, 1390 (9th Cir. 1988) (finding voluntary consent because, among other factors, defendant repeated his consent to the police's request to search). A few hours after signing the consent to search form, Defendant reaffirmed his consent to Sergeant Robb and Detective Serafin during his recorded interview: "Well you have my permission to search the house," in response to Sergeant Robb's question as to whether the officers would find evidence of chloroform use in the house. [First Tr. at 112.] Also during that interview, Defendant noted his desire to cooperate with law enforcement, stating "if there's a way I can help you guys, I want to." [Id. at 116.] And, almost eighteen months later, when Defendant spoke to

Gowran about his interactions with the police on the day of the search, Defendant did not mention ever objecting to the search or to the police's treatment of him that morning. Defendant even told Gowran: "Yeah, I let the police search my house. I gave them a signed copy that says they can search my house." [Second Tr. at 20.] Thus, Defendant's subsequent affirmations of consent show Defendant voluntarily and freely gave law enforcement consent to search his home. Considering the totality of the circumstances, the Court is satisfied Defendant's consent was, in fact, freely and voluntarily given.

2. The search warrant complies with the Fourth Amendment.

Defendant next argues the supposed defects in the search warrant and the delay in obtaining the search warrant violated his Fourth Amendment rights. These arguments fail because the search warrant is supported by probable cause, is sufficiently particular, and the delay in obtaining the search warrant was reasonable.

a. The search warrant was based on probable cause.

Defendant argues the search warrant lacked probable cause to search for evidence of child pornography. This argument fails because Judge Bartlett, the New Jersey Superior Court Judge who issued the search warrant, had a substantial basis for concluding that probable cause existed for finding child pornography on Defendant's electronic media.

A judge may find probable cause when, viewing the totality of the circumstances, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983); United States v. Hodge, 246 F.3d 301, 305 (3d Cir. 2001). The reviewing court need not determine whether probable cause actually existed, but only whether there was "a 'substantial basis' for finding probable cause." United States v. Jones, 994 F.2d 1051, 1054 (3d Cir. 1993). "[T]he resolution of doubtful or marginal cases in this area

should be largely determined by the preference to be accorded to warrants." Id. at 1057-58 (quoting United States v. Ventresca, 380 U.S. 102, 109 (1965)).

The Government points to five pieces of information in the search warrant application that it maintains creates a basis for probable cause to search for evidence of child pornography. First, Kosnac told Marcinkowski that "several years ago [Defendant] had a problem with kiddy porn in the form of pictures and books." [Govt. Ex. 401 ¶ 5(e), admitted into evidence July 12, 2016.][8] Second, Defendant told Marcinkowski "he had a problem with porn." [Id.] Third, Defendant allegedly took a photograph of Marcinkowski's minor daughter while she was showering. [Id.] Fourth, Defendant's electronic media included floppy disks labelled "Derrick's eyes ONLY" and "pics incriminating," and a hard drive marked "porn." [Id. ¶ 5(g).] Finally, Defendant's minor daughter reported she once woke up and found Defendant standing over her with a washcloth, raising the possibility to law enforcement Defendant may have used chloroform on his minor daughter. [Id. ¶ 5(i).] These pieces of information, taken together, create a substantial basis for concluding probable cause existed for finding child pornography on Defendant's electronic media.

Defendant argues the witness accounts included in the search warrant application were not a reliable basis for probable cause because they were based on hearsay. Credible hearsay statements, however, can be the basis of probable cause for a search warrant. See, e.g., United States v. Ventresca, 380 U.S. 102, 108 (1965) (noting hearsay may be the basis for a search warrant as long as there is a substantial basis for crediting the hearsay (citing Jones v. United

[8] Defendant argues it is significant that law enforcement found no "kiddy porn in the form of pictures and books" despite their exhaustive search of Defendant's residence on May 31, 2010. [Def. Supp. Br. at 20.] This argument is unavailing. Pictures and books can be electronic and, as is the case here, can be stored on one's electronic media.

States, 362 U.S. 257, 269-70 (1960)). As Sergeant Robb explained at the hearing, the suspicious labels found on some of the electronic media items (i.e., "pics incriminating, "porn," and "Derrick's eyes ONLY"), taken together with the information provided by Marcinkowski that Kosnac once stated Defendant "had a problem with kiddy porn" and that Defendant had taken a photograph of Marcinkowski's minor daughter while showering, contributed to the possibility that child pornography would be found on Defendant's electronic media. [Second Tr. at 126-27.] Sergeant Robb further testified the large amount of electronic media found in the house (eighteen hard drives, sixty-eight floppy disks, four computers, and one CD-R) made him want to examine these items to see if child pornography would be located within. [Id. at 127.]

Moreover, the lab results confirming that chloroform was on the rag found in the jar in Defendant's home and the autopsy report that chloroform was found in Kosnac's body further confirmed a central aspect of the account Kosnac reportedly gave Marcinkowski concerning Defendant's conduct—his use of chloroform on her to knock her out for sex. [First Tr. at 129-32.] This makes it even more likely that Kosnac's account of Defendant's problem with child pornography was credible. See United States v. Bush, 647 F.2d 357, 363 (3d Cir. 1981) (police need not corroborate every detail of an informant's report to establish sufficient veracity of informant for probable cause). As such, hearsay concerning Defendant's previous problem with "kiddy porn" and his other sexual predilections, along with corroborating information, all provided a substantial basis for probable cause that child pornography would be found on Defendant's electronic media.

b. The search warrant satisfies the particularity requirement of the Fourth Amendment.

Defendant argues the search warrant was overbroad and lacks particularity. This argument fails because the search warrant particularly described the places to be search for child pornography.

The Fourth Amendment requires that warrants particularly describe the place to be searched and the persons or things to be seized. U.S. Const. amend. IV; United States v. Yusuf, 461 F.3d 374, 393 (3d Cir. 2006). General warrants violate the Fourth Amendment because they authorize "a general, exploratory rummaging in a person's belongings." Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971). For a warrant to be invalidated as general, it must "vest the executing officers with unbridled discretion to conduct an exploratory rummaging through [defendant's] papers in search of criminal evidence." United States v. Christine, 687 F.2d 749, 753 (3d Cir. 1983). In contrast, an overly broad warrant "describe[s] in both specific and inclusive generic terms what is to be seized," but it authorizes the seizure of items as to which there is no probable cause. Id. at 753-54.

Here, the search warrant was neither general nor overbroad. The search warrant described in detail each computer, hard drive, floppy disk, and CD the police sought to search for evidence related to specific criminal offenses. It also expressly incorporated Sergeant Robb's affidavit applying for the search warrant concerning the criminal offenses at issue and possible electronic evidence pertaining to those offenses that witnesses referred to, such as child pornography and Internet searches for making chloroform.

Defendant argues the search warrant gave officers unlimited discretion to search for whatever they wished. This argument, however, is simply untrue. The search warrant narrowed the search to evidence relating to three enumerated New Jersey State criminal offenses: Criminal

Homicide, Manslaughter, and Endangering Welfare of Children.[9] [Govt. Ex. 402 ¶¶ 1, 3.] By limiting the search for evidence relating to these specific crimes, the search warrant did not give law enforcement unlimited discretion to search for whatever they wished. See, e.g., Yusuf, 461 F.3d at 395 (finding that a limitation in a warrant for agents to search for evidence of specifically enumerated federal crimes helps satisfy the particularity requirement).

Moreover, the explicit incorporation of Sergeant Robb's affidavit on the face of the search warrant, [Govt. Ex. 402 ¶ 4], provided further particularity for the search of Defendant's electronic media. See Bartholomew v. Pennsylvania, 221 F.3d 425, 429 (3d Cir. 2000) (finding that incorporation of affidavit in the search warrant limits officers' discretion regarding what they are entitled to seize); United States v. Johnson, 690 F.2d 60, 64 (3d Cir. 1982) ("When a warrant is accompanied by an affidavit that is incorporated by reference, the affidavit may be used in construing the scope of the warrant."). Sergeant Robb's affidavit specified that the search of Defendant's electronic media will reveal evidence of child pornography and Internet searches for making chloroform. [Govt. Ex. 401 ¶ 6.] The affidavit described Defendant's "problem with kiddy porn in the form of pictures and books" and referenced labels found on Defendant's electronic media such as "pics incriminating," "Derrick's eyes ONLY," and "porn." [Id. ¶¶ 5(e), 5(g).] The incorporation of Sergeant Robb's affidavit demonstrated law enforcement's intent to find these specific types of evidence on Defendant's electronic media, it did not authorize a general search for evidence of any crime.

Defendant focuses on the catch-all phrase "including but not limited to." Defendant argues a search for evidence of crimes "including but not limited to" Criminal Homicide,

[9] The offense of Endangering Welfare of Children includes child pornography-related offenses such as knowingly possessing or viewing through any means an item depicting the sexual exploitation or abuse of a child. See N.J. Stat. Ann. § 2C:24-4(b)(5)(a).

Manslaughter, and Endangering Welfare of Children evinced law enforcement's intent to conduct a "wholesale search." In Yusuf, the Third Circuit found the use of a catch-all provision, which authorized the Government to search for evidence of money laundering "and illegal activities," did not render the warrant unconstitutionally overbroad. Yusuf, 461 F.3d at 396. In Andresen v. Maryland, 427 U.S. 463 (1976), the search warrant at issue added the phrase "together with other fruits, instrumentalities and evidence of crime at this (time) unknown" to the list of evidence to be searched. The Supreme Court rejected the argument that this catch-all phrase rendered the warrant overbroad, because the context of the warrant made clear this phrase related to the suspected crime specified in the rest of the sentence and in the affidavit. Andresen, 427 U.S. at 479-82; see also United States v. Miknevich, 638 F.3d 178, 182 (3d Cir. 2011) (noting a warrant must be read as a whole, and a supporting affidavit "is to be read in its entirety and in a common sense, nontechnical manner"). In this case, the phrase "including but not limited to" is in the same sentence as the suspected crimes, and should be read in the context of an incorporated affidavit that describes in detail the specific types of evidence on Defendant's electronic media (i.e., child pornography and Internet searches for making chloroform). As such, the search warrant was not overbroad and was sufficiently particular under the Fourth Amendment.

c. The amount of time to obtain and execute the search warrant did not violate the Fourth Amendment.

Defendant argues the fourteen-month delay it took for law enforcement to obtain the search warrant to conduct a forensic search of his electronic media violated his Fourth Amendment rights. This argument fails because the delay was not unreasonable under the circumstances of this case.

The Supreme Court has adopted a balancing test to determine whether a seizure is reasonable. A court must "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." United States v. Place, 462 U.S. 696, 703 (1983). In balancing these interests, courts may consider whether the individual consented to a search and seizure. See United States v. Stabile, 633 F.3d 219, 235 (3d Cir. 2011). "[W]here a person consents to search and seizure, no possessory interest has been infringed because valid consent, by definition, requires voluntary tender of property." Id.; see also United States v. Laist, 702 F.3d 608, 618 (11th Cir. 2012).

In applying this balancing test to the seizure of Defendant's electronic media, the Court must consider the extent of the intrusion on Defendant's possessory interests given the totality of the circumstances. Because Defendant provided consent, did not limit its scope, and did not revoke it, Defendant had little—if any—personal interest in his electronic media. See Stabile, 633 F.3d at 235. First, as discussed above, Defendant consented to the seizure of his property.

Second, Defendant did not limit the scope of his consent. The consent to search form specifically provided for a "complete search" of Defendant's residence, without limitation, including all "documents, materials, things, or other property" considered pertinent by law enforcement. [Govt. Ex. 201.] As such, Defendant provided a general consent and did not restrict his consent to certain subject matters, namely, items related to the allegations concerning his use of chloroform on Kosnac. Pursuant to Defendant's general consent to a "complete search" of his home, law enforcement was not restricted to looking only for items related to specific offenses, or to only those offenses for which the police had probable cause at the time of the search. See Schneckloth, 412 U.S. 218 (search of property, without warrant and without

probable cause, but with proper consent voluntarily given, is valid under the Fourth Amendment). Thus, given Defendant's general consent to search his residence, law enforcement was free to search the residence for and seize any evidence related to the use of chloroform on Kosnac, child pornography, or any other criminal offense located within the residence.

Third, it is undisputed that Defendant never sought return of his electronic media. See United States v. Johns, 469 U.S. 478, 487 (1985) (defendants who "never sought return of the property" cannot argue delay adversely affected Fourth Amendment rights). Defendant claims he did not seek return of his property because he was following his prior lawyer's advice not to ask for the return of the items. The bounds of Defendant's consent and the reasonableness of law enforcement's retention of the electronic media, however, are evaluated based on objective facts, not Defendant's intent. See, e.g., Florida v. Jimeno, 500 U.S. 248, 251 (1991) (for consensual searches, the standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of "objective" reasonableness, not the subjective belief of the suspect giving consent); United States v. Marshall, 348 F.3d 281, 287 (1st Cir. 2003) ("The standard for measuring the scope of a search is one of objective reasonableness, not the consenting party's subjective belief.").

Defendant also claims he did not seek the return of his electronic media because he was invoking his "Fifth Amendment right not to speak with law enforcement." This argument similarly fails. His attorney at the time, John Flynn, could have sought the return of the property on Defendant's behalf, obviating any need for Defendant to speak with law enforcement. At the hearing, Sergeant Robb testified that Flynn, Defendant's prior lawyer, never requested that any of Defendant's property be returned. [Second Tr. at 25.] Defendant's Fifth Amendment interests are entirely separate from the Fourth Amendment issue of whether it was objectively

reasonable for law enforcement to act pursuant to Defendant's unrevoked consent. See United States v. Beckmann, 786 F.3d 672, 679 (8th Cir. 2015) ("Where a suspect provides general consent to search, only an act clearly inconsistent with the search, an unambiguous statement, or a combination of both will limit the consent.").

The Court next considers the degree to which the seizure and retention of the electronic media was necessary for the promotion of legitimate governmental interests. Place, 462 U.S. at 703-04. Law enforcement maintained a substantial interest in retaining the electronic media until the completion of a forensic review by the RCFL because law enforcement had a compelling and substantial interest in pursuing the investigation of Kosnac's death and the claims of Defendant's penchant for child pornography. On October 29, 2010, after the electronic media was seized, the Medical Examiner issued an autopsy report which corroborated Marcinkowski's statements that Defendant used chloroform on Kosnac to incapacitate her for sex. [Govt. Ex. 304.] Moreover, Sergeant Robb's testimony established the amount of time taken to apply for the search warrant was reasonable given the circumstances that precluded obtaining it sooner. After having been initially impeded from pursuing a search warrant because of a prosecutor with a differing view of the case,[10] Sergeant Robb continued his investigation once a new prosecutor was assigned to the case in 2011. [First Tr. at 125-28, 131-32.] Additional time was then needed to compile the evidence for the new prosecutor, for the new prosecutor to review such evidence, for Sergeant Robb to draft a search warrant application, and have the search warrant application reviewed by the prosecutor before it could be presented to a judge. [Id. at 132; Second Tr. at 65.]

[10] At the hearing, Sergeant Robb testified that the original prosecutor denied his request to apply for a search warrant and said "[h]ow do we know that she didn't like it?" [First Tr. at 127.] Sergeant Robb testified that he understood the original prosecutor's comment to mean he was not able to get a search warrant in the case. [Id.]

The Government's course of conduct was reasonable under the totality of the circumstances given Defendant's diminished personal interest and the Government's substantial interest in retaining and searching the electronic media for evidence of crimes. Even if the Government could have moved faster to obtain a search warrant, the Government is not required to pursue the least intrusive course of action. Illinois v. Lafayette, 462 U.S. 640, 647 (1983). Accordingly, the Government's seizure and retention of the electronic media for approximately fourteen months before obtaining a search warrant does not amount to an unreasonable seizure under the Fourth Amendment.

