No.

in the

Supreme Court

of the

United States

Term,

CHRISTOPHER LEE BRYANT,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Does the Fourth Amendment require police officers to corroborate information obtained from a recently arrested person, whom officers did not know until the arrest, before obtaining a warrant based solely on that information?

RELATED CASES

Pursuant to Supreme Court Rule 14(1)(b)(iii), Petitioner submits the following cases which are directly related to this Petition:

none

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The Petitioner, Christopher Bryant, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on April 4, 2022.

OPINION BELOW

The Sixth Circuit's opinion in this matter is unpublished, and is attached hereto as Appendix 1. The district court's opinion is unpublished, and attached as Appendix 2.

JURISDICTION

The Sixth Circuit denied Petitioner's appeal on April 4, 2022. This petition is timely filed. The Court's jurisdiction in invoked pursuant 28 U.S.C. § 1291 and Supreme Court Rule 12.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> 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.

STATEMENT OF THE CASE

On January 28, 2020, police officers in La Habra, California raided the home of Phineas Cozmiuc. Officers had information that Cozmiuc was trading in child pornography, and had obtained a warrant to search his home. Once inside, Cozmiuc admitted to his crimes, and showed officers where they could find the child pornography. They located it, and Cozmiuc was arrested.

Upon his arrival at the police station, Cozmiuc was most cooperative with officers. During their interrogation of Cozmiuc, they asked whether he knew of anyone who had sent him images of a "real victim." Cozmiuc responded there was a female who had recently sent him explicit images of a four year old female. Cozmiuc indicated that he and female had communicated on Discord and Wickr, and that the Username for the female was AkiHaru. Cozmiuc was permitted to log onto his Discord account, and showed officers profile Akiharu#5042, which he identified as that person with whom he had traded the pictures of the four year old. Based upon this information, officer Baclit sought and obtained a warrant for the Discord account for Akiharu#5042.

The information contained in the Discord account gave officers two pieces of information: the owner of the account was engaged in discussions about child pornography (including discussions with Cozmiuc), and the owner of the account was Petitioner Christopher Bryant. Officers found that Bryant lived at a residence located in Springfield, Ohio, for which they obtained a warrant. There, officers

located more child pornography, including evidence that Bryant had created and sent pictures.

On September 8, 2020, Bryant was named in a one count indictment charging production of child pornography, in violation of 18 U.S.C. § 2251. On December 8, 2020, Bryant moved to suppress the evidence, based upon the Discord warrant. Bryant contended that the warrant was a bare bones warrant containing no probable cause for its issuance. Bryant also argued he was entitled to a Franks hearing, as the warrant contained the statement "[t]his is an addendum to the already granted search warrant; which your affiant has attached as an item of reference for the court's review," which was false.

The district court denied the motion without a hearing on February 21, 2021. First, the court found there was probable cause to support the magistrate judge's decision to issue the warrant for the Discord account. The court reasoned that although the Discord account might not contain evidence of child pornography, there was probable cause it would contain evidence of such an offense. (Appendix 2, p.6) Next, the court found that the warrant application did not rely solely on an informant (Cozmiuc), as it also contained the following information: officers corroborated that Cozmiuc committed the crimes he himself committed; and Cozmiuc's statements about Petitioner Bryant were self-incriminating, and therefore entitled to belief. (Appendix 2, p.13) The district court alternatively found that, even if the warrant did not contain probable cause, the good faith exception justified

officer's reliance on the issuance of the warrant. The court rejected Bryant's claim that the information regarding an "addendum" to an already granted warrant was false, or that it misled the issuing magistrate.

The parties thereafter entered into a conditional plea, in which Petitioner Bryant agreed to plead guilty to the one count indictment in exchange for the right to appeal the suppression decision. Bryant agreed to waive all other rights to appeal. Sentencing was held on June 8, 2021. The court imposed a sentence of 330 months incarceration, to be followed by 5 years supervised release.

On appeal to the Sixth Circuit, Petitioner Bryant raised two issues:

1. Officers applied for a search warrant for Appellant Bryant's Discord account based solely upon statements from an informant previously unknown to them. They did not corroborate the allegations made by the informant. The affidavit supporting the warrant was a bare bones affidavit, which could not support probable cause for search of the Discord account.

2. Officer Baclit made two materially false statements in the search warrant application, which contributed to the probable cause determination. This required a Franks hearing.

After oral argument, the Sixth Circuit denied Bryant's appeal. Regarding the lack of police corroboration of Cozmiuc's claims, the Sixth Circuit held that the fact that Cozmiuc alleged that he saw the crime first hand, along with the fact that Cozmiuc was an "identified" informant, who "risked criminal liability" by admitting such matters to police, provided sufficient trustworthiness to support probable cause. (Appendix 1, pp.6-7) The court determined that police need corroborate only an

informant's tips with independent police investigation if the tipster is anonymous. (Appendix 1, p.9)

REASON FOR GRANTING THE WRIT

1. Probable cause cannot be based upon statements not independently corroborated by police obtained from identified but untested informants

"The Fourth Amendment protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures' and provides that 'no Warrants shall issue, but upon probable cause.'" *Lange v. California*, 141 S. Ct. 2011, 2028, 210 L. Ed. 2d 486 (2021). The decision by the Sixth Circuit creates a split among the circuits as to whether police must corroborate details of an informant's story before they may obtain a search warrant. Virtually every other circuit has held that, where police use information from an informant whose reliability is not yet known, they are required to corroborate details of the informant's story before moving forward with an arrest or obtaining a warrant. The Sixth Circuit has broken with this reasoning, holding where the identity of the informant is known, no corroboration of any details is necessary if the informant incriminates themselves in some crime. The Sixth Circuit's decision and reasoning do not pass Fourth Amendment muster, and this Court should accept certiorari review to resolve this split.

"In the run of cases, informant identities exist along a spectrum of knowledge and reliability that affects the reasonableness of police action taken pursuant to the tip. At one end of that spectrum, officers receive a tip from a known, trusted, and reliable source. At the other end, officers receive an anonymous tip without signs of

reliability." *United States v. Lopez*, 907 F.3d 472, 479–80 (7th Cir. 2018). The assessment of reliability of an informant anywhere on this spectrum requires a totality of the circumstances approach. *Florida v. Harris*, 568 U.S. 237, 244, 133 S. Ct. 1050, 1055, 185 L. Ed. 2d 61 (2013).

Here, informant Cozmiuc was an identified, but unproven informant. He was not known by police until his arrest, and had no "track record" of reliability. Under such circumstances, the circuits have agreed that corroboration of details of Cozmiuc's allegations would be a necessary prerequisite to obtaining a search warrant. "When the police receive information from an informant for the first time, they have a duty to independently corroborate at least some of the information the informant provides." *United States v. Nasir*, 17 F.4th 459, 466 (3d Cir. 2021); Accord *United States v. Maglio*, 21 F.4th 179, 186 (1st Cir. 2021)(even with informant implicating himself and subjecting himself to false claims, independent corroboration of details necessary as part of probable cause calculus); *United States v. McKenzie*, 13 F.4th 223, 237 (2d Cir. 2021) (finding probable cause when "many of the informant's allegations were corroborated via the first-hand observations of law enforcement officers"); *United States v. Gondres-Medrano*, 3 F.4th 708, 716 (4th Cir. 2021)("corroboration can confirm the reliability of an informant who is known (rather than anonymous) but whose credibility is unknown to the officer. [citation omitted] Some corroboration is still required with no track record of reliability."); *United States v. Norbert*, 990 F.3d 968, 976–77 (5th Cir. 2021)("Because the tip was

not presented as a 911 call or a contemporaneous emergency, or predict future behavior, the police's failure to corroborate illegal activity was insufficient verification of the tip to justify the stop.")(affirmed by equally divided en banc court 24 F.4th 1016); *United States v. Swinney*, 28 F.4th 864, 869 (7th Cir. 2022)("[A] tip must be reliable before the police can act on it."); *United States v. Martin*, 297 F.3d 1308, 1314 (11th Cir. 2002) (requiring "sufficient independent corroboration of an informant's information" where the informant's "veracity" is not established).

