RECORD NUMBER: _____

In the

Supreme Court of the United States

RICHARD TODD HAAS,

Petitioner,

– v. –

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this challenge to the district court's denial of Petitioner's request for a *Franks* Hearing, the Fourth Circuit specifically declined to consider the materiality of information omitted from affidavits submitted by a law enforcement agent in support of two search warrants for Petitioner's computers. Instead, the court held that it "need not consider whether the purported omissions were material to the affidavit's probable cause" because it found that the agent's omissions were not made knowingly and intentionally, or with reckless disregard for the truth. *United States v. Haas*, 986 F.3d 467, 477 (4th Cir. 2021). This Court has not addressed whether a materiality analysis can be dispensed with when a court considers whether to grant a *Franks* hearing. In contrast to the Fourth Circuit, other circuits have held that the omission of material adverse information from a search warrant affidavit gives rise to an inference of recklessness sufficient to grant a request for a *Franks* hearing. *See e.g., United States v. Glover*, 755 F.3d 811, 820 (7th Cir. 2014) (holding that "omitted credibility information was clearly material" and that "[a]n officer's omission from the probable cause affidavit of known and substantial adverse information about the informant's credibility is sufficient to support a reasonable inference of recklessness, requiring that Glover's request for a Franks hearing be granted.").

The question presented in this case is whether the Fourth Circuit

erred in refusing to engage in a materiality analysis of the information omitted from the affidavits to determine whether the omissions support a reasonable inference of recklessness sufficient to grant a request for a *Franks* hearing.

PARTIES TO THE PROCEEDING

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The opinions of the United States District Court for the Eastern District of Virginia, at Richmond, (3:16-cr-00139-REP-1) (Payne, J.) denying Mr. Haas's two separate Motions for a *Franks* Hearing can be found in Appendix C and D and in the Joint Appendix ("JA") at 445 – 73, 586 – 603.[1] The decision of the Fourth Circuit Court of Appeals affirming the lower court's denial of his motions for a *Franks* Hearing was entered on January 27, 2021, is in Appendix A and reported in *United States v. Haas*, 986 F.3d 467 (4th Cir. 2021). The Fourth Circuit Court of Appeals denied Petitioner's Motion for Rehearing on March 2, 2021. Appendix B.

STATEMENT OF JURISDICTION

This Court has jurisdiction to consider Mr. Haas's petition from the Fourth Circuit Court of Appeals pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution reads: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[1] Citations to JA refer to the appellate record compiled in the joint appendix on file with the Fourth Circuit. See United States v. Haas, 19-4077, Joint Appendix, (ECF No. 13 and 15) (4th Cir. filed June 3, 2019).

STATEMENT OF THE CASE

I. FACTUAL HISTORY

In 2016, Mr. Haas arranged a sexual encounter with Sarah[2] at his home after seeing her Backpage.com advertisement. JA 624. More than four years earlier, Mr. Haas had also paid Sarah for sex several times, but the two had lost touch. JA 620 – 23. The last time Mr. Haas had seen Sarah, he told her that he liked younger women and he "wanted to talk more about it and see if [Sarah] was interested in that the next time [they] m[ ]et." J.A. 622.

When Mr. Haas met with Sarah in 2016, he asked if she remembered their last conversation and was interested in "what he was talking about last time." JA 625. While Sarah told Mr. Haas that she was interested, she actually intended to report Mr. Haas to law enforcement. *Id*. Haas then opened his laptop and showed her photos of young children performing sexual acts in various stages of undress. *Id*. Sarah testified that she saw "probably like 1,500" photos and that the children in the photos appeared to range from age 4 to 12. JA 627.

About two weeks after meeting with Mr. Haas, Sarah reached out to the FBI and was put in contact with Special Agent Gonzalez. JA 633. The agent met with Sarah, and she told him about her encounters with Mr. Haas. To corroborate her statement, the FBI asked her to identify a photograph of Mr. Haas and of his residence. JA 452 - 53. The agents also verified that the phone number Sarah

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[2] In accordance with the convention used by the Fourth Circuit, her last name is omitted.

provided was linked to Mr. Haas and that he had owned the house that Sarah identified until it was later sold. *Id*. Sarah told Agent Gonzalez of her prior prostitution-related conviction, and Agent Gonzalez knew that she was on probation, although he did not know for what offense. *Id*.

After meeting with the FBI, Sarah fabricated a "story about a woman [she] knew in Baltimore" who "had children that she could bring down from Baltimore for [Haas] to photograph and ... engage in sexual things with." JA 634. After hearing this story, Mr. Haas texted and called Sarah several times to ask about procuring the young girls to create child pornography. JA 635.

Sarah then arranged to meet Mr. Haas in person so that he could give her $100 to obtain nude pictures of the children from Baltimore. JA 636. But on her way to that meeting, Sarah was pulled over by Henrico County police officers. JA 639. When she saw the police car's flashing lights, she pulled into the grocery store parking lot where she had planned to meet Mr. Haas, jumped out of her car, and ran to his car. *Id*. Mr. Haas gave her $100, and she promised that she would get the photos soon. *Id*.

Upon returning to her car, Sarah was met by the police, who asked for her driver's license. Sarah's license had been suspended so she gave the officer her sister's name instead of her own. JA 639 – 40. She received three tickets in her sister's name. *Id*. A week later, Sarah met with the FBI agent again. During this meeting, she admitted that she had lied to the Henrico County police about her identity and "that she wanted to take care of it." JA 143–44. The agent reached out

to the Henrico County Police Department and arranged to drive Sarah to her hearing a few days later so that she could resolve the false-identity issue. At that hearing, Sarah was charged with providing false information to a law-enforcement officer and held in jail without bail. JA 144-45, 662 - 63.

When Sarah was released two weeks later, the FBI gave her a recording device to record her phone calls with Mr. Haas. JA 663. She recorded two phone calls. During the second call, the two discussed getting the two young girls from Sarah's "friend" from Baltimore. 665 – 67.

Shortly after this phone call, the FBI learned that Mr. Haas had been accused of molesting an eleven-year-old girl. JA 57. The investigation was cut short, and Agent Gonzalez prepared an application for a search warrant seeking evidence of child-pornography offenses. JA 44 – 81.

The FBI obtained a search warrant for Mr. Haas's residence on August 31, 2016. *Id*. The district court's findings of fact pursuant to the first Motion to Suppress filed by Mr. Hass disclose that when the FBI attempted to execute the warrant on September 1, 2016, Haas had left for work. JA 451. FBI agents proceeded to Mr. Haas's work location and arrested him in his work vehicle, a 1995 Ford tractor-trailer truck. *Id*. Haas was arrested pursuant to a Virginia arrest warrant charging him with aggravated sexual battery of a minor. *Id*. During the search incident to the arrest and a protective sweep, FBI agents recovered a Samsung Galaxy S5 telephone and a laptop bag. *Id*.

"After seeing the laptop bag, the agent ceased his protective sweep and exited the vehicle." *Id*. A second affidavit, identical to the first, was submitted in support of a request for a warrant to search Haas's 1995 Ford tractor-trailer. JA 452. Based on the affidavit, a search warrant was issued and allowed the search of Haas's 1995 tractor-trailer and his cell phone. *Id*. A laptop was seized from the tractor-trailer and a forensic examination revealed that Haas saved approximately 17,000 images of children, including prepubescent children, engaged in sexually explicit conduct. *Id*.

Special Agent Gonzalez testified at the evidentiary hearing on Mr. Haas's Motion to Suppress that he did not personally know Sarah before the case, but he knew she had served as a confidential witness for the FBI in the Norfolk Division. *Id*. When he swore out the affidavit, he was aware that Sarah was on felony probation supervision in the Virginia court system. JA 453. Sarah also told Agent Gonzalez that she previously had been arrested for prostitution and the Agent assumed Sarah was on probation for these offenses as well. *Id*. Special Agent Gonzalez testified that Sarah told him on July 14, 2016 that she had an encounter with the Henrico County Police one week earlier and she made false statements to the Henrico police about her identify during the traffic stop. *Id*. She admitted that she provided false information and signed the traffic summons with another identity. *Id*. Sarah also told Special Agent Gonzalez she wanted assistance in setting the matter straight with Henrico. *Id*. This information was not included in the affidavit.

Special Agent Gonzalez testified that no information regarding Sarah's criminal history, other than that she was a prostitute, was included in the affidavit. *Id*. Her history of having been a witness for the FBI was also not included. Special Agent Gonzalez testified that before swearing to the affidavit, he did not run a criminal history check of Sarah. *Id*.

II. PROCEEDINGS BELOW

On September 26, 2018, a jury found Mr. Haas guilty of attempted sex trafficking of children, receipt of child pornography, and possessing child pornography. JA at 1066. Prior to trial, Mr. Haas moved to suppress two search warrants issued for his computers, asserting pursuant *Franks v. Delaware*, 438 U.S. 154 (1978), that the case agent made material omissions with reckless disregard for the truth in the affidavits submitted in support of the search warrants. JA at 23, 479. The District Court issued a memorandum opinion denying Mr. Haas's motion for a *Franks* hearing as well as his motion to suppress the evidence. JA 445, *published at United States* v. *Haas*, 2017 U.S. Dist. LEXIS 67178 (E.D. Va. May 2, 2017). In this opinion, the District Court set forth its rationale for denying the request for a *Franks* hearing, JA 461-66, found that the warrant lacked probable cause for the laptop seized in Mr. Haas's work vehicle, J.A. 470-71, but then applied the good-faith exception and did not order the evidence to be suppressed. JA 472. After issuing its first Memorandum Opinion in May of 2017, the District Court issued another opinion following Mr. Haas's change of counsel, who made a renewed motion for a *Franks* hearing and for suppression of the evidence seized in his

personal vehicle, a white Volkswagen Jetta. J.A. 586. The court again rejected the request for a Franks hearing. *See United States v. Haas*, 2018 U.S. Dist. LEXIS 143890 (E.D. Va. Aug. 22, 2018) (denying Mr. Haas' motions). A Notice of Appeal was filed on January 31, 2019. J.A. 1072. The United States Court of Appeals for the Fourth Circuit heard the appeal. In a published opinion, the appellate court upheld the district court's denial of a *Franks* hearing and the subsequent convictions against Mr. Haas, but vacated the sentence and remanded the case to the district court due to a miscalculation of the Sentencing Guidelines. *See United States v. Haas*, 986 F.3d 467 (4th Cir. 2021).

REASONS FOR GRANTING THE PETITION

In evaluating Mr. Haas's request for a *Franks* hearing, the Fourth Circuit declined to analyze the materiality of the information omitted from the affidavits. Instead, the court ruled that the case agent's omissions were not made with the intent to mislead or with reckless disregard for the truth. *United States v. Haas*, 986 F.3d 467, 477 (4th Cir. 2021). The Fourth Circuit specifically declined to address the materiality prong of the *Franks* analysis. *Id.* By doing so, the appellate court failed to determine whether the omission of material information supported an inference of recklessness.

The Fourth Circuit, contrary to most other Circuit Courts, has decline to consider whether the omission of highly material information may support an inference of recklessness when analyzing a *Franks* motion. *See U.S. v. Colkley*, 899 F.2d 297, 301 (4th Cir. 1990) (holding that "the district court [could not] have

inferred intent or recklessness from the fact of omission itself. Some courts have recognized this type of inference if the omitted material was "clearly critical" to the finding of probable cause. *See United States v. Martin*, 615 F.2d 318, 328 (5th Cir. 1980). We have doubts about the validity of inferring bad motive under Franks from the fact of omission alone, for such an inference collapses into a single inquiry the two elements — "intentionality" and "materiality" — which Franks states are independently necessary."). Almost every other circuit to address the issue, however, has held that the omission of information material to probable cause creates an inference of recklessness. *See, e.g.*, *United States v. Glover*, 755 F.3d 811, 820 (7th Cir. 2014) ("omitted credibility information was clearly material" and that "[a]n officer's omission from the probable cause affidavit of known and substantial adverse information about the informant's credibility is sufficient to support a reasonable inference of recklessness, requiring that Glover's request for a Franks hearing be granted."); *United States v. Martin*, 615 F.2d 318, 329 (5th Cir. 1980) ("It is possible that when the facts omitted from the affidavit are clearly critical to a finding of probable cause the fact of recklessness may be inferred from proof of the omission itself.").

This Petition should be granted to resolve the conflict in the Circuits.

ARGUMENT

I. Did the Fourth Circuit err in refusing to engage in a materiality analysis of the information omitted from the affidavits to determine whether the omissions support a reasonable inference of recklessness sufficient to grant a request for a Franks hearing.

The Fourth Circuit begins its analysis by correctly reciting the standards applicable when a defendant seeks a *Franks* hearing:

> A Franks hearing provides a criminal defendant with a narrow way to attack the validity" of a search-warrant affidavit. *United States v. Moody*, 931 F.3d 366, 370 (4th Cir. 2019). Along with affirmative false statements, "*Franks* protects against omissions that are designed to mislead, or that are made in reckless disregard of whether they would mislead, the magistrate." *United States v. Colkley*, 899 F.2d 297, 301 (4th Cir. 1990) (emphasis omitted).
>
> To obtain a *Franks* hearing, a defendant must make a "substantial preliminary showing" to overcome the "presumption of validity with respect to the affidavit supporting the search warrant." *Moody*, 931 F.3d at 370 (citations and quotation marks omitted); see also *Franks*, 438 U.S. at 171, 98 S.Ct. 2674 (defendant's "attack must be more than conclusory and must be supported by more than a mere desire to cross-examine"). When a defendant relies on an omission, this heavy burden is even harder to meet. *Tate*, 524 F.3d at 454–55. In that situation, a defendant must provide a substantial preliminary showing that (1) law enforcement made an omission; (2) law enforcement made the omission "knowingly and intentionally, or with reckless disregard for the truth," and (3) the inclusion of the omitted evidence in the affidavit would have defeated its probable cause. *Colkley*, 899 F.2d at 300–01. If the district court finds that a defendant has made this threshold showing, it must hold a Franks hearing to develop evidence on the affidavit's veracity. Id. at 301. If after the hearing the defendant establishes "perjury or reckless disregard" by a preponderance of the evidence and shows that the inclusion of the omitted evidence would defeat the probable cause in the affidavit, "the search warrant must be voided and the fruits of the search excluded." *Franks*, 438 U.S. at 156, 98 S.Ct. 2674 ; *see also Colkley*, 899 F.2d at 300–01.