Defendant further argues the delay it took for law enforcement to execute the search warrant violated his Fourth Amendment rights. This argument also fails. Once the search warrant was authorized on August 10, 2010, it took Sergeant Robb—who had never before handled a case involving the forensic review of electronic media by the RCFL—approximately forty days to ascertain the steps for submission of the electronic media to the RCFL. This delay is not unreasonable given (1) Sergeant Robb's other law enforcement duties, and (2) the fact that Sergeant Robb needed to ascertain, for the first time, the forensic review process with the RCFL. [First Tr. at 126, 137; Second Tr. at 7-8.] Finally, the reasonableness of the delay is illustrated by the fact that, on the same day Sergeant Robb received notification the RCFL was ready to accept the electronic media for review, he submitted the items to the RCFL. [First Tr. at 149.]

d. Suppression is not warranted because law enforcement acted in good faith.

Even if the search warrant was defective or the amount of time to apply for and execute the search warrant was unreasonably long, suppression in this case is unwarranted because law enforcement acted in good faith.

Under the good faith exception to the exclusionary rule, suppression of evidence is "inappropriate when an officer executes a search warrant in objectively reasonable reliance on a warrant's authority." See United States v. Hodge, 246 F.3d 301, 307 (3d Cir. 2001) (quoting United States v. Williams, 3 F.3d 69, 74 (3d Cir. 1993)). The Third Circuit has identified four circumstances where an officer's reliance on a search warrant would not be reasonable and, in turn, not trigger the good faith exception:

> (1) [when] the magistrate [judge] issued the warrant in reliance on a deliberately or recklessly false affidavit;
>
> (2) [when] the magistrate [judge] abandoned his or her judicial role and failed to perform his or her neutral and detached function;
>
> (3) [when] the warrant was based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable'; or
>
> (4) [when] the warrant was so facially deficient that it failed to particularize the place to be searched or the things to be seized.

Hodge, 246 F.3d at 308. None of these exceptions apply here.

As described above, there was no reckless or grossly negligent conduct by Sergeant Robb in applying for the search warrant.[11] He then reasonably relied on the Superior Court Judge's approval of the warrant because the judge did not issue it on a deliberately or recklessly false affidavit; did not abandon her judicial role; nor was the warrant so lacking in indicia of probable cause or facially deficient. Moreover, the search warrant affidavit disclosed that Defendant's electronic media items had been seized by law enforcement on May 31, 2010. [First Tr. at 135-36.] Thus, the judge who reviewed the August 10, 2011 search warrant was fully aware that

[11] Defendant points to Sergeant Robb's failure to provide a receipt of the property taken immediately after the search and the lack of the phrase "in sum of substance" before quotation marks in recounting Marcinkowski's statements in the search warrant affidavit. This does not negate the ample record of Sergeant Robb acting in good faith.

these items had been in law enforcement's possession for approximately fourteen months. Thus, even assuming the search warrant was defective or the amount of time to apply for and execute the search warrant was unreasonably long, the exclusionary rule should not apply in this case.

IV. DEFENDANT'S FIFTH AMENDMENT CLAIMS

Defendant also moves to suppress the statements he made to law enforcement on the day of the search. Defendant argues the statements were obtained in violation of his Fifth Amendment rights.

A. Legal Standard

The Fifth Amendment to the U.S. Constitution provides "no person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. In Miranda v. Arizona, 384 U.S. 436 (1966), the U.S. Supreme Court concluded "without proper safeguards the process of in-custody interrogation . . . contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." 384 U.S. at 467. The Government must take certain steps to protect an individual's Fifth Amendment privilege against self-incrimination, including notifying a suspect interrogated while in police custody he has a right to remain silent, any statements he makes may be used against him in court, and he has the right to have an attorney present at the interrogation. Thompson v. Keohane, 516 U.S. 99, 107 (1995); see also Miranda, 384 U.S. at 479. A defendant may waive these rights and make a statement, "provided the waiver is made voluntarily, knowingly and intelligently." Miranda, 384 U.S. at 444. On a motion to suppress statements as involuntary, the Government must demonstrate by a preponderance of the evidence (1) the defendant was properly advised of his Miranda rights; (2) the defendant voluntarily, knowingly, and intelligently waived said rights; and (3) the ensuing statement was voluntary. Colorado v. Connelly, 479 U.S.

157, 169 (1986).

B. Analysis

Defendant argues the statements he made in response to Sergeant Robb and Detective Serafin's questions in Sergeant Robb's police car should be suppressed because they were obtained in violation of his Fifth Amendment rights. This argument fails because Defendant's statements were voluntary and made subsequent to a valid Miranda waiver.

To determine the sufficiency of Miranda warnings and any waiver of rights, courts examine the totality of the circumstances surrounding questioning. See United States v. Velasquez, 885 F.2d 1076, 1086 (3d Cir. 1989); Arizona v. Fulminante, 499 U.S. 279 (1991). In analyzing the totality of the circumstances, a court "must look at the facts of a particular case, including the background, experiences, and conduct of the suspect." Velasquez, 885 F.2d at 1068. Potential circumstances affecting the voluntariness of statements include: (1) evidence of police coercion; (2) the length and location of the interrogation; (3) the defendant's maturity, physical condition, mental health, and level of education; (4) whether Miranda warnings were given; and (5) whether an attorney was present for the interview. See United States v. Swint, 15 F.3d 286, 289 (3d Cir. 1994). Statements following Miranda warnings and waivers are rarely deemed involuntary. See North Carolina v. Butler, 441 U.S. 369, 373 (1979) ("An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver.").

Under the totality of the circumstances, the Court finds Defendant's statements were voluntary and subsequent to a valid Miranda waiver. First, there is no evidence of police coercion. See Swint, 15 F.3d at 289 ("[A] court will not hold that a confession was involuntary unless it finds that it was the product of 'police overreaching.'"). Defendant states he agreed to be

interviewed by Sergeant Robb and Detective Serafin "because [he] believed it was the only way that [he] could be allowed to leave the scene and be with [his] children." [Def. Aff. ¶ 11.] The only evidence supporting Defendant's version of events, however, is his own affidavit.

As Sergeant Robb and Sergeant Goodell independently testified, Defendant was asked to remain on the scene during the search of his home so he could exercise his right to stop the search, and was asked to stay in the front yard for officer safety reasons. [First Tr. at 42, 62-63, 89-90.] The consent to search form explicitly acknowledges Defendant's right to stop the search. [Govt. Ex. 201.] Contrary to Defendant's assertions otherwise, the officers' testimony made clear Defendant was not told he could not leave the premises, and Defendant never asked to leave. [First Tr. at 42-43, 71-72, 87, 89-90.] Sergeant Goodell testified Defendant did not ask about his children or ask to leave to be with his children. [Id. at 32.] Sergeant Robb and Sergeant Goodell were credible and consistent in their testimony, and the Court credits their version of events on this point. See Bonner, Criminal No. 2010 WL 1628989, at *5.

As heard from the recording of the interview, at the end of Defendant's statement, when Sergeant Robb asked him whether he gave his statement of his own free will and whether anyone coerced him, threatened him, or made him any promises to give the statement, Defendant replied "[n]o" and did not mention feeling impaired or coerced in any way. [First Tr. at 123.] Moreover, Defendant's statement to the police "if there's a way I can help you guys I want to," and the clarity, tone, and responsiveness of his answers to the officers' questions further refute any claim of feeling coerced. [Id. at 116.]

In addition, Defendant's claim he was coerced into providing a statement to law enforcement is belied by his conversation with Gowran. Defendant never once complained to Gowran that the police coerced him into giving a statement. [Second Tr. at 19-20.]

Second, the length and location of the interview further support a finding of voluntariness. The interview lasted less than an hour—it began at approximately 8:39 a.m. and concluded at approximately 9:29 a.m. [Govt. Ex. 501-TR, admitted into evidence July 12, 2016.] As such, the interview was not excessively long. Moreover, Sergeant Robb testified the only reason the interview was conducted in the back of his patrol car was to protect Defendant's right to stop the search. [First Tr. at 95.] Sergeant Robb testified if the interview took place at police headquarters, the officers would have to stop the search because Defendant would no longer be present to exercise his right to stop the search.

Third, there is no evidence Defendant's maturity, physical condition, mental health, or level of education prevented him from giving voluntary consent. It is undisputed that Defendant was not handcuffed or detained, nor was he subject to physical force or threat of force; which he confirmed when he replied that "I am sitting freely in your patrol car" at the end of the interview when Sergeant Robb asked him whether he gave his statement of his own free will. [Id. at 123.] Moreover, as heard by the Court, Defendant had a lucid, responsive, and composed tone of voice during the recorded interview and gave detailed and calm answers to even personal and pointed questions by law enforcement concerning his sexual relationship with Kosnac. [Id. at 109-21.]

Fourth, Defendant was given Miranda warnings both verbally and in writing. As heard from the recording of the interview, Defendant was read his Miranda rights, stated he understood them, and then answered questions without indicating at any point that he wished to remain silent. [Id. at 100-04.] Defendant also received a written Miranda waiver card, which he initialed and signed. [Id. at 101; Govt. Ex. 202.] Sergeant Robb testified Defendant signed the Miranda waiver card without hesitation and had a "calm" demeanor when he agreed to proceed with the interview after being advised of his Miranda rights. [First Tr. at 104.]

Finally, although an attorney was not present for the interview, Defendant was advised of his right to have counsel present during the questioning. [Id. at 100-01.] As discussed above, Defendant stated he understood his Miranda rights—including his right to have counsel present—and Defendant signed and initialed a Miranda waiver card. [Id. at 101-02.] Accordingly, under the totality of the circumstances, the Court finds Defendant's statements to law enforcement on May 31, 2010 were freely and voluntarily made. Thus, Defendant's motion to suppress his statements is denied.

V. CONCLUSION

For the foregoing reasons, Defendant's motion to suppress the evidence against him is DENIED. An appropriate order accompanies this Opinion.

DATE: September 9, 2016

CLAIRE C. CECCHI, U.S.D.J.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **DERRICK BAER,** **Defendant.**	**Criminal Action No.: 15-417** **ORDER**

Before the Court is Defendant Derrick Baer's ("Defendant") motion to suppress evidence obtained by the Pohatcong Police Department during the early morning of May 31, 2010. [ECF No. 21.] The Government opposed the motion. The Court held a two-day evidentiary hearing on July 12 and July 13, 2016. The Court has considered the initial and supplemental post-hearing briefs filed by Defendant and by the Government as well as the evidence presented at the evidentiary hearing. For the reasons set forth in this Court's corresponding Opinion,

IT IS on this 9 day of September, 2016,

ORDERED that Defendant's motion to suppress evidence is DENIED.

SO ORDERED.

CLAIRE C. CECCHI, U.S.D.J.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : CRIMINAL
COUNTY OF WARREN

STATE OF NEW JERSEY)
) ss.
COUNTY OF WARREN)

CRIMINAL AFFIDAVIT FOR SEARCH WARRANT

Detective Sergeant Scott Robb, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I make this affidavit in the performance of my duties as a Law Enforcement officer of the State of New Jersey. I have been a member of the Pohatcong Township Police Department for 11 years. I graduated from the Somerset County Police Academy on January 2000, where I was trained in basic criminal investigation, arrest, search and seizure, etc

During my career, I have attended many schools and training seminars dealing in the investigation of crimes, processing of crime scenes and recovery of evidence including but not limited to:

2003 March @ Union County Police Academy – Manadnock Baton Instructor
2003 September @ NJDCJ Undercover Narcotics Investigations

2004 February @ Warren County Prosecutors Office, Arrest, Search, &Seizure
2004 June @ NJSP Marijuana Eradication/Collection

2005 July @ Warren County Prosecutors Office, Arrest, Search, & Seizure

2006 July @ Warren County Prosecutors Office, Arrest, Search, & Seizure

2008 April @ NJSP Crime Scene School

2009 January @ Gerald Lewis Interview School
2009 January @ WCPO Police Academy Recovery of Evidence School
2009 August @Managing Property and Evidence Rhode Academy.
2009 September @ Top Gun School, Sayreville, N.J. Police Academy

2010 January @ WCPO/Somerset County Method of Instruction School
2010 March @ Magiocien Seminar Combating Major Crime.
2010 March @ Holtz Arrest, Search, & Seizure, Bergen County Academy
2010 April @ Instructor on Arrest, Search, & Seizure WCPolice Academy.

2011 March@ Crime Scene Dusting and Lifting prints, Somerset Police Academy.
2011 April @ Clandestine Grave Dig Seminar, Somerset County Police Academy.
2011 June @ Crime Scene Blood Patterns, Somerset County Academy.

I have been involved in approximately several hundred arrests, including, but not limited to, most statutes covering New Jersey Criminal code 2C and more specifically in this matter, criminal homicide, and/or endangering the welfare of children by possession of child pornography.

2. I have probable cause to believe and do believe that in the Township of Pohatcong, Warren County, New Jersey there is evidence of the violation of the penal laws of this State or any other State, including, but not limited to the offense of Criminal Homicide (N.J.S.A. 2C:11-2) and/or Endangering the Welfare of a Child (N.J.S.A. 2C:24-4) (possession of child pornography).

3. The evidence sought may be found in the following list of computers, hard drives, floppy disks, and CD-Rs described in #4 presently in the possession of the Pohatcong Township Police Department as a result of being seized on May 31, 2010 with the written consent of Derrick Baer residing at that time at 106 Route 639, Pohatcong Township, Warren County, New Jersey.

4. The property to be searched is more particularly described as:

(a) (1) Desktop Computer, manufactured by Dimensions, model #2400, serial # GD5Q751

(b) (1) Western Digital Computer hard drive, model # WDAC21200-00H. P/N # 99004211000

(c) (1) Seagate Computer Hard Drive. Serial # ST31276A

(d) A total of (68) 3 ½ inch Floppy Disks

(e) (1) CD-R

(f) (1) Sony Desktop Computer, model #PVC2232. serial #3052657 .

(g) (1) Desktop Computer, manufactured by Dimensions, serial #3MGDV11 .

(h) (1) Desktop Computer, manufactured by Dimensions, model #43000. Serial #00043-147-439-369.

(i) (1) Hitachi Deskstar Hard Drive, model #HDS722512VLAT20. Serial #C3G3072K

(j) (1) Western Digital Hard Drive, model #WD100BA. Serial #WM929

(k) (1) Western Digital Hard Drive, model #WD1200AB-00DBAO. Serial # WMACM1699309

(l) (1) Maxtor Hard Drive, model #5T040H4. Serial #SG-053EDU-19661-1B6-A53J

(m) (1) WD Hard Drive, model #WD300AA. Serial #WMA2J .

(n) (1) Western Digital hard Drive, model #WD800BB-00JHC0. Serial # WCAM9A345861 .

(o) (1) Iomega Hard Drive, model #Z100ATAPI. Serial #HYAV5196KU .

(p) (1) Seagate Hard Drive, model #ST380021A. Serial #3HV1X3N5 .

(q) (1) Western Digital Hard Drive, model #WD64AA-00AMT2. Serial # WM6273949901

(r) (1) Seagate Hard Drive, model # FNHXTRP. Serial # ST31276A

(s) (1) Western Digital Hard Drive, model # AC35100-00LC. Serial # WT4130136226

(t) (1) Seagate Hard Drive, model # ST5850A. Serial # DZ497887

(u) (1) Maxtor Hard Drive, model # 91531U3. Serial # G3H95CCC

(v) (1) IBM Hard Drive, model # DHEA-36480 E182115A. Serial #DP/N00089659 12561-76J-0E6H

(w) (1) Fujitsu Hard Drive, model # MPD3130AT. Serial # 01010021

(x) (1) Seagate Hard Drive, model # ST310212A. Serial # 7EG2747R

Any and all computers computer systems, computer programs, computer software, web cameras, video cameras, digital cameras, computer hardware, including central processing and video display devices, printers or printing devices, power cords, disk drive units including but not limited to USB thumb drives, floppy disks or magnetic tapes, hard disk drives/units, external hard drives, tape drives/units, memory cards, documentation, passwords and data security devices, magnetic media, magnetic media display equipment, peripheral computer equipment, and any data contained therein, as well as phone books, phone bills, address books, correspondence, diaries, photographs, or any other material which would indicate additional victims or suspects.