While the details corroborated need not be incriminating ones ("[w]hile it is true that some independent verification is required when a known informant is without a track record of reliability, [citation omitted], corroboration of even minor or innocent details may be sufficient to establish probable cause," *United States v. Reed*, 25 F.4th 567, 570 (8th Cir. 2022)), the need for such corroboration is universally accepted as a prerequisite. This Court has noted "[o]ur decisions applying the totality-of-the-circumstances analysis outlined above have consistently recognized the value of corroboration of details of an informant's tip by independent police work." *Illinois v. Gates*, 462 U.S. 213, 241, 103 S. Ct. 2317, 2334, 76 L. Ed. 2d 527 (1983).

Against this backdrop stands the Sixth Circuit's decision here. The Sixth Circuit held that because Cozmiuc was identified, and faced criminal liability by the allegations he made, this was all that was required to meet the probable cause standard. But "[r]equiring police to corroborate tips from identified but unproven

informants is an important protection of individual liberty." *United States v. Lopez*, 907 F.3d 472, 483 (7th Cir. 2018). The Sixth Circuit's exclusion of this critical step in the investigative process violates the very core of the Fourth Amendment, and reduces police's independent duty to assess probable cause to nothing.

The Sixth Circuit also eschewed this Court's admonition that "rigid rules, bright-line tests, and mechanistic inquiries" should not be used to weigh the probable cause standard. *Florida v. Harris*, 568 U.S. 237, 244, 133 S. Ct. 1050, 1055, 185 L. Ed. 2d 61 (2013). The Sixth Circuit, ignoring this holding, determined that where an informant admits to crime, this itself provides sufficient basis for reliability. However, other courts have rightly noted that such admissions are merely a piece of the puzzle, and should be weighed against other factors, such as "an informant's past reliability, her reputation for honesty, the basis of her knowledge, and her potential motive." *United States v. Cherry*, 920 F.3d 1126, 1133 (7th Cir. 2019). The Sixth Circuit did not do this; instead placing all reliance on Cozmiuc's willingness to implicate himself in his own crimes.1

This Court should therefore grant certiorari, and reverse the Sixth Circuit's decision which upends the duty of corroboration for the use of informant's information.

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1 The Sixth Circuit also suggested, without citing to any precedent, that it was Bryant's burden to prove that Cozmiuc had an "ulterior motive" to implicate him in a crime. (Appendix 1, p.10) It is never a defendant's burden to disprove an informant's reliability.

CONCLUSION

Bryant requests this Court grant certiorari, reverse the Sixth Circuit's decision, and remand for further necessary proceedings.

Respectfully submitted,

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APPENDIX

1. COURT OF APPEALS ORDER April 4, 2022
2. DISTRICT COURT DECISION February 21, 2021

NOT RECOMMENDED FOR PUBLICATION
File Name: 22a0142n.06

No. 21-3524

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE SOUTHERN DISTRICT OF
CHRISTOPHER LEE BRYANT,	)	OHIO
	)	
Defendant-Appellant.	)	

Before: SILER, CLAY, and MURPHY, Circuit Judges.

MURPHY, Circuit Judge. After a police officer received tips from Discord, an online app, that an accountholder had uploaded child pornography, the officer obtained a warrant to search the accountholder's home. The search uncovered substantial child pornography. The accountholder then turned into an informant, asserting that he had obtained sexually explicit images of a four-year-old girl from a user that went by AkiHaru#5042. The officer thus obtained a warrant to compel Discord to provide information about this account. That warrant led law enforcement to the defendant in this case, Christopher Bryant, who ultimately pleaded guilty to a child-pornography offense. On appeal, Bryant argues that the informant's tip did not establish the probable cause necessary to obtain a warrant for his Discord records. Yet the officer's affidavit in support of that warrant identified this informant by name and described the informant's direct

knowledge of AkiHaru#5042's crime. Because the affidavit sufficed to establish probable cause under our caselaw, we affirm Bryant's conviction.

I

The events that led to Bryant's conviction in Ohio began across the country with a separate investigation in La Habra, California. In late 2019, the National Center for Missing and Exploited Children sent several "CyberTips" about child pornography on the internet to a La Habra police officer. The tips had originated from Discord, which operates an internet app that allows accountholders to exchange text messages, images, and video in a "chat channel." Although Discord primarily serves video gamers, people who possess child pornography also use the app to distribute illegal images. The CyberTips revealed that an accountholder with a specific IP address in La Habra had uploaded sexually explicit images of young girls onto Discord. Acting on these tips, the La Habra officer obtained a warrant compelling an internet service provider to turn over the subscriber information for the identified IP address. The officer also obtained warrants for Google and Yahoo to produce information from the email addresses connected to the relevant Discord account. The internet service provider's records showed that the IP address was registered to a La Habra apartment at which a man named Phineas Cozmiuc lived. Cozmiuc's name also closely matched the name in the suspected email addresses.

The La Habra officer used this information to obtain a warrant to search Cozmiuc's apartment. During the search, Cozmiuc confessed to possessing over a hundred images of child pornography and gave the officer the password to his computer. The officer found the illegal images on this device and asked Cozmiuc to sit for an interview. Cozmiuc agreed. When questioned if he had received child pornography from anyone actively abusing children, Cozmiuc noted that a suspected female had been sending him explicit images of a four-year-old girl.

The two had met on Discord in the last couple of months but had switched to communicating on Wickr, an encrypted platform that can automatically delete conversations. Cozmiuc logged into his Discord account and showed the officer this suspect's username: AkiHaru#5042.

The officer asked a California judge for a warrant that would require Discord to disclose AkiHaru#5042's account information and communications with others in the Discord app. The judge issued the warrant. Discord's records (along with additional police work) revealed that this Discord account actually belonged to Bryant, not the female adult that Cozmiuc had suspected. Bryant's driver's license listed his residence as an apartment in Springfield, Ohio. The La Habra officer thus handed over the investigation to federal law enforcement in that state.

Federal officers continued with the investigation. Through surveillance of Bryant and conversations with his employer, they learned that the apartment listed on his driver's license belonged to a different couple. This couple had been allowing Bryant to stay with them and their children, including their four-year-old daughter. Yet the officers also learned that Bryant had recently moved to another apartment in Springfield.

They obtained a search warrant for this new apartment. The search uncovered hundreds of child-pornography images and videos on Bryant's phones and flash drives. After the search, Bryant confessed to using the AkiHaru#5042 account and posing as a female to discuss child pornography with Cozmiuc. He also confessed that he regularly took sexually explicit images of his friend's four-year-old daughter when he babysat her. All told, Bryant created some 116 illegal images of this small child and circulated some of these images to others, including Cozmiuc.