United States v. Haas, 986 F.3d 467, 474 (4th Cir. 2021).

However, "the Supreme Court in *Franks* gave no guidance concerning what constitutes a reckless disregard for the truth in fourth amendment cases, except to state that negligence or innocent mistake is insufficient.'" *Wilson v. Russo*, 212 F.3d 781, 787 (3d Cir. 2000) (alterations and some internal quotation marks omitted)

(*quoting United States v. Davis*, 617 F.2d 677, 694 (D.C. Cir. 1979). What is clear is that, consistent with the Fourth Amendment, "a police officer cannot make unilateral decisions about the materiality of information, or, after satisfying him or herself that probable cause exists, merely inform the magistrate or judge of inculpatory evidence." *Wilson*, 212 F.3d at 787.

In grappling with this question, the Third Circuit chose to "follow the common-sense approach" of the Eighth Circuit, *id*., and held that "omissions are made with reckless disregard for the truth when an officer recklessly omits facts that any reasonable person would know that a judge would want to know." *Id*. at 783. Critically, almost every Circuit to address this question has held that an inference of recklessness can be made based on the materiality of the omitted information. *See e.g., United States v. Jacobs*, 986 F.2d 1231, 1235 (8th Cir.1993) (inferring reckless disregard based on the "highly relevant" nature of the omitted information); *United States v. Reivich*, 793 F.2d 957, 961 (8th Cir.1986) (noting inference permissible when omission would have been "'clearly critical'" to the issuing judge's probable cause determination) (*quoting United States v. Martin*, 615 F.2d 318, 329 (5th Cir.1980)); *Burke v. Town of Walpole*, 405 F.3d 66, 81 (1st Cir. 2005) (inference permitted "'where the omitted information was critical to the probable cause determination.'"(*quoting Golino v. City of New Haven*, 950 F.2d 864, 871 (2d Cir.1991); *citing Wilson*, 212 F.3d at 783); *accord Madiwale v. Savaiko*, 117 F.3d 1321, 1327 (11th Cir.1997); *DeLoach v. Bevers*, 922 F.2d 618, 622 (10th Cir.1990).

One court surveying the authority on this issue noted that "the First, Second, Third, Fifth, Eighth, Tenth, and Eleventh circuits instruct courts assessing a defendant's request for a *Franks* hearing to infer that an affiant's omission was reckless if the omitted material was "clearly critical" to the finding of probable cause. The Ninth Circuit has also adopted this approach, albeit in an unpublished opinion. *See United States v. Hayes*, Nos. 87–5164, 87–5166, and 87–5168, 1993 WL 515508, at *2 (9th Cir. Dec. 10, 1993) ("recklessness may be inferred 'where the omitted information was clearly critical to the probable cause determination' " (some internal quotation marks omitted) (quoting *Rivera v. United States*, 928 F.2d 592, 604 (2d Cir.1991))." *U. S. v. Ali*, 870 F. Supp. 2d 10, 29 n.23 (D.D.C. 2012).

The case of *United States v. Glover*, 755 F.3d 811, 815 (7th Cir. 2014) demonstrates the importance of employing an inference of recklessness when critical facts are omitted from a search warrant affidavit. There, the case agent obtained a search warrant based on information from "Doe," who "had been an informant for the Chicago police for six years. He had been affiliated with a gang. He had fourteen criminal convictions, including four for crimes committed while he was working as an informant. On two prior occasions, Doe had used aliases when questioned by police officers. Doe had also received payment for providing information to the police in the past." *Id.* This information was all omitted from the affidavit in support of the search warrant. The Seventh Circuit held that "the omitted credibility information was clearly material" and that "[a]n officer's omission from the probable cause affidavit of known and substantial adverse

information about the informant's credibility is sufficient to support a reasonable inference of recklessness, requiring that Glover's request for a Franks hearing be granted." *United States v. Glover*, 755 F.3d 811, 820 (7th Cir. 2014).

In the present case, Sarah, like the informant in *Glover*, had a criminal history, had committed crimes while she was working as an informant and had lied to police and used an alias when questioned by officers in another matter while working as an informant in this case. As the *Glover* court concluded, these are material omissions and that should have been considered as part of the Fourth Circuit's intentionality evaluation. In the words of the Eighth Circuit, these are "facts that any reasonable person would know that a judge would want to know." *United States v. Jacobs*, 986 F.2d 1231, 1235 (8th Cir.1993). By refusing to engage in a materiality analysis and thereby not determining whether a reasonable inference of recklessness exists, the Fourth Circuit has established itself as an outlier amongst the Circuits. Had the Fourth Circuit conducted such an analysis, it could have concluded that the omitted information constituted "substantial adverse information about the informant's credibility" that supported a reasonable inference of recklessness, requiring that Mr. Haas's request for a Franks hearing be granted.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari in this case.

Respectfully submitted,

_____/s/_____

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Dated: July 28, 2021

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4077

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RICHARD TODD HAAS,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert E. Payne, Senior District Judge. (3:16-cr-00139-REP-1)

Argued: October 29, 2020 Decided: January 27, 2021

Before WILKINSON, HARRIS, and RICHARDSON, Circuit Judges.

Affirmed in part, vacated in part, and remanded by published opinion. Judge Richardson wrote the opinion, in which Judge Wilkinson and Judge Harris concurred.

ARGUED: William Jeffrey Dinkin, WILLIAM J. DINKIN, PLC, Richmond, Virginia, for Appellant. Heather Hart Mansfield, OFFICE OF THE UNITED STATES ATTORNEY, Richmond, Virginia, for Appellee. **ON BRIEF:** G. Zachary Terwilliger, United States Attorney, Alexandria, Virginia, Brian R. Hood, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Richmond, Virginia, for Appellee.

RICHARDSON, Circuit Judge:

Richard Haas was convicted of attempted sex trafficking of a minor and three child-pornography offenses. He argues on appeal that the district court erred in denying a *Franks* hearing to challenge the veracity of law enforcement's declarations in two warrant affidavits. *See Franks v. Delaware*, 438 U.S. 154 (1978). He also contends that the district court wrongly permitted the attempted-trafficking count to go to the jury and incorrectly applied two Guideline enhancements during his sentencing. We affirm Haas's convictions. But we vacate his sentence because one of those enhancements, a four-level increase under § 2G2.1, should not have applied.

I. Background

A. The sex-crimes investigation

In 2016, Haas arranged a sexual encounter with Sarah[1] at his home after seeing her Backpage.com advertisement. This was not the first time that Haas had met Sarah. More than four years earlier, Haas had paid Sarah for sex several times, but the two had lost touch. The last time Haas had seen Sarah, he told her that he liked younger women and he "wanted to talk more about it and see if [Sarah] was interested in that the next time [they] m[]et." J.A. 622.

So when Haas met up with Sarah in 2016, he asked if she remembered their last conversation and was interested in "what he was talking about last time." J.A. 625. Sarah told Haas that she was interested. But little did Haas know, Sarah had agreed because she

[1] We refrain from providing a surname to protect her privacy.

intended to report Haas to law enforcement. Haas then opened his laptop and showed her photos of young children performing sexual acts in various stages of undress. Sarah testified that she saw "probably like 1,500" photos and that the children in the photos appeared to range from age 4 to 12. J.A. 627.

After meeting with Haas, Sarah reached out to the FBI and was put in contact with Special Agent Gonzalez. The agent met with Sarah, and she told him about her encounters with Haas. To corroborate her statement, the FBI asked her to identify a photograph of Haas and of his residence. The agents also verified that the phone number Sarah provided was linked to Haas and that he had owned the house that Sarah identified until it was later sold. Sarah told Agent Gonzalez of her prior prostitution-related conviction, and Agent Gonzalez knew that she was on probation, although he did not know for what offense.

After meeting with the FBI, Sarah told Haas a made-up "story about a woman [she] knew in Baltimore" who "had children that she could bring down from Baltimore for [Haas] to photograph and . . . engage in sexual things with." J.A. 634. After hearing this story, Haas texted and called Sarah several times to ask about procuring the young girls to create child pornography.

Sarah then arranged to meet Haas in person so that he could give her $100 to obtain nude pictures of the children from Baltimore. But on her way to that meeting, Sarah was pulled over by Henrico County police officers. When she saw the police car's flashing lights, she pulled into the grocery store parking lot where she had planned to meet Haas, jumped out of her car, and ran to his car. Haas gave her $100, and she promised that she would get the photos soon.

Upon returning to her car, Sarah was met by the police, who asked for her driver's license. Sarah's license had been suspended so she gave the officer her sister's name instead of her own. She received three tickets in her sister's name. A week later, Sarah met with the FBI agent again. During this meeting, she admitted that she had lied to the Henrico County police about her identity and "that she wanted to take care of it." J.A. 143–44. The agent reached out to the Henrico County Police Department and arranged to drive Sarah to her hearing a few days later so that she could resolve the false-identity issue. At that hearing, Sarah was charged with providing false information to a law-enforcement officer and held in jail without bail.

When Sarah was released two weeks later, the FBI gave her a recording device to record her phone calls with Haas. She recorded two phone calls. During the second call, the two discussed getting the two young girls from Sarah's "friend" from Baltimore:

> HAAS: You need to f****** hook it up, girl.
>
> [Sarah]: Alright, awesome, we can do that.
>
> HAAS: Need to hook it up, man.
>
> [Sarah]: What's the um, what's the range that you like?
>
> HAAS: Um, it ain't so much me as it is like other, but you know, around like exactly what you were saying before, you know, give or take a little bit, you remember what you were talking about before? That is, that is like the most.
>
> [Sarah]: I remember I said I had a 12 and a 8[.]
>
> HAAS: Yeah that's, the lower side of that is definitely better.

J.A. 371. Shortly after this phone call, the FBI learned that Haas had been accused of molesting an eleven-year-old girl. The investigation was cut short, and Agent Gonzalez prepared an application for a search warrant seeking evidence of child-pornography offenses.

B. The search warrant, search, and proceedings below

The search warrant for Haas's residence and personal vehicle was approved by a federal magistrate judge. And the agents executed the warrant at Haas's home the next day, seizing two laptops. Haas had left for work, so the agents traveled to his workplace and found him sitting in his work truck. Haas was arrested on a state warrant for the sexual battery of the eleven-year-old, and during a protective sweep of the truck, an agent saw a laptop bag containing a third laptop. Agent Gonzalez then obtained a second search warrant for the truck and seized the laptop. Neither warrant affidavit included information about Sarah's criminal history or recent encounter with the Henrico County police.

After Haas was indicted, he sought to suppress the evidence seized from the truck. He argued that the second search warrant lacked probable cause and requested a *Franks* hearing. The district court held a probable-cause hearing, during which Agent Gonzalez testified. Based on this hearing, the district court issued an opinion denying both the suppression motion and the request for a *Franks* hearing. *See United States v. Haas*, No. 3:16CR139, 2017 WL 1712521, at *1 (E.D. Va. May 2, 2017). Although the district court found that the warrant lacked probable cause of a nexus between Haas's home laptop, on which Sarah had seen child pornography, and Haas's work laptop found in the truck, it held

that the evidence collected under the warrant should not be suppressed under *Leon*'s good-faith exception. *Id.* at *10.

More than a year later, Haas filed a second motion to suppress and request for a *Franks* hearing, this time challenging the first search warrant for his residence and personal vehicle. The two warrant affidavits were identical, except that the second mentioned the laptop seen in the truck during Haas's arrest. *Compare* J.A. 45–81 (second warrant affidavit), *with* J.A. 273–309 (first warrant affidavit). The district court held another hearing and issued an opinion that again denied suppression and a *Franks* hearing. *United States v. Haas*, No. 3:16CR139, 2018 WL 4040171, at *1 (E.D. Va. Aug. 23, 2018).

After a trial, the jury convicted Haas of attempted sex trafficking of a minor, receipt of child pornography, and possession of child pornography. Considering Haas's Guidelines range, the district court imposed a life sentence. Haas timely appealed, and we have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a)(2).

II. Discussion

A. *Franks* hearing

Haas twice moved for a *Franks* hearing to determine whether facts about Sarah's credibility were intentionally or recklessly omitted from the first and second warrant affidavits. The district court denied both motions, relying on the same analysis for both warrants. *See, e.g.*, *Haas*, 2018 WL 4040171, at *1–2 (written denial of second motion). We assess de novo whether Haas provided enough evidence to be entitled to a *Franks* hearing. *United States v. Tate*, 524 F.3d 449, 455 (4th Cir. 2008).

"A *Franks* hearing provides a criminal defendant with a narrow way to attack the validity" of a search-warrant affidavit. *United States v. Moody*, 931 F.3d 366, 370 (4th Cir. 2019). Along with affirmative false statements, "*Franks* protects against omissions that are designed to mislead, or that are made in reckless disregard of whether they would mislead, the magistrate." *United States v. Colkley*, 899 F.2d 297, 301 (4th Cir. 1990) (emphasis omitted).