Access to any and all information pertaining to passwords and/or hidden, erased, compressed and password protected or encrypted information relating to the computer system, computer software, and/or related device(s) is authorized.

5. The facts tending to establish the grounds for this application of probable cause for my beliefs are as follows:

(a) On May 31, 2010 at 3:08am, Officer Anthony Goodell of the Pohatcong Township Police Department responded to a 911 call at 106 County Route #639 made by the resident of that address, Derrick Baer. On arrival it was learned that Mr. Baer resided with his girlfriend, Lorianne Kosnac at that address. Mr. Baer had called 911 when he noticed Ms. Kosnac lying on their bed on her side with vomit coming from her mouth. He stated that she was making a gurgling sound and she was not responding to him. He called 911. The responding officer, Goodell, observed Ms. Kosnac laying face up on the bed, no pulse, with her face turning blue, and vomit coming from her mouth. Officer Goodell, with the assistance of Mr. Baer, removed her from the bed to the hard, flat floor and began Defibtech, then CPR. Officer Goodell was relieved immediately on the arrival of Bloomsbury Rescue personnel along with EMS personnel from Hunterdon Medical Center. Ms. Kosnac was pronounced dead at that location at 3:58am by Dr. Mehta, the Medical Center Physician working in conjunction with the EMS personnel on location.

(b) Officer Goodell spoke to Mr. Baer and was told that he and Ms. Kosnac resided at that location together as girlfriend and boyfriend. He was aware of a medical condition Ms. Kosnac had wherein she was prescribed "Levothyroxin for a thyroid problem". Mr. Baer also reported to Officer

Goodell that Ms. Kosnac complained to him earlier in the day that she had a headache and she took (3) Ibuprofen. He reported that Ms. Kosnac had consumed "a couple of vodka and lemonade drinks during the day". Mr. Baer reported that prior to his finding Ms. Kosnac unresponsive on the bed they had "sex in the bedroom". He left the bedroom after this, " for a cigarette, and was cleaning up in the kitchen, a short time later he returned to the bedroom and found her making a gurgling sound and the vomit coming from her mouth."

(c) I responded to the scene at the request of Det. Teddy Garcia who had responded at the request of Officer Goodell. I learned that Ms. Kosnac's sister had called 911 after learning of her sister's death and left a message stating, "She thought her sister may have been murdered by her boyfriend, Baer who she had broken up with a few months earlier because of Baer using Chloroform on her to have sex."

(d) At 06:12 hours, on 5-31-2010, a consent to search form was explained to Derrick Baer and he signed the form allowing Officers to search his residence at 106 Route 639 in Pohatcong Township. Det. Serafin of the Warren County Prosecutor's Office and I then went to the Pohatcong Township Police Department to obtain a sworn statement from Cynthia Macinkowski.

(e) Synopsis of Ms. Macinkowski's statement: "Around 5:00am she got a phone call from her mother Sharon Mancini telling her, her sister was dead." She called her sister's boyfriend, Derrick and asked him, "if he did anything to her?" She said Derrick replied "no, I tried to do CPR." She said she spoke with her mother then called 911 to alert the police of her conversations with her sister.

Ms. Macinkowski learned from her mother in late February or the beginning of March 2010 that "her sister Lorianne moved out of the residence where she was living with Derrick because of something serious." She said her mom would not tell her what it was and that she would have to speak with Lorianne about it. About a week after speaking to her mother, she spoke with her sister. Ms. Macinkowski picked her sister up at her mother's house where Lorianne was living after moving out. She said they took a ride to go to the Sands Casino and at that time, Lorianne told Ms. Macinkowski why she left Derrick. Lorianne told Ms. Macinkowski that while she was still living with Derrick, she was cleaning her bedroom and found two jars underneath the bed. One of the jars contained a washcloth and the other contained something that smelled like ammonia. Lorianne told

Ms. Macinkowski that she remembered waking up within the past year and there was a horrible smell and she felt sick. "I asked Derrick if he smelled it, and he told her, no". Lorianne told her, "I could never put my finger on where the smell was coming from." Lorianne told her sister that she called Derrick and confronted him about the contents of the bottles. Lorianne said Derrick admitted to her, that it was homemade chloroform which he found on the Internet and had used it on her. She said, "while she was asleep at night he would cover her face with the washcloth and rape her." She also told her that one day their daughter Emilie said, she woke up and Derrick was standing over top of her with a washcloth with his hand on the pillow. Lorianne told Ms. Macinkowski that she was scared, but did not call the police because she did not want to get Derrick in trouble. Lorianne told Ms. Macinkowski that she had taken pictures of the two bottles she found and sent them to her sister-in-law Liz Baer.

Lorianne also told her that several years ago Derrick had a problem with kiddy porn in the form of pictures and books. Ms. Macinkowski said several years ago her daughter, Allison, who was 14 at the time, had spent the night at Lorianne's house. Ms. Macinkowski stated when she picked her daughter up in the morning her daughter told her that while she was in the shower Derrick took a picture of her. Cynthia said she confronted Lorianne and Derrick about the situation but he had denied it.

Ms. Macinkowski said, after the conversation at the Sands Casino, she stayed in touch with her sister for the next couple of weeks. She said, after this time, Lorianne had "become sick" with a cyst on her rectal area that had become pretty big. The cyst got infected and she had to have surgery on it. Cynthia said, when she got to the hospital Derrick was there and, "she tried to remain neutral for her sister." She spoke with Derrick, "about the whole chloroform situation." She told Derrick she knew everything and wanted to know, what was the matter? Derrick admitted to her, "he had a problem with porn." Derrick also told her he knows what he did was wrong and he was sorry. Derrick also admitted to her that he used the chloroform on Lorianne. Cynthia asked him where he found out how to do this. Derrick told Cynthia that he looked it up on the Internet. He also said he did not do it all the time, but had been doing it over a period of a year. Derrick also told Cynthia he was going to go get help and that he loved her sister. Cynthia also said that she learned from her sister that she and Derrick had sexual problems in their relationship. She said, "Derrick wanted sex all of the time and Lorianne did

not want sex possibly because of her thyroid problem." Cynthia brought one last point up, stating, "at one point Lorianne had a blister on her face, which at first, Lorianne thought it was from medication, and after everything came to light she realized that the big blister on her face had to come from that homemade chloroform."

(f) After I returned to the Baer residence. I spoke with Mr. Baer about his relationship with Lorianne. He stated that he and Lorianne Kosnac have been together for approximately nine years. They are not legally married but have a child together, Emilie age 7. Emilie resides with them as well as Lorianne's son, Parrish age 10, from a previous relationship.

At 8:39am on May 31, 2010 Mr. Baer was advised he was not under arrest, was advised and acknowledged his Miranda Rights, then was asked to describe his activities throughout the day on May 31, 2010. All of which was tape recorded. He stated at 10:00 a.m. he had breakfast with Lorianne and the kids. At approximately 2:00 p.m. they went to Home DePot and Shop Rite in Greenwich Township. They arrived back at their home between 5:00 and 5:30 p.m. He stated that Lorianne began to drink vodka and lemonade and they decided to mow the grass and rototill the garden in the backyard. He stated that Lorianne had been complaining about a headache throughout the day.

At approximately 9:00 p.m. they put the kids to bed. Lorianne had taken Ibuprofen medication for her headache. Mr. Baer stated that at some point after watching a movie Lorianne invited him into their bedroom and they had sex together. He stated that shortly after that she stated her headache had become worse and she took Nyquil. Mr. Baer stated that, "after making love he left the bedroom." At approximately 1:00 a.m. he went outside. He picked up tools where he had been working on small engines. He stated that he eventually went back in the bedroom, layed down next to Lorianne when he heard gurgling. He turned a light on and observed, "vomit on Lorianne." He stated that she continued to vomit and he called 911.

When asked about his relationship with Lorianne Baer stated that, "the relationship had its ups and downs." He stated that approximately three or four months ago, "they had a fight and she went to

live with her mother." He stated, "the fight was over money because they were not able to pay some of their bills."

Baer stated that,"after Lorianne had returned from her mother's their relationship had gotten better." When questioned about his sexual relationship with his wife Mr. Baer stated that "she did not like to have anal sex which he preferred." He stated that they would get into verbal arguments in regards to her not performing anal sex with him. Mr. Baer stated that this is one of the reasons that they had broken up approximately three months ago and she had gone to live with her mother.

Mr. Baer was then questioned about the information received regarding his use of the internet to obtain a formula to make chloroform. Mr. Baer stated that he had never used the internet to find this recipe nor had he ever made chloroform. When Mr. Baer questioned denied having any bottles of chloroform in the home or on the property. He also denied that any type of chloroform or its derivative would be found in the home or on the property. Mr. Baer stated that he did have other chemicals in the home and on the property that he used to clean parts from the motors that he worked on. At this time Mr. Baer had nothing further to add to his statement and we had no further questions. Mr. Baer was sworn, the statement was concluded at 9.29 a.m.

(g) On May 31, 2010 Derrick Baer signed a Consent to Search his residence located at 108 Route 639, Pohatcong Township, Warren County, New Jersey. The property described in paragraph 4 of this affidavit was seized and transported back to Pohatcong Township Police Department where it was secured in evidence.

In addition to the aforementioned articles a "Classico" glass jar with a rag inside of it (item SR-1). This item was found in a separate room that was next to the main bedroom under an iron board in plain view near the doorway. While collecting these items I noticed on one of the floppy disks it had the writing of "Derrick's eyes ONLY" (item – SR3-5). On another floppy disk was written "pics incriminating" (item – SR5-5). After processing the computer room we processed the living room. In the living room we located two (2) desktop computers and eight (8) computer hard drives.

After processing the living room we went to the outside of the residence. Outside of the

Residence on the back patio we located eight (8) computer hard drives. One of these hard drives had the word "porn" handwritten on it. This item was marked with item number (SR14-1). Near the outside shed we located a bottle of Acetone. We photographed this container but did not collect it. Other pieces of the evidence collected had the word "pics" on them. While we processed the above rooms Det. Teddy Garcia processed the other parts of the residence. During his processing he was able to locate one (1) desktop computer in the master bedroom. Det. Garcia also located ibuprofen, Nyquil and Equate headache medicine inside the kitchen. Once processing was complete we cleared the scene and secured all items taken at the Pohatcong Township Police Department.

(h) On May 31, 2010, I spoke with Elizabeth Baer at her residence in Bound Brook, N.J. Elizabeth said she was best friends with Lorianne and also her husband is Derricks brother. Elizabeth appeared to be very upset over the death of Lorianne. I asked if Lorlaine ever sent her picture(s). She said one (1) picture was sent to her of two jars. The pictures were sent to her by Lorainne on her cell phone. Elizabeth said she was talking on the phone with Lorianne when Lorlaine found the jars. One of the jars had a towel in it and the other had chloroform in it. Elizabeth said she was told by Lorianne that she had called or texted Derrick about the bottles and the smell of the liquid and Derrick admitted to Lorianne that it was chloroform. Lorianne told Elizabeth that Derrick admitted to using the chloroform on her while she was sleeping to have sex with her. Lorianne told her they have always argued about sex. Lorianne told her Derrick said he would use the chloroform on her to fulfill his sexual pleasure. Elizabeth said after Lorainne confronted Derrick about the jars and he admitted what he was doing she left the house and moved in with her mother. Elizabeth said this only lasted a short time because Lorianne was not getting along with her mother. Lorianne told her that when she came back everything seemed to be going good. Lorianne told her a few days prior she smelled the smell again. Lorianne said she confronted Derrick but he denied it. Lorianne told her that Derrick made the chloroform himself and he found out how to do it on the internet. Elizabeth said the only other thing she knew was that Derrick was supposed to be getting help for the problem with the chloroform.

(i) On May 31, 2010, Det. Hemani Goncalves and Det. Teddy Garcia went to Albrightsville, Pennsylvania to speak with Lorianne Kosnacs mother, Sharon Mancini. The statement started at 3:05 pm. Sharon said Derrick and Lorianne met when "P.J", (Lorianne's son Parrish J. Kosnac, age 10)

was a baby while working at the same auto parts store. Sharon said the relationship went south a couple of months prior to Lorianne's death (March/April 2010). Sharon said Lorianne left Derrick and her and the kids came to stay with her. Lorianne told her that he could have killed her. Lorianne said he made some kind of concoction to knock her out so he could have sex with her. Lorianne told her she found bottles under her bed. Lorianne told her one of the bottles had a washcloth and she confronted Derrick about it. Derrick admitted to her he was putting the washcloth over her face and having sex with her. Lorianne also told her that she suspects Derrick did something to their daughter Emilie (age 7). Lorianne told Sharon that Emilie told her that she woke up and saw her Daddy by her bed with a washcloth. Sharon did not have anymore details than this. Sharon did not have any other knowledge of the relationship problems between Derrick and Lorianne.

(j) I was given information from Cynthia Marcinkowski that one of Lorianne's ex-boyfriends might have some information for the investigation. I spoke with John Ingersoll over the phone. John said he dated Lorianne for three (3) years while they were in high school. John said since then the only communication is through facebook, John said the Thursday prior to Loriannes death he was instant messaging with Lorianne on Facebook. John said Lorianne left a message for him stating she was having serious problems with her boyfriend. Lorianne also said her boyfriend was hitting her. John tried to communicate over the phone with Lorianne but was not successful about this situation. John said that was the last time he communicated with Lorianne.

(k) On June 1, 2010, Cynthia Marcinkowski said she spoke with Derrick Baer this morning. Cynthia said the first thing Derrick said to her was "I'm so sorry". Otherwise the conversation was about what they were going to do with Lorianne's body.

(l) On June 1, 2010, Det. Teddy Garcia and I took the sexual assault kit and the glass jar found in the residence to the New Jersey State Police Lab. On June 2, 2010, the lab results came back on the items submitted. The glass jar was tested for chloroform and it came back positive for chloroform. The sexual assault kit results came back July 19, 2010 stating there was two contributors of DNA found in the samples provided. One of these DNA profile came back as being Lorianne Kosnac's DNA.

(m) On June 2, 2010, I contacted Derrick Baer at his mother's residence. The reason for me contacting Derrick was to conduct a second interview. Derrick advised me he wanted an attorney and would have the attorney contact me.

On June 2, 2010, I received a call from attorney John Flynn who said he was representing Derrick Baer. Mr. Flynn asked when charges are filed if we could give him a phone call so he could turn his client in.

(n) On June 7, 2010, Det. Serafin and I went to Elizabeth Baer's residence in order to retrieve the photograph of the glass jars from her cell phone. I took her SD card out of her phone and utilized a computer program to extract photographs from her SD card. I was able to extract approximately 400 photographs but none of which was a picture of the jars. Elizabeth did provide a print out from her cell phone account showing a picture message was sent from Lorianne's cell phone to Elizabeth's cell phone. This message was sent on March 2, 2010 at 1:09 pm.

(o) On June 8, 2010, Det. Hernani Goncalves from the Warren County Prosecutor's Office conducted interviews of Lorianne Kosnac's children, Emilie Baer and Parrish Kosnac. Det. Goncalves first interviewed Emilie. Emilie said one time she woke up and found her Dad standing over top of her with a washcloth that smelled like paint. Emilie also made a disclosure about her brother improperly touching her. Det. Goncalves then interviewed Parrish who did not disclose any information which would be pertinent to this case.

