United States of America, Appellee v. Gregory Scott Stephen, Appellant
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
2021 U.S. App. LEXIS 3379
No: 19-1966
February 5, 2021, Decided

Editorial Information: Prior History

{2021 U.S. App. LEXIS 1}Appeal from U.S. District Court for the Northern District of Iowa - Cedar Rapids. (1:18-cr-00031-CJW-1).**United States v. Stephen**, 984 F.3d 625, 2021 U.S. App. LEXIS 3, 2021 WL 18456 (8th Cir. Iowa, Jan. 4, 2021)

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For Gregory Scott Stephen, Defendant - Appellant: Mark Robert Brown, Cedar Rapids, IA; Randy S. Kravis, Bruce Zucker, KRAVIS & GRAHAM, Santa Monica, CA.

Gregory Scott Stephen, Defendant - Appellant, Pro se, Tucson, AZ.

Opinion

ORDER

The petition for rehearing by the panel is denied.

Appendix A

17-8202

United States of America, Plaintiff - Appellee v. Gregory Scott Stephen, Defendant - Appellant
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
984 F.3d 625; 2021 U.S. App. LEXIS 3
No. 19-1966
September 25, 2020, Submitted
January 4, 2021, Filed

Editorial Information: Subsequent History

Rehearing denied by **United States v. Stephen**, 2021 U.S. App. LEXIS 3379 (8th Cir. Iowa, Feb. 5, 2021)

Editorial Information: Prior History

{2021 U.S. App. LEXIS 1}Appeal from United States District Court for the Northern District of Iowa - Cedar Rapids.United States v. Stephen, 2018 U.S. Dist. LEXIS 171764, 2018 WL 4839065 (N.D. Iowa, Oct. 4, 2018)

Counsel For United States of America, Plaintiff - Appellee: Clifford R. Cronk, Assistant U.S. Attorney, U.S. ATTORNEY'S OFFICE, Davenport, IA; Amy L. Jennings, Assistant U.S. Attorney, Marc Krickbaum, U.S. Attorney, U.S. ATTORNEY'S OFFICE, Des Moines, IA.

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Gregory Scott Stephen, Defendant - Appellant, Pro se, Tucson, AZ.

Judges: Before COLLOTON, GRUENDER, and GRASZ, Circuit Judges.

CASE SUMMARY Defendant's conviction and 2,160-month sentence for violating 18 U.S.C.S. §§ 2251(a) and 2252(a)(1) and (a)(4)(B), were affirmed since the district court properly denied his motion to suppress as his Fourth Amendment rights were not violated, and his sentence was not substantively unreasonable.

OVERVIEW: HOLDINGS: [1]-Defendant's conviction was affirmed since his Fourth Amendment rights were not violated when his former brother-in-law took and searched the USB drive (USB)as he was not acting as a government agent, the police chief did not violate the Fourth Amendment by asking the former brother-in-law to bring the USB to the police station without first obtaining a search warrant as the chief had not seized the USB, he had probable cause to believe the USB contained child pornography and exigent circumstances justified immediate seizure pending obtaining a search warrant, and the Iowa Division of Criminal Investigation did not exceeding the scope of the search warrant when it viewed the USB's contents; [2]-His sentence was affirmed as it was not substantively unreasonable as the district court did not abuse its discretion in weighing the 18 U.S.C.S. § 3553(a) factors.

OUTCOME: Conviction and sentence affirmed.

Appendix B

LexisNexis Headnotes

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Motions to Suppress
Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence
Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review > Motions to Suppress
Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review > Findings of Fact

In evaluating a district court's decision denying a motion to suppress, an appellate court reviews factual findings for clear error and legal conclusions de novo. Reversal is warranted only if the district court's decision is unsupported by substantial evidence, based on an erroneous interpretation of applicable law, or, based on the entire record, it is clear a mistake was made.

Criminal Law & Procedure > Search & Seizure > Requirement of Government Action
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Private Searches
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection

The Fourth Amendment protects persons against unreasonable searches and seizures by the government. Thus, the Fourth Amendment does not apply to private-citizen searches unless that private citizen is acting as a government agent. Whether a private party should be deemed an agent or instrument of the government for Fourth Amendment purposes necessarily turns on the degree of the government's participation in the private party's activities, a question that can only be resolved in light of all the circumstances. In resolving that question, courts have typically considered: (1) whether the government knew of and acquiesced in the citizen's conduct, (2) whether the citizen intended to assist law enforcement, and (3) whether the citizen acted at the government's request.

Criminal Law & Procedure > Search & Seizure > Requirement of Government Action
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Private Searches
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection

In the context of a Fourth Amendment violation, the core question is whether the private citizen was acting as a government agent, and agency typically requires the principal's assent. The relation of agent and principal cannot exist, without the consent of the principal. Furthermore, while the United States Court of Appeals for the Eighth Circuit has identified multiple relevant factors, the ultimate issue still necessarily turns on the degree of the government's participation in the private party's activities.

Criminal Law & Procedure > Search & Seizure > Requirement of Government Action
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Private Searches
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection

Without more, a bare intent to help law enforcement is insufficient to transform a private citizen into a government agent under the Fourth Amendment.

Healthcare Law > Good Samaritan Laws
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of

Protection

In the context of a Fourth Amendment violation, whether someone acts to protect someone they know or if he acts to protect the community from harm, does not matter. Not every Good Samaritan is a government agent.

Criminal Law & Procedure > Search & Seizure > Requirement of Government Action
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Private Searches

In the context of a Fourth Amendment violation, that a private citizen is motivated in part by a desire to aid law enforcement does not in and of itself transform her into a government agent. Rather, a citizen must be motivated solely or even primarily by the intent to aid the officers.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
Criminal Law & Procedure > Search & Seizure > Seizures of Things
Civil Rights Law > Section 1983 Actions > Law Enforcement Officials > Search & Seizure
Criminal Law & Procedure > Search & Seizure > Seizures of Persons

For purposes of the Fourth Amendment, a seizure occurs when there is some meaningful interference with an individual's possessory interests.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Exigent Circumstances > Opportunity to Obtain Warrant
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Warrants
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Probable Cause
Criminal Law & Procedure > Search & Seizure > Seizures of Things

Where law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Fourth Amendment permits seizure of the property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Probable Cause
Criminal Law & Procedure > Search & Seizure > Search Warrants > Probable Cause > Totality of Circumstances Test

Probable cause exists when, given the totality of the circumstances, a reasonable person could believe there is a fair probability that contraband or evidence of a crime would be found in a particular place.

Criminal Law & Procedure > Search & Seizure > Search Warrants > Scope

When considering whether a search exceeded the scope of a warrant, a court looks to the fair meaning of the warrant's terms.

Criminal Law & Procedure > Sentencing > Appeals > Proportionality Review

An appellate court reviews a sentence's substantive reasonableness under a deferential

abuse-of-discretion standard. When the district court imposes a within-U.S. Sentencing Guidelines sentence, the United States Court of Appeals for the Eighth Circuit applies a presumption of reasonableness.

Criminal Law & Procedure > Sentencing > Imposition > Factors

A district court has wide latitude to weigh the 18 U.S.C.S. § 3553(a) factors in each case and assign some factors greater weight than others.

Opinion

Opinion by: GRUENDER

Opinion

{984 F.3d 627} GRUENDER, Circuit Judge.

While remodeling one of Appellant Gregory Stephen's homes, Vaughn Ellison discovered a hidden camera containing child pornography. Subsequent searches of Stephen's homes by law enforcement uncovered further child pornography and images of Stephen abusing children. A federal grand jury indicted Stephen for sexually exploiting children as well as possessing and transporting child pornography. Stephen moved to suppress evidence related to these charges, arguing Fourth Amendment violations, which the district court1 denied. Stephen conditionally pleaded guilty, and the district**{2021 U.S. App. LEXIS 2}** court sentenced him to 2,160 months' imprisonment. Stephen appeals, challenging both the suppression **{984 F.3d 628}** denial and his sentence. For the following reasons, we affirm.

I.

On February 15, 2018, Ellison was remodeling his friend and former brother-in-law Stephen's house. While using the bathroom, Ellison noticed a USB drive (the "USB") on the toilet tank. Because Ellison had recently researched hidden recording devices following a break-in, Ellison recognized the USB as a hidden camera. Curious and concerned as to why there was a hidden camera in the bathroom-and what it had recorded-Ellison took the USB home but did not view its contents.

The next morning, Ellison returned to Stephen's home and discovered a young boy sleeping in the bedroom next to the bathroom where Ellison had found the USB. Ellison worried the boy would have used that bathroom. Stephen (a youth basketball coach) arrived shortly after with another boy, indicating he was taking them both to a basketball game. After returning home, Ellison viewed the USB's contents, finding at least fifty videos depicting children secretly recorded in various stages of undress. The following evening, Ellison discussed what he had seen and**{2021 U.S. App. LEXIS 3}** what he should do with his girlfriend, ultimately deciding to contact law enforcement.

On February 18, three days after Ellison took the USB and two days after viewing its contents, Ellison contacted Monticello Police Chief Britt Smith, and the two discussed what Ellison had found. Chief Smith asked Ellison to give him the USB, and the next day Ellison dropped off the USB at the Monticello Police Department. Chief Smith then sought the Iowa Division of Criminal Investigation's (the "DCI") assistance.

Two days later, the DCI took possession of the USB, obtained a search warrant for the device, and

viewed its contents. After obtaining a search warrant, law enforcement searched Stephen's homes. Therein, they found more secret recording devices and a hard drive containing approximately 400 visual depictions of nude minor boys, including some images of Stephen molesting unconscious victims.