To obtain a *Franks* hearing, a defendant must make a "substantial preliminary showing" to overcome the "presumption of validity with respect to the affidavit supporting the search warrant." *Moody*, 931 F.3d at 370 (citations and quotation marks omitted); *see also Franks*, 438 U.S. at 171 (defendant's "attack must be more than conclusory and must be supported by more than a mere desire to cross-examine").[2] When a defendant relies on an omission, this heavy burden is even harder to meet. *Tate*, 524 F.3d at 454–55. In that situation, a defendant must provide a substantial preliminary showing that (1) law enforcement made an omission; (2) law enforcement made the omission "knowingly and intentionally, or with reckless disregard for the truth," and (3) the inclusion of the omitted evidence in the affidavit would have defeated its probable cause. *Colkley*, 899 F.2d at 300–01. If the district court finds that a defendant has made this threshold showing, it must hold a *Franks* hearing to develop evidence on the affidavit's veracity. *Id.* at 301. If after the

[2] Both of the district court's opinions purport to deny Haas's request for a *Franks* hearing, *Haas*, 2017 WL 1712521, at *1; *Haas*, 2018 WL 4040171, at *1–2, but they incorrectly state the burden of persuasion as "preponderance of the evidence," rather than "substantial preliminary showing," *Haas*, 2017 WL 1712521, at *7; *Haas*, 2018 WL 4040171, at *2. This error is subject to a harmlessness review under Federal Rule of Criminal Procedure 52.

hearing the defendant establishes "perjury or reckless disregard" by a preponderance of the evidence and shows that the inclusion of the omitted evidence would defeat the probable cause in the affidavit, "the search warrant must be voided and the fruits of the search excluded." *Franks*, 438 U.S. at 156; *see also Colkley*, 899 F.2d at 300–01.

Several of Haas's claims fail at the outset. Haas contends that the warrant affidavits omitted three categories of information: (1) information about Sarah's criminal history, including that she was on probation during the relevant time, was arrested for providing a false name to Henrico County police during a traffic stop while working on Haas's case, and had previously been arrested for a prostitution-related offense; (2) information about Sarah's reliability as a confidential informant, including the (unidentified) outcomes that resulted from her prior work with the FBI; and (3) corroborating evidence of her claim that she saw child pornography on Haas's laptop.

Haas's second argument about Sarah's reliability is "conclusory" because he does not identify specific information, such as the actual outcomes of Sarah's prior work as an FBI informant, that was omitted from the affidavits. *Franks*, 438 U.S. at 171. And conclusory allegations fail. *See Moody*, 931 F.3d at 371 (A "defendant must provide facts—not merely conclusory allegations—indicating that the officer subjectively acted" improperly.). If these unidentified "outcomes" were known and consistently showed that Sarah provided misinformation, they could have formed the basis to grant a *Franks* hearing. But without that, we conclude that Haas's second argument did not warrant a *Franks* hearing.

The third purported omission, additional corroborating evidence, fails for a more fundamental reason. At its core, this is an argument that the warrant affidavits *lacked* probable cause, not that the omitted material was intentionally or recklessly omitted and would have *negated* probable cause. There was no additional corroborating evidence that the affiant could include that would have "defeat[ed] probable cause for arrest," as corroborating evidence could have only strengthened the affidavit. *Colkley*, 899 F.2d at 301. Instead, Haas is arguing that the affidavits did not present enough evidence to meet the probable-cause standard. But the presence (or absence) of probable cause is not the proper subject of a *Franks* hearing.

This leaves us with Haas's first category of omissions: various aspects of Sarah's criminal history, including her encounter with the Henrico County police.[3] But "[a]n affiant cannot be expected to include in an affidavit every piece of information gathered in the course of an investigation" so the "mere fact" that the agent did not include every piece of information known about Sarah in the affidavits "does not taint the[ir] validity." *Id.* at 300–01 (quoting *United States v. Burnes*, 816 F.2d 1354, 1358 (9th Cir. 1987)). Instead, to satisfy *Franks*'s intentionality prong, law enforcement must have omitted the information to mislead the magistrate judge or in reckless disregard of whether it would be

[3] Haas tries to argue that the agent omitted the fact that Sarah was on probation for the commission of a *felony* offense from the warrant affidavits. But when he swore out the affidavits, the agent only knew that Sarah was on probation for a prior offense; he did not know whether it was a misdemeanor or felony because he had not yet conducted a criminal background check. So the most Haas can claim that the agent should have included in the affidavits is the fact that Sarah was on probation for an unidentified offense during the time of the investigation.

misleading. *Tate*, 524 F.3d at 455; *Colkley*, 899 F.2d at 301. An officer acts with reckless disregard when she fails to inform the magistrate of facts she subjectively knew would negate probable cause. *Miller v. Prince George's Cnty.*, 475 F.3d 621, 627 (4th Cir. 2007). And the mere fact that information was omitted from an affidavit cannot alone show recklessness or intentionality. *United States v. Shorter*, 328 F.3d 167, 171 (4th Cir. 2003).

Haas relies on our decision in *United States v. Lull*, 824 F.3d 109 (4th Cir. 2016).[4] There law enforcement used an informant to make a controlled buy from the defendant. *Id.* at 111–12. At the end of the deal, the informant failed to return $20 of the buy money. *Id.* at 112. The officers searched him and found the missing $20, at which time law enforcement "immediately determined that the informant was not reliable and terminated" his informant status. *Id.* Law enforcement did not "think it would be an ethical thing to do, to use someone as a confidential informant knowing full well [he] had stolen from" them. *Id.* (alteration in original). Later that evening, the informant was arrested on a felony charge of obtaining property under false pretenses. *Id.* Right after the arrest, the case investigator submitted an affidavit to get a search warrant for Lull's residence, relying in part on the buy, but failed to disclose the informant's actions. *Id.* at 112–13.

After Lull challenged the affidavit, the district court held a *Franks* hearing. *Id.* at 114. The district court found that the investigator's omission of the incident did not satisfy *Franks*'s intentionality requirement and denied the motion to suppress. *Id.* We reversed.

[4] Although *Lull* applied the higher preponderance-of-the-evidence standard because we were addressing a *Franks* motion to suppress, its principles still guide us.

Id. at 120. We determined that the investigator was reckless in omitting the relevant information about the informant's credibility, crediting four facts established during the *Franks* hearing:

> (1) the decisiveness with which the Sheriff's Office acted in discharging and arresting the informant;
> (2) [the affiant's] knowledge of the consequences of the informant's crime;
> (3) the temporal proximity of the arrest to the decision to omit the information from the affidavit; and
> (4) the obvious impact of the informant's misconduct on any assessment of his reliability.

Id. at 116.

The district court properly found *Lull* distinguishable. Our case differs in four important respects. First, although Sarah's lie to the Henrico County police occurred in temporal proximity to the Haas investigation, the lie did not concern the investigation itself. By contrast, in *Lull*, the informant's lie about the missing $20 concerned the controlled buy that his testimony was to establish. *See Lull*, 824 F.3d at 116 (crediting "the obvious impact of the informant's misconduct on any assessment of his reliability"). Second, *Lull*'s holding hinged on the informant's dishonesty to the warrant affiant himself, while here there is no evidence that Sarah was anything but honest to the agent about the false-identity incident. In fact, Sarah came clean to the agent the next time she saw him and expressed that she wished to resolve things with the Henrico County police. Third, Sarah's misconduct did not cause the FBI to determine that she was unreliable and discharge her from her duties as an informant, as the Sheriff's Office did in *Lull*. *See Lull*, 824 F.3d at 112; *id.* at 116 (crediting "the decisiveness with which the Sheriff's Office acted in discharging and arresting the informant"). And last, the agent did not submit the first

warrant affidavit to the magistrate judge until a month and a half after Sarah's encounter with the Henrico County police, unlike the investigator in *Lull* who submitted the affidavit on the same day that the informant was terminated and arrested. *Id*. at 116 (crediting "the temporal proximity of the arrest to the decision to omit information from the affidavit"). This gave the agent more time to evaluate Sarah's credibility after the incident and before filing the warrant affidavits.

Haas also argues that we should find that the agent acted at least recklessly in omitting Sarah's criminal history from the affidavits because a "reasonable officer" would have known that the omission of witness credibility information violated clearly established precedent. But that is not the test for determining whether an officer has acted recklessly in omitting information from a warrant affidavit, and Haas provides no precedent to the contrary. The Supreme Court has held that "[a]llegations of negligence . . . are insufficient" to require a *Franks* hearing, *Franks*, 438 U.S. at 171, and our caselaw has considered the affiant's subjective state of mind in assessing this prong, *see Colkley*, 899 F.2d at 301 ("The most that the record here reveals about Moore's failure to include the photospread information is that he did not believe it to be relevant to the probable cause determination."). Haas presented no evidence that the agent subjectively knew that his failure to include Sarah's criminal history in the warrant affidavits would mislead the magistrate, and indeed, the record itself points to the opposite conclusion. *See* J.A. 143–44 (explaining that he did not include Sarah's encounter with the Henrico County police in the affidavits because he "didn't know [he] was obligated to include it"). And nothing

about Sarah's unrelated criminal history so undermined her credibility that we otherwise question the agent's subjective intent.

Because Haas failed to make a substantial preliminary showing that the agent acted with the requisite intent in omitting Sarah's criminal history from the warrant affidavits, we affirm the district court's denial of Haas's requests for a *Franks* hearing.[5] As we resolve this case at the first prong of the *Franks* analysis, we need not consider whether the purported omissions were material to the affidavits' probable cause.

B. Motion for judgment of acquittal

At the close of the evidence at trial, Haas moved for an acquittal on all counts. The district court denied the motion, noting for the attempted-trafficking count that "there is clearly a credibility question that stands between conviction and acquittal. If the jury believes [Sarah], then there's ample evidence to convict. If they do not believe her, then they may acquit him." J.A. 837–38. The jury found him guilty, and Haas now appeals the denial of his motion for acquittal on the attempted-trafficking count, which we review de novo. *United States v. Wolf*, 860 F.3d 175, 194 (4th Cir. 2017).

A jury's guilty verdict must be upheld if, "viewing the evidence in the light most favorable to the government, substantial evidence supports it." *Id.* (quoting *United States v. Kiza*, 855 F.3d 596, 601 (4th Cir. 2017)). "[S]ubstantial evidence is evidence that a

[5] We also affirm the district court's denial of suppression based on the *Leon* good-faith exception. The good-faith exception to the Fourth Amendment's exclusionary rule does not apply to warrants issued based on deliberately or recklessly false affidavits. *United States v. Leon*, 468 U.S. 897, 914 (1984). But because we have held that neither warrant was issued based on a deliberately or recklessly false affidavit, this exception does not apply, and Haas's argument to the contrary fails.

reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *United States v. Burgos*, 94 F.3d 849, 862 (4th Cir. 1996) (en banc). A defendant contending that there was insufficient evidence to support his guilty verdict "must overcome a heavy burden." *Wolf*, 860 F.3d at 194 (quoting *United States v. Hoyte*, 51 F.3d 1239, 1245 (4th Cir. 1995)). So "[r]eversal for insufficient evidence is reserved for the rare case where the prosecution's failure is clear." *Id.* (quoting *United States v. Ashley*, 606 F.3d 135, 138 (4th Cir. 2010)).

Haas was charged with "knowingly attempt[ing] to recruit, entice, solicit and obtain by any means" a person, knowing or in reckless disregard of the fact that she was younger than age eighteen and would "be caused to engage in a commercial sex act" in violation of 18 U.S.C. §§ 1591 and 1594. J.A. 475. To sustain this attempted-sex-trafficking-of-a-child conviction, the government must have proven that (1) Haas knowingly attempted to recruit, entice, obtain, or solicit by any means a person, (2) Haas knew or recklessly disregarded that the person was under the age of eighteen and would be caused to engage in a commercial sex act, and (3) the defendant's conduct was in or affected interstate commerce. Haas only challenges the sufficiency of the evidence on the first element, attempt.

To convict a defendant of attempt, the government must prove beyond a reasonable doubt that the defendant (1) had "culpable intent" to commit the substantive crime and (2) took a "substantial step towards completion of the crime that strongly corroborates that intent." *United States v. Engle*, 676 F.3d 405, 419–20 (4th Cir. 2012). Accepting that he possessed the "culpable intent," Haas argues that his conduct did not constitute a

"substantial step" in furtherance of sex trafficking a minor. A substantial step "need not be the last possible act" toward the crime's commission but must be more than "[m]ere preparation for the commission of a crime." *United States v. Pratt*, 351 F.3d 131, 136 (4th Cir. 2003). While words and discussions might be considered preparations for most crimes, the very nature of a sex-trafficking-of-a-minor violation—recruiting, enticing, and soliciting a minor—depends on the use of words and discussions. *Engle*, 676 F.3d at 423. So while the line between attempt and preparation is fact-intensive, speech alone will often constitute a substantial step in furtherance of a § 1591 violation that is strongly corroborative of culpable intent. *See id.*

A jury could conclude that Haas's words and discussions stepped well over that line. Through his discussions with Sarah, Haas "recruit[ed]," "entice[d]," and "solicit[ed]" individuals whom he believed were under the age of eighteen knowing that they would be caused to engage in a commercial sex act. § 1591; *cf. United States v. Clarke*, 842 F.3d 288, 297–98 (4th Cir. 2016) (explaining that "communications with an intermediary aimed at . . . enticing . . . a minor to engage in sexual activity fit within [the] common understanding of a criminal attempt" (quoting *United States v. Roman*, 795 F.3d 511, 517 (6th Cir. 2015))). He contacted Sarah multiple times to ask if she knew of any children he could photograph, and upon hearing of the fictitious Baltimore children, expressed interest in obtaining photos of them and procuring them to make child pornography. Haas later gave Sarah $100 to procure nude pictures of the children and, in a recorded phone call, urged Sarah to "definitely hook [a trip to Baltimore to get the children] up, man, I'm serious" and "[g]et me some pictures too, man, because I can like set it up to where we can

make some money beforehand," J.A. 371; *see also id.* ("[T]he lower side of [8 and 12] is definitely better."); J.A. 372 ("[H]ook that s*** up, dude, and make some money, man.").