The government charged Bryant with violating several child-pornography statutes, including 18 U.S.C. § 2251(a). Section 2251(a) prohibited Bryant from persuading a minor to engage in sexually explicit conduct in order to produce a visual depiction of the conduct. In

response to the charges, Bryant moved to suppress all evidence derived from the La Habra officer's Discord warrant seeking information for AkiHaru#5042. Bryant claimed that the officer lacked probable cause that this Discord account had been used in criminal activity. He also requested an evidentiary hearing over whether the officer had included false information in the affidavit seeking the warrant. The district court denied his motion, finding that probable cause supported the warrant and that the allegedly false statements did not alter that conclusion.

Bryant later pleaded guilty to violating 18 U.S.C. § 2251(a). The court sentenced him to 330 months' imprisonment. Bryant's plea agreement reserved the right to challenge the district court's decision denying his motion to suppress. He now appeals this suppression order.

II

The parties do not dispute (and so we can take as a given on appeal) that the La Habra officer needed a warrant to obtain information from Discord about the AkiHaru#5042 account. *Cf. Carpenter v. United States*, 138 S. Ct. 2206, 2221–23 (2018). But they disagree over whether this officer's affidavit created the "probable cause" necessary for such a warrant under the Fourth Amendment. U.S. Const. amend. IV. Although we review the district court's probable-cause ruling de novo, we give "great deference" to the California judge's original conclusion that probable cause justified issuance of the warrant. *United States v. Sheckles*, 996 F.3d 330, 337–38 (6th Cir. 2021) (citation omitted).

Probable cause "is not a high bar." *District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018) (citation omitted). The general probable-cause test requires an officer to establish only a "'fair probability' of criminal activity" based on the totality of the circumstances listed in the officer's affidavit. *Sheckles*, 996 F.3d at 337 (citation omitted). Yet courts apply more specific tests depending on what the police seek to accomplish with the warrant. *See United States v.*

Baker, 976 F.3d 636, 645 (6th Cir. 2020). Probable cause to *arrest* a suspect, for example, requires a fair probability that the suspect has committed a crime, whereas probable cause to *search* a home for illegal drugs requires a fair probability that the home will contain the drugs. *See id.* at 645–46.

Here, the La Habra officer sought a warrant to compel Discord to disclose the following information for the AkiHaru#5042 account: "the IP address, device ID, username, email addresses, messages, images, transient [voice] data, and other content sent using chat features." Aff., R.25-1, PageID 100. The officer sought this information for two basic reasons. He asserted that the information might include confiscable child pornography. *See id.* This suggestion required the officer to show a fair probability that the account would contain the illegal contraband. *Cf. United States v. Lapsins*, 570 F.3d 758, 766–67 (6th Cir. 2009); *United States v. Terry*, 522 F.3d 645, 648–49 (6th Cir. 2008). The officer also asserted that the records might identify an unknown person suspected of abusing a four-year-old girl and contain other evidence relevant to proving the alleged abuse. *See* Aff., R.25-1, PageID 100, 103. This suggestion required the officer to show a fair probability that the evidence would "aid in a particular apprehension or conviction." *Warden v. Hayden*, 387 U.S. 294, 307 (1967); *cf. Sheckles*, 996 F.3d at 338.

What did the officer put in his affidavit to establish a fair probability of these things? He sought to prove probable cause primarily through Cozmiuc's statements about the AkiHaru#5042 account. The officer's affidavit detailed the investigation leading up to the search of Cozmiuc's apartment and Cozmiuc's confession to possessing child pornography. Aff., R.25-1, PageID 102–03. The affidavit next noted that the officer had personally confirmed that Cozmiuc's computer contained child pornography. *Id.*, PageID 103. It also summarized the officer's interview with Cozmiuc. Cozmiuc had confessed that a suspected female had been sending him sexually explicit images of a four-year-old girl who may have been the victim of ongoing abuse. *Id.* Cozmiuc

described his prior conversations with this suspect. *Id.* He also logged on to his Discord account in the officer's presence and identified the suspect's username (AkiHaru#5042) and user ID. *Id.*

Under our caselaw, this information created a fair probability that the requested Discord records for AkiHaru#5042 contained child pornography or other evidence of a crime. If an officer's affidavit seeks to show probable cause using hearsay statements from an informant like Cozmiuc, our precedent tells us to consider both the informant's reliability ("is the informant sufficiently trustworthy?") and the informant's basis of knowledge ("how did the informant learn about the criminal activity?"). *United States v. Bell*, 2022 WL 59619, at *2 (6th Cir. Jan. 6, 2022) (citing *Illinois v. Gates*, 462 U.S. 213, 228–30, 229 nn.4–6 (1983)). We balance these factors together, meaning that a stronger showing of one factor can make up for a weaker showing of the other under the totality-of-the-circumstances test. *See id.* at *3.

Critically for present purposes, we have repeatedly found probable cause using these factors when officers both identified informants by name in their affidavits and explained that the informants had indicated that they had seen a crime firsthand. *See, e.g.*, *United States v. Woods*, 858 F. App'x 868, 870–72 (6th Cir. 2021); *United States v. Hodge*, 714 F.3d 380, 384–85 (6th Cir. 2013); *United States v. Kinison*, 710 F.3d 678, 682–83 (6th Cir. 2013); *United States v. Miller*, 314 F.3d 265, 270 (6th Cir. 2002); *United States v. Allen*, 211 F.3d 970, 976 (6th Cir. 2000) (en banc); *United States v. Pelham*, 801 F.2d 875, 878 (6th Cir. 1986). According to our caselaw, affidavits of this sort generally establish an informant's reliability and basis of knowledge.

As for reliability, an officer's decision to name an individual in the affidavit distinguishes that person from an unnamed confidential informant or an anonymous source. *See, e.g.*, *Woods*, 858 F. App'x at 870; *Kinison*, 710 F.3d at 682–83; *Miller*, 314 F.3d at 270; *Allen*, 211 F.3d at 976; *Pelham*, 801 F.2d at 878. Known and named informants generally risk criminal liability if they

lie to police officers about a crime. *See Miller*, 314 F.3d at 270. So we view their statements as presumptively reliable for probable-cause purposes even if an affidavit does not include many other corroborating details about their trustworthiness (such as their previous history with the police). *See Woods*, 858 F. App'x at 870.

As for basis of knowledge, an informant's "eyewitness" account about criminal conduct distinguishes that informant from those who regurgitate facts learned from others or who simply fail to disclose how they came to know the recounted facts. *See, e.g.*, *Woods*, 858 F. App'x at 870; *Ahlers v. Schebil*, 188 F.3d 365, 370 (6th Cir. 1999); *cf. United States v. Howard*, 632 F. App'x 795, 802–04 (6th Cir. 2015); *United States v. Smith*, 182 F.3d 473, 481–82 (6th Cir. 1999). Practically speaking, there can be no firmer foundation for an informant's knowledge of a crime than the informant's "direct viewing" of the crime. *Pelham*, 801 F.2d at 878. So we also view an eyewitness's report of a crime as presumptively adequate to create a fair probability that the crime occurred. *See Ahlers*, 188 F.3d at 370.

Pelham provides perhaps the first example of this general rule. There, officers arrested an informant found with pounds of marijuana in his truck. 801 F.2d at 876. When asked where he had obtained the drugs, this informant said that he had picked them up at a specific address at which James Pelham lived. *Id.* An officer sought a warrant for Pelham's home based on the informant's statements, including that the informant had recently been in the home and seen Pelham storing marijuana. *Id.* We held that this affidavit sufficed to establish probable cause to search the home. *Id.* at 878. The informant's willingness "to be named in the affidavit" showed his reliability, and his viewing of the illegal drugs firsthand showed his basis of knowledge. *Id.*

This case is a virtual cousin of *Pelham*. Here, as there, officers discovered an individual with illegal contraband in his possession (whether drugs or child pornography). The informants

in both cases were asked about sources of the contraband, and they implicated a second suspect in response (whether by identifying the suspect's physical address or by identifying the suspect's internet account). The officers' affidavits in both cases expressly named the informants, who had subjected themselves to potential criminal liability if they had lied to the police about the other suspects' crimes. *See* Cal. Penal Code § 148.5(a)–(b); *Navarette v. California*, 572 U.S. 393, 400–01 (2014). The affidavits in both cases also described the informants' bases of knowledge. The informant in *Pelham* had seen the drugs in the suspect's home; the informant in this case had seen the child pornography in the suspect's online communications. *Pelham* thus controls here.