A federal grand jury subsequently indicted Stephen on five counts of sexually exploiting a child, 18 U.S.C. § 2251(a), one count of possessing child pornography, 18 U.S.C. § 2252(a)(4)(B), and one count of transporting child pornography, 18 U.S.C. § 2252(a)(1). Stephen moved to suppress evidence of those offenses. The district court denied Stephen's motion, finding no**{2021 U.S. App. LEXIS 4}** Fourth Amendment violations. Afterward, Stephen conditionally pleaded guilty to all counts, preserving his right to appeal the suppression denial. The district court sentenced Stephen to 2,160 months' imprisonment. Stephen appeals both the suppression denial and his sentence.

II.

In evaluating a district court's decision denying a motion to suppress, we review factual findings for clear error and legal conclusions *de novo*. *United States v. Harper*, 466 F.3d 634, 643 (8th Cir. 2006). Reversal is warranted "only if the district court's decision is unsupported by substantial evidence, based on an erroneous interpretation of applicable law, or, based on the entire record, it is clear a mistake was made." *Id.* (internal quotation marks omitted). Here, Stephen argues that his Fourth Amendment rights were violated: (i) when Ellison took and searched the USB, (ii) when Chief Smith took the USB before obtaining a search warrant, and (iii) when the DCI searched the USB. Stephen further argues that, because of these violations, evidence found on the USB and in his homes, as well as statements Stephen **{984 F.3d 629}** made to law enforcement, must be suppressed as fruit of the poisonous tree.

A.

Stephen first claims his Fourth Amendment rights were violated when Ellison took and searched the USB. "The Fourth Amendment protects persons**{2021 U.S. App. LEXIS 5}** against unreasonable searches and seizures *by the government*." *Arnzen v. Palmer*, 713 F.3d 369, 372 (8th Cir. 2013) (emphasis added). Thus, the Fourth Amendment does not apply to private-citizen searches "unless that private citizen is acting as a government agent." *United States v. Smith*, 383 F.3d 700, 705 (8th Cir. 2004). "Whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private party's activities, a question that can only be resolved in light of all the circumstances." *See Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 614, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989) (internal citations and quotation marks omitted). In resolving this question, we have typically considered: (i) whether the government knew of and acquiesced in the citizen's conduct, (ii) whether the citizen intended to assist law enforcement, and (iii) whether the citizen acted at the government's request. *Smith*, 383 F.3d at 705. Here, Stephen concedes two of the three factors, admitting that law enforcement neither knew Ellison took or searched the USB nor asked him to do so. Stephen argues only that Ellison was acting as a government agent because he intended to assist law enforcement.

But, even if Ellison had an intent to assist law enforcement, it would not be enough to establish he was a government agent. Tellingly, Stephen cites**{2021 U.S. App. LEXIS 6}** no case where we have found government agency based solely on a private citizen's intent to assist law enforcement. And this makes sense. The core question is whether the private citizen was acting as a government agent, *see id.*, and agency typically requires the principal's assent, *see Astor v. Wells*, 17 U.S. (4 Wheat.) 466, 481, 4 L. Ed. 616 (1819) ("The relation of agent and principal cannot exist, without the consent of the principal."). Furthermore, while we have identified multiple relevant factors, the ultimate issue still "necessarily turns on the degree of the Government's participation in the private

district court reasoned that Chief Smith had not meaningfully interfered with Stephen's possessory interest in the USB because Ellison had already taken it. *Cf. United States v. Jacobsen*, 466 U.S. 109, 119, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984).

Stephen challenges this holding, insisting that *Jacobsen* is inapplicable to possessory interests. But we need not reach this argument as the district court independently upheld the seizure because Chief Smith had probable cause to believe the USB contained child pornography and exigent circumstances justified immediate seizure pending obtaining a search warrant. Because Stephen does not contest this holding on appeal, he waives any challenge to**{2021 U.S. App. LEXIS 10}** this alternative holding. This **{984 F.3d 631}** alone defeats Stephen's argument. *See United States v. Benson*, 888 F.3d 1017, 1020 (8th Cir. 2018). But, even on the merits, the district court correctly found that Chief Smith did not violate the Fourth Amendment by seizing the USB before obtaining a warrant.

"Where law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant," the Fourth Amendment "permit[s] seizure of the property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present." *United States v. Place*, 462 U.S. 696, 701, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983); *see also Clutter*, 674 F.3d at 985.

First, Ellison's discussion with Chief Smith about the USB established probable cause that the USB contained contraband. "Probable cause exists when, given the totality of the circumstances, a reasonable person could believe there is a fair probability that contraband or evidence of a crime would be found in a particular place." *United States v. Fladten*, 230 F.3d 1083, 1085 (8th Cir. 2000). When Ellison contacted Chief Smith, he identified himself to police, and Ellison delivered the USB to police in person. *See United States v. Nolen*, 536 F.3d 834, 839-40 (8th Cir. 2008) (explaining that tips from identifiable informants deserve greater weight because they "can be held responsible if [their] allegations turn**{2021 U.S. App. LEXIS 11}** out to be fabricated"). More importantly, he indicated he had seen child pornography on the USB firsthand. *See United States v. Stevens*, 530 F.3d 714, 718-19 (8th Cir. 2008) (finding probable cause in part because the tipster had offered "a first-person, eyewitness account of . . . contraband").

Second, "the exigencies of the circumstances demand[ed]" seizing the USB pending issuance of a warrant. *See Place*, 462 U.S. at 701. We considered a similar case in *Clutter*. There, police had probable cause to believe Clutter's computers contained child pornography. 674 F.3d at 985. At that time, Clutter was already in jail, and Clutter's father had the computers. *Id.* at 982-83. Clutter's father, a former police officer, urged police to take the computers, which they did before obtaining a warrant. *Id.* We upheld the seizure, suggesting it was necessary "to prevent the disappearance of evidence" and "to ensure that the hard drive was not tampered with before a warrant was obtained." *Id.* at 985. Like *Clutter*, the contraband here was in the possession of a cooperative third party, and, without immediate seizure, the police risked losing digital evidence. *See also United States v. Goodale*, 738 F.3d 917, 922 (8th Cir. 2013) (upholding warrantless seizure of laptop pending obtaining a warrant for similar reasons). If anything, the situation here was even more urgent because Stephen,**{2021 U.S. App. LEXIS 12}** unlike Clutter, was free and actively searching for the USB. Accordingly, the district court correctly concluded that Chief Smith did not violate the Fourth Amendment.

C.

Stephen next claims that the DCI violated his Fourth Amendment rights by exceeding the scope of the search warrant when it viewed the USB's contents. "When considering whether a search exceeded the scope of a warrant, we look to the fair meaning of the warrant's terms." *United States*

v. Sturgis, 652 F.3d 842, 844 (8th Cir. 2011) (per curiam) (internal quotation marks and alterations omitted). Here, the search warrant authorized law enforcement to conduct "[a] complete **{984 F.3d 632}** forensic examination of [the USB]." The ordinary reading of this phrase clearly authorized law enforcement to view the USB's contents. *See Merriam Webster's Collegiate Dictionary* 434 (11th ed. 2005) (defining "examine" as "to inspect closely").

Stephen counters that the warrant "expressly defined [a complete forensic examination] as 'extracting and cloning data'" while also "referenc[ing] copying." But, although the warrant states that "[t]he examination may include extracting and cloning data," the word "include" indicates this is not an exhaustive definition. *See United States v. Reingold*, 731 F.3d 204, 228-29 (2d Cir. 2013) (holding, in interpreting the sentencing guidelines, that the word "includes"**{2021 U.S. App. LEXIS 13}** indicates an illustrative, not exhaustive, list); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 132 (2012) ("[T]he word *include* does not ordinarily introduce an exhaustive list."). Accordingly, the district court properly found that law enforcement did not exceed the search warrant in viewing the USB's contents.

In sum, the district court correctly found that Stephen's Fourth Amendment rights were not violated. Accordingly, because there was no illegal search or seizure, Stephen's related fruit-of-the-poisonous-tree argument also fails. *See United States v. Villa-Gonzalez*, 623 F.3d 526, 534 (8th Cir. 2010). The district court correctly denied Stephen's motion to suppress.

III.

Stephen also appeals his sentence. The district court found that Stephen had an offense level of 43 and a criminal history category of I, yielding an advisory guidelines sentence of life imprisonment. The district court ultimately sentenced Stephen to 2,160 months' imprisonment.

Initially, it seemed Stephen might be arguing that his sentence was procedurally erroneous. But in his reply brief he conceded "that the District Court properly calculated the Guidelines range, treated that range as advisory, considered the § 3553(a) factors as applied to Mr. Stephen, and did**{2021 U.S. App. LEXIS 14}** not base its sentence on any clearly erroneous facts." Further, Stephen does not claim that the district court failed to explain adequately his sentence. Thus, Stephen is not claiming procedural error, *see United States v. Bordeaux*, 674 F.3d 1006, 1009 (8th Cir. 2012), and we consider only whether Stephen's 180-year sentence was substantively reasonable.

We review a sentence's substantive reasonableness under a "deferential abuse-of-discretion standard." *United States v. Cole*, 657 F.3d 685, 688 (8th Cir. 2011). When, as here, the district court imposes a within-guidelines sentence, we apply a presumption of reasonableness. *See United States v. Betcher*, 534 F.3d 820, 827-28 (8th Cir. 2008) (applying presumption of reasonableness to a 750-year sentence when the guidelines recommended life imprisonment).