6. Based on my training and experience and the aforementioned facts, I have probable cause to believe and do believe that: a search and retention of the said items will reveal evidence of offenses including, but not limited to, Criminal Homicide, and/or Endangering the Welfare of a Child. The search of the said items taken will reveal evidence including, but not limited to instructions on how to make chloroform, internet searches about chloroform, suspicious internet key word searches, incriminating photographs, and/or child pornography.

7. Based on my education persons sexually attracted to younger children tend to collect and save child pornography in many forms such as computer image files. They also tend to keep addresses and phone numbers of contacts within the illegal world of child pornography.

8. Based on my training I have learned that computer storage devices like hard disks, diskettes, tapes, and laser disks generally can store the equivalent of thousands of pages of information. Additionally, a suspect may try to conceal criminal evidence; he or she might store it in random order with deceptive file names. This may require searching authorities to examine all stored data to determine which particular files are evidence or instrumentalities of the crimes. This sorting process can take weeks or months, depending on the volume of data stored, and it would be impractical to attempt this king of data search on site.

Searching computer systems for criminal evidence is a highly technical process requiring expert skill and a properly controlled environment. The vast array of computer hardware and software available requires even computer experts to specialize in some systems and applications, so it is difficult to know before a search which expert is qualified to analyze the system and its data. In any event, data search protocols are exacting scientific procedures designed to protect the integrity of the evidence and to recover even "hidden", erased, compressed, password-protected, coded or encrypted files. Since computer evidence is extremely vulnerable to inadvertent or intentional modification or destruction (both from external sources and from destructive codes imbedded in the system as a "booby trap", a controlled environment is essential to its complete and accurate analysis. education, and experience, persons sexually attracted to younger children tend to collect and save child pornography in many forms such as computer image files. They also tend to keep addresses and phone numbers of contacts within the illegal world of child pornography.

Therefore, authorization is requested to execute this warrant and retain all items listed on the Consent to Search including but not limited to the items in Paragraph 4 of this Affidavit. Further authorization is sought to turn over all items retained to an Agent at the New Jersey State Police Regional Computer Forensics Laboratory or any other certified forensic computer analyst so a forensic examination can be performed on all the aforementioned items until such examination is complete.

WHEREFORE, I respectfully request that this Court issue a Search Warrant allowing the Pohatcong Township Police Department to retain the items seized as listed on the Consent to Search form as well as Paragraph 4 of this Affidavit.

9. Wherefore, I have probable cause to believe the items seized from Derrick Baer and a complete search of those items will reveal evidence stored involving crimes, including but not limited to, Criminal Homicide, in violation of N.J.S.A. 2C:11-2, and/or Endangering the Welfare of a Child, in violation of N.J.S.A. 2C: 24-4.

I respectfully request that a Search Warrant be issued authorizing a search and retention of the property specified and the examination of said property.

I FURTHER REQUEST PERMISSION to execute this warrant until the completion of the forensic analysis by a law enforcement officer or agency from the issuance thereof.

DSgt. Scott Robb #13

Sworn and subscribed to before me
this 10th day of Aug., 2011

HONORABLE ANN R. BARTLETT
Warren County Superior Court Judge

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – CRIMINAL
COUNTY OF WARREN

STATE OF NEW JERSEY :
COUNTY OF WARREN :

SEARCH WARRANT

To Detective Sergeant Scott Robb or any officer of any police department having jurisdiction:

1. This matter being opened to the Court under oath by Detective Sergeant Scott Robb on application for the issuance of a Search Warrant for the property described below, and the Court having reviewed the affidavit under oath of said Detective Sergeant Scott Robb.

Good cause being shown therefrom in that the facts presented in said affidavit show probable cause for believing that a search and retention of property belonging to Derrick Baer, obtained in a Consent to Search dated May 31, 2010 will yield evidence of offenses, including but not limited to, Criminal Homicide, N.J.S.A. 2C:11-2, Manslaughter, N.J.S.A. 2C:11-4, and Endangering the Welfare of Child, N.J.S.A. 2C:24-4.

2. The following is a description of the property to be searched and retained:

(a) One (1) Dimensions desktop computer, Model#2400, Serial # GD5Q751.

(b) One (1) Western Digital computer hard drive, Model# WDAC21200-00H, P/N # - 99-004211-000.

(c) One (1) Seagate computer hard drive. Serial # ST31276A.

(d) Sixty-Eight (68) 3 ½" floppy disks.

(e) One CD-R.

(f) One (1) Sony desktop computer, Model # PVC2232, Serial # 3052857.

(g) One (1) Dell Dimensions desktop computer, Serial #3MGDV11.

(h) One (1) Dell Dimension desktop computer, Model #4300, Serial #00043-147-439-369.

(i) One (1) Hitachi Deskstar hard drive, Model # HDS722512VLAT20, Serial # C3G3072K.

(j) One (1) Western Digital hard drive, Model #WD100BA, Serial #WM929.

(k) One (1) Western Digital hard drive, Model #WD1200AB-00DBA0, Serial # WMACM1699309.

(l) One (1) Maxtor hard drive, Model #5T040H4, Serial # SG-053EDU-19661-1B6-A53J.

(m) One (1) WD Caviar hard drive, Model # WD300AA, Serial # WMA2J.

(n) One Western Digital hard drive, Model #WD800BB-00JHC0, Serial # WCAM9A345861.

(o) One (1) Iomega hard drive, Model # Z100ATAPI, Serial # HYAV5196KU.

(p) One (1) Seagate hard drive, Model # ST380021A, Serial # 3HV1X3N5.

(q) One (1) Western Digital hard drive, Model # WD64AA-00AMT2, Serial # WM6273949901.

(r) One (1) Seagate hard drive, Model #FNHXTRP, Serial # ST31276A.

(s) One (1) Western Digital hard drive, Model # AC35100-00LC, Serial # WT4130136226.

(t) One (1) Seagate hard drive, Model # ST5850A, Serial # DZ497887.

(u) One (1) Maxtor hard drive, Model # 91531U3, Serial # G3H95CCC

(v) One (1) IBM hard drive, Model # DHEA-36480 E182115S, Serial # DP/N 00089659-12561-76J-0E6H.

(w) One (1) Fujitsu hard drive, Model # MPD3130AT, Serial # 01010021.

(x) One (1) Seagate hard drive, Model # ST310212A, Serial # 7EG2747R

The Court being satisfied from the foregoing that grounds for granting the warrant exist.

3. You are hereby commanded to search and retain the above described property for evidence pertaining to crimes including, but not limited to, Criminal Homicide, N.J.S.A. 2C:11-2, and/or Endangering the Welfare of Child, N.J.S.A. 2C:24-4, including but not limited to:

Any and all computers, computer systems, computer programs, computer software, web cameras, video cameras, digital cameras, computer hardware, including central processing and video display devices, printers or printing devices, power cords, disk drive units including but not limited to USB thumb drives, floppy disks or magnetic tapes, hard disk drives/units, external hard drives, tape drives/units, memory cards, documentation, passwords and data

security devices, magnetic media, magnetic media display equipment, peripheral computer equipment, and any data contained therein, as well as phone books, phone bills, address books, correspondence, diaries, photographs, or any other material which would indicate additional victims or suspects.

Access to any and all information pertaining to passwords and/or hidden, erased, compressed and password protected or encrypted information relating to the computer system, computer software, and/or related device(s) is authorized

4. You are hereby ordered, to give a copy of this Warrant together with a receipt for the property to be retained to the person from whom it was taken or in whose possession it was found or in the absence of such person to leave a copy of this warrant together with such receipt in or upon the said premises from which the property was taken.

All information contained in the affidavit under oath furnished in support of this application for this search warrant is expressly incorporated herein by reference and the executing officer are directed to familiarize themselves with contents thereof.

5. You are further authorized to retain all items voluntarily turned over by Derrick Baer listed on the Consent to Search form.

6. You are further authorized to turn over any items retained to the New Jersey State Police Regional Computer Forensics Laboratory or any other certified forensic computer analyst so a forensic examination can be performed on all the aforementioned items. You are further authorized to execute this Warrant until the completion of the forensic examination.

7. You are further authorized to execute this warrant until the completion of the forensic analysis by any law enforcement officer or agency and forthwith make return thereof to me with your report of the execution of this warrant and written inventory of the property searched and retained hereunder by you.

GIVEN and ISSUED under my hand at Belvidere, New Jersey, at 4:32 o'clock ~~a.m.~~/p.m. this 10th day of August 2011.

ANN R. BARTLETT, J.S.C.
Judge of the Superior Court
State of New Jersey

AO 106 - DNJ (Rev. 03/15) Application for a Search Warrant

United States District Court

for the

District of New Jersey

In the Matter of the Search of *(Briefly describe the property to be searched or identify the person)* SEAGATE FREEAGENT GOFLEX 640GB EXTERNAL HARD DRIVE, PRODUCT NUMBER 9ZF2A3-500, SERIAL NUMBER NA0F3Z6M, IN THE POSSESSION OF THE POHATCONG TOWNSHIP POLICE DEPARTMENT	:	Case No. 17-6661 **APPLICATION FOR A SEARCH WARRANT**

I, a federal law enforcement officer or an attorney for the government, request a search warrant and state under penalty of perjury that I have reason to believe that on the following person or property *(identify the person or describe the property to be searched and give its location)*:

See Attachment A

located in the District of New Jersey, there is now concealed *(identify the person or describe the property to be seized)*:

See Attachment B

The basis for the search under Fed. R. Crim. P. 41(c) is *(check one or more)*:

- ☑ evidence of a crime;
- ☑ contraband, fruits of crime, or other items illegally possessed;
- ☑ property designed for use, intended for use, or used in committing a crime;
- ☐ a person to be arrested or a person who is unlawfully restrained.

The search is related to a violation of:

Code Section	*Offense Description*
18 U.S.C. § 2251 18 U.S.C. § 2252 18 U.S.C. § 2252A	Production, possession, receipt, and distribution of child pornography

The application is based on these facts:

See Attachment C

- ☑ Continued on the attached sheet.
- ☐ Delayed notice of _____ days (give exact ending date if more than 30 days: _____) is requested under 18 U.S.C. § 3103a, the basis of which is set forth on the attached sheet.

Applicant's signature

Kevin Matthews, Special Agent, FBI
Printed name and title

Sworn to before me and signed in my presence.

Date: October 16, 2017

Judge's signature

City and State: Newark, New Jersey

Honorable Joseph A. Dickson
Printed name and title

DBAER000965

ATTACHMENT A

DESCRIPTION OF PROPERTY TO BE SEARCHED

The Target Media to be searched is:

A Seagate FreeAgent GoFlex 640 GB external hard drive, bearing the product number 9ZF2A3-500, and the serial number NA0F3Z6M, which is in the secure custody of the Pohatcong Township Police Department.

ATTACHMENT B

DESCRIPTION OF ITEMS TO BE SEIZED AND SEARCHED

The property to be searched and seized is evidence, fruits, and instrumentalities relating to violations of Title 18, United States Code, Sections 2251, 2252, 2252A, and 2, which make it a crime to produce, receive, possess, or distribute, or aid and abet the production, receipt, distribution or possession of child pornography (the "Specified Federal Offenses"), namely:

1. Any and all motion pictures, films, videos, and other recordings, in any form, of visual depictions of minors engaged in sexually explicit conduct.

2. Any and all computer software, computer related documentation, computer passwords and data security devices that may be, or are used to:

   a. visually depict child pornography or child erotica;

   b. display or access information pertaining to a sexual interest in child pornography;

   c. display or access information pertaining to sexual activity with children;

   d. distribute, possess, or receive child pornography, child erotica, or information pertaining to an interest in child pornography or child erotica.

3. Any and all computer software, including programs to run operating systems, applications (such as word processing, graphics, or spreadsheet programs), utilities, compilers, interpreters, and communications programs, including, but not limited to, peer-to-peer software (which refers to software used to access a network in which participating computers can share files with one another directly, without requiring the use of an intermediary server. Users access these networks through software that allows users to search for and share files across the network).

4. Any and all visual depictions of minors relevant to the Specified Federal Offenses.

5. Any and all images of child pornography and files containing images of child pornography in any form wherever they may be stored or found on the Target Media.

6. Any and all records, documents or correspondence, in any form, reflecting personal contact or any other activities with minors, relevant to the Specified Federal Offenses.

7. Any and all notes, documents, records, or correspondence, in any format (including, but not limited to, text messages, e-mail messages, chat logs and electronic messages, other digital data files and web cache information):

   a. identifying persons transmitting, through interstate or foreign commerce by any means, including, but not limited to the United States Mail, common carrier, computer, or some other facility or means of interstate or foreign commerce, any child pornography or any visual depictions of minors engaged in sexually explicit conduct;

   b. concerning the receipt, transmission, shipment, distribution, possession, production, order, purchase, request, trading, or sharing of child pornography or visual depictions of minors engaged in sexually explicit conduct;

   c. concerning communications between individuals about child pornography or the existence of sites on the Internet that contain child pornography or that cater to those with an interest in child pornography;

   d. concerning membership in online groups, clubs, or services that provide or make accessible child pornography to members;

   e. concerning the preparation, purchase, and/or acquisition of names, mailing lists, supplier lists, mailing address labels, or lists of names to be used in connection with the purchase, sale, trade, or transmission, through interstate or foreign commerce by any means, including, but not limited to the United States Mail, common carrier, computer, or some other

facility or means of interstate or foreign commerce, any child pornography or any visual depiction of minors engaged in sexually explicit conduct, including registries regarding peer-to-peer file-sharing software communications and participants in peer-to-peer file-sharing software networks;

f. concerning online storage or other remote computer storage, including, but not limited to, software used to access such online storage or remote computer storage, user logs or archived data that show connection to such online storage or remote computer storage, and user logins and passwords for such online storage or remote computer storage; or

g. concerning the occupancy or ownership of the Target Media.

8. Any and all credit card and other financial information, including, but not limited, to bills and payment records, reflecting evidence of the purchase of child pornography.

9. Any and all lists of names and addresses of individuals who may have communicated, by use of the computer or by other means, with the owner or user of a computer containing child pornography or visual depictions of minors engaged in sexually explicit conduct for the purpose of receiving, transmitting, shipping, distributing, possessing, producing, ordering, purchasing, requesting, trading, or sharing child pornography or visual depictions of minors engaged in sexually explicit conduct.

AO 93 - DNJ (Rev 3/15) Search and Seizure Warrant

United States District Court

for the

District of New Jersey

In the Matter of the Search of *(Briefly describe the property to be searched or identify the person)* SEAGATE FREEAGENT GOFLEX 640GB EXTERNAL HARD DRIVE, PRODUCT NUMBER 9ZF2A3-500, SERIAL NUMBER NA0F3Z6M, IN THE POSSESSION OF THE POHATCONG TOWNSHIP POLICE DEPARTMENT	:	Case No. 17-6661
	:	**SEARCH AND SEIZURE WARRANT**

To: Any authorized law enforcement officer

An application by a federal law enforcement officer or an attorney for the government requests the search of the following person or property located in the District of New Jersey *(identify the person or describe the property to be searched and give its location)*

See Attachment A

I find that the affidavit(s), or any recorded testimony, establish probable cause to search and seize the person or property described above, and that such search will reveal *(identify the person or describe the property to be seized)*

See Attachment B

YOU ARE COMMANDED to execute this warrant on or before October 30, 2017 *(not to exceed 14 days)*

☑ in the daytime, 6:00 a.m. to 10:00 p.m. ☐ at any time in the day or night because good cause has been established.

Unless delayed notice is authorized below, you must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken, or leave the copy and receipt at the place where the property was taken.