If anything, other information listed in the affidavit further bolstered Cozmiuc's reliability and basis of knowledge. For one thing, Cozmiuc's statement about receiving child pornography from AkiHaru#5042 also implicated him in criminal liability. After all, it is just as illegal to knowingly *receive* child pornography as it is to knowingly *send* it. *See* 18 U.S.C. § 2252(a)(2). That Cozmiuc's statements were against his penal interest made them more reliable. *See Kinison*, 710 F.3d at 683; *see also United States v. Harris*, 403 U.S. 573, 583–84 (1971) (plurality opinion); *cf.* Fed. R. Evid. 804(b)(3). For another thing, physical evidence corroborated Cozmiuc's statements. Cozmiuc did not simply identify AkiHaru#5042 from memory. Cozmiuc "logged into his Discord account in front of [the officer] and showed [him] the profile name for" the person who sent the child pornography. Aff., R.25-1, PageID 103. This corroborating evidence reduced the possibility that Cozmiuc had simply made up a story about the other Discord account he had implicated in a crime. And, of course, the officer had just found many images of child pornography on Cozmiuc's computer, including images of young girls like the ones that Cozmiuc described receiving from AkiHaru#5042. This physical evidence further corroborated that Cozmiuc had been actively involved in similar child-pornography crimes. In sum, this case fits comfortably

within our precedent that permits a judge to find probable cause when a named informant provides detailed statements about witnessing and participating in a crime.

In response, Bryant argues that this general rule should not apply here because Cozmiuc was "unknown" to the La Habra officer until his arrest. Bryant misunderstands what the relevant caselaw means by "unknown" sources. That adjective typically refers to informants who provide *anonymous* tips—such as, for example, callers who leave voice messages with the police about a crime but who do not otherwise identify themselves. *See, e.g.*, *Navarette*, 572 U.S. at 397; *Florida v. J.L.*, 529 U.S. 266, 270 (2000). Courts require extra corroboration for these types of informants because they have unknown reputations and motives and because they cannot be held to account if they provide false information. *See J.L.*, 529 U.S. at 270.

Yet, unlike the anonymous tipster in *J.L.*, Cozmiuc was known to the La Habra officer and even identified in the affidavit. We have repeatedly recognized that "naming the informant to the magistrate" is "an indicia of reliability," even if the affidavit does not identify the informant's prior history with the police. *United States v. Abdalla*, 972 F.3d 838, 849 (6th Cir. 2020); *Woods*, 858 F. App'x at 870. *Pelham* confirms this point. The affidavit in that case gave no indication that the police had previously worked with the informant before they discovered marijuana in his truck. 801 F.2d at 876. But we did not treat this individual as an anonymous or unknown source. *Id.* at 878. And although Bryant suggests that *Pelham* has been superseded by recent caselaw, we have adhered to its logic in the past year. *See, e.g.*, *Woods*, 858 F. App'x at 871. The cases that Bryant cites to sidestep *Pelham*, by contrast, involved anonymous sources or confidential informants, not individuals like Cozmiuc who were identified in the affidavit. *See, e.g.*, *J.L.*, 529 U.S. at 270; *United States v. Moore*, 999 F.3d 993, 997 (6th Cir. 2021).

Bryant also suggests that a probable-cause finding in this case would allow informants to implicate the online accounts of famous politicians or actors with little corroboration so long as the informants are willing to be named in the affidavit. Perhaps so. As the government recognized at oral argument, we must neutrally apply the same probable-cause test no matter the suspect. But these hypothetical informants could face criminal liability if it turns out that they gave false information, which is why we have generally found them reliable for probable-cause purposes. *See Miller*, 314 F.3d at 270. And the totality of the circumstances still governs the probable-cause analysis. So if *other* evidence suggests that an informant had a motive to lie—say, because the informant merely wanted to harass a member of the opposing political party—that factor could play into whether probable cause existed to search an online account. *See Ahlers*, 188 F.3d at 370. In this case, however, Bryant identifies no evidence to suggest that Cozmiuc had ulterior motives to implicate AkiHaru#5042 in a crime.

Bryant lastly asserts that the La Habra officer's affidavit in support of the warrant contained false information, which required the district court to hold an evidentiary hearing under the framework established by the Supreme Court in *Franks v. Delaware*, 438 U.S. 154 (1978). In particular, the affidavit to obtain AkiHaru#5042's Discord records included a statement that referred to an earlier warrant in the investigation: "This is an addendum to the already granted search warrant; which your affiant has attached as an item of reference for the court's review." Aff., R.25-1, PageID 101. Bryant argues that the request for AkiHaru#5042's records was not an "addendum" to any prior warrant because the new warrant involved a different suspect.

This claim did not necessitate a *Franks* hearing. Under *Franks*, a defendant may obtain a hearing to challenge a search warrant by making a preliminary showing of two things: that the officer who requested the warrant knowingly or recklessly included false statements in a

supporting affidavit and that probable cause would not have existed without the allegedly false statements. *See* 438 U.S. at 171–72; *United States v. Bateman*, 945 F.3d 997, 1009 (6th Cir. 2019). Here, it is not clear that the La Habra officer's ambiguous "addendum" statement, when read in the context of the entire affidavit, meant to convey anything other than that the requested warrant flowed out of information obtained from a previous one. But we need not resolve whether this statement conveyed a knowing or reckless falsehood. For the reasons that we have explained, the affidavit contained "sufficient" additional "content" "to support a finding of probable cause" without the challenged statement. *Franks*, 438 U.S. at 172; *see Bateman*, 945 F.3d at 1010. So the statement was immaterial to the probable-cause finding.

We affirm.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

United States of America,

Plaintiff,

v.

Case No. 3:20-cr-094
Judge Thomas M. Rose

Christopher Lee Bryant,

Defendant.

DECISION AND ORDER OVERRULING MOTION TO SUPPRESS EVIDENCE; FRANKS EVIDENTIARY HEARING REQUESTED. ECF. 25.

Pending before the Court is Defendant's Motion to Suppress Evidence; Franks Evidentiary Hearing Requested. ECF. 25. Therein, Defendant Christopher Lee Bryant requests an order suppressing all evidence obtained from a California state search warrant issued on January 28, 2020 to search Bryant's "AkiHaru#5042" Discord account. The Government has filed a Response, ECF 27, to which Defendant has replied. ECF 29.

Bryant contends the warrant was issued without probable cause that evidence of alleged crimes would be found at the location to be searched, in violation of the Fourth Amendment. He further asserts the warrant application contained a "bare bones" affidavit, which did not establish a nexus between the place to be searched and evidence from the alleged crime.