At the outset, Stephen suggests that the district court failed to account for the fact that Stephen's guilty plea "spare[d] the government, the court, and the victims . . . the time, expense, and difficulty that a trial would have caused." This is mistaken. At sentencing, the district court expressly considered Stephen's guilty plea and described it as the strongest mitigating factor. But the district court also found this factor outweighed by others, including the fact that Stephen's acceptance of responsibility was half-hearted. The district court explained that,**{2021 U.S. App. LEXIS 15}** at sentencing, Stephen "focus[ed] . . . on his own achievements" and described his greatest regret as "the tarnishment [sic] of [his] reputation and his achievements" rather **{984 F.3d 633}** than focusing on the harm he inflicted on his victims. The district court "has wide latitude to weigh the § 3553(a) factors in each case and assign some factors greater weight than others." *United States v. Bridges*, 569 F.3d 374, 379 (8th Cir. 2009). And Stephen's "disagreement with how the district court weighed

the factors does not demonstrate abuse of discretion." *See United States v. McSmith*, 968 F.3d 731, 737 (8th Cir. 2020); *see also United States v. Sanchez-Rojas*, 889 F.3d 950, 952 (8th Cir. 2018) (rejecting argument that the district court abused its discretion by failing to give adequate weight to the defendant's guilty plea).

Stephen also argues life imprisonment "is simply excessive" as he "did not kill anyone, and no victim was physically injured." Stephen grossly downplays the seriousness and magnitude of his offense. The district court found that Stephen had committed "a horrendous offense" by sexually exploiting more than 400 children over nearly two decades. And the district court emphasized that the harm to the children was "incalculable and profound" and radiated to their families. Further, the district court acknowledged that Stephen's use of his position as a youth basketball coach**{2021 U.S. App. LEXIS 16}** to carry out his offense made it even more sinister. Considering the seriousness of Stephen's offense, the presumption of reasonableness, and the district court's wide latitude to weigh the § 3553(a) factors, we find the district court did not abuse its discretion in imposing Stephen's sentence.

IV.

For the foregoing reasons, we affirm.

Footnotes

1

The Honorable C.J. Williams, United States District Judge for the Northern District of Iowa.

UNITED STATES OF AMERICA, Plaintiff, vs. GREGORY SCOTT STEPHEN, Defendant.
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, CEDAR RAPIDS DIVISION
2018 U.S. Dist. LEXIS 171764
No. 18-CR-31-CJW
October 4, 2018, Decided
October 4, 2018, Filed

Editorial Information: Prior History

United States v. Stephen, 2018 U.S. Dist. LEXIS 64060 (N.D. Iowa, Apr. 16, 2018)

Counsel **{2018 U.S. Dist. LEXIS 1}**For US Probation, Interested Party: uspNotify, LEAD ATTORNEY.

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For USA, Plaintiff: Anthony Morfitt, LEAD ATTORNEY, US Attorney's Office, Cedar Rapids, IA.

Judges: C.J. Williams, United States District Judge.

CASE SUMMARY Defendant's motion to suppress was denied because government's conduct in holding a USB device for two days before obtaining a warrant did not violate his U.S. Const. amend. IV rights; government had probable cause to believe device contained child pornography, and had reason to believe that if they returned device to him that he would destroy it.

OVERVIEW: HOLDINGS: [1]-Defendant's friend did not seize and search the USB device as an agent of the government and, therefore, the government did not violate defendant's U.S. Const. amend. IV rights when the friend took and viewed the USB device; [2]-The government's conduct in obtaining the USB device from the friend and holding it for two days before obtaining a warrant did not violate defendant's U.S. Const. amend. IV rights; the government had probable cause to believe the USB device contained contraband, knew defendant was looking for it, and would have had reason to believe that if they returned the USB device to him that he would destroy it; [3]-Defendant did not make a substantial threshold showing entitling him to a Franks hearing; he came forward with no evidence to demonstrate that a special agent intentionally or recklessly made materially false or misleading statements of fact.

OUTCOME: Defendant's motions denied. Government's motion to strike denied as moot.

LexisNexis Headnotes

Criminal Law & Procedure > Bail

When determining whether a defendant may be released pending trial, a court shall take into account the available information concerning the weight of the evidence against the person. 18 U.S.C.S. § 3142(g)(2).

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection

Appendix C

Circumstances
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Probable Cause
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Exigent Circumstances

Where law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Fourth Amendment to the United States Constitution, U.S. Const. amend. IV, permits seizure of the property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present.

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

The exclusionary rule is intended to punish the police and deter them from violating the constitution. The rule is a judicially created remedy designed to safeguard rights under the Fourth Amendment to the United States Constitution, U.S. Const. amend. IV, generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved. The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force. Where the government diligently pursued its investigation, and its conduct was not unreasonable under the totality of the circumstances, suppression is inappropriate.

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Child Pornography > Elements

Iowa Code § 728.12 makes it a crime to possess a visual depiction of a minor engaging in a prohibited sexual act. Iowa Code § 728.1(7)(g) includes within the definition of a "prohibited sex act" nudity of a minor for the purpose of arousing or satisfying the sexual desires of a person who may view a visual depiction of the nude minor. Moreover, Iowa Code § 709.21 makes it a crime to photograph or film another person, for the purpose of arousing or gratifying the sexual desire of any person, if it is done without the other person's consent, the person is fully or partially nude, and the person had a reasonable expectation of privacy while in that state.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Probable Cause

Sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment to the United States Constitution, U.S. Const. amend. IV. Probable cause does not require evidence to prove a crime beyond a reasonable doubt, or even by a preponderance of the evidence.

Criminal Law & Procedure > Search & Seizure > Search Warrants > Probable Cause
Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Exceptions > Good Faith

Suppression of the evidence is not appropriate when agents relied in good faith on the judgment of judicial officers in finding probable cause.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > Search Warrants > Particularity

The Fourth Amendment to the United States Constitution, U.S. Const. amend. IV, prohibits general search warrants and requires a description, with particularity, of places to be searched and the items to be seized. The purpose of the particularity requirement is to prevent a general exploratory rummaging through a person's belongings. An affidavit may provide the necessary particularity for a warrant if it is incorporated into the warrant, attached to the warrant, or present at the search. The standard used to gauge the particularity requirement of a search warrant is one of practical accuracy rather than a hyper-technical one. In short, for a warrant to be valid, there must be evidence of a nexus between the contraband and the place to be searched.

Criminal Law & Procedure > Search & Seizure > Search Warrants > Affirmations & Oaths > Sufficiency Challenges

In order to be entitled to a hearing under Franks, a defendant must make a substantial preliminary showing of a false or reckless statement or omission and must also show that the alleged false statement or omission was necessary to the probable cause determination. Allegations of negligence or innocent mistake are insufficient. Such a showing is not easily made. It is not enough for a defendant to simply allege misconduct.

Criminal Law & Procedure > Search & Seizure > Search Warrants > Affirmations & Oaths > Sufficiency Challenges

A representation is "material," in the Franks context, only if the correct information may have made a probable cause finding unsupportable.

Opinion

Opinion by: C.J. Williams

Opinion

ORDER

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I. INTRODUCTION

This case is before the Court pursuant to defendant's Motion to Dismiss (Doc.**{2018 U.S. Dist. LEXIS 2}** 11),1 Motion to Suppress (Doc. 12), and Motion for a *Franks* Hearing. (Doc. 41). Defendant filed additional "supplements" to these motions. (Docs. 13, 40, & 44). Also before the Court is the government's Motion to Strike one of those supplements at Doc. 44. (Doc. 48). On September 27, 2018, the Court held a hearing on these motions. Vaughn Ellison, Monticello Police Chief Britt Smith, and Iowa Division of Criminal Investigation ("DCI") Special Agent Ryan Kedley testified at the hearing. (Doc. 50-1). The Court also accepted into evidence government's Exhibits 12 through 4 and defense exhibits M, R, T, W1, W2, W3, and X. (*Id.*) The Court also heard argument from the parties on the motions. (Doc. 50).

For the following reasons, the Court **denies** all of the motions.

II. FACTUAL BACKGROUND

A. Defendant and Vaughn Ellison

Defendant is a resident of Monticello, Iowa, and also has a home in Delhi, Iowa. Defendant is the cofounder of the Iowa Barnstormers Youth Basketball Organization. Defendant traveled with young boys throughout the United States in connection with this organization.

Vaughn Ellison is a resident of Monticello, Iowa, and owns a construction company. Mr. Ellison is defendant's former**{2018 U.S. Dist. LEXIS 3}** brother-in-law. They remained friends after Mr. Ellison ended his marriage to defendant's sister. Many years before, Mr. Ellison saw computer-printed images of naked boys in defendant's possession, along with some computer discs with references to nudity and "XXX." Mr. Ellison was aware that defendant often had young boys staying at defendant's residence in connection with basketball trips. Defendant had previously coached Mr. Ellison's sons in basketball when Mr. Ellison's sons were minors.

B. Discovery and Seizure of the USB Device

From about December 2017, to mid-February, 2018, Vaughn Ellison, one of his adult sons, and other subcontractors performed home remodeling on defendant's house in Monticello, Iowa. Mr. Ellison was performing this work on defendant's house as part of Mr. Ellison's business and for compensation. Defendant provided Mr. Ellison with a code to enter the front door of defendant's residence. Defendant gave Mr. Ellison and his workers the freedom to come and go from the residence, and to move about within the residence, as needed to complete their work. This included use of the bathrooms.

On the morning of Thursday, February 15, 2018, Mr. Ellison used the bathroom**{2018 U.S. Dist. LEXIS 4}** in defendant's home and observed a USB device on the tank of the toilet. Mr. Ellison recognized the USB device as one disguised to look like a phone charger but capable of secretly recording video images. Mr. Ellison was curious about why that USB device was in the bathroom and what images may have been recorded on the USB device. Mr. Ellison took the USB device and put it in his pocket, where it remained for the day.