Haas's words strongly corroborated his intent to recruit, entice, or solicit children to engage in commercial sex acts. And so there is no doubt that substantial evidence supported his attempt conviction.

C. Sentencing Guidelines enhancements

The district court applied two Guideline enhancements that Haas challenges on appeal. The first was a four-level enhancement under § 2G2.1(b)(1)(A) because one of the fictitious minors Haas attempted to traffic had "not attained the age of twelve years." The second was a five-level enhancement under § 4B1.5(b) for being a repeat and dangerous sex offender against minors based on his repeated sexual abuse of the eleven-year-old girl. When evaluating a district court's Guidelines calculations, we review factual findings for clear error and legal conclusions de novo. *United States v. Strieper*, 666 F.3d 288, 292 (4th Cir. 2012).

1. Definition of "minor" in § 2G2.1

A defendant convicted of attempted sex trafficking receives a four-level enhancement under the Guidelines if the offense "involved a minor who had [] not attained the age of twelve years." U.S.S.G. § 2G2.1(b)(1). The district court applied this enhancement because one of the fictitious minors Haas solicited Sarah to procure was eight years old. Haas argues that the enhancement applies only if the minor was real, not fictitious.

The application note to § 2G2.1(b)(1) defines "minor" to mean:

> (A) an individual who had not attained the age of 18 years;
>
> (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or
>
> (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

U.S.S.G. § 2G2.1 cmt. n.1 (paragraph breaks added). The government argues that this case falls within subparagraph (B), with Sarah standing in the shoes of law enforcement as a de facto law enforcement agent. In the alternative, the government contends that subparagraph (A) applies because a fictitious minor can support applying the enhancement when the offense of conviction is *attempted* sex trafficking. The district court refused to apply subparagraph (B) but found that subparagraph (A) applied because Haas was "attempting to obtain a real child." J.A. 1007–08.

But the definition of "minor" in subparagraph (A) does not include fictitious individuals. We interpret the Guidelines "using standard canons of statutory interpretation," *United States v. Medina-Campo*, 714 F.3d 232, 236 (4th Cir. 2013), which caution against interpreting this provision as the district court did. The canon against superfluity, *see Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 110–11 (2012), warns against reading the term "individual" in subparagraph (A) to include both real and fictitious individuals, as this would render the modifying phrase "fictitious or not" in subparagraph

(B) superfluous.[6] And the canon of *expressio unius est exclusio alterius* (expressing one item of an associated group excludes another left unmentioned) advises that when language is used in one part of a Guidelines provision and not in another, the exclusion is presumed intentional. *United States v. Curtis*, 934 F.2d 553, 556 (4th Cir. 1991); *see also Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 629 (2013). Because the term "individual" is modified in subparagraph (B) by the phrase "fictitious or not," while the same modifier is not present in subparagraph (A), we must presume that the exclusion was intentional. *See United States v. Fulford*, 662 F.3d 1174, 1181 (11th Cir. 2011). The government's argument that an attempt crime demands a different reading of this provision is not supported by the Guidelines' text. Accepting that argument would require us to rewrite the Guidelines to bring about a certain result. We, like other circuits that have addressed this issue, decline to do so. *See id*. at 1178; *United States v. Vasquez*, 839 F.3d 409, 413 (5th Cir. 2016).

Likewise, the term "law enforcement officer" in subparagraph (B) does not naturally include private citizens working with law enforcement. If the Guidelines Commission had wanted this term to be read broadly, it was more than capable of including such language. But without broadening language, we construe terms in the Sentencing Guidelines according to their ordinary meaning. *Chapman v. United States*, 500 U.S. 453, 461–62

[6] If the term "individual" unambiguously included fictitious victims, we would accept that plain meaning. *See Kawashima v. Holder*, 565 U.S. 478, 486–87 (2012). But it does not. *See Individual*, 7 OXFORD ENGLISH DICTIONARY 880 (2d ed. 1989) ("A human being, a person.").

(1991). The term 'law-enforcement officer' means a "person whose duty is to enforce the laws and preserve the peace." BLACK'S LAW DICTIONARY 1058 (11th ed. 2019); *id.* (defining "law enforcement" as "[p]olice officers and other members of the executive branch of government charged with carrying out and enforcing the criminal law"); *see also Officer*, MERRIAM-WEBSTER 861 (11th ed. 2011). So because the ordinary meaning of the term 'law enforcement officer' does not include private-citizen agents with no semblance of official authority, we cannot read this provision to encompass Sarah's conduct.

As a result, because neither subparagraph (A) or (B) of the application note defining "minor" for § 2G2.1 encompass a situation in which a private citizen represents that a fictitious child could be provided to engage in sexual conduct, the district court erred in applying this enhancement.

2. Repeat-offender enhancement in § 4B1.5

A five-level enhancement is applied "[i]n any case in which the defendant's *instant offense of conviction* is a covered sex crime, neither § 4B1.1 nor subsection (a) of this guideline applies, and the defendant engaged in a pattern of activity involving prohibited sexual conduct." U.S.S.G. § 4B1.5(b) (emphasis added). Haas argues that this enhancement was improperly applied in his case because only one of his convictions was a "covered sex crime" and the others were not.

Under the definition of "covered sex crime" provided by U.S.S.G. § 4B1.5, Haas's attempted-sex-trafficking-of-a-minor conviction, 18 U.S.C. § 1591, is a "covered sex

crime," but his child-pornography offenses are not.[7] But Haas argues that the Guidelines first fail to identify which offense is the "instant" offense and then fail to address how to handle multiple offenses of conviction when some are covered and others are not. Because of this ambiguity, he contends that the rule of lenity should apply.

First, the term "instant offense of conviction" unambiguously encompasses convictions on multiple counts. Throughout the Guidelines, "[t]he term 'instant' is used in connection with 'offense,' 'federal offense,' or 'offense of conviction,' as the case may be, to distinguish the violation for which the defendant is being sentenced from a prior or subsequent offense, or from an offense before another court." U.S.S.G. § 1B1.1 n.1(I) (emphasis omitted). By negative inference, this means that the term is not used, as Haas suggests, to distinguish between a single "offense" of conviction and multiple "offense[s]" of conviction. Circuit courts, including our own, have applied the term "instant offense," used in various parts of Chapter 4, where multiple charges are part of the same trial or guilty plea. *See, e.g.*, *United States v. Summers*, 893 F.2d 63, 68 (4th Cir. 1990) (applying

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[7] The application notes in this section define "covered sex crime":

> (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of such title, not including trafficking in, receipt of, or possession of, child pornography, or a recordkeeping offense; (iii) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; or (iv) 18 U.S.C. § 1591; or
> (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (iv) of this note.

U.S.S.G. § 4B1.5 cmt. n.2.

enhancement under § 4A1.1, which includes the term "instant offense," to a case involving multiple gun and weapons convictions); *United States v. Coleman*, 964 F.2d 564, 565–66 (6th Cir. 1992) (not questioning that two convictions could constitute "the instant offense" under § 4B1.1). And an application note to § 4B1.5(a) contemplates that "the instant offense of conviction" can include "more than one count." U.S.S.G. § 4B1.5 cmt. n.3(B) ("In a case in which more than one count of the instant offense of conviction is a felony that is a covered sex crime, the court shall use the maximum authorized term of imprisonment for the count that has the greatest offense statutory maximum, for purposes of determining the offense statutory maximum under subsection (a)."); *cf.* 1 U.S.C. § 1 ("In determining the meaning of any Act of Congress, unless the context indicates otherwise--words importing the singular include and apply to several persons, parties, or things."). We find no reason that the same phrase used in the next subparagraph should be interpreted differently. *Cf. Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 860 (1986) ("The normal rule of statutory construction assumes that 'identical words used in different parts of the same act are intended to have the same meaning.'" (quoting *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934))).

And second, as long as one count is a covered sex crime, the "instant offense of conviction is a covered sex crime" and the enhancement applies. U.S.S.G. § 4B1.5(b); *see United States v. Buchanan*, 59 F.3d 914, 919–20 (9th Cir. 1995) (finding that although one count met the criteria in § 4A1.1 and one did not, both were part of a single "instant offense" under the Guideline); *cf. United States v. Dowell*, 771 F.3d 162, 164, 171 (4th Cir. 2014) (not questioning the application of this enhancement when the defendant was

convicted of both covered and non-covered offenses). Conviction of non-covered offenses in the same trial does not erase the covered sex offense.

Because the structure and context of the Guidelines dispel any ambiguity in the meaning of this term, there is no need to apply the rule of lenity as Haas suggests. *Reno v. Koray*, 515 U.S. 50, 65 (1995) ("The rule of lenity applies only if, 'after seizing everything from which aid can be derived,' we can make 'no more than a guess as to what Congress intended.'" (internal citations omitted)). One count of Haas's "instant offense of conviction" was a covered sex crime, so the enhancement applies, even though Haas was convicted of additional non-covered sex offenses.[8]

* * *

The district court properly disposed of Haas's pretrial motions and correctly permitted the attempted-sex-trafficking-of-a-minor count to go to the jury. So we affirm Haas's convictions. But the district court erred in applying the four-level enhancement under § 2G2.1 during Haas's Guidelines calculations. So we vacate his sentence and remand for resentencing. The judgment below is thus

[8] The district court properly applied this five-level enhancement to the adjusted offense level for his receipt-of-child-pornography count, which is not a "covered sex offense." The Guidelines are applied sequentially. First, the base offense level and appropriate adjustments for each count are calculated under Chapter 2. U.S.S.G. § 1B1.1(a). Then the adjustments and considerations from Chapters 3 and 4 are applied to the highest adjusted offense level, and the defendant's Guideline range is determined by looking to Chapter 5. *Id.* Because Haas's receipt-of-child-pornography count had the highest adjusted offense level after the Chapter 2 adjustments were applied, the five-level enhancement was properly added to that number, even though the receipt count itself was not a "covered sex offense" that triggered application of the enhancement.

AFFIRMED IN PART, VACATED IN PART,
AND REMANDED.

FILED: January 27, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4077
(3:16-cr-00139-REP-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

RICHARD TODD HAAS

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed in part and vacated in part. This case is remanded to the district court for further proceedings consistent with the court's decision.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

APPENDIX B

FILED: March 2, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4077
(3:16-cr-00139-REP-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

RICHARD TODD HAAS

Defendant - Appellant

O R D E R

The court denies the petition for rehearing.

Entered at the direction of the panel: Judge Wilkinson, Judge Harris, and Judge Richardson.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

UNITED STATES OF AMERICA

v. Criminal No. 3:16CR139

RICHARD TODD HAAS,

Defendant.

MEMORANDUM OPINION

This matter is before the Court on DEFENDANT'S MOTION TO SUPPRESS EVIDENCE (ECF No. 14) ("Def's Mtn. to Suppress"). Also included in the Defendant's Motion to Suppress is a request for a *Franks* hearing. (ECF No. 14, #7, FN. 2). For the reasons set forth below, the DEFENDANT'S MOTION TO SUPPRESS EVIDENCE (ECF No. 14) and the request for a *Franks* hearing will be denied.

BACKGROUND

On September 1, 2016, Magistrate Judge Young granted the Government's APPLICATION FOR A SEARCH WARRANT. (ECF No. 14-1, #53). The SEARCH AND SEIZURE WARRANT for the 1995 Ford tractor trailer truck, license plate 26-392, VIN: 1FTYY90V6SVA73472, and a Samsung Galaxy S5, model SM-G900V,90004913336164, related to a violation of 18 U.S.C. § 2252A(2)(a), Possession, Receipt and Distribution of Child Pornography and 18 U.S.C. § 2251,

Production of child pornography. (ECF No. 14-1, #41). In support of its application, the Government, through Special Agent Melvin Gonzales, presented an AFFIDAVIT IN SUPPORT OF AN APPLICATION UNDER RULE 41 FOR A WARRANT TO SEARCH AND SEIZE. (ECF No. 14-1, #54-82)(the "affidavit"). The affidavit's contents are described below:

Agent Gonzales, a member of the Child Exploitation Task Force, conducts investigations involving child sex trafficking, child pornography, and child abductions. Aff. at ¶ 1. Gonzales stated that he had probable cause to believe that a 1995 Ford Tractor Trailer, license plate 26-392, and a Samsung Galaxy S5 telephone, model SM-G900V, contained contraband and evidence of a crime in violation of 18 U.S.C. § 2551 (production of child pornography); 18 U.S.C. § 2251A (selling or buying of children); 18 U.S.C. § 2252 (possession of, knowing access or attempted access with intent to view, child pornography); 18 U.S.C. § 2422 (enticement or coercion of a minor to engage in illegal sexual activity); and 18 U.S.C § 1591 (sex tracking of children). Id. at ¶ 2. The affidavit is based on information provided by FBI Special Agents, FBI Task Force Agents, other law enforcement agents, electronic surveillance conducted by law enforcement agents, and independent investigation conducted by FBI agents as well as computer forensic professionals. Id. at ¶ 4. Gonzales explained, "I have not included each and every fact known to me

concerning that investigation. Instead, I have set forth only the facts that I believe are necessary to establish the necessary foundation for the requested warrant." Id.