I. FACTS

On the morning of January 28, 2020, law enforcement executed a search warrant at 1401

S. Harbor Blvd #6P, in the city of La Habra, California. This was the residence of a Phineas Cozmiuc, whom law enforcement suspected of uploading images of child pornography based on three "Cyber Tips" submitted by the Discord application to NCMEC (National Center for Missing and Exploited Children). Discord is a proprietary freeware VoIP application and digital distribution platform designed for video gaming communities, that specializes in text, image, video and audio communication between users in a chat channel. Affiant, Corporal Nick Baclit of La Habra Police Department was familiar with Discord through prior child pornography investigations and knew that child pornography is often traded on Discord. (Id.). The NCMEC tip reported two pornographic images and a video depicting a prepubescent minor female, approximately seven years old were uploaded in the city of La Habra. (Id.). LHPD traced these images to Cozmiuc and his Discord account. (Id. at p.101-02). These "Cyber Tips" indicated that two images and one video of child pornography were uploaded in the city of La Habra. Law enforcement eventually identified Cozmiuc's residence at 1401 S. Harbor Blvd #6P as the registered IP address for these uploaded child pornography files.

Cozmiuc was home when law enforcement executed the search warrant. He was detained and admitted that he was in possession of numerous images and videos of child pornography. Cozmiuc provided law enforcement with log in and password information for his computer. A preliminary review of the computer revealed hundreds of images of suspected child pornography. Cozmiuc was transported to the La Habra Police Department where he was interviewed. He was asked if he had ever communicated with anyone who was sending him child pornography of a real victim. Cozmiuc told law enforcement that he was communicating with a person whom he believed was an adult female who had been sending him still images of a four-year old child's

vagina. The Government alleges Cozmiuc's correspondent was actually a male, namely the Defendant in this case, Bryant. Cozmiuc said he had met this person originally on the social media platform, Discord, but then agreed to transfer communications to another platform called Wickr. Wickr is an encrypted platform that serves as an anonymous means of communication. Wickr automatically deletes communications to conceal activity.

Cozmiuc stated that he had been communicating with this female for the past two months, and as recently as one week prior. He then logged into his Discord account in front of Corporal Nick Baclit of the La Habra Police Department and showed him the profile for this alleged female. The Discord screen name was "AkiHaru#5042".

Having viewed the screen name "AkiHaru#5042" on Cozmiuc's Discord account and heard Cozmiuc's self-incriminating admission to receiving child pornography from it, Baclit applied for a search warrant for all the contents of Bryant's "AkiHaru#5042" Discord account on the same date, January 28, 2020. In the affidavit for the search warrant submitted to Orange County Magistrate Judge Fred Slaughter, Baclit stated the following, "[t]his is an addendum to the already granted search warrant; which your affiant has attached as an item of reference for the court's review." Defendant would have the Court view this not as an addendum to an already granted search warrant amending the scope to include the "AkiHaru#5042" discord account, but as a separate application to search Bryant's Discord account.

Magistrate Judge Slaughter authorized the search warrant for Bryant's "AkiHaru#5042" Discord account. Discord responded, and eventually sent the entirety of the search warrant results to Special Agent Christopher Wallace from Homeland Security Investigations.

After reviewing the results of the search warrant return, Corporal Baclit discovered the user

AkiHaru#5042 had posted pictures of their driver's license on Discord. (Complaint, Doc. 3, p.14). The license was an Ohio driver's license for the Defendant. (Id.). The investigation was then turned over to Special Agent Chris Wallace of Homeland Security Investigations in the Southern District of Ohio. (Id.). Wallace reviewed the chat records of Defendant's Discord account and found child erotica images, as well as a chat between Defendant and Cozmiuc in which Defendant posed as a female and discussed sexual interest in children with Cozmiuc. (Id. at p15-17.). Defendant suggested that they move their conversation over to Wickr, which he described as "a chat app that is safe and has security with messages." (Id. at p.17). This is consistent with Cozmiuc's account of the conversation. (Affidavit, Doc. 25-1, p.103). After additional investigation, Wallace discovered that Defendant was residing at a home in Springfield. (Complaint, Doc. 3, p.15, 18-21). Wallace also discovered that multiple minor children lived in that home, one of whom is a four-year-old female (consistent with the minor victim AkiHaru#5042 discussed with Cozmiuc and sent child pornography images of).

Wallace would eventually obtain a number of search warrants in the Southern District of Ohio pertaining to Bryant, including search warrants for two suspected residences in Springfield, Ohio; a silver Saturn Ion vehicle; the person of Christopher Bryant; and GPS location records for Christopher Bryant's cellular phone.

The affidavits in support of each of these warrants rely almost exclusively on the information derived from the California state search warrant results for Bryant's "AkiHaru#5042" Discord account to establish probable cause. On March 24, 2020, agents executed search warrants at two locations in Springfield, Ohio. Bryant was present at one of them. Law enforcement recovered a Samsung Galaxy cell phone, a flash drive, and two other cell phones from

this residence.

Alleged child pornography was found on the Samsung Galaxy cell phone and the flash drive. Bryant was interviewed and made incriminating statements regarding the possession and production of child pornography.

On March 24, 2020, the federal search warrant was executed on Defendant's apartment at which Defendant was present, and several electronic devices were seized. (Id.). Child pornography videos and images were discovered on Defendant's cell phone, including a video approximately thirty-two minutes in length of an adult male having vaginal and anal sex with a minor female toddler in various positions. (Id. at p 23).

After being Mirandized, Defendant was interviewed by Wallace. (Id. at p.24). He admitted to being the user of the Discord username AkiHari#5042, and to communicating with and sending child pornography to Cozmiuc. (Id. at p.24-25). Defendant admitted he had been living at the home in Springfield between August 2019 and February 2020, with the family there, to include several minor children, one of whom was a four-year-old female. (Id. at p.25). Defendant admitted to producing images on his cell phone of the genitalia of the four-year-old female and distributing those images to other individuals online. (Id.).

A later search of Defendant's cell phone revealed images of that four-year-old female in various states of clothing, to include a close-up image of her unclothed vagina. Metadata from that photograph showed it was created on March 19, 2020, only five days prior. Defendant admitted that a specific user on Discord (not Cozmiuc) would request more and more "lewd" images of the four-year-old female, and that Defendant would comply by producing such images and distributing them to that user. (Id.). Defendant admitted he was still in regular contact with

that user and had last spoken to him as recently as a week prior. (Id. at p.26). Defendant admitted to producing photographs of the genitalia of the minor male child living in the home as well. (Id. at p.25). Defendant admitted he produced these images when he was alone with the children babysitting them. (Id.).

Defendant stated that he had relatives in California, and that he used to babysit his niece (a minor), who was located in California. (Id. at p.26). Defendant stated that during this babysitting he rubbed his hand on his niece's unclothed vagina, and he took photographs of this. (Id.). A later search of Defendant's electronic devices revealed images consistent with Defendant's admissions.

II. ANALYSIS

The Fourth Amendment requires that search warrants be issued only "'upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.'" *United States v. Baker*, 2019 WL 1125685, at *3 (S.D. Ohio Mar. 12, 2019) (Rose, J.) (citation omitted). "Probable cause exists when there is a 'fair probability,' given the totality of the circumstances, that contraband or evidence of a crime will be found in a particular place." *Davidson*, 936 F.2d at 859, quoting *Loggins*, 777 F.2d at 338. This is not "a high bar." *District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018). Probable cause does not require "certainty," *United States v. Silvey*, 393 F. App'x 301, 306 (6th Cir. 2010), but rather "only the kind of fair probability on which reasonable and prudent people, not legal technicians, act." *Kaley v. United States*, 571 U.S. 320, 338 (2014)(brackets omitted); see also *Baker*, 2019 WL 1125685, at *3 (noting that probable cause "requires only a 'probability or substantial chance of criminal activity, not an actual showing of such activity.'" (citation omitted)).