Mr. Ellison returned the following day, Friday, February 16, 2018, with his adult son to work on defendant's house. Shortly after they arrived, at about 8:00 a.m., Mr. Ellison's son opened a door to a bedroom to work on the flooring. There, he discovered a young boy sleeping in the bed. The bedroom was adjacent to the bathroom where Mr. Ellison had discovered the USB device. Later that morning, defendant returned to his house with another young boy and picked up the boy who had been sleeping, explaining to Mr. Ellison that defendant was taking the boys to a basketball event. Defendant introduced the boys to Mr. Ellison by name.

That evening, Mr. Ellison connected the USB device to his home computer and viewed the images. The USB device contained "at least" 50 videos, each**{2018 U.S. Dist. LEXIS 5}** about two to three minutes in length, and three folders identified with male first names. Mr. Ellison recognized one of those names as belonging to one of the boys he met that morning. Inside each of those folders were duplicates of the videos that were unorganized on the USB device. Mr. Ellison looked at each of the video clips, at least for some period of time. The videos showed what appeared to be a hotel bathroom. The USB device was positioned to have a view of the toilet and an area immediately in front of a shower. Although many of the video clips showed an empty bathroom, many others showed young boys using the toilet or undressing, entering the shower area, then emerging wet. The videos showed the boys' genitals. Some of the videos also showed defendant using the toilet.

C. Mr. Ellison's Delivery of the USB Device to the Police

The following night, Saturday, February 17, 2018, Mr. Ellison discussed with his girlfriend what he observed on the USB device. After further discussions the following morning with his girlfriend, Mr. Ellison decided that he needed to contact the police. At approximately 1:44 p.m. on Sunday, February 18, 2018, Mr. Ellison sent a text message to Monticello**{2018 U.S. Dist. LEXIS 6}** Police Chief Britt Smith. The text message stated that Mr. Ellison needed to talk to Chief Smith "about a situation I stumbled on, illegal and kind of close to me, that in [sic] not sure how to handle." (Doc. 54-2). Chief Smith replied that he was eating lunch then, but would call him later. (*Id.*).

Chief Smith spoke with Mr. Ellison later that Sunday evening. During the conversation, Mr. Ellison described finding and taking the USB device, his review of the videos on the USB device, and the images he observed in the videos. Mr. Ellison told Chief Smith that he did not know what to do with the USB device. Chief Smith directed Mr. Ellison to drop off the USB device at the police station the following day.

During the conversation, Mr. Ellison also stated that he had not yet been paid for the work performed at defendant's house and was worried about getting paid, depending on what may happen as a result of the images on the USB device. Mr. Ellison explained that he was supposed to be paid on Monday, February 19, 2018. Chief Smith acknowledged that Mr. Ellison had a valid reason to be concerned and told Mr. Ellison to let him know when Mr. Ellison got paid. Defendant paid Mr. Ellison approximately**{2018 U.S. Dist. LEXIS 7}** $22,000 on Tuesday, February 20, 2018, for the work Mr. Ellison had performed on defendant's house. At some point, Mr. Ellison informed someone in law enforcement that he had been paid. Additionally, Mr. Ellison related that defendant was aware the USB device was missing and was looking for the USB device.

On Monday, February 19, 2018, at approximately 8:00 a.m., Mr. Ellison delivered the USB device to a receptionist at the Monticello Police Department. When Chief Smith arrived at the police department at approximately 9:00 a.m., the USB device was in a zip-lock baggie on his desk. Chief Smith placed the USB device in an evidence locker. Based on Mr. Ellison's description of the video images on the USB device, Chief Smith considered the USB device to be contraband.

Mr. Ellison had no prior working relationship with law enforcement officers. He never worked as an informant, had never been paid by law enforcement officers, and had never been provided any benefit from law enforcement officers in the form of dropped or reduced charges or of any other kind. Mr. Ellison could not recall why he had Chief Smith's telephone number in his contact list on his phone, but believed he might have obtained**{2018 U.S. Dist. LEXIS 8}** it in connection with his contacting the police department the prior year when someone stole items from Mr. Ellison's construction trailer. Chief Smith had Mr. Ellison's telephone number in his contact list on his work/personal cell phone as well. Chief Smith explained that in a small town like Monticello, it is part of his duties to know the people living there, and that he had the contact information for many citizens. Mr. Ellison and Chief Smith do not socialize together and described themselves as only acquaintances, not friends. Chief Smith testified that he did not consider charging Mr. Ellison with theft for taking the USB device from defendant's home because: (1) he did not believe Mr. Ellison intended to permanently deprive defendant of possession of the USB device had it not contained illegal images, and (2) he did not believe charges were appropriate when a citizen did the morally correct thing of reporting suspected criminal activity and acting to protect the public.

D. Law Enforcement Search of the USB Device

Later on Monday morning, February 19, 2018, Chief Smith contacted DCI Special Agent in Charge ("SAC") Rick Rahn, regarding the USB device and the information Mr. Ellison**{2018 U.S. Dist. LEXIS 9}** had told Chief Smith about what was on the USB device. SAC Rahn told Chief Smith that he

would assign an agent to the case. SAC Rahn initially assigned the case to a DCI Special Agent in Cedar Rapids, Iowa, but that agent was ill and was unable to respond to the Monticello Police Department to begin the investigation for several days. When that agent's illness continued to Wednesday, February 21, 2018, SAC Rahn reassigned the case to Special Agent Kedley.

That same day Special Agent Kedley met with Chief Smith at the Monticello Police Department. Chief Smith described to Special Agent Kedley what Mr. Ellison had told Chief Smith about the discovery of the USB device, Mr. Ellison's taking and reviewing of the video images on the USB device, and the nature of the images captured on the videos. Based on this description, Special Agent Kedley thought there was probable cause to believe the USB device contained evidence of a violation of Iowa law. In particular, Special Agent Kedley believed the USB device would contain evidence of a violation of Iowa Code § 728.12 (Sexual Exploitation of a Minor), and § 709.21 (Invasion of Privacy).

Special Agent Kedley then drafted an application for a warrant to search the USB**{2018 U.S. Dist. LEXIS 10}** device. Later that day, Wednesday, February 21, 2018, Special Agent Kedley presented the application to a state magistrate judge, who signed the search warrant. (Doc. 54-3). The affidavit in support of the search warrant stated that Mr. Ellison described the videos as containing "footage of young males showering in what appeared to Ellison to be a hotel shower." Once the warrant was signed, Special Agent Kedley took possession of the USB device from the Monticello Police Department's evidence room and transported it to Cedar Rapids, where another agent trained in forensic examination of electronic devices accessed the USB device, made a mirror image of its contents, and then viewed the video images on the USB device with Special Agent Kedley. Special Agent Kedley found that the USB device contained the images described by Mr. Ellison.

E. Interview of Defendant and Searches of his Residences

On Thursday, February 22, 2018, Special Agent Kedley and his partner interviewed defendant at his place of employment. During the interview, defendant made incriminating statements. In conducting the interview, the agents disclosed to defendant that they had viewed the contents of the USB device.**{2018 U.S. Dist. LEXIS 11}** They also informed him that they had obtained search warrants for each of his residences.

In the affidavits in support of the search warrants for defendant's homes, Special Agent Kedley again repeated the same language used in the warrant for the USB device to describe what Mr. Ellison said was contained on the USB device. The affidavits also related the agent's own review of the images and described them as showing "young, non-adult male individuals disrobing to the point of nudity with genitalia exposed to the camera." In the final paragraph of the affidavit, Special Agent Kedley added:

> Through my knowledge, training and experience, I know a complete search of the above-noted residence and person of STEPHEN could be crucial in identifying potential additional child pornographic images, child pornographic videos, additional victims who either knowingly or unknowingly were video recorded by STEPHEN and have been subjected to the unlawful manufacturing of child pornography and invasion of privacy, as well as any other evidence of child pornography associated with STEPHEN.

The Honorable Ian Thornhill, Iowa District Court Judge, signed the warrants. On the Endorsements of the warrants, Judge**{2018 U.S. Dist. LEXIS 12}** Thornhill summarized additional information Special Agent Kedley provided orally to Judge Thornhill. Specifically, Judge Thornhill wrote:

> Affiant indicates that based on his history & experiences & consult with other agents that individuals who engage in child pornographic activities often keep and store copies of images &

videos on multiple electronic storage devices in various locations.(Docs. 54-4, at 6; 54-5, at 6). Generally speaking, the search warrants for defendant's residences (Docs. 54-4, 54-5) authorized the search and seizure of electronic devices that could contain images (pornographic and nonpornographic) of children and adults.

F. Defendant's Arrest and Detention on Federal Charges

On March 13, 2018, defendant was arrested on a criminal complaint charging him with knowingly transporting child pornography, in violation of Title 18, United States Code, Section 2252(a)(1). (18-MJ-0074, Docs. 2, 8). On March 21, 2018, United States Magistrate Judge Kelly Mahoney presided over a detention hearing, at the conclusion of which she ordered defendant detained pending trial. (18-MJ-0074, Docs. 21, 22). On April 4, 2018, defendant appealed Judge Mahoney's detention order to the district court. (18-MJ-0074, Doc. 23). On April**{2018 U.S. Dist. LEXIS 13}** 5, 2018, a grand jury indicted defendant. (Doc. 2). On April 5, 2018, defendant filed a Motion for Review and Revocation of the Magistrate's Pretrial Detention Order. (Doc. 3). On April 17, 2018, United States District Court Judge Linda R. Reade issued an order denying defendant's motion to revoke the detention order. (Doc. 10). In discussing the detention factors in her order, Judge Reade found that the evidence was strong that defendant violated Title 18, United States Code, Section 2252, which makes it a crime to transport child pornography. In her analysis, Judge Reade reviewed the law defining child pornography.