The officer executing this warrant, or an officer present during the execution of the warrant, must prepare an inventory as required by law and promptly return this warrant and inventory to Hon. Joseph A. Dickson
(United States Magistrate Judge)

☐ Pursuant to 18 U.S.C. § 3103a(b), I find that immediate notification may have an adverse result listed in 18 U.S.C. § 2705 (except for delay of trial), and authorize the officer executing this warrant to delay notice to the person who, or whose property, will be searched or seized *(check the appropriate box)*

☐ for ____ days *(not to exceed 30)* ☐ until, the facts justifying, the later specific date of ____

Date and time issued: October 16, 2017 2:59 p.m. Joseph A. Dickson
Judge's signature

City and state: Newark, New Jersey Hon. Joseph A. Dickson
Printed name and title

AO 93 - DNJ (Rev. 3/15) Search and Seizure Warrant (Page 2)

Return

Case No.: 17-6661	Date and time warrant executed:	Copy of warrant and inventory left with:

Inventory made in the presence of:

Inventory of the property taken and name of any person(s) seized:

Certification

I declare under penalty of perjury that this inventory is correct and was returned along with the original warrant to the designated judge.

Date: _____

_____
Executing officer's signature

_____
Printed name and title

ATTACHMENT A

DESCRIPTION OF PROPERTY TO BE SEARCHED

The Target Media to be searched is:

A Seagate FreeAgent GoFlex 640 GB external hard drive, bearing the product number 9ZF2A3-500, and the serial number NA0F3Z6M, which is in the secure custody of the Pohatcong Township Police Department.

ATTACHMENT B

DESCRIPTION OF ITEMS TO BE SEIZED AND SEARCHED

The property to be searched and seized is evidence, fruits, and instrumentalities relating to violations of Title 18, United States Code, Sections 2251, 2252, 2252A, and 2, which make it a crime to produce, receive, possess, or distribute, or aid and abet the production, receipt, distribution or possession of child pornography (the "Specified Federal Offenses"), namely:

1. Any and all motion pictures, films, videos, and other recordings, in any form, of visual depictions of minors engaged in sexually explicit conduct.

2. Any and all computer software, computer related documentation, computer passwords and data security devices that may be, or are used to:

   a. visually depict child pornography or child erotica;

   b. display or access information pertaining to a sexual interest in child pornography;

   c. display or access information pertaining to sexual activity with children;

   d. distribute, possess, or receive child pornography, child erotica, or information pertaining to an interest in child pornography or child erotica.

3. Any and all computer software, including programs to run operating systems, applications (such as word processing, graphics, or spreadsheet programs), utilities, compilers, interpreters, and communications programs, including, but not limited to, peer-to-peer software (which refers to software used to access a network in which participating computers can share files with one another directly, without requiring the use of an intermediary server. Users access these networks through software that allows users to search for and share files across the network).

4. Any and all visual depictions of minors relevant to the Specified Federal Offenses.

5. Any and all images of child pornography and files containing images of child pornography in any form wherever they may be stored or found on the Target Media.

6. Any and all records, documents or correspondence, in any form, reflecting personal contact or any other activities with minors, relevant to the Specified Federal Offenses.

7. Any and all notes, documents, records, or correspondence, in any format (including, but not limited to, text messages, e-mail messages, chat logs and electronic messages, other digital data files and web cache information):

   a. identifying persons transmitting, through interstate or foreign commerce by any means, including, but not limited to the United States Mail, common carrier, computer, or some other facility or means of interstate or foreign commerce, any child pornography or any visual depictions of minors engaged in sexually explicit conduct;

   b. concerning the receipt, transmission, shipment, distribution, possession, production, order, purchase, request, trading, or sharing of child pornography or visual depictions of minors engaged in sexually explicit conduct;

   c. concerning communications between individuals about child pornography or the existence of sites on the Internet that contain child pornography or that cater to those with an interest in child pornography;

   d. concerning membership in online groups, clubs, or services that provide or make accessible child pornography to members;

   e. concerning the preparation, purchase, and/or acquisition of names, mailing lists, supplier lists, mailing address labels, or lists of names to be used in connection with the purchase, sale, trade, or transmission, through interstate or foreign commerce by any means, including, but not limited to the United States Mail, common carrier, computer, or some other

facility or means of interstate or foreign commerce, any child pornography or any visual depiction of minors engaged in sexually explicit conduct, including registries regarding peer-to-peer file-sharing software communications and participants in peer-to-peer file-sharing software networks;

f. concerning online storage or other remote computer storage, including, but not limited to, software used to access such online storage or remote computer storage, user logs or archived data that show connection to such online storage or remote computer storage, and user logins and passwords for such online storage or remote computer storage; or

g. concerning the occupancy or ownership of the Target Media.

8. Any and all credit card and other financial information, including, but not limited, to bills and payment records, reflecting evidence of the purchase of child pornography.

9. Any and all lists of names and addresses of individuals who may have communicated, by use of the computer or by other means, with the owner or user of a computer containing child pornography or visual depictions of minors engaged in sexually explicit conduct for the purpose of receiving, transmitting, shipping, distributing, possessing, producing, ordering, purchasing, requesting, trading, or sharing child pornography or visual depictions of minors engaged in sexually explicit conduct.

WARREN COUNTY PROSECUTOR'S OFFICE

FILE NUMBER:

TRANSCRIBED STATEMENT OF: CYNTHIA S. MARCINKOWSKI

DATE OF STATEMENT: MAY 31, 2010

STATEMENT TAKEN AT. POHATCONG TOWNSHIP POLICE DEPARTMENT

QUESTIONS ASKED BY: DETECTIVE SERGEANT SCOTT ROBB
(Names and Agency Affiliations)

WITNESSES PRESENT: DETECTIVE JOHN SERAFIN
(Names and Agency Affiliations)

TIME STATEMENT STARTED: 7:07 A.M

TIME STATEMENT FINISHED: 7.51 A.M

TRANSCRIBED BY: LESLIE ANDERSON

DATE TRANSCRIBED: JUNE 24, 2010

CM: I don't think everything has really hit me yet.

SR: No, I'm sure it hasn't. Uh just so you know this is gonna be um audio and video taped okay

CM: Video taped to huh?

SR: That's alright. Um today's date is uh May 31, 2010. The time now is 7:07 a.m. Um this is uh taken at the Pohatcong Township Police Department. Um this will be a statement of could you please state your full name?

CM: Cynthia S. Marcinkowski

SR: Could you spell your last name?

CM: M-A-R-C-I-N-K-O-W-S-K-I

SR: And Cynthia is C-Y?

CM: C-Y-N-T-H-I-A

SR: And your telephone number?

CM: [redacted] hat's my cell phone

SR: Okay do you have any other contact numbers?

CM: No

SR: No? And your uh current address?

CM: [redacted]

SR: (Phone ringing) Hello, okay

JS: [redacted]

SR: Yes

JS: Okay is that a residence apartment?

CM: Um town home

JS: Okay

SR: Okay, then you're gonna um alright just stand by. Just stand by there and alright, alright 8 30

JS: Okay, good

SR: Alright, you said that was in Flanders?

CM: Florence

SR: Florence

CM: F-L-O-R-E-N-C-E

JS That's in Middlesex County, right?

CM. Burlington

JS: Bur oh, oh all the way down there?

CM It's about twenty minutes past Trenton

JS: Okay

CM: That's the address that's listed on my license and everything

SR And how old are you?

CM: Forty one

SR: And what's your date of birth?

CM

SR: And where were you born?

CM: In [illegible]ey

SR: And your social?

CM

SR: And do you have a driver's license?

CM: I do

SR: In what state?

CM: New Jersey

SR: You know that number off hand?

CM:

SR: And are you currently employed?

CM: No, I'm disabled since 1997

SR: And whom do you reside with?

JS: Do you live with anyone at that address?

CM: Um my husband and children live there.

SR: Okay but you're separated right now?

CM: Yeah were separated 19 months

SR: Um, okay um and this is in reference to Case # 2010-3154 um the uh residence there is 106 Route 639 uh Bloomsbury, New Jersey uh in Pohatcong Township. Um Cynthia um we I know you talked to uh myself a little bit and Detective Garcia um over at the residence um your sister

CM: Yes

SR: And her name was?

CM: Lorianne Kosnac

SR: Okay

CM: Lorianne Dabrowski Kosnac

SR: Right, okay um

JS: Can you uh Lorianne?

CM: Yeah Lorianne

JS: L-O-R-I-A-N-N-E?

CM: Yes, all one word

JS: Okay, is that your maiden name Kosnac?

CM: No that's actually her first married name

JS: Okay

CM: Her, her maiden name is Dabrowski D-A-B-R-O-W-S-K-I

JS: Okay

SR: But she uses both?

CM: Uh she goes by Lorianne Kosnac legally um but her maiden name is Dabrowski her first marriage was short and um

SR: Okay

JS: You're originally from Raritan, New Jersey?

CM: Yes

JS: I use to work in Bridgewater

CM: Oh did you really?

JS: Are you related to the Dabrowski's that worked in uh one was the cop in Bridgewater his son lives in Raritan?

CM: She might have been I'm not sure her father's name was ya he went by Yonak

JS: Oh okay

CM: John and my mom's maiden name is Rosa that's my maiden name

JS: Okay, just curious

CM: I grew up in the Bridgewater area

JS: Um hum, okay

SR: Um ya know obviously were here because um your sister passed and ya know there was some information that you supplied to us um not only on the phone um but also in person up at, up at the residence

CM: Right

SR: Um we asked you to come down here to provide us with a formal uh statement um which you have no problem with correct?

CM: No

SR: Okay um what I'd like you to do is first start off with when you were notified and then when you were notified what did you do cause you told us at the scene that you made a 911 call right?

CM: This morning you mean?

SR: Yeah, yeah this morning, I mean yes

CM: Yes, yes, yes

SR: Start off with that and then

CM: Okay

SR: Once you do that then we'll go into the history that you told us about at the scene

CM: Okay, okay um this morning at about 5 a.m. I got a phone call from my mom and she told me that my sister was deceased and uh it took me about 5 minutes or 10 minutes to just realize I wasn't still dreaming or something um at which time I contacted Derrick to find out if it were true or not and I asked him if he had done anything and the police had just walked in or were already there and he said no he tried to give her CPR and I asked what happened and he said that he'd have to call me back I then hung up with him and I called my mom and I asked her if she notified the police at all and she told me no and uh I then hung up the phone and all I had was my cell phone and I dialed 911 and uh they gave me Sussex County

SR: Um hum

CM: Hopatcong first and uh then gave me the number, I called into the 911 here and explained that this needed to be investigated perhaps as a murder um because there was a past situation um that I became aware of in about the beginning of March um

JS: March 2010?

CM: Yeah it could have been the end of February, beginning of March of 2010

JS: Okay

CM: Um my mom had advised me that my sister had left Derrick and had the kids and really wouldn't tell me too much about what happened just that it was really serious and that my sister would have to tell me and uh within a week ya know I, I had spoken with my sister I didn't really push for too much information I just knew that it involved Derrick um my sister and I uh she called me and she needed somebody there and I drove to her house to my mom's house she was staying with my mom in the Pocono's

SR: Okay when she left she went to your mother's house?

CM: Yes, yes

SR: Alright

CM: My mom lives in , uh I drove there and ya know my, my sister was crying, she was very upset and I knew she needed to get out of the house for awhile so I suggested we take a ride to Sand's because it's kind of like private you can talk nobody knows what's going on so we took a ride to the Sand's and well we just we talked a little bit on the way there not all that much just kind of general BS and when we got to the Sand's uh her and I sat together and didn't play and she proceeded to tell me that uh the reason that she had left Derrick was that she was cleaning her bedroom and found two jars underneath the bed, one of them contained a wash cloth and the other one contained something that smelled like ammonia and she proceeded to tell me that, that um she had remembered waking up several times within the last year and there was a horrible smell and she felt sick and she would ask Derrick if he smelled it and he would say no and she could never put her finger on it she could never figure out where it came from um but she found herself like really feeling sick for awhile and just wrote it off as ya know a sinus infection or some weird funky smell in the house and uh when she found the two jars underneath the bed and smelled them and then she saw the washcloth she realized that he had been using it on her at which time she called him, confronted him about it and um he admitted that he, he had in fact made homemade chloroform which he found on the internet um the, the cocktail for it and made it and had in fact used it on her uh while

she was asleep at night, he would I guess cover her face with the washcloth and rape her and um she had no memory, no knowledge of any of it um she then told me that her daughter Emily one morning when she woke up said to my sister um that she had woken up, Emily had woken up and found Derrick standing over her with a washcloth with his hand on the pillow and um ya know my sister was very upset, devastated and ya know realized that all these things could have taken place and in fact could have killed either one of them and she, she was beside herself she didn't really know what to do and how to handle it but she did tell me that uh she didn't contact the police um I think from embarrassment and from fear I guess of getting him in trouble I, I don't know um she did tell me she took some pictures and, and sent them to Liz Baer um I tried to convince my sister to give me a copy of the pictures but she didn't, she wouldn't.

JS: Who is Liz Baer?

CM: Liz Baer is her sister-in-law it is Derrick's brother's wife and um my sister and Liz have become very close friends over the past couple years and I guess she trusted her the most um my guess is she wouldn't give me the pictures because she probably knew that I would have come right to the police station and, and

SR: Do you know what the pictures entailed?

CM: I think that they entail um the jars um possibly the information that he found on the internet um I, I'm not a hundred percent sure but I know that my sister could have really gotten Derrick in a world of trouble um she had all kinds of proof and that's really all she told me

SR: Okay

CM: Um she also advised me at that time that several years ago um Derrick had a problem with kiddy porn, that he had um been on the internet and he had pulled all kinds of stuff off there and then I guess he had books and um pictures I, I'm really not sure I kind of tried not to pay to much attention to the details with that because uh several years ago my daughter had spent the night there and when I came in the morning to pick her up my daughter Allison was very upset and said that when she was in the shower Derrick was outside and took a picture of her and I confronted ya know my sister and Derrick with it and he had denied it and ya know I, I kind of like at the time wrote it off as ya know maybe the sunlight or something like that it's not that I didn't believe my daughter its just that it was a situation where you really couldn't do anything with it, there was no proof, there was no anything but when my sister told me about the kiddy porn problem I realized that he must of in fact taken pictures of my daughter while she was in the shower. Um ya know my sister said she would of returned to him but she wanted him to get help um psychological help and um ya that there, there were a lot of problems there and um over the course of the next couple weeks her and I talked a little bit here and there just made sure she knew I was there for her and uh she had gotten sick with a problem um like uh a cyst on her rectal area that had gotten very big like the size of a I really don't know how big it was but she ended up it got infected and she had to go and have surgery on it and when I went to the hospital he was there and I tried to remain very neutral for my sister um we did, I did talk to Derrick about the whole situation and I, I did tell him that he, he could of killed her I mean how would you know how to make homemade chloroform. How would you know how much to use and, and it's just crazy

SR: Wouldn't, okay now all this stuff that you said to us so far is that is what your sister told you?

CM: Absolutely

SR: But now you say that you also confronted Derrick on it?

CM: I did, I did

SR: Can you tell us what that conversation was specifically about?

CM: I told Derrick

SR: And when, do you know when like

CM: It was the date that she was in the hospital for surgery. I don't have exact dates

SR: Um hum

CM: It was in March, it was between March actually be I'm gonna say between April 15th and it was before March 6th I believe

JS: May 6th?

CM: April and March. March

JS: Alright March 6th, April 15th

CM: Yeah because I got custody of my older daughter on March the 6th and that was within one week of my sister and I talking

JS: Um hum

CM: Um so it had to be the end of April the beginning of March um I brought her to the hospital because she, she had to have surgery and she needed ya know I wanted to be there

SR: Um hum

CM: And I told Derrick that I knew everything uh because he was kind of skating around the whole issue and uh I, I discussed it all in detail with him and he had said that he was going for help that he had gone to um several different churches and things like that and I, I had advised Derrick that he had a very serious problem and that it was a very serious issue and that I didn't feel that any church in the world would be able to help him and I told him that he needed to see a psychiatrist and he needed to um discuss it. I did tell him however that if he were to tell a psychiatrist everything that happened that they would have to notify the police because if you're a danger to yourself or someone else by law they have to notify and he was already aware of that and I think that's the reason why he didn't seek any professional help that I know of

SR: Okay but what was the conversation about between (inaudible)?