When assessing the sufficiency of allegations in a warrant affidavit, "[t]he affidavit should

be reviewed in a commonsense – rather than a hyper technical – manner, and the court should consider whether the totality of the circumstances supports a finding of probable cause, rather than engaging in line-by-line scrutiny." *United States v. Woosley*, 361 F.3d 924, 926 (6th Cir. 2004). In other words, the reviewing court must "consider the whole picture" and must not engage in the "sort of divide-and-conquer analysis" under which a movant attempts to pick off the affidavit's allegations "one by one." *Wesby*, 138 S. Ct. at 588 (internal quotation marks omitted). Further, "[the affidavit is [to be] judged on the adequacy of what it does contain, not on what it lacks, or on what a critic might say should have been added." *United States v. Allen*, 211 F.3d 970, 975 (6th Cir. 2000) (*en banc*). Ultimately, the reviewing court "must give great deference to a magistrate's determination of probable cause." *Brown*, 732 F.3d at 573. "'An issuing judge's findings of probable cause . . . should not be reversed unless arbitrarily exercised.'" *United States v. Higgins*, 557 F.3d 381, 389 (6th Cir. 2009) (quoting *United States v. Miller*, 314 F.3d 265, 268 (6th Cir. 2002)). So long as the judge who issued the warrant had a 'substantial basis' for believing there to be [probable cause, [the reviewing court] must affirm." *Davidson*, 2019 WL 1220845, at *3, see also *Baker*, 2019 WL 1125685, at *4.

In order to obtain a *Franks* hearing, a defendant must make a substantial preliminary showing that (1) the affiant's statement was deliberately false or demonstrated reckless disregard for the truth, *Franks v. Delaware*, 438 U.S. 152, 155-56, 171 (1978), and (2) the challenged statement or omission was essential to the magistrate's finding of probable cause. Id. at 155-56, 171-72. To the extent a defendant relies on "recklessness," the test is a subjective one. *United States v. Cican*, 63 Fed. App'x 832, 835-36 (6th Cir. 2003); *United States v. Colquitt*, 604 Fed. App'x 424, 429-30 (6th Cir. 2015). A law enforcement officer's statement is made with "reckless

disregard for the truth" when he or she subjectively "entertains serious doubts as to the truth of his [or her] allegations." *United States v. Cican*, 63 Fed. App'x at 836.

"Only after the defendant makes this showing may the court consider the veracity of the statements in the affidavit or the potential effect of any omitted information." *United States v. Archibald*, 685 F.3d 553, 558-59 (6th Cir. 2012). "Without this substantial showing, courts may not make a *Franks* ruling regarding the veracity of statements made in an affidavit." Id. at 559. A defendant seeking a *Franks* hearing "should point out specifically the portion of the warrant affidavit that is claimed to be false." *Franks*, 438 U.S. at 170.

A. Probable Cause to Search the Discord Account.

Defendant asserts the search warrant affidavit was deficient and also argues the warrant is defective because law enforcement should have taken other investigative steps first. First, Defendant asserts that "there was no nexus shown between the place to be searched (Bryant's 'AkiHaru#5042' Discord account), and purported evidence to be found (still images of a four-year old child's vagina)." (Motion, Doc. 25, p.92). A nexus does exist, and this statement also mistakenly limits the evidence to be searched for.

An issuing judge's probable cause determination is entitled to "great deference." *Brown*, 732 F.3d at 573. "Probable cause exists when there is a 'fair probability,' given the totality of the circumstances, that contraband or evidence of a crime will be found in a particular place." *Davidson*, 936 F.2d at 859, quoting *Loggins*, 777 F.2d at 338. The evidence to be found refers to not only the pornographic image of the four-year-old child, but also any contraband (any child pornography) or evidence of that crime. Evidence of the crime of child pornography encompasses more than simply the child pornography images themselves; it includes communications about

child pornography, communications about sexual interest in children, communications about access to children, child erotica materials, as well as any information that could be used to identify the offender or the victim.

The affiant requested a warrant for "the IP address, device ID, username, email addresses, messages, images, transient VoIP Data, and other content sent using chat features" associated with the Discord account. (Affidavit, Doc. 25-1, p.100, 103). Such information could be used to identify and locate the offender. The affidavit detailed how Cozmiuc's IP address and email addresses led law enforcement to initially identify Cozmiuc as a distributor of child pornography. (Id. at 101-02).

Defendant misunderstands the nature of the investigation: it was not an investigation into a single instance of possession or distribution of child pornography, intending only to recover one specific image. This was an investigation into production of child pornography, by a suspect who had access to a four-year-old child and appears to have been engaging in the ongoing exploitation of that child. The goal of the investigation was not just to locate a specific image, but to identify the offender and the child to stop that exploitation from continuing.

A review of the search warrant shows that there was a substantial nexus between the place to be searched (the Discord account subscriber information and content) and the items sought (child pornography or evidence of child pornography crimes). Specifically, the affidavit contained the following information:

> • The affiant's experience and training: Corporeal Baclit had been a police officer for over 18 years and is assigned as a sex crimes investigator and is a member of the Internet Crimes Against

Children Task Force. He was familiar with Discord and knew child pornography is often traded on that application; he had personally investigated several incidents where child pornography was traded on Discord. (Affidavit, Doc. 25-1, p.101).

• The affiant also detailed his knowledge and experience concerning the behavior of child pornography possessors, distributors, and producers, and the value the evidence sought in the search warrant could provide to the investigation. (Id. at p.104).

• Information provided by Discord allowed law enforcement to locate Cozmiuc. The email address and IP address of the Discord user who uploaded the child pornography were linked to Cozmiuc. (Id. at p.101-02).

• When law enforcement encountered Cozmiuc on January 28, 2020, he was immediately cooperative and forthcoming. Cozmiuc volunteered that he knew why law enforcement was there, and that he was in possession of over 100 images and videos of child pornography. (Id. at p.102-03).

Contrary to Defendant's assertion that the "only information" in the affidavit "comes from the uncorroborated and self-serving statements of Cozmiuc after his arrest for child pornography," (Motion, ECF 25, PageID 92; Reply, ECF 28, PageID 266), Cozmiuc's statements were corroborated and were all consistent with what law enforcement observed or knew, to wit:

• When Cozmiuc was asked if he was aware of any child

pornography producers, he was forthcoming and advised he was communicating with a user he believed to be a female who was producing images of a four-year-old female. Cozmiuc was able to corroborate this by showing Corporal Baclit that individual's username when he pulled up his Discord account – AkiHaru#5042. (Id.).

• Cozmiuc statement that he met AkiHaru#5042 on Discord was consistent with Corporal Baclit's knowledge that Discord was often used to discuss child sexual abuse and trade child pornography, and his personal experience investigating such crimes. Baclit wrote in the affidavit, "In October and November of 2019, your affiant received three CyberTip Reports from NCMEC . . . documenting the possession and transmission of child pornography through the social medial platform Discord. . . . Based on your affiant's training and experience, your affiant knows that child pornography is often traded on this application. Your affiant has investigated several incidents where child pornography was traded on the Discord application." (Id.).

• That Cozmiuc was in ongoing communication with an individual who supplied him with images of a prepubescent four-year-old female was consistent with what was known of Cozmiuc's preferences at that point – the NCMEC tip had been of child

pornography images also of a prepubescent minor female, roughly seven years in age. (Id. at 101).