III. ANALYSIS

Defendant moves to dismiss the indictment, arguing that, in ordering the defendant detained pending trial, the Court adopted a definition of child pornography that now establishes "the law of the case," and that definition, as applied to defendant, violates his First Amendment rights and his right to privacy. (Docs. 11, 11-1). Defendant moved to suppress evidence from the USB device, and all derivative evidence, on the grounds that: (1) the government's acceptance of the USB device from Mr. Ellison constituted a warrantless search and seizure of the USB device by the government, and; (2) the warrants for both**{2018 U.S. Dist. LEXIS 14}** the USB device and defendant's homes were overbroad, general warrants. (Docs. 12, 12-1). In a supplement to his motion to suppress, defendant further argued that the warrant to search the USB device lacked probable cause. (Doc. 13). In yet another supplement to his motion to suppress, defendant expanded upon his prior arguments, and further argued that Chief Smith violated defendant's Fourth Amendment right when Chief Smith "seized" the USB device when he got it from Mr. Ellison, and kept it for two days without a warrant. (Doc. 40). In another supplemental motion, defendant moved to suppress evidence from the search on the ground that Special Agent Kedley allegedly made materially false and misleading statements in the affidavits in support of the search warrants. (Doc. 41). Defendant again supplemented this supplement by submitting a report from an expert in computer forensics, who opined that the images on the USB device do not constitute child pornography. (Doc. 44). The government moves to strike the latest supplement on timeliness and other grounds. (Doc. 48). The Court will address each of parties' arguments in turn.

A. Defendant's Motion to Dismiss

Defendant's motion to dismiss (Doc. 11) seeks**{2018 U.S. Dist. LEXIS 15}** dismissal of Count Seven of the Superseding Indictment, which charges transportation of child pornography, based on the First and Fourteenth Amendments to the United States Constitution. Although defendant advances an overbreadth challenge under the First Amendment and a right to privacy challenge under the Fourteenth Amendment, the crux of the two arguments is the same. (*See* Doc. 11-1). Specifically, defendant argues that, in reviewing Judge Mahoney's detention order, the Court misinterpreted the relevant statute and determined "the law of the case at bar" to be "that a depiction of otherwise

innocent conduct can be 'sexually explicit conduct.'" (Doc. 11-1, at 3). Such an interpretation, defendant reasons, is "unconstitutionally overbroad as applied to the facts of [this] case," and amounts to a violation of defendant's First Amendment right to free speech and his Fourteenth Amendment right to privacy. (*Id.*, at 3-4).

The Court did not, however, misinterpret the law, nor create "the law of the case at bar," in reviewing Judge Mahoney's detention order. Defendant has twisted the Court's reasoning. Defendant has taken out of context a quote that the Court used as additional authority to help define "lascivious exhibition" as evidence that the Court had defined child pornography to include depictions that are not lascivious,**{2018 U.S. Dist. LEXIS 16}** and then argued that defendant has a First Amendment right to possess such images because they aren't child pornography. When determining whether a defendant may be released pending trial, a court "shall . . . take into account the available information concerning . . . the weight of the evidence against the person . . .." 18 U.S.C. § 3142(g)(2). It was in considering the weight of the evidence against defendant that the Court noted that "'otherwise innocent conduct'" *could* be construed as sexually explicit conduct, "'based on the actions of the individual creating the depiction.'" (Doc. 10, at 4 (quoting *United States v. Holmes*, 814 F.3d 1246, 1251-52 (11th Cir. 2016))).

The Court's citation to *Holmes* does not amount to a holding that the conduct alleged in the instant case is sufficient to turn "otherwise innocent conduct" into sexually explicit conduct. Rather, the Court's citation to *Holmes* explains that defendant's admission "that he recorded the images in question out of a 'sexual curiosity' and that he became aroused while viewing them," together with the secretive nature surrounding the creation of the recordings, amounted to "strong" evidence that the conduct in the recordings could be considered sexually explicit conduct. (*Id.*). In finding the evidence strong, the Court merely**{2018 U.S. Dist. LEXIS 17}** turned to one interpretation of the relevant statute to determine the strength of the evidence against defendant when such evidence was considered in light of the statute. That consideration did not inherently invoke *Holmes* as the law of the case at bar. Because defendant's First and Fourteenth Amendment arguments both rest on the assertion that *Holmes* was adopted as the law of the case, defendant's motion to dismiss (Doc. 11) is **denied**.

B. Defendant's Motion to Suppress-Agency Theory

Defendant argues that the Court should suppress evidence because the government's acceptance of the USB device from Mr. Ellison constituted a warrantless search and seizure of the USB device by the government. (Docs. 12-1, at 3-5; 13, at 1-3; 40-1, at 2-7). In other words, defendant argues Mr. Ellison was working as an agent for the government when he seized and searched the USB device. Defendant acknowledges that a wrongful search of seizure by a private party, and not the government, does not constitute a violation of the Fourth Amendment. (Doc. 12-1, at 3). Defendant argues, however, that the government's acquiescence in Mr. Ellison's unlawful taking of the USB device from defendant's house converts the private taking to an act of the government.**{2018 U.S. Dist. LEXIS 18}** (Docs. 12-1, at 3-5; 13-1, at 2-3; 40-1, at 2).

The Fourth Amendment guarantees the right of citizens to be free from "unreasonable searches and seizures." U.S. Const. amend. IV. As the Supreme Court has long held, however, this protection extends only to actions undertaken by government officials or those acting at their direction. *See Burdeau v. McDowell*, 256 U.S. 465, 475, 41 S. Ct. 574, 65 L. Ed. 1048 (1921) (holding that the Fourth Amendment applies to government action, and not that of a private party); *see also Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 614, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989) (holding that "the Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative" but it does "protect[ ] against such intrusions if the private party

argument fails for many reasons. First, the Court finds credible the testimony by Mr. Ellison and Chief Smith that, although Mr. Ellison expressed a concern about receiving payment, and Chief Smith acknowledged**{2018 U.S. Dist. LEXIS 22}** it as a legitimate concern, law enforcement officers did not delay the search of the USB device to ensure defendant paid Mr. Ellison first. Second, there was no quid pro quo between the government and Mr. Ellison regarding any conduct by Mr. Ellison. Mr. Ellison had already engaged in all of the conduct that constituted a search and seizure of the USB device before any mention was made of wanting to be paid by defendant. Chief Smith did not direct Mr. Ellison to do anything, or refrain from any conduct, as a condition of law enforcement officers doing anything to ensure defendant paid Mr. Ellison. Finally, defendant, not the government, paid Mr. Ellison money, and defendant paid Mr. Ellison the money for services rendered in remodeling his house and not for anything to do with the taking and viewing of the USB device.

Finally, defendant argues that somehow the government's involvement in receiving the USB device from Mr. Ellison constitutes a violation of defendant's constitutional rights because, in defendant's opinion, Mr. Ellison's conduct in taking the USB device was itself illegal. Defendant contends that the private-party exception does not apply when the search and seizure results**{2018 U.S. Dist. LEXIS 23}** from a trespass or theft by the private party. This argument is without merit. The private-search exception applies "to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official." *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984) (quoting *Walter v. United States*, 447 U.S. 649, 662, 100 S. Ct. 2395, 65 L. Ed. 2d 410 (1980)); *see also United States v. Malbrough*, 922 F.2d 458, 462-63 (8th Cir. 1990) (upholding a search by a private citizen who trespassed on another's property and viewed marijuana). Here, the Court has found Mr. Ellison did not act as a government agent with the participation or knowledge of any government official when he took and viewed the USB device. Therefore, even if Mr. Ellison's conduct was illegal, it does not transform his private conduct into government action.

Accordingly, the Court finds that Mr. Ellison did not seize and search the USB device as an agent of the government and, therefore, the Court finds the government did not violate defendant's Fourth Amendment rights when Mr. Ellison took and viewed the USB device. Defendant's motion to suppress on this ground is therefore **denied**.

C. Defendant's Motion to Suppress-Acceptance as Seizure Theory

Defendant argues that the Court should suppress evidence because the government's acceptance and**{2018 U.S. Dist. LEXIS 24}** retention of the USB device for two days prior to obtaining a search warrant constituted an unlawful seizure. (Docs. 40-1, at 3-7). Defendant argues that the government "seized" the USB device from him without a warrant when it directed Mr. Ellison to deliver the USB device to the Monticello Police Department and then unreasonably held the USB device for two days before obtaining a court order authorizing its seizure and search. (*Id.*) Defendant argues that there were no exigent circumstances that justified the warrantless seizure and the police officers could have and should have immediately obtained a warrant authorizing them to seize and hold the USB device. (*Id.*) Defendant acknowledges that contraband found in a public place may be seized by law enforcement officers without a warrant. (*Id.*, at 6). Defendant argues, however, that even if seized lawfully, the government was not permitted to hold it without a warrant. (*Id.*, at 6-7).

Defendant's argument raises two questions. The first question is whether the government's action in directing a private party to turn over an object the private party seized constitutes a government seizure at the time it is turned over. The second question is whether, if it**{2018 U.S. Dist. LEXIS 25}** is a seizure, the delay of two days before the government obtained a warrant was an unreasonable seizure under the Fourth Amendment.

U.S. 583, 592-593, 94 S. Ct. 2464, 41 L. Ed. 2d 325 (1974) (impoundment and 1-day delay did not make examination of exterior of vehicle unreasonable even when it could have been done on the spot).