A. Contents of the Affidavit Respecting Haas and Child Pornography

The affidavit avers that, "[o]n June 16, 2016, members of the FBI Richmond Child Exploitation Task Force, received information [that] . . . Haas . . . was both interested in and actively producing child pornography." Aff. at ¶ 7. The information was provided by a confidential witness ("CW"), who was an escort to Haas for a period of four years.[1]

CW told the FBI that "Haas advised CW that he had a neighbor who was approximately 12 years old that would come over and perform oral sex on him." Aff. at ¶ 7. CW reported that she and Haas stopped seeing each other shortly after that conversation.

CW relayed that, in May 2016, she and Haas resumed their relationship and met at a residence in Chesterfield County, Virginia. Aff. at ¶ 8.

> During this visit, Haas again brought up his interest in juvenile females. Haas displayed his laptop to CW, which contained images of juvenile females. CW described

[1] The affidavit makes clear that, although CW knew Haas for a period of four years, she only recently resumed her association with him. See Aff. at ¶ 7 ("CW and Haas parted ways shortly after that conversation four years ago.").

> the images as depicting juvenile females between the ages of 5 and 12 in various stages of undress and engaged in sexually explicit acts. CW advised that she was shown between 50 and 100 images of these girls. Haas advised CW that he knew the victims because they lived in the neighborhood. While Haas displayed the images to CW, he masturbated to the photos.

Id. Haas then told CW that he would like her to be "involved in the production of images and videos of child pornography with juvenile females and inquired as to whether CW would be able to help provide these females for such production." Id.

CW identified Haas in a photograph provided by FBI agents and she also provided the agents with Haas's phone number. "FBI agents cross searched [the number provided by CW] with law-enforcement databases and were able to determine that it has been used as a contact number for Haas in law-enforcement investigations." Aff. at ¶ 9.[2] CW told the agents that Haas drove a light-colored Jetta and was able to identify a photo of Haas's residence.

In a meeting on July 21, 2016, CW told FBI agents that she had numerous telephone conversations with Haas. CW also told the agents that Haas "constantly discussed the production of child pornography with CW and requested CW to find an underage female in order to produce child pornography." Aff. at ¶ 10.

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[2] The affidavit does not provide details of the other law enforcement investigations involving Haas.

On August 12, 2016 and August 13, 2016, acting under the authority of the FBI agents, CW recorded two telephone conversations with Haas. Aff. at ¶ 11.[3] CW relayed that, "Haas requested CW to coordinate a meeting between him and an underage female not older than 12 years old." Id. "Haas also requested nude photos of underage females in exchange for money." Id.

B. Contents of the Affidavit Respecting Child Molestation by Haas

"On August, 18, 2016, FBI agents received a complaint from the Richmond Police Department, indicating that Haas had sexually molested an 11-year old female ("CV1") on multiple occasions." Aff. at ¶ 14. CV1 was forensically interviewed and provided the following information: CV1 and her father would go to the Richmond Inn to beg for money. Haas approached CV1's father and gave him $5. He then returned a short time later, gave CV1's father $60, and asked if CV1 could go to his home to babysit. At first, CV1's father refused; however, when Haas asked if CV1 could provide cleaning services, CV1's father agreed. Aff. at ¶ 15.

The affidavit provides that, "[d]uring the initial visit to [Haas's] house . . . [a]t some point, [Haas] asked CV1 to come to the living room where he was sitting on the floor in front of

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[3] The transcripts of these calls were not included in the affidavit.

the couch. [Haas] asked CV1 to lie down on the couch . . . CV1 said that [Haas] pulled her pants down and pushed her shirt up. CV1 sat up and pulled her pants up and attempted to exit the room. [Haas] stopped her and told her to lie back down on the couch." Aff. at ¶ 16.[4] According to CV1, this occurred on at least five separation occasions.

On August 26, 2016, when CV1's guardian was interviewed by the FBI, she told agents that CV1 reported that Haas had given her between $200-$600 every time she had an encounter with him.[5] The guardian reported that the last time CVI saw Haas, sometime in late June 2016, "he picked her up at her brother's residence and sexually abused CV1 in his vehicle." Aff. ¶ 17.

CV1 was unable to identify Haas from a photograph shown to her by law enforcement. Aff. ¶ 19. CV1's guardian obtained Haas's cell phone number from CV1's mother. FBI agents confirmed that the number reported by the guardian was registered to Haas. Aff. ¶ 20. FBI agents confirmed that this

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[4] The affidavit provides that after Haas's first encounter with CV1, Haas drove CV1 back to the Richmond Inn, gave her $200, "and told her to give it to her parents. [He also] told CV1 that she could not tell anyone what he had done or he would be arrested and sent to jail." Aff. at ¶ 16. The affidavit provided additional graphic details regarding the alleged sexual assault against CV1.

[5] It appears from the affidavit that the multiple visits between Haas and CV1 were organized by CV1's mother, not CV1's current guardian.

number had called the Richmond Inn on numerous occasions. Additionally, the number was used for 60 test messages and 100 telephone calls to CV1's mother from May 2016 to July 2016. Aff. ¶ 22.

After receiving the foregoing information about CV1, FBI conducted surveillance on Haas's residence, in North Chesterfield, Virginia and observed Haas depart the residence in his Jetta.[6]

C. Execution of Search Warrant and Haas's Arrest

The FBI obtained a search warrant for Haas's residence on August, 31, 2016 (ECF No. 18-1)(Gov. Exhibit A). When the FBI tried to execute the warrant on September 1, 2016, Haas had already left for work. Aff. ¶ 25. FBI agents then proceeded to Haas's work location and arrested Haas in his work vehicle, a 1995 Ford tractor trailer truck. Haas was arrested pursuant to a Virginia arrest warrant, charging him with aggravated sexual battery of a minor. Id. During the search incident to the arrest, the FBI agents recovered a Samsung Galaxy S5 telephone. During a protective sweep of the tractor trailer vehicle, an FBI agent noticed a laptop bag. "After seeing the laptop bag, the agent ceased his protective sweep and exited the vehicle." Id

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[6] The affidavit reports that during the course of the events described in the affidavit, Haas relocated to a new residence.

A new affidavit, identical to the first,[7] was submitted to the Magistrate Judge in support of a request for a warrant to search Haas's 1995 Ford tractor trailer. Based on the affidavit, the Magistrate Judge issued a search warrant to allow the search of Haas's 1995 tractor trailer and Haas's cell phone. The laptop was seized from the tractor trailer. A forensic examination of the laptop seized from the tractor trailer revealed that Haas had saved approximately 17,000 images of children, including prepubescent children, engaged in sexually explicit conduct.

D. Motion to Suppress Hearing

FBI Agent Gonzales ("Gonzales"), the agent responsible for drafting the affidavit at issue, testified at an evidentiary hearing on the Motion to Suppress. He provided testimony about several topics.

1. History of CW

Agent Gonzales testified that before the case, he did not personally know CW, but he knew that she had served as a confidential witness for the FBI in the Norfolk Division. (ECF No. 26, #230). After CW reported to the FBI that she had seen Haas viewing child pornography on his computer in May 2016, Gonzales corroborated Haas's identity, his address, and his date

[7] The new affidavit did not include information about what, if anything was found during the search of Haas's residence.

of birth. Gonzales also obtained Haas's telephone records which "indicated hundreds of calls between them [Haas and CW] and text messages." Id. at #238. When Gonzales swore out the affidavit, he was aware that CW was on felony probation supervision in the Virginia court system. During the course of the investigation, sometime in July 2016, Gonzales learned from CW that she was on probation. CW told Gonzales that she previously had been arrested for prostitution. Gonzales assumed that CW was on probation for the prostitution offense. Gonzales also testified that, on July 14, 2016, CW told him that she had an encounter with the Henrico County Police one week earlier, and that CW disclosed that she had made a false statement to a Henrico police officer about her identify during that traffic stop.

CW voluntarily provided the information to him and explained that she wanted to set the matter straight. Gonzales then contacted the Henrico Police Department, and the Henrico Commonwealth Attorney's Office agreed to set up a meeting with CW. Gonzales escorted CW to the Henrico Court on July 25, 2016, where she was charged and held in jail without bond. Gonzales again explained that none of the information regarding CW's criminal history, other than the information that she was an escort, was included in the affidavit. Gonzales also testified that before swearing to the affidavit, he did not run a criminal history check of CW.

2. Information about the Laptop

Gonzales testified that CW reported that Haas had viewed the child pornography on his black laptop at home. Gonzales did not include the color of the laptop in the affidavit. Id. at #265. Gonzales explained that CW did not provide any specific identifying marks respecting the laptop.

Gonzales also testified that, upon executing the first warrant at Haas's residence, the FBI located two laptop computers. When asked whether he knew, at the time he was filling out the application for the second warrant whether the two laptops had been seized, Gonzales testified "Probably, yes. Yes. I would say yes." Gonzales explained that the information about the seized laptops was not included in the affidavit for the second warrant.

3. New Arguments

When the Court inquired into the connection between CW's testimony about Haas viewing child pornography on his laptop in his home and Haas's laptop that was found in his work truck, the Government, for the first time, relied on paragraph 36A of the affidavit, which in relevant part states:

> *Probable cause.* I submit that if a computer or storage medium is found in the SUBJECT PROPERTY, there is probable cause to believe those records will be stored on that computer or storage medium, for at least the following reasons: (a) Based on my knowledge, training, and experience, I know

> that computer files or remnants of such files can be recovered months or even years after they have been downloaded onto a storage medium . . . .

The Government explained that "this specific paragraph . . . discusses essentially how long electronic files can be stored, and that deleted files can be recovered by way of forensic techniques. Furthermore, paragraph 28 of the affidavit provides how "[c]omputers and digital technology have dramatically changed the way in which individuals interested in child pornography" view it. The Government argued that this goes to "the probable cause to search essentially any laptop [] found in Mr. Haas's possession." (ECF No. 26, #356).

ANALYSIS AND APPLICATION OF LAW

Haas asserts that the affidavit in support of the search warrant does not supply probable cause because "a reasonably prudent person would not have been justified in believing that the totally-of-the-circumstances surrounding Mr. Haas's alleged crimes suggested that evidence of such crimes might be found on Mr. Haas's computer." (Def's Mot. To Suppress)(ECF No. 14, #34). The Court agrees with the Defendant and finds that the affidavit does not provide probable cause to support a finding that evidence of child pornography would be found on Haas's computer that was located in his tractor trailer. Nonetheless, under the good faith exception, the evidence will not be

suppressed. In making this determination, the Court considers each of the Defendant's relevant arguments as described below.

A. The Affidavit Lacks Probable Cause

The Constitution of the United States provides that "no Warrants shall issue, but upon probable cause." **U.S. Const, amend. IV**. There is no rigid formula for determining probable cause. Instead, courts must make a "practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983). The Supreme Court has held that "great deference" should be given "to a magistrate's determination" of a finding of probable cause. Spinelli v. United States, 393 U.S. 410, 419 (1969).

1. Evidence of Child Molestation Alone is Insufficient for a Finding of Probable Cause for Possession of Child Pornography

Haas argues that the allegations of child molestation included in the affidavit do not support a finding of probable cause to search a laptop computer for child pornography located in his work vehicle. "The eleven year old never claimed that Mr. Haas's computer was connected to the offense being investigated," thus, says Haas, under United States v. Doyle,

allegations of sexual assault cannot create "probable cause to search the electronic devices" of the defendant.

Despite the great deference given to magistrates when making probable cause determinations, certain situations, as a matter of law, preclude a finding of probable cause. In United States v. Church, the Court was confronted with such a situation. Laying out the standard adopted by the Fourth Circuit in United States v. Doyle, 650 F.3d 460, 72 (4th Cir. 2011), the Court held that a warrant to search for child pornography was lacking in probable cause where the warrant was based solely on allegations of child molestation. 2016 WL 6123235, *3 (E.D. Va. 2016); see also United States v. Doyle, 650 F.3d 460, 472 (4th Cir. 2011)("The bulk of the information supplied in the affidavit concerned allegations of sexual assault. But evidence of child molestation alone does not support probable cause to search for child pornography.")

In Church, the Government failed to distinguish its affidavit from the affidavit in Doyle because "none of the additional information provided in the [Church] affidavit bears on the probable cause analysis. The only 'material facts supporting probable cause' offered by [the affidavit] related to child molestation." 2016 WL 6123235, *5.

The exact opposite is true in this case. Rather than rely on allegations of child molestation *alone* to obtain a warrant to

search for child pornography on Haas's electronic devices, the Government instead relied on the information from a witness who saw Defendant viewing child pornography on his personal laptop.

Notwithstanding the fact that other information about child pornography was included in the affidavit, the evidence of child molestation contained in the affidavit need not be ignored in making a probable cause determination. Haas incorrectly argues that, under Doyle, the "information regarding the eleven year old [] bore no relationship to Mr. Haas's computer or the GPS device." (ECF No. 14, # 35). In making this statement, Haas overstates the Fourth Circuit's holding in Doyle.

Although the Fourth Circuit drew a line in Doyle,[8] that line relates to a finding of probable cause to search for child pornography based on affidavits alleging child molestation *alone*. However, Doyle does not stand for the proposition that evidence of child molestation should be ignored when seeking a warrant to search for child pornography. In fact, it would be impermissible to ignore averments in an affidavit that a defendant molested a child when the affidavit also avers that the same defendant viewed child pornography because the Fourth

[8] Doyle has subsequently been applied in other circuits. See Virgin Islands v. John, 654 F.3d 412, 420 (3d Cir. 2011); Dougherty v. City of Covina, 654 F.3d 892, 898 (9th Cir. 2011).

Amendment analysis should be based on the totality of circumstances.

The Court need not determine whether probable cause to search the tractor trailer for child pornography was proper based solely on the allegations of child molestation contained in the affidavit because that is simply not the factual record presented here. Instead, the Court will consider the information in the affidavit about child molestation as a part of the overall probable cause analysis in light of the information contained in the affidavit about Haas's use and continued interest in child pornography.