CM: The conversation was about the fact that he said that he had uh, uh a problem that he admitted that he had a problem with porn was how he put it and I stated that he had a lot more than a problem with porn if he could make homemade chloroform and use it on my sister while she's sleeping and rape her and I made sure that he was aware of the fact that it could have killed her

SR: But when you say, when you, like when you confronted him with that

CM: Right

SR: What did he say?

CM: He said he knows and he regrets it and ya know that he doesn't know what happened to him he doesn't understand why he did it.

SR: Um hum

CM: And uh I know there were a lot of intimacy issues between the two of them.

SR: Um hum

CM: Um ya know my sister usually didn't want to be intimate and he always wanted to be intimate and he felt that he had an addiction to sex

SR: Um hum

CM: Um ya know we discussed all that and then we discussed his childhood and just different things that took place and

SR: What about his childhood though?

CM: There was a lot of situations um my sister had told me about one was that they um my sister had found a homemade movie of him and his brother and his sister that apparently his parents had gone out to a bar and there was a camera in the house and the kids didn't know there was a camera in the house and when the parents left the kids pulled out all of their genitals and started messing around with each other and I mean its I, I personally don't understand it, I don't ya know

SR: Um hum

CM: Why parents would do that and, and I don't, I can't comprehend that whole situation but I had specifically said to Derrick that ya know maybe he needed to investigate the fact that maybe something happened to him

SR: Right

CM: I know that his father he had a lot of problems with his father and I, I mean I'd be speculating if I were to say that he were abused sexually or, or anything like that it just kind of seems to fit.

SR: Okay, but now he didn't tell you

CM: He didn't no and

SR: He said we just know that you were told that he had family issues going on?

CM: Yeah my sister had told me that ya know she had found this video and that she, she just it blew her mind and

SR: Um hum

CM: She had told me the details of the video and um there were a lot of things that had come up between my sister and I in conversations. Ya know just even over the years that I felt that Derrick might have a problem and

SR: A sexual problem or?

CM: Yeah oh definitely a sexual problem um

JS: How long have they been together? Their not legally married?

CM: Their not legally married I would say 6 to 9 years. Um think for a minute she's 30 and him my nephew is 9 or 10 maybe about 8 years, 7 or 8 years because they met when my nephew was about a year old and Emily is gonna be 6.

JS: That's their child, Emily?

CM: Yeah that's their child by marriage but um her son is not his son

SR: But he's been around since the son was 1 year old?

CM: Yeah

SR Like 1 right?

CM: Yes, but there were even issues between Derrick and PJ over the years that ya know like kids when they become adults they, they practice what they've have learned as kids

SR Um hum

CM: It, its just a natural thing they and, and a lot of adults don't realize what their doing to kids and I think that Derrick as much as he hated his childhood and, and felt that a lot of things weren't right he became his dad and he was very tough on PJ and Emily ya know there's discipline and then there's discipline and ya know I, I couldn't get to involved in the whole issue because I understand how complex everything works and it, its not up to me to make a call on everybody else's life (inaudible)

JS: Getting back to the chloroform did he ever admit to you that he used the chloroform?

CM: Yes, yes

JS: On your sister?

CM: Yes and he stated that I, I said well where in the world would you even find out how to do that and he said that he looked it all up on the internet and it was over a period of a year and it wasn't all the time and, and I said once was too much

JS: Um hum

CM: I mean just, just the thought of going on the internet and finding out how to make it and I tried to make him understand that he, he's sick that, that, that to go on the internet and look up something like that is one thing but to proceed even further and make it and actually use it

JS: Um hum

CM: I mean that's just

JS: Then you had that conversation

CM: While my sister

JS: Was in the hospital?

CM Yes, while she was in surgery (inaudible)

JS: What hospital was she in?

CM: Warren County

JS: Warren Hospital

CM: Yes

JS: Phillipsburg?

CM: Warren

JS: And he said he was gonna get help?

CM: Yes he said he was gonna get help and that he loved her and that he would never do it again and um he didn't realize what he had until she was gone um

JS: Did your sister have any problems with alcohol at all?

CM: No, no absolutely not in fact she wasn't much of a drinker at all

JS: Okay

CM: The fact of that she, she had spoken with my mom yesterday and she didn't say anything to my mom about a headache that I know

JS: Okay

CM: Uh it, it surprises me a bit that she was drinking at all because she's not, not a drinker I mean alcoholism is (inaudible) in our moms and dads even though her and I have separate fathers

JS: Um hum

CM: Um we've both been very, very careful with the alcohol

JS: Okay, so you wouldn't classify her as uh alcoholic?

CM: No

JS: Or a heavy drinker?

CM: No not at all

JS: Just a social drinker?

CM: Social um ya know maybe

SR: But even if you could call her a social I mean it doesn't sound like she drinks hardly at all right?

CM: No, she doesn't not to my knowledge

SR: Like what would you say?

CM: I in uh November of 2008 I had I was at her house and it was her and Derrick's birthday and he had made pina colodas and she didn't even drink a full pina coloda and she didn't want anymore

SR: Um hum

CM: She just wasn't I mean years ago when she was a teenager she was she drank

SR: Um hum

CM: And, and did things like that but that's just ya know as soon as as soon as especially as soon as her son was born it just wasn't, it wasn't part of her life at all. I know Derrick drank a lot

SR: Um hum

CM: Um there was always alcohol in the house and every now and then I would mention something to her ya know how come there and she would say that he drinks but he doesn't drink like he used to ya know I guess he was getting pretty drunk on many occasions and it just seems to me to like if she had a headache last night or all day yesterday it doesn't make any sense that she would drink. She also has a thyroid problem she's had many, many issues over the years and she's um I'm not so sure if she's on the medication for the thyroid right now or not but uh cause she would always run out and didn't have the money to get it and it just doesn't make sense to me that if she had a headache all day long that she'd be drinking

SR: Um hum

CM: Um especially not heavily

JS: And how did you learn about the headache?

CM Um one of the detectives let me know

JS: Okay

CM: Um cause I asked I said is there any other possibilities here

JS: Besides the thyroid that's the only like medical issue she had and

CM: She had a lot of medical issues, she had um I think its called Hashimoto disease, she has a thyroid sheet, the thyroid causes depression I know that um

JS This other thing you stated what does that do?

CM The Hashimoto?

JS: Yeah

CM: I'm not sure that I know its related to the thyroid

JS: Okay

CM: Um they, they kind of all run hand in hand ya know I know that um the thyroid was always out of whack and she didn't have the money to get the medication and then and treated the right way and find the right doctor and then I know she was having some bowel problems as well and they were pretty severe and that was the type of surgery she had and um I don't really remember the word for it but its like a muscle that's in, in the rectum that she was having a lot of problems with and she, she finally had found a good doctor and the doctor was working with her and I also know she was having a lot of OBGYN issues um but I think a lot of that is from the thyroid also because it makes you very irregular

SR: Okay no other, no heart problems?

CM: No, no heart problems no, no in fact she had, had a whole bunch of test done at Warren Hospital um cat scans and because she had, had this pain in her side and it was like her right side kind of like it seemed like her gallbladder ya know she thought she had gall stones and everything came out good

SR: Um hum

CM: Um ya know she was always scared because her father had died of kidney cancer and when he was diagnosed it was stage 4 or 5 already and ya know he, he died when she was 11 and uh my mom just got diagnosed with um she has a blockage in her aorta and there, there's like less then one percent circulation in her legs and when they were doing the stuff for the surgery um to see if everything worked properly they found a tumor on her left kidney ya know and I remember telling my mom be very careful how you tell and what you tell Lorianne because I didn't want Lorianne to get so upset that she was gonna lose her mom to this, our mom and I know my mom was very careful ya know and I know that even when my sister went back to Derrick my mom and my sister were not talking and when everything came to light with my mother I had gone to my sister's and convinced the two of

them that they needed to talk because things happen in life and you don't want regrets when somebody's gone.

SR: Um hum

CM: And, and they started talking again and that was probably about a month ago. And I, I know that my mother has a lot more information when it comes to this whole situation with Derrick and the kids and my sister but my mom and I have never discussed it other than we can't believe that Lorianne went back ta that.

JS: Hum

CM: Um it just was something that the two of us could, could not discuss. I tried to remain neutral for my sister

JS: Um hum

CM: Ya know as far as accepting Derrick and ya know I just tried to be her big sister and be neutral and I know better than anybody that I could tell her not to go back but that's not gonna stop her we all have to make mistakes and learn from them.

SR: Has there been any other problems in the relationship that they've had beside I mean uh this is uh

CM: They, they've always had a huge problem when it came to sex um ya know I, I know that my sister was never really that interested in, and a lot of that came from the thyroid um and I think that the rest of it came from the pressure of always he, he always wanted to have sex and she didn't and ya know she felt guilty about it but then there, there were times where things became violent and ya know she would want to leave and he threw her purse on the roof and I mean there were a lot of situations but I wasn't there and I, I'm not a judgmental person, and I know there, there was between two people there's always one side, another side and right smack in the middle somewhere between is the truth and ya know I it, it's not up to me to judge anybody

SR. Right

CM: Um ya know I know that he was drinking for awhile, I know that ya know she had found stuff on the internet where he had gone on the web sites for dating and your typical relationship problems I guess ya know some things more than others um

JS: Where does he work?

CM: He works at um Heber's in Whitehouse, I believe it's called Heber's its uh um like a lawn shop

JS: Okay

CM: On Route 22 and he's been there since they've been here They moved here I'm gonna say they've moved here maybe five or six years ago and they started off renting the house and then he bought it ya know and she was always upset that like they didn't get married and that he didn't, he didn't she wanted to be married and he didn't and that was always a huge thing in their relationship um

ya know he never proposed, he'd never given her a ring and that always bothered her a lot and there were even a lot of fights with that

JS: Um

CM: Um I always told her to be thankful because once you marry somebody it's not always that easy to separate.

SR: Um did you say your mom might have some more information?

CM: My mom does I know she does its just that we've never discussed it

SR: And what's her first name?

CM Her first name is and her last name is

SR: Okay, and where does she live (inaudible)?

CM: She lives in he um, I know that she had called the police station this morning as well.

SR: Um hum

CM: I gave, in fact I gave her the number and I said that she needed to call because I had, had situation here 19 months ago and I didn't know if anybody would take me seriously or not

SR: Um hum

CM: And I didn't have as much information as my mother did

SR: Right

CM: And I told her that she needed to call and she needed to advise everybody or somebody that there were, there was a situation

SR: Okay, do you have a contact number for her?

CM: I do in my cell phone, she's on speed dial so and she her car wouldn't start this morning and

SR: Okay

CM: And she's just not really (inaudible)

SR: Um hum

CM: It is 5 area code . I've been staying with my mom, I have her exact address in here if you need it?

SR: Sure

CM: And then there's another part to her address its not her mailing address its um like a 911 thing I think its HC3, Box 3369. Um I've actually been staying with my mom since she found out that my mom is diabetic ya know the circulation and

SR: Um hum

CM: And I've been in nursing so I've been going there, taking care of her I've been bouncing all over so its

SR: Um hum

CM: Its been crazy

SR: Okay

CM: I know that my uh husband and my kids were on their way here um ya know can't, I can't tell my husband what to do I just ya know he was upset and my kids are upset and

SR: I think their here

CM: Oh okay

SR: I think so

CM: I know that ya know I don't know whether you need to speak with my daughter or not. My daughter doesn't know , (inaudible)

JS: How old is she?

CM: She's , she doesn't know anything about the situation as to what took place between Derrick and my sister

SR: Um hum

CM: It, I didn't feel that it was a child's need to know

SR: Um hum

CM: Um ya know but she ya know if you needed to question her about the pictures or whatever um that's all the information she has is that situation or whatever else has ever taken place with her she doesn't know anything about

JS: Um hum

CM: Anything else

SR: Okay

CM: So other than she's not allowed there at all

SR: Right

CM: I, I wouldn't allow my kids use to spend the night there and once all this came to light I would not allow them to go

SR: Okay

CM Not unless I was there with them and then when I did take Allison to visit I did it when he was not at home and he was at work

SR: Um hum

CM: So I mean they've asked me a lot of questions and I just said its private and

SR: Um hum

CM: That's it so my children don't know they just know that (inaudible) Ya know if you, if you think that you might need my mom to come here for a statement and I, I haven't spoken with her since I was advised not to

SR: Um hum

CM: Um I did contact my aunt and tell her ta maybe talk to my mom because (inaudible) her car won't start

SR: Um hum

CM: I can go get her

SR: Um hum

CM: Or I can even send well its not a good idea for him to go get her because that will just set her off even more

SR: Um hum, alright well lets uh we'll talk about that

CM: Okay

SR: Um in a little bit but you have anything else?

JS: No, I'm good

SR: Okay, um no that, that's really all we have um the only thing I'm gonna ask is that uh um is there anything else that you would wish to add to this statement?

CM: Um not really I mean I could, I, I do a lot of poetry and things

SR: Um hum

CM: I had written a poem to my sister after she returned cause I didn't and I have a date on that poem if you need any dates

SR: Okay

CM: I mean it might help

SR: Sure

CM: I don't have any, anything in my phone I delete everything um

SR: Were in the beginning stages right now

CM: I know

SR: And I'm sure we'll be contacting ya and talking to ya there's no doubt that we will be um ya know this is just basically we get the initial information from ya and then were definitely gonna be talking to you again

CM: Okay

SR: Uh cause we'll definitely have more questions its just once we find out more information and then we might have more questions for you

CM: And I understand that this is all like uh pre thing and I understand and, and I'm not looking at it could have been an aneurism, it could have been God only knows but it just it didn't add up to me I mean my biggest fear of all was that she would go back and not wake up

SR: Um hum

CM. And to know that he, he I don't know what time he called my mom but I got the phone call about 5 a.m. or so and the first thing that came to my head is oh my God if, if he had found her in the bathroom or anywhere else in the house but in, in the bed and in the morning this was his thing, this is what he did, it just, it doesn't feel right to me

SR· Um hum

CM: And I ya know Derrick's a great guy to an extent I don't, I don't really hold any grudges I'm just not like life is to short I hope its something like an aneurism I, I just pray to God it is because I don't

SR: Um well nobody coerced you or anything or promised you anything

CM: No, no

SR: To give this statement so you've given it freely and

CM: I called immediately when I found out it, its something that needed to be known

SR: Okay

CM: I mean its ya know I, I know my sister didn't tell many people

SR: Um hum

CM: And I was one of them ya know I'm sure like knows a whole lot more than anybody

SR: Um hum

CM: But is not I, I raised my sister

SR: Um hum

CM: She, she's more like my daughter than anything

SR: Um hum

CM: And I'm not even I haven't even accepted the fact that she's deceased yet I'm still in shock but when the phone call came and I realized that I was awake that it wasn't a dream the first thing I did was call, called the 911 here because it didn't add up to me.