• Cozmiuc admitted that after communicating on Discord, he and AkiHaru#5042 agreed to move their conversation to another platform called Wickr. (Id. at PageID 103). This is consistent with Corporal Baclit's knowledge and experience of how these platforms work and how child pornography collectors and creators behave. Corporal Baclit wrote that "Your affiant knows this platform is encrypted and serves as a means of communication in an anonymous setting. The communication is automatically deleted to conceal illegal activity." (Id. at p.103). He also detailed that communications regarding child pornography, and the images and videos themselves are "usually maintained in a secure place" and are "stored in a manner to avoid detection by law enforcement." (Id.).

• Cozmiuc had advised he possessed over 100 images of child pornography, and an initial search of Cozmiuc's computer by Corporal Baclit confirmed this. (Affidavit, Doc. 25-1, p.102-03).

All of Cozmiuc's statements were consistent with either other evidence, or with law enforcement's knowledge of the behavior of child pornography consumers, the operation of Discord, the operation of Wickr, or the use of those platforms for child exploitation crimes. The evidence included in the affidavit, viewed in the totality of the circumstances, establishes that there

was at a minimum a "fair probability" that "contraband or evidence of a crime" would be found on the AkiHaru#5042 Discord account. *Davidson*, 936 F.2d at 859, quoting *Loggins*, 777 F.2d at 338. This evidence certainly established the "kind of fair probability on which reasonable and prudent people, not legal technicians, act." *Kaley*, 571 U.S. at 338 (2014)(brackets omitted).

Moreover, a face-to-face tip from an identified informant is entitled to greater weight than that from an anonymous informant because officers have a first-hand opportunity to assess the informant's credibility and demeanor, and such persons may be exposing themselves to prosecution for lodging false complaints and/or being in the presence/possession of contraband. *United States v. Valentine*, 232 F.3d 350, 354-55 (3d Cir. 2000) (and cases cited therein). Here, the issuing magistrate was not relying on an out-of-the-blue accusation, the officers were swimming in evidence of child pornography at Cozmiuc's residence. Cozmiuc's statements regarding AkiHaru#5042 were self-incriminating. Looking at the whole, the statements are reliable.

Defendant also attacks the search warrant by insisting law enforcement should have undertaken other investigatory tactics first, such as taking over Cozmiuc's Discord account or having Cozmiuc reach out to AkiHaru#5042 on Discord to attempt to illicit incriminating statements. (Motion, Doc. 25, p.93). This rationale has been rejected: "The affidavit is [to be] judged on the adequacy of what it does contain, not on what it lacks, or on what a critic might say should have been added." *Allen*, 211 F.3d at 975. The information contained in the affidavit gave the issuing judge a "substantial basis" for finding probable cause, *Davidson*, 2019 WL 1220845, at *3, and the issuing judge's discretion in granting the warrant was not "arbitrarily exercised." *Higgins*, 557 F.3d at 389 (internal citations omitted). Defendant has not overcome the "great

deference" a reviewing court "must give . . . to a magistrate's determination of probable cause." *Brown*, 732 F.3d at 573.

B. Good-Faith Exception to the Exclusionary Rule.

Even if the Court were to have found an insufficient basis for finding probable cause, suppression would also be inappropriate here under the good-faith exception of *Leon*, 468 U.S. 897. The purpose of the good faith exception is "not to bar from admission evidence 'seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective.'" *United States v. Hython*, 443 F.3d 480, 484 (6th Cir. 2006), quoting *Leon*, at 905. The *Leon* good-faith exception has four exceptions: (1) where the issuing magistrate was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard for the truth; (2) where the issuing magistrate wholly abandoned his judicial role and failed to act in a neutral and detached fashion, serving merely as a rubber stamp for the police; (3) where the affidavit was nothing more than a "bare bones" affidavit that did not provide the magistrate with a substantial basis for determining the existence of probable cause, or where the affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) where the officer's reliance on the warrant was not in good faith or objectively reasonable, such as where the warrant is facially deficient. *Hython*, 443 F.3d at 484.

The first circumstance under which the *Leon* good faith exception would not apply is if the issuing magistrate was misled by information that the affiant knew was false or would have known was false save for his reckless disregard of the truth. This goes to the heart of Defendant's request for a *Franks* hearing and will be addressed below.

The second circumstance in which the *Leon* good faith exception would not apply is if the

issuing magistrate failed to "perform his 'neutral and detached' function'" and instead served "'merely as a rubber stamp for the police'" *Leon*, 468 U.S. at 914 (internal citations omitted), or who "acts instead as 'an adjunct law enforcement officer[.]'" Id., quoting *Lo–Ji Sales, Inc. v. New York*, 442 U.S. 319, 326–27 (1979). Defendant does not allege that this occurred. The standard to find that an issuing magistrate wholly abandoned their judicial role is a high one and there is no evidence that such flagrant behavior occurred in the instant case.

The third circumstance under which the *Leon* good faith exception will not apply is if the affidavit "was nothing more than a 'bare bones' affidavit that did not provide the magistrate with a substantial basis for determining the existence of probable cause, or where the affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable[.]" *Hython*, 443 F.3d at 484. Defendant argues this is the case here. (Motion, Doc. 25, at 94).

However, the standard of proof required for an officer's reliance on a warrant to be objectively reasonable is low one. "The conclusion that the officers' reliance on the warrant was objectively reasonable requires a 'less demanding showing than the "substantial basis" threshold required to prove the existence of probable cause.'" *United States v. Soto*, 794 F.3d 635, 646 (6th Cir. 2015)(internal citations omitted). Instead, the label of a "bare bones" affidavit "is reserved for an affidavit that merely states suspicions, or conclusions, without providing some underlying factual circumstances regarding veracity, reliability, and basis of knowledge." *United States v. Acosta-Barrera*, 819 F. App'x 366, 371 (6th Cir. 2020)(internal citations omitted).

> For an officer's reliance on a warrant to have been objectively reasonable, the affidavit need only "contain 'a minimally sufficient nexus between the illegal activity and the place to be searched.'" Because this [standard is less than] than probable cause, the affidavit

> "need not establish a 'substantial basis,' only 'some connection, regardless of how remote it may have been—some modicum of evidence, however slight—between the criminal activity at issue and the place to be searched.'"

Id. at 371-72(internal citations omitted).

The instant warrant affidavit was hardly "so skimpy, so conclusory, that anyone looking at the warrant would necessarily have known it failed to demonstrate probable cause." *United States v. Asgari*, 918 F.3d 509, 513 (6th Cir. 2019). Instead, the affidavit contained sufficient facts to meet the higher standard of showing that the issuing judge had a "substantial basis" for finding probable cause, *Davidson*, 2019 WL 1220845, at *3. Accordingly, this exception does not preclude the *Leon* good faith exception from applying in this case.

The fourth circumstance under which the *Leon* good faith exception will not apply is where the warrant is facially deficient or otherwise plainly invalid, rendering the officer's reliance on such a warrant to have been in bad faith or not objectively reasonable. *Hython*, 443 F.3d at 484. Such a circumstance will apply where the warrant was facially deficient, for example if it failed to identify the place to be searched or the things to be seized. *Groh v. Ramirez*, 540 U.S. 551, 557 (2004). See also *United States v. Lazar*, 604 F.3d 230, 237 (6th Cir. 2010).

Defendant does not allege that this occurred. The warrant did particularize the place to be searched and things to be seized on the cover page of the warrant and in the body of the affidavit. (Affidavit, Doc. 25-1, p.100, 103). Because the warrant was not facially deficient, this circumstance does not preclude the application of the *Leon* good faith exception. Because none of the above four circumstances apply, the *Leon* good faith exception applies in this case even if the affidavit had lacked probable cause.