2. The Affidavit Provides Sufficient Information to Assess the Credibility of the Government Witness

Next, Haas asserts that the affidavit "failed to provide any information regarding the reliability or veracity of the cooperating witness." In particular, Haas attacks the background of the government witness CW, noting that CW's criminal history was not included in the affidavit. Additionally, Haas argues that there was no corroborating evidence "regarding pornography on the computer through independent investigation."

a. Credibility and Probable Cause

The "probable cause standard does not 'require officials to possess an airtight case before taking action. The pieces of an

investigative puzzle will often fail to neatly fit, and officers must be given leeway to draw reasonable conclusions from confusing and contradictory information, free of the apprehension that every mistaken search or seizure will present a triable issue of probable cause.'" United States v. Robinson, 275 F.3d 371, 380 (4th Cir. 2001) (quoting Taylor v. Farmer, 13 F.3d 117, 121-22 (4th Cir. 1993)).

In United States v. Moore, the Court explained that there is no one rule that governs the use of informants in the Fourth Circuit. However, the Court of Appeals has "distinguished between an informant who meets face-to-face with an officer, thereby providing the officer with an opportunity to assess his credibility and demeanor and exposing himself to accountability for making a false statement, and cases involving anonymous tipsters." 775 F. Supp. 2d 882, 895-96 (E.D. Va. 2011) (internal citations omitted) (quoting United States v. DeQuasie, 373 F.3d 509, 523 (4th Cir. 2004)); see also United States v. Christmas, 222 F.3d 141, 144 (4th Cir. 2000).

Haas asserts that the only link in the affidavit between him and illegal activity on the computer was provided by CW, and that CW's statements are not reliable because the affidavit failed to establish her reliability or credibility. In making this argument, Haas ignores the holding in Moore. Here, the FBI had several opportunities, as evidenced in the affidavit, to

meet with CW in person. At these meetings, CW identified Haas in photos, provided Haas's cell phone number, and identified Haas's personal vehicle and residence. The FBI could, and did, assess the reliability of the information CW provided from these encounters. Moreover, CW provided recordings of her calls with Haas which the agents were then able to review independently. As the Government explains in its papers, "it is difficult to imagine additional steps the agents could have taken to corroborate CW's credibility." (ECF No. 18, #104).

b. *Franks* Hearing

In challenging the credibility and reliability of CW, Haas also argued that a *Franks* hearing was necessary because the affidavit omitted information about the credibility of CW.[9] At the hearing, the Court denied the request. The Court has

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[9] Haas also argued that a *Franks* hearing was necessary because it was improper for the affidavit to: (1) omit information regarding the discovery of the two laptops at Haas's residence; and (2) omit the transcripts from the recorded calls between CW and Haas. The Court finds that neither omission was intentional. If anything, the information omitted would have served to support the Government's position as to probable cause. Specifically, the presence of two laptops at Haas's home indicates that he possessed multiple electronic devises, including quite possibly, the third laptop later uncovered in his work vehicle. Additionally, the transcripts of the phone calls strongly suggest that Haas was interested in obtaining nude pictures of young children. While the transcript does not include the term "nude" and instead refers to Haas's request for pictures, the affidavit sufficiently describes that CW understood Haas to be requesting pictures of nude children.

reconsidered the issue at Haas's urging and continues to find no basis to warrant a *Franks* hearing.

Pursuant to Franks v. Delaware, 438 U.S. 153 (1988), a defendant may challenge a search warrant by challenging the veracity of the affidavit made to obtain the warrant. "In *Franks*, the Supreme Court developed a two-prong test clarifying what a criminal defendant must show when challenging the veracity of statements made in an affidavit supporting a search warrant. If both prongs are met, the search warrant must be voided and the fruits of the search excluded." United States v. Lull, 824 F.3d 109, 114-15 (4th Cir. 2016) (citing Franks, 438 U.S. at 155-56).

As to the first prong, known as the "intentionality" prong, a defendant must show, by a preponderance of the evidence, that "a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit." Franks, 438 U.S. at 155-56. As to the second prong, the "materiality" prong, a defendant must show, also by a preponderance of the evidence, that, "with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause." Id. at 156.

(i) Defendant has Failed to Show That the Affidavit Included or Failed to Include any Statement with Reckless Disregard for the Truth

The intentionality prong can be applied in cases where affidavits include a false statement, or alternately, where affidavits omit relevant facts. See Lull, 824 F.3d at 114 (discussing United States v. Colkley, 899 F.2d 297, 300 (4th Cir. 1990)). In Lull, the Fourth Circuit considered whether an investigator's omissions in an affidavit were misleading, sufficient to satisfy the intentionality prong under Franks. The Court noted, "[u]nderstandably, the defendant's burden in showing intent is greater in the case of an omission because '[a]n affiant cannot be expected to include in an affidavit every piece of information gathered in the course of an investigation.'" 824 F.3d at 115(internal citations omitted).

In Lull, an informant was used during a control buy and after the buy, the informant lied to the officers and tried to hide $20 from the proceeds of the buy in his underpants. Having lied and stolen from the officers, the sheriff's office immediately terminated the informant's services and subsequently arrested him. Id. at 112. Immediately thereafter, the investigator drafted an affidavit to search Lull's residence, the residence where the control buy occurred. Id. The investigator neither "disclose[d] the informant's theft and subsequent arrest to the state court magistrate," nor did the

affidavit contain information "concerning the informant's reliability or previous experience working as a confidential informant." Id. at 113. The Court of Appeals determined that, by leaving out the information regarding the informant's theft and subsequent arrest, the affidavit did not give the magistrate the opportunity to consider the informant's reliability under the totality of circumstances test.

In this case, Haas believes that the information known to the agents about CW's criminal history, specifically that CW was a convicted felon who was on probation and who had recently been arrested for providing a false statement to the police during a traffic stop, should have been provided in the affidavit. The comparison of CW to the informant in Lull is unjustified. In Lull, the informant lied to the investigators about a drug buy, which served as the basis for the affidavit, thus when the investigator made the decision to omit this theft in the affidavit, it was the investigator's belief that the drug buy was still reliable. In this case, the affidavit fully discloses all relevant conduct between Haas and CW which serves as the basis for the affidavit. The Government explains, "[t]he affiant states up front in the affidavit that CW was an 'escort,' which demonstrates the affiant was not trying to hide the nature of the relationship between CW and the defendant." (ECF No. 20, #167). As to CW's criminal history, there is no

indication that her past offenses had any bearing on her interactions with Haas. At the hearing on the Motion to Suppress, Agent Gonzales testified that, at the time he swore to the affidavit, he did not think it was necessary to run CW's criminal history. He further explained that, although he arranged a meeting between the Henrico Attorney's Office and CW to address the false statement that CW had made to police during a traffic stop, it was CW who willingly disclosed the information to Gonzales and indicated her desire to resolve the issue. CW had informed Gonzales that she was on probation and Gonzales knew that CW was a prostitute. Given the nature of CW's conduct and her forthcoming nature with Agent Gonzales, the agent was not reckless in omitting these facts.

If CW had done something to make the agents question her truthfulness, as did the informant in Lull, providing more information as to her reliability would have been necessary. Here however, CW was forthcoming with the police, correctly identified Haas in photos, and provided his cellphone number to agents, which the agents were able to independently corroborate. CW never once provided information to the agents that they subsequently determined was false. Based on the totality of the circumstances, it was possible for the magistrate to make a determination of the reliability of CW. Thus, unlike Lull, the

witness's statements need not be removed from the affidavit before making a determination of materiality.[10]

3. The Information in the Affidavit Fails to Provide a Nexus between Haas's Laptop in his home, which Allegedly Contained Child Pornography, and a Laptop Found in Haas's Work Tractor Trailer

Haas made several arguments about the connection between the laptop observed by CW in Haas's home and the laptop recovered from his work vehicle at the work site. In particular, he argues that "there was no information in the affidavit to suggest that the computer in the tractor trailer was the same laptop that the CW saw in May 2016. In fact, the laptop in the truck was more likely to be a work computer and less likely to contain child pornography." And, at the hearing on the Motion to Suppress, Haas argued that "[t]here's no evidence that there were [child pornography] images stored or possessed in Mr. Haas's work truck. There's no allegation of that. The CW certainly didn't mention his work truck, nor did the 11-year-old complainant . . . ." (ECF No. 26, # 302-303).

"In determining whether a search warrant is supported by probable cause, the crucial element is not whether the target of the search is suspected of a crime, but whether it is reasonable to believe that the items to be seized will be found in the

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[10] Clearly, the affidavit contained no false statement.

place to be searched. *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 & n. 6, 98 S.Ct. 1970, 1976-77 & n. 6, 56 L.Ed.2d 525 (1978)." United States v. Lalor, 996 F.2d 1578, 1582 (4th Cir. 1993). "[T]he nexus between the place to be searched and the items to be seized may be established by the nature of the item and the normal inferences of where one would likely keep such evidence." United States v. Lalor, 996 F.2d 1578, 1582 (4th Cir. 1993) (citing United States v. Anderson, 851 F.2d 727, 729 (4th Cir. 1988)). "[P]robable cause can be inferred from the circumstances, and a warrant is not invalid for failure to produce direct evidence that the items to be seized will be found at a particular location." Id. at 1582.

In Lalor, the Court determined that an affidavit was devoid of a basis by which a magistrate could make a probable cause determination. The Court explained: "The affidavit does not describe circumstances that indicate such evidence was likely to be stored at Lalor's residence. Nor does the affidavit explain the geographic relationship between the area where the drug sales occurred and [Defendant's residence]." Id. at 1583. "In short, the magistrate was given no basis for making a judgment concerning this aspect of probable cause." Id.

An identical nexus problem exists from the record here. There was no basis on which to conclude that evidence of child pornography would be found on a laptop in Haas's tractor

trailer, a work vehicle located at his place of work. Paragraph 8 of the affidavit provides, in relevant part, "Haas displayed his laptop to CW, which contained images of juvenile females. CW described the images as depicting juvenile females between the ages of 5 and 12 in various stages of undress and engaged in sexually explicit acts. CW advised that she was shown between 50 and 100 images of these girls." All of this conduct occurred in Haas's residence. There is no mention of illegal child pornography on a laptop in Haas's work vehicle. In fact, the affidavit hardly discusses the work vehicle. The affidavit describes that Haas "has been observed driving to his work location," Haas was arrested while at work, in the "driver's seat of his work vehicle, 1995 Ford tractor-trailer truck" and "during a protective sweep of the tractor-trailer truck, an FBI agent observed a [] laptop bag . . ." See Aff. ¶ 25 (ECF No. 14-1, #69).

Additionally, the Court agrees that nothing in the record shows whether the laptop in the tractor trailer was in fact the same laptop CW had seen Haas using in his residence some months earlier. The affidavit contained no description of the laptop witnessed by CW, therefore, there was no way to find probable cause that evidence of child pornography would be found on the laptop seen in the tractor trailer.

At the hearing on the Motion to Suppress, the Government, for the first time, presented an argument that paragraph 36A of the affidavit, which discusses "Probable Cause", and paragraph 28 of the affidavit, which discusses how computer sophistication has changed how these types of crimes are permitted, support a finding of probable cause that evidence of child pornography would be found in a laptop in Haas's tractor trailer. In the SUPPLEMENTAL RESPONSE BRIEF OF THE UNITED STATES (ECF No. 28), in further support of this argument, the Government points to the following language in the affidavit:

> Individuals who possess child pornography often maintain their collections that are in a digital or electronic format in a safe, secure and private environment, such as a computer and surrounding area. These collections are often maintained for several years and are kept close by, usually at the collector's residence, or inside the collector's vehicle, to enable the individual to view the collection, which is valid highly.

Aff. at ¶ 27. The Government then explains that, when agents saw the laptop in Haas's work vehicle, "they immediately went back to the magistrate . . . because they knew that it likely contained child pornography."

The Court fails to see how it is permissible to draw an inference between the language in the affidavit describing how individuals possess child pornography generally and the notion that a laptop viewed in Haas's work vehicle would likely contain

child pornography. The Government relies on United States v. Lamb, 943 F.Supp 441 (N.D.N.Y. 1996), for the proposition that "images of child pornography are likely to be hoarded by persons interested in those materials in the *privacy of their homes* . . . ." (emphasis added). However, in this case, the laptop was not found in Haas's home, it was found in his work vehicle, and not even in his personal vehicle. Further, the laptop viewed by CW in Haas's home was seen there long before the agents viewed the laptop in the work vehicle. On this record, Lamb lends no aid to the Government's position.

Additionally, the Government cites several decisions which show that evidence of child pornography on a computer can be retrieved by scientific examination if the files were deleted from the computer. See United States v. Richardson, 607 F.3d 357 (4th Cir. 2010). This, no doubt, is true, but it is unclear how, if at all, that point is relevant. There are no allegations in the affidavit that support a finding that Haas deleted images of child pornography. The issue is whether the affidavit provided a sufficient basis to believe that evidence of child pornography would in fact be found on a laptop in Haas's tractor trailer based on his conduct in viewing child pornography on a laptop in his home months earlier. The Court is not persuaded by the Government's argument and finds no nexus between the information presented in the affidavit and the

location and items to be searched and seized. A finding of probable cause is lacking.

B. Good Faith Exception

Because the Court finds that the affidavit was not sufficient to supply probable cause to issue a warrant to seize the laptop in Haas's work vehicle, it is necessary to consider whether a good faith basis exists to justify the search and seizure of the laptop. Under the good faith exception doctrine, evidence obtained from an invalidated search warrant will only be suppressed: (1) "if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth"; (2) if the "issuing magistrate wholly abandoned his judicial role"; (3) if the "affidavit [was] so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; or (4) the officer had "no reasonable grounds for believing that the warrant was properly issued." United States v. Leon, 468 U.S. 897 (1984). None of those circumstances exist here.