SR: Um hum

CM: And, and ya know I felt that the police should have known about this when I found out

SR: Sure

CM: But you make promises to people and it ya know It ya know I couldn't have done anything with it because it would its all heresay either way if I come to this police station and said that I knew this information what would have happened I mean especially when I have a history of a problem here

SR: That doesn't matter you said that to me earlier in the day

CM. I know I know but ya know I don't know that

SR. Right

CM: Ya know it just and, and I talked a lot of people about it I talked to my counselor about it I ya know it, it wouldn't have made any difference if I had come here and said all of that ya know I

SR: Well but the bottom line we don't know

CM: I know

SR: If it would have or not

CM: And we'll never know

SR: Right

CM: Even matters

SR: And we have a situation that were dealing with now

CM: Right

SR: Um we

CM: And that's important

SR: Deal with what we have now in front of us

CM: Right

SR: Um we don't second guess anything that happened in the past We can't

CM: There, there is one other thing

SR: Um hum

CM: Actually my sister while she was still living there and it was right before she left had a um big blister on her face and at the time she thought that it was I think that they thought it was medication or something and after everything came to light she realized that the big blister on her face had to of come from that homemade chloroform and I had a picture of it, I might have the picture in my other cell phone I'm not sure because I switched cell phones in between but she had sent me the picture of it

SR: Um hum

CM: And it, it was like uh um maybe two inches long

SR: Um hum, alright well if you can get that cell phone

CM: Its in my car, I can go look

SR: Okay yeah that would be great um

CM: I can go and look

SR: But

CM. But she did see a doctor about it I know that

SR: Okay

CM: I don't know her doctor's like her family doctor

SR: Um hum

CM: But I know she saw somebody about it

SR: Okay um do, do you swear that everything you've given in this statement is the truth, the whole truth and nothing but the truth

CM: And nothing but the truth absolutely

SR: And do you believe in God?

CM: Yes

SR: Okay and do you swear that this statement you provided is the truth, the whole truth and nothing but the truth so help you God?

CM: I swear so help me God

SR: Okay um this statement will be concluded at uh 7:52 a m on May 31st two thousand and ten

On this date, I personally reviewed the above transcription and compared it for accuracy with the tape recording from which the transcription was made. I certify that the above transcription is accurate to the best of my ability

Dated. 7/7/10

[John Dunfee]
Detective

WARREN COUNTY PROSECUTOR'S OFFICE

FILE NUMBER:

TRANSCRIBED STATEMENT OF: SHARON MANCINI

DATE OF STATEMENT: MAY 31, 2010

STATEMENT TAKEN AT:

QUESTIONS ASKED BY: DETECTIVE TEDDY GARCIA
(Names and Agency Affiliations)

WITNESSES PRESENT: DETECTIVE HERNANI GONCALVES
(Names and Agency Affiliations)

TIME STATEMENT STARTED. 3:05 P.M

TIME STATEMENT FINISHED. 3:27 P.M

TRANSCRIBED BY: LESLIE ANDERSON

DATE TRANSCRIBED: JUNE 14, 2010

TG: Today is Monday May 31, 2010. The time now is 3:05 p.m. My name is Detective Teddy Garcia with the Pohatcong Township Police Department. Uh we are taking a statement from Sharon Mancini. Uh we are located right now a[illegible] 18210. Uh also present is Detective Hernani Goncalves from the Warren County Prosecutor's Office Sharon could you state your name and spell your last name?

SM: Sharon Mancini M-A-N-C-I-N-I

TG: Uh your date of birth?

SM:

TG: And your age please?

SM: at the moment

TG: And your age?

SM:

TG: I'm sorry

SM: At the moment

TG: Um your phone number?

SM:

TG: Okay uh social security number?

SM:

TG: Okay um were here for the purpose of taking a statement from you um in regards to your daughter. Um I know we talked a little bit before um I just want to talk about uh your relat uh your daughter's relationship with uh Derrick Baer. Uh basically I just want you to tell me uh like a story how they first got involved and very briefly and we can refer what we want to talk about is most recently um the uh, the issues that are fresh in your memory.

SM: They met whe[illegible] was a baby they worked at the same store uh parts store that's how they connected.

HG: When you say they who are you referring to?

SM: Derrick and Lorianne

HG: Okay what's Lorianne's last name?

SM: Kosnac

HG: Okay

SM: She was married to someone else who was another criminal who's out of the picture they only thing he's been good is paying child support but they had uh relationship where it was a mutual thing that he would stay out of 's life because she didn't want him headed to but he was like armed robbery going no where whatever, she was doing a great job with him. Her and Derrick lived with me in Manville for a time then they went out on their own I don't know how many places they lived in but then they rented this house up here Pohatcong and he ended up buying it

TG: How long they lived there approximately in Pohatcong?

SM: Couple years I know that.

TG: Okay

SM: I'm not sure, seems like forever Ya know there was a lot of problems with the house, junk collector, told to clean it up and he just

TG: When did your relationship go south with, with Derrick?

SM: I always had a feeling about him. Ya know how you can tell whether you trust somebody or not? But it really went bad when she came here a couple months ago. She left him (inaudible) brought the kids and she told me that he could have killed her, what he did he made this concoction ya know ether maybe to knock her out so he could have sex with her.

TG And she told you this?

SM: Um hum

TG: You can you recall that conversation um can you tell me about that conversation, was it over the phone, was it when she came here?

SM: Both she started on the phone and then when she got here ya know and she cried and cried ya know how can he do this he could have killed me and she just her mind was firm she's leaving, she's out of the relationship, she don't trust him, that's it she's firm so she moved everything here

TG: About how long ago was this?

SM: Couple months

TG: Couple months

SM: I can't remember if it was March, beginning of April

TG Okay

SM: I know it snowed so.

HG: Now let me ask you something you said she said that he uh had some concoction of ether or something to that extent, how does she know what it was?

SM: She found the bottles.

HG: She found the bottles

SM: Under her bed

HG: Okay, and

SM: And a washcloth

HG: And a washcloth and did she say what he did with them?

SM She confronted him

HG: Okay

SM: And he admitted to her that's what he did

HG: Uh what he used uh ether or whatever chemical it was?

SM: Yeah

HG. On her? Did he say what he would do with it?

SM Put it on the washcloth, cover her face

HG. Okay and what would happen then did she say?

SM: Well she didn't know because she has asked me in the past mom did you ever wake up in the middle of the night and smell ammonia and I said maybe ya know she never put it all together ya know how you, you think you smell something, it wakes you up?

HG: Um hum And did, did she state what he would do? What uh when he put the ether or use the ether or whatever it was on her, whatever chemical?

SM: Honest to God I can't remember if she was awake. She recognized that this is what he was doing, he had the washcloth hidden

HG: Um hum

SM: And I guess she would come to and it just seemed so coincidental like last night that he would do it again while she's sleeping

HG: And what would he do after he used the cloth rag with the ether?

SM: If she went out have his way with her.

HG: What do you mean by that have his way with her?

SM: Sex

HG: Okay so he would have sexual intercourse with her while she was passed out?

SM: Um huh

HG: Does she know for a fact that he would have sexual intercourse?

SM: Um hum

HG: Did he admit that to her then?

SM: Yes

HG: Okay and while she was passed so he would and did she tell you what he would do? What kind of sexual intercourse he would have with her?

SM: She never told me that?

HG: Okay

TG: When she was here how long was she here, did she live with you?

SM: Three weeks

TG: Three weeks? Um in that three weeks was there contact between Derrick and Lorianne?

SM: Yeah but then it got even worse. She was in contact with Derrick's sister-in-law, they were very close Liz

TG: Okay

SM: Ya know and then oh Derrick would just cry and cry it will never happen again please come back ya know and she just for a long time stuck to her guns was not gonna go back but then she got to a point where she had a problem she had to have like emergency surgery well that happened sort of around the time that she left but when she left she didn't talk to me we didn't talk to her

HG: What kind of surgery did she have do you know?

SM: A cyst in her rectum

HG: Okay

SM: Couldn't tell ya that medical terminology I don't know

HG Okay that's fine What hospital did she got to?

SM: Up there

HG: Warren Hospital?

SM: (Inaudible)

HG: Okay

TG: And you said you didn't talk for a week?

SM: She, yeah we didn't talk no it was longer then that

TG: Oh okay

SM: A few weeks, that way it had to be more in March, were like almost in June now

TG: Yeah were May

HG: It's the last day of May

SM: Well I'm losing track myself with all my tests going back and forth but no we weren't talking then finally Cindy was the one that talked to Lorianne and said ya know life is to short ya know you've gotta you have to talk

TG: Um hum

SM: Ya know can't be mad at mom cause we talked everyday, we were each other's best friend

TG: And when uh when she, when she came here for three weeks you said you did you get into an argument which made her leave?

SM: She made it appear that way

TG: Um

SM: She was looking for a fight so then she started packing things up which I knew what was coming so instead of just hanging around and having a confrontation my husband and I went to bingo and we got back here and she was gone, everything was gone

TG: How many things did she bring here?

SM: A lot of bags

TG: A lot of bags?

SM: Yeah a lot of stuff

TG: And the kids uh were in school up here or

SM: She did put in school up here

TG: Okay

SM: But I'm thinking it didn't last very long ya know because he would not go

TG: Did she ever tell you uh how he was with the children and her while at home like you spoke a lot so

SM: Oh yeah

TG: Did she, was she in fear of her life when she was living with him or would she kind of brush it off?

SM: She wasn't in fear, like I said he could talk her, he would talk her into anything and I think she just loved him more then she wanted sex, what the bad points were ya know and I, I observed Derrick with both kids and he was terrible he was strict, he was mean ya know cause I got him in a corner one day, gotta go past me you don't treat my grandkids like that ya know and he would everything was for Derrick and I, I, me, me she, she always lived like poverty is the way I put it things on the side of the road ya know he would collect and yet he's got all his little toys when it came to the kids and Lorianne they were last that's like she told me one day I think even Friday she went to Salvation Army and she ended up buying summer clothes for the kids and she was afraid to tell Derrick, said Derrick's gonna kill me she said they needed it that she was afraid that she spent his money but yet he could use her for the other things like getting help with paying the electric, food stamps ya know anything that didn't come out of his pocket

HG: Um hum

SM: Ya know and they had it rough for a long time and she went to the food bank, I'd give her food cause I know she, she's not the type that would ask ya know but I really knew The last time I saw her was mother's day

TG: Mother's Day

HG: Was there any conversation that day, did she say anything to you?

SM: No

HG: Okay um how about uh him with the, with the children, any problems with him with him and the children besides his being strict?

SM: He would be mean and I imagine there's other stuff that you don't even know about ya know with the punishment, making them sit in a chair, look at a wall or taking things away or I know he was just mean

HG: Um hum. Anything criminal that he did?

SM: The only thing I would say is the one time Lorianne said to me is she suspected that he did something with Emily because Emily told her mommy I woke up and I saw daddy by my bed with a washcloth and immediately that's where her thoughts went

TG: When did she tell you this around?

SM: I couldn't tell you if it was when she was here ya know cause I told her I said why would you even think of going back ya know I said there's something wrong with him ya know and he swore he was gonna get help

TG: Okay

SM: He was gonna get help, he was gonna see somebody, see a psychiatrist for what?

TG: For what?

SM. His mental problem

TG: Mental problem?

SM: That's what he said he admitted he had a mental problem

TG: With concerning what?

SM: Whatever he did? What he did to her? He knew it was wrong

TG: Yeah

SM: You don't do something like that to somebody

TG: I'm asking you what, what he's referring to though?

SM: Oh okay

TG: Ya have to tell me what mental problem with what?

SM: With the trying to knock her out and raping her

TG: Okay so he had a sexual problem?

SM: Oh yeah

TG: Can you elaborate on the sexual problem like with past conversations um

SM: He, he I couldn't tell you how long ago her daughter the young girl, I don't know how old she was at the time I, I couldn't say

TG: When you say her daughter who are you referring to?

SM:

TG: 's daughter?

SM: Swore that Derrick took a picture of her when she was in the shower. At that time things were kind of rocky between everybody, me / and Lorianne Lorianne swears he wouldn't do it he swore he didn't do anything like that and from what I understand now they found the picture

HG: They found the picture?

SM: Whoever is searching the house.

HG: Okay

SM: Found the picture of

TG: Who, who told ya this?

SM:

TG: They found a picture of y?

SM: That he took while she was in the shower

TG: Okay, I don't think that's correct

SM: I don't know

TG: Yeah I'm not sure where that information came from

SM: I don't know but I mean he would take showers with the kids which I thought was inappropriate

TG: At what age? Are we talking when they were um his daughter is 5 and

SM: I don't know if he ever took a shower with , but I know he did with

TG: is how old is J right now?

SM: Nine

TG: Nine, so you're talking when J is eight or nine or you're talking when PJ was

SM: Younger

TG: Younger?

SM: I mean we never discussed it and it still went on

TG: Okay

SM: Sometimes he would be Mr. Tightwad and save water, shower with a friend, shower together but

TG: Okay, has he been known to be tight with his money?

SM: Yes

TG: Lorianne expressed that to you?

SM: Oh yeah ya know he always promised her a ring, never came through with it

TG: Approximately how long have they been together?

SM: Since I was little, he's now nine

TG: Nine? So about around nine years?

SM: Yes

TG: They've been dating steady?

SM: Yes

TG: A couple break-ups here and there or has it been

SM: Pretty much steady

TG: Pretty much steady for nine years?

SM: Yeah and then I think she was here maybe one other time and they would get into a fight and he would always throw it up in her face go ahead run to mommy, run to mommy

TG: Uh you said earlier when uh when we spoke he would not take no for an answer. What were you referring to?

SM: Derrick would not take no for an answer?

TG: Yes, what were you referring to when you said

SM: Having sex

TG: Having sex?

SM: Yes

TG: And you know this because

SM: Lorianne told me

TG: She, she would tell you?

SM: Yes

HG: Can you tell us what occurred this morning, who contacted you?

SM: Oh my God. My phone was ringing and you know how you're like in a sleep and cause I only had like two hours of sleep. Couldn't comprehend where the phone was and these are new phone so I finally got the phone, he called back three times and I'm trying to find the talk button and I couldn't find it and Tony finally answered the phone and then I got on the phone with him

HG: Who's Tony?

SM: My husband

HG: Okay

SM: And I thought it was Lorianne and I said Lorianne what's wrong. Its Derrick What's wrong? He just come out and said Lorianne is dead. I said what did you do to her he didn't say nothing

TG: How many times did you ask him? Did you repeat it what did you do to her? What did you do to her? What was the rest of that conversation?

SM: One or two times.

TG: Yeah

SM: And then it was like the kids are crying and I said Derrick I can't come down there cause my car don't work guess that's when he called his mother. He would never confide in his family, his mother um any of this going on like they still think he's Mr. Wonderful other than being a pack rat ya know just they were to the Baer's, Baer's and they just like did not really include Lorianne because she wasn't a Baer's.

HG: Um hum

SM: Ya know like Adrianne I guess his sister moved back with her mommy again so she can go out partying so somebody's there to watch the kids, her kids ya know and she'd just make snide remarks behind Lorianne's back, I'll tell you who knows the most is Liz, Henry's wife, I don't know if she'll come through and say what she knows but she knows everything, her and Loraine were tight

TG: Okay

SM: Lorianne sent her pictures

TG: Okay

SM: Of the bottles that she found

HG: Okay

TG: The bottles you're referring to

SM: His concoction whatever

TG: The concoction that he made?

SM: Yes

TG: And you know this because?

SM: Lorianne told me

TG: Lorianne told you okay?

SM: Yeah

TG: Alright, just want to make sure you're I know what you're talking about but we have to

SM: Right, right

TG: Portray this

SM: Right, because talking with Liz, Derrick and Henry are a lot alike. Henry is very sexual

TG: Okay

SM: Yeah they, their both like that and I don't know they swear a lot of it has to do with their upbringing, that their father was he was one of those hippies just got off the Volkswagon bus ya know did drugs or whatever. I guess he didn't like Derrick but it's a messed up family

TG: Um hum

SM: But I'll tell you right now my daughter never lied to me, never

TG: What would Derrick do for money to provide for the family? Do you know what he did?

SM: Scrapping

TG: He scrapped? Any other job that he held?

SM: Oh no its beyond him. Just like the one time I don't know how many cars they had there, how many motorcycles, how many lawnmowers, instead of junking the cars he wouldn't part with them He just wouldn't part with this stuff that was his

TG: Was he good at repairing uh lawn mowers and cars and computers or is that something that he just dabbled in did, did you and Lorianne talk about that?