C. Evidentiary Hearing.

Defendant seeks an evidentiary hearing. As the Sixth Circuit has repeatedly held, "[a]n evidentiary hearing is required only if [a] motion [to suppress] is sufficiently definite, specific, detailed, and non-conjectural to enable the court to conclude that contested issues of fact going to the validity of the search are in question." *United States v. Abboud*, 438 F.3d 554, 577 (6th Cir. 2009) (internal quotation marks omitted); see also *United States v. Ickes*, 922 F.3d 708, 710 (6th Cir. 2019) ("[A] defendant is not entitled to an evidentiary hearing if his argument is 'entirely legal in nature.'"). A suppression motion such as Defendant's, premised only on the argument that "[a] search warrant was not supported by probable cause" raises only "questions of law." *United States v. Knowledge*, 418 F. App'x 405, 408 (6th Cir. 2011); see also *United States v. Lawson*, 476 F. App'x 644, 649 (6th Cir. 2012)(defendant's "challenge[] [of] *Leon*'s applicability to the case is also a pure legal question."). Thus, Defendant is not entitled to an evidentiary hearing on his Motion.

III. *Franks* Hearing

The second half of Defendant's Motion is a request for a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). Defendant bears the burden to demonstrate he is entitled to such a hearing, and Defendant has failed to carry that burden.

A. Legal Standard

To establish he is entitled to a *Franks* hearing, Defendant must make "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause . . . ." *Franks* at 155-56. The burden is on the Defendant. "A defendant who challenges the veracity of statements made in an affidavit that

formed the basis for a warrant has a heavy burden." *United States v. Bennett*, 905 F.2d 931, 934 (6th Cir. 1990). The United States Supreme Court in *Franks* stressed that "[t]here is, of course, a presumption of validity with respect to the affidavit supporting the search warrant." Id. at 171.

To mandate an evidentiary hearing, Defendant's showing "must be more than conclusory and must be supported by more than a mere desire to cross-examine." Id. "Allegations of negligence or innocent mistake are insufficient." Id. Rather, "[t]here must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. . . Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained." Id.

A *Franks* hearing is not an opportunity for Defendant to go on a fishing expedition for the evidence necessary to make such a showing, nor to investigate for discovery. *United States v. Schumacher*, 611 F. App'x 337, 341 (6th Cir. 2015)(" "[The defendant] appears to have confused the purpose of a *Franks* hearing, which is to permit the court to determine whether law enforcement agents made deliberate falsehoods to secure a search warrant, not to provide discovery for the defendant."). A defendant must make a substantial preliminary showing as a threshold matter to trigger a *Franks* hearing. However, this substantial preliminary showing of a knowing and deliberate falsehood or reckless disregard for the truth is only the first prong Defendant must satisfy to mandate a *Franks* hearing.

Even if Defendant can make such a showing, he must then demonstrate that if the challenged information was removed, the affidavit would no longer contain probable cause. If a defendant fails to show the removal of the challenged information would be fatal to the warrant, no hearing is required. "Finally, if these requirements are met, and if, when material that is the

subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required." *Franks*, 438 U.S. at 171-72. See also *Bennett*, 905 F.2d at 934.

B. Analysis

Defendant requests a *Franks* hearing based on the following statement in the affidavit: "[t]his is an addendum to the already granted search warrant; which your affiant has attached as an item of reference for the court's review." (Doc. 25-1, p.101). Defendant argues that this was a false statement designed to mislead the issuing magistrate.

The challenged language is a reference to the fact that there were several search warrants already issued in this case. The rest of the challenged affidavit details how the investigation led to Cozmiuc, and then to Defendant. The affiant describes how, during the course of the investigation into Cozmiuc, search warrants were issued for (1) Cozmiuc's Yahoo email account (which was linked to the Discord account that uploaded the child pornography which was the subject of the NCMEC report), (2) Cozmiuc's IP address (the IP address used to upload that child pornography), and later (3) for Cozmiuc's residence (which was associated with the aforementioned IP address). (Affidavit, Doc. 25-1, p.102).

There is no evidence of an intention to mislead the issuing magistrate. The affiant discussed all three of the prior search warrants in context to explain the history of the investigation. The affidavit made plain that these three prior search warrants related to Cozmiuc, not Defendant; they did not provide further evidence against Defendant, instead they merely explained how the investigation had arrived at its present point.

Neither is there evidence that this statement about a previously issued search warrant could

have somehow misled the issuing magistrate. Despite the language stating that an addendum is attached, it would have been obvious to the magistrate that there were no such pages attached to the four-page search warrant and affidavit. Defendant asserts that such a statement may have been "an intentional tactic" on the part of the affiant "to ensure a more cursory 'rubber stamp' by a state magistrate judge[.]" (Id.).

While this statement implies significant deceit on the part of the affiant, it underestimates the issuing judge, and assumes the judge did not even read the document presented to them. These theories are unsupported by evidence, and run up against the substantial facts laid out in the affidavit that support the magistrate's probable cause determination.

An affiant's awkward phrasing is not the same as "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit. . . ." *Franks* at 155-56. The affiant's language about an addendum being attached to the warrant, even if intentionally inserted is insufficient to trigger a hearing, because without it, the warrant application still supports a finding of probable cause. Id. See also *United States v. Green*, 572 F. App'x 438, 443 (6th Cir. 2014).

Defendant has failed to overcome the "presumption of validity" granted to search warrants. Id. at 171. He has neither made "allegations of deliberate falsehood or of reckless disregard for the truth," nor offered any proof to substantiate any such allegations. Instead, Defendant's arguments regarding the statement at issue are conclusory and rebutted by examining the face of the warrant itself. Id. Defendant has thus failed to meet his burden to show he is entitled to a *Franks* hearing.

Even if Defendant is able to make a substantial preliminary showing that the affiant

deliberately included information that he knew was false or that he was reckless with regard to the truth of the information, Defendant still is not automatically entitled to a *Franks* hearing. Instead, Defendant must also establish that the challenged information was material, and that excising the challenged material would deprive the affidavit of probable cause. *Bennett*, 905 F.2d at 934 (6th Cir. 1990)("If probable cause exists absent the challenged statements, a defendant is entitled to no more[.]"); *Mastromatteo*, 538 F.3d at 546. See also *United States v. Green*, 572 F. App'x 438, 441–42 (6th Cir. 2014). This the Defendant does not do. Removing the challenged language removes none of the information that supplied the issuing magistrate with probable cause. The affidavit contained more than sufficient information to establish that there was a "'fair probability,' given the totality of the circumstances, that contraband or evidence of a crime" would be found in the requested subscriber information and content of Defendant's Discord account. *Davidson*, 936 F.2d at 859, quoting *Loggins*, 777 F.2d at 338. The affidavit at issue here is self-contained. The removal of the challenged language—and the absence of an attached addendum—does not change its strength or alter the probable cause analysis.

Because Defendant cannot establish that excising the challenged language would deprive the affidavit of probable cause, he cannot show he is entitled to a *Franks* hearing and his request will be denied.

IV. CONCLUSION

Because the affidavit supporting the application for the search warrant contained sufficient support for a finding of probable cause even when omitting language Defendant asserts was false, Defendant's Motion to Suppress Evidence; Franks Evidentiary hearing ECF 25 is **DENIED**.

DONE and **ORDERED** this Sunday, February 21, 2021.

s/Thomas M. Rose

THOMAS M. ROSE
UNITED STATES DISTRICT JUDGE