The government's temporary retention of the USB device in this case was also justified because they had probable cause to believe it contained contraband, knew defendant was looking for it, and could reasonably believe defendant would destroy it if they returned the USB device to him. "Where law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the [Fourth] Amendment to permit seizure of the property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present." *United States v. Clutter*, 674 F.3d 980, 985 (8th Cir. 2012), quoting *Place*, 462 U.S. at 701. The government had probable cause to believe the USB device contained**{2018 U.S. Dist. LEXIS 29}** contraband based on Mr. Ellison's description of its contents. "The exigencies of the circumstances also demanded continuing seizure" to preserve the evidence. *See United States v. Goodale*, 738 F.3d 917, 922 (8th Cir. 2013) (holding that the government's two-day retention of a laptop believed to contain child pornography was reasonable, pending obtaining a warrant, because the defendant "knew about the investigation and could destroy the evidence."). Here, the government had probable cause to believe the USB device contained contraband, knew defendant was looking for it, and would have had reason to believe that if they returned the USB device to him that he would destroy it.

The exclusionary rule is intended to punish the police and deter them from violating the constitution. The rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States v. Calandra*, 414 U.S. 338, 348, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974). In *Michigan v. Tucker*, 417 U.S. 433, 447, 94 S. Ct. 2357, 41 L. Ed. 2d 182 (1974), the Supreme Court explained:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct,**{2018 U.S. Dist. LEXIS 30}** the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.*See also United States v. Peltier*, 422 U.S. 531, 539, 95 S. Ct. 2313, 45 L. Ed. 2d 374 (1975) ("If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."). Where, as here, the government diligently pursued its investigation, and its conduct was not unreasonable under the totality of the circumstances, suppression is inappropriate.

Defendant cites *United States v. Walker*, 324 F.3d 1032 (8th Cir. 2003) and *United States v. Demoss*, 279 F.3d 632 (8th Cir. 2004), for the proposition that the government unreasonably seized the USB device when Chief Smith directed Mr. Ellison to deliver the USB device to the police department. The Court finds those cases distinguishable. In *Walker*, a postal inspector removed a package from the mail stream, believing it may have contained contraband. *Walker*, 324 F.3d at 1035-36. *Demoss*, which involved a police officer at an airport removing a package from checked**{2018 U.S. Dist. LEXIS 31}** luggage, is distinguishable for the same reasons. *Demoss*, 279 F.3d at 634. In both of these cases, the government, not a private party, effectuated the initial seizure. In neither of these cases was there probable cause to believe the packages contained

contraband at the time of the government seizure. Finally, neither case addressed the issue of reasonable delay between seizure of the package and obtaining a warrant.

Accordingly, the Court finds that the government's conduct in obtaining the USB device from Mr. Ellison and holding it for two days before obtaining a warrant did not violate defendant's Fourth Amendment rights. Defendant's motion to suppress on this ground is therefore **denied**.

D. Defendant's Motion to Suppress-Lack of Probable Cause Theory

Defendant argues that the Court should suppress evidence because the warrant for the USB device lacked probable cause. Defendant argues that the warrant was supported only by "bare conclusions" by Mr. Ellison that the USB device contained child pornography. (Doc. 13, at 3-5). Further, defendant asserts that even assuming, based on Mr. Ellison's description, the USB device contained videos showing nude children, that child nudity alone is not child pornography. (*Id.*). Defendant**{2018 U.S. Dist. LEXIS 32}** asserts this same defect impairs the search warrants for his homes. (*Id.*).

Defendant's focus on whether the images, as described by Mr. Ellison, would legally constitute "child pornography" under federal law is misplaced. The state agents here applied for a state search warrant asserting violations of state law. Although Special Agent Kedley did not specifically identify the crimes under investigation by section number, Special Agent Kedley applied for search warrants asserting probable cause to believe the items to be searched would contain evidence that defendant "inappropriately, secretly, and unlawfully manufactured videos and images of youth (sic) males" (Doc. 54-3, at 3) and "child pornographic images, child pornographic videos, additional victims who either knowingly or unknowingly were video recorded by STEPHEN and have been subjected to the unlawful manufacturing of child pornography and invasion of privacy" (Docs. 54-4, at 5; 54-5, at 5). Iowa Code Section 728.12 makes it a crime to "possess a visual depiction of a minor engaging in a prohibited sexual act . . .." Iowa Code Section 728.1(7)(g) includes within the definition of a "prohibited sex act" "[n]udity of a minor for the purpose of arousing or satisfying the sexual desires**{2018 U.S. Dist. LEXIS 33}** of a person who may view a visual depiction of the nude minor." Moreover, Iowa Code Section 709.21 makes it a crime to photograph or film another person, "for the purpose of arousing or gratifying the sexual desire of any person," if it is done without the other person's consent, the person is fully or partially nude, and the person had a reasonable expectation of privacy while in that state. The affidavits in support of the search warrants demonstrate probable cause to believe the items to be searched would contain evidence of these state crimes.

Further, the question is not whether the images would, in fact, constitute child pornography but whether the totality of the circumstances would establish probable cause to believe that child pornography would be found on the USB device and defendant's other electronic device. "[S]ufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment." *Hill v. California*, 401 U.S. 797, 804, 91 S. Ct. 1106, 28 L. Ed. 2d 484 (1971). Probable cause does not require evidence to prove a crime beyond a reasonable doubt, or even by a preponderance of the evidence. *United States v. Donnelly*, 475 F.3d 946, 954 (8th Cir. 2007). Here, the search warrants were supported not only by a description of the images on the USB device, but also by other circumstantial evidence which suggested that it and**{2018 U.S. Dist. LEXIS 34}** other devices might contain child pornography. These circumstances included the fact that the images were taken by a hidden USB device, Mr. Ellison's previous observation of defendant in possession of pornographic images of young males, defendant's connection with a youth basketball organization, and the fact that defendant had organized the videos in file folders under male first names.

Finally, even were this Court to find that the affidavits failed to establish probable cause for the searches, state court judges found they did. Suppression of the evidence, therefore, is not appropriate when, as here, the agents relied in good faith on the judgment of judicial officers in

finding probable cause. *See United States v. Leon*, 468 U.S. 897, 922, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). For an agent to act in bad faith under *Leon*, the warrant would have to be "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Leon*, 468 U.S. at 923. In this case, the Court finds that the affidavits were not so lacking in indicia of probable cause to lead to the conclusion that the agent was acting in bad faith in applying for the warrant. This is particularly true with respect to the state law crime of invasion of privacy.

Accordingly, the Court**{2018 U.S. Dist. LEXIS 35}** finds that the search warrants were supported by probable cause related to violations of state law. In the alternative, the Court finds that even if the warrants lacked probable cause, the agent acted in good faith reliance on state judges' conclusions that the warrants were supported by probable cause. Defendant's motion to suppress on this ground is therefore **denied**.

E. Defendant's Motion to Suppress-Overbroad, General Search Theory

Defendant argues that the Court should suppress evidence because the warrants for both the USB device and defendant's homes were overbroad, general warrants. Defendant argues that the warrant for the USB device "did not put any limits" on the search and constituted a "general warrant." (Doc. 12-1, at 5). Defendant argues that the warrant "should have been limited to a search for the files that Ellison reported that he had seen," and that "authorizing the search of the entire USB device infringed on [defendant's] privacy and was unreasonable." (*Id.*, at 6.). Defendant claims this is particularly so because a USB device is like a computer that contains thousands of files and could be full of private information. (*Id.*). In an alternative argument, defendant claims that**{2018 U.S. Dist. LEXIS 36}** the officers exceeded the scope of the warrant by conducting "a complete forensics examination" of the USB device. Specifically, defendant argues that warrant did not authorize opening and viewing the files; rather, it only permitted "extracting and cloning data" and "copying" that data. (Doc. 40-1, at 8-9). Defendant further argues that the warrants for his homes were also too broad because they authorized the search of "any and [sic] electronic device found . . . of any kind" in the homes. (Doc. 12-1, at 7).

The Fourth Amendment prohibits general search warrants and requires a description, with particularity, of places to be searched and the items to be seized. *Andresen v. Maryland*, 427 U.S. 463, 480, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976). "'The purpose of the particularity requirement is to prevent a general exploratory rummaging through a person's belongings.'" *United States v. Mosby*, 101 F.3d 1278, 1281 (8th Cir. 1996) (quoting *United States v. Hibbard*, 963 F.2d 1100, 1102 (8th Cir. 1992)). An affidavit may provide the necessary particularity for a warrant if it is incorporated into the warrant, attached to the warrant, or present at the search. *Rickert v. Sweeney*, 813 F.2d 907, 909 (8th Cir. 1987). The standard used to gauge the particularity requirement of a search warrant is one of "'practical accuracy' rather than a hypertechnical one." *United States v. Summage*, 481 F.3d 1075, 1079 (8th Cir. 2007) (quoting *United States v. Peters*, 92 F.3d 768, 769-70 (8th Cir. 1996)). In short, for a warrant to be valid "there must be evidence of a nexus between the contraband**{2018 U.S. Dist. LEXIS 37}** and the place to be searched . . .." *United States v. Tellez*, 217 F.3d 547, 550 (8th Cir. 2000).

Regarding the USB device, the Court finds that the search warrant was neither too broad, nor did the search exceed the scope of the warrant. Defendant argues that the agents should have searched only the files that Mr. Ellison viewed, but Mr. Ellison indicated he viewed all of the files on the USB device. There is nothing in the record suggesting that Mr. Ellison described only searching part of the USB device or only certain files. Defendant has failed to identify in what manner he believes the warrant could have been limited on this ground. In any event, a magistrate judge authorized this search.5 Therefore, the *Leon* good faith exception applies to the assertion that the warrant was

overbroad with the same force and effect as it does to the assertion that the warrant lacked probable cause. Finally, the warrant authorized a "complete forensic examination of the video recording device." (Doc. 54-3). A complete forensic examination would include opening and viewing the videos under any common sense meaning of the phrase.

Regarding the search of defendant's homes and electronic devices in those homes, the Court again finds the warrants were not overbroad,**{2018 U.S. Dist. LEXIS 38}** general warrants. The nature of the evidence being sought in this case, photographs and videos of naked children, dictates the scope of the search. Such images could be located on any type of electronic storage device described in the warrants and a search of such devices for such images was therefore justified. *See United States v. Rector*, No. 08-50015, 2013 U.S. Dist. LEXIS 156937, 2013 WL 5929961, at *4 (W.D. Ark. Nov. 1, 2013) ("Because such evidence [of child pornography] might be stored on an object as small as a thumb drive, an extremely wide-ranging search was justified by both the object of the search and the places in which there was probable cause to believe that it might be found."); *see also, e.g., United States v. Alexander*, 574 F.3d 484, 489-90 (8th Cir. 2009) (holding that a search warrant was not facially overbroad when it authorized the search of "digital storage devices" and other items, including defendant's computer, despite the fact that "there was no evidence that [defendant's] computer was used in making the surreptitious recordings," finding "it was a fair inference that illicit recordings of people in a state of nudity or sexual activity would be found stored on digital devices."); *United States v. Cartier*, 543 F.3d 442, 447-48 (8th Cir. 2008) (rejecting defendant's general warrant argument, finding agents' search of thirteen hard drives, two thumb drives, and hundreds of compact discs and videotapes**{2018 U.S. Dist. LEXIS 39}** for child pornography was not overbroad and that agents did not have to develop a search protocol to avoid viewing other personal information); *Summage*, 481 F.3d at 1079-80 (finding a warrant authorizing the search and seizure of all videotapes and DVDs, pornographic pictures, video and digital recording devices and equipment, all equipment that is used to develop, upload, or download photographs and movies, and computers was not overbroad "[b]ecause no indication was given regarding the nature of the format in which the sought-for video and photographs were created or stored, it was necessary to search a broad array of items for the relevant materials.").

In this case, the USB device had to be hooked up to a computer to view the videos and to organize them into files. It was reasonable, therefore, for the agents and the Court to believe defendant used computers or other electronic devices for those purposes. *See United States v. Flanders*, 468 F.3d 269, 271-72 (5th Cir. 2006) (holding that use of digital camera to photograph a naked child supported probable cause to search a computer). Finally, the Court again finds that the *Leon* good faith exception to the exclusionary rule would apply to this issue; a judge authorized the search and the scope of the items to be searched**{2018 U.S. Dist. LEXIS 40}** was not so clearly overbroad that the agent could not rely in good faith on a judge's authorization of the search.

Accordingly, the Court finds that the search warrants were not overbroad, general warrants, and that the agents did not exceed the scope of the warrant for the USB device by opening and viewing videos on it. Defendant's motion to suppress on this ground is therefore **denied**.

F. Defendant's Motion to Suppress-Franks Theory

Defendant argues that the Court should suppress evidence because Special Agent Kedley made materially false and misleading statements in the affidavits in support of the search warrants. In particular, defendant argues that Special Agent Kedley: (1) "repeated[ly] mischaracterize[ed] the contents of the USB device" because he described the USB device as containing videos of "young men showering" when Mr. Ellison only described the videos of "teenage boys who were partially clothed using the shower" (Doc. 41-1, at 4); (2) "repeatedly referred to the contents of the USB

argument to be that by describing the videos as constituting**{2018 U.S. Dist. LEXIS 44}** child pornography, the agent incorporated the federal statutory definition which, depending on the statute, may require a showing of lewd or lascivious exhibition of genitals. There are two problems with this line of reasoning. First, as noted previously, Special Agent Kedley was applying for state warrants for violations of state law (including invasion of privacy), which do not incorporate the federal definition of child pornography. Second, the affidavits do not state, as a fact, that the videos contained child pornography. Rather, Special Agent Kedley accurately and factually described the contents of the videos, then in the form of a conclusion made reference to likely finding evidence of child pornography during the searches. In context, therefore, at most Special Agent Kedley's reference to child pornography, both in the written affidavit and orally to Judge Thornhill as referenced in the endorsements to the home search warrants, reflected his opinion of what crimes he believed were reflected by the images on the USB device, or may have been found upon searching that and other electronic devices in defendant's possession. Given the nature of the videos as factually described,**{2018 U.S. Dist. LEXIS 45}** and the secretive nature of the recording device, that was not an unreasonable opinion. It was not a material misrepresentation of fact.

Accordingly, the Court finds that defendant has not made a substantial threshold showing entitling him to a *Franks* hearing because he came forward with no evidence to demonstrate that Special Agent Kedley intentionally or recklessly made materially false or misleading statements of fact. In the alternative, the Court finds that Special Agent Kedley did not make any materially false or misleading statement of fact. Defendant's motion to suppress on this ground is therefore **denied**.

G. Government's Motion to Strike

The government moves to strike defendant's supplemental motion for a *Franks* hearing at Doc. 44. (Doc. 48). The government argues the supplemental motion (1) was untimely; (2) falsely alleges the affidavits claimed the videos contained lewd and lascivious exhibition of genitals; and (3) attaches a late, irrelevant report by defendant's unqualified expert. (Doc. 48). Because the Court finds that defendant's motion to suppress based on the *Franks* allegation fails on its merits, the Court denies as moot the government's motion to strike the supplement**{2018 U.S. Dist. LEXIS 46}** to the motion. The Court agrees, however, that defendant's expert's opinion about whether, in his view, the images constitute child pornography under federal law is irrelevant. It is irrelevant because, as noted, the applications for search warrants were for violation of state law, not federal law. It is also irrelevant because it does not matter what defendant's expert thought about the images after the fact. The relevant inquiry was whether Special Agent Kedley intentionally or recklessly made a materially false or misleading statement of fact at the time he applied for the search warrant. The Court has found he did not.7

Therefore, the Court **denies as moot** the government's motion to strike. (Doc. 48).

IV. CONCLUSION

For the reasons set forth above, defendant's motions to Dismiss (Doc. 11), to Suppress (Docs. 12, 13), and for a *Franks* hearing (Doc. 41), are **denied**, and the government's Motion to Strike (Doc. 48) is **denied as moot**.

IT IS SO ORDERED this 4th day of October, 2018.

/s/ C.J. Williams

C.J. Williams

United States District Judge

Footnotes

1

All references to the docket pertain to Case No. 18-CR-31, unless otherwise specified.

2

Exhibit 1 is a copy of videos from a USB device depicting minors in various states of nudity and using a bathroom and shower. According to the government, it constitutes contraband and, therefore, the exhibit has been retained by the government. The Court finds it unnecessary to view the videos to reach a decision on the merits of the pending motions.

3

Chief Smith speculated, at the invitation of defense counsel, that Mr. Ellison might have been motivated to take and view the USB device because he suspected it might contain illegal images and he might then intend to provide it to law enforcement officers to aid the government. There was no evidence from Mr. Ellison, however, that this was his motivation.

4

Notably, it is well established that "[l]aw enforcement authorities must [only] possess a reasonable suspicion based on articulable facts that a package contains contraband before they may detain the package for investigation." *United States v. Johnson*, 171 F.3d 601, 603 (8th Cir. 1999); *see also United States v. Terriques*, 319 F.3d 1051, 1056 (8th Cir. 2003) ("A seizure will not violate the Fourth Amendment if the authorities have reasonable suspicion based on articulable facts that a package contains contraband ...." (quotation marks and citation omitted)). Here, there was at least a reasonable, articulable suspicion that the USB device contained contraband based upon Mr. Ellison's statements.

5

The Court further notes that a USB videotape device is not like a computer in the sense that it is not likely to contain thousands of files of otherwise personal information. In that regard, and others, defendant's reliance on *United States v. Lichtenberger*, 786 F.3d 478, 485-91 (6th Cir. 2015), is misplaced.

6

The Court notes that, over the government's objection and because the agent was present and available, the Court allowed defendant to call Agent Kedley to testify at the suppression hearing. After the hearing, defense counsel stated that they would not have presented any other evidence had the Court, in advance of the suppression hearing, made a finding that defendant was entitled to a *Franks* hearing. So, in a very real sense defendant received a *Franks* hearing, even though the Court finds he was not entitled to one.

7

The Court takes no position at this time whether defendant's expert is qualified to opine as to whether the images on the USB device constitute child pornography under federal law.

UNITED STATES OF AMERICA, Plaintiff, vs. GREGORY SCOTT STEPHEN, Defendant.
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, CEDAR RAPIDS DIVISION
2018 U.S. Dist. LEXIS 64060
No. 18-CR-31-LRR
April 16, 2018, Decided
April 17, 2018, Filed

Editorial Information: Subsequent History

Motion denied by, Motion denied by, As moot **United States v. Stephen**, 2018 U.S. Dist. LEXIS 171764 (N.D. Iowa, Oct. 4, 2018)Judgment entered by **United States v. Stephen**, 2018 U.S. Dist. LEXIS 181329 (N.D. Iowa, Oct. 22, 2018)

Counsel **{2018 U.S. Dist. LEXIS 1}**For US Probation, Interested Party: uspNotify, LEAD ATTORNEY.

For Gregory Scott Stephen, Defendant: Mark R Brown, LEAD ATTORNEY, Cedar Rapids, IA; Mark C Meyer, LEAD ATTORNEY, Kinnamon Kinnamon Russo Meyer, Cedar Rapids, IA.