In Lalor,[11] the Fourth Circuit found that, although a warrant was deficient for failure to establish a nexus between the alleged illegal conduct and the location that was to be

[11] United States v. Lalor, 996 F.2d at 1583.

searched, "the warrant is not so lacking in probable cause that the officers' reliance upon it was objectively unreasonable." Id. at 1583. The same is true here. The affidavit was not a bare bones affidavit, far from it. Furthermore, the magistrate was not misled by information that the affiant knew was false, or would have known was false if not for a reckless disregard for the truth. As described earlier under the Franks Hearing section, the record does not show that Agent Gonzales purposefully omitted material information from the affidavit. Therefore, the evidence of the laptop computer seized from the tractor trailer and its contents fall within the protection of the good faith exception. Suppression, therefore, is not appropriate.

CONCLUSION

The affidavit provided in this case was not sufficient to support a finding of probable cause to issue a search warrant for Haas's work vehicle. Evidence of child molestation, coupled with Defendant viewing child pornography in his home on a laptop computer, could not lead a reasonable person to conclude that evidence of child pornography would be found in a laptop computer located months later in Haas's work vehicle. Nonetheless, under the good faith exception, evidence obtained from an invalidated search warrant is not to be suppressed where

officer conduct was reasonable and where the magistrate relied on an affidavit that contained more than bare bones allegations. All the requirements necessary to support the application of the good faith exception under Lalor and United States v. Leon, 468 U.S. 897 (1984) are present here. Therefore, DEFENDANT'S MOTION TO SUPPRESS EVIDENCE (ECF No. 14) will be denied.

It is so ORDERED.

/s/ REP
Robert E. Payne
Senior United States District Judge

Richmond, Virginia
Date: May 2, 2017

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

UNITED STATES OF AMERICA

v. Criminal Action No. 3:16CR139

RICHARD TODD HAAS,

Defendant.

MEMORANDUM OPINION

This matter is before the Court on DEFENDANT'S MOTION TO SUPPRESS AND MOTION FOR A FRANKS HEARING (ECF No. 128). Defendant Richard Todd Haas ("Haas") first seeks an evidentiary hearing, pursuant to Franks v. Delaware, 438 U.S. 153 (1988), to challenge the completeness of statements made in an affidavit supporting a search warrant for Haas' 2015 Volkswagen Jetta. Haas also moves to suppress all evidence seized during the ensuing search of the Jetta. For the reasons discussed below, the motion will be denied in both respects.

BACKGROUND

On August 31, 2016, FBI Special Agent Melvin Gonzalez ("Gonzalez") presented Magistrate Judge Young with an application for a search warrant for: (1) Haas' residence at 236 Monath Road, North Chesterfield, Virginia; and (2) Haas' 2015 Jetta. See Search Warrant (ECF No. 27-1) at Attachments A-B. The

application was supported by a lengthy affidavit from Gonzalez ("the First Affidavit"), which asserted probable cause based, in part, on Haas' communications with a confidential witness ("CW"). See First Aff. ¶¶ 7-13. Magistrate Judge Young granted the application, and FBI agents executed the warrant on September 1, 2016. Second Aff. (ECF No. 14-1) ¶ 25. As Haas' counsel explained at oral argument, among the items recovered from the car was sex paraphernalia (a purple vibrator) that Haas allegedly used to commit other child molestation offenses, evidence of which is the subject of the UNITED STATES' NOTICE OF INTENT AND MOTION TO INTRODUCE OTHER ACTS EVIDENCE PURSUANT TO FED. R. EVID. 414 AND 404(b) (ECF No. 81).

The agents searched Haas' residence and Jetta when he was not present. They were aware, from surveillance, that Haas was at work, so they then went to his work address and found him in his work vehicle, a 1995 Ford tractor-trailer truck, after which they arrested him for aggravated sexual battery of a minor. While searching Haas' person and the truck, the agents recovered a Samsung Galaxy S5 cellphone and laptop, respectively. Second Aff. ¶ 25. Gonzalez then submitted an application for another search warrant for the Ford truck and Samsung cellphone, which was supported by the Second Affidavit. That affidavit was

identical to the First Affidavit except for Paragraph 25, which summarized the events following the execution of the search warrant on September 1. See id.; see also United States v. Haas, No. 3:16CR139, 2017 WL 1712521, at *3 (E.D. Va. May 2, 2017). Later that day, Magistrate Judge Young granted the second warrant application, and a search of the laptop in the truck revealed numerous images of children engaged in sexually explicit conduct. Haas, 2017 WL 1712521, at *3.

On January 3, 2017, Haas moved to suppress evidence seized during the Ford truck search. See ECF No. 14. Haas argued then, much like he does now, that he was entitled to a Franks evidentiary hearing because the Second Affidavit omitted information relevant to CW's reliability. He also claimed that the Second Affidavit did not allege enough facts to support the finding of probable cause to search the truck. The Court rejected the first argument, concluding that the Second Affidavit had fully disclosed the information necessary to assess CW's reliability. Haas, 2017 WL 1712521, at *7-8.

At the same time, the Court held that the Second Affidavit failed to establish probable cause as to the truck because there was no nexus between that location and the evidence to be seized from it, including the laptop with pornographic images. Id. at

*8-9. That finding did not require suppression, however, because the good-faith exception applied, and the Second Affidavit was not so lacking in indicia of probable cause to make the FBI agents' reliance on it objectively unreasonable. Id. at *10.

The contents of the Second Affidavit—and, by implication, those of the First Affidavit—are detailed in the Court's opinion denying Haas' initial motion to suppress. See id. at *1-3. That opinion also describes Gonzalez's testimony about his knowledge of CW's history when preparing the First Affidavit. See id. at *3-4. As a result, the Court will not restate those details here.

Against this background, the Court will turn to the attack now made on the First Affidavit and the search of the Jetta.

DISCUSSION

I. Omission of Facts from the First Affidavit

Franks set forth a two-part test "clarifying what a criminal defendant must show when challenging the veracity of statements made in an affidavit supporting a search warrant." United States v. Lull, 824 F.3d 109, 113 (4th Cir. 2016). Under the first facet of the test, the defendant must establish that an affiant included a false statement or omitted relevant facts "'knowingly and intentionally, or with reckless disregard for

the truth.'" Id. at 114 (quoting Franks, 438 U.S. at 155). Under the second facet of the test, the defendant must show that the facts stated in the affidavit are insufficient to establish probable cause without the false or omitted information. "Both prongs must be proven by a preponderance of the evidence." Id.

Haas now asserts that Gonzalez knowingly or recklessly omitted several relevant pieces of information from the First Affidavit, including: (1) CW's criminal history; (2) the existence of text messages between Haas and CW showing her contact with the police and her continued work as a prostitute; (3) the fact that police had not corroborated CW's statements that Haas had shown her child pornography on his laptop and had told her that the victims were neighborhood children; and (4) the contents of the full transcripts of the calls between CW and Haas. None of these arguments is persuasive.

The Court has already addressed the omission of CW's criminal history and the phone call transcripts in the context of the Second Affidavit, which is no different than the First Affidavit. The current motion presents no basis for the Court to reconsider its earlier decision that those omissions did not merit a Franks hearing. "A motion for reconsideration is appropriate where the Court has patently misunderstood a party,

has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension." Paasch v. Nat'l Rural Elec. Coop. Ass'n, No. 115CV01638GBLMSN, 2016 WL 10519130, at *2 (E.D. Va. May 27, 2016) (citing Above the Belt, Inc. v. Mel Bohannan Roofing, Inc., 99 F.R.D. 99, 101 (E.D. Va. 1983)). But motions that simply "ask[] a court to 'rethink what the Court had already thought through—rightly or wrongly' should not be granted." TomTom, Inc. v. AOT Sys. GmbH, 17 F. Supp. 3d 545, 546 (E.D. Va. 2014) (quoting Above the Belt, 99 F.R.D. at 101). The Court previously noted that CW's criminal history did not need to be included in the Second Affidavit because she had an otherwise "forthcoming nature" with FBI agents, and "there [wa]s no indication that her past offenses had any bearing on her interactions with Haas." Haas, 2017 WL 1712521, at *7-8. Similarly, the Court did not consider the claim about the call transcripts in detail because "the transcripts . . . strongly suggest that Haas was interested in obtaining nude pictures of young children," such that their inclusion would have only bolstered the probable cause finding. Id. at *6 n.9. Haas points to no new evidence making that analysis improper. Instead, his argument amounts to nothing more than disagreement with the

Court's decision, which, of course, does not make reconsideration appropriate. See TomTom, 17 F. Supp. 3d at 546.

Haas' other arguments fare no better. He first asserts that the First Affidavit should have included some of the text messages between CW and Haas because they would have revealed that CW was "continuing to violate the law while working for/with the [FBI] agents," Def. Mot. (ECF No. 128) at 3, because the communications showed CW's prostitution and interaction with Henrico County police. But her work as a prostitute is readily inferable from Gonzalez's statement in the First Affidavit that CW had "provided escort services to Haas" for the four years that she knew him. First Aff. ¶ 7. "Escort services" can, of course, mean legal or illegal activity, but either meaning carries a negative connotation, which is all that is relevant for purposes of CW's reliability. See Haas, 2017 WL 1712521, at *7 (accepting Government's assertion that use of "escort" showed that Gonzalez "was not trying to hide the nature of the relationship between CW" and Haas (quotation marks omitted)). Moreover, even if that meaning was not clear, this argument is indistinguishable from Haas' contention about CW's criminal history, which has now been rejected twice. It remains true that "CW was forthcoming with the police, correctly

identified Haas in photos, . . . provided [Haas'] cellphone number to agents," and "never once provided information to the agents that they subsequently determined was false." Id. at *8.[1] As a result, there was simply no need for Gonzalez to include every single piece of information that would have only minimally affected CW's reliability, including the text messages. See United States v. Colkley, 899 F.2d 297, 300 (4th Cir. 1990) ("An affiant cannot be expected to include in an affidavit every piece of information gathered in the course of an investigation."). Gonzalez's omission of those messages was thus not intentional or reckless in the manner required for a Franks hearing.

The First Affidavit's failure to mention the lack of corroboration of CW's statements that Haas had shown her child pornography on his laptop and had identified the victims as neighborhood children is of no moment for similar reasons. As discussed, providing this sort of information to support CW's credibility might have been appropriate "[i]f CW had done something to make the agents question her truthfulness," but she

[1] As the Court noted before, the absence of any lies by CW in the course of her relationship with FBI agents makes Lull inapposite. Haas, 2017 WL 1712521, at *7. Because the text messages do not show that CW lied to or even deceived the agents, they do not change that distinction.

had not. Haas, 2017 WL 1712521, at *8. It is also unclear why corroborating the victimization of neighborhood children in particular should have affected the probable cause analysis; Gonzalez likely omitted the information because he deemed it irrelevant. See Colkley, 899 F.2d at 301. In any event, Gonzalez explicitly stated that FBI agents corroborated other details provided by the CW, such as Haas' telephone number, which in turn helped the FBI uncover more facts suggesting child molestation. First Aff. ¶¶ 9, 20-22. Given these circumstances, the Court cannot find that the omission of the lack of corroboration constitutes a Franks violation.

Because Haas cannot identify any intentional or reckless omissions of relevant facts in the First Affidavit, his request for a Franks hearing must be denied.

II. Existence of Probable Cause

The Fourth Amendment requires probable cause for the issuance of warrants. **U.S. Const.** amend. IV. Probable cause exists where, looking at the totality of the circumstances, Maryland v. Pringle, 540 U.S. 366, 371 (2003), "the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found," Ornelas v. United States, 517 U.S. 690, 696

(1996); see also Illinois v. Gates, 462 U.S. 213, 232 (1983) (probable cause is "a fair probability that contraband or evidence of a crime will be found in a particular place"). This concept is a "fluid" one depending on the facts of a case, and is thus "not readily, or even usefully, reduced to a neat set of legal rules." Gates, 462 U.S. at 232. Moreover, "a finding of probable cause does not require absolute certainty." United States v. Gary, 528 F.3d 324, 327 (4th Cir. 2008); see also Taylor v. Farmer, 13 F.3d 117, 121 (4th Cir. 1993) (officials need not "possess an airtight case before taking action").

A court reviewing a magistrate's probable cause determination also does not assess the existence of probable cause de novo. Instead, the court must only ascertain whether "the magistrate had a substantial basis for concluding that probable cause existed." Gates, 462 U.S. at 238-39 (internal quotations omitted); see also Lull, 824 F.3d at 115. In doing so, courts should accord the magistrate's determination "great deference," and should not invalidate warrants by "interpreting [them] in a hypertechnical, rather than commonsensical, manner." Gates, 462 U.S. at 236 (internal quotations omitted). Moreover, courts must "give due weight to inferences drawn from th[e]

facts by . . . law enforcement officers." Lull, 824 F.3d at 114-15 (internal quotations omitted).

Haas claims that there was not a substantial basis for finding probable cause to search the Jetta for three reasons. First, he argues, the First Affidavit did not provide enough information to allow Magistrate Judge Young to assess CW's reliability. Second, Haas asserts that the affidavit does not establish that he actually possessed child pornography. Finally, he contends that there was an inadequate nexus between the Jetta and the evidence of child pornography that the FBI sought to recover.