SM: He dabbled in it but I think what I've seen is he makes himself better then what he is

TG: Okay

SM: (Inaudible) computers and repairing things a lot of things she's better then he is. As far as car repairs he was just he's your typical bullshit artist

TG: Um hum

SM: Ya know had to make himself look great and mr. wonderful ya know and I didn't like, I didn't like how he treated her and I told him that and I told her that. Said you deserve so much better, so much more. Now I'm alright.

TG: Throughout this nine year relationship when did it start getting uh

SM: It's always been ups and downs

TG: Okay

SM: Ups and downs as far as the fighting seriously fighting I'd say this year

TG: This year? Okay

HG: Finish up?

TG: Yeah um is there anything that I'm leaving out that I'm not asking you that you feel that needs to get that would help us with our investigation um gonna be wrapping up the interview right now so I want to give you the opportunity to

SM: I personally think Derrick would look you in the eye and lie to you

TG: Okay

SM: He's that kind of person.

TG: Okay

HG: Um what I'm gonna do ma'am I'm gonna swear you into your statement okay Um

SM: I'm fingerprinted with the FBI the whole bit

HG: No, no um the, we do this in the State of New Jersey um

SM: Yeah, I live in

HG: Yeah but um according to Title 41, which is the law 41 2-3 1, I as a county detective am authorized and empowered to administer oaths Such oaths may only be administered in relation to a violation or an attempted violation of the laws of the State of New Jersey Do you swear and affirm the contents of this statement are the truth to the best of your knowledge?

SM: Oh yes

HG: Has anyone forced you, threatened you

SM: No

HG: Or coerced you in any way in giving this statement ma'am?

SM: No

HG: Have uh Detective Garcia and I threatened you, coerced you

SM: Oh no

HG: Promised you anything in giving this statement?

SM: No

HG: Okay this will conclude our statement.

TG: The time now is 3:27 p.m.

On this date, I personally reviewed the above transcription and compared it for accuracy with the tape recording from which the transcription was made. I certify that the above transcription is accurate to the best of my ability.

Dated: 6/3/13

DET. Teddy Garcia

Detective Teddy Garcia

UNITED STATES DISTRICT COURT
District of New Jersey

UNITED STATES OF AMERICA

v.

CASE NUMBER 2:15-CR-00417-CCC-1

DERRICK BAER

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, DERRICK BAER, was represented by TIMOTHY MICHAEL DONOHUE, ESQ.

The defendant was found guilty on count(s) 1 & 2 by a jury verdict on 4/9/2019 after a plea of not guilty. Accordingly, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date of Offense	Count Number(s)
18:2252A(A)(2)(A) and 2252A(b)(1), and 2	RECEIPT OF CHILD PORNOGRAPHY	1/13/09 - 2/8/09	1
18:2252A(a)(5)(B) and 2252A(b)(2), and 2	POSSESSION OF CHILD PORNOGRAPHY	5/31/10	2

As pronounced on November 19, 2019, the defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must pay to the United States a special assessment of $200.00 for count(s) 1 & 2, which shall be due immediately. Said special assessment shall be made payable to the Clerk, U.S. District Court.

It is further ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material change in economic circumstances.

Signed this 20 day of November, 2019.

Claire C. Cecchi
U.S. District Judge

18014

Defendant: DERRICK BAER
Case Number: 2:15-CR-00417-CCC-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 168 months consisting of 168 months as to Count 1 and 120 months as to Count 2 to be served concurrently.

The Court makes the following recommendations to the Bureau of Prisons: Designate the facility FMC Devens for service of this sentence.

The defendant will remain in custody pending service of sentence.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ To _____

At _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a total term of life, consisting of life as to Count 1 and 3 years as to Count 2 all terms to run concurrently.

Within 72 hours of release from custody of the Bureau of Prisons, you must report in person to the Probation Office in the district to which you are released.

While on supervised release, you must not commit another federal, state, or local crime, must refrain from any unlawful use of a controlled substance and must comply with the mandatory and standard conditions that have been adopted by this court as set forth below.

You must submit to one drug test within 15 days of commencement of supervised release and at least two tests thereafter as determined by the probation officer.

You must cooperate in the collection of DNA as directed by the probation officer

If this judgment imposes a fine, special assessment, costs, or restitution obligation, it is a condition of supervised release that you pay any such fine, assessments, costs, and restitution that remains unpaid at the commencement of the term of supervised release.

You must comply with the following special conditions:

DRUG TESTING AND TREATMENT

You must refrain from the illegal possession and use of drugs, including prescription medication not prescribed in your name, and must submit to urinalysis or other forms of testing to ensure compliance. It is further ordered that you must submit to evaluation and treatment, on an outpatient or inpatient basis, as approved by the U.S. Probation Office. You must abide by the rules of any program and must remain in treatment until satisfactorily discharged by the Court. You must alert all medical professionals of any prior substance abuse history, including any prior history of prescription drug abuse. The U.S. Probation Office will supervise your compliance with this condition.

COMPUTER MONITORING

You must submit to an initial inspection by the U.S. Probation Office, and to any unannounced examinations during supervision, of your computer equipment. This includes, but is not limited to, personal computers, personal digital assistants, entertainment consoles, cellular telephones, and/or any electronic media device which is owned or accessed by you. You must allow the installation on your computer of any hardware or software systems which monitor computer use. You must pay the cost of the computer monitoring program. You must abide by the standard conditions of computer monitoring. Any dispute as to the applicability of this condition will be decided by the Court.

FINANCIAL DISCLOSURE

Upon request, you must provide the U.S. Probation Office with full disclosure of your financial records, including co-mingled income, expenses, assets and liabilities, to include yearly income tax returns. With the exception of the financial accounts reported and noted within the presentence report, you are prohibited from maintaining and/or opening any additional individual and/or joint checking, savings, or other financial accounts, for either personal or business purposes, without the knowledge and approval of the U.S. Probation Office. You must cooperate with the U.S. Probation Officer in the investigation of your financial dealings and must provide truthful monthly statements of your income. You must cooperate in the signing of any authorization to release information forms permitting the U.S. Probation Office access to your financial records.

RESTRICTED CONTACT WITH MINORS

With the exception of brief, unanticipated and incidental contacts, you must not associate with children under the age of 18, except for family members or children in the presence of an adult who has been approved by the U.S. Probation Officer. You must not obtain employment or perform volunteer work which includes, as part of its job/work description, contact with minor children, without the expressed approval of the U.S. Probation Office. You must not maintain, within your residence or within any outside establishment within your control or custody, a collection of digital images or videos, films, slides, pictures, tapes, videotapes or other form of pictorial representation whose subject matter involves minor children of either sex and can be deemed to be pornographic. The U.S. Probation Office will have the right of reasonable search of your person and residence, or any other establishment within your custody or control, and will, if necessary, request the assistance of other law enforcement personnel to enforce the provisions of this special condition.

NEW DEBT RESTRICTIONS

You are prohibited from incurring any new credit charges, opening additional lines of credit, or incurring any new monetary loan, obligation, or debt, by whatever name known, without the approval of the U.S. Probation Office. You must not encumber or liquidate interest in any assets unless it is in direct service of the fine and/or restitution obligation or otherwise has the expressed approval of the Court.

POLYGRAPH EXAMINATION

You must submit to an initial polygraph examination and subsequent maintenance testing, at intervals to be determined by the U.S. Probation Office, to assist in treatment, planning, and case monitoring. You will be required to contribute to the costs of services rendered in an amount to be determined by the U.S. Probation Office, based on ability to pay or availability of third-party payment.

MOTOR VEHICLE COMPLIANCE

You must not operate any motor vehicle without a valid driver's license issued by the State of New Jersey, or in the state in which you are supervised. You must comply with all motor vehicle laws and ordinances and must report all motor vehicle infractions (including any court appearances) within 72 hours to the U.S. Probation Office.

SEX OFFENSE-SPECIFIC ASSESSMENT AND TREATMENT

You must appear participate in a sex offense-specific assessment and treatment program and follow the rules and regulations of that program. You must remain in that program until satisfactorily discharged with the approval of the Court or the U.S. Probation Office. You shall pay the cost of assessment and/or treatment as directed by the Probation Office.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1) You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.

2) After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.

3) You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.

4) You must answer truthfully the questions asked by your probation officer.

5) You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

6) You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

7) You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have fulltime employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8) You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

9) If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

10) You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e.. anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

11) You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

12) If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.

STANDARD CONDITIONS OF SUPERVISION

13) You must follow the instructions of the probation officer related to the conditions of supervision.

For Official Use Only - - - U.S. Probation Office

Upon a finding of a violation of probation or supervised release, I understand that the Court may (1) revoke supervision or (2) extend the term of supervision and/or modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions, and have been provided a copy of them.

You shall carry out all rules, in addition to the above, as prescribed by the Chief U.S. Probation Officer, or any of his associate Probation Officers.

(Signed)_____
Defendant Date

_____
U.S. Probation Officer/Designated Witness Date

Defendant: DERRICK BAER
Case Number: 2:15-CR-00417-CCC-1

RESTITUTION AND FORFEITURE

RESTITUTION

The defendant shall make restitution in the amount of $8,000.00. The Court will waive the interest requirement in this case. Payments should be made payable to the **U.S. Treasury** and mailed to Clerk, U.S.D.C., 402 East State Street, Rm 2020, Trenton, New Jersey 08608, for distribution to:

Cusack, Gilfillan & O'Day, LLC.
Ref: "Cindy Series" – Derrick Baer Docket No. 2:15-CR-417 (CCC)
Attn: Thomas M. Watson
415 Hamilton Boulevard
Peoria, Illinois 61602

The restitution is due immediately. It is recommended that the defendant participate in the Bureau of Prisons Inmate Financial Responsibility Program (IFRP). If the defendant participates in the IFRP, the restitution shall be paid from those funds at a rate equivalent to $25 every 3 months. In the event the entire restitution is not paid prior to the commencement of supervision, the defendant shall satisfy the amount due in monthly installments of no less than $250.00, to commence 30 days after release from confinement.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

Defendant: DERRICK BAER
Case Number: 2:15-CR-00417-CCC-1

RESTITUTION AND FORFEITURE

FORFEITURE

The defendant is ordered to forfeit the following property to the United States:

Preliminary Order of Forfeiture as to Specific Property (Final as to the Defendant) filed Separately on November 22, 2019 (Document #189)

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

WARREN COUNTY PROSECUTOR'S OFFICE

FILE NUMBER: **IN10-041**

TRANSCRIBED STATEMENT OF: **Carly Jones**

DATE OF STATEMENT: **May 29, 2014**

STATEMENT TAKEN AT: **Pohatcong Township Police Headquarters**

QUESTIONS ASKED BY:
(Names and Agency Affiliations)

Lt. John Serafin
Warren County Prosecutor's Office

Sgt. Scott Robb
Pohatcong Police Department

WITNESSES PRESENT:

(Names and Agency Affiliations)

TIME STATEMENT STARTED: **11:20am**

TIME STATEMENT FINISHED: **12:14pm**

TRANSCRIBED BY: **Suzanne Smith**

DATE TRANSCRIBED: **July 7, 2014**

On this date, I personally reviewed the above transcription and compared it for accuracy with the tape recording from which the transcription was made. I certify that the above transcription is accurate to the best of my ability.

Dated: 7/8/2014

John Sirofi

Detective

C.J.: And then um, I was living with him for a couple of months and one of my friends had come to visit and she tried to kill herself. And, cause she's just got a lot of issues (giggle) and um, she still has issues but she's in Florida so, she's away..but gone...um, Sgt. Robb had showed up to my house that time when she had done that. And, I guess at that point, is when DYFS got involved and had said to me that he wasn't supposed to have any children living in the household and that if I didn't leave, that I would lose my children.

J.S.: Mm hm.

C.J.: So, at that point, I moved and I moved to Phillipsburg. And I had an apartment there. And at that point...

J.S.: And where was that?

C.J.: That was um, [redacted].

J.S.: Ok.

C.J.: And uh, Derrick was not allowed to stay there at any point. And he never did. Um, not so long as the children were there.

J.S.: Mm hm.

C.J.: I made sure that that was not, that was never gonna be an issue again because I was not going to lose my children over something so stupid...that I thought was stupid because I didn't know the whole situation.

J.S.: Ok, so what's he telling you about this situation?

C.J.: He told me that originally what had happened was that him and Lori Ann, it was Memorial Day weekend and they were working in the garden and Lori Ann wasn't feeling so well.

J.S.: Mm hm.

C.J.: And that she had taken something for her head and they were also drinking and they were also smoking pot and that she went to bed. And the kids had gone to bed, like this is...the kids had gone to bed and then she went to bed. And then um, what I was told was that he had chloroformed her. He told me that he went in and he chloroformed her and that he had sex with her and then he went into the living room to watch tv and do whatever. And then he heard this gurgling coming from the bedroom.

J.S.: Mm hm.

J.S.: Mm hm.

C.J.: You know, so, I, I feel terrible because I had him around my children. And, I shouldn't have. Not that anything has happened that I'm aware of, but, and my children haven't shown any signs of anything, but I'm just...I'm still so upset that I, that I let this go on for so long.

J.S.: Mm hm. This item here...where was this located?

C.J.: Um, it was on my coffee table. And then I hid it in my drawer.

J.S.: And...you know this belongs to Derrick?

C.J.: I do know it belongs to Derrick. There is paperwork on there from his lawyer. That his lawyer gave him that showed all the stuff that was taken from the house and the statements from P[redacted] and E[redacted] and so on and so forth.

J.S.: Mm hm. And you took this...what was the reason you stated earlier?

C.J.: The reason I took it was because I needed an out.

J.S.: OK. But you saw you...you, you observed pictures of yourself...

C.J.: I did see pictures of myself on there and I did take...

J.S.: Will you...did you voluntarily take em...take, those, did you know those pictures were being taken?

C.J.: Yes. I did know those pictures were being taken but I also didn't want them on there either because I didn't know what he was capable of doing to use them for anything.

J.S.: How...how old were the pictures of yourself on this?

C.J.: At least two years.

J.S.: Two years. And since that time, you're, you're uncomfortable with it...

C.J.: I'm very uncomfortable with it.

J.S.: Him having the pictures?

C.J.: Yes, I was very uncomfortable with him having the pictures. And there was other things that were on there that were like you know, just, like outings that we had had with the kids.

C.J.: Ok.

S.R.: And you know, we can, hopefully some of the information you can give us can assist us with our investigation to um, help you know the victims that we have. And, and help you with not being a victim...

C.J.: There's one other thing...um, he told me that there were some things that he had looked at that LoriAnn had looked with him as well on the computer. Um, there was once a snuff video or something like that...that had been seen. I don't know if that was found or not. Um, and that that was you know, that they had looked at weird things like you know animals, and things like that. But, I never, I didn't know it was to the extent it was with the children. Honestly. So, but those are the things I remember he had talked about.

J.S.: Are you cur...you're currently broken up right?

C.J.: Yes.

J.S.: You don't see him anymore?

C.J.: We're done. I haven't seen him since uh Tuesday morning when he left for work.

J.S.: And you told him don't come back or?

C.J.: I told him not to come back. Um, I told him I would not, that if he wanted to get some of his stuff, that I would not be there on Saturday so that if he wanted to come get some of his stuff he was welcome to do so. Um, his cousin and his cousin's fiancé know that I do not want him there while I am there. Um, and I have to talk to the security guard that knows both of us to let him know don't let him in. Especially if I don't call him in, don't let him in.

J.S.: Ok.

C.J.: "Cause I know that this is, this is not gonna be good. (giggle) And I'm to the point where I'm ready to get a restraining order. After everything that's been going on.

S.R.: Well, if that's the way you feel then I, I recommend then that you go to who...whoever covers Tobyhanna...maybe the Pennsylvania State Police or if they have their local and go to them and file what you need to file.

C.J.: Pocono Mountain.

S.R.: Pocono Mountain Regional I think right?