For USA, Plaintiff: Anthony Morfitt, LEAD ATTORNEY, US Attorney's Office, Cedar Rapids, IA.

Judges: LINDA R. READE, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: LINDA R. READE

Opinion

ORDER

I. INTRODUCTION

The matter before the court is Defendant Gregory Scott Stephen's "Request for Review and Revocation of the Magistrate's Pretrial Detention Order" ("Motion") (docket no. 3).

II. RELEVANT PROCEDURAL HISTORY

On March 13, 2018, a Complaint (18-MJ-74-LRR docket no. 2) was filed against Defendant alleging that he knowingly transported child pornography in violation of 18 U.S.C. § 2252(a)(1).1*See* Complaint at 1. On March 13, 2018, Defendant appeared before United States Chief Magistrate Judge C.J. Williams for an initial appearance. *See* March 13, 2018 Minute Entry (18-MJ-74-LRR docket no. 8). On March 21, 2018, Defendant appeared before United States Magistrate Judge Kelly K.E. Mahoney for a detention hearing ("Hearing"). *See* March 21, 2018 Minute Entry (18-MJ-74-LRR docket no. 21). Defendant appeared in court with his attorneys,**{2018 U.S. Dist. LEXIS 2}** Mark Brown and Mark Meyer. Assistant United States Attorney Anthony Morfitt represented the government. At the Hearing, Judge Mahoney ordered Defendant detained, and she subsequently entered an order to that effect on March 22, 2018. *See* Order of Detention Pending Trial

Appendix D

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conduct." Brief in Support of Motion (docket no. 3-1) at 6. Defendant argues that theses images, therefore, do not fall within the purview of the statute. *Id.* (citing 18 U.S.C. § 2252(a)(1) (criminalizing the transportation of images which depict, and whose production involved, "a minor engaging in sexually explicit conduct")).

Defendant is incorrect. "Sexually explicit conduct," for purposes of 18 U.S.C. § 2252, includes "lascivious exhibition of the genitals or pubic area of any person." 18 U.S.C. § 2256(2)(A)(v). The Eighth Circuit Court of Appeals has said that an image is lascivious, and therefore constitutes child pornography, "when the child is nude or partially clothed, when the focus of the depiction is the child's genitals or pubic area, and when the image is intended to elicit a sexual response in the viewer." *United States v. Horn*, 187 F.3d 781, 789 (8th Cir. 1999). "The 'lascivious exhibition' is not the work of the child, whose innocence is not in question, but of the producer or editor of the video." *Id.* at 790; *see also United States v. Holmes*, 814 F.3d 1246, 1251-52 (11th Cir. 2016) ("[D]epictions of**{2018 U.S. Dist. LEXIS 6}** otherwise innocent conduct may in fact constitute a 'lascivious exhibition of the genitals or pubic area' of a minor based on the actions of the individual creating the depiction."). In this case, Defendant allegedly admitted to Special Agent Kedley that he recorded the images in question out of a "sexual curiosity" and that he became aroused while viewing them. Hearing Transcript at 82-83. Additionally, the secretive and extensive nature of Defendant's efforts to record nude, pubescent boys indicates that these images were created for his sexual gratification. As such, the court finds that the evidence against Defendant is strong. This factor weighs in favor of detention. *See* 18 U.S.C. § 3142(g)(2).

Third, the court considers the history and characteristics of Defendant. *See id.* § 3142(g)(3). Defendant was born in Cedar Rapids, Iowa and has lived in Delhi, Iowa for the past nine years. *See* Pretrial Services Report at 1. Defendant has significant ties to the area, as his parents, sister, step-sister and several nieces and nephews reside in the area. *See id.* at 1-2. Defendant has maintained steady employment for the past eighteen years. *See id.* at 2. For the past six years, he has worked at his father's car dealership in Monticello, Iowa.**{2018 U.S. Dist. LEXIS 7}** *See id.* at 2. Defendant has no criminal history, and this case appears to be his first arrest. These facts indicate that Defendant poses a low risk of flight, and therefore weigh in favor of release. *See* 18 U.S.C. § 3142(g)(3).

Fourth, the court considers "the nature and seriousness of the danger to any person or the community that would be posed by [Defendant's] release." *Id.* § 3142(g)(4). Because this case involves a minor victim, there is a rebuttable presumption that no conditions can reasonably assure the safety of the community if Defendant is released. *See* 18 U.S.C. § 3142(e)(3). "[A] defendant bears a limited burden of production-not a burden of persuasion-to rebut that presumption by coming forward with evidence he does not pose a danger to the community . . . ." *United States v. Abad*, 350 F.3d 793, 797 (8th Cir. 2003) (quoting *United States v. Mercedes*, 254 F.3d 433, 436 (2d Cir. 2001)). "Once a defendant has met his burden of production relating to these two factors, the presumption favoring detention does not disappear entirely, but remains a factor to be considered among those weighed by the district court." *Id.* If the presumption is rebutted, the government bears the burden to prove by clear and convincing evidence that no conditions can reasonably assure the safety of the community if a defendant is released. *See* 18 U.S.C. § 3142(f).

The court finds that Defendant**{2018 U.S. Dist. LEXIS 8}** met his limited burden of production by offering some evidence indicating that he is not a danger to the community. The court further finds, however, that the government has proved by clear and convincing evidence that no conditions of release can reasonably assure that Defendant will not pose a danger to the community. Defendant presented the testimony of Dr. Luis Rosell, a forensic psychologist who testified that, in his opinion, Defendant would pose little risk to the community if released. *See* Hearing Transcript at 7. The court

gives limited weight to Dr. Rosell's testimony. Dr. Rosell is not Defendant's treating psychologist, but rather met with Defendant for approximately two and a half hours in anticipation of an upcoming criminal charge. *See id.* at 12, 17. During the evaluation, Defendant was defensive and underreported his own conduct. *See id.* at 14. Importantly, Dr. Rosell's opinion rested in large part on the belief that Defendant had never committed a "hands on" offense-that is, that he had never had inappropriate physical contact with a minor. *See id.* at 7-10. The government, however, presented evidence that Defendant had committed hands-on offenses, largely blunting the impact of Dr. Rosell's testimony.**{2018 U.S. Dist. LEXIS 9}**

Special Agent Kedley testified that Defendant is a youth basketball coach who frequently takes his teen and pre-teen players on road trips away from the supervision of their parents. *See id.* at 74-76. One of Defendant's former players described to Special Agent Kedley an incident in which he was inappropriately touched by Defendant. *See id.* at 90. The witness stated that, when he was fifteen years old, he shared a bed with Defendant on a road trip and awoke during the night to find that Defendant was touching his buttocks while masturbating. *See id.* The child tried to get out of the bed, but Defendant directed him back into the bed and resumed touching him. *See id.* at 90-91. Another former player also described being touched on the buttocks by Defendant while sharing a bed with him during a road trip. *See id.* at 91. Finally, another former player described, at age thirteen, waking up in the night to find Defendant masturbating in the bed next to him. *See id.* at 88-89. These incidents are of grave concern to the court as they seriously undermine the credibility of Dr. Rosell's opinion and strongly indicate that Defendant poses a danger to the community. These alleged abuses, considered in conjunction with the other aforementioned factors,**{2018 U.S. Dist. LEXIS 10}** leave the court firmly convinced that there are no conditions of release that the court could impose on Defendant that would reasonably assure the safety of the community.

Defendant objects to the court considering these incidents, stating that "there is nothing in the relevant statute that allows a judge to . . . rely on allegations of uncharged conduct unrelated to the offense for which . . . [D]efendant is actually charged." Motion at 2. Defendant is incorrect. The court is required to consider both "past conduct" and "criminal history" in determining whether Defendant poses a danger to the community. 18 U.S.C. § 3142(g)(3). Defendant also incorrectly relies on *United States v. Leyba*, 104 F. Supp. 2d 1182, 1184 n.2 (S.D. Iowa 2000), which he argues proscribes the consideration of uncharged conduct. *See* Brief in Support of Motion at 7. *Leyba* is inapposite. In *Leyba*, the court concluded that it could not consider a defendant's prior arrests that did not result in a conviction as a reason for detention. *See Leyba*, 104 F. Supp. 2d at 1184 n.2. In the absence of a conviction, however, the fact that a defendant was arrested for some prior offense is not evidence that he committed a particular act. By contrast, in this case the court is considering past conduct for which the government has offered evidence. "[A]n**{2018 U.S. Dist. LEXIS 11}** arrestee's past conduct is essential to an assessment of the danger he poses to the public, and this will inform a court's determination [of] whether the individual should be released on bail." *Maryland v. King*, 569 U.S. 435, 453, 133 S. Ct. 1958, 186 L. Ed. 2d 1 (2013). Accordingly, the court properly considers these alleged incidents in making its determination.

After considering all of the factors listed in 18 U.S.C. § 3142(g), and for the reasons set forth in the Order of Detention Pending Trial, the court finds by clear and convincing evidence that Defendant is a danger to the community and "that no condition or combination of conditions will reasonably assure . . . the safety of any other person and the community." 18 U.S.C. § 3142(e)(1).

V. CONCLUSION

In light of the foregoing, the Motion (docket no. 3) is **DENIED**. Defendant shall remain in the custody of the United States Marshals Service pending further order of the court.

IT IS SO ORDERED.

DATED this 16th day of April, 2018.

/s/ Linda R. Reade

LINDA R. READE, JUDGE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF IOWA

Footnotes

1

On April 5, 2018, the government filed an Indictment (docket no. 2), charging Defendant with one count of transportation of child pornography in violation of 18 U.S.C. §§ 2252(a)(1) and 2252(b)(1). *See* Indictment at 1-2. The Indictment does not alter the court's analysis of the Motion.