The common foundation of these arguments is Haas' assertion that the First Affidavit was a "bare bones affidavit" filled with "'boilerplate recitations'" of Gonzalez's experience that were not appropriately tethered to the facts of this case. Def. Mot. at 4-5 (quoting United States v. Weber, 923 F.2d 1338, 1345 (9th Cir. 1990)). Yet that claim ignores the Court's recognition that the Second Affidavit—which, again, was practically identical to the First Affidavit—was "far from" a bare bones affidavit. Haas, 2017 WL 1712521, at *10. Weber does not change this conclusion. There, the affiant relied on his knowledge of the general habits of "child molesters," "pedophiles," and

"child pornography collectors" to support his contention that certain evidence would be in the defendant's house, even though "there was not a whit of evidence in the affidavit indicating that [defendant] was a 'child molester.'" Weber, 923 F.2d at 1345. Here, in contrast, the First Affidavit clearly "lay[s] a foundation which shows that the person subject to the search"—Haas—"is a member of" at least two of those classes—"child molesters" and "child pornography collectors." Id.; see also First Aff. ¶¶ 7-22. Accordingly, characterizing that document as bare bones is a mistake.

This conclusion is reinforced by examining Haas' individual arguments. The Court previously rejected Haas' assertion that the First Affidavit did not establish CW's reliability when considering the first motion to suppress. Indeed, after detailing the pertinent facts in the Second Affidavit, the Court noted that "it is difficult to imagine additional steps the agents could have taken to corroborate CW's credibility." Haas, 2017 WL 1712521, at *6 (quotation marks omitted). Haas identifies no bases for reconsidering that decision here.

Likewise, the First Affidavit contains ample "indicia [that] [Haas] actually possessed child pornography." Def. Mot. at 5. Haas correctly notes that his alleged possession of child

pornography is supported almost entirely by CW's statement that she observed pornography on Haas' laptop. But he misstates the applicable standard here; "probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." Gates, 462 U.S. at 243 n.13 (emphasis added); see also Gary, 528 F.3d at 327; Taylor, 13 F.3d at 121. CW's statements support that likelihood because the FBI's corroboration of several details from CW implies that her description of the images on Haas' computer is also accurate. See United States v. Lalor, 996 F.2d 1578, 1581 (4th Cir. 1993) ("Corroboration of apparently innocent details of an informant's report tends to indicate that other aspects of the report are also correct." (citing Gates, 462 U.S. at 244)). Furthermore, CW did not need any experience with child pornography to observe that the girls in the pictures on Haas' laptop were "in various stages of undress and engaged in sexually explicit acts," especially given the significant number of images that she saw. First Aff. ¶ 8. Accepting Haas' view would in effect prevent the Court from finding probable cause unless a forensic child pornography expert stated that he personally observed a defendant with pornography. That approach is both ill-advised and inconsistent with precedent.

Finally, Magistrate Judge Young had sufficient information to find a nexus between Haas' Jetta and evidence of child pornography that the FBI sought there. "[T]he crucial element [of the probable cause inquiry] is not whether the target of the search is suspected of a crime, but whether it is reasonable to believe that the items to be seized will be found in the place to be searched." Lalor, 996 F.2d at 1582. This nexus "'may be established by the nature of the item and the normal inferences of where one would likely keep such evidence,'" and does not demand "direct evidence that the items to be seized will be found at a particular location." Id. (quoting United States v. Anderson, 851 F.2d 727, 729 (4th Cir. 1988)).

Seen through this lens, the First Affidavit contains enough facts to connect Haas' Jetta with evidence of his misconduct. The Jetta is only referenced in the affidavit twice: CW saw Haas in the Jetta once when they met in person, and the FBI observed Haas leaving his residence in that car on several occasions. First Aff. ¶¶ 10, 23.[2] However, as noted, there is ample evidence

[2] The Government also claims that the Court can infer Haas' use of the Jetta from allegations that he picked up and brought to his residence a young girl whom he is alleged to have molested. See First Aff. ¶¶ 15-16. Although the First Affidavit indeed states that Haas drove the girl, id. ¶ 16, it is impossible to

to show that Haas possessed child pornography. In addition, Gonzalez stated that, in his experience with child exploitation investigations, "individuals who access with intent to view, possess, collect and receive child pornography often maintain their collections . . . in a safe, secure and private environment, such as a computer . . . . These collections are often maintained for several years and are kept close by, usually at the collector's residence, or inside the collector's vehicle, to enable the individual to view the collection." Id. ¶ 25(d) (emphasis added). This allegation was not enough to create a nexus between Haas' Ford truck and evidence of child pornography, but the link is much closer here because Haas had previously been observed driving the Jetta—his personal vehicle—from his residence, where he was very likely to maintain illicit material. See Haas, 2017 WL 1712521, at *9. Taken together, these factors indicate that evidence of child pornography "was likely to be stored" in the Jetta. Lalor, 996 F.2d at 1582; see also United States v. Suarez, 906 F.2d 977, 984-85 (4th Cir. 1990).

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determine whether he was using his personal or work vehicle at the time, so that fact does not help show a nexus.

Based on these circumstances, there was a sufficient factual nexus between the evidence of Haas' child pornography possession and his Jetta to allow Magistrate Judge Young to infer that more evidence related to child pornography would likely be found there. Accordingly, the information in the First Affidavit gave Magistrate Judge Young a "substantial basis" to conclude that probable cause existed, Gates, 462 U.S. at 238, and Haas' motion to suppress can be denied on that basis.

III. Application of Good Faith Exception

Even if the First Affidavit did not support a probable cause finding, the good faith exception precludes exclusion of the evidence from the Jetta. The exclusionary rule "bars the prosecution from introducing evidence obtained by way of a Fourth Amendment violation." Davis v. United States, 564 U.S. 229, 232 (2011). However, under the good faith exception, evidence obtained pursuant to a search warrant issued by a neutral magistrate does not need to be excluded if reliance on the warrant was 'objectively reasonable.'" United States v. Perez, 393 F.3d 457, 461 (4th Cir. 2004) (quoting United States v. Leon, 468 U.S. 897, 922 (1984)). The relevant question is thus whether "a reasonably well trained officer would have known that the search was illegal despite the magistrate's

authorization." Leon, 468 U.S. at 923. There are four situations in which an officer's reliance cannot be considered "objectively reasonable":

> (1) where the magistrate was misled by information in an affidavit that the officer knew was false or would have known was false except for the officer's reckless disregard of the truth;
>
> (2) where the magistrate wholly abandoned his detached and neutral judicial role;
>
> (3) where the supporting affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and
>
> (4) where the warrant was so facially deficient, by failing to particularize the place to be searched or the things to be seized, that the executing officers cannot reasonably presume it to be valid.

United States v. Williams, 548 F.3d 311, 317-18 (4th Cir. 2008) (citing Leon, 468 U.S. at 923). Haas argues that the third exception applies here.

That contention is misguided. As detailed above, evidence that Haas possessed child pornography in his residence and used his Jetta to get to and from that location gave Magistrate Judge Young a solid basis on which to find probable cause. Even if the First Affidavit was technically inadequate in that regard, the indicia of probable cause to search the Jetta were stronger than the indicia as to the Ford truck, the search of which was

permissible under the good faith exception. See Haas, 2017 WL 1712521, at *10. Similarly, this case is far less egregious than Lalor, in which the third Leon exception did not apply even though the underlying affidavit contained no statements about the likelihood of discovering evidence at the target address. See 996 F.2d at 1583. As a result, even if probable cause is lacking, the good faith exception prevents the application of the exclusionary rule.

CONCLUSION

For the foregoing reasons, DEFENDANT'S MOTION TO SUPPRESS AND MOTION FOR A FRANKS HEARING (ECF No. 128) will be denied.

It is so ORDERED.

/s/ REP
Robert E. Payne
Senior United States District Judge

Richmond, Virginia
Date: August 22, 2018

APPENDIX E

UNITED STATES DISTRICT COURT
Eastern District of Virginia
Richmond Division

UNITED STATES OF AMERICA

v.

RICHARD TODD HAAS,
a/k/a RICHARD THOMAS HAAS

Defendant.

Case Number: 3:16-CR-00139-REP-1

USM Number: 90501-083

Defendant's Attorney: JEFFREY L. EVERHART

JUDGMENT IN A CRIMINAL CASE

The defendant was found guilty on Counts 1 through 4 of the Superseding Indictment after a plea of not guilty and a trial by jury.

Accordingly, the defendant is adjudged guilty of the following counts involving the indicated offenses.

Title and Section	Nature of Offense	Offense Class	Offense Ended	Count
18 U.S.C. §§ 1591 (a)(1), 1591(b)(1) and 1594	ATTEMPTED SEX TRAFFICKING OF CHILDREN	Felony	08/13/2016	1
18 U.S.C. §§ 2252A(a)(2)(A) and 2252A(b)	RECEIPT OF CHILD PORNOGRAPHY	Felony	07/19/2016	2
18 U.S.C. § 2252A(a)(5)(B)	POSSESSION OF CHILD PORNOGRAPHY	Felony	09/01/2016	3
18 U.S.C. § 2252A(a)(5)(B)	POSSESSION OF CHILD PORNOGRAPHY	Felony	09/01/2016	4

On motion of the United States, the Court has dismissed the original indictment as to defendant RICHARD TODD HAAS.

As pronounced on January 17, 2019, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

Date of imposition of judgment this 17th day of January, 2019.

/s/ REP

Robert E. Payne
Senior United States District Judge

Dated: January 24, 2019

Case Number: 3:16-CR-00139-REP-1
Defendant's Name: HAAS, RICHARD TODD

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of LIFE. This term of imprisonment consists of a term of LIFE on Count 1, a term of TWO HUNDRED FORTY (240) MONTHS on Count 2, a term of ONE HUNDRED TWENTY (120) MONTHS on Count 3, and a term of ONE HUNDRED TWENTY (120) MONTHS on Count 4, all to be served concurrently.

The Court makes the following recommendations to the Bureau of Prisons:

1) The defendant shall participate in sexual offender treatment for which he is eligible and volunteers.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows: _____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this Judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

Case Number: 3:16-CR-00139-REP-1
Defendant's Name: HAAS, RICHARD TODD

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of LIFE. This term consists of a term of LIFE on Count 1, a term of LIFE on Count 2, a term of LIFE on Count 3, and a term of LIFE on Count 4, all to run concurrently.

The Probation Office shall provide the defendant with a copy of the standard conditions and any special conditions of supervised release.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution obligation, it is a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the standard conditions that have been adopted by this court set forth below:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance or any paraphernalia related to such substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer for a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Case Number: 3:16-CR-00139-REP-1
Defendant's Name: HAAS, RICHARD TODD

SPECIAL CONDITIONS OF SUPERVISION

While on supervised release pursuant to this Judgment, the defendant shall also comply with the following additional special conditions:

1) The defendant shall pay the balance owed on any court-ordered financial obligations in monthly installments of not less than $25.00, starting 60 days after supervision begins until paid in full.

2) The defendant shall provide the probation officer access to any requested financial information.

3) The defendant shall participate in a program approved by the United States Probation Office for mental health treatment, to include a psychosexual evaluation and sex offender treatment. The defendant shall be required to waive any right of confidentiality as to any sex offender/mental health treatment to allow release of information to the Probation Officer and authorize communication between the probation officer and the treatment provider.

4) The defendant shall not have any access to or possess any pornographic material or pictures displaying nudity or any magazines using juvenile models or pictures of juveniles under the age of 18.

5) Pursuant to the Adam Walsh Child Protection and Safety Act of 2006, the defendant shall submit to a search of his person, property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning unlawful conduct or a violation of a condition of supervision.

6) Pursuant to the Adam Walsh Child Protection and Safety Act of 2006, the defendant shall register with the state sex offender registration agency in any state where the defendant resides, works, and attends school, according to federal and state law and as directed by the probation officer.

7) The defendant shall comply with the requirements of the computer monitoring program as administered by the Probation Office. The defendant shall consent to installation of computer monitoring software on any computer to which the defendant has access. Installation shall be performed by the probation officer. The software may restrict and/or record any and all activity on the computer, including the capture of keystrokes, application information, internet use history, email correspondence, and chat conversations. A notice will be placed on the computer at the time of installation to warn others of the existence of the monitoring software. The defendant shall also notify others of the existence of the monitoring software. The defendant shall not remove, tamper with, reverse engineer, or in any way circumvent the software.

8) The defendant shall not utilize any sex-related adult telephone services, websites, or electronic bulletin boards. The defendant shall submit any records requested by the probation officer to verify compliance with this condition including, but not limited to, credit card bills, telephone bills, and cable/satellite television bills.

Case Number: 3:16-CR-00139-REP-1
Defendant's Name: HAAS, RICHARD TODD

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on Page 6.

Count	Assessment	Fine	Restitution
1	$100.00	$0.00	$0.00
2	$100.00	$0.00	$0.00
3	$100.00	$0.00	$0.00
4	$100.00	$.00	$0.00
TOTALS:	**$400.00**	**$0.00**	**$0.00**

FINES

No fines have been imposed in this case.

RESTITUTION

No restitution has been imposed in this case.

Case Number: **3:16-CR-00139-REP-1**
Defendant's Name: **HAAS, RICHARD TODD**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

The special assessment is due and payable immediately. Any balance remaining unpaid on the special assessment at the inception of supervision, shall be paid by the defendant in installments of not less than $25.00 per month, until paid in full. Said payments shall commence 60 days after defendant's supervision begins.

The defendant shall forfeit the defendant's interest in the following property to the United States:

SEE Consent Order of Forfeiture entered by the Court on January 17, 2019.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed. Payments shall be applied in the following order: (1) assessment (2) restitution principal (3) restitution interest (4) fine principal (5) fine interest (6) community restitution (7) penalties and (8) costs, including cost of prosecution and court costs.

Nothing in the court's order shall prohibit the collection of any judgment, fine, or special assessment by the